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No. 62978-6-I

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DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
JAMES THOMAS BAIRD,
Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR WHATCOM COUNTY

Cause No. 93-1-00095-5

BRIEF OF APPELLANT

Brett A. Purtzer
WSB #17283

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant
1008 South Yakima Avenue
Suite 302
Tacoma, Washington 98405
(253) 272-2157

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I. ASSIGNMENTS OF ERROR

1. The Whatcom County Superior Court erred when it entered Conclusions of Law #1 wherein it indicated that the defendant's motion was untimely;

2. The Whatcom County Superior Court erred when it entered Conclusions of Law #2 wherein it ordered that the exception to RCW 10.73.090 does not apply;

3. The Whatcom County Superior Court erred when it entered Conclusions of Law #3 wherein it ordered that the victim addressed the court by way of a letter.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Because CrR 7.8(b)(5) allows relief from judgment or order for "[A]ny ... reason justifying relief from the operation of the judgment," this court should consider Mr. Baird's arguments.

(Assignments of Error #1)

2. Because the circumstances justifying the relief were unavailable at the time of sentencing, CrR 7.8 (b)(5) allows this court to vacate Mr. Baird's sentence in the interests of justice.

(Assignments of Error #2)

3. Because it was improper for the court to allow the prosecutor to serve as the victim's proxy during sentencing, Mr. Baird's exceptional sentence was improper, and this court should remand his case for re-sentencing. (Assignments of Error #3).

III. STATEMENT OF THE CASE

A. Procedural History

On February 10, 1993, James Thomas Baird, petitioner herein, was charged with one count of first degree assault for an event occurring against his wife, Susan Baird, on February 9, 1993. Trial was held before the Honorable David A. Nichols from March 1 through March 3, 1994. After the jury convicted Mr. Baird, the court, on April 1, 1994, sentenced Mr. Baird to an exceptional sentence of 240 months within the Department of Corrections.

Mr. Baird appealed his conviction on April 4, 1994. On September 9, 1996, the Court of Appeals, Division I, affirmed his conviction and exceptional sentence. The mandate was issued March 19, 1997.

In December of 2008, Mr. Baird sought to have his judgment vacated under CrR 7.8(b)(5). On January 29, 2009, the Whatcom County Superior Court entered findings of fact and conclusions of law denying Mr. Baird's request for vacation of judgment.

B. Facts

At the time of Mr. Baird's sentencing, the State sought an exceptional sentence, but the victim, Susan Baird, never addressed the court regarding Mr. Baird's sentence. Ms. Baird did submit a letter to the court, but she did not attend the sentencing hearing or request to speak.

During sentencing, the prosecutor acted as a proxy for Ms. Baird. For example, the prosecutor stated:

The result of that, beyond the injury itself, Doctor Rubey has spoken to but, I think, that there's an easier way to look at that. We all see our nose all the time every time we look out of our eyes. The nose is the most prominent facial feature and it's right before us. Every waking moment she sees the absence of her nose . It reminds her of the fear and the trauma of the incident itself and waking up in the hospital finding the damage that was done. Every time she looks at another person, whether it's a stranger or somebody she knows, she can look in their eyes and see the first thing they see because it's how we identify people is the appearance of the nose .

RP at 14-15.

Following these statements by the prosecutor, the court followed the State's request and sentenced Mr. Baird to the maximum penalty allowed, to-wit: 20 years in the Department of

Corrections. The standard range for this offense was 93 to 123 months.

IV. ARGUMENT

- A. BECAUSE CrR 7.8(b)(5) ALLOWS RELIEF FROM JUDGMENT OR ORDER FOR "ANY ... REASON JUSTIFYING RELIEF FROM THE OPERATION OF THE JUDGMENT," THIS COURT SHOULD CONSIDER MR. BAIRD'S ARGUMENTS.

CrR 7.8(b)(5) permits a judgment to be vacated for "any other reason justifying release." In Re Personal Restraint of Cadwallader, 155 Wn.2d 867, 880, 123 P.3d 456 (2005). Because this rule grants the court the authority of offer relief from judgment, this court is procedurally justified in considering the merits of Mr. Baird's arguments.

- B. BECAUSE THE CIRCUMSTANCES JUSTIFYING THE RELIEF WERE UNAVAILABLE AT THE TIME OF SENTENCING, CrR 7.8(b)(5) ALLOWS THIS COURT TO VACATE MR. BAIRD'S SENTENCE IN THE INTERESTS OF JUSTICE.

CrR 7.8(b)(5) does not apply when the circumstances offered for vacation exist at the time that the judgment was entered. State v. Zavala-Reynoso, 127 Wn.App. 119, 123, 110 P.3d 827 (2005). Further, relief from a final judgment may only be vacated in certain limited, extraordinary

circumstances required by the interest of justice. "The time limit for seeking relief is 'a reasonable time'." CrR 7.8(b); See State v. Golden, 112 Wn.App. 68, 47 P.3d 587 (2002) (8 1/2 years was not an unreasonable time to bring a motion for relief from judgment).

Here, the case that Mr. Baird is relying for relief on State v. Carreno-Moldenado, 135 Wn.App. 77, 143 P.3d 343 (2006) wasn't decided until 2006.

Because Mr. Baird has only become aware of the court's prohibition against prosecutor's "speaking for the victim" since that case was published, Mr. Baird's request for relief falls within a reasonable time and must be considered in the interests of justice.

C. BECAUSE IT WAS IMPROPER FOR THE COURT TO ALLOW THE PROSECUTOR TO SERVE AS THE VICTIM'S PROXY DURING SENTENCING, MR. BAIRD'S EXCEPTIONAL SENTENCE WAS IMPROPER, AND THIS COURT SHOULD REMAND HIS CASE FOR RE-SENTENCING.

Mr. Baird received an exceptional sentence of 20 years - based upon the request of the prosecutor. Significantly, however, the victim, Susan Baird, did not speak at Mr. Baird's

sentencing. As this court is aware, both the State Constitution and statute provide crime victims certain rights related to criminal cases.

Pursuant to RCW 7.69.030, crime victims have the opportunity to present a statement in person at the defendant's sentencing hearing and also at any hearing conducted regarding the pardon or commutation of a sentence. See RCW 7.69.030(13), (16). However, when a victim does not speak, the State does not serve as the victim's proxy. See State v. Carreno-Moldenado, 135 Wn.App. 77, 143 P.3d 343 (2006).

In Carreno-Moldenado, the defendant sought to withdraw his guilty plea after the State argued aggravating factors at sentencing after the prosecutor had already agreed to recommend a low end sentence of 240-months for first degree rape convictions. The court, in assessing the actions of the prosecutor, addressed the defendant's arguments and also the State's argument that "it has a right to speak on the victim's behalf at the sentencing hearing." Carreno-Moldenado, 135 Wn.App. at 83-84.

The Court, in reaching its decision, focused on both Article 1 § 35 of the Washington Constitution as well as RCW 7.69.030. In determining the rights of the parties, the Court stated as follows:

Article 1 § 35 and RCW 7.69.030 give the victims the right to speak or not speak on their own behalf. **But they do not provide the State with the right to speak for the victims when they have decided not to speak**, they have not requested assistance in otherwise communicating with the court, such as by presenting a victim impact statement. Here the victims were present and able to speak or ask for the prosecutor's assistance if they so desired. The record does not show that the victims asked the prosecutor to serve as their proxy, either by speaking on their behalf, by reading a victim impact statement they had prepared or by giving the court specific documents supporting a request for restitution.

Id. at 86 (emphasis added).

Because the victims did not request the state to argue on their behalf, the court found that Mr. Carreno-Moldenado's motion to withdraw his guilty plea should be granted based upon the prosecutor's remarks at sentencing.

In Mr. Baird's case, Susan Baird did not address the court at sentencing. She sent a letter to the judge, but the contents of the

letter were never memorialized on the record. There is certainly no evidence that Ms. Baird wanted the prosecutor to speak on her behalf or describe, firsthand, the impacts of the first degree assault. It is clear from the record that the State "spoke for the victim" as a means of persuading the court to impose an exceptional sentence. Although the Constitutional amendment and the victim's rights' statute were in effect at the time of Mr. Baird's sentencing, absent evidence that the prosecutor's statements were ratified by the Ms. Baird, the prosecutor's statements were improper under Carreno-Moldenado. Accordingly, this court should grant Mr. Baird's motion for relief from judgment.

The State may attempt to argue the possibility that Ms. Baird requested that the judge impose an exceptional sentence in the letter she sent to him. However, because the content of the letter was never addressed on the record, it would be improper to assume it was a request for an exceptional sentence.

Additionally, regardless of the contents of the letter, the rule is that a prosecutor cannot

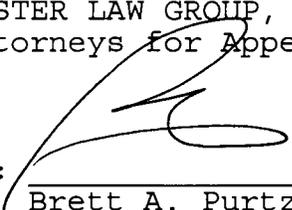
act as a proxy for the victim unless the victim makes such a request in some form of a victim impact statement. Here, no mention of such a statement was made. Hypothetically, it is possible that Ms. Baird's letter to the judge was a request for leniency or forgiveness towards Mr. Baird, but following the prosecutor's colloquy, the judge felt uncomfortable not following the State's recommendation. Although this hypothetical scenario is purely speculative, it is consistent with the reasoning and command from Carreno-Moldenado, where the court held that the prosecutor cannot act as a proxy for the victim when he/she chooses not to publicly address the court.

V. CONCLUSION

Accordingly, and based upon the
aforementioned, because the State does not serve
as Ms. Baird's proxy, Mr. Baird respectfully
requests that this court vacate his sentence and
remand this matter for re-sentencing.

RESPECTFULLY SUBMITTED this 11th day of
June, 2009.

HESTER LAW GROUP, INC. P.S.
Attorneys for Appellant

By: 

Brett A. Purtzer
WSB #17283

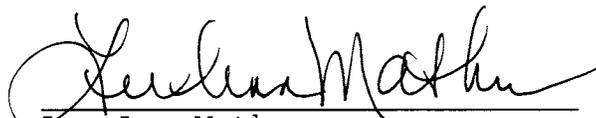
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Mac Setter
Whatcom County Prosecuting Attorney's Office
311 Grand Avenue
Bellingham, WA 98225

James Thomas Baird
DOC #722806
Stafford Creek Correctional Center
191 Constantine Way
Aberdeen, WA 98520

Signed at Tacoma, Washington this 16th day
of June, 2009.



Lee Ann Mathews

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