

63570-1

63570-1

No. 63570-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

STEVEN MILLER,

Appellant.

---

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JAN 28 PM 4:51

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

---

APPELLANT'S REPLY BRIEF

---

NANCY P. COLLINS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT ..... 1

WHERE THE TRIAL COURT EXPRESSLY PROHIBITED MILLER FROM APPEALING AND NEVER TOLD HIM HE HAD ANY RECOURSE WHEN HE PLED GUILTY UNDER FALSE EXPECTATIONS OF HIS POSSIBLE SENTENCE, MILLER PROPERLY APPEALS AND MUST BE GIVEN THE OPPORTUNITY TO WITHDRAW HIS GUILTY PLEA ..... 1

1. The prosecution ignores the trial court’s explicit prohibition on Miller’s right to appeal ..... 1

2. The prosecution fundamentally misrepresents Miller’s understanding of his available sentencing options that served as the basis of his decision to plead guilty ..... 2

3. Miller has never been accorded his right to appeal..... 3

4. The prosecution ignores the ineffective assistance of Miller’s attorney who persuaded Miller to plead guilty on the false promise that he could receive a sentence involving treatment in the community ..... 7

B. CONCLUSION ..... 8

TABLE OF AUTHORITIES

**Washington Supreme Court Decisions**

City of Seattle v. Klein, 161 Wn.2d 554, 166 P.3d 1149 (2007) ..4, 5

State v. French, 157 Wn.2d 593, 141 P.3d 54 (2006)..... 4

State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) ..... 4

State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989)..... 6

State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978)..... 4

State v. Webb, 167 Wn.2d 470, 219 P.3d 695 (2009) ..... 4

**Washington Court of Appeals Decisions**

State v. Kissee, 88 Wn.App. 817, 947 P.2d 262 (1997)..... 2

State v. Littlefair, 112 Wn.App. 749, 51 P.3d 116 (2002)..... 5

**Washington Constitution**

Article I, section 22 ..... 3



range. RP 27. It would be “almost impossible” for him to withdraw his plea after he entered it. RP 26. Even though the judge knew that Miller pled guilty with the understanding that he would ask the court for a community-based treatment sentence or SSOSA, and Miller did not learn until sentencing that his desired SSOSA or other community-based sentence would be unlawful and unavailable to him, the judge never told Miller that he could ask to withdraw his plea based on his lack of understanding of the direct sentencing consequences that formed the basis of the decision to plead guilty. See State v. Kissee, 88 Wn.App. 817, 822, 947 P.2d 262 (1997); see also Opening Brief, at 5-7.

2. The prosecution fundamentally misrepresents Miller’s understanding of his available sentencing options that served as the basis of his decision to plead guilty. The prosecution incorrectly claims Miller knew he could not receive a SSOSA sentence. What Miller understood was that the prosecution would be asking for a different sentence from that which Miller’s attorney would seek. RP 13. Before he pled guilty and throughout the plea portion of the hearing, no one discussed with Miller his ineligibility for the sentence that he sought. Only in the middle of sentencing

did Miller's lawyer concede that the sentence Miller desired would not be legally authorized. RP 43.

Even after Miller's attorney conceded that the law would not permit the SSOSA sentence she sought, Miller himself asked the court to impose a SSOSA, thus demonstrating that he did not understand the rug had been pulled from under his ability to seek or receive such a sentence. RP 52. The court told to Miller he was ineligible for the sentence he desired; it then discussed alternatives with defense counsel; and it concluded that even defense counsel's proposed alternative would also be illegal and unauthorized by statute. RP 52-54. Then the court imposed sentence without even inquiring further of Miller as to whether he understood the permissible sentence options and the sentence being imposed. RP 54. No one ever asked Miller if he still wanted to plead guilty even though the court had no authority to impose the sentence he sought when he pled guilty.

3. Miller has never been accorded his right to appeal.

Miller filed a motion asking to withdraw his plea two years after he was sentenced. Having been told he could not file a direct appeal, he did not do so. CP 93.

Article I, section 22 of the Washington Constitution

mandates that any person convicted of a crime has “the right to appeal in all cases.” City of Seattle v. Klein, 161 Wn.2d 554, 566-67, 166 P.3d 1149 (2007). Consequently, an appeal from a criminal conviction is an absolute right in Washington, unless it is knowingly, intelligently, and voluntarily waived. Id. at 566 (“right to appeal is a constitutional right that applies in ‘all cases’”); State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978) (“The presence of the right to appeal in our state constitution convinces us it is to be accorded the highest respect by this court.”). Only by extremely dilatory conduct does an appellant forfeit the right to appeal a criminal conviction. See State v. French, 157 Wn.2d 593, 141 P.3d 54 (2006) (defendant does not forfeit right to appeal by fleeing to Mexico upon convictions for multiple counts of child sexual abuse in effort to escape sentencing).

In Washington, a guilty plea does not preclude an appeal involving “the circumstances in which the plea was made.” State v. Majors, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). Indeed, even a deceased person’s heirs retain the right to appeal in the name of the decedent. State v. Webb, 167 Wn.2d 470, 478, 219 P.3d 695 (2009).

A person waives the right to appeal only if he or she knowingly, intelligently, and voluntarily forgoes an appeal. Klein, 161 Wn.2d at 566. “The government must carry the burden of demonstrating that the right to appeal was knowingly waived.” Id. A defendant must receive “fair notice” of his right to appeal. Id. at 567. Miller was informed that he could not appeal his judgment and sentence, and was also told he had no permissible basis to withdraw his plea unless the imposed sentence was illegal. RP 26-27; CP 93. Miller’s failure to seek relief earlier does not constitute a waiver of the right to appeal because he was not given fair notice that his right to appeal existed.

Miller’s motion to withdraw his plea was originally filed in the Supreme Court on December 11, 2008, and apparently transferred to the trial court. CP 43. Washington recognizes equitable tolling of collateral attack deadlines, when the delay is not the fault of the appellant and blame lies with the affirmative deception as to the ability to proceed with the case by the court, prosecution, or defense attorney. State v. Littlefair, 112 Wn.App. 749, 757-58, 51 P.3d 116 (2002). In Littlefair, a defendant was permitted to withdraw his plea two years after it was entered because he had not been advised of the immigration consequences of pleading

guilty and did not know that it would lead to his deportation. Id. at 755.

Here, the court told Miller he could not appeal his conviction or sentence. The court also told Miller he had no legal basis to challenge his plea unless he was given an illegal sentence. The court never explained that Miller's incorrect understanding of his eligibility for community treatment as a sentence could be a basis to challenge the plea. Miller was deceived as to his ability to appeal or attack his conviction, which presents an equitable basis to permit a late appeal and demonstrates that he never knowingly, intelligently, or voluntarily waived his right to appeal.

Additionally, the trial court rejected Miller's request based on its belief that it lacked authority to reconsider Miller's sentence under State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989). CP 48. Shove precludes a trial court from reducing a sentence for reasons other than the legal errors in the judgment or sentence. Id. at 86-87. Miller was not asking to reduce his sentence, he was explaining that his guilty plea was based on his misunderstanding of the sentencing consequences was he thus moved to withdraw his plea. CP 43. The court erred by rejecting the application based on Shove.

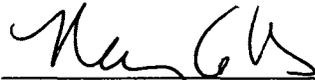
4. The prosecution ignores the ineffective assistance of Miller's attorney who persuaded Miller to plead guilty on the false promise that he could receive a sentence involving treatment in the community. The State's Response Brief ignores Miller's argument that he received ineffective assistance of counsel based on his attorney's deficient understanding of the sentencing consequences of Miller's guilty plea. For the reasons set for in Miller's Opening Brief, the deprivation of the right to competent counsel induced him forgo trial and plead guilty, and neglected to explain to Miller before he was sentenced that he could withdraw his plea based on counsel's newly formed understanding of the available legal sentence options, requiring remand for the opportunity to withdraw the guilty plea.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Steven Miller respectfully requests this Court reverse remand his case for the opportunity to withdraw his guilty plea.

DATED this 8<sup>th</sup> day of January 2010.

Respectfully submitted,



NANCY P. COLLINS (28806)  
Washington Appellate Project (91052)  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 STEVEN MILLER, )  
 )  
 Appellant. )

NO. 63570-1-I

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JAN -8 PM 4:51

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8<sup>TH</sup> DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |   |   |
|---|---|
| <input checked="" type="checkbox"/> ANN MARIE SUMMERS, DPA<br>KING COUNTY PROSECUTOR'S OFFICE<br>APPELLATE UNIT<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | <input checked="" type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input type="checkbox"/> _____ |
| <input checked="" type="checkbox"/> STEVEN MILLER<br>888378<br>STAFFORD CREEK CORRECTIONS CENTER<br>191 CONSTANTINE WAY<br>ABERDEEN, WA 98520                   | <input checked="" type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input type="checkbox"/> _____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 8<sup>TH</sup> DAY OF JANUARY, 2010.

X \_\_\_\_\_ *[Signature]*

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710