

70435-4

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No. 70435-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

GREGORY CATER,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF IN SUPPORT OF  
MOTION TO ENLARGE TIME TO FILE NOTICE OF APPEAL

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A. SUMMARY OF ARGUMENT

Any person convicted of a criminal offense has a fundamental constitutional right to appeal. Even an offender who pleads guilty to a crime retains the right to appeal collateral questions, such as the validity of the statute, the jurisdiction of the court, or the circumstances under which the plea was made. Here, Gregory Cater filed a notice of appeal with the intent to challenge the constitutional validity of his guilty plea to first degree arson. At the time he pled guilty, he was not informed that he had a right to appeal his guilty plea on this basis and was affirmatively misinformed that he had no right to appeal. Because Mr. Cater never knowingly or intentionally waived his right to appeal, this Court should grant his motion to enlarge the time in which he may file his notice of appeal.

B. STATEMENT OF THE CASE

In March 1979, Mr. Cater was charged in King County Superior Court with one count of first degree arson. CP 1. He pled guilty as charged. CP 3-5. At the time of the plea, he was informed that, by pleading guilty, he was giving up certain enumerated rights, including “the right to appeal from any finding of guilty and the sentence on that

finding of guilty.”<sup>1</sup> CP 3. The guilty plea statement did not state that Mr. Cater had any appellate rights. CP 3-5.

Mr. Cater was sentenced on May 25, 1979. The court deferred incarceration and ordered Mr. Cater to serve four years of probation. CP 6. The sentencing document did not advise Mr. Cater that he had a right to appeal, nor did it advise him of the time deadline for filing a notice of appeal. CP 6.

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<sup>1</sup> The guilty plea statement provides:

The court has told me that ON A PLEA OF NOT GUILTY:

(a) I have the right to have counsel (a lawyer) and that if I cannot afford to pay for counsel, one will be furnished at no cost to me;

(b) I have the right to a trial by jury;

(c) I have the right to hear and question witnesses who testify against me;

(d) I have the right to testify or not testify and even if I decide not to testify I have the right to have witnesses testify for me. These witnesses can be made to appear in court at the trial at no expense to me;

(e) The charge must be proved beyond a reasonable doubt;

(f) I have the right to appeal from any finding of guilty and the sentence on that finding of guilty.

The court has also told me that BY ENTERING A PLEA OF GUILTY, I GIVE UP ALL OF THE ABOVE RIGHTS EXCEPT (a), and that I cannot later change my plea back to not guilty to regain those rights on the basis that I do not like the sentence that I receive. I understand that by entering a plea of guilty, I will be sentenced as guilty.

CP 3.

Several years later, Mr. Cater was charged with first degree arson and first degree murder as a result of an unrelated incident. Appendix D, State's Opposition to Motion to Enlarge Time. A jury found him guilty as charged and he was convicted. Appendix E and F, State's Opposition.

On February 14, 2013, Mr. Cater was charged with two counts of second degree assault, which was allegedly his "third strike." Appendix H, State's Opposition.

On May 15, 2013, Mr. Cater filed a notice of appeal of his 1979 first degree arson conviction. He intends to challenge the constitutional validity of his guilty plea and whether it was made with an adequate understanding of the elements of the charge. Motion to Enlarge Time, Appendix at 6. In a declaration, trial counsel asserted that Mr. Cater was not informed until recently of his appellate rights nor of the timing requirement in which to file a notice of appeal. Motion to Enlarge Time, Appendix at 3, 6. He therefore did not knowingly waive his constitutional right to appeal and his appeal is timely. The Court ordered the parties to file additional briefs addressing the motion to enlarge time.

### C. ARGUMENT

MR. CATER'S APPEAL IS TIMELY BECAUSE HE NEVER KNOWINGLY OR VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHT TO APPEAL

1. Any person convicted of a criminal offense has a fundamental constitutional right to appeal which cannot be waived or forfeited without notice of the right and an intelligent, intentional relinquishment of it

Article I, section 22 of the Washington Constitution guarantees “[i]n criminal prosecutions the accused shall have . . . the right to appeal in all cases.” In State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978), the Washington Supreme Court declared that the explicit presence of the right to appeal in our state constitution requires courts to accord the right “the highest respect.” Courts must apply an analysis to safeguard the right to appeal that is equivalent to the analysis applied to other fundamental constitutional rights. Id.

As with other fundamental constitutional rights, any waiver of the right to appeal must be knowing, intelligent and voluntary. Id. “Waiver is the intentional relinquishment or abandonment of a known right or privilege.” Id. (citing Johnson v. Zerbst, 304 U.S. 458, 88 S. Ct. 1019, 82 L. Ed. 1461 (1938)). There is no presumption in favor of waiver of the right to appeal. Id. at 286-88. Thus, even if a defendant

is informed at sentencing of the right to appeal and fails to file a timely notice of appeal, the court may not presume an intentional waiver. Id. The record must show the defendant fully understood the right and intended to relinquish it. Id.

The State bears the burden to prove a knowing, intelligent and voluntary waiver of the right to appeal. Id. at 286.

The Supreme Court has repeatedly reaffirmed that the State must “demonstrate a defendant understood his right to appeal and consciously gave up that right before a notice of appeal may be dismissed as untimely.” State v. Kells, 134 Wn.2d 309, 314, 312, 949 P.2d 818 (1998); see also, e.g., Sweet, 90 Wn.2d at 288-90 (appeal not untimely where defendant did not knowingly and consciously waive right to appeal); State v. Tomal, 133 Wn.2d 985, 989-90, 948 P.2d 833 (1997) (same). Ordinarily, a notice of appeal must be filed within 30 days after entry of the judgment. RAP 5.2(a). Generally, “the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time” to file a notice of appeal. RAP 18.8(b). But the strict time deadline for filing a notice of appeal is secondary to a criminal defendant’s constitutional right to appeal. Kells, 134 Wn.2d at 314. “[A] criminal appeal may not be dismissed as untimely unless

the State demonstrates that the defendant voluntarily, knowingly, and intelligently abandoned his appeal right.” Id. at 313.

A defendant’s failure to file a timely notice of appeal does not amount to a knowing and voluntary waiver of the right to appeal if the defendant did not have a full understanding of the nature of the right he was giving up. State v. Smith, 134 Wn.2d 849, 853-54, 953 P.2d 810 (1998); Kells, 134 Wn.2d at 314. In Kells, the defendant, a juvenile, pled guilty in adult court to second degree murder. Kells, 134 Wn.2d at 312. He signed a plea form acknowledging that by entering the plea, he waived various rights including the right to appeal a determination of guilt after trial. Id. The trial court did not inform him that he retained the right to appeal the juvenile court’s order declining jurisdiction. Id. Kells filed an untimely notice of appeal, asserting that he had not understood he could appeal the declination order notwithstanding his guilty plea. Id. The Supreme Court held Kells did not knowingly, intelligently and voluntarily waive his right to appeal because he had not understood the nature of the right he was giving up. Id. at 313-15.

Similarly, in Smith, Smith pled guilty to possession of cocaine and signed a guilty plea statement advising him that he was giving up “a right to appeal a determination of guilt after a trial.” Smith, 134 Wn.2d at 851, 853. At the same time, his attorney stated on the record that Smith intended to appeal the court’s denial of his suppression motion. Id. at 853. Smith did not understand that a person pleading guilty to a crime ordinarily does not have a right to appeal a suppression order. Id. Under these circumstances, Smith did not knowingly, voluntarily or intelligently relinquish his right to appeal the suppression ruling. Id.

Before a notice of appeal may be dismissed as untimely, the record must show not only that the defendant understood the nature of the appellate rights he was giving up, it must also show he had notice that his failure to act in time would result in a forfeiture of the right to appeal. Tomal, 133 Wn.2d at 990; City of Seattle v. Klein, 161 Wn.2d 554, 565-67, 166 P.3d 1149 (2007). Constitutional due process requires that a defendant be given adequate notice before being deprived of any fundamental right, including the right to appeal. Klein, 161 Wn.2d at 566-67; Const. art. I, § 3; U.S. Const. amend. XIV. “Due process requires notice of proscribed conduct so that there is a fair

warning of potential penalties from a chosen course of action.” Klein, 161 Wn.2d at 567. Such notice must be given *prior* to deprivation of the substantial right. Id. at 566.

In Tomal, Tomal’s attorney filed a timely notice of appeal but then took no further action on the appeal for more than four years. 133 Wn.2d at 987. The Supreme Court held Tomal did not waive his right to appeal because there was no showing that he knowingly and intentionally abandoned the appeal. Id. at 989-90. The court rejected the contention that a defendant’s failure to act, without more, could amount to a forfeiture of the right to appeal. Id. Instead, “any waiver of the right to appeal via the alleged abandonment of an appeal must be knowing, intelligent and voluntary.” Id.

In Klein, the defendants filed timely appeals but then avoided the court’s jurisdiction by failing to appear at later hearings. 161 Wn.2d at 557-58. The Supreme Court held the defendants did not thereby forfeit their right to appeal. Id. at 560-61. Their failure to appear, “*without notice* that the right to appeal may be lost, does not constitute knowing waiver of the core constitutional right.” Id. Analogizing to the constitutional right to counsel, the court noted in *dicta* that the right to appeal *could* be forfeited in extraordinary

circumstances if the defendant's conduct was "extremely dilatory," but only if the defendant was "warned that he or she w[ould] waive this right if he or she engage[d] in dilatory tactics." Id. The fundamental right to appeal cannot be lost due to waiver by conduct—or by a failure to act—if the defendant is not warned of the consequences. Id. at 562-63; see also State v. Tran, 149 Wn. App. 144, 202 P.3d 969 (2009) (applying Klein and holding that "fugitive disentitlement doctrine," which provides that a defendant who appeals a conviction and then flees the court's jurisdiction waives his right to pursue the appeal, does not deprive a defendant of his constitutionally guaranteed right to appeal).

In sum, a conscious, intelligent, and willing failure to pursue an appeal can be shown to constitute waiver. Tomal, 133 Wn.2d at 990. But a failure to file a timely appeal, even if that failure is "extremely dilatory," does not amount to forfeiture of the right to appeal absent notice of the consequences of the failure to act. Id. at 989-90; Klein, 161 Wn.2d at 562-63. In addition, a defendant cannot be deemed to have forfeited his right to appeal if he did not understand the nature of the right he was giving up. Smith, 134 Wn.2d at 853-54; Kells, 134 Wn.2d at 314.

2. Mr. Cater has a constitutional right to appeal the validity of his guilty plea

In this appeal, Mr. Cater intends to challenge the constitutional validity of his guilty plea and whether it was made with an adequate understanding of the elements of the charge. Motion to Enlarge Time, Appendix at 6. Mr. Cater has a constitutional right to appeal his conviction on this basis.

The long-standing rule, established long before Mr. Cater entered his guilty plea, is that a defendant pleading guilty to a crime retains the right to appeal “collateral questions” such as the validity of the statute, the jurisdiction of the court, or the circumstances under which the plea was made. State v. Majors, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980); State ex rel. Fisher v. Bowman, 57 Wn.2d 535, 536, 358 P.2d 316 (1961); State v. Rose, 42 Wn.2d 509, 514-15, 256 P.2d 493 (1953); State v. Eckert, 123 Wash. 403, 406, 212 P. 551 (1923). A guilty plea “is, in effect, a confession,” and thus a defendant who pleads guilty may appeal only issues consistent with his admission of guilt. Eckert, 123 Wash. at 406. One of the issues he may raise is whether the guilty plea was voluntary and made with a full and complete knowledge of his rights and the effect of the plea. Id.

A defendant may waive his right to appeal as part of a plea bargain agreement with the State, but only if the waiver is intelligent and voluntary and made with an understanding of the consequences. State v. Perkins, 108 Wn.2d 212, 215, 217-18, 737 P.2d 250 (1987). The defendant must be fully advised of his appellate rights and of the time deadline in which to file a notice of appeal, and the record must show he understood and intended to waive those rights. Id. at 219-20.

Here, Mr. Cater did not waive his right to appeal as part of a plea agreement with the State. See CP 3-5. Therefore, he retained the right to appeal the validity of his plea and whether it was made with a full understanding of the elements of the crime. See Eckert, 123 Wash. at 406.

3. Mr. Cater did not knowingly and intelligently waive his right to appeal because he was not informed that he had such a right nor how to exercise it, and because he was affirmatively misinformed that he had no right to appeal

At the time he pled guilty, Mr. Cater was affirmatively told that he was giving up “the right to appeal from any finding of guilty and the sentence on that finding of guilty.” CP 3. The guilty plea statement did not inform him that he retained the right to appeal the validity of the plea itself. CP 3-5. Similarly, the sentencing document did not

advise Mr. Cater that he had a right to appeal, nor did it advise him of the time deadline for filing a notice of appeal. CP 6.

At the time of Mr. Cater's sentencing in 1979, the court rules did not require the sentencing court to advise a defendant pleading guilty that he had a right to appeal. Former CrR 7.1(b)<sup>2</sup> provided:

(b) **Procedure at Time of Sentencing.** The court shall, at the time of sentencing, *unless the judgment and sentence are based on a plea of guilty*, advise the defendant:

- (1) of his right to appeal;
- (2) that unless a notice of appeal is filed within 30 days after the entry of the judgment or order appealed from, the right of appeal is irrevocably waived;
- (3) that the Court clerk will, if requested by defendant appearing without counsel, file a notice of appeal in his behalf; and
- (4) of his right, if unable to pay the costs thereof, to have counsel appointed and portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal. These proceedings shall be made a part of the record.

(emphasis added).

It was not until 1986 that the rule was amended to require sentencing courts to inform defendants pleading guilty of their appellate rights.<sup>3</sup> 4A Karl B. Tegland, Washington Practice: Rules

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<sup>2</sup> The current rule is CrR 7.2(b).

<sup>3</sup> CrR 7.2(b) now provides:

(b) **Procedure at Time of Sentencing.** The court shall, immediately after sentencing, advise the defendant: (1) of the right to appeal the conviction; (2) of the right to

Practice § CrR 7.2, at 496 (7th ed. 2008) (citing Committee on Court Rules and Procedures of the Washington State Bar Association).

Here, not only was Mr. Cater not informed of his appellate rights, he was affirmatively told at the time of the plea that he was giving up “the right to appeal from any finding of guilty and the sentence on that finding of guilty.” CP 3. This statement was misleading and further demonstrates that Mr. Cater did not understand the nature of his appellate rights.

In People v. Lopez, 6 N.Y.3d 248, 256-57, 844 N.E.2d 1145, 811 N.Y.S.2d 623 (N.Y. Ct. App. 2006), the defendant pled guilty and was advised by the court at the time of the plea that “when you plead guilty you waive your right to appeal.” The California Court of Appeals held this statement was “misleading” and not sufficient to

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appeal a sentence outside the standard sentence range; (3) that unless a notice of appeal is filed within 30 days after the entry of the judgment or order appealed from, the right to appeal is irrevocably waived; (4) that the superior court clerk will, if requested by the defendant appearing without counsel, supply a notice of appeal form and file it upon completion by the defendant; (5) of the right, if unable to pay the costs thereof, to have counsel appointed and portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal; and (6) of the time limits on the right to collateral attack imposed by RCW 10.73.090 and .100. These proceedings shall be made a part of the record.

demonstrate the defendant understood the valued right she was relinquishing. Id. Some claims are “forfeited” by operation of law as a consequence of a guilty plea. Id. But a defendant does not waive the right to raise other claims that would survive the guilty plea unless the waiver is knowing and intelligent. Id. The court explained,

When a trial court characterizes an appeal as one of the many rights automatically extinguished upon entry of a guilty plea, a reviewing court cannot be certain that the defendant comprehended the nature of the waiver of appellate rights. The record must establish that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty—the right to remain silent, the right to confront one's accusers and the right to a jury trial, for example.

Id.

Here, similar to Lopez, the guilty plea statement characterized Mr. Cater’s right to appeal as one of the many rights automatically extinguished upon entry of the guilty plea. CP 3. This statement was misleading because Mr. Cater retained the right to appeal other issues that survived the plea. The misleading advisement in the guilty plea statement undermines any conclusion that Mr. Cater received adequate notice of his appellate rights.

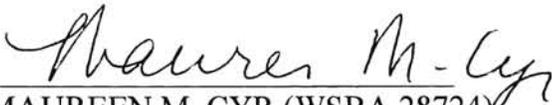
Mr. Cater was not informed that he had a right to appeal the validity of his guilty plea, nor was he informed of the time deadline for

filing a notice of appeal. He therefore did not knowingly and intelligently waive his right to appeal because he was not informed of the nature of the right he was giving up. Smith, 134 Wn.2d at 853-54; Kells, 134 Wn.2d at 314. He also did not forfeit his right to appeal by filing an untimely notice of appeal because he did not receive notice of the consequences of his failure to act. Tomal, 133 Wn.2d at 989-90; Klein, 161 Wn.2d at 562-63. In sum, Mr. Cater did not knowingly, intelligently or voluntarily waive his fundamental right to appeal.

D. CONCLUSION

Because Mr. Cater was never informed of his appellate rights, and was affirmatively misinformed that he had no right to appeal, he did not knowingly, intelligently and voluntarily waive his right to appeal. This Court should grant his motion to enlarge time to file the notice of appeal.

Respectfully submitted this 6th day of January, 2014.

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

|                      |   |               |
|----------------------|---|---------------|
| STATE OF WASHINGTON, | ) |               |
|                      | ) |               |
| Respondent,          | ) |               |
|                      | ) |               |
| v.                   | ) | NO. 70435-4-I |
|                      | ) |               |
| GREGORY CATER,       | ) |               |
|                      | ) |               |
| Appellant.           | ) |               |

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6<sup>TH</sup> DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **BRIEF I SUPPORT OF MOTION TO ENLARGE TIME TO FILE NOTICE OF APPEAL** 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:

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KENT, WA 98032

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