

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

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 67513-3-I
)	
vs.)	STATE'S ANSWER TO
)	MOTION TO WITHDRAW
SERGIO PERALTA,)	PURSUANT TO RAP
)	18.3(a)(2)
Appellant.)	
)	
)	
)	
)	

A. IDENTITY OF MOVING PARTY

The State of Washington, respondent, asks for the relief designated in Part B.

B. STATEMENT OF RELIEF SOUGHT

Grant of appellant counsel's motion to withdraw and dismissal of this appeal, as the State agrees this case presents no non-frivolous issues.

C. ISSUES PRESENTED

1. Appellate counsel should be permitted to withdraw

from a case where there is no basis for a good faith argument on review. There are no issues here that could potentially be raised on review. Should appellate counsel be permitted to withdraw from the case?

D. STATEMENT OF THE CASE

Following a jury trial, defendant Sergio Peralta was convicted of numerous crimes, including two counts of Kidnapping in the First Degree with Sexual motivation and Rape in the First Degree. CP 91-92, 98. At sentencing, the parties agreed that one of the kidnapping counts merged with the first degree rape, and the court dismissed that kidnapping count. CP 91. Peralta appealed, and this Court reversed the first degree rape conviction because the trial court had instructed the jury on an uncharged alternative means (displaying what appeared to be a deadly weapon). CP 20. However, for purposes of remand, this Court found that there was sufficient evidence to support the dismissed kidnapping conviction. CP 18-19.

On remand, the parties agreed that the court should enter a finding of guilt on the lesser included offense of second degree rape, and agreed not to "revive" the dismissed kidnapping count.

CP 118-19; RP 4. In exchange, Peralta agreed that he:

knowingly, intelligently, and voluntarily waives his right to appeal or collaterally attack the judgment and sentence based on a conviction for Rape in the Second Degree. This agreement is intended to bring finality to this litigation for all parties.

CP 119; See also RP 14-15.

On February 18, 2009, the trial court resentenced Peralta but inadvertently neglected to check the box that reflected the sexual motivation finding with respect to the remaining first degree kidnapping charge. CP 24. Despite this omission, the court properly sentenced Peralta to an indeterminate sentence on the kidnapping charge. CP 27. Had Peralta been convicted of Kidnapping in the First Degree without a finding of sexual motivation, he would have been subject to a determinate sentence. RCW 9.94A.505(2)(a)(i); RCW 9.94A.507(1)(a)(2), (3)(a-c). Peralta did not appeal the resentencing.

Almost five months after the resentencing, the clerical error was brought to the attention of the court and the parties. CP 130. The court entered an order to correct the judgment and sentence to reflect the jury's finding of sexual motivation on the kidnapping charge. CP 53-54. The sentence imposed in February was not

altered by the July order. CP 53.

Despite his agreement that he would not appeal, Peralta filed motions in the trial court seeking to allow him to file a notice of appeal and to vacate the agreed order entering judgment on the lesser included offense. CP 60-75. The sentencing court transferred the motions to this Court for consideration as a personal restraint petition. CP 55-56. In May of 2010, this Court dismissed the petition, noting that Peralta had waived his right to appeal his sentence. CP 76-80. In 2012, this Court enlarged the time for filing of a direct appeal.

E. ARGUMENT

1. THIS COURT SHOULD PERMIT COUNSEL TO WITHDRAW BECAUSE THERE ARE NO NON-FRIVOLOUS ISSUES TO BE RAISED.

RAP 18.3(a)(2) provides, in relevant part:

If counsel appointed to represent an indigent defendant [in a criminal case] can find no basis for a good faith argument on review, counsel should file a motion in the appellate court to withdraw as counsel for the indigent. The motion shall identify the issues that could be argued if they had merit and, without argument, include references to the records and citations of authority relevant to the issues.

That procedure has been invoked in this case.

Counsel for the State has reviewed the prosecutor's file, the

appellant's brief, the court file, and the transcripts in this case. The potential issues set forth in appellant's brief, as discussed below, demonstrate the lack of merit of these issues under the facts of the case. Accordingly, the State concurs in appellate counsel's motion to withdraw and requests dismissal of the appeal.

2. THE CORRECTION OF A CLERICAL ERROR IS NOT A CRITICAL STAGE OF THE PROCEEDINGS AND PERALTA HAD NO RIGHT TO BE PRESENT WHEN THE JULY 2009 ORDER WAS ENTERED.

Even if this Court elected to consider Peralta's claim, this claim would be frivolous. A defendant has a right to be present at all "critical stages" of a criminal prosecution. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed.2d 486 (1985). A critical stage is one that involves the presentation of evidence or confrontation of witnesses, or one where the defendant's presence would contribute to the fairness of the procedure. State v. Rooks, 130 Wn. App. 787, 797-98, 125 P.3d 192 (2005). A reviewing court must consider whether the subject of the hearing related to a purely legal matter, and if so, whether the absence of the defendant affected the opportunity to defend against the charge or whether a fair and just hearing was thwarted by his absence. State v. Berry Smith, 87 Wn. App. 268, 273-74, 944 P.2d

397 (1997).

A trial court has the authority to correct a clerical mistake in a judgment at any time, either on its own initiative or on the motion of any party, and after such notice, if any, as the court orders. CrR 7.8(a). Clerical errors occur when a judgment and sentence does not reflect the intent of the court. State v. Rooth, 129 Wn. App. 761, 770, 121 P.3d 755 (2005) (citing Presidential Estates Apartment Associates v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). "A clerical mistake is one that, when amended, would correctly convey the intention of the court based on other evidence." State v. Davis, 160 Wn. App. 471, 478, 248 P.3d 121, 124 (2011) (citing State v. Priest, 100 Wn. App. 451, 456, 997 P.2d 452 (2000)).

The correction of a clerical error on a judgment and sentence is not a critical stage of the proceedings for which a defendant has the right to be present. See State v. Hawkins, 164 Wn. App. 705, 715, 265 P.3d 185 (2011) (defendant had no right to be present at a post-conviction motion to correct a ministerial error).

Here, Peralta's presence or absence had absolutely no effect on the proceedings. A jury had previously found him guilty of

kidnapping with sexual motivation, and the court had previously entered the appropriate sentence for that crime. When entering his judgment and sentence, the court had merely neglected to check a box to properly reflect the jury's finding of sexual motivation. The court's July 2009 order was entered for the sole purpose of correcting the oversight and to conform the written sentence to the jury's verdict. Peralta had no ability to affect the correction of that error; the court could have corrected it on its own initiative, without his input. See CrR 7.8(a).

Peralta was not denied the right to be present at a critical stage. Thus, this issue is frivolous and could not support a good faith argument on appeal.

3. PERALTA'S RIGHT TO COUNSEL WAS NOT VIOLATED.

Both the federal and Washington Constitution accord the accused the right to be represented by counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. Among the components of the constitutional right to counsel is "the right to a reasonable opportunity to select and be represented by chosen counsel." State v. Price, 126 Wn. App. 617, 631, 109 P.3d 27 (2005), review

denied, 155 Wn.2d 1018 (2005); State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), review denied, 126 Wn.2d 1016 (1995).

However, a defendant generally does not have a right to counsel in post-conviction proceedings. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999). More specifically, a defendant does not have the right to counsel at a post-conviction proceeding to correct a clerical error. Hawkins, 164 Wn. App. at 715.

Because Peralta had no right to counsel at all when the order correcting the clerical error was entered, he could not argue that the court violated his right to chosen counsel.

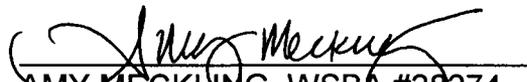
F. CONCLUSION

For the foregoing reasons, the potential issues raised by Peralta's counsel in the Motion to Withdraw are clearly without merit and would not support an arguable claim on appeal. After an independent review of the record in this case, the State could not identify any other potential issues for review. Thus, the State agrees that there are no non-frivolous issues

presented. The State respectfully requests that counsel's motion to withdraw be granted and that this appeal be dismissed.

Submitted this 29 day of JUNE, 2012.

DANIEL T. SATTERBERG
Prosecuting Attorney

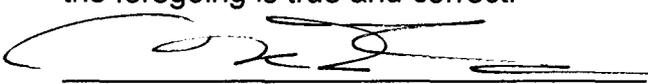

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana M. Nelson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the State's Answer to Motion to Withdraw, in STATE V. SERGIO PERALTA, Cause No. 67513-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

06/29/12

Date