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SUPREME COURT
STATE OF WASHINGTON
Apr 09, 2014, 8:00 am
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

JAMES EDWARD BALLOU, II,

Appellant

Supreme Court No. 89844-8
Court of Appeals No. 68725-5-1
(consolidated with 68747-6-1)

RESPONSE TO MOTION
FOR EXTENSION OF TIME

I. IDENTITY OF MOVING PARTY

Comes now the State of Washington, Respondent, and moves for the relief identified in Part II.

II. STATEMENT OF RELIEF SOUGHT

Denial of petitioner's motion for extension of time to file petition for review.

III. RELEVANT FACTS

A. Court of Appeals

Petitioner Ballou's conviction was affirmed on December 30, 2013. Unpublished Opinion, Court of Appeals—Division One, No. 68725-5-1 (consolidated with No. 68747-6-1). Petitioner filed for review in the Supreme Court on March 12, 2014.

B. Supreme Court Decision

Co-defendant, Leonard Pegs, Jr., filed for review on January 29, 2014. On April 2, 2014, Department I of the Supreme Court denied Leonard Pegs, Jr.'s petition for review. Order, Supreme Court, No. 89844-8.

IV. GROUNDINGS FOR RELIEF AND ARGUMENT

RAP 13.4 requires a party seeking review by the Supreme Court of a Court of Appeals decision to file a petition for review within 30 days after the decision is filed. Petitioner Ballou's Motion for Discretionary Review in this case was untimely. The appellate court will dismiss a review proceeding for failure to timely file a notice for review. RAP 18.9(b) and (c).

RAP 18.8(b) allows extension of time under very limited circumstances:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice ... for discretionary review.... The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. ...

This rule applies in criminal cases when the constitutional right to appeal is not involved. For example, it governs belated petitions for review of decisions affirming criminal convictions. Shumway v. Payne, 136 Wn.2d 383, 392-393, 964 P.2d 349 (1998). The concept of "extraordinary circumstances" is a narrow one:

"Extraordinary circumstances" include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. The standard set forth in the rule is rarely satisfied.

Id. at 395 (citations omitted).

Under RAP 18.8(b), mistakes made by counsel do not justify extending the time to file a notice of appeal. See Schaeferco, Inc. v. Columbia River Gorge Comm'n, 121

Wn.2d 366, 349 P.2d 1225 (1993) (counsel's error in failing to serve opposing party with motion for reconsideration); Reichelt v. Raymark Indus., Inc., 52 Wn. App. 763, 764 P.2d 653 (1988) (law firm representing defendants lost attorney during 30-day notice of appeal period and that firm's appellate attorney had unusually heavy workload); but see Scannell v. State, 128 Wn.2d 829, 834-835, 912 P.2d 489, 491 (1996) (reasonably diligent pro se litigant being misled by the recently amended RAP was excusable error).

In one case, for example, a multi-million dollar judgment was entered against the State. The plaintiffs noted the judgment for presentation. They gave proper notice of this presentation, but no one appeared for the State. The State did not receive notice of the entry of the judgment until after the time for appeal had lapsed. In seeking an extension of time, the State claimed that the Assistant Attorney General assigned to the case had *intentionally* failed to respond to the notice of presentation. Even assuming that this was true, this court held that there were no "extraordinary circumstances" justifying an extension of time to file a notice of appeal. Beckman v. DSHS, 102 Wn. App. 687, 695-696, 11 P.3d 313 (2000).

In Beckman, the appealing party received no notice of the appeal deadline. It was not even aware that the judgment had been entered. Nonetheless, the court refused to grant a 10-day extension of time to file an appeal of a multi-million dollar judgment. It is thus clear that a party being unaware of appellate deadlines is not a basis for an extension of time under RAP 18.8(b).

In short, petitioner's argument is inconsistent with Shumway and Beckman. Petitioner's alleged ignorance of his right to petition for review does not justify extending

the time for him to do so. The motion for extension of time to file should be denied. As the motion for discretionary review is untimely, it should be dismissed.

V. CONCLUSION

For the reasons stated above, the motion for extension of time to file should be denied. The motion for discretionary review should be dismissed as untimely.

Respectfully submitted this 9 day of April, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

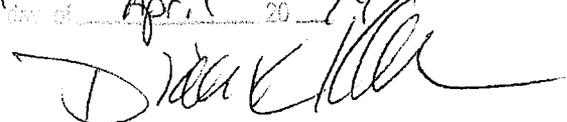
By: 
JOHN J. JUHL, WSBA # 18951
Deputy Prosecuting Attorney
Attorney for Respondent

Sent via e-mail

On this day I mailed a ~~properly stamped envelope~~ addressed to the attorney for the defendant that contained a copy of this document.

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office
this 9th day of April 2014



OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, April 09, 2014 8:01 AM
To: 'Kremenich, Diane'; Andrew Zinner (zinnera@nwattorney.net); suzanne-elliott@msn.com
Subject: RE: State v. James Ballou

Rec'd 4-9-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kremenich, Diane [mailto:Diane.Kremenich@co.snohomish.wa.us]
Sent: Wednesday, April 09, 2014 7:45 AM
To: OFFICE RECEPTIONIST, CLERK; Andrew Zinner (zinnera@nwattorney.net); suzanne-elliott@msn.com
Subject: State v. James Ballou

Good Morning...

RE: State v. James Ballou
Supreme Court No. 89844-8

Please accept for filing the following attachment: State's Response to Motion for Extension of Time to File Petition for Review.

Let me know if anyone has a problem opening the attachment.

Thanks.

Diane.

Diane K. Kremenich
☞☞☞ Snohomish County Prosecuting Attorney - Criminal Division
Legal Assistant/Appellate Unit
Admin East, 7th Floor
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