

FILED
Court of Appeals
Division III
State of Washington
5/26/2020 4:03 PM

IN COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	
	)	No. [REDACTED]
Respondent,)	
	)	EMERGENCY
v.	)	MOTION TO STAY
	)	SENTENCE UNDER RCW
[REDACTED],	)	9.94A.585(3) AND FOR
	)	REVIEW OF TRIAL
Appellant.	)	COURT'S DENIAL OF
	)	STAY UNDER RAP 8.2(b)
)	

I. IDENTITY OF MOVING PARTY AND RELIEF SOUGHT

[REDACTED], the appellant, moves for this Court to exercise its authority under RCW 9.94A.585(3) and order [REDACTED] placed on conditional release or bond. Alternatively, he asks that this Court overrule the trial court's denial of a stay and instruct that [REDACTED] request be granted, or at least reconsidered. [REDACTED] also requests expedited consideration of this emergency motion pursuant to RAP 17.4(b).

II. GROUNDS FOR RELIEF AND ARGUMENT

a. Background on trial, trial court's denial of stay of sentence or bond, and appeal.

On June 14, 2016, a man tried to cash an altered check. Believing [REDACTED] was this man, the prosecution charged him with one count of forgery. Following his first appearance in mid-2018, the court set

conditions of release and ██████████ secured his release by posting a bond of \$2,500. Supp. CP __ (sub. nos. 7, 8, 10).

At the jury trial in May 2019, ██████████ presented a defense of identity, but was convicted. The trial court sentenced ██████████ to 26 months of confinement. CP 41.

At sentencing, ██████████ asked for the trial court to stay the sentence and grant an appeal bond. RP 252; Supp. CP __ (sub. no. 37).

██████████ consistently appeared for his hearings in Spokane. RP 250-51. This was particularly significant because ██████████ lived in ██████████ RP 249, 261.

The prosecution opposed a stay. Supp. CP __ (sub. no. 38). The prosecution did not disagree that ██████████ had a good track record of attending court. The prosecution further conceded that ██████████ was not a danger to the community and that the offense at issue was not violent. RP 252. Still, the prosecution opposed a stay, contending a stay would unduly diminish the deterrent effect of the punishment. RP 252-53. Mr. Almaguer argued that given the nature of the offense, the length of time between the incident and trial, and ██████████ age, the prosecution had not met its burden to prove this. RP 253-54.

The trial court agreed that ██████████ was not a flight risk, noting that he had made his court appearances. RP 257. The court further

agreed that [REDACTED] was not a danger to the community and that a stay did not create a risk of unreasonable trauma to the victim of the forgery. RP 257-58. While not finding that the prosecution had proved that a stay would unduly diminish the deterrent effect of punishment, the court denied the request for a stay, explaining briefly that “it’s really not well-taken under the circumstances and I’m going to deny it.” RP 259.

[REDACTED] filed his opening brief in this Court on May 13, 2020. In his brief, [REDACTED] argues his conviction for forgery should be reversed for four reasons: (1) the court erred in denying his motion for a new trial due to the prosecutor’s misconduct in citing extrinsic evidence to the jury; (2) error in admission of hearsay over [REDACTED] objection; (3) two judicial comments on the evidence; and (4) cumulative error. [REDACTED] also argues resentencing is required because the trial court incorrectly calculated his offender score as a “9+.” Rather, [REDACTED] score should have been a “4” because the prosecution had not met its burden to disprove washout as to [REDACTED] prior class C felony convictions.

b. *Due to [REDACTED] health, he is at an increased risk of death or serious illness from COVID-19 and his incarceration at Coyote Ridge Correction Center creates a significant risk that he will become infected.*

Washington is in throes of a pandemic from COVID-19. While Washington is in the process of slowly reopening its economy and society, COVID-19 will not disappear anytime soon. And a second wave may occur in the fall. Deadlier strains of the virus may evolve.

[REDACTED] is incarcerated at Coyote Ridge Corrections Center, located in Connell, Washington. Due to his incarceration, [REDACTED] risk of contracting COVID-19 is substantially increased. As of [REDACTED] submission, three staff members and seven incarcerated individuals at Coyote Ridge have tested positive for COVID-19.¹ Individuals at Coyote Ridge have been quarantined due to exposure. Declaration of [REDACTED].²

As [REDACTED] attests to in a declaration, healthcare staff from the Department of Corrections have identified him as being at an increased risk from COVID-19. [REDACTED] is [REDACTED] years old. He is a [REDACTED]. As a

¹ <https://www.doc.wa.gov/news/covid-19.htm>

² [REDACTED] declaration will be filed as soon defense counsel receives a signed copy from [REDACTED]. A copy of the declaration that defense counsel expects [REDACTED] to sign is attached in the appendix.

diabetic, he is at a higher risk for severe illness from COVID-19.³ Because social distancing is virtually impossible and he is not in control of his environment, [REDACTED] is placed at a significant risk of contracting the virus.

This risk would be significantly mitigated if [REDACTED] is released. He has a supportive [REDACTED] and could reside there. He would be able to social distance and stay at home.

c. This Court should exercise its authority under RCW 9.94A.585(3) and order that a stay be grant while Mr. Almaguer's appeal is pending.

“Pending review of the sentence, the sentencing court or the court of appeals may order the defendant confined or placed on conditional release, including bond.” RCW 9.94A.585(3) (emphasis added). By its plain language, this provision grants this Court authority to order [REDACTED] [REDACTED] release pending review. State v. Portomene, No. 81264-5-I, 2020 WL 2114633, at *3 (Wash. Ct. App. Apr. 29, 2020) (unpublished)⁴; see RAP 8.2(a) (“The conditions under which a defendant in a criminal case or a juvenile in a juvenile offense proceeding may be released

³ https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fhigh-risk-complications.html

⁴ Cited for persuasive authority. GR 14.1.

pending review, or may obtain a stay of execution of sentence, are set forth in the criminal rules, juvenile court rules, and in statutes.") (emphasis added).

This Court should exercise this authority for three reasons. First, due to [REDACTED] health and incarceration, he is placed at an unnecessary increased risk of death or serious illness from COVID-19. Second, he is not a flight risk and does not pose a danger to the community. And third, [REDACTED] demonstrates a high probability of success in winning his appeal either as to reversal of his conviction or a new sentencing hearing.

It is appropriate take into account the risk to [REDACTED] from COVID-19 in consideration of a stay. As the Massachusetts Supreme Court has reasoned, “[i]n these extraordinary times, a judge deciding whether to grant a stay should consider not only the risk to others if the defendant were to be released and reoffend, but also the health risk to the defendant if the defendant were to remain in custody.” Christie v. Commonwealth, 484 Mass. 397, 401, 142 N.E.3d 55 (2020). “In evaluating this risk, a judge should consider both the general risk associated with preventing COVID-19 transmission and minimizing its spread in correctional institutions to inmates and prison staff and the specific risk to the defendant, in view of his or her age and existing

medical conditions, that would heighten the chance of death or serious illness if the defendant were to contract the virus.” Id. at 401-02.

Here, [REDACTED] is at high risk of serious illness due to being diabetic. COVID-19 has already infected staff members and inmates at Coyote Ridge. [REDACTED] is not a danger to others, as the prosecutor and the court below acknowledged at sentencing. [REDACTED] was convicted of forgery, a non-violent crime. He has a place to stay in [REDACTED]. He has a history of attending his court appearances.

Further, while the prosecution has not yet filed its Respondent’s Brief, appellate counsel believes [REDACTED] has a high chance of success in either winning outright reversal of his conviction, or at the least a new sentencing hearing. If the conviction is reversed, he may not be retried. Even if retried, he may be acquitted. If he receives a new sentencing hearing, he may receive a significantly reduced sentence if the prosecution is unable to meet its burden to prove [REDACTED] criminal history.

Regardless, even if unsuccessful, [REDACTED] will have avoided the increased risk of exposure to COVID-19 at this time. Conditions may improve significantly by the time the appeal is resolved.

For these reasons, this Court should order that [REDACTED] sentence be stayed and that he be released pending appeal. He should be

released on personal recognizance. Alternatively, bond in the amount of \$2,500, which was the bond at trial, is appropriate. The conditions of release set in the trial court are appropriate to adopt for purposes of the appeal bond or release on personal recognizance. Supp. CP __ (sub. nos. 8, 10).⁵ The sentence should also be stayed until the appellate mandate is issued.

c. Alternatively, this Court should reverse the trial court's order refusing to stay the sentence or grant an appeal bond.

A trial court has authority to stay a sentence, including granting an appeal bond. RAP 7.2(f); CrR 3.2(h). Whether to grant a stay is discretionary. State v. Johnson, 105 Wn.2d 92, 96, 711 P.2d 1017 (1986). A statute, however, requires a trial court to deny a stay if the prosecution shows by a preponderance of the evidence any one of four grounds:

Notwithstanding CrR 3.2 or RAP 7.2, an appeal by a defendant in a criminal action shall not stay the execution of the judgment of conviction, if the court determines by a preponderance of the evidence that:

- (a) The defendant is likely to flee or to pose a danger to the safety of any other person or the community if the judgment is stayed; or
- (b) The delay resulting from the stay will unduly diminish the deterrent effect of the punishment; or

⁵ A copy of trial court's order setting conditions of release pending trial is attached in appendix B.

(c) A stay of the judgment will cause unreasonable trauma to the victims of the crime or their families; or

(d) The defendant has not undertaken to the extent of the defendant's financial ability to pay the financial obligations under the judgment or has not posted an adequate performance bond to assure payment.

RCW 9.95.062(1); State v. Cole, 90 Wn. App. 445, 447, 949 P.2d 841

(1998). A party can object to a denial of a stay by motion in the appellate court. RAP 8.2(b).

In this case, the prosecution conceded that grounds (a), (c), and (d) in RCW 9.95.062(1) did not apply. RP 252-53. The prosecution only argued that a stay should be denied under ground (b). RP 252-53. Mr. Almaguer argued that the prosecution had not met its burden to prove the delay resulting from the stay would unduly diminish the deterrent effect of the punishment. RP 253-54. [REDACTED] is not a young man for whom punishment might need to be immediately imposed for it to have a deterrent effect. The punishment here would have a deterrent effect even if the appeal delays him serving the sentence (assuming he is unsuccessful in his appeal).

While denying a stay, the court did not find that the prosecution had proved ground (b). RP 257-59. Instead, the court appears to have denied a stay because (1) "the presumption of innocence no longer

exist[ed]” and (2) there was a three-year-period between the charge and the conviction. RP 257-58.

The trial court’s decision was manifestly unreasonable. While not dispositive, the prosecution did not prove that the criteria in RCW 9.95.062(1) were satisfied. ██████████ was not a risk to the community and he has a good track record of making his court appearances in Spokane. That the presumption of innocence no longer existed was not a valid reason to deny a stay. This fact is true in every criminal appeal following a conviction and bond is appropriate in at least some cases. As for the length of time between the charge and conviction, the trial court did not explain why this justified a denial of a stay. Accordingly, the trial court’s denial of a stay was manifestly unreasonable. This Court should reverse and order Mr. Almaguer be granted a stay with the conditions set out in the previous section.

Regardless, given the change in circumstances due to the COVID-19 pandemic, reconsideration of ██████████ request for a stay is appropriate. That is the path this Court recently took in State v. Portomene. There, prior to Governor Inslee’s stay at home order, issued on March 23, 2020, the trial court denied Mr. Portomene’s request for an appeal bond. 2020 WL 2114633, at *3. After filing an emergency motion in this Court, this Court remanded to the trial court to conduct a new

hearing. Id. Accordingly, given the change in circumstances, this Court should at least order a new hearing. Id.

d. This motion should be heard on an expeditated basis in light of the significant risks to Mr. Almaguer's health from COVID-19.

A party may seek “expedited consideration” on a motion in an emergency. RAP 17.4(b). In seeking an expedited consideration of a motion on an emergency basis, the moving party must show “(1) that adequate relief cannot be given if the motion is considered in the normal course, and (2) the movant has taken reasonable steps under the circumstances to give notice to persons who would be affected by the ruling sought.” RAP 17.4.

Here, time is of the essence because [REDACTED] may become infected with COVID-19. There are reported cases of staff and inmates at Coyote Ridge contracting the virus. Everyday [REDACTED] is incarcerated at Coyote Ridge increases his risk from COVID-19. If [REDACTED]. [REDACTED] is infected, he could become seriously ill or die. Under these circumstances, adequate relief cannot be given if the motion is not heard on an expeditated basis. Additionally, counsel has given notice to the Spokane County Prosecuting Attorney's Office of the intent to file this motion and seek emergency review. App. C (declaration of counsel).

Accordingly, expedited consideration of this motion is appropriate. RAP 17.4(b).

III. CONCLUSION

The Court should exercise its authority under RCW 9.94A.585(3) and grant [REDACTED] request for a stay of his sentence. Alternatively, the trial court's refusal to order a stay should be reversed. If not, remand for a new hearing is appropriate.

Respectfully submitted this 26th day of May, 2020.



Richard W. Lechich – WSBA #43296
Washington Appellate Project – #91052
Attorney for Appellant

Appendix A

STATE OF WASHINGTON,)
)
Plaintiff/Respondent,)
)
v.)
)
)
)
Defendant/Appellant.)
)

Trial No. [REDACTED] 8
CoA No. [REDACTED]

Declaration of
[REDACTED]

[REDACTED] declares the following and that if called as a witness he would testify that:

1. [REDACTED]
2. I am incarcerated at the Coyote Ridge Corrections Center. I am appealing my conviction for forgery.
3. Among my health conditions, I am a [REDACTED].
4. Healthcare staff from the Department of Corrections have identified me as being at an increased risk from COVID-19.
5. My conditions of confinement increase my risk. Social distancing is virtually impossible. An individual adjacent to my cell has been quarantined due to possible exposure to COVID-19.
6. If granted an appeal bond, I would abide by any conditions of release during the pendency of my appeal.
7. [REDACTED]

The foregoing is true and correct to the best of my knowledge

DATED this ____ day of _____, 2020

[REDACTED]

Appendix B

CN: 201601025138

SN: 8

PC: 3

FILED

AUG 01 2018

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON)

Plaintiff,)

V.)

Defendant.)



CHARGES:

Count 1: 9A.60.020(1)(B) -
FORGERY(POSSESS/UTTER/OFFER)

AMENDED

RELEASE CONDITIONS PENDING TRIAL
(CrR 3.2) (ADULT) (ORECRP)

DEFENDANT TO BE BOOKED ON FTC
WARRANT

PROBABLE CAUSE:

- Probable cause has previously been determined.
- The court finds probable cause exists to believe the accused committed the offense(s) charged. CrR 3.2.1(e)(2).
- The court does not find probable cause exists for the offense(s) charged, but does find probable cause exists to believe the accused committed the offense of _____. CrR 3.2.1(e)(2).
- The court does not find probable cause to believe the accused committed any offense and the accused is ordered released without conditions. CrR 3.2.
- Probable cause statement not received from law enforcement and the accused is ordered released without conditions. CrR 3.2.
- Other: _____.

CUSTODY:

- 1. Defendant shall be in the custody of Spokane County Jail.
 - Housing at Geiger is authorized if eligible and approved.
 - Work Crew/Work Release authorized if eligible and approved.
- 2. Defendant shall be released on his/her own recognizance.
- 3. Defendant shall post a surety or cash bond in the sum of \$2,500.00. Reserved Argued
- 4. No Bond shall be accepted. Reserved Argued

If released: Defendant shall remain: Phone number:

Further, defendant shall:

- Appear at all court dates; Regularly contact her/his attorney;
- Remain in Spokane County and/or Yakima;
- No use or possession of non-prescribed controlled substances, legend drugs, or drug paraphernalia;

RELEASE CONDITIONS PENDING TRIAL
(CrR 3.2)

ORIGINAL

SPOKANE COUNTY PROSECUTING ATTORNEY
COUNTY CITY PUBLIC SAFETY BUILDING
SPOKANE, WA 99260 (509) 477-3662

- The current offense and a prior qualified offense involve alcohol
 - Defendant MUST install Ignition Interlock Device on ALL vehicles operated by him/her AND PROOF of installation must be filed within 5 days of the date of release
 - with the Superior Court
 - Defendant must comply with a 24/7 Sobriety Program Monitoring – if/when available
- Commit no criminal law violations; No contact with minors under the age of 18;
- No operating a motor vehicle without a valid driver's license and proof of insurance;
- Obey any and all court orders in effect and, if under supervision, obey all conditions of supervision;
- Other: Not use or possess any access device, credit/debit card, check, or identification not legally issued in his or her name, and financial or personal information not belonging to him/her.

THE COURT FINDS THAT THERE EXISTS a substantial danger that the defendant will commit a serious crime or that the defendant's physical condition is such to jeopardize his/her safety or that of others or that he/she will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice and, therefore:

- 1. Defendant shall not approach or communicate with (named victim) [REDACTED]
 - or any others residing at the same residence
 - or any immediate member of his/her family
 - or any witness of the State, as listed in the police reports or witness lists
- 2. Defendant shall not go to the following (area) (premises) [REDACTED]
 - the block of [REDACTED] in Spokane County
 - or any known location of any individual listed in number 1 of this order (e.g. school, work, residence, etc.)
- 3. Defendant shall not
 - a. possess any dangerous weapons. b. engage in the activity of _____
 - c. engage in the activity of sexual contact with minors under the age of 18
 - d. use, possess or consume (intoxicating liquor) and/or (use or in possession of marijuana and/or products containing Tetrahydrocannabinol (THC)) and/or (the following drugs _____)
 - e. possess any pornographic material
- 4. Defendant shall report regularly and remain under the supervision of NEWTA or other Court approved facility. Defendant shall report within 24 hours of the entry of this order or release from custody.
 - Reserved
 - Other: _____
- 5. Defendant shall be detained until his/her physical condition permits his/her release.
- 6. Defendant is referred for assessment by Geiger/NEWTA.
- 7. Other: _____

DONE IN OPEN COURT this 1st day of August, 2018, in the presence of the defendant.



JUDGE JAMES M. TRIPLET

J U D G E

NOTICE TO DEFENDANT: Your attorney is required to advise the Court if you do not maintain RELEASE CONDITIONS PENDING TRIAL (CrR 3.2)

regular contact with your lawyer. If you do not maintain regular contact with your lawyer, the Court may issue a bench warrant for your apprehension and incarceration in the Spokane County Jail. Failure to abide by any court ordered release condition is considered a violation and will be reported to the Court. A violation could result in a modification of release conditions, revocation of release, or the issuance of a bench warrant.

IF NO CHARGES ARE FILED BY AT , THE DEFENDANT SHALL BE RELEASED ON THIS CAUSE AND BOND SHALL BE EXONERATED.

Presented by:

Approved:

		
MARGARET J MACRAE for RICHARD REESE STERETT	ANDREW R. NONNENMACHER	
Deputy Prosecuting Attorney	Attorney for Defendant	
WSBA # 50783	WSBA# 52571	

Appendix C

STATE OF WASHINGTON,)	
)	
Plaintiff/Respondent,	)	CoA No. [REDACTED]
)	
v.	)	Declaration of
	)	Richard Lechich,
[REDACTED],	)	appellate counsel for
	)	[REDACTED]
Defendant/Appellant.)	
)	

Richard Lechich, counsel for [REDACTED] declares that on May 26, 2020, he emailed the Spokane County Prosecuting Attorney's Office and the trial prosecuting attorney, Micheal Jolstead, to notify them of [REDACTED] intent to file an emergency motion in the Court of Appeals seeking a stay of his sentence and for review of the trial court's denial of a stay of his sentence or appeal bond. A copy of that email is attached.

Respectfully submitted this 26th day of May, 2020.



Richard W. Lechich – WSBA #43296
Washington Appellate Project – #91052
Attorney for Appellant

From: [Richard Lechich](#)
To: [SCPA Appeals](#)
Cc: majolstead@spokanecounty.org
Subject: State v. [REDACTED]
Date: Tuesday, May 26, 2020 12:46:59 PM

Per RAP 17.4(b), I am writing to provide notice to the Spokane County Prosecutor's Office that [REDACTED] intends to file an emergency motion in the Court of Appeals seeking a stay of his sentence and for review of the trial court's denial of a stay of his sentence or appeal bond. I intend to file the motion tomorrow on May 27, 2020, or this afternoon if possible.

Respectfully,

Richard Lechich
Washington Appellate Project
206-587-2711

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.	)	NO. [REDACTED]
)	
[REDACTED])	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF MAY, 2020, I CAUSED THE ORIGINAL **EMERGENCY MOTION TO STAY** TO BE FILED IN THE COURT OF APPEALS – DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> LARRY STEINMETZ, DPA	()	U.S. MAIL
[SCPAappeals@spokanecounty.org]	()	HAND DELIVERY
[lsteinmetz@spokanecounty.org]	(X)	E-SERVICE VIA PORTAL
SPOKANE COUNTY PROSECUTOR'S OFFICE		
1100 W. MALLON AVENUE		
SPOKANE, WA 99260		

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF MAY, 2020.



X _____

WASHINGTON APPELLATE PROJECT

May 26, 2020 - 4:03 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: [REDACTED]
Appellate Court Case Title: State of Washington v. [REDACTED]
Superior Court Case Number: [REDACTED]

The following documents have been uploaded:

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This File Contains:
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- 369951_Motion_20200526160241D3228331_4988.pdf
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Motion 1 - Other
The Original File Name was washapp.052620-02.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- lsteinmetz@spokanecounty.org
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- wapofficemail@washapp.org

Comments:

*EMERGENCY MOTION TO STAY

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Richard Wayne Lechich - Email: richard@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
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SEATTLE, WA, 98101
Phone: (206) 587-2711

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