

FILED
Court of Appeals
Division III
State of Washington
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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

The State of Washington, respondent, asks this court to deny appellant [REDACTED] motion for release pending a decision on the merits of his appeal.

II. STATEMENT OF RELIEF SOUGHT

The Respondent, State of Washington, requests that this Court deny the Appellant's motion.

III. FACTS RELEVANT TO MOTION

A. [REDACTED] WAS FOUND GUILTY FOLLOWING A JURY TRIAL; THE TRIAL COURT IMPOSED SENTENCE ON [REDACTED] AND DID NOT GRANT A STAY OF ITS SENTENCE.

The State charged [REDACTED] with forgery and, on May 8, 2019, a jury convicted him as charged. CP 1, 31. Sentencing was scheduled for June 6, 2019, but was continued to permit [REDACTED] to obtain a medical procedure. RP 214. The trial court stated:

I'm going to continue this -- the sentencing approximately 30 days. I'm going to say 30 days, sir, because I think you're

being honest with me and you seem to have -- be in some clear discomfort.

And what I'm going to do, sir, is suggest to you that you need to get right back to the doc, emergency, whatever they told you to do, right away because if you've got to get this surgery scheduled, I don't want to hear in 30 days that nothing has happened and that you don't have any information because then I'll be in a situation where I'll have to say, well, sorry --

THE DEFENDANT: Okay.

THE COURT: -- too late and I didn't hear from you before then. So you've got some work to do, which means go to the doctors, go to the hospital, whatever, get the surgery hopefully taken care of and done, and then maybe I'll see you on crutches in 30 days but we'll see you. So don't assume it's going to get continued again, okay, sir?

RP 217-218.

At the rescheduled sentencing on July 26, 2019, ██████████ asked for a stay of the sentence and for the trial court to grant an appeal bond. RP 252. The prosecution opposed the request and asked that the court sentence Mr. Almaguer and have him placed in custody of the Department of Corrections (DOC).

The court denied ██████████ request for a stay pending appeal.

In denying the request, the trial court said:

[A stay of sentence] would be inappropriate here, you know, for a couple reasons. Number one, the presumption of innocence no longer exists. We're here post-conviction and this is an information that was filed on July 1 of 2016. So three -- it's more than three years old. And it didn't proceed

to trial until May of 2019, and then add to that, it's been almost three months since the trial.

RP 257. The trial court continued, explaining:

The prong [of RCW 9.95.062] that is applicable is 2, which is the delay from the stay will unduly diminish the deterrent effect of the punishment. That's, I guess, definitely where the argument should lie. And add to the fact that not only is this case three-plus years old, with respect to [REDACTED], who, you know, seems to be a gentle soul and he's been here every time, at least during trial. He's been late a few times but he still made it. So nevertheless I've continued it over and over again at his request after an objection from the State each time. I continued it over the State's objection based on [REDACTED] medical condition.

RP 258. The trial court sentenced [REDACTED] to 26 months, a mid-range sentence. RP 259, CP 41.

Following the trial court's ruling, [REDACTED] asked the trial court if he could again delay being taken into custody for another week to take care of a medical concern; the trial court replied, "Not going to happen, sir. Sorry. I've granted you continuance after continuance, sir, and I'm not lacking in consideration by any means, but at some point I've got to put my foot down and say that's it." RP 262. [REDACTED] was taken into custody on July 26, 2019.

[REDACTED] filed his notice of appeal on August 5, 2019. CP 53. [REDACTED] filed his opening brief on May 13, 2020, arguing his conviction should be reversed and, barring reversal, resentencing is required to correct an error in the calculation of his offender score. On May 26, 2020, [REDACTED] filed this emergency motion to stay his sentence pursuant

to RCW 9.94A.585(3) and for review of the trial court's denial of a stay under RAP 8.2(b).

The State now files its response to [REDACTED] motion and asks this Court to deny his request for relief.

B. THE DEPARTMENT OF CORRECTIONS HAS TAKEN EXTRAORDINARY PRECAUTIONS TO HALT THE TRANSMISSION OF COVID-19 AT THE COYOTE RIDGE CORRECTIONS CENTER.

[REDACTED] is incarcerated at Coyote Ridge Corrections Center and has provided this Court with a declaration indicating that he is a [REDACTED]. Persons with [REDACTED], if their [REDACTED] is poorly controlled, are at a higher risk of experiencing severe COVID-19 symptoms, caused by the novel coronavirus. See <https://www.doc.wa.gov/news/2020/docs/wa-state-doc-covid-19-screening-testing-infection-control-guideline.pdf> at 6.

On May 18, 2020, Division I of this Court issued a published opinion *In the Matter of the Personal Restraint of Pauley*, No. 81370-6-I, that discusses the steps taken by the Department of Corrections to address the novel coronavirus. It is relevant here so is quoted at length. The *Pauley* court, relying heavily on information provided by the DOC at <https://www.doc.wa.gov/news/covid-19.htm> stated:

DOC operates 12 prisons, houses approximately 18,000 people, and employs over 5,000 staff. Since January 2020, DOC has been working to mitigate the risk of COVID-19 to incarcerated individuals who reside in, and its staff who work in, its facilities...

Each major prison...has medical facilities, with a physician director, doctors, physician assistants, nurse practitioners, and other health care providers. DOC implemented a Communicable Disease and Infection Prevention Program before the COVID-19 pandemic to prevent, educate about, identify, and treat infectious diseases. A board-certified infectious disease physician oversees this program and each prison facility has an Infection Prevention Nurse on staff. DOC screens all individuals for infectious diseases as they enter the system at one of two reception centers, the Washington Corrections Center in Shelton, and the Washington Corrections Center for Women in Purdy.

On January 24, 2020, DOC's Health Service sent a message to all staff explaining the novel coronavirus. On February 9, 2020, DOC opened an Emergency Operations Center to support its response to this infectious disease. It later activated Incident Command Posts (ICPs) at each prison. This ICP designation places responsibility for incident management on a single person with the authority to make decisions on a 24/7 basis.

On March 4, 2020, DOC authorized the use of alcohol-based hand sanitizers, usually a contraband item, in its facilities for staff and others working in the prisons.

On March 5, 2020, DOC's Chief Medical Officer created a team to develop guidelines specific to the COVID-19 coronavirus. The guidelines detail protocols for screening, testing, and infection control, including isolation and quarantine of confirmed and suspected COVID-19 patients.

On March 12, 2020, the DOC restricted access to [DOC facilities] to DOC employees, contract staff and legal professionals. A DOC staff member tested positive for the coronavirus that same day. [DOC facilities] then implemented an active screening process for all staff before they are allowed to enter the premises.

On March 15, 2020, DOC implemented enhanced screening processes for all staff, contract staff, contractors and volunteers. These enhanced screenings, including taking temperatures, have been conducted every day since March 16, 2020. On March 18, 2020, DOC issued guidelines for

risk mitigation practices at units for special populations, including infirmaries at all facilities. And on March 20, 2020, DOC implemented social distancing protocols in the prisons. It has since provided direction on how to follow social distancing practices for kitchen workers and during meals. It subsequently provided additional guidance about cleaning and sanitizing products approved for COVID-19 in order to comply with guidelines issued by the Centers for Disease Control and Prevention (CDC).

On March 23, 2020, the CDC issued a guidance document specific to corrections facilities. DOC has been working since that date to reach substantial compliance with these guidelines.

...

The DOC has modified its COVID-19 guidelines over the course of the pandemic but the current version, Washington State DOC COVID-19 Screening, Testing, and Infection Control Guideline, Version 17 (updated May [15,] 2020),¹ sets out detailed screening procedures for all new intakes, requirements for the use of full personal protective equipment, and recommendations for any inmates considered to be at “high risk” – defined by the DOC as anyone with an underlying condition and those aged 50 years or older. For any inmate identified as high risk, the DOC recommends that he:

- Wear an issued face covering when out of his cell or when within 6 feet of others
- Perform frequent hand hygiene
- Clean his cell frequently throughout the day
- Avoid contact with high-touch surfaces
- Limit movement in the facility
- Stay at least 6 feet from others in the day room, the yard, the gym, the dining hall, and the medication line, as well as any other areas where the population congregates.

¹ <https://www.doc.wa.gov/news/2020/docs/wa-state-doc-covid-19-screening-testing-infection-control-guideline.pdf>

All incarcerated individuals must now wear DOC-provided face coverings.

...

DOC is now in substantial compliance with the majority of CDC's recommendations on personnel practices, operations and supplies, prevention, cleaning and disinfection practices, hygiene, screening, management of staff, medical isolation of confirmed and suspected cases, the disinfecting of spaces inhabited by positive COVID-19 inmates, the quarantining of those in contact with a COVID-19 positive inmate, and the management of asymptomatic and symptomatic inmates...

DOC acknowledges that as of now, it is unable to obtain sufficient test kits to allow it to test all inmates and staff for COVID-19. As a result, it has implemented a testing protocol under which a health care practitioner will test those with COVID-19 symptoms or those who have had contact with a suspected COVID-19 positive individual. But as of May 7, 2020, DOC has 983 test kits in prison facilities, 200 test kits at its headquarters, 950 test kit vials at headquarters, awaiting receipt of 10,000 swabs and 2,000 test kit vials, both of which have been ordered. It now has sufficient test kits to administer tests in accordance to Washington Department of Health guidelines. And DOC's testing criteria appear consistent with the recommendations of the CDC: priorities for COVID-19 testing are those exhibiting symptoms and who are either hospitalized or working in healthcare facilities or congregate living settings, or living in long-term care facilities or congregate living settings, such as prisons.

Matter of Pauley, No. 81370-6-I, slip op. at 4-8 (May 18, 2020).

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. THE STANDARD OF REVIEW.

In the State of Washington, sentences of more than one year must be served in a state correctional facility. RCW 9.94A.190(1). Once a trial

court has entered a judgment and sentence of confinement longer than one year, jurisdiction over the defendant passes to the Department of Corrections. *January v. Porter*, 75 Wn.2d 768, 453 P.2d 876 (1969); *Clark County Sheriff v. Dep't of Soc. & Health Servs.*, 95 Wn.2d 445, 448, 626 P.2d 6 (1981). For this reason, once the judgment has been entered, the trial court has no power to delay execution of the sentence. RCW 9.94A.575; *State v. Hale*, 94 Wn. App. 46, 54, 971 P.2d 88 (1999). There is an exception to this rule: that the court may delay execution of the sentence if it grants release pending appeal. RCW 9.95.062.

The trial court is empowered to deny a defendant's request for a stay pending appeal, if it determines by a preponderance of the evidence that one or more of the following applies:

- (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
- (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)(a)-(d). The trial court's decision whether to stay a sentence and release a defendant pending appeal under RCW 9.95.062 is discretionary. *State v. Swiger*, 159 Wn.2d 224, 227, 149 P.3d 372 (2006). The decision is therefore subject to abuse of discretion review; the decision

will not be overturned unless trial court exercised its discretion on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Therefore, a defendant in a criminal case may file a motion in the appellate court to challenge the trial court's denial of release pending review. RAP 8.2(b). Additionally, pending review of the sentence, the court of appeals may order the defendant placed on conditional release, including bond. RCW 9.94A.585(3).

B. LAW AND ARGUMENT.

1. This Court should affirm the trial court's denial of a stay of sentence during the pendency of [REDACTED] appeal.

The trial court properly declined to grant [REDACTED] request for a stay of his sentence pending appeal. Here, the court found that RCW 9.95.062(1)(b) applied. The trial court had granted [REDACTED], who was out of custody, "continuance after continuance," delaying sentencing almost 80 days following trial. The trial court did not abuse its discretion in finding by a preponderance of the evidence that, considering the continuances of [REDACTED] sentencing date, a stay of the sentence itself would unduly diminish the deterrent effect of the punishment. RCW 9.95.062(1)(b). This Court should affirm the trial court's decision.

2. This Court should not grant an appeal bond pursuant to RCW 9.94A.585(3).

██████████ requests this Court grant him an appeal bond elucidating three reasons for this Court to consider. First, he argues he should be released because of his health condition and the risk of contracting COVID-19 at Coyote Ridge Correction Center; second, he argues he is not a flight risk or a danger to the community; third, he alleges a high probability of success in winning his appeal.

██████████ does not present any evidence to contradict the showing that DOC has substantially complied with CDC guidance for prisons, notwithstanding the fact that individuals at Coyote Ridge have tested positive for COVID-19. He asserts that because of his diagnosis as a diabetic, he is at high risk of serious illness to contract COVID-19. He does not state in his declaration if his diabetes is “poorly controlled,” which would put him in a high-risk category, or if his disease is well-managed, meaning he is not in a high-risk category. ██████████ has not provided sufficient information for this Court to make a determination on this issue with the record presented.

The State does not, and never has, alleged that ██████████ is a danger to others or a flight risk. Nevertheless, the State agrees with the trial court’s finding that a stay of the sentence would unduly diminish the deterrent effect of the punishment as discussed in RCW 9.95.062(1)(b). The trial court, and this Court, are not required to find that all or even most of

the alternatives listed in RCW 9.95.062 must apply to stay a sentence pending appeal. It is sufficient that the trial court found one of the alternatives in RCW 9.95.062 existed; as discussed above, this Court should affirm that finding and not itself find a reason to stay the sentence at this time.

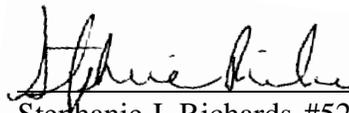
Finally, though [REDACTED] believes he has a high chance of success in winning a reversal of his conviction on his direct appeal, his true belief is not a legal certainty. Postulating “what ifs” and assuming they will all resolve in one’s favor is not a sound legal basis for this Court to grant a stay of a sentence. The State would ask this Court to not find this argument a basis for granting a stay of sentence.

V. CONCLUSION

The State of Washington respectfully requests this Court both deny [REDACTED] motion to stay his sentence and affirm the trial court’s denial of a stay.

Dated this 3 day of June 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney



Stephanie J. Richards #52061
Deputy Prosecuting Attorney
Attorney for Respondent

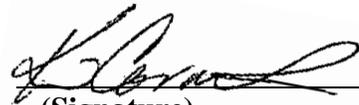
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on June 3, 2020, I e-mailed a copy of the State's Response to Emergency Motion to Stay Sentence Under RCW 9.94A.585(3) and for Review of Trial Court's Denial of Stay Under RAP 8.2(b) in this matter, pursuant to the parties' agreement, to:

Richard Lechich
wapofficemail@washapp.org

6/3/2020
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

June 03, 2020 - 11:28 AM

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