

39555-3-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	KITTITAS COUNTY
Plaintiff,)	NO. 20 1 00195 19
Respondent,)	
)	
v.)	TIMELINESS
)	MEMORANDUM
)	
NELSON LAMONT EDWARDS JR.,)	
)	
Defendant,)	
Petitioner.)	
_____)	

Nelson Lamont Edwards Jr. was sentenced in Kittitas County Superior Court on November 21, 2022. This was a resentencing hearing. (Appendix “A”).

Mr. Edwards's trial counsel failed to file a Notice of Appeal until March 1, 2023. In connection with that Notice he filed a Declaration indicating that he was at fault for the untimely appeal. (Appendix "B"; Appendix "C")

RAP 5.2 (a) provides:

Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e).

None of the exceptions set forth in RAP 5.2 (a) apply to Mr. Edwards's appeal.

Const. art. I, § 22 gives a criminal defendant the right to appeal in all cases. A waiver of the right to appeal should not be implied when an attorney fails to file it in a timely manner.

The courts have long recognized that the right to appeal should not be denied unless there is proof of a knowing, intelligent and voluntary waiver of that right. In *State v. Kells*, 134 Wn.2d 309, 313, 949 P.2d 818 (1998) the Court determined that:

Although CrR 7.2(b) does not require the State to inform Kells of his right to appeal, an involuntary forfeiture of the right to a criminal appeal is never valid. We now reiterate our recent holding in *State v. Tomal*, 133 Wn.2d 985, 948 P.2d 833 (1997) that a criminal appeal may not be dismissed as untimely unless the State demonstrates that the defendant voluntarily, knowingly, and intelligently abandoned his appeal right.

As noted in the trial attorney's declaration he had a misunderstanding concerning the effect of the resentencing. It was his belief that the case would be remanded to the Court of Appeals for further action.

Mr. Edwards, in his prior appeal, had raised issues concerning the potential washout of prior convictions based upon the invalidity of his controlled substance conviction which ran counter to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

The appellate court ruled in *State v. Edwards*, 23 Wn. App.2d 118, 122, (2022) that

We ... limit our review to the issues raised by this original disposition.

With respect to the original January 25, 2021, judgment and sentence, it is uncontested that Mr. Edwards's current conviction for simple possession of a controlled substance must be dismissed under Blake.

We remand for resentencing pursuant to Blake. Resentencing shall be de novo, with the parties free to advance any and all factual and legal arguments regarding Mr. Edwards's offender score and sentencing range.

The Court of Appeals, in its prior decision limiting review appears to have created an aura of confusion for counsel at the resentencing hearing.

Nevertheless, counsel has the duty to properly represent a client and advise that client of his appellate rights.

Counsel's obligation, once it arises, is not satisfied by a cursory reference to a right to an appeal. Rather, the duty to consult in this context means "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Roe* [*Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)] at 478. ... [O]ur supreme court has expressed its expectation that attorneys will follow similar procedures outlined in the American Bar Association's Standards:

“8.2 Appeal.

“(a) After conviction, the lawyer should explain to the defendant the meaning and consequences of the court’s judgment and his right of appeal. The lawyer should give the defendant his professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. He should also explain to the defendant the advantages and disadvantages of an appeal. The decision of whether to appeal must be the defendant’s own choice.”

Sweet, [*State v. Sweet*, 90 Wn.2d 282, 581 P.2d 579 (1978)] at 290....

State v. Chetty, 184 Wn. App. 607, 614-15, 338 P.3d 298 (2014).

Under RAP 18.8 (a) an appellate court has the ability to enlarge or shorten the time within which an act must be done in a particular case in order to serve the ends of justice.

RAP 18.8 (b) provides, in part:

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 of appeal....

A gross miscarriage of justice would occur by depriving Mr. Edwards of his constitutional right to appeal due to defense counsel's failure to file the notice in a timely manner.

Meritorious issues exist concerning the calculation of Mr. Edwards's offender score. It is currently listed in the Amended Judgment and Sentence as a 4. It may, in fact, only be a two.

Mr. Edwards seeks only to have the issues raised in his original appeal given due consideration under the current appeal. They are still applicable.

Mr. Edwards's appeal should be allowed to proceed.

DATED this 24th day of March, 2023.

s/ Dennis W. Morgan
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Certificate of Compliance: I hereby certify there are 850 words contained in this Timeliness Memorandum.

s/ Dennis W. Morgan
DENNIS W. MORGAN

SUBSCRIBED AND SWORN to before me this 24th day of March, 2023.

s/Jasmine Nutt
NOTARY PUBLIC in and for the State of
Washington, residing at Republic
My commission expires: 06/19/2026