

NO. 43814-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BESS OVERMON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant, Judge

No. 05-1-05483-4

Reply Brief

MARK LINDQUIST
Prosecuting Attorney

By
MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ARGUMENT..... 1

1. THE TRIAL COURT ERRED WHEN IT CONSIDERED DEFENDANT'S UNTIMELY MOTION TO WITHDRAW HER GUILTY PLEA WHEN THE COURT RULE MANDATES SUCH MOTIONS BE TRANSFERRED TO THE COURT OF APPEALS 1

2. THE STATE INCLUDED CITATIONS THAT CLEARLY DENOTED THE FINDINGS OF FACT AND CONCLUSIONS OF LAW IT WAS REFERRING TO. ..3

3. THE COURT'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.....3

D. CONCLUSION.5

Table of Authorities

State Cases

<i>Bott v. Rockwell Intern.</i> , 80 Wn. App. 326, 908 P.2d 909 (1996)	3
<i>State v. Flaherty</i> , 177 Wn.2d 90, 296 P.3d 904 (2013)	1
<i>State v. Kipp</i> , 171 Wn. App. 14, 25, 286 P.3d 68 (2012).....	4

Statutes

RCW 10.73.090	1
RCW 10.73.090(1)	2

Rules and Regulations

CrR 7.8.....	1, 4
CrR 7.8(c)(2)	1, 2
RAP 10.4(c).....	3

A. ARGUMENT.

1. THE TRIAL COURT ERRED WHEN IT CONSIDERED DEFENDANT'S UNTIMELY MOTION TO WITHDRAW HER GUILTY PLEA WHEN THE COURT RULE MANDATES SUCH MOTIONS BE TRANSFERRED TO THE COURT OF APPEALS.

Defendant fails to address the mandatory nature of CrR 7.8 in her response brief. In fact, defendant does not address the court rule at all in her brief. It is clear that the court rule mandates the transfer of such an untimely motion, and the trial court had no discretion to decide the motion. The court rules are specific and tell the trial court exactly how to treat a collateral attack. CrR 7.8(c)(2) states

The court *shall* transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

CrR 7.8(c)(2)(emphasis added). The transfer is non-discretionary if defendant is time barred under RCW 10.73.090. "If the challenge is untimely, the court shall transfer it to the Court of Appeals." *State v. Flaherty*, 177 Wn.2d 90, 296 P.3d 904 (2013).

In that instant case, defendant's case was final on July 11, 2006, the day her judgment and sentence entered in this case. CP 12-21. Defendant did not file a direct appeal. Defendant filed a motion to withdraw her guilty plea on November 21, 2011, over four years after the one year time limit had expired. CP 40-102. As such, under CrR 7.8(c)(2), the trial court was required to transfer the petition to the Court of Appeal unless the court determined that it was not valid on its face or was not rendered by a court of competent jurisdiction. *See* RCW 10.73.090(1). The trial did not make any of the findings necessary to decide the case on its merits. In fact, there was no allegation that the judgment and sentence was not valid on its face or that the court that took the plea did not have jurisdiction. The trial court had no discretion to hold a fact finding hearing or decide the motion itself when the court rule directed that it send the motion to the Court of Appeals. The trial court never even addressed the time bar, despite the fact that the State pointed it out in their brief and on the record. RP 20-22, CP 103-113,120. The trial court ignored the court rule and ignored the time bar. The trial court did not have discretion to hold a hearing. The motion should have been immediately transferred to the Court of Appeals. The trial court erred in holding a fact finding hearing and in deciding defendant's motion to withdraw her guilty plea.

2. THE STATE INCLUDED CITATIONS THAT CLEARLY DENOTED THE FINDINGS OF FACT AND CONCLUSIONS OF LAW IT WAS REFERRING TO.

It was an oversight by the State not to include the verbatim portions of the Findings of Fact and Conclusions of Law either in the opening brief itself or attached as an appendix. RAP 10.4(c) states: "If a party presents an issue which requires study of a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like, the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief." However, the State clearly included a citation to the Clerk's Papers for the Findings of Fact and Conclusions of Law so there was no need for opposing counsel or the court to have to hunt for what finding was being discussed. The court will address issues if they are "well framed by the record and the briefing." *Bott v. Rockwell Intern.*, 80 Wn. App. 326, 908 P.2d 909 (1996). There is only one set of findings in this case and the State very clearly assigned error to each finding it discussed, and clearly noted the number when discussing each finding. The State will also attach the findings as an appendix to this brief to remedy the situation.

3. THE COURT'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

It is well settled that the trial court's findings of fact are reviewed to see if substantial evidence supports the findings and whether those

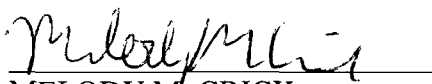
findings support the court's conclusions of law. *State v. Kipp*, 171 Wn. App. 14, 25, 286 P.3d 68 (2012). The trial court's ruling on the record was simply, "Well can't I do both? Can't I make a ruling saying that I find there was ineffective assistance of counsel, that she was not fully informed of the consequences and you take that up?" RP 24. When the State stated that the State could appeal such a ruling the trial court stated, "So that's what I'll do." RP 24. The trial court had indicated that it read the briefs and heard argument but that does not relieve the trial court of its duty to analyze the issue under the case law. As noted in the State's opening brief, the trial court made a finding of ineffective assistance of counsel without going through any kind of analysis as required by the case law. Whether or not the court read the briefs or was familiar with the issue is immaterial if the court does not engage in any kind of legal analysis. The trial court essentially held an evidentiary hearing without the authority to do so, made a conclusory ruling devoid of legal analysis and purposely made the ruling so it would be appealed. The trial court should have just transferred the case to this court as required under CrR 7.8 in the first place. As the State noted in its initial brief, the findings are much broader than the testimony that was actually elicited at the hearing and the findings are not supported by the testimony. The State had detailed those discrepancies in its opening brief. Again, the State does not feel the trial court should ever have reached the substantive issue of the motion, but regardless, the findings made by the court are not supported by substantial evidence.

D. CONCLUSION.

The trial court held a fact finding hearing and decided defendant's untimely motion to withdraw her guilty plea despite a clear directive that it transfer the motion to the Court of Appeals. The State respectfully requests that this Court reverse the trial court's ruling that granted defendant's motion to withdraw her guilty plea.

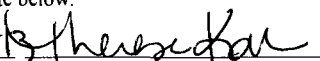
DATED: August 22, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

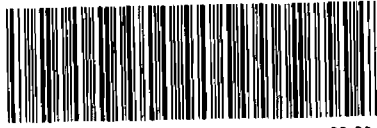
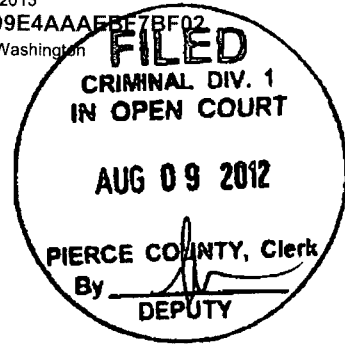
Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.22.13 
Date Signature

APPENDIX “A”

Case Number: 05-1-05483-4 Date: August 22, 2013
SerialID: A77DAE94-110A-9BE2-A99E4AAA...BF02
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05-1-05483-4 38996578 FNFL 08-09-12



**PIERCE COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

vs.

BESS OVERMON,

Defendant.

No. 05-1-05483-4

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND**

~~ORDER GRANTING~~ **DEFENDANT'S MOTION TO
WITHDRAW GUILTY PLEA**

CONCERNING

**TO: THE CLERK OF THE ABOVE-TITLED COURT;
AND TO: THE PIERCE COUNTY PROSECUTING ATTORNEY**

The Pierce County Superior Court – Judge Beverly Grant – having considered the written motion of the Defendant, the response by the State, the arguments of undersigned counsel and the testimony, docket, records and documents in this case, and enters the following

Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER GRANTING
DEFENDANT'S MOTION TO
WITHDRAW GUILTY PLEA - 1**

LEIST LAW OFFICE, PS
PO BOX 1856
ISSAQUAH, WA 98027
PHONE (206) 219-5557



FINDINGS OF FACT

1
2 1. The Defendant was represented by counsel, Robert DePan, in this matter in
3 2005, when the case was originally filed, and through 2006, when it was resolved via a guilty
4 plea.

5 2. Given the passage of time, Mr. DePan does not have any independent memories
6 of this case but testified consistent with his review of the transcripts and pleadings.

7 3. Defendant is a Nigerian citizen who has lived in the U.S. for approximately 10
8 years. During that time she has married.

9 4. During the time Mr. DePan represented the Defendant, he would not always
10 represent her at hearings. Instead, due to counsel's workload, Mr. DePan would sometimes
11 have other counsel cover routine hearings for Ms. Overmon's case.

12 5. Ms. Overmon initially set the matter for trial (in March 2006) but failed to
13 appear for trial. She resolved the matter via guilty plea in July 2006.

14 6. The total amount of time Mr. DePan was able to spend with Ms. Overmon,
15 including all meetings, all hearings, the plea and sentencing totaled no more than 3 hours.

16 7. At some juncture, around the time of the guilty plea, Mr. DePan discovered that
17 the Defendant was not a U.S. citizen.

18 8. At that time, Mr. DePan's had certain practices he would employ with non-
19 citizen clients who could face deportation. He would either (i) counsel them to consult with
20 independent immigration counsel or (ii) provide advice given to him by the Washington
21 Defender's Association immigrant rights project concerning risks of deportation.

22 9. While Mr. DePan would provide information related to deportation, it was not
23 his practice to provide any information about exclusion.
24
25

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER GRANTING
DEFENDANT'S MOTION TO
WITHDRAW GUILTY PLEA - 2**

LEIST LAW OFFICE, PS
PO BOX 1856
ISSAQUAH, WA 98027
PHONE (206) 219-5557

1 10. Mr. DePan does not have any specific memory as to counsel he might have
2 provided to Ms. Overmon concerning deportation or exclusion. He does not believe he gave her
3 any information about exclusion and does not recall whether he gave her advice concerning
4 deportation or whether he confirmed that Ms Overmon had consulted independent immigration
5 counsel.

6 11. In this case, Mr. DePan was not certain of the source of the misinformation
7 provided to the Defendant – that the amount allegedly taken by Ms. Overmon would not subject
8 her to deportation or exclusion if she pled guilty to Theft 2° -- whether that was from him or
9 someone else.
10

11 12. In any case, at the hearing concerning the withdrawal of her guilty plea held in
12 2012, Mr. DePan confirmed that Ms. Overmon had, in fact, received inaccurate information
13 about the consequences of her guilty plea in this case at the time of her plea and sentencing.

14 13. Following the entry of her guilty plea and sentencing in this matter, Ms.
15 Overmon heard from U.S. immigration authorities and discovered that, as a result of this plea,
16 she was subject to both deportation and exclusion. U.S. immigration authorities have initiated
17 deportation proceedings against Ms. Overmon.
18

19 14. At a hearing on May 11, 2012, the Court heard testimony from Mr. DePan and
20 Ms. Overmon as well as argument from counsel concerning her motion with withdraw her
21 guilty plea in this matter.

22 GIVEN THOSE FINDINGS OF FACT, THE COURT ENTERS THE FOLLOWING
23 CONCLUSIONS OF LAW:

24 1. The Defendant set this matter for trial and intended to push it to trial.
25

1 2. Prior to entering her plea, the Defendant received inaccurate information about
2 the consequences of that plea. Specifically, she was incorrectly advised that the amount she was
3 alleged to have taken was not an amount sufficient to trigger adverse immigration
4 consequences.

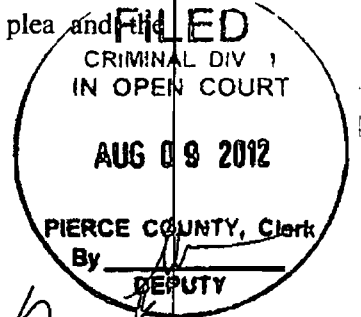
5 3. The consequences of Ms. Overmon's guilty plea, given her immigration status,
6 were or should have been reasonably ascertainable to counsel.

7 4. Mr. DePan's failure to ensure that Ms. Overmon knew and understood correct
8 immigration consequences of her plea prior to entry of that plea constituted ineffective
9 assistance of counsel.

10 5 That ineffective assistance and misinformation caused the Defendant to resolve
11 this matter with a guilty plea to the reduced charge of Theft 2. As a result, Ms. Overmon's plea
12 was not knowingly and voluntarily entered.

13 6. Accordingly, Ms. Overmon is entitled to withdraw her guilty plea and the
14 Defendant's motion is GRANTED.

15 DATED this 9 day of August, 2012.



16
17
18
19
20
21 *Beverly M. Grant*
22 Judge Beverly Grant

23 Presented By.

Agreed as to Form By

24 *[Signature]*
25 Scott F. Leist, WSBA #29940
Counsel for Ms. Overmon

[Signature]
Marcus Miller, WSBA # 2783
Deputy Pierce County Prosecutor

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER GRANTING
DEFENDANT'S MOTION TO
WITHDRAW GUILTY PLEA - 4

LEIST LAW OFFICE, PS
P O BOX 1856
ISSAQUAH, WA 98027
PHONE (206) 219-5557

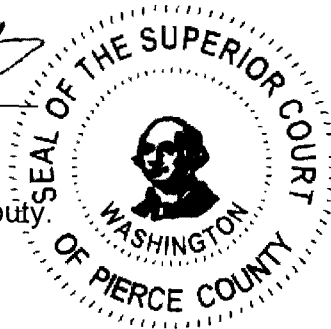
State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 22 day of August, 2013



Kevin Stock, Pierce County Clerk

By /S/Dorylee Phillips-Reyes, Deputy

Dated: Aug 22, 2013 12:24 PM



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PIERCE COUNTY PROSECUTOR

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