Supreme Court No. 91991-7
COA No. 45569-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIN RIEMAN,

Petitioner.

PETITION FOR REVIEW

PETER B. TILLER
Attorney for Petitioner

THE TILLER LAW FIRM
Rock & Pine
P. O. Box 58
Centralia, Washington 98531
(360) 736-9301

FILED IN COA ON JULY 24, 2015

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is Erin Rieman, the Defendant and Appellant in this case, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Rieman seeks review of Division Two's Unpublished Opinon dated May 27, 2015, in *State v. Rieman*, No. 45569-2–II. A Motion for Reconsideration has been filed in the Court of Appeals. The Motion for Reconsideration was denied June 25, 2015.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in denying the appellant's motion to vacate his conviction, denying his motion for reconsideration, and in failing to conduct an evidentiary hearing on the motion where the appellant presented newly-discovered evidence that reasonable diligence could not have discovered within the statutory one year period?

2. Did the petitioner receive ineffective assistance of counsel while attempting to withdraw his *Alford* plea where trial counsel failed to diligently pursue the motion and present evidence pertaining to Walter Bremmer's subsequent arrest and conviction, where Bremmer was Rieman's chief accuser? RAP 13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

On September 12, 2014, Rieman filed a brief alleging that the trial court had erred in regards to the above-indicated issues. The brief set out facts and law relevant to this petition and are hereby incorporated herein by reference.

1. Proceedings on Appeal.

On appeal, Rieman challenged the trial court's denial of his motion to withdraw his guilty plea. Brief of Appellant at 5-14. The Court affirmed the lower court. Rieman moved for reconsideration, which was denied on June 25, 2015. For the reasons set forth below, Rieman seeks review.

E. ARGUMENT

It is submitted that the issues raised by this Petition should be addressed by this Court because the decision of the Court of Appeals raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b).

1. THE TRIAL COURT ERRED WHEN IT DENIED RIEMAN AN EVIDENTIARY HEARING ON HIS MOTION TO WITHDRAW PLEA BECAUSE THE MOTION SETS OUT A FACTUAL AND LEGAL BASIS FOR GRANTING THE RELIEF REQUESTED

Mr. Rieman's motion was made after imposition of judgment

and sentence, which was entered May 21, 2010. Thus, under CrR 4.2(f), CrR 7.8 governs. *State v. Forest*, 125 Wn. App. 702, 706, 105 P.3d 1045 (2005). CrR 7.8 sets forth the substantive basis for relief from judgment, along with a procedural framework which governs such motions. However, the "manifest injustice" standard delineated in CrR 4.2 and the case law interpreting it nevertheless applies to motions conducted under CrR 7.8.

CrR 7.8 governs motions for relief from judgment. CrR 7.8(b) enumerates the bases upon which a judgment will be vacated including mistakes, new discovered evidence, fraud, a void judgment or any other reason justifying relief. CrR 7.8(b)(1)-(5). A motion for relief from judgment must be made within a reasonable time for newly discovered evidence, "not more than 1 year after the judgment" and is also subject to RCW 10.73.090, .100, .130, and .140. CrR 7.8(b).

A court shall not accept a guilty plea without determining that it is made voluntarily, competently, and with an understanding of the nature of the charge and consequences of the plea. CrR 4.2(d). Withdrawal of a guilty plea may be necessary to correct a manifest injustice where a defendant establishes that: (1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3)

effective counsel was denied; and (4) the plea agreement was not kept. *State v. Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). An involuntary plea constitutes a manifest injustice. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

In likening a personal restraint petition to a post-conviction motion, the Washington Supreme Court has held the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. *In re Rice,* 118 Wn.2d 876, 886, 828, P.2d 1086 (1992). The Court stated:

> "... If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify...." *Id.* 885-886.

In both his original declaration and the motion for reconsideration, Mr. Rieman presented the statistically remarkable fact that his accuser, Bremmer—was involved an a **second** homicide in Hawaii. Unfortunately, Mr. Rieman's request for a hearing based on the newly discovered evidence of Bremmer's

conviction was extremely poorly presented. Mr. Rieman's letter, if supported by additional, easily obtained documentation of Bremmer's Hawaiian conviction, supported by a full evidentiary hearing.

Mr. Rieman's plea was involuntary because it was entered under duress and coercion and because he was denied effective assistance of counsel, as argued below.

Mr. Bremmer threatened Mr. Rieman and his family. His threats ended only when Mr. Bremmer was arrested and convicted of murder in Hawaii, which occurred after Mr. Rieman entered his plea. CP 49. Mr. Rieman wrote that Mr. Bremmer strangled Mr. Adkins and forced Mr. Rieman to watch and threatened his life "if I did not support his story and help him dispose of John's body .. . ." CP 50, 51.

The trial court erred in failing to provide an opportunity for a full hearing on the merits of Mr. Rieman's motion to withdraw his plea. If coerced, a plea of guilty is involuntary and constitutes a manifest injustice. *Boykin v. Alabama,* 395 U.S. at 243.

Coercion renders a guilty plea involuntary whether or not the State was involved in or knew about the coercion. *State v. Frederick,* 100 Wn.2d 550, 556, 558-59, 674 P.2d 136 (1983) (reversed and remanded for a new trial on habitual criminal charge

in which the defendant may present evidence of coercion in entering plea).

Extrinsic evidence is admissible in post-plea proceedings to determine a plea's voluntariness. *Frederick*, 100 Wn.2d at 553-54. A bare allegation of coercion, without other evidence in the record, is, however, insufficient to overcome a defendant's statements in the plea proceeding indicating that the plea was voluntary. *State v. Osborne,* 102 Wn.2d 87, 97, 684 P.2d 683 (1984). In Mr. Rieman's case there is more than a bare allegation of coercion and duress. *C.F., Osborne,* 102 Wn.2d at 97. In this case, Mr. Bremmer was arrested after Mr. Rieman entered his *Alford* plea. Mr. Rieman argues that the fact of Mr. Bremmer's conviction in Hawaii supports his argument that his plea was coerced and therefore involuntary because Mr. Bremmer was revealed to be violent and capable of committing a violent offense. Mr. Rieman contends that not only was his plea involuntarily, but evidence of Mr. Bremmer's disposition should be presented to a jury in order to evaluate Mr. Bremmer's credibility as a witness for the State against Mr. Rieman.

2. **THE COURT ERRED WHEN IT DENIED AN EVIDENTIARY HEARING PURSUANT TO MR.**

RIEMAN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A motion for a new trial based on ineffective assistance of counsel requires the defendant to establish facts showing deficient performance and resulting prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 1052, 80 L.Ed.2d 674 (1984). Defense counsel does not provide effective assistance if he deprives a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. *State v. Adams,* 91 Wn:2d 86, 90, 586 P.2d 1168 (1978).

Rieman's counsel presented no evidence of Bremmer's conviction for manslaughter in Hawaii other than Mr. Rieman's letter. Counsel did not obtain a copy of the judgment and sentence or other easily obtainable supporting documentation. Instead, counsel merely filed a motion to withdraw the plea and requesting an order of transport. CP 48. The motion contained a four paragraph "memorandum," which stated in relevant part:

> Defendant was convicted of manslaughter in the first degree with an aggravating factor for the death of his friend and business partner John C. Adkins. Defendant asserts that his plea of guilty was an involuntary result of duress and coercive threats by Walter Bremmer against the defendant, his girlfriend at the time, his daughter and grandchildren who live in Hawaii. Those threats only ended when Bremmer was arrested and convicted of murder in Hawaii.

Defense counsel attached a letter by Mr. Rieman in which he asserted that Mr. Bremmer killed Mr. Adkins while on a fishing boat on July 5, 2009, and that he threatened his life and lives of his family members if he did not support his story. Other than the letter, counsel presented no substantive facts regarding Rieman's argument that he was threatened by Bremmer into entering a plea agreement.

To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. *State v. Early,* 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *rev. denied,* 123 Wn.2d 1004, 868 P.2d 872 (1994). Absent the argument of defense counsel, Mr. Rieman was completely precluded from establishing that based on the record, counsel deprived him of a substantial defense: his argument that he was coerced to enter the *Alford* plea due to threats by Mr. Bremmer. A trial court should grant an evidentiary hearing if the defendant timely submits *prima facie* evidence that he is entitled to a new trial. *State v. D.T.M.,* 78 Wn. App. 216, 221, 896 P.2d 108 (1995). Nevertheless, here the court did not grant the reference hearing. This was error and this Court should reconsider its previous opinion of May 27, 2015, reverse the

lower court's denial of the motion and remand for an evidentiary hearing.

The Court of Appeals' opinion affirming the trial court's denial of Rieman's motion to withdraw his plea was based on a cursory assessment of the facts and merits review by this Court.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E.

DATED this 24th day of July, 2015.

Respectfully submitted,

PETER B. TILLER, WSBA #20835
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

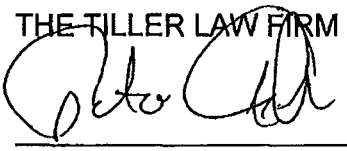
The undersigned certifies that on July 24, 2015, that this Petition for Review was sent by JIS link to (1) David Ponzoha, Clerk of the Court of Appeals, Division II, and was sent by first class mail, postage pre-paid to the following:

Mr. Mark McClain
Deputy Prosecutor
P.O. Box 145
South Bend, WA 98586

Mr. Erin Rieman
DOC #340662, H6B461
Stafford Creek Corr. Center
191 Constantine Way
Aberdeen, WA 98520
LEGAL MAIL/SPECIAL MAIL

Dated: July 24, 2015.

THE TILLER LAW FIRM



PETER B. TILLER – WSBA #20835
Of Attorneys for Petitioner

ATTACHMENT A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ERIN D. RIEMAN, Appellant.	No. 45569-2-II UNPUBLISHED OPINION

LEE, J. — Erin D. Rieman appeals the trial court's denial of his CrR 7.8 motion to withdraw his guilty plea, arguing that he is entitled to relief because newly discovered evidence shows that his plea was involuntary and because he received ineffective assistance of counsel from the attorney who filed his motion to withdraw. We convert his appeal to a personal restraint petition and deny Rieman's claims as untimely and without merit.

FACTS

On October 20, 2009, the State charged Rieman, as a principal or an accomplice, with one count of second degree murder with aggravating factors, a deadly weapon sentence enhancement, and first degree theft. Rieman was accused of murdering John Adkins. After extended negotiations, Rieman agreed to enter an *Alford* plea[1] to an amended charge of first degree

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

manslaughter with the aggravating factor that he used his position of trust, confidence, or fiduciary responsibility to facilitate the offense.

During the plea hearing, the State explained that the "tremendous amount of circumstantial evidence" in the case was tied together by a statement from codefendant Walter Bremmer, who was on a fishing vessel with Adkins and Rieman when Adkins died.[2] Verbatim Report of Proceedings (May 11, 2010) at 5. Defense counsel acknowledged that Bremmer's statement about Adkins' death was central to Rieman's decision to plead guilty. Counsel added that an extensive investigation had revealed blood and DNA (deoxyribonucleic acid) evidence attributable to Rieman and Adkins but not to Bremmer, and that other evidence from the murder scene corroborated Bremmer's statement.

After an extended colloquy in which Rieman assured the trial court that no one had threatened him and that he was acting of his own free will, Rieman pleaded guilty to the amended charge and agreed to an exceptional sentence of 132 months. On May 21, 2010, the trial court sentenced him accordingly. Rieman did not appeal.

On September 30, 2013, Rieman moved to withdraw his guilty plea and to vacate his sentence under CrR 7.8. Rieman argued that his plea was involuntary because it was coerced by threats from Bremmer, his former codefendant. Rieman asserted for the first time that Bremmer strangled Adkins and then threatened Rieman and his family if Rieman did not "support his story." Clerk's Papers (CP) at 51. Rieman argued that he could not reveal these facts or threats until Bremmer's arrest on an unrelated murder charge in Hawaii.

[2] Bremmer apparently received immunity from prosecution in return for his statement.

The State moved to strike Rieman's motion on the ground that it was untimely. Following a hearing, the trial court agreed and ruled as follows:

> IT IS HEREBY ORDERED that the motion of the defendant to withdraw his guilty plea is denied. More than one year has elapsed since the defendant was sentenced. The defendant has not made a threshold showing that he meets the requirements for withdrawal of plea as listed in CrR 7.8(b) and RCW 10.73.100.

CP at 56.

Rieman moved for reconsideration and argued that the one-year time limit did not apply because Bremmer's arrest in October 2012 constituted newly discovered evidence. The trial court denied reconsideration.

Rieman then filed this appeal, arguing that the trial court erred in denying his motion to withdraw without holding an evidentiary hearing, that the motion was timely because of newly discovered evidence, and that he received ineffective assistance of counsel from the attorney who filed the motion. Rieman asserts that we should reverse and remand for a hearing on the merits or treat this matter as a personal restraint petition.

ANALYSIS

A. CrR 7.8 Motions

Under CrR 7.8(c)(2), the superior court must transfer a motion to vacate judgment to this court unless it determines that the motion is timely filed under 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." In other words, only if the motion is timely and appears to have merit or requires fact finding should the superior court retain and hear the motion; in all other cases, the motion is transferred to this court. *State v. Smith*, 144 Wn. App. 860, 863, 184 P.3d 666

(2008). Under CrR 7.8(c)(2), the superior court does not have authority to dismiss a CrR 7.8 motion if it is untimely under RCW 10.73.090. *Smith*, 144 Wn. App. at 863.

Under RCW 10.73.090(1), a collateral attack on a judgment and sentence generally is timely if filed within one year after the judgment becomes final.[3] Rieman's judgment became final in 2010, and he did not file his CrR 7.8 motion until 2013. *See* RCW 10.73.090(3)(a) (judgment is final when filed with clerk of trial court). Rieman's CrR 7.8 motion was not timely under RCW 10.73.090, and the trial court should have transferred it to this court for consideration as a personal restraint petition. CrR 7.8(c)(2). But, because Rieman invites us to consider his appeal as a personal restraint petition, we decline to remand for an order complying with CrR 7.8(c)(2) and instead convert this appeal to a personal restraint petition.

B. NEWLY DISCOVERED EVIDENCE UNDER RCW 10.73.100(1)

The one-year time limit does not apply to a personal restraint petition if its issues implicate the exceptions to the time bar in RCW 10.73.100. *In re Pers. Restraint of Gentry*, 179 Wn.2d 614, 624-25, 316 P.3d 1020 (2014). Rieman's assertion that newly discovered evidence demonstrates that his plea was involuntary triggers the exception in RCW 10.73.100(1). This exception entitles a petitioner to relief if he establishes that the evidence "'(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.'" *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) (quoting *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981)).

[3] The exceptions to the time bar for facially invalid judgments and judgments entered outside the court's jurisdiction do not apply here. RCW 10.73.090(1).

Rieman argues that Bremmer's 2012 conviction is newly discovered evidence that entitles him to withdraw his plea. *See State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984) (coercion may render plea involuntary). Rieman asserts that he could not reveal the coercion and threats that led him to plead guilty until he learned of Bremmer's conviction. But this argument does not satisfy the test for newly discovered evidence because it rests on information that Rieman allegedly knew at the time of his plea; i.e., that he was being threatened by Bremmer. *See Brown*, 143 Wn.2d at 453 (to qualify as newly discovered, evidence must have been discovered since trial and must not have been discoverable before trial). Thus, the fact that Bremmer's conviction prompted Rieman to reveal preexisting coercion does not support Rieman's claim that newly discovered evidence shows his plea was involuntary.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Rieman also argues that he received ineffective assistance from the attorney who filed his motion to withdraw his plea. This issue is timely.

To show that he received ineffective assistance of counsel, Rieman must demonstrate that his counsel's performance was deficient and that the deficiency was prejudicial. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012). Rieman complains that in moving to withdraw his plea, his attorney presented no independent evidence concerning Bremmer's recent conviction in Hawaii. Rieman also notes that the motion to withdraw contained only a four-paragraph memorandum, which stated in relevant part:

> Defendant was convicted of manslaughter in the first degree with an aggravating factor for the death of his friend and business partner John C. Adkins. Defendant asserts that his plea of guilty was an involuntary result of duress and coercive threats by Walter Bremmer against the defendant, his girlfriend at the time,

> his daughter and grandchildren who live in Hawaii. Those threats only ended when Bremmer was arrested and convicted of murder in Hawaii.

CP at 49.

Attached to this memorandum was a letter from Rieman stating that Bremmer killed Adkins and threatened Rieman's life and the lives of his family if Rieman did not support Bremmer's story. Other than the letter, defense counsel presented no substantive facts to support Rieman's argument that Bremmer coerced him into entering the plea agreement. Rieman argues that he was prejudiced by counsel's failure to produce evidence of Bremmer's conviction, "which tended to support the argument that Mr. Bremmer is violent, that he caused the death of Mr. Adkins, and that he threatened Mr. Rieman in order to cover up the crime." Br. of Appellant at 14.

In opposing Rieman's motion to withdraw, the State did not dispute the facts regarding Bremmer's recent arrest and conviction. The State did dispute the relevance of those facts to Rieman's request for relief. We agree with the State that the fact that Bremmer was subsequently convicted of an unrelated murder does not show that he killed Adkins or that he threatened Rieman to cover up the crime. Moreover, even if defense counsel had obtained additional information supporting the claim that Bremmer coerced Rieman into pleading guilty, that information would not satisfy the test for newly discovered evidence because Rieman was aware of Bremmer's purported threats when he pleaded guilty. The fact of Bremmer's conviction does not change the information that Rieman possessed at the time of his plea. Consequently, we see no deficient performance in counsel's failure to obtain more information about Bremmer's conviction or about his alleged threats and coercion.

We deny the petition's claims as untimely and without merit.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Maxa, J.

ATTACHMENT B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ERIN DEON RIEMAN,

Appellant.

No. 45569-2-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **May 27, 2015** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Lee, Worswick, Maxa

DATED this 25th day of June, 2015.

FOR THE COURT:

PRESIDING JUDGE

Mark D McClain
Pacific County Prosecutor's Office
PO Box 45
South Bend, WA, 98586-0045
mmcclain@co.pacific.wa.us

Peter B. Tiller
The Tiller Law Firm
PO Box 58
Centralia, WA, 98531-0058
ptiller@tillerlaw.com

Eric Deon Rieman
DOC# 340662
Stafford Creek Corr Ctr
191 Constantine Way
Aberdeen, WA 98520

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Transmittal Letter

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Comments:

No Comments were entered.

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