

NO. 43591-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JEFFREY ZIEGLER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.05-1-01088-6

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

- I. Pursuant to RAP 2.2(a), this Court should strike the defendant's first assignment of error because the trial court's orders transferring the defendant's November 10, 2010 and March 19, 2012 motions to this Court for consideration as Personal Restraint Petitions are not orders that are appealable as a matter of right.
- II. Pursuant to CrR 7.8, the trial court was not required to hold a hearing on the defendant's May 2, 2012 motions; however the trial court erred when it denied these motions because the motions should have been transferred to this Court for consideration as Personal Restraint Petitions.
- III. The trial court did not err by adopting Finding of Fact No. 3; in the alternative, the issue is moot.

B. STATEMENT OF THE CASE

On May 15, 2005, the appellant (hereafter, "the defendant") was charged by Information with two counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree. (CP 294-95). Following a trial by jury and two direct appeals, the defendant was ultimately convicted and sentenced for three counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree. (CP 47-56, 57-63).

On November 10, 2010, the defendant filed a "Motion to Dismiss Information for Irregularities in the Proceedings Depriving Defendant of a Speedy Trial" with the Clark County Superior Court. (CP 64-143). When

the trial court failed to timely review the defendant's motion, the defendant filed a Petition for Writ of Mandamus with the Washington Supreme Court. On February 7, 2012, the Supreme Court issued an Order, in which it granted the defendant's petition, thereby requiring the trial court to "act upon" the defendant's motion. (CP 213).

On March 7, 2012, having reviewed the defendants' motion, the trial court determined the motion was governed by CrR 7.8, it determined the motion was time-barred (pursuant to RCW 10.73.090), and it entered an order transferring the defendant's motion to the Court of Appeals for Consideration as a Personal Restraint Petition (pursuant to CrR 7.8(c)(2)). (CP 227).

On March 19, 2012, the defendant filed a "Motion of Objection to Reclassification of CrR 8.3 Motion Into a CrR 7.8 Motion Without Prior Notice" with the Clark County Superior Court. (CP 228-37). On March 27, 2012, the trial court determined this motion was also governed by CrR 7.8 and that it was time-barred. (CP 232). Consequently, the trial court also transferred the defendant's March 19, 2012 motion to the Court of Appeals for consideration as a Personal Restraint Petition. (CP 232).

On June 7, 2012, the Court of Appeals for Division II filed an "Order Dismissing Petitions." *See* ATTACHMENT: Order Dismissing Petitions, COA Nos. 43163-7-II, *consolidated with* No. 43276-5-II (June

7, 2012). In its Order, the Court determined the defendant's motion (filed on November 10, 2010) and his motion (filed on March 19, 2012) were properly transferred for consideration as Personal Restraint Petitions. The Court consolidated the Petitions for review. The Court then dismissed the defendant's consolidated petitions because they were time-barred (pursuant to RCW 10.73.090) and because they were successive collateral attacks (pursuant to RCW 10.73.140). *Id.*

Meanwhile, on May 2, 2012, the defendant filed the following post-conviction motions for relief from judgment with the Clark County Superior Court: (1) Motion for Arrest of Judgment pursuant to CrR 7.4; (2) Motion for New Trial/Hearing pursuant to CrR 7.5; (3) Motion for Appointment of Counsel (CrR 3.1); (4) Affidavit of Prejudice pursuant to RCW 4.12.050 and CR 40(f); (5) Motion and Affidavit for Pre-assignment of Judge; and (6) Motion to Vacate Transfer of Petitioner's CrR 7.8 Motion. (CP 248-86).

On June 1, 2012, the trial court determined each of the defendant's motions were without merit. Consequently, the court entered "Findings of Fact and Conclusions of Law, and Order Denying Defendant's Motions." (CP 287-90). The trial court did not convert the defendant's motions into CrR 7.8 motions and it did not transfer the defendant's motions to this Court for consideration as Personal Restraint Petitions.

On June 18, 2012, the defendant filed a “Notice of Appeal To 06-02-2012 Blanket Denial of Ziegler’s Motions.” (CP 20). In his NOA, the defendant wrote that he was seeking review of the “‘Motions Denied’ ruling by affidized prejudiced Judge Diane Woolard entered on June 6, 2012” [sic].¹ (CP 20). This appeal followed.

C. ARGUMENT

- I. Pursuant to RAP 2.2(a), this Court should strike the defendant’s first assignment of error because the trial court’s orders transferring the defendant’s CrR 7.8 motions to this Court for consideration as Personal Restraint Petitions are not orders that are appealable as a matter of right.

In his first assignment of error, the defendant claims the trial court erred when it transferred his post-trial motions to the Court of Appeals without notice and an opportunity to be heard. *See* Brief of Appellant (“Brief”) at p. 1. This claim is without merit.

Under Washington Rules of Appellate Procedure (“RAP”) 2.2(a), only final judgments terminating review are appealable as a matter of right. *State v. Taylor*, 150 Wn.2d 599, 601, 80 P.3d 605 (2003) (quoting *In re Det. of Petersen*, 138 Wn.2d 70, 88, 980 P.2d 1204 (1999) (internal quotations removed) (stating, a final judgment “ends the litigation, leaving nothing for the court to do but execute the judgment”) Under RAP

¹ The only “denial of motions” that has occurred in this case in this “Findings of Fact and Conclusions of Law, and Order Denying Defendant’s Motions,” which was filed by the trial court on June 1, 2012.

2.2(a)(10), an order granting or denying a motion to vacate a judgment is also considered a final judgment that is appealable as a matter of right. There is no provision under RAP 2.2(a) that states “an order of the superior court transferring a CrR 7.8 motion to the Court of Appeals for consideration as a personal restraint petition” is an order that is appealable as a matter of right.

The only motions that the trial court transferred to this Court for consideration as PRP’s are the motions that the defendant filed on November 10, 2010 and on March 19, 2012. Under RAP 2.2(a), the trial court’s orders transferring the defendant’s motions (dated March 7, 2012 and March 27, 2012) are not orders that are appealable as a matter of right. Consequently, these orders cannot be reviewed as part of the instant appeal.

In addition, in his Notice of Appeal (“NOA”), the defendant did not state he was seeking review of the trial court’s orders of transfer. In his NOA, the defendant expressly stated he was only seeking review of the “Motions Denied” ruling made by Clark County Superior Court Judge Woolard in June of 2012. Judge Woolard only “denied” the motions that the defendant filed on May 2, 2012. She did not deny the motions the

defendant filed on November 10, 2010 or March 19, 2012. Therefore, the defendant did not preserve the trial court's transfer orders for review.²

Also, the propriety of the trial court's transfer of the defendant's motions (filed on November 10, 2010 and on March 19, 2012) was already reviewed and resolved by this Court in its Order Dismissing Petitions, which was filed on June 7, 2012. COA No. 43163-7-II, *consolidated with* No. 43276-5-II. In its Order, this Court ruled the defendant's motions were properly transferred to the Court of Appeals for consideration as PRP's. This Court went on to dismiss the defendant's PRP's because they were time-barred and because they were successive collateral attacks.

Further, under the plain language of CrR 7.8, the defendant was not entitled to have a hearing on the motions that he filed on November 10, 2010 and on March 19, 2012. CrR 7.8 governs collateral attacks that are filed at the trial court. CrR 7.8 (c)(2) and (3) states that the trial court has jurisdiction to hold an evidentiary hearing on a collateral attack only if it makes the preliminary determination that the defendant's motion is not time-barred. If the court determines the defendant's motion is not time-barred, then it has jurisdiction to hold a hearing only if it also determines the defendant has made a substantial showing that he is entitled to relief or

² The defendant filed a Notice of Appeal on April 20, 2012, in which he objected to the transfer of his November 10, 2010 motion to this court. (CP 233). However, the defendant's NOA was untimely and there is no evidence that it was accepted by this Court for late filing.

that resolution of the matter will require an evidentiary hearing. CrR 7.8(c)(2) and (3). Otherwise, the trial court must transfer the defendant's motion to the Court of Appeals for consideration as a PRP. CrR 7.8(c)(2) and (3).

Here, the trial court determined the defendant's motions were time-barred. Therefore, it was required by CrR 7.8 to transfer the defendant's motions to this Court. The trial court had no jurisdiction to hold an evidentiary hearing. Consequently, no error occurred when the trial court transferred the defendant's motions to this Court, without first providing the defendant with "notice and an opportunity to be heard."

Lastly, the Supreme Court's order granting the defendant's writ of mandamus did not require the trial court to review the defendant's motions on the merits and it did not require the trial court to conduct a hearing. Rather, the Supreme Court's order simply required the trial court to "act upon" the defendant's motions. The trial court properly acted upon the defendant's motions when it reviewed them, when it determined they were time-barred, and when it transferred them to this Court. No further action was required by the trial court and no error occurred.

- II. Pursuant to CrR 7.8, the trial court was not required to hold a hearing on the defendant's May 2, 2012 motions; however the trial court erred when it denied these motions because they should have been transferred to the Court of Appeals for consideration as Personal Restraint Petitions.

In his second assignment of error, the defendant claims the trial court erred by “summarily denying [his] May 2nd post-trial motions without a hearing.” *See* Brief, at p. 1. The trial court denied these motions in its “Findings of Fact and Conclusions of Law, and Order Denying Defendant’s Motions,” filed on June 1, 2012.

The State does not dispute that the trial court erred when it denied the motions that the defendant filed on May 2, 2012. However, the trial court did not err because it denied these motions without first conducting a hearing; rather, the trial court erred because these motions were post-conviction motions for relief from judgment. Consequently, the trial court’s ability to act was governed by CrR 7.8. The trial court should have re-characterized these motions as CrR 7.8 motions. The trial court should have then transferred the defendant’s motions to the Court of Appeals for consideration as personal restraint petitions, pursuant to CrR 7.8(c)(2), because the defendant’s motions were time-barred.³ The trial court had no jurisdiction to hold a hearing on these motions because the defendant

³ Even if an exception to the time-bar applied under RCW 10.73.100, transfer would have been warranted because the defendant failed to make substantial showing that he was entitled to relief or that resolution of the matters required an evidentiary hearing.

failed to demonstrate that an exception to the time-bar applied and because he failed to make a substantial showing that he was entitled to relief. CrR 7.8(c)(2) and (3).

The State respectfully asks this Court to reverse with instructions to the trial court. The trial court should be instructed to vacate its June 1, 2012 order denying the defendant's May 2, 2012 motions. The trial court should be further instructed that it should either transfer the defendant's motions to this Court under CrR 7.8(c)(2), or it should hold a hearing on the defendant's motions under CrR 7.8(c)(3), if it determines the defendant's motions are not time-barred and it determines the defendant has made a substantial showing that he is entitled to relief or that resolution of the matters will require an evidentiary hearing.⁴

III. The trial court did not err by adopting Finding of Fact No. 3; in the alternative, any error is moot.

In his third assignment of error, the defendant claims the trial court erred when it adopted "Finding of Fact No. 3." *See* Brief, at p. 1. The State presumes the defendant is referring to Finding of Fact No. 3 in the trial court's "Findings of Fact and Conclusions of Law, and Order Denying Defendant's Motions," filed on June 1, 2012. In Finding of Fact No. 3, the trial court wrote:

⁴ The defendant appears to agree that this is the appropriate remedy. *See* Brief, at p. 7, *n.* 5.

The Court of Appeals, Division II, also received the defendant's Motion to Vacate Transfer of Petitioner's CrR 7.8 Motion and found the superior court acted within its authority and the transfer was proper.

- (CP 288).

This finding was in response to the sixth motion that the defendant filed on May 2, 2012: "Motion to Vacate Transfer of Petitioner's CrR 7.8 Motion," wherein the defendant objected to the trial court transferring the motion he filed on November 10, 2010 to this Court. (CP 267). No error occurred here because the trial court correctly stated that the Court of Appeals found the transfer of the defendant's prior CrR 7.8 motion was proper. However, this issue is moot, presuming this Court instructs the trial court to vacate its order denying the defendant's motions.

D. CONCLUSION

The defendant's convictions should be affirmed. The defendant's first assignment of error should be stricken. The defendant's third assignment of error is moot. Regarding the defendant's second assignment of error, the trial court should be instructed to vacate its order denying the defendant's May 2, 2012 motions. The trial court is not required to hold a

hearing; however, it should be instructed to resolve these motions according to the requirements of CrR 7.8(c)(2) and (3).

DATED this _____ day of _____, 2012.

Respectfully submitted:

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By:

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COURT OF APPEALS
DIVISION II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON
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In re the
Personal Restraint Petition of

JEFFREY S. ZIEGLER,

Petitioner.

Nos. 43163-7-II

Consolidated with
No. 43276-5-II

ORDER DISMISSING
PETITIONS

Jeffrey S. Ziegler seeks relief from personal restraint imposed following his 2007 conviction for one count of first degree child rape and three counts of first degree child molestation. Petitioner originally filed this action in the superior court, which transferred it to this court on March 7, 2012, for consideration as a personal restraint petition under CrR 7.8(c)(2). This court assigned cause number 43163-7-II. On March 27, 2012, this court received another order transferring petition under CrR 7.8(c)(2) and assigned it cause number 43276-5-II. It is now apparent that both petitions involve the same pleadings and therefore are now consolidated under No. 43163-7-II.

Petitioner raises several arguments in support of his claim that his restraint is unlawful but this court will not consider them unless petitioner shows that this petition is both timely and nonsuccessive. RCW 10.73.090 and RCW 10.73.140. Petitioner's primary concern is that due to government mismanagement, his preliminary hearing, probable cause hearing, arraignment hearing, and trial were all untimely. He also claims ineffective assistance of counsel and the deprivation of a fair trial. Not one of these

claims, however, falls within the six exceptions to the RCW 10.73.090 time bar as set out in RCW 10.73.100.¹ Further, petitioner fails to show good cause for not raising his current claims in his prior petition and thus this court must dismiss it as successive. RCW 10.73.140.

Petitioner argues that this court should apply equitable tolling and allow his claim to proceed because government mismanagement and ineffective assistance of counsel prevented him from discovering these issues. But this is not a circumstance for applying equitable tolling. *See In Re Personal Restraint of Bonds*, 165 Wn.2d 135, 196 P.3d 672 (2008) (petitioner has high burden of demonstrating that his petition was untimely due to bad faith, deception, or false assurances). Petitioner fails in meeting this burden. Accordingly, it is hereby

¹ RCW 10.73.100 provides:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction;

or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

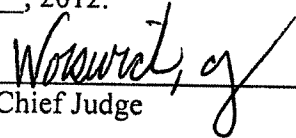
No. 43163-7-II
Consolidated with No. 43276-5-II

ORDERED that petition No. 43276-5-II is consolidated to No. 43163-7-II. It is
further

ORDERED that petitioner's motion for appointment to counsel is denied. It is
further

ORDERED that these petitions are dismissed under RAP 16.11(b).

DATED this 7th day of June, 2012.



Chief Judge

cc: Jeffrey S. Ziegler
Clark County Clerk
County Cause No(s). 05-1-01088-6
Abigail E. Bartlett

CLARK COUNTY PROSECUTOR

November 16, 2012 - 3:48 PM

Transmittal Letter

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Court of Appeals Case Number: 43591-8

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