

64390-8

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NO. 64390-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL DANCER,

Appellant.

REC'D

JUN 29 2010

King County Prosecutor  
Appellate Unit

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JUN 29 PM 3:34

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jeffrey M. Ramsdell, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON  
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The trial court erred in summarily denying appellant's CrR 7.8 motion to vacate judgment and sentence. CP 49.

Issue Pertaining to Assignment of Error

CrR 7.8(c) requires the court to transfer to this Court a timely filed motion, or set a hearing for the adverse party to appear and show cause why the requested relief should not be granted. Where appellant filed a timely CrR 7.8 motion to vacate judgment and sentence, supported by declaration, did the trial court err in summarily denying the motion?

B. STATEMENT OF THE CASE

On November 24, 2008, the King County Prosecutor charged appellant Daniel Dancer with second degree assault. CP 1. On March 26, 2009, Dancer pled guilty to an amended charge of third degree assault. CP 5, 13-32; RP 3-12. The court imposed a standard range sentence of 73 days, which Dancer had served by the time of sentencing. CP 7-12; RP 16. Dancer's subsequent appeal was ultimately abandoned and therefore dismissed. CP 98-99.

On or about September 20, 2009, Dancer filed a pro se CrR 7.8 motion, with a supporting memorandum and declaration, asking the court

to vacate his judgment and sentence.<sup>1</sup> CP 50-65. Dancer argued the motion should be granted based on newly discovered evidence and because he was denied effective assistance of counsel. CP 52-55.

On September 28, 2009, the court summarily denied Dancer's motion. CP 49. By letter dated September 30, 2009, Dancer requested a copy of the verbatim report of proceedings for the hearing at which his motion was denied. CP 67. It does not appear Dancer's request was granted, or even responded to, nor does it appear a hearing was ever held in conjunction with Dancer's motion.

On October 24, 2009, Dancer filed a pro se notice of appeal from the order denying his motion to vacate. CP 76. The trial court entered an order to transfer Dancer's case to the Court of Appeals "as a Personal Restraint Petition." CP 75. On December 11, 2009, this Court ordered that the matter be treated as a direct appeal.

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<sup>1</sup> Dancer's motion to vacate was not formally filed until September 30, 2009. CP 50. The signature page indicates, however, that it was submitted to the court on September 20, 2009. CP 56.

C. ARGUMENT

IT WAS REVERSIBLE ERROR TO SUMMARILY DENY DANCER'S TIMELY CrR 7.8 MOTION WITHOUT A HEARING.

Prior to 2007, CrR 7.8(c) provided:

**(c) Procedure on Vacation of Judgment.**

(1) *Motion.* Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) *Initial Consideration.* The court may deny the motion without a hearing if the facts alleged in the affidavits do not establish grounds for relief. The court may transfer a motion to the Court of Appeals for consideration as a personal restraint petition if such transfer would serve the ends of justice. Otherwise, the court shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

Former CrR 7.8 (c) (emphasis added).

Effective September 1, 2007, however, CrR 7.8(c) was amended to provide:

**(c) Procedure on Vacation of Judgment.**

(1) *Motion.* Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) *Transfer to Court of Appeals.* 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.

(3) *Order to Show Cause*. If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

CrR 7.8(c).

This amendment discontinued a 21-year history of allowing superior courts the option of

(1) deny[ing] a CrR 7.8 motion without a hearing if the alleged facts did not establish grounds for relief; (2) transfer[ring] the motion to the court of appeals for consideration as a personal restraint petition if the transfer would serve the ends of justice; or (3) set[ting] a hearing so the adverse party could show why the court should not grant the requested relief.

State v. Smith, 144 Wn. App. 860, 862, 184 P.3d 666 (2008) (emphasis added).

In Smith, the trial court dismissed a CrR 7.8 motion on the basis that it was untimely under RCW 10.73.090.<sup>2</sup> In reversing, this Court held that under the post-2007 version of CrR 7.8;

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<sup>2</sup> RCW 10.73.090 provides:

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

the superior court does not have authority to dismiss a CrR 7.8 motion if it is untimely under RCW 10.73.090. Instead, the superior court must transfer the motion to [the Court of Appeals] for consideration as a personal restraint petition. The superior court may only rule on the merits of the motion when the motion is timely filed and either (a) the defendant makes a substantial showing that he is entitled to relief or (b) the motion cannot be resolved without a factual hearing. Only when these prerequisites are absent may the superior court transfer a timely petition to this court for consideration as a personal restraint petition.

Smith, 144 Wn. App. at 863.

Similar to Smith, under the current version of CrR 7.8 the trial court had only two options; (1) transfer the motion to the Court of Appeals for consideration as a personal restraint petition; or (2) set a time and place for a hearing at which the State had to show cause why Dancer's motion should not be granted. Smith, 144 Wn. App. at 863. No longer could the

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(2) For the purposes of this section, "collateral attack" means any form of post-conviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

trial court summarily deny the motion without a hearing on the basis that it failed to "establish grounds for relief." Former CrR 7.8(c)(1).

Unfortunately, the trial court did not transfer Dancer's motion to the Court of Appeals, nor did it hold a hearing. Instead the court summarily denied Dancer's motion based solely on Dancer's pleadings. In conflict with the rule, the court failed to require any showing by the State that Dancer's claims of ineffective counsel and newly discovered evidence did not warrant granting the relief requested. This was error that requires reversal. Smith, 144 Wn. App. at 864.

On remand, the trial court should set a time and place for a hearing at which the State is required to show cause why Dancer's motion should not be granted. CrR 7.8(c)(3). In the alternative, if on remand the trial court determines Dancer has failed to make a substantial showing that he is entitled to the requested relief *and* that a factual hearing is *not* required to resolve the motion, then the court may transfer the motion to this Court for consideration as a personal restraint petition. CrR 7.8(c)(2). Such a re-characterization and transfer may not occur, however, without the trial court first notifying Dancer of the court's intent to recharacterize motion, warning him that the re-characterization could subject the motion to the second or successive motion rule, and providing Dancer the opportunity to withdraw or amend the motion before transfer, as required under Castro v.

United States, 540 U.S. 375, 383, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003).

Smith, 144 Wn. App. at 864.

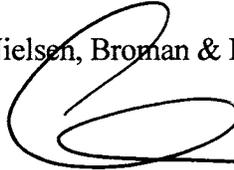
D. CONCLUSION

By summarily denying Dancer's motion to vacate judgment and sentence without a hearing, the trial court violated the procedure under the post-2007 version of CrR 7.8 for consideration of post-conviction motions for relief. This court should therefore reverse and remand for proper consideration of Dancer's motion.

DATED this 2<sup>nd</sup> day of June, 2010.

Respectfully submitted,

Nielsen, Broman & Koch, PLLC



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Respondent,	)	
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	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DANIEL DANCER  
DOC NO. 305475  
WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF JUNE, 2010.

x *Patrick Mayovsky*