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COA NO. 64472-6-I

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

REC'D

APR 30 2010

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JOHN JAMES,

Appellant.

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RECEIVED
COURT OF APPEALS
DIVISION ONE

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

The Honorable Joan E. DuBuque, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The trial court erred in denying appellant's motion to vacate the judgment and sentence as untimely.

Issue Pertaining to Assignment of Error

The trial court denied appellant's CrR 7.8 motion as untimely. Is vacature of the denial order and remand required because the trial court lacked authority under CrR 7.8(c)(2) to dismiss the motion as untimely?

B. STATEMENT OF THE CASE

In 1995, John James was convicted of first degree rape, first degree robbery and first degree burglary. CP 6. The court imposed an exceptional sentence of 500 months confinement for the rape conviction. CP 7-8, 38-41. James filed a direct appeal, challenging the trial court's suppression ruling and the basis for imposing an exceptional sentence. CP 42-49. This Court affirmed and the mandate issued on June 20, 1997. CP 42.

James subsequently filed a pro se¹ personal restraint petition (PRP), claiming due process and his right to a jury trial required a jury to find facts underlying imposition of an exceptional sentence. CP 55. This Court dismissed the PRP as time barred. CP 55-65. The mandate issued on January 29, 2004. CP 53-54.

¹ ACORDS shows his pro se status. See appendix A.

In 2005, James filed a pro se motion to vacate and modify his judgment and sentence, relying on Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) to argue the factual basis for his exceptional sentence needed to be found by a jury rather than a judge.² CP 67. The superior court transferred the motion to this Court. CP 109. This Court, treating the motion as a PRP, dismissed it on the ground that Blakely did not apply retroactively. CP 96 (citing State v. Evans, 154 Wn.2d 438, 114 P.3d 627 (2005)). The certificate of finality issued on September 8, 2005. CP 94.

In 2009, James filed a pro se CrR 7.8 motion to vacate and modify the judgment and sentence, arguing the judgment and sentence contained an incorrect offender score and that he was entitled to be resentenced on the basis of a corrected offender score. CP 22-32. Without conducting a hearing on the matter or providing prior notice to James, the trial court denied the CrR 7.8 motion, stating "The judgment and sentence is valid on its face and this motion is untimely. Court of Appeals filed a mandate in 1997. Denied." CP 14. This appeal follows. CP 34.

² The United States Supreme Court decided Blakely on June 24, 2004.

C. ARGUMENT

THE SUPERIOR COURT LACKED AUTHORITY TO DISMISS THE CrR 7.8 MOTION AS UNTIMELY.

CrR 7.8(c)(2) provides:

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.

Under this rule, the trial court lacks authority to dismiss a CrR 7.8 motion as untimely. State v. Smith, 144 Wn. App. 860, 861, 863, 184 P.3d 666 (2008). Instead, the superior court must transfer the motion to the court of appeals for consideration as a personal restraint petition. Smith, 144 Wn. App. at 863.

The present appeal cannot simply be converted into a PRP at this stage. Id. at 863-64. Converting a CrR 7.8 motion into a PRP could have future collateral consequences.

A CrR 7.8 motion transferred to the court of appeals as a personal restraint petition will generally bar subsequent petitions under RCW 10.73.140.³ In re Pers. Restraint of Vasquez, 108 Wn. App. 307, 313-14,

³ RCW 10.73.140 provides "If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on

31 P.3d 16 (2001). But James is not barred from having a PRP heard by the Supreme Court in the future under the successive petition rule because James was pro se on previous petitions. Because RCW 10.73.140 does not apply to the Supreme Court, the abuse of writ doctrine is the only direct bar to the raising of new issues in successive petitions in the Supreme Court. In re Pers. Restraint of Perkins, 143 Wn.2d 261, 265 n.5, 19 P.3d 1027 (2001); In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 351-52, 5 P.3d 1240 (2000). The abuse of writ doctrine barring successive petitions applies only where the petitioner was represented by counsel throughout post conviction proceedings. Perkins, 143 Wn.2d at 265 n.5.

Converting the wrongly transferred CrR 7.8 motion to a PRP could infringe James's right to choose whether he wants to pursue a future PRP in the Supreme Court. If this appeal were converted into a PRP, James would be subject to the successive petition bar under the abuse of writ

similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the court of appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition. Upon receipt of a first or subsequent petition, the court of appeals shall, whenever possible, review the petition and determine if the petition is based on frivolous grounds. If frivolous, the court of appeals shall dismiss the petition on its own motion without first requiring the state to respond to the petition."

doctrine because he has appellate counsel appointed for him on this matter.

James, pro se at the time his CrR 7.8 motion was denied, was entitled to notice that the superior court intended to deny his motion as untimely. This Court should vacate the trial court order denying the CrR 7.8 motion and remand to the trial court to give James the opportunity to object to a transfer, agree to dismiss his motion, or seek dismissal once the motion is transferred. Smith, 144 Wn. App. at 863-64. This remedy is necessary to ensure James has the opportunity to pursue a future PRP in the Supreme Court.

D. CONCLUSION

For the reasons stated, this Court should vacate the trial court order denying the CrR 7.8 motion as untimely and remand the case back to the superior court.

DATED this 30th day of April 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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APPENDIX A

Participants for Case # 495704 ↓

Petitioner

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Petitioner

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Petitioner

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Petitioner

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Work phone number:	206-296-9000

Participants for Case # 495755 

Petitioner

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Participants for Case # 495941 

Petitioner

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--	--

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Participants for Case # 495909 

Petitioner

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Petitioner

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Attorney(s) for Petitioner(Keith Lee Whitling)

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Fax number:	206-622-4911

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 64472-6-I
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JOHN JAMES,)	
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Appellant.)	

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 30TH DAY OF APRIL, 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] JOHN JAMES
DOC NO. 712756
MCNEIL ISLAND CORRECTIONS CENTER
P.O. BOX 881000
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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF APRIL, 2010.

x *Patrick Mayovsky*

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STATE OF WASHINGTON
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