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Nov 30, 2015  
Court of Appeals  
Division I  
State of Washington

COA NO. 73502-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

BRETT MARKER,

Appellant.

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

The Honorable John R. Ruhl, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The court erred in dismissing appellant's motion to withdraw his guilty plea with prejudice. CP 75-76, 100-01.

2. The court erred in denying appellant's motion to deny, without prejudice, his motion to withdraw his guilty plea.

3. The court erred in granting the State's motion to deny, with prejudice, appellant's motion to withdraw his guilty plea.

Issue Pertaining to Assignments of Error

Whether the court erred in dismissing appellant's motion to withdraw his guilty plea with prejudice, as opposed to denying it without prejudice, because the motion was not decided on its merits and the court lacked authority to bar appellant from bringing a subsequent collateral attack on the same ground?

**B. STATEMENT OF THE CASE**

The State charged Brett Marker with second degree unlawful possession of a firearm. CP 1. In June 2013, the court found Marker incompetent to stand trial and committed him to Western State Hospital for a restoration period. CP 13-23. In August 2013, the court found Marker remained incompetent, ordered a second restoration period, and authorized the involuntary administration of psychotropic medication. CP

24, 25-28. On November 27, 2013, the court determined Marker was restored to competency. CP 29-40.

On December 12, 2013, Brett Marker pled guilty as charged. CP 41-64; RP<sup>1</sup> 11-12, 17. That same day, the court entered the judgment and sentence, imposing four months jail time. CP 69.

In June 2014, Marker filed a pro se motion for an order authorizing review at public expense and appointment of an attorney. CP 83-86. There was some question over whether Marker wanted to appeal or whether he wanted to file a CrR 7.8 motion to withdraw his plea. CP 90. In December 2014, Marker, through appointed counsel, filed a motion to withdraw his guilty plea under CrR 7.8(b)(5), alleging he was incompetent at the time he entered the plea and that prior counsel provided ineffective assistance. CP 73-74; 93; File Exhibit.

The matter came before the superior court for an evidentiary hearing on May 7, 2015. RP 22; CP 75. At the start of the hearing, defense counsel informed the court that Marker did not wish to testify. RP 23. Counsel said he was unable to proceed with the hearing because Marker was the only witness whom he planned to call in support of the motion. RP 23, 26. Counsel also informed the court that he was

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: RP – one volume consisting of 12/12/13, 5/7/15.

concerned that Marker was incompetent to testify or otherwise participate in the hearing. RP 29-31, 34. In light of this competency concern, counsel moved for an order denying the present motion to withdraw the plea without prejudice and to allow Marker to refile the motion and renote it for a hearing in the future. RP 29-31, 34, 38-40. The State argued the motion should be dismissed with prejudice, complaining about the time that had already been spent on the matter and invoking a need for finality. RP 27, 31-33, 35-37, 45.

As Marker was not ready to go forward, the court did not think it was "fair" to the State to allow the motion to "float indefinitely." RP 42-43. The court therefore entered an order (1) denying the defense motion for an order denying, without prejudice, the motion to withdraw the plea; (2) granting the State's motion to deny, with prejudice, the motion to withdraw the plea; and (3) dismissing, with prejudice, the defense motion to withdraw the plea. CP 75-76, 100-01. Marker appeals. CP 78-82.

**C. ARGUMENT**

- 1. DISMISSAL OF A COLLATERAL ATTACK WITH PREJUDICE IS INAPPROPRIATE WHERE THE CLAIM HAS NOT BEEN ADJUDICATED ON ITS MERITS.**

The trial court erred in dismissing Marker's CrR 7.8 motion with prejudice. The denial should have been without prejudice because the

claim was not adjudicated on its merits. Dismissal with prejudice, which bars Marker from presenting the same claim in the future, conflicts with established rules for when a successive collateral attack on the same ground may be filed.

**a. The standard of review is de novo.**

Where facts are not at issue, a trial court's ruling on a motion to dismiss is reviewed de novo. AOL, LLC v. Dep't of Revenue, 149 Wn. App. 533, 541-42, 205 P.3d 159 (2009). The scope of relief awarded to the State — dismissal with prejudice — is also a question of law reviewed de novo. Hous. Auth. of City of Everett v. Kirby, 154 Wn. App. 842, 849, 226 P.3d 222 (2010), abrogated on other grounds by Hous. Auth. of City of Seattle v. Bin, 163 Wn. App. 367, 260 P.3d 900 (2011).

**b. The court lacked authority to deny Marker's collateral attack with prejudice.**

"A dismissal 'with prejudice' is equivalent to an adjudication upon the merits and will operate as a bar to a future action." Maib v. Maryland Cas. Co., 17 Wn.2d 47, 52, 135 P.2d 71 (1943). "[A] dismissal 'with prejudice' appropriately follows an adjudication on the merits, while a dismissal 'without prejudice' means that the existing rights of the parties . . . are as open to legal controversy as if no judgment or dismissal

had been entered." Parker v. Theubet, 1 Wn. App. 285, 291, 461 P.2d 9 (1969) (citing Maib).

Marker's CrR 7.8 motion was not adjudicated on its merits. The trial court did not reach the merits because Marker was unwilling to testify at the CrR 7.8 hearing and his counsel could not go forward with the motion in the absence of testimony. It was therefore inappropriate for the trial court to dismiss the motion with prejudice. Such a dismissal appropriately follows adjudication on the merits, which never took place here. Parker, 1 Wn. App. at 291. "[W]here the dismissal is based on some ground not going to the merits of the case, a decree or order cannot be made precluding the party from again litigating a question touching the merits." Peterson v. Parker, 151 Wn. 392, 395, 275 P. 729 (1929) (quoting 18 C. J. p. 1201)). Such a dismissal should therefore be without prejudice. Peterson, 151 Wn. at 395.

Dismissal with prejudice acts as a bar to a subsequent action between the same parties on the same claim. By dismissing Marker's CrR 7.8 motion with prejudice, the trial court barred Marker from litigating his claim again in the future. The trial court, however, lacked authority to bar a subsequent collateral attack in this manner.

Examination of the relevant rules regarding successive collateral attacks shows this to be true. A collateral attack on a criminal judgment

includes any type of postconviction relief other than a direct appeal, such as a motion to withdraw a guilty plea under CrR 7.8(b). In re Pers. Restraint of Becker, 143 Wn.2d 491, 496, 20 P.3d 409 (2001). Motions to vacate under CrR 7.8(b) are the functional equivalent of personal restraint petitions and are subject to RCW 10.73.140's general rule against subsequent collateral attacks.<sup>2</sup> State v. Brand, 120 Wn.2d 365, 369, 842 P.2d 470 (1992); Becker, 143 Wn.2d at 496, 499.

A court may therefore refuse to consider a CrR 7.8(b) motion if the movant has previously brought a collateral attack on "similar grounds." Brand, 120 Wn.2d at 370. But the similar ground bar does not apply in the context of successive collateral attacks where the previous attack was never resolved on its merits. In re Pers. Restraint of Van Delft, 158 Wn.2d 731, 738, 147 P.3d 573 (2006); In re Pers. Restraint of Johnson, 131 Wn.2d 558, 564, 933 P.2d 1019 (1997). Similarly, under RAP 16.4(d), "[n]o more than one petition for similar relief on behalf of the same petition will be

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<sup>2</sup> 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 similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. . . . 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."

entertained without good cause shown." But again, that bar applies only if "the relevant issue was previously heard and determined on the merits." Van Delft, 158 Wn.2d at 737.

Neither RCW 10.73.140 nor RAP 16.4(d) bars Marker from bringing a subsequent motion to vacate his guilty plea on the same ground. His initial collateral attack was never adjudicated on its merits and is therefore not subject to the successive petition bar under RCW 10.73.140 or RAP 16.4(d). Van Delft, 158 Wn.2d at 737-38; Johnson, 131 Wn.2d at 564; cf. Becker, 143 Wn.2d at 499-500 (petitioner's writ, treated as motion for relief under CrR 7.8(b), barred as successive collateral attack because it merely reiterated the same issues raised *and adjudicated* in original postconviction motion); Brand, 120 Wn.2d at 368, 370-71 (subsequent CrR 7.8 motion on same grounds of newly discovered evidence procedurally barred where earlier collateral attack was dismissed for failure to establish admissibility of newly discovered evidence).

But the trial court's dismissal with prejudice bars Marker from bringing the same claim again. In the absence of an adjudication on the merits, the trial court's denial of Marker's CrR 7.8 motion with prejudice conflicts with Marker's rights under RCW 10.73.140 and RAP 16.4(d) to litigate a subsequent motion on the same ground. The trial court cannot, by judicial fiat, abrogate a litigant's procedural rights in this manner.

Neither the State nor the trial court articulated a legal theory for why dismissal with prejudice was justified. The court's decision to dismiss with prejudice appears to rest on the notion that Marker had his opportunity and did not take advantage of it, and therefore the court was not going to devote any more time to addressing the same claim in the future because it would not be "fair" to the State. RP 42-43; see also RP 27 (prosecutor: "you all spent a great deal of time preparing for this and I for one am not willing to spend hours and hours again if he has a change of mind in a couple of weeks. This is his opportunity."); RP 41 (judge: "A great deal of resources have been devoted since last summer to frame the issues, to appoint counsel, to allow time to develop evidence and legal arguments and frame this for a decision today. This is the day.").

This rationale may generously be interpreted as obliquely invoking an "abuse of writ" standard for barring a later claim. But the Washington Supreme Court has never found abuse of the writ applied to a successive collateral attack raising the *same* claim not previously adjudicated on its merits. Rather, the abuse of writ doctrine applies to *new* claims raised in a successive petition. See, e.g., In re Pers. Restraint of Martinez, 171 Wn.2d 354, 363, 256 P.3d 277 (2011) ("When a petitioner is represented by counsel throughout the entirety of postconviction proceedings, it is an abuse of the writ to raise a new issue that could have been raised in an

earlier petition."); In re Pers. Restraint of Perkins, 143 Wn.2d 261, 265 n. 5, 19 P.3d 1027 (2001) (same), In re Pers. Restraint of Greening, 141 Wn.2d 687, 700, 9 P.3d 206 (2000) (same); In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 352, 5 P.3d 1240 (2000) (same).

Further, defense counsel was concerned that Marker lacked competency to continue with the motion. The court never decided whether Marks was competent to proceed. Incompetency does not prevent a court from deciding a collateral attack on its merits. In re Pers. Restraint of Hews, 108 Wn.2d 579, 586, 741 P.2d 983 (1987). But even in that situation, the incompetent still has the opportunity to renew his collateral plea attack under RAP 16.4(d) should he later become competent and, as a result, have available new evidence that creates a reason to question the initial decision on the merits. Hews, 108 Wn.2d at 587. Marker's motion was never decided on its merits yet it was dismissed with prejudice, despite competency concerns that may have prevented him from going forward with the motion. That is not a fair outcome in light of Hews.

For the reasons discussed, the trial court cannot bar Marker from bringing another collateral attack on the same ground by dismissing the motion with prejudice. The court's order denying the motion with prejudice must be reversed. CP 75-76, 100-01.

The State might argue the one-year deadline for filing a collateral attack under RCW 10.73.090 has now passed and so Marker will be barred from bringing the same claim in the future even if this Court reverses the trial court's order. The question of whether a future claim by Marker would be barred by the statutory deadline is not ripe for review because the triggering event has not yet happened. If Marker brings a subsequent collateral attack, the timeliness of that attack will become an issue to be litigated at that time. The present appeal is not the appropriate forum to decide the matter.

It may be pointed out, however, that incompetency concerns could provide a basis to equitably toll the deadline. "Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed." In re Pers. Restraint of Bonds, 165 Wn.2d 135, 141, 196 P.3d 672 (2008). A plurality in Bonds recognized that equitable tolling of the time bar is available under narrow circumstances where justice requires and where certain predicates are met, such as a showing of "bad faith, deception, or false assurances" by another "and the exercise of diligence by the [person seeking equitable tolling]." Bonds, 165 Wn.2d at 141. The Supreme Court, however, more recently acknowledged "equitable tolling of the time bar may be available in contexts broader than those recognized by the

Bonds plurality." In re Pers. Restraint of Carter, 172 Wn.2d 917, 929, 263 P.3d 1241 (2011).

The question would be whether incompetency in fact prevented Marker from proceeding with his timely filed collateral attack and, if so, whether he can take advantage of the equitable tolling doctrine to renew the attack upon regaining competency. See Calderon v. United States Dist. Court, 163 F.3d 530, 541 (9th Cir. 1998) (genuine basis of concern of mental incompetency justified equitable tolling of one-year deadline for filing of federal habeas petition, at least until a reasonable period of time has elapsed after the district court makes a competency determination). That is a question to be litigated if and when Marker brings another collateral attack on the same grounds. An evidentiary hearing on the matter of competency would appropriately be held at that time. See Laws v. Lamarque, 351 F.3d 919, 923 (9th Cir. 2003) (district court abused its discretion by denying habeas petition without ordering the development of the factual record on petitioner's eligibility for tolling due to alleged incompetency).

**D. CONCLUSION**

For the reasons set forth, Marker requests reversal of the trial court's order dismissing the CrR 7.8(b) motion with prejudice.

DATED this 30th day of November 2015

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO.73502-1-I
	)	
BRETT MARKER,	)	
	)	
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 30<sup>TH</sup> DAY OF NOVEMBER 2015, 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] BRETT MARKER  
1402 AUBURN WAY N. #408  
AUBURN, WA 98002

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF NOVEMBER 2015.

X *Patrick Mayovsky*