

FILED
COURT OF APPEALS

05 MAY 22 09:10:45

STATE OF WASHINGTON

BY  _____

No. 33419-4-II
(consol. w/33545-0-II)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KEVIN DAVID DYE,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 01-1-00478-8
The Honorable Kathryn Nelson, Judge

REPLY BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

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I. ADDITIONAL PROCEDURAL HISTORY

On February 15, 2005, Dye filed what he titled a Habeas Corpus Petition in the Superior Court, raising numerous challenges to his conviction and sentence. (CP 224-724) The trial court entered a written order denying the petition, titled "Order on Relief from Judgment (CrR 7.8)." (CP 725-26) The order states that Dye's "motion from relief from judgment is denied based on the written material submitted. Defendant's motion fails to establish the legal criteria for granting a motion based on CrR 7.8 and the relevant case law." (CP 725) Dye filed a second Notice of Appeal, which this Court accepted and for which this court appointed appellate counsel. (CP 728-31)

Subsequently, Dye requested that this Court treat the denial of his petition not as an appeal from the denial of a CrR 7.8 motion, but as a Personal Restraint Petition. (See letter dated October 11, 2005 on file with this court, and also attached in Appendix A) This court denied the request by order entered October 26, 2005. (See order on file with this court, and also attached in Appendix B)

II. ARGUMENT & AUTHORITIES

For the first time, the State argues that Dye's petition should be treated as a Habeas Corpus Petition and that it was correctly

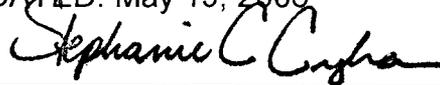
denied because it was not properly filed and served. (Brief of Respondent at 5-7) However, the Superior Court did not dismiss the petition because of supposed procedural defects, which would have given Dye notice and an opportunity to correct such defects. Rather, the Superior Court reviewed the petition and decided to treat it as a CrR 7.8 motion. The Superior Court denied Dye's petition because it failed to establish grounds for relief from judgment under CrR 7.8. (CP 725-26) This Court subsequently treated Dye's appeal from the Superior Court's order as an appeal from the denial of a CrR 7.8 motion.

Both the Superior Court and this Court have determined that Dye's petition is actually a CrR 7.8 motion and should be treated as such. The State cannot now argue that Habeas Corpus rules should apply. Because the courts have treated Dye's petition as a CrR 7.8 motion, and because Dye has never been informed of any procedural deficiencies in his Habeas procedure or been given the opportunity to correct any deficiencies, this Court should continue to treat the petition as a CrR 7.8 motion, and should reach the merits of Dye's arguments on appeal. The State's argument that the trial court correctly denied the petition on procedural grounds should be rejected.

III. CONCLUSION

For the reasons argued above and in Dye's Opening Brief of Appellant, this Court should reverse Dye's conviction for a hearing on the merits of his CrR 7.8 motion.

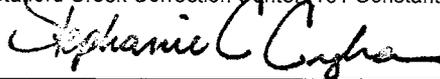
DATED: May 19, 2006



STEPHANIE C. CUNNINGHAM
WSBA No. 26436
Attorney for Kevin David Dye

CERTIFICATE OF MAILING

I certify that on 05/19/2006, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Kevin David Dye, DOC#707276 Stafford Creek Correction Center, 191 Constantine Way, Aberdeen, WA 98520.



STEPHANIE C. CUNNINGHAM

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STATE OF WASHINGTON
BY 

APPENDIX A

October 11, 2005

Debbie, Case Manager
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

RE: *State v. Kevin D. Dye*
Pierce Co. No. 01-1-00478-8
Appeal No. 33419-4-II (consol. w/33545-0-II)

Dear Debbie,

This letter is to follow up on our conversation this afternoon about the status of Mr. Dye's second appeal, number 33545-0-II.

Mr. Dye previously appealed his judgment and sentence in appeal number 28212-7-II. This court affirmed his conviction but remanded for resentencing. Mr. Dye subsequently appealed his new sentence, and I was appointed to represent Mr. Dye in that appeal (number 33419-4-II).

Subsequently, Mr. Dye filed a pro se "Petition for Writ of Habeas Corpus" in the Superior Court. The Superior Court's boilerplate order denied the petition because it "fails to establish the legal criteria for granting a motion based upon CrR 7.8 and the relevant case law." The court attached one page of written findings, which concludes: "Personal Restraint Petition may be brought to the Court of Appeals, Division II."

Mr. Dye filed a notice of appeal. He also requested and was granted an order of indigency. However, the notice of appeal was filed late, so Mr. Dye subsequently filed in Division II a motion to allow late filing of the notice of appeal. By order dated September 23, 2005, this court granted his motion, accepted his notice of appeal, and consolidated this second appeal (number 33545-0-II) to Mr. Dye's direct appeal, number 33419-4-II.

I was informed at that time that I would be representing Mr. Dye in the second appeal as well as the first. However, to date, no order has been entered appointing me to appeal number 33545-0-II. In addition, I was not notified prior to consolidation that the court

was considering consolidating the two cases, and I was not give an opportunity to respond.

After review of Mr. Dye's Petition for Writ of Habeas Corpus, and review of the Superior Court's ruling, I believe the Petition may be akin to a PRP, and should possibly be treated as a PRP rather than a direct appeal of CrR 7.8 motion. The Petition does not cite to CrR 7.8, but rather focuses on State and Federal Constitutional provisions. Along with the Petition, Mr. Dye submitted nearly 450 pages of attachments, consisting primarily of documents that were not a part of the trial court record, and that are not in the form of affidavits normally required by CrR 7.8. A review of the Petition and attachments indicates that Mr. Dye may not have intended the Petition to be treated as a CrR 7.8 motion.

In addition, the direct appeal in case number 33419-4-II is limited to the sentence imposed on Mr. Dye at the resentencing hearing. However, the Petition and appeal in case number 33545-0-II involve issues related to Mr. Dye's entire pre-trial and trial proceedings. There is no commonality or overlap in the records or issues presented in the two appeals. It does not appear that consolidation is appropriate or necessary.

Therefore, I respectfully ask that the court review the file and Mr. Dye's petition and its attachments (which should be received shortly in the form of clerk's papers), and re-screen the case to determine whether consolidation is appropriate, and to determine whether case number 33545-0-II should be a direct appeal or a PRP.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

STEPHANIE C. CUNNINGHAM

cc: Kathleen Proctor, DPA

APPENDIX B



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

October 26, 2005

Dana Eby
Court Reporter
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Pierce County Prosecuting Atty Ofc
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Seattle, WA 98105-4183

CASE #: 33419-4-II
State of Washington, Respondent v. Kevin David Dye, Appellant

Counsel:

The action indicated below was taken in the above-entitled case.

A RULING SIGNED BY COMMISSIONER SKERLEC:

The court has reviewed counsel's letter of 10/11/05 and concluded that consolidation was appropriate and therefore the cases remain consolidated with Ms. Cunningham as attorney of record.

Very truly yours,

David C. Ponzoha
Court Clerk