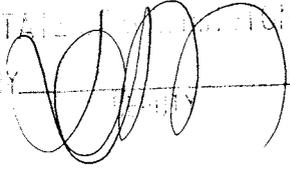


FILED
COURT OF APPEALS

06 OCT 23 PM 12:41

STATE OF WASHINGTON

BY 

NO. 34702-4-II, 34709-1-II, 34712-1-II
consolidated under NO. 34702-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RODNEY STEVEN MITUNIEWICZ,

Appellant.

BRIEF OF APPELLANT

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 ORIGINAL

P. M. 10-20-06

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ASSIGNMENT OF ERROR

Assignment of Error

The trial erred under CrR 7.8(c)(2) when it failed to set an evidentiary hearing because the facts alleged in the defendant's affidavit establish legal grounds for the relief requested.

Issues Pertaining to Assignment of Error

Does a trial court err under CrR 7.8(c)(2) if it fails to set an evidentiary hearing when the facts alleged in the defendant's affidavit establish legal grounds for the relief requested?

STATEMENT OF THE CASE

By information filed March 12, 2003, signed by Clark County Deputy Prosecuting Attorney Michael B. Dodds, the state charged the Defendant Rodney Steven Mituniewicz with one count of Forgery under cause number 03-1-00525-8. CP I 1-2.¹ On July 18, 2003, the defendant plead guilty to this charge. CP I 28-38. At the time he had an offender score of 11 points and a range of 22 to 29 months in prison. *Id.* On July 25, 2003, the court sentenced the defendant to 14.5 months under the special drug offender sentencing alternative (DOSA). CP I 45. The defendant did not appeal from this sentence. CP I 1-103.

By information filed April 24, 2003, again signed by Clark County Deputy Prosecutor Attorney Michael B. Dodds, the state charged the Defendant with one count of possession of heroin with intent to deliver, one count of possession of methamphetamine, one count of possession of morphine, one count of possession of diazepam, and one count of reckless driving under cause number 03-1-00817-6. CP II 1-2. On June 30, 2003, the defendant pled guilty to the lesser included offense of possession of heroin on Count I with the state dismissing all other counts. CP II 3-13. The

¹“CP I” refers to clerk’s papers in appeal number 34712-1-II. “CP II” refers to clerk’s papers in appeal number 34709-1-II. “CP III” refers to clerk’s papers in appeal number 34702-4-II.

statement of defendant on plea of guilty lists the defendant's offender score at "9+" and the range at 43 to 57 months in prison. CP II 4. On August 6, 2003, the court sentenced the defendant to 28 months² on another DOSA sentence. CP II 25. The court specifically ran the sentence concurrently with the forgery sentence. CP I 34, CP II 29. The defendant thereafter filed a personal restraint petition arguing that the trial court had miscalculated his standard range. CP II 36. In an order entered January 12, 2004, this court denied the petition. CP 36.

By amended information filed August 22, 2005, once again signed by Clark County Deputy Prosecutor Attorney Michael B. Dodds, the state charged the defendant with one count of Possession of Stolen Property in the Second Degree under cause number 05-1-01656-6. CP III 3-4. On August 22, 2005, the defendant pled guilty to this charge. CP III 10-24. The statement of defendant on plea of guilty notes an offender score of 9+ points and a standard range of 22 to 29 months in prison. CP III 11. On the same day as the plea the court imposed a sentence of 25 months. CP III 30. The defendant thereafter filed a timely notice of appeal. CP III 46-47. This

²In fact, the court erred when it imposed a sentence of 28 months because one-half of the mid-point of the standard range was 25 months. In a separate appeal this court vacated that portion of the sentence imposing 28 months and remanded the case to the trial court with instructions to impose 25 months. *See Unpublished Opinion in State v. Mituniewicz*, No. 32499-9.

appeal was denied in an unpublished opinion in *State v. Mituniewicz*, No. 33869-6-II.

On February 15, 2006, the defendant filed motions under 7.8(b)(3) seeking vacation of his three sentences and dismissal of all charges with prejudice. CP I 53-90; CP II 52-108; CP III 65-94. Although the documents the defendant filed in support of his motion were lengthy, the essence of his argument was that Michael B. Dodds had used his authority as a deputy prosecuting attorney in order to execute a personal vendetta against the defendant. *Id.* This personal vendetta included (1) intentionally misrepresenting the defendant's actions to the courts, (2) charging the defendant with crimes that would not have been charged but for Mr. Dodds' personal animus for the defendant, and (3) refusing to plea bargain in good faith in order to punish the defendant for reporting Mr. Dodds' illegal and unprofessional conduct to the Washington State Bar Association. *Id.* In spite of the fact that the defendant supported his factual allegations with his own affidavit, the trial court summarily denied the defendant's requested relief without holding a factual hearing. CP I 103, CP II 111, CP III 101. The defendant thereafter filed timely notice of appeal. CP I 95-102, CP III 93-100.

ARGUMENT

THE TRIAL ERRED UNDER CrR 7.8(c)(2) WHEN IT FAILED TO SET AN EVIDENTIARY HEARING BECAUSE THE FACTS ALLEGED IN THE DEFENDANT'S AFFIDAVIT ESTABLISH LEGAL GROUNDS FOR THE RELIEF REQUESTED.

Under CrR 7.8(b), first adopted on September 1, 1986, the Washington State Supreme Court has set out five bases upon which a defendant can obtain relief from a final judgment. This rule states:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.6;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment and suspend its operation.

CrR 7.8(b).

In the case at bar, the defendant attacks the three judgments in this

case under CrR 7.8(b)(3) on the basis that they were entered by way of fraud and official misconduct on the party of the prosecuting attorney in charge of the cases. He supported this claim by a lengthy affidavit filed with each motion. As the following explains, under CrR 7.8(c) the trial court should have either granted an evidentiary hearing in order to determine whether or not the defendant could prove his factual allegations, or the court should have remanded the case to the court of appeals to be handled as a personal restraint petition. The following argument supports this conclusion.

(1) Under CrR 7.8(c)(2), If the Affidavits or Other Evidence Given in Support of the Motion for Relief from Judgment Establish a Factual Basis for Relief, the Trial Court must Either Transfer the Motion to the Court of Appeals or Set an Evidentiary Hearing to Adjudicate the Defendant's Factual Claims.

Under CrR 7.8(c)(2), the Supreme Court has set out a specific procedure for the initial consideration of Motions for Relief from Judgment.

It states:

(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.

CrR 7.8(c).

Initially, CrR 7.8(c)(1) requires that applications for relief from judgment must be “made by motion stating the grounds upon which relief is asked,” and that motion must be accompanied by “affidavits setting forth a concise statement of the facts or errors upon which the motion is based. If the defendant meets these requirements, the trial court must then progress to the next step in the analysis, which is found in paragraph (c), which requires the court to take one of three possible steps: (1) “deny the motion without a hearing if the facts alleged in the affidavits do not establish grounds for relief,” (2) transfer the case to the Court of Appeals to be treated as a Personal Restraint Petition if such transfer would serve the “ends of judgment,” or (3) “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.”

Under the plain language of the first alternative the court cannot “deny the motion without a hearing” unless the “facts alleged in the affidavit do not establish grounds for relief.” In making this determination, the rule does not allow the court to make any type of factual determination. Rather, it requires the court to determine whether or not the facts and law alleged

establish a grounds for relief. In essence, at this point in the analysis, the trial court enters into the same review as it does upon a Motion for Judgment on the Pleadings under CR 12(b)(6). In other words, the court looks to the facts, assumes that they are true, and then determines whether those facts as alleged would be sufficient to warrant the relief requested if ultimately found to be true. In essence, both CR 12(b)(6) and CrR 7.8(c)(2) function as a filter mechanism whereby the court may eliminate claims that do not support the requested relief even if the facts as alleged are correct.

For example, in *State v. Dallman*, 112 Wn.App. 578, 50 P.3d 274 (2002), the defendant pled guilty to one count of First Degree Rape of a Child. At sentencing, he requested a SSOSA sentence, but the court refused, instead imposing a standard range sentence. Following entry of the judgment and sentence, the defendant filed three concurrent post conviction relief petitions, including a motion to withdraw his guilty plea. The defendant did not support his claims made with any affidavits or other evidence. When the trial court summarily denied the motions, the defendant appealed, arguing that under CrR 7.8(c), he was entitled to an evidentiary hearing. However, based upon the failure to support the motions with affidavits or other evidence, the Court of Appeals affirmed, holding as follows:

Dallman asserts that whenever a defendant files a post-conviction motion, the trial court must notify the State and hold a hearing on the merits. We disagree.

CrR 7.8(c) governs all three motions to vacate judgment. The court may deny such a motion without a hearing if the facts alleged in the supporting affidavit do not establish grounds for relief or, upon finding that it would serve the ends of justice, the court may transfer the matter to the Court of Appeals for consideration as a personal restraint petition. CrR 7.8(c)(2).

Post-conviction motions must be made within the time limits set forth in CrR 7.8(b) and RCW 10.73.090, .100, and .130. If the trial court finds that the affidavit in support of a timely motion establishes grounds for relief, 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)(2).

Here, Dallman’s post-trial motions were untimely, unperfected, and unsupported by sufficient affidavits. Summary dismissal was proper.

State v. Dallman, 112 Wn.App. at 582 (citations and footnotes omitted).

As the Court of Appeals clarified in its opinion, under CrR 7.8(c), if the trial court does not transfer the case to the Court of Appeals, it may only enter an order of dismissal if the defendant fails to support the request for relief with sufficient factual allegations made by affidavit to support the requested relief. On the contrary, a motion that is supported by an affidavit that establishes factual grounds for relief must then be sent to the third stage in the process: a hearing at which the opposing party may present evidence to refute the defendant’s factual and legal claims. At that hearing, the court finally addresses and determines the facts as claimed by the defendant and as counterclaimed by the state.

(2) The Defendant's Supporting Affidavit in this Case Does Establish a Factual Basis for Relief and the Trial Court Should Have Ordered an Evidentiary Hearing to Adjudicate the Defendant's Factual Claims.

In the case at bar, the defendant's affidavit supporting his request for relief sets out a number of factual and legal claims. The factual claims include the following: (1) that the defendant was denied due process in that the prosecutor intentionally misrepresented the facts of his cases to courts and did so out of personal animus toward the defendant; (2) that the prosecutor's animus arises from the defendant exercising his right under Washington Constitution, Article 1, § 5 and United States Constitution, First Amendment, to write the Washington State Bar Association and inform that organization about the prosecutor's misconduct, and (3) that but for the prosecutor's improper conduct the state would not have filed certain charges against him, and on other charges would have entered into plea bargaining that would have been advantageous to the defendant. As the following explains, the defendant's factual claims, if proven, do support his request for relief.

As a part of the due process rights guaranteed under both Washington Constitution, Article 1, § 3, and the United States Constitution, Fourteenth Amendment, the state is barred from participating in grossly outrageous conduct in order to obtain an arrest or conviction. *United States v. Russell*,

411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1973). Unlike an affirmative defense such as entrapment, which focuses upon the subjective predisposition of the defendant to commit an offense, a claim of outrageous governmental conduct focuses on the objective conduct of the police and their agents. *Id.* Thus, as the court stated in *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996), “the conduct of the law enforcement officers and informants may be so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *State v. Lively*, 130 Wn.2d at 19 (quoting *United States v. Russell*, 411 U.S. at 431-32).

Put another way, to violate the strictures of due process, the conduct of the state or its agents must be so outrageous so as to “shock the universal sense of fairness”. *Lively*, 130 Wn.2d at 19; *State v. Myers*, 102 Wn.2d 548, 689 P.2d 38 (1984). The decision whether the state’s conduct reaches this level is a question of law for the court, not a question of fact for the jury. *United States v. Dudden*, 65 F.2d 3d 1461 (9th Cir. 1995). Mere deceptive conduct by the police or informants in the detection and apprehension of criminal activity is insufficient to constitute a violation of due process. *State v. Emerson*, 10 Wn.App. 235, 517 P.2d 245 (1973). Rather, dismissal as a due process violation “is reserved for only the most egregious circumstances.” *State v. Lively*, 130 Wn.2d at 20 (citing *United States v.*

Sneed, 34 F.3d 1570 (10th Cir. 1994)).

The Washington Supreme Court has stated the following concerning the standards by which our courts should review a due process violation claim for outrageous governmental conduct.

We agree with those courts which hold that in reviewing a defense of outrageous government conduct, the court should evaluate the conduct based on the ‘totality of the circumstances.’ Each case must be resolved on its own unique set of facts and each component of the conduct must be submitted to scrutiny bearing in mind “proper law enforcement objectives--the prevention of crime and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness.” The government conduct may be so extensive that even a predisposed defendant may not be prosecuted based on “the ground of deprivation of due process.”

In evaluating whether the State’s conduct violated due process, we focus on the State’s behavior and not the Defendant’s predisposition. There are several factors which courts consider when determining whether police conduct offends due process: whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity, whether the defendant’s reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, whether the government controls the criminal activity or simply allows for the criminal activity to occur, whether the police motive was to prevent crime or protect the public and whether the government conduct itself amounted to criminal activity or conduct “repugnant to a sense of justice.”

State v. Lively, 130 Wn.2d at 21-22 (citations omitted).

For example, in *State v. Lively*, *supra*, the defendant, a young, single mother who was drug and alcohol dependent, began attending Alcoholics Anonymous - Narcotics Anonymous (AA-NA) meetings following inpatient treatment for her addictions. Up to that time she had not sold drugs, and had

no criminal convictions. During the AA-NA meetings, the defendant met a person named Desai, who later asked her out on a number of dates. According to the defendant, Desai was very supportive and responsive to her emotional needs. Within a month, the defendant began a sexual relationship with Desai, who later proposed marriage to him. Eventually, the defendant moved in with Desai, who told her that they would get married after he obtained a divorce from his current wife.

In fact, the person named Desai was an informant who had long worked with the police. Eventually, he began repeatedly pressuring the defendant to get some cocaine for his friend “Rick,” who was actually a police officer. Although the defendant initially refused, eventually she relented and made two drug purchases for “Rick.” Following the second transaction, the defendant was arrested and charged with two counts of delivery of cocaine.

The defendant later went to trial and claimed that she was entrapped. However, the jury rejected the claim and found her guilty as charged. The defendant then appealed, arguing that (1) the trial court erred when it refused to instruct the jury that the state had to disprove entrapment, and (2) the state’s conduct was so outrageous as to require dismissal. On direct review, the Washington Supreme Court rejected the defendant’s first argument, holding that entrapment was an affirmative defense, and the burden was on

the defendant to prove it by a preponderance of the evidence.

However, the court agreed with the second argument, based upon the following five facts: (1) the informant in this case was instigating criminal conduct, not merely “infiltrating ongoing criminal activity”, (2) the defendant’s reluctance to commit the crime was overcome by pleas of sympathy or persistent solicitation, (3) the conduct of the informant was so closely related to the actions of the defendant so as to indicate that the informant controlled the criminal conduct, (4) the governmental conduct through the informant indicated a greater desire to create a crime as opposed to discovering or preventing a crime, and (5) the state’s actions were “repugnant to a sense of justice.”

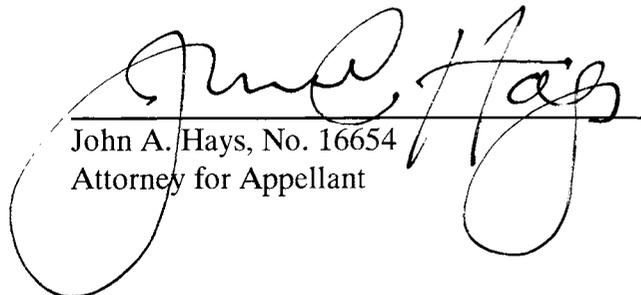
In the case at bar, the defendant’s affidavit makes an analogous claim that the conduct of the prosecuting attorney was so outrageous that dismissal of each charge was compelled under CrR 8.3. Given the defendant’s specific factual claims of personal animus and governmental misconduct, the trial court erred under CrR 7.8(c)(2) when it denied the defendant a hearing on his factual claims.

CONCLUSION

The trial court erred when it summarily dismissed the defendant's Motions for Relief from Judgment because the defendant's supporting affidavits alleges facts which, if proven, establish a legal basis for withdrawing his guilty plea. As a result, this court should reverse the trial court's orders of dismissal and remand the case for an evidentiary hearing on the defendant's factual claims.

DATED this 20 day of October, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 5**

Every person may freely speak, write and publish and all subjects, being responsible for the abuse of that right.

**UNITED STATES CONSTITUTION,
FIRST AMENDMENT**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

CrR 7.8

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090,.100,.130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

(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.

CrR 8.3

(a) On Motion of Prosecution. The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information or complaint.

(b) On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

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STATE OF WASHINGTON
BY: *[Signature]*

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

6 STATE OF WASHINGTON,)
7 Respondent,)
8 vs.)
9 RODNEY S. MITUNIEWICZ,)
10 Appellant,)

APPEAL NO: 34702-4-II
AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON)
12 COUNTY OF CLARK) vs.)

13 CATHY RUSSELL, being duly sworn on oath, states that on the 20TH day of OCTOBER,
14 2006, affiant deposited into the mails of the United States of America, a properly stamped
envelope directed to:

15 ARTHUR CURTIS
16 CLARK COUNTY PROSECUTING ATTY
17 1200 FRANKLIN ST.
VANCOUVER, WA 98668

RODNEY MITUNIEWICZ #912672
MONROE CORR COMPLEX
P.O. BOX 7001
MONROE, WA 98272

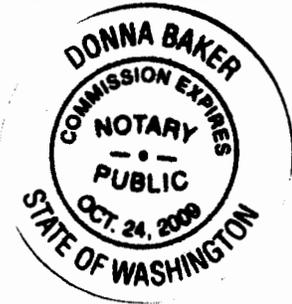
and that said envelope contained the following:

- 18 1. BRIEF OF APPELLANT
- 19 2. AFFIDAVIT OF MAILING

DATED this 20TH day of OCTOBER, 2006.

Cathy Russell
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 20th day of OCTOBER, 2006.



[Signature]
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 10-24-09