

*Supp. App. Reply*

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COURT OF APPEALS  
DIVISION II

No. 36880-3-II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON  
DEPUTY

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

BOBBY D. BEASLEY, JR.,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge  
Cause No. 07-1-00139-5

RESPONSE TO SUPPLEMENTAL BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. Responses To Supplemental Brief of Respondent Issues .....1

B. Argument.....1

1. The respondent erroneously characterizes the appellant’s first assignment of error as “the trial court erred in failing to disclose a local practice involving not presiding over trials in which local counsel were live fact witnesses whose credibility would be judged.” The lower court, in first disclosing the practice, described the practice as “not to preside over cases in which there are fact witnesses that are local attorneys” and did not limit the practice to “trials”. Likewise, in giving its oral decision denying the appellant’s motion to vacate, the court again described the practice as “not to preside over cases in which there was a fact witness that was a local attorney.” Hence, the appellant’s first assignment of error was that the “trial court erred in failing to disclose to the parties that the court had a local practice of not hearing matters in which local counsel were witnesses whose credibility would thus need to be judged.” .....1, 2

2. The respondent’s argument that “there is no showing that any such practice was in effect at the time of the hearing at issue” is refuted by the record made by the trial court in denying the appellant’s motion to vacate.....2

3. The respondent’s argument that there was no showing by the appellant that the trial court had “any similar practice for motion hearings based upon written declarations” is an attempt to create a distinction without a difference .....2

4. The respondent’s argument that a court may summarily deny a CrR 7.8(b) motion is unsupported by the court rule in effect at the time of appellant’s motion to vacate made under that rule .....4

C. Conclusion.....6

**TABLE OF AUTHORITIES**

**1. State Cases**

State v. Robinson, 153 Wn.2d. 689, 107 P.3d 90 (2005).....5

**2. Rules**

CrR 7.8.....5

CrR 7.8(b).....1, 4, 5

CrR 7.8(c)(2).....5

CrR 7.8(c)(3).....5

**A. RESPONSES TO SUPPLEMENTAL BRIEF OF RESPONDENT ISSUES**

No. 1. The respondent erroneously characterizes the appellant's first assignment of error as "the trial court erred in failing to disclose a local practice involving not presiding over trials in which local counsel were live fact witnesses whose credibility would be judged." The lower court, in first disclosing the practice, described the practice as "not to preside over cases in which there are fact witnesses that are local attorneys" and did not limit the practice to "trials". Likewise, in giving its oral decision denying the appellant's motion to vacate, the court again described the practice as "not to preside over cases in which there was a fact witness that was a local attorney." Accordingly, the appellant's first assignment of error was that the "trial court erred in failing to disclose to the parties that the court had a local practice of not hearing matters in which local counsel were witnesses whose credibility would thus need to be judged."

No. 2. The respondent's argument that "there is no showing that any such practice was in effect at the time of the hearing at issue" is refuted by the record made by the trial court in denying the appellant's motion to vacate.

No. 3. The respondent's argument that there was no showing by the appellant that the trial court had "any similar practice for motion hearings based upon written declarations" is an attempt to create a distinction without a difference.

No. 4. The respondent's argument that a court may summarily deny a CrR 7.8(b) motion is unsupported by the court rule in effect at the time of appellant's motion to vacate made under that rule.

**B. ARGUMENT**

1. The respondent erroneously characterizes the appellant's first assignment of error as "the trial court erred in failing to disclose a local practice involving not presiding over trials in which local counsel were live fact witnesses whose credibility would be judged." The lower court, in first

disclosing the practice, described the practice as “not to preside over cases in which there are fact witnesses that are local attorneys” and did not limit the practice to “trials”. Likewise, in giving its oral decision denying the appellant’s motion to vacate, the court again described the practice as “not to preside over cases in which there was a fact witness that was a local attorney.” Hence, the appellant’s first assignment of error was that the “trial court erred in failing to disclose to the parties that the court had a local practice of not hearing matters in which local counsel were witnesses whose credibility would thus need to be judged.”

2. The respondent’s argument that “there is no showing that any such practice was in effect at the time of the hearing at issue” is refuted by the record made by the trial court in denying the appellant’s motion to vacate.
3. The respondent’s argument that there was no showing by the appellant that the trial court had “any similar practice for motion hearings based upon written declarations” is an attempt to create a distinction without a difference.

The respondent’s Supplemental Brief begins with the erroneous characterization of the appellant’s first assignment of error as “the trial court erred in failing to disclose a local practice involving not presiding over trials in which local counsel were live fact witnesses whose credibility would be judged.” However, the ultimate disclosure by the trial court of its practice “not to preside over cases in which there are fact witnesses that are local attorneys” did not limit the practice to “trials”. The only parameter necessary for the practice to apply was that a local attorney be a fact witness in a case over which the court was presiding. In the

matter below, the counsel for both the state and the defendant met that parameter. As such, the trial court's practice applied to the matter.

The Respondent argues that "there is no showing that any such practice was in effect at the time of the hearing at issue" at issue. This argument is refuted by the record made by the trial court. Initially, it would seem obvious that if the practice in question had not in fact been effect at the time of the underlying hearing herein, the court would simply have indicated as much in denying the state's motion to vacate. However, the court did the opposite. The court, in denying the appellant's motion to vacate, made a reference to the court's "individual practices" that had been in place "for a lengthy period of time", clearly including the practice in question in those "practices". (RP 25)

Respondent also argues that there was no showing by the appellant that the trial court had "any similar practice for motion hearings based upon written declarations". Similarly, the court below, in giving its oral decision denying the motion to vacate, stated:

And the court also sees a distinction in that there is a situation where there is a trial as opposed to motion practice, which was what was before the court in the Beasley matter. (RP 25)

However, the court gave no explanation of why the court's local practice was not necessary or called for in the situation where a local

attorney is a fact witness before the court below in the context of written declarations rather than live testimony. Nor does respondent offer any basis for the inapplicability of the practice under such a scenario. Under either scenario, the court is called upon to judge the credibility of the local counsel, the very scenario underlying the reason for the practice in the first instance. Moreover, the court's after-the-fact attempt, on January 26, 2009, to justify the scenario's inapplicability on the basis of motion practice must be contrasted with what the court actually stated on the record on August 14, 2007:

The Court, in assessing this particular issue, certainly has been uncomfortable because I have both of the attorneys practice before me on a daily - practically a daily basis. And to make a head-on determination of a factual question makes the Court uncomfortable . . .

Simply put, in acknowledging that it was uncomfortable with the situation before it, the court was acknowledging that the basis for the local practice existed in the case before it.

4. The respondent's argument that a court may summarily deny a CrR 7.8(b) motion is unsupported by the court rule in effect at the time of appellant's motion to vacate made under that rule.

Appellant's final assignment of error as to the instant appeal was that the trial court erred in failing to address that portion of Appellant's Motion to Vacate Judgment which advised the court of a statement by

Respondent counsel indicating that “everything I told the court was a lie”. At the outset of the argument on the state’s motion to vacate judgment on October 23, 2008, Appellant had specifically taken the position that a decision on this aspect of the motion to vacate required the court to invoke its local practice and have the matter heard by a visiting judge. (RP 13-14)

As to this issue, Respondent now argues that the trial court has the authority to summarily deny a CrR 7.8(b) motion, citing State v. Robinson, 153 Wn. 2d 689, 107 P.3d 90 (2005). Respondent’s reliance on the Robinson case and the version of CrR 7.8(b) it dealt with is misplaced.

Previous to September 1, 2007, CrR 7.8(c)(2) provided, in pertinent part, as follows:

(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 . . .

The most recent amendment to CrR 7.8, effective September 1, 2007, deleted the opening sentence of CrR 7.8(c)(2) quoted above and added a subsection (c)(3). That subsection provides:

(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.

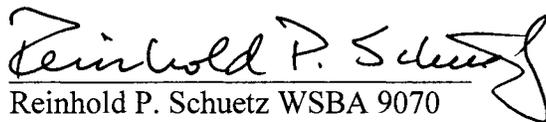
The court followed the procedure required by this new subsection except as to its failure to address the issue relating to the statement by Respondent's counsel. Contrary to Respondent's argument, the court did have an obligation to set a hearing as to this issue. Its failure to do so was error.

**C. CONCLUSION**

It is respectfully requested that the lower court's denial of the state's motion to vacate judgment be reversed.

DATED this 30<sup>th</sup> day of October, 2009.

Respectfully submitted,



Reinhold P. Schuetz WSBA 9070  
Special Deputy Prosecuting Attorney  
Attorney for Appellant

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

STATE OF WASHINGTON, )  
 )  
 Appellant, ) No. 36880-3-II  
 )  
 vs. ) DECLARATION OF  
 ) FILING/MAILING  
 ) PROOF OF SERVICE  
 BOBBY D. BEASLEY, JR., )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY  
COURT OF APPEALS  
DIVISION II

I, MARGIE OLINGER, declare and state as follows:

On October 30, 2009, I deposited in the U.S. Mail, postage properly  
prepaid, the documents related to the above cause number and to which this  
declaration is attached (RESPONSE TO SUPPLEMENT BRIEF OF  
RESPONDENT), to:

Bruce Finlay  
P.O. Box 3  
Shelton, WA 98584

Bobby Beasley, Jr.  
220 E. Tahuya Drive  
Shelton, WA 98584

I, Margie Olinger, declare under penalty of perjury of the laws of the  
State of Washington that the foregoing information is true and correct.

Dated this 30<sup>th</sup> day of October, 2009, at Shelton, Washington.

Margie Olinger  
Margie Olinger

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