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COURT OF APPEALS
DIVISION II

03 SEP 19 PM 4:05

STATE OF WASHINGTON
BY_____
DEPUTY

NO. 37031-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES STOGSDILL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 04-1-03718-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When the sentencing court does not transfer defendant's Criminal Rule (CrR) 7.8 motion to the Court of Appeals as a personal restraint petition, must the sentencing court order a show cause hearing and require the State to show cause why defendant's motion should not be granted?

2. Should this court decline to reach the merits of defendant's CrR 7.8 motions on a direct appeal when those issues are not properly before the court?

B. STATEMENT OF THE CASE.

1. Procedure

On July 30, 2004, the State charged James Stogsdill, hereinafter "defendant," with two counts of second degree rape of a child (Counts I and III), one count of second degree child molestation (Count II), one count of child molestation in the third degree (Count IV), and two counts of third degree child molestation (Counts V and VI), for incidences involving AT and HW. CP 54-58. [1]

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[1] Citations to Clerk's Papers will be referred to as "CP." Citations to the verbatim report of proceedings will be referred to as (DATE) RP (PAGE #).

On March 2, 2006, the State filed an amended information, reducing the charges to one count of second degree child rape, as part of plea negotiations which would allow defendant to be eligible for a Special Sex Offender Sentencing Alternative (SSOSA). CP 1; 3/2/2006 RP 3, 4; 3/31/2006 RP 6. Both AT and HW were referenced in the single count, despite the fact that HW was 14 years old at the time of the acts. *See* CP 1; 3/2/2006 RP 13; 3/31/2006 RP 3-4.

Defendant pleaded guilty to one count of second degree rape of a child for engaging in sexual intercourse with AT, who was between 12 and 14, more than 36 months younger than defendant, and not his wife. CP 41-52. The court found defendant's plea to be knowing, voluntary, and intelligent and accepted the plea. 3/2/2006 RP 14.

At sentencing, defendant requested a SSOSA. 3/31/2006 RP 4. The court determined that defendant's risk of re-offense was too high for a SSOSA, based, in part, upon defendant's evaluation. 3/31/2006 RP 36. The court sentenced defendant to 136 months to life, with 457 days credit for time served. 3/31/2006 RP 37.

Defendant appealed his conviction, alleging that his plea was not knowingly, intelligently, and voluntarily entered. In an unpublished opinion, this court affirmed defendant's conviction finding that defendant's plea was knowing, intelligent, and voluntary; that his statement of defendant on plea of guilty specifically acknowledged that there may not be a factual basis for the plea because of the age of one of

the victims, and that he was pleading guilty to take advantage of the plea agreement; and that defendant's ineffective assistance of counsel claim failed because he could not satisfy the ***Strickland***[2] test. ***State v. Stogsdill***, COA No. 34756-3-II, 2007 LEXIS 1508. The judgment in this case became final on July 31, 2007, the day this court issued its mandate. CP 59-71.

On September 5, 2007, defendant filed two documents in Superior Court entitled "Motion to Modify or Correct Sentence and Judgment." CP 15-21. Both documents are dated August 27, 2007. CP 15-21. In the first motion, which is a three page document, defendants asks the court to modify his judgment and sentence to allow him to have contact with his biological children. CP 15-17. In the second motion, a four page document, defendant asserts, among other claims, that his plea was not voluntary because he was misinformed of the "mandatory minimum sentence of 136 months to life" and asks the court allow him to withdraw his guilty plea and resentence him to an exceptional sentenced down. CP 20.

The sentencing court denied defendant's motions in two separate documents entitled 1) Order on Motion for Relief From Judgment (CrR 7.8)(Motion to Modify No Contact Order), and 2) Order on Motion for

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[2] ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)

Relief from Judgment. CP 22-23, 24-25. Defendant appealed the court's orders denying his CrR 7.8 motions. This court appointed counsel to represent defendant on his appeal of the court's denial of defendant's CrR 7.8 motion.

In January, 2008, the sentencing court filed an order transferring defendant's September 5, 2007, motions to the Court of Appeals as a personal restraint petition. CP 31-35. However, this court declined to accept the motions as a personal restraint petition because the trial court had previously ruled on the September 5th motions, and the orders denying defendant's motions were already before the court on a direct appeal.

C. ARGUMENT.

1. UNDER THE CURRENT VERSION OF CRIMINAL RULE (CrR) 7.8 WHEN THE TRIAL COURT DOES NOT TRANSFER DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA TO THE COURT OF APPEALS AS A PERSONAL RESTRAINT PETITION, THE TRIAL COURT MUST ORDER A SHOW CAUSE HEARING REQUIRING THE ADVERSE PARTY TO SHOW CAUSE WHY DEFENDANT'S MOTION SHOULD NOT BE GRANTED.

CrR 7.8 governs a defendant's motions for relief from judgment or order. The current version of CrR 7.8 became effective on September 1, 2007, five days before defendant filed his motions in this matter. The sole issue before this court is whether trial court properly denied defendant's

post-judgment motions without a hearing under the current version of CrR 7.8 CrR 7.8 states in the relevant part:

> (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) *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.
>
> (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.**

CrR 7.8(c)(3) (emphasis added).

In the present case, without a hearing, the trial court denied defendant's two post judgment motions because the materials defendant submitted were insufficient to establish the legal criteria for granting a CrR 7.8 motion. CP 22-25. This was permissible under the prior version of CrR 7.8, which allowed the trial court to deny a CrR 7.8 motion without a hearing if the alleged facts did not establish grounds for relief. Former CrR 7.8(c)(2) (adopted September 1, 1986). Under the new rule, however,

a trial court can only rule on the merits of a timely filed CrR 7.8 motion when either (a) the defendant makes a substantial showing that he is entitled to relief, or (b) the motion cannot be resolved without a factual hearing. CrR 7.8(c); and *see* ***State v. Smith*** 144 Wn. App. 860, 184 P.3d 666 (2008). Additionally, under CrR 7.8(c)(3), whenever the trial court does not transfer a postjudgment motion to the Court of Appeals, a show cause hearing must be set.

In ***State v. Smith***, Smith filed an untimely CrR 7.8 motion, which the trial court dismissed. On appeal, this court vacated the trial court's order of dismissal and remanded the matter for the superior court to enter an order complying with the new version of CrR 7.8. ***Smith***, 144 Wn. App. 860, 864. This court declined to convert Smith's notice of appeal into a personal restraint petition because Smith was not provided notice that his CrR 7.8 motion would be transferred to the Court of Appeals as a personal restraint petition. ***Smith***, 144 Wn. App. 860, 863-64.

In the present case, the trial court denied defendant's CrR 7.8 motions because the motions failed to establish the necessary legal criteria for granting a CrR 7.8 motion. CP 22-23, 24-25. However, under the current version of CrR 7.8, the trial court did not have authority to rule on the merits of defendant's motions because his motions were timely under RCW 10.73.090, and they neither made a substantial showing that

defendant was entitled to relief, nor required a factual hearing to resolve the motion. *See* CrR 7.8(c).

It appears the sentencing court recognized its error and attempted to correct it by filing the December 13, 2007, Order on Motion for Relief from Judgment (CrR 7.8). The court's efforts to properly transfer defendant's motions to the Court of Appeals were not successful because the trial court had already denied defendant's motions, and defendant had appealed that denial.

Because the sentencing court did not have the authority to deny defendant's motions without a hearing, this court should vacate the court's orders and remand for the sentencing court to enter an order in compliance with the current version of CrR 7.8.

2. THIS COURT SHOULD NOT REACH THE MERITS OF DEFENDANT'S MOTIONS BECAUSE ONLY THE COURT'S DENIAL OF THOSE MOTIONS IS PROPERLY BEFORE THE COURT.

An order denying a CrR 7.8 motion is appealable as of right under RAP 2.2(a)(10). However, the scope of appellate review is limited to whether the superior court abused its discretion in denying defendant's CrR 7.8 motion. *See* ***State v. Gaut***, 111 Wn. App. 875, 881, 46 P.3d 832 (2002), quoting ***Bjurstrom v. Campbell***, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). Gaut pleaded guilty to one count of first degree child

rape, and one count of first degree child molestation. ***Gaut***, 111 Wn. App. 875, 876. Several weeks after the court sentenced him, Gaut moved to withdraw his plea pursuant to CrR 4.2(f). The court denied Gaut's motion. *Id.* at 879. Gaut appealed, but assigned error to issues surrounding the underlying judgment, and not to the Court's denial of his post judgment motion. *Id.* at 881. The court held that Gaut could not assign error to the circumstances of the plea, or to the underlying judgment on an appeal from an order denying a motion to vacate. *Id.* at 881-82.

Similarly, in this case defendant's appeal stems from the sentencing court's denial of his CrR 7.8 motion. However, defendant attempts to expand the issues before the court by claiming for the first time on appeal that defendant's plea was involuntary because he was not informed that he would be on community custody for the balance of his life[3]. Brief of Appellant at 6-8. Defendant cannot challenge this for the first time on appeal. The sole issue before this court is whether the sentencing court erred when it applied the old version of CrR 7.8 to defendant's motions; the circumstances of the plea or the underlying judgment are not before the court on this direct appeal.

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[3] Even if the court were to reach this issue it is without merit because the court informed defendant that "[t]he standard range of community custody [for the rape charge] actually is up to life." 3/2/06 RP 6

Additionally, defendant's attempt to include issues beyond the court's denial of his CrR 7.8 motion in this direct appeal would circumvent RCW 10.73.150(4), which limits a defendant's right to court appointed counsel in collateral attacks.

> **Counsel shall be provided at state expense to an adult offender convicted of a crime...when the offender is indigent or indigent and able to contribute...and the offender:**
>
> (1) **Files an appeal as a matter of right**;
> (2) Responds to an appeal filed as a matter of right or responds to a motion for discretionary review or petition for review filed by the state;
> (3) Is under a sentence of death and requests counsel be appointed to file and prosecute a motion or petition for collateral attack as defined in RCW 10.73.090. Counsel may be provided at public expense to file or prosecute a second or subsequent collateral attack on the same judgment and sentence, if the court determines that the collateral attack is not barred by RCW 10.73.090 or 10.73.140;
> (4) **Is not under a sentence of death and requests counsel to prosecute a collateral attack after the chief judge has determined that the issues raised by the petition are not frivolous, in accordance with the procedure contained in rules of appellate procedure 16.11.** Counsel shall not be provided at public expense to file or prosecute a second or subsequent collateral attack on the same judgment and sentence.
> (5) Responds to a collateral attack filed by the state or responds to or prosecutes an appeal from a collateral attack that was filed by the state;
> (6) Prosecutes a motion or petition for review after the supreme court or court of appeals has accepted discretionary review of a decision of a court of limited jurisdiction; or
> (7) Prosecutes a motion or petition for review after the supreme court has accepted discretionary review of a court of appeals decision.

RCW 10.73.150 (emphasis added). A defendant is entitled to court appointed counsel under RCW 10.73.150(1) when he files a direct appeal of a court's denial of a CrR 7.8 motion. ***State v. Thompson***, 93 Wn. App. 364, 368-69, 967, P.2d 1282 (1998). However, a defendant who is not under sentence of death is not entitled to counsel when collaterally attacking his judgment and sentence unless "the chief judge has determined that the issues raised by the petition are not frivolous, in accordance with the procedure contained in rules of appellate procedure 16.11." RCW 10.73.150(4).

In the present case, defendant was properly appointed counsel to pursue his direct appeal of the court's denial of his CrR 7.8 motion. However, defendant is not entitled to court appointed counsel to pursue the merits of his CrR 7.8 motion, which is a collateral attack on his judgment and sentence, because he is not under sentence of death and the chief judge has not determined that the issues raised are not frivolous. *See* RCW 10.73.150(4). To do otherwise, would allow defendant to circumvent RCW 10.73.150(4).

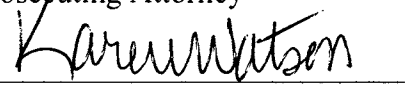
D. CONCLUSION.

This court should vacate the court's denial of defendant's CrR 7.8 motions and remand to the trial court for the motions to be considered in light of the current version of CrR 7.8. This court should not address the

merits of defendant's CrR 7.8 motions, because they are not properly before the court on this direct appeal and defendant is not entitled to counsel on motions as they are a collateral attack on defendant's judgment.

DATED: September 19, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



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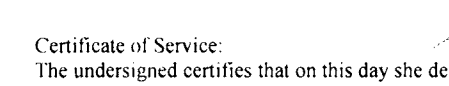
Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.19.08 
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