

NO. 38430-2

FILED
COURT OF APPEALS
DIVISION II

CO. CT - 6 FILED 08

STATE DEPARTMENT
BY *ks*
DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ERNEST L. BRAZZEL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 98-1-02245-2

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. After determining, without a factual hearing, that defendant's motion for relief of judgment was non-meritorious, did the trial court err when it denied the motion rather than transferring the motion to the Court of Appeals as required by the current version of CrR 7.8? 1

B. STATEMENT OF THE CASE. 1

C. ARGUMENT..... 2

 1. WHILE DEFENDANT IS CORRECT THAT THE TRIAL COURT DID NOT ACT IN COMPLIANCE WITH THE CURRENT VERSION OF CrR 7.8, THE RECORD INDICATES THAT THE ERROR MADE BY THE TRIAL COURT WAS THAT IT FAILED TO TRANSFER A NON-MERITORIOUS MOTION TO THE COURT OF APPEALS..... 2

D. CONCLUSION. 8

Table of Authorities

State Cases

State v. Smith, 144 Wn. App. 860, 862, 184 P.3d 666 (2008).....3, 4

Statutes

Former RCW 9.94A.360(2).....6

RCW 10.73.0902, 3, 4

RCW 10.73.090(1)4

RCW 10.73.090(3)4

RCW 9.94A.525(2)(c)6

Rules and Regulations

CrR 7.8.....1, 2, 3, 5, 6, 7, 8

CrR 7.8(c)2

CrR 7.8(c)(2)4

Former CrR 7.8.....6

Former CrR 7.8(c)(2).....3

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

1. After determining, without a factual hearing, that defendant's motion for relief of judgment was non-meritorious, did the trial court err when it denied the motion rather than transferring the motion to the Court of Appeals as required by the current version of CrR 7.8?

B. STATEMENT OF THE CASE.

This is an appeal stemming from entry of an order denying defendant's CrR 7.8 motion for relief from judgment. Defendant Ernest Brazzel pleaded guilty to one count of assault in the first degree in Pierce County Cause No. 98-1-02245-2. CP 139-147. Prior to sentencing defendant signed a stipulation as to his criminal history and the calculation of his offender score. CP 161-163. His attorney also signed this stipulation. *Id.* On March 18, 2008, the court imposed sentence based upon the criminal history and offender score listed in this stipulation. CP 164-176. Defendant did not appeal the entry of this judgment.

On May 21, 2008, defendant filed a pro se motion under CrR 7.8 asserting that his offender score was incorrect because it included a 1991 conviction for unlawful possession of a controlled substance (UPCS) that should have "washed" out. CP 179-188. The trial court entered an order directing the State to file a response to the motion. CP 177-178. After the

State filed its response, the court entered an order denying the motion. CP 190-195, 196-199.¹ Defendant filed a notice of appeal from entry of the order denying his CrR 7.8 motion for relief. CP 123.

C. ARGUMENT.

1. WHILE DEFENDANT IS CORRECT THAT THE TRIAL COURT DID NOT ACT IN COMPLIANCE WITH THE CURRENT VERSION OF CrR 7.8, THE RECORD INDICATES THAT THE ERROR MADE BY THE TRIAL COURT WAS THAT IT FAILED TO TRANSFER A NON-MERITORIOUS MOTION TO THE COURT OF APPEALS.

The procedure for filing a post judgment motion for relief from judgment is set forth in CrR 7.8(c), which provides:

(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.

¹ The order denying the motion for relief of judgment was filed at the same time as a letter informing the defendant of the court's ruling. Apparently these documents were stapled together and filed as a single document into the court file. Consequently, the index to the clerk's papers lists these document as "letter from department 4, filed August 14, 2008. CP 196-199. This entry contains the order denying the motion.

(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 rule was amended in 2007; former CrR 7.8(c)(2) allowed the superior court three options when presented with a post judgment motion; it could “deny the motion without a hearing if the facts alleged did not establish a grounds for relief [,]...transfer the motion to the Court of Appeals for consideration as a personal restraint petition if such transfer would serve the ends of justice[,]....[or] enter an order fixing a time and place for hearing and directing the adverse party to show cause why the relief ...should not be granted.” *See* former CrR 7.8(c)(2); *State v. Smith*, 144 Wn. App. 860, 862, 184 P.3d 666 (2008).

Under the current version of CrR 7.8, the trial court has limited authority to decide a CrR 7.8 motion on the merits as the rule mandates transfer to the Court of Appeals unless two conditions are met. For a trial court to retain the motion for resolution, the trial court must find that the motion is: 1) not time barred by RCW 10.73.090 *and* 2) either a) requires a factual hearing or b) makes a substantial showing that defendant is entitled to relief.

The trial court is first required to find whether the motion is timely under RCW 10.73.090; if the motion is untimely, the trial court has no authority to decide the motion on the merits – it must transfer the motion

to the Court of Appeals. *Smith*, 144 Wn. App. at 863. The time bar for collateral attacks provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

RCW 10.73.090(1). A case becomes “final” on the last of the following dates: “(a) The date it is filed with the clerk of the trial court; (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal.” RCW 10.73.090(3).

In this case, the parties are in agreement that defendant’s collateral attack was timely under RCW 10.73.090. Defendant was sentenced on March 18, 2008; he did not appeal. CP 164-176. His post-judgment motion (collateral attack) was filed on May 21, 2008, within one year of the judgment being filed with the superior court clerk. CP 179-188.

But even if the trial court finds that the motion is timely, it can only retain the matter for determination if the defendant has made a substantial showing that he is entitled to relief or if the motion requires a factual hearing. CrR 7.8(c)(2). In the case before the court, the trial court denied the motion finding:

The defendant’s motion for relief from judgment is denied based upon the written material submitted. Defendant’s

motion fails to establish the legal criteria for granting a motion based upon CrR 7.8 and the relevant case law.

CP 196-199. The court's reasons for denying the motion show that the defendant's motion failed to provide a sufficient legal basis to allow the court to retain the motion for determination under CrR 7.8. The record before this court does show that the trial court was correct in finding defendant's motion to be non-meritorious.

Both the current and the former versions of CrR 7.8 require a motion to be in writing and supported by "affidavits setting forth a concise statement of the facts or errors upon which the motion is based." In his collateral attack, defendant asserted that the error the court made was to include a conviction in his criminal history - his 1991 conviction for UPCS- when that conviction had "washed" out. CP 179-188. Defendant asserted that his motion was "based on the record and file, herein and the memorandum" he filed in support of his motion. *Id.* His memorandum failed to include any supporting affidavits and he did not sign the memorandum under penalty of perjury. *Id.* Defendant failed to present any factual support for his claims.

The trial court file showed that defendant's current offense occurred on March 6, 2008. CP 164-176. His judgment lists a 1991 conviction for UPCS with a sentencing date of May 22, 1991. *Id.* The next felony listed in his judgment is an unlawful imprisonment with a date of offense of May 16, 1998. At the time of sentencing, defendant and his

attorney signed a stipulation as to his criminal history that listed the 1991 UPCS; defendant and his attorney stipulated that the 1991 conviction had not “washed” out and was properly included in the offender score. CP 161-163.

At the time the defendant committed his current offense the washout provision provided in pertinent part:

. . . class C felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing *any* crime that subsequently results in a conviction.

Former RCW 9.94A.360(2)(recodified as RCW 9.94A.525(2)(c))

(emphasis added). Nowhere in the written materials submitted with defendant’s CrR 7.8 motion was there a sworn statement, or any evidence that defendant had spent five consecutive crime free years in the community since his conviction in 1991. CP 179-188. In order for defendant to make a substantial showing that he was entitled to relief, he had to provide this supporting evidence with his motion. Under the former CrR 7.8, the trial court could have properly denied this motion. Under the new rule, the court was required to send defendant’s non-meritorious motion to the Court of Appeals. The trial court should have transferred the non-meritorious motion to the Court of Appeals; entry of an order denying the motion was error.

Defendant contends that the trial court lacked the authority to direct the prosecution to file a responsive pleading to the defendant's motion without also setting the matter for a show cause hearing. The State submits that while the court rule does not specifically authorize the trial court to seek input from the State on whether it should retain or transfer the motion, neither does the rule expressly forbid it. Defendant provides no rationale on why a trial court should be prevented from seeking information that may be relevant to the decision to transfer or retain the pending motion. In our adversarial system, the court usually obtains input from both parties before reaching a decision. Defendant fails to provide any compelling reason why a trial court should be limited to considering input from only one party in determining whether retention of the motion is appropriate. It might be impossible for the court to assess whether the motion will require a factual hearing without input from the opposing side. For example, had defendant filed a sworn affidavit providing some evidence that he had been crime free and living in the community for five consecutive years between 1991 and 1997, the trial court would need to know whether the State agreed with this factual claim or disputed it. If the State responded with evidence that someone with defendant's name had been convicted of a crime during that time frame, then the trial court would know that an evidentiary hearing would be necessary to resolve the conflicting evidence. Nothing in CrR 7.8 precludes a trial court from obtaining additional information from the opposing party before making a

decision on whether it has the authority to retain the motion under CrR 7.8 or whether it must transfer the motion to the Court of Appeals.

While the State agrees with defendant that the trial court failed to act in accordance with the current version of CrR 7.8, the State disagrees as to the nature of the error. Rather than setting the matter for a show cause hearing, the court should have transferred the non-meritorious motion to the Court of Appeals. Remand is appropriate so that the court can enter an order consistent with the current version of CrR 7.8.

D. CONCLUSION.

The State asks this court to remand the matter to the trial court for entry of an order in compliance with the current version of CrR 7.8.

DATED: October 6, 2009.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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.

10/6/09 
Date Signature

COURT OF APPEALS
CLERK
10 OCT -5 PM 2009
STATE OF WASHINGTON
BY 
DEPUTY