

**NO. 46557-4-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**KEVIN S. ROBINSON,**

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Marilyn Haan, Judge

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENT OF ERROR**

The trial court abused its discretion when it considered Mr. Robinson's Motion for Relief from Judgment in violation of the mandatory procedures set forth in CrR 7.8(c).

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

Did the trial court abuse its discretion in ruling on Mr. Robinson's Motion for Relief from Judgment when, under CrR 7.8(c), it was instead required to transfer the motion to the Court of Appeals for consideration as a personal restraint petition?

**C. STATEMENT OF THE CASE**

On May 8, 2008, Kevin Robinson pleaded guilty in Cowlitz County Superior Court to Delivery of Methamphetamine<sup>1</sup> and Unlawful Possession of a Firearm in the First Degree.<sup>2</sup> CP 1-10. The court sentencing Mr. Robinson to 90 months in the Department of Corrections (DOC) plus 9 to 12 months of DOC-supervised community custody. CP 17. The Judgment and Sentence was filed on May 8, 2008. CP 11-24.

On June 13, 2014, Mr. Robinson filed a "Motion for Relief from Judgment, Order, or Proceeding Pursuant to CrR 7.8(b), and Declaratory and Injunctive Relief Pursuant to RCW 7.24.010 and RCW 7.24.080" with the trial court. CP 25-108. Mr. Robinson's motion asked the trial court

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<sup>1</sup> RCW 69.50.401(1)

<sup>2</sup> RCW 9.41.040(1)(a)

for relief from the DOC community custody sanctions illegally imposed against him on July 24 and December 2 and 10, 2013. CP 25-26. Mr. Robinson explained he was released to community custody after serving the in-custody portion of his 2008 sentence. Thereafter, DOC found Mr. Robinson in violation of community custody conditions and sanctioned him to 789 days in custody. CP 27-30. In February 2014, Mr. Robinson initiated the two-level appeal process available to him through DOC. His appeal was denied at both levels and became final on April 23, 2014. CP 29-30.

Mr. Robinson's motion argued he was entitled to relief from the trial court under four theories: illegal sanctions, breach of contract, failure to define cause of aggravating or mitigating circumstances, and double jeopardy. CP 30-108.

The motion came on for hearing before the trial court on July 7, 2014. RP<sup>3</sup> 1-2. Mr. Robinson was not present at the hearing and he was not represented by counsel. RP 1. The prosecutor made a short argument after which the court denied Mr. Robinson's motion holding, "Mr. Robinson is directed to go through the appropriate procedures to appeal his sanctions from the DOC." RP 1. The court entered written findings of fact and conclusions of law on July 24, 2014. CP 126-28. The court took

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<sup>3</sup> There appeal has a single volume of verbatim.

no further action on Mr. Robinson's motion. Specifically, it did not transfer the motion to the Court of Appeals for consideration as a personal restraint petition. Mr. Robinson appealed the trial court's denial of his motion to this court on August 13, 2014. CP 128-29.

**D. ARGUMENT**

**THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO FOLLOW THE DIRECTIVES OF CrR 7.8(c) AND TRANSFER MR. ROBINSON'S MOTION FOR RELIEF TO THE COURT OF APPEALS.**

Under CrR 7.8(c), the trial court had no authority to rule on Mr. Robinson's Motion for Relief from Judgment. Instead, the trial court should have transferred the motion to the Court of Appeals for consideration as a personal restraint petition. Because the trial court erred by ruling on Mr. Robinson's motion, the trial court's order denying Mr. Robinson's motion must be vacated and the motion transferred to the Court of Appeals for consideration as a personal restraint petition.

1. CrR 7.8(c) limits the trial court's authority to rule on motions for relief from judgment.

CrR 7.8(b) gives a trial court authority to grant relief from judgment for various enumerated reasons to include the catchall provision of "any other reason justifying relief from the operation of the judgment." CrR 7.8(b)(5). The procedures governing the trial court's authority to act are spelled out at CrR 7.8(c).

At its inception in 1986, CrR 7.8(c) allowed trial courts to deny a CrR 7.8 motion for relief from judgment without a hearing if the alleged facts did not establish grounds for relief. *State v. Smith*, 144 Wn. App. 860, 861, 184 P.3d 666 (2008) (discussing former CrR 7.8(c)). In 2007, CrR 7.8(c) was amended to specifically limit trial courts' authority to rule on post-conviction motions. The current rule is the result of the 2007 amendment. The current rule provides mandatory procedures and criteria for determining when a trial court must transfer a motion to the Court of Appeals, when the trial court is to retain a motion and, if retained, what procedures the trial court must apply:

(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).

Restated, the rule requires a trial court to transfer a CrR 7.8(b) motion to the Court of Appeals when (1) the motion is time barred by RCW 10.73.090,<sup>4</sup> and (2) the defendant has not made a substantial showing he is entitled to relief, or (3) no factual hearing is needed to resolve the issue. CrR 7.8(c)(2). If the trial court retains the motion, it must order a show cause hearing directing the adverse party to appear. CrR 7.8(c)(3).

2. CrR 7.8(c)'s limitations obliged the trial court to transfer Mr. Robinson's motion to the Court of Appeals.

Here the trial court found Mr. Robinson failed to make a substantial showing he was entitled to relief.<sup>5</sup> CP 127 (Conclusions of Law 2 and 3). Yet, the court took no additional action: it neither transferred the motion to the Court of Appeals nor set the motion for a CrR 7.8(c)(3) show case hearing.

3. The trial court abused its discretion in failing to transfer Mr. Robinson's motion to the Court of Appeals.

A trial court's denial of a motion for relief from judgment is reviewed for abuse of discretion. *State v. Larranaga*, 126 Wn. App. 505,

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<sup>4</sup> "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."

<sup>5</sup> The court did not address whether the motion was time barred or whether a factual hearing was necessary. CrR 7.8(c)

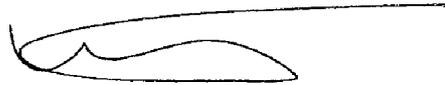
509, 108 P.3d 833 (2005). “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A decision is manifestly unreasonable if, based on the facts and the applicable legal standard, the decision is outside the range of acceptable choices.” *In re Custody of Halls*, 126 Wn. App. 599, 606, 109 P.3d 15 (2005).

Where a trial court fails to follow CrR 7.8(c)’s mandatory procedures, it abuses its discretion. *State v. Flaherty*, 177 Wn.2d 90, 92-93, 296 P.3d 904 (2013) (trial court erred in refusing to follow directives of CrR 7.8(c)(2)); *Smith*, 144 Wn. App. at 864 (trial court acted without authority when it failed to follow CrR 7.8(c)); see also *State v. Mendoza*, 165 Wn.2d 913, 921, 205 P.3d 113 (2009) (court rules are interpreted as though they were drafted by the legislature). The trial court’s inaction in this case has caused Mr. Robinson’s motion to languish at the trial court waiting the outcome of this appeal and its inevitable resolution as a personal restrain petition.

**E. CONCLUSION**

Mr. Robinson's motion should be transferred to this court as a personal restraint petition.

Respectfully submitted this 20th day of March 2015.

A handwritten signature in black ink, appearing to read "Lisa E. Tabbut", written over a horizontal line.

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LISA E. TABBUT/WSBA #21344  
Attorney for Kevin S. Robinson

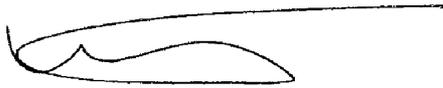
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief with: (1) Ryan Jurvakainen, Cowlitz County Prosecutor, at [Jurvakainen.ryan@co.cowlitz.wa.us](mailto:Jurvakainen.ryan@co.cowlitz.wa.us) and (2) the Court of Appeals, Division II; and (3) I mailed it to Kevin Robinson/DOC# 764821, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed March 20, 2015, in Mazama, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Kevin S. Robinson

## COWLITZ COUNTY ASSIGNED COUNSEL

**March 20, 2015 - 12:09 PM**

### Transmittal Letter

Document Uploaded: 6-465574-Appellant's Brief.pdf

Case Name: State of Washington v. Kevin S. Brown

Court of Appeals Case Number: 46557-4

**Is this a Personal Restraint Petition?**    Yes     No

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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### Comments:

No Comments were entered.

Sender Name: Lisa E Tabbut - Email: [ltabbutlaw@gmail.com](mailto:ltabbutlaw@gmail.com)

A copy of this document has been emailed to the following addresses:

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