

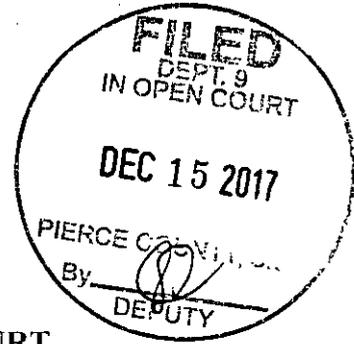
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ORIGINAL



03-1-02581-1 50463258 MTV 12-19-17



PIERCE COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

No. 03-1-02581-1

vs.

MOTION TO VACATE JUDGMENT
PURSUANT TO CrR 7.8

THEODORE ROOSEVELT RHONE,

Defendant.

Comes now the defendant, Theodore Rhone, by and through his attorney, Peter Reich with the Department of Assigned Counsel, and hereby moves this Court to vacate the Judgment in the above-captioned matter pursuant to CrR 7.8.

1. Declaration of Facts:

In 2003, Theodore Rhone was charged with and convicted of first degree robbery with a firearm enhancement, unlawful possession of a controlled substance with intent to deliver also with a firearm enhancement, and first degree unlawful possession of a firearm. The trial court found that Rhone was a persistent offender and imposed a sentence of life without the possibility of parole.

Prior to trial Rhone raised a Batson challenge when the State exercised one of its peremptory challenges to remove the last remaining African-American juror from the venire (Mr. Rhone is

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1 African-American). The trial court denied Rhone's challenge and the court of appeals on direct
2 appeal affirmed the trial court. In 2010, the Washington Supreme Court denied Rhone's Personal
3 Restraint Petition regarding whether the trial court erred in denying Rhone's Batson challenge.
4 State v. Rhone, 168 Wn.2d 645 (2010). However, on July 6, 2017, the Washington Supreme
5 Court in City of Seattle v. Erickson, 188 Wn.2d 721, altered the Batson analysis framework and
6 adopted the bright line rule described by the dissent in its 2010 State v. Rhone decision.

7 Before trial, Rhone had unsuccessfully moved to suppress the cocaine and firearm seized
8 during the search of a car in which Rhone was a passenger. The trial court denied the motion.
9 The court of appeals, Div. II, affirmed the ruling on direct appeal. See State v. Rhone, 137 Wn.
10 App. 1046.

11 In 2014, the Washington Supreme Court granted Rhone's Personal Restraint Petition, and
12 remanded his case to the Superior Court for reconsideration of the suppression ruling in light of
13 Arizona v. Gant and State v. Patton. On remand, the trial court adopted its original findings of
14 fact and legal reasoning, and again upheld the vehicle search and denied the motion to suppress.

15 In an unpublished opinion, the Court of Appeals, Div. II, found that the suppression motion
16 should have been granted and that the cocaine and firearm should have been suppressed.

17 However, the appeals court nevertheless affirmed Rhone's robbery conviction and its related
18 firearm sentencing enhancement after finding that the error in failing to suppress was harmless.

19 I, Peter Reich, hereby declare under penalty of perjury pursuant to the laws of the State of
20 Washington the foregoing is true and correct.

21 Signed at TACOMA, WA on DECEMBER 15, 2017.

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PETER REICH, WSBA NO. 37926
Attorney for Defendant

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2. Law and Argument

“The trial court has the authority to hear and determine (1) postjudgment motions authorized by...the criminal rules, or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision.” RAP 7.2(e). “The postjudgment motion or action shall first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision.” RAP 7.2(e).

The defendant’s CrR 7.8 motion is not time barred because the one year time limit pursuant to RCW 10.73.090 is not applicable to defendant’s motion as there has been a substantial change in the law that is material to the defendant’s conviction and the defendant is able to make a substantial showing that he is entitled to relief.

CrR 7.8 provides in relevant part:

(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;

...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.

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1 (c) Procedure on Vacation of Judgment.

2 (1) Motion. Application shall be made by motion stating the grounds upon
3 which relief is asked, and supported by affidavits setting forth a concise statement
4 of the facts or errors upon which the motion is based.

5 (2) Transfer to Court of Appeals. The court shall transfer a motion filed by a
6 defendant to the Court of Appeals for consideration as a personal restraint petition
7 unless the court determines that the motion is not barred by RCW 10.73.090 and
8 either (i) the defendant has made a substantial showing that he or she is entitled to
9 relief or (ii) resolution of the motion will require a factual hearing.

10 (3) Order to Show Cause. If the court does not transfer the motion to the Court
11 of Appeals, it shall enter an order fixing a time and place for hearing and directing
12 the adverse party to appear and show cause why the relief asked for should not be
13 granted.

14 RCW 10.73.100 provides in relevant part:

15 The time limit specified in RCW 10.73.090 does not apply to a petition or motion
16 that is based solely on one or more of the following grounds:

17 ...
18 (6) There has been a significant change in the law, whether substantive or
19 procedural, which is material to the conviction, sentence, or other order entered in
20 a criminal or civil proceeding instituted by the state or local government, and either
21 the legislature has expressly provided that the change in the law is to be applied
22 retroactively, or a court, in interpreting a change in the law that lacks express
23 legislative intent regarding retroactive application, determines that sufficient
24 reasons exist to require retroactive application of the changed legal standard.

25 The Washington Supreme Court has defined a significant change in the law to be “where an
26 intervening opinion has effectively overturned a prior appellate decision that was originally
27 determinative of a material issue.” State v. Brown, 154 Wn.2d 787, 795 (2005) quoting In re
28 Pers. Restraint of Grasso, 151 Wn.2d 1, 11 (2004) (quoting In re Pers. Restraint of Greening, 141
29 Wn.2d 687, 697 (2000)).

30 Prior to trial Rhone raised a Batson challenge when the State exercised one of its peremptory
31 challenges to remove the last remaining African-American juror from the venire (Mr. Rhone is
32 African-American). The trial court denied Rhone's challenge and the court of appeals on direct
33

1 appeal affirmed the trial court. In 2010, the Washington Supreme Court denied Rhone's Personal
2 Restraint Petition regarding whether the trial court erred in denying Rhone's Batson challenge.
3 State v. Rhone, 168 Wn.2d 645 (2010). At issue in State v. Rhone was the first prong of the
4 Batson analysis.

5 Batson established a three-part analysis to determine whether a venire member was
6 peremptorily challenged pursuant to discriminatory criteria. A defendant challenging a
7 prosecutor's peremptory challenge of a venire member must first establish a prima facie case of
8 purposeful discrimination. To establish this prima facie case, the court held that the defendant
9 must provide evidence of any relevant circumstances that "raise an inference" that a peremptory
10 challenge was used to exclude a venire member from the jury on account of the venire member's
11 race. Batson, 476 U.S. at 96. Second, if a prima facie case is established, the burden shifts to the
12 prosecutor to come forward with a race-neutral explanation for challenging the venire member.
13 Finally, the trial court determines whether the defendant has established purposeful
14 discrimination.

15 Rhone and the dissent asked the court to adopt a "bright line rule that a defendant establishes
16 a prima facie case of discrimination when, as here, the record shows that the State exercised a
17 peremptory challenge against the sole remaining venire member of the defendant's
18 constitutionally cognizable racial group." State v. Rhone, 168 Wash. 2d 645, 659 (2010).

19 In an opinion published July 6, 2017, the Washington Supreme Court in City of Seattle v.
20 Erickson, 188 Wn.2d 721 (2017), changed the Batson analysis framework and adopted the bright
21 line rule described by the dissent in its 2010 State v. Rhone decision. In abrogating its earlier
22 decision, the Court stated:

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In the past, this court has provided great discretion to the trial court when it comes to the finding of a prima facie case pursuant to a Batson challenge. To ensure a robust equal protection guaranty, we now limit that discretion and adopt the bright-line Rhone rule. We hold that the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury. The trial court must then require an explanation from the striking party and analyze, based on the explanation and the totality of the circumstances, whether the strike was racially motivated.

City of Seattle v. Erickson, 188 Wn.2d 721, 734 (2017).

The Court in Erickson ordered the case be remanded for a new trial for reasons substantially similar to Rhone’s circumstance:

Traditionally, the remedy for this error would be to remand to the trial court for a complete three-part analysis as the United States Supreme Court did in Batson itself. But Erickson urges that if we adopt a new bright-line rule and find a prima facie case of discrimination, we should remand for a new trial. We agree. The trial court’s in-person examination of the credibility and demeanor of the prosecutor and jury is essential in a Batson analysis. Here, the passage of time since the ruling would make this analysis problematic. Erickson’s presiding judge has left the Seattle municipal bench. Even if he had not, he heard the original challenge in October 2014, two and a half years ago. It would be unreasonable to require the trial court to recall and evaluate the prosecutor’s demeanor and credibility after that passage of time, let alone recall and evaluate the jury. It would also be inappropriate to dismiss Erickson’s charges outright. However, remand for a new trial is generally appropriate when other rights, including trial rights, have been violated. Because of the unavailability of the original trial judge and the stretch of time since the original challenge, we remand the case for a new trial.

City of Seattle v. Erickson, 188 Wash. 2d 721, 735, 398 P.3d 1124, 1131 (2017) (internal citations omitted).

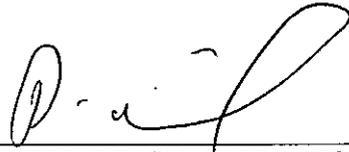
The Erickson court’s analysis applies with equal force to Rhone’s case where his trial commenced in 2005, approximately 12 years ago, and since that time the judge who presided over the trial is now a judge with the Court of Appeals.

Conclusion

For the reasons enumerated above, the defendant respectfully requests the Court grant his motion vacate the Judgement and Sentence pursuant to CrR 7.8.

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Dated December 15, 2017.



PETER REICH, WSBA NO. 37926
Attorney for Defendant

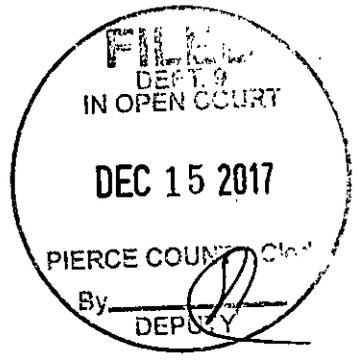
MOTION TO VACATE JUDGMENT PURSUANT TO
CrR 7.8 – page 7 of 7

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03-1-02581-1 50640323 ORDM 01-23-18



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff

vs.

RHONE, THEODORE ROOSEVELT,
Defendant

Cause No: 03-1-02581-1

**ORDER ON DEFENDANT'S MOTION TO
MODIFY JUDGMENT AND SENTENCE**

CLERK'S ACTION REQUIRED

THIS MATTER came before the undersigned judge of the above entitled court upon review of the defendant's motion(s) filed on ^{15 + 1/2/18} ~~12/17/17~~ ~~12/17/17~~ ~~12/17/17~~ ~~12/17/17~~ ~~12/17/17~~ After reviewing the defendant's written pleadings, the court now enters the following order pursuant to CrR

7.8(c)(2):

A. IT IS HEREBY ORDERED that this petition is transferred to the Court of Appeals, Division II, to be considered as a personal restraint petition. The petition is being transferred because:

- it appears to be time-barred under RCW 10.73.090;
- is not time-barred under RCW 10.73.090, but is untimely under CrR 7.8(a) and therefore would be denied as an untimely motion in the trial court; or
- is not time barred but does not meet the criteria under CrR 7.8 (c)(2) to allow the court to retain jurisdiction for a decision on the merits.

If box "A" above is checked, the Pierce County Superior Court Clerk shall forward a copy of this order as well as the defendant's pleadings identified above, to the Court of Appeals.

1 B. IT IS HEREBY ORDERED that this court will retain consideration of the motion
2 because the following conditions have been met: 1) the petition is not barred by the one year
3 time bar in RCW 10.73.090, and either:

4 the defendant has made a substantial showing that he or she is entitled to relief; or

5 the resolution of the motion will require a factual hearing.

6 IT IS FURTHERED ORDERED that the defendant's motion shall be heard on its merits.

7 The State is directed to:

8 file a response by _____ After reviewing
9 the response, the Court will determine whether this case will be transferred to the
10 Court of Appeals, or if a hearing shall be scheduled.

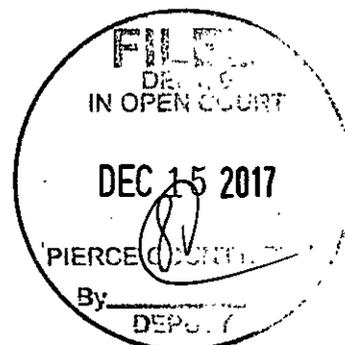
11 appear and show cause why the defendant's motion should not be granted. That
12 hearing shall be held on _____ at _____ a.m. / p.m.

13 As the defendant is in custody at the Department of Corrections, the State is further
14 directed to arrange for defendant's transport for that hearing.

15 If box "B" above is checked, the clerk is directed to send a copy of this Order to
16 the Appellate Division of the Pierce County Prosecutor's Office.

17 DATED this 15th of December, 2017.

18 
19 _____
20 JUDGE
21 EDMUND MURPHY



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03-1-02581-1 50550104 MT9 01-08-18

FILED
IN COUNTY CLERK'S OFFICE

JAN 02 2018

COPIES

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY NA DEPUTY

THEODORE R. RHONE

Defendant/Petitioner

CAUSE NO. 03-1-02581-1

PROSE

MOTION FOR BAIL HEARING

UNDER WASHINGTON COURT RULE

RULE 3.2. RELEASE OF ACCUSED

STATE OF WASHINGTON

Plaintiff/Respondant

(b)(5)(6)

1/10/2018

A. IDENTITY OF MOVING PARTY:

COMES NOW, Theodore R. Rhone, appearing pro se, and Moves
This Court for relief sought in Part B.

B. NATURE OF RELIEF SOUGHT:

Petitioner respectfully request This Court To Grant
Said Motion requesting Bail/Release of The Accused.
Rule 3.2. (b)(5)(6).

C. FACTS RELEVANT TO MOTION:

On December 15, 2017, The petitioner Theodore R. Rhone

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1/10/2016

was brought before The Honorable EDMUND MURPHY For The purposes of Vacating The firearm and drug Pursuant To The Washington State Court of Appeals decision July 6, 2016, Based on Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 Ed. 2d 485 (2009), And State v. Patton, 167 Wn. 2d 379, 219 P.3d 651. Defendant was charged with Robbery in The first degree, Possession with intent to deliver, Possession of firearm, and bail jump. The Washington State Court of Appeals upheld The petitioner Robbery conviction with firearm enhancement.

The petitioner argued before The Murphy Court That The Washington State Court of Appeals upheld The Robbery conviction based on an erroneous Jury instruction That was not founded by The record, information or evidence. Petitioner argued That his Judgment and Sentence is Valid on its face, Therefore, after The vacating of The firearm, The Robbery Should be vacated. The Honorable Edmund Murphy agreed, But did not believe he had authority or Jurisdiction to rule.

D. GROUNDS FOR RELIEF AND ARGUMENT:

The Honorable Edmund Murphy Sent MJ 7.5 Motion for New Trial, and MJ 7.8 Motion to vacate Judgment up to The Washington State Court of Appeals. As a (PRP) Personal Restraint petitions.

According to this procedure, The petitioner has a right to ask for bail, or Special Conditions of Release while defendant is waiting the response of the Washington State Court of Appeals.

"BLACKS LAW DICTIONARY (Tenth edition)." p. 968

Personal Restraint Petition. (1976) A Motion filed by a convicted and sentenced prisoner seeking release from custody either on the prisoner's own recognizance or to house arrest with the aid of an electronic monitoring device while the court reconsiders the petitioner's sentence.

Under Washington Court Rule 3.2. Release of Accused (b)(5)(6) Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or

(6) impose any condition other than detention deemed reasonably necessary to assure appearance as required. If the court determines that the accused must post secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the accused's appearance.

Under Washington Court Rule 3.2. (k) (1), The court

ordering The release of an accused on any Condition Specified in This rule May at any Time on Change of Circumstances, New information or Showing of Good Cause amend its Order to impose additional or different Conditions for release.

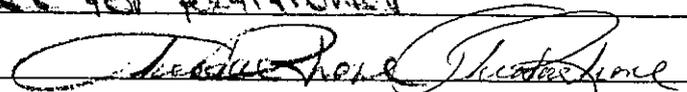
E. CONCLUSION:

Due to The Circumstances That Surround This Case, Taking Under Consideration The Jury Issue, as well as The Batson Issue, it would seem clear that The petitioner will be returning to The Superior Court on a remand for New Trial, or Vacate. At any point, The Circumstances do favor The petitioner. The petitioner has done approximately 15 Years on Said conviction. it is not unheard of to request Special Condition release, Just as afforded to convicted Felons on Appeal Bonds. The petitioner believes that The Superior Court is in agreement that petitioner will return on appeal for New Trial. Therefore, petitioner not abiding by Special Conditions of release is not a relevant concern.

Petitioner ask This Court to Grant This Motion for Special Conditions of release for petitioner

under penalty of perjury under

The laws of Washington, I certify,
These statements are true.



Theodore Rhone Date 12-17-2017

PIERCE COUNTY SUPERIOR COURT

January 23, 2018 - 3:48 PM

Filing PRP Transfer Order

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: Case Initiation
Trial Court Case Title: State of Washington Vs Rhone, Theodore Roosevelt **cod**
Trial Court Case Number: 03-1-02581-1
Trial Court County: Pierce County Superior Court
Signing Judge:
Judgment Date:

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