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Court of Appeals
Division II
State of Washington
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No. 52639-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY DWAIN DAVIS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 95-1-00160-4
The Honorable Jerry Costello, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The superior court erred when it failed to comply with the procedural requirements of CrR 7.8(c).

II. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the superior court abuse its discretion when it denied Anthony Davis' motion after failing to comply with the procedural requirements of CrR 7.8(c)? (Assignment of Error 1)
2. Did the superior court abuse its discretion when it failed to transfer Anthony Davis' motion to the Court of Appeals as a Personal Restraint Petition? (Assignment of Error 1)
3. Alternatively, did the superior court abuse its discretion when it denied Anthony Davis' motion without first conducting a required hearing? (Assignment of Error 1)

III. STATEMENT OF THE CASE

Anthony Dwain Davis pleaded guilty on July 12, 1995 to one count of first degree rape. (CP 1-5) The State's criminal history summary included prior convictions for attempted robbery in the second degree, burglary in the first degree, and rape in the first degree. (CP 2) The State asserted that Davis' criminal history included two most serious offenses, and that the current offense

was also a most serious offense, therefore requiring a mandatory life sentence under the State's "three strikes" law. (CP 3; Sup CP __) Davis disputed his criminal history. (CP 2) But the sentencing court found that Davis was a persistent offender and imposed a term of life without the possibility of parole. (CP 9, 12) Davis' subsequent direct appeal was dismissed after appellate counsel found no non-frivolous issues to raise.¹

On October 17, 2018, Davis filed a pro se Motion to Withdraw Guilty Plea. (CP 17-34) Davis asserted that: (1) his life sentence was unconstitutional because the persistent offender law was improperly applied retroactively to convert his prior offenses into strike offenses; and (2) his plea agreement is invalid on its face because it misinformed him of his right to withdraw his guilty plea. (CP 17-34)

The lower court did not hold a hearing or direct the State to respond, and instead simply denied the motion by written order entered on October 24, 2018. (CP 35) The one-page order states:

The defendant filed a motion to withdraw his guilty plea on October 17, 2018. The court reviewed the pleadings submitted and reviewed the file herein. Therefore, being duly advised in all matters,
IT IS HEREBY ORDERED that:

¹ See *State v. Davis*, 133 Wn.2d 187, 943 P.2d 283 (1997).

- 1) Oral argument is waived.
- 2) The State shall not be required to respond to the motion.
- 3) The court will not conduct an evidentiary hearing on this motion.
- 4) The motion for withdrawal of guilty plea filed on October 17, 2018 is denied.

(CP 35) Davis timely filed a Notice of Appeal. (CP 36-45)

IV. ARGUMENT & AUTHORITIES

The trial court exceeded its authority and abused its discretion when it failed to follow the procedural requirements of CrR 7.8(c)(2) and (3). A ruling on a CrR 7.8 motion is reviewed for abuse of discretion. *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996). The superior court did not provide any reasons for its decision to deny Davis' motion. (CP 35) This alone constitutes an abuse of discretion. See *State v. Hampton*, 107 Wn.2d 403, 409, 728 P.2d 1049 (1986) ("we cannot say [the trial court] based its decision on tenable grounds or reasons" when it did not provide any reasons for its decision); *Beers v. Ross*, 137 Wn. App. 566, 574, 154 P.3d 277 (2007) (the trial court erred when it denied the Beerses' motion for no apparent reason).

Furthermore, where a trial court fails to follow CrR 7.8(c)'s mandatory procedure, it also abuses its discretion. *State v. Flaherty*, 177 Wn.2d 90, 92-93, 296 P.3d 904 (2013); *State v.*

Smith, 144 Wn. App. 860, 863, 184 P.3d 666 (2008).

CrR 7.8(c) prescribes the specific procedure for the initial consideration of Motions for Relief from Judgment.² It states in relevant part:

(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 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 [time] 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) (emphasis added).

The superior court did not indicate whether it found Davis'

² Davis' motion was titled "Motion to Withdraw Plea Pursuant to CrR 7.8(b)(3)(4)(5) and RAP 7.2(a)." Although not titled as a Motion for Relief from Judgment, it is still governed by CrR 7.8; under CrR 4.2(f) "if the motion for withdrawal [of a guilty plea] is made after judgment, it shall be governed by CrR 7.8."

motion to be timely or untimely (not barred by RCW 10.73.090).³ (CP 35) If the motion was untimely, then the court was obligated to transfer the motion to this Court as a personal restraint petition (PRP). *Flaherty*, 177 Wn.2d at 92-93; *Smith*, 144 Wn. App. at 863.

If the superior court found that Davis' motion was timely, then CrR 7.8 only allows the court to rule on the motion under specific circumstances. The superior court has authority to rule on the merits of a timely CrR 7.8 motion only if it finds that either (1) the defendant has made a substantial showing he is entitled to relief, or (2) the motion cannot be resolved without a factual hearing. CrR 7.8(c)(2).

The superior court specifically declined to order an evidentiary hearing, so it apparently did not find that "resolution of the motion will require a factual hearing" under CrR 7.8(c)(2)(i). (CP 35) Thus, the court only had authority to rule on the merits of the motion if it found that Davis "made a substantial showing" that

³ RCW10.73.090(1) 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." But RCW 10.73.100 provides that the one year time limit imposed by RCW 10.73.090 does not apply to a petition or motion that is based on one or more of six specific exceptions identified by the statute. One exception to this one-year requirement, which Davis relied on in his motion, is where the judgment and sentence is facially invalid. *In re Pers. Restraint of Yates*, 180 Wn.2d 33, 38, 321 P.3d 1195 (2014); RCW 10.73.090(1).

he “is entitled to relief.” CrR 7.8(c)(2)(i). The superior court did not make such a finding. (CP 35)

But even if the superior court had made this determination, but just neglected to note it in its order, the court still did not have authority to enter the order denying the motion without first holding a show cause hearing. That is because the superior court must conduct a show cause hearing to allow the opposing party to respond. CrR 7.8(c)(3).

If the motion is timely, but the defendant fails to make a substantial showing, or the court concludes there is no need for a factual hearing, the superior court is only authorized to transfer the timely petition to the appellate court for consideration as a personal restraint petition. *Smith*, 144 Wn. App. at 863.

The superior court was obligated to either transfer Davis’ motion to this Court as a PRP, or to hold a hearing on the merits of the motion. The superior court failed to follow either of these required courses of action. Accordingly, the superior court abused its discretion by failing to follow the procedural requirements of CrR 7.8(c)(2) and (3).

This case should be remanded to the superior court so that Davis’ motion can be considered after a hearing and application of

the proper legal standard. *Smith*, 144 Wn. App. at 864. Further, this motion should not be converted to a personal restraint petition and considered on its merits by this Court. In *Smith*, the Court held the defendant is entitled to both notice and an opportunity to object before his motion is transferred as a personal restraint petition, as such action “could infringe on his right to choose whether he wanted to pursue a personal restraint petition because he would then be subject to the successive petition rule in RCW 10.73.140.” *Smith*, 144 Wn. App. at 864.

V. CONCLUSION

Based on the foregoing facts and authorities, this matter should be remanded to the superior court with instructions to follow the proper procedure for a CrR 7.8 motion.

DATED: February 22, 2019



STEPHANIE C. CUNNINGHAM
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CERTIFICATE OF MAILING

I certify that on 02/22/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Anthony D. Davis, DOC# 259315, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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Transmittal Information

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