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Court of Appeals  
Division II  
State of Washington  
5/23/2019 8:58 AM  
NO. 52639-5

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY DWAIN DAVIS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Jerry Costello

No. 95-1-00160-4

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**Brief of Respondent**

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

1. Should this Court vacate the trial court's order denying defendant's motion to withdraw guilty plea and remand the matter to the trial court directing it to enter an order in compliance with CrR 7.8(c)?

B. STATEMENT OF THE CASE.

On July 12, 1995, Anthony Dwain Davis ("defendant") pleaded guilty to one count of first degree rape. CP 1-5. In defendant's statement on plea of guilty, the prosecutor's statement of defendant's criminal history included convictions for first degree rape, first degree burglary, and second degree burglary. CP 2. Defendant disagreed with the prosecutor's statement of defendant's criminal history, but he did not attach a different statement. CP 2. On October 31, 1995, the court sentenced defendant to life without parole after finding that he is "a persistent offender." CP 6-15.

On October 17, 2018, defendant filed a pro se "Motion to Withdraw Plea Pursuant to CrR 7.8(b) (3) (4) (5), R.A.P. 7.2(e)." CP 17-34. In his motion, defendant challenged the sentencing court's retroactive application of the persistent offender law and the facial validity of the

plea. CP 20-22. On October 24, 2018, the trial court filed a written order denying defendant's motion. CP 35. The court further ordered that:

- 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. Defendant timely appeals the trial court's order. CP 36-41, 45.<sup>1</sup>

C. ARGUMENT.

1. THIS COURT SHOULD VACATE THE TRIAL COURT'S ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA AND REMAND THE MATTER TO THE TRIAL COURT DIRECTING IT TO ENTER AN ORDER IN COMPLIANCE WITH CrR 7.8(c).

This Court should vacate the trial court's order denying the defendant's motion to withdraw his guilty plea and remand for the trial court to enter an order addressing the criteria listed in CrR 7.8(c). Remand is appropriate for the trial court to address the timeliness of the motion.

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<sup>1</sup> This Court recently affirmed defendant's judgment and sentence on other grounds in a consolidated direct appeal and personal restraint petition on September 18, 2018. CP 55-65.

A trial court's ruling on a motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. Bao Sheng Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). Abuse of discretion occurs where the trial court's decision was manifestly unreasonable or based on untenable grounds. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). However, an appellate court cannot determine whether a trial court's ruling was reasonable or tenable if the trial court fails to provide any reasons for its decision. *State v. Hampton*, 107 Wn.2d 403, 409, 728 P.2d 1049 (1986). Such failure constitutes an abuse of discretion. *Id.*

A motion to withdraw a guilty plea after judgment is governed by CrR 7.8. CrR 4.2(f); *State v. Boyd*, 109 Wn. App. 244, 249, 34 P.3d 912 (2001). CrR 7.8(c)(2) requires the trial court to transfer the motion to the Court of Appeals when certain criteria are met:

The court shall transfer a motion filed by the 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.

CrR 7.8(c)(2). Accordingly, the trial court "may only rule on the merits of the motion when the motion is timely filed and 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." *State v. Smith*, 144 Wn.

App. 860, 864, 184 P.3d 666 (2008). If the trial court does not transfer the motion to the Court of Appeals, it must order a hearing for the adverse party to show cause why the requested relief should not be granted. CrR 7.8(c)(3).

Here, the trial court failed to first determine whether defendant's motion was time-barred under RCW 10.73.090, as required by CrR 7.8(c). CP 35. If defendant's motion was time-barred, then the trial court would have been required to transfer it to this Court as a personal restraint petition. CrR 7.8(c). Because the trial court failed to follow the proper procedure under CrR 7.8(c), this Court should vacate the trial court's order and remand for the trial court to enter an order addressing the criteria listed in CrR 7.8 (c). *See Smith*, 144 Wn. App. at 864 (holding that vacating and remanding a wrongly-decided CrR 7.8 motion is the appropriate remedy because converting the motion to a personal restraint petition could infringe on a defendant's right to choose whether he wanted to pursue a personal restraint petition because he would then be subject to the successive petition rule).

D. CONCLUSION.

The State agrees that the trial court failed to comply with the procedural requirements of CrR 7.8(c) when it entered an order denying defendant's motion to withdraw his guilty plea. The State respectfully

requests this Court vacate the order and remand the case for the trial court to enter an order in compliance with the criteria outlined in CrR 7.8(c).

DATED: May 22, 2019.

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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.

5-23-19 Kristie Barham  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**May 23, 2019 - 8:58 AM**

**Transmittal Information**

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