

No. 297217

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
Oct 11, 2011
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, Respondent

v.

DANIEL A. FLAHERTY, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

REPLY BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The lower court erred when it failed to comply with the requirements of CrR 7.8(c)(2) and (3).

II. STATEMENT OF FACTS

The facts submitted in appellant's opening brief are incorporated by reference.

III. ARGUMENT

The Lower Court Erred When It Did Not Follow The Procedural Requirements of CrR 7.8(c)(2) and (3).

In the Respondent's brief, the State agrees that the trial court should have, but did not follow the procedures contained in CrR 7.8(c). (Br. of Respondent at 5.)

If the lower court determines a motion is time barred under RCW 10.73.090, it is required to transfer the motion to the Court of Appeals, or to enter an order fixing a time and place for a hearing, directing the adverse party to appear and show cause why the relief asked for should not be granted. CrR 7.8(c)(3); *State v. Smith*, 144 Wn. App. 860, 863, 184 P.3d 666 (2008).

Here, the court's ruling, finding the motion was untimely and dismissing it was based on an erroneous view of the criminal rule and the case law. Such a ruling is an abuse of discretion. *State v.*

Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (citing *Wash.State Physicians Ins. Exch. & Ass'n. v. Fisions Corp.* 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

Mr. Flaherty asks this Court to remand the matter to the superior court to follow the proper procedure.

IV. CONCLUSION

Based on the facts and authorities cited in appellant's opening and reply briefs, Mr. Flaherty asks this Court to remand the matter to the superior court.

Dated this 11th day of October 2011.

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for appellant Daniel Flaherty, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the reply brief of appellant was sent by first class mail, postage prepaid on October 11, 2011, to Daniel A. Flaherty, Federal Corrections Institute, PO Box 800, Herlong, CA 96113; and emailed per agreement between the parties to Andrew Metts, Spokane County Prosecutor, at kowens@spokanecounty.org.

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