

**FILED**  
SEP 09, 2011  
Court of Appeals  
Division III  
State of Washington

29737-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JESSE JAMES REYNOLDS, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

---

APPELLANT'S BRIEF

---

Janet G. Gemberling  
Jill S. Reuter  
Attorneys for Appellant

GEMBERLING & DOORIS, P.S.  
PO Box 9166  
Spokane, WA 99209  
(509) 838-8585

**INDEX**

A. ASSIGNMENTS OF ERROR .....1

B. ISSUES .....1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT .....5

    1. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER MR. REYNOLDS’S THIRD MOTION TO MODIFY OR CORRECT JUDGMENT AND SENTENCE .....5

    2. THE TRIAL COURT ERRED IN NOT APPOINTING COUNSEL FOR MR. REYNOLDS FOR HIS THIRD MOTION TO MODIFY OR CORRECT JUDGMENT AND SENTENCE .....7

E. CONCLUSION.....9

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

BRUNSON V. PIERCE CNTY., 149 Wn. App. 855,  
205 P.3d 963 (2009)..... 5

STATE V. COPPIN, 57 Wn. App. 866,  
791 P.2d 228 (1990)..... 6

STATE V. DAVENPORT, 100 Wn.2d 757,  
675 P.2d 1213 (1984)..... 6

STATE V. FISHER, 165 Wn.2d 727,  
202 P.3d 937 (2009)..... 6

STATE V. FOREST, 125 Wn. App. 702,  
105 P.3d 1045 (2005)..... 7

STATE V. MAGERS, 164 Wn.2d 174,  
189 P.3d 126 (2008)..... 6

STATE V. MARTINEZ, 161 Wn. App. 436,  
253 P.3d 445 (2011)..... 5

STATE V. PETTITT, 93 Wn.2d 288,  
609 P.2d 1364 (1980)..... 5

STATE V. ROBINSON, 153 Wn.2d 689,  
107 P.3d 90 (2005)..... 7, 8

STATE V. SWAN, 114 Wn.2d 613,  
790 P.3d 610 (1990)..... 5

STATE V. TALLEY, 134 Wn.2d 176,  
949 P.2d 358 (1998)..... 6

STATE V. THORGERSON, No. 83357-5, 2011  
WL 3716980, at \*2 (Wash. Aug. 25, 2011)..... 6

**FEDERAL CASES**

UNITED STATES V. BRUMMETT, 786 F.2d 720 (6th Cir. 1986) ..... 5

**STATUTES**

RCW 9A.72.085..... 8

RCW 9A.72.085(1)..... 8

**COURT RULES**

CrR 3.1(b)(2)..... 7

CrR 7.8..... 2, 3, 5, 7

CrR 7.8(c)(1)..... 7, 8

RPC 3.3(a)(1)..... 6

**OTHER AUTHORITIES**

BLACK'S LAW DICTIONARY 62 (8th ed. 2004) ..... 8

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by failing to consider Mr. Reynolds's third Motion to Modify or Correct Judgment and Sentence.
2. The prosecutor committed misconduct by misrepresenting the grounds for Mr. Reynolds's third Motion to Modify or Correct Judgment and Sentence to the trial court.
3. The trial court erred in not appointing counsel to Mr. Reynolds for his third Motion to Modify or Correct Judgment and Sentence.

B. ISSUES

1. At the hearing on the defendant's third Motion to Modify or Correct Judgment and Sentence, the prosecutor told the trial court that the motion was the exact same as the motion the trial court previously decided. But the third motion was based upon different grounds than the earlier motion. The trial court ruled it would not rehear the motion, and denied it, stating the motion had already been heard and decided. Did the trial court abuse its discretion by failing to hear the

third Motion to Modify or Correct Judgment?  
(Assignments of Error 1, 2).

2. The defendant filed a docket notice, informing the trial court that he would move for a hearing to assign new counsel, at the time his third Motion to Modify or Correct Judgment and Sentence was heard. The trial court did not appoint counsel for the defendant for purposes of his motion. Did the trial court err in not appointing counsel to represent defendant for his third Motion to Modify or Correct Judgment and Sentence? (Assignment of Error 3).

### C. STATEMENT OF THE CASE

The State charged Jesse James Reynolds with one count of first degree robbery. (CP 1-2). Mr. Reynolds pleaded guilty to that charge in May 2010. (CP 3-11; 4/29/2010 RP 2-7). The trial court sentenced Mr. Reynolds to a standard range sentence of 52 months' confinement. (CP 16; 5/6/2010 RP 3-4). The sentence was based upon an offender score of two, comprising four prior juvenile convictions for first degree malicious mischief. (CP 4, 13-14; 5/6/2010 RP 3-4).

In June, Mr. Reynolds filed a CrR 7.8 Motion to Modify or Correct Judgment and Sentence, and an affidavit in support of the motion.

(CP 22-26). He argued he should have been sentenced based on an offender score of one, because his four prior juvenile convictions for first degree malicious mischief were charged under the same cause number, and were same criminal conduct. (CP 23, 25). Mr. Reynolds also filed a motion asking the trial court to appoint an attorney to assist him with the motion. (CP 28-29).

In July, Mr. Reynolds filed a second CrR 7.8 Motion to Modify or Correct Judgment and Sentence, and an affidavit in support of the motion. (CP 48-53). This motion was based on the same grounds as his first motion. (CP 49, 51). Without the presence of Mr. Reynolds or an attorney representing him, the trial court denied the motion, stating “it appear[ed] that [Mr. Reynolds’s] prior juvenile convictions were committed on separate dates with different victims[.]” (CP 55; 7/22/2010 RP 5).

In January 2011, Mr. Reynolds filed a third Motion to Modify or Correct Judgment and Sentence.<sup>1</sup> (CP 58-65). This time he argued he should have been sentenced based upon an offender score of zero because all of his juvenile convictions washed out. (CP 59). After stating this ground for relief, Mr. Reynolds stated “I declare under the penalty of

---

<sup>1</sup> This motion listed Federal Rule of Criminal Procedure 35 as its authority. (CP 59).

perjury the laws of the State of Washington that the foregoing is true and correct.” (CP 60). Mr. Reynolds also filed notice that he would move for a hearing to assign counsel when his third Motion to Modify or Correct Judgment and Sentence was heard. (CP 66-67).

On January 27, 2011, the trial court denied Mr. Reynolds’s third Motion to Modify or Correct Judgment and Sentence, stating “the same motion has been heard and decided.” (CP 68; 1/27/2011 RP 4). The following colloquy occurred between the State and the trial court:

[The State:] [Mr. Reynolds] pro se filed a motion to modify and correct the Judgment And Sentence, but he had the exact same motion in July of 2010 in front of Judge VanderSchoor who found that it was already done correctly, and so an order denying that motion was already entered. So I just ask the Court to enter another order still denying the exact same motion.

[The Court:] I think that I’ll do it differently. Instead of rehearing the motion, I’m indicating that the same motion has been heard and decided.

[The State:] OK.

[The Court:] It is hereby ordered that [Mr. Reynolds’s] motion is denied. So I’m denying it because it’s already been heard, rather than redeciding it.

[The State:] That’s fine.

(1/27/2011 RP 4).

Mr. Reynolds appealed the trial court’s denial of his third Motion to Modify or Correct Judgment and Sentence. (CP 71).

#### D. ARGUMENT

##### 1. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER MR. REYNOLDS'S THIRD MOTION TO MODIFY OR CORRECT JUDGMENT AND SENTENCE.

A trial court's denial of a CrR 7.8 motion is reviewed for an abuse of discretion. *State v. Martinez*, 161 Wn. App. 436, 447, 253 P.3d 445 (2011) (citing *State v. Swan*, 114 Wn.2d 613, 642, 790 P.3d 610 (1990)).<sup>2</sup> "Failure to exercise discretion is an abuse of discretion." *Brunson v. Pierce Cnty.*, 149 Wn. App. 855, 861, 205 P.3d 963 (2009) (citing *State v. Pettitt*, 93 Wn.2d 288, 295-96, 609 P.2d 1364 (1980)).

Mr. Reynolds's third Motion to Modify or Correct Judgment and Sentence was based on different grounds than his previous two motions. (CP 58-65). His third motion argued he should have been sentenced with an offender score of zero, because his prior juvenile convictions washed out, while his first two motions had argued he should have been sentenced based on an offender score of one, because his prior juvenile convictions were same criminal conduct. (CP 23, 25, 49, 51, 59-65). Nonetheless, the trial court did not decide Mr. Reynolds's third motion, declining to

---

<sup>2</sup> Motions under Federal Rule of Criminal Procedure 35 are also reviewed for an abuse of discretion. See *United States v. Brummett*, 786 F.2d 720, 723 (6th Cir. 1986).

exercise its discretion. This was an abuse of discretion. *Brunson*, 149 Wn. App. at 861 (citing *Pettitt*, 93 Wn.2d at 295-96).

Further, the prosecutor misinformed the trial court that the motion was the exact same as the motion the trial court had previously decided in July 2010. (1/27/20911 RP 4).

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, No. 83357-5, 2011 WL 3716980, at \*2 (Wash. Aug. 25, 2011) (internal quotation marks omitted) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). “Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)). “A prosecutor, like any other attorney, has a duty of candor toward the tribunal which precludes it from making a false statement of material fact or law to such tribunal.” *State v. Talley*, 134 Wn.2d 176, 183 n.6, 949 P.2d 358 (1998) (quoting *State v. Coppin*, 57 Wn. App. 866, 874 n.4, 791 P.2d 228 (1990)); see also RPC 3.3(a)(1) (stating an attorney’s duty of candor towards the tribunal).

The misrepresentation by the prosecutor to the trial court regarding the grounds for Mr. Reynolds's third Motion to Modify or Correct Judgment and Sentence was misconduct. Because neither Mr. Reynolds nor any attorney representing him was present, no one could object to the misstatement or bring the correct facts to the trial court's attention. Based upon the trial court's failure to exercise its discretion, and the prosecutorial misconduct, this court should remand the case to the trial court to consider Mr. Reynolds's third Motion to Modify or Correct Judgment and Sentence.

2. THE TRIAL COURT ERRED IN NOT APPOINTING COUNSEL FOR MR. REYNOLDS FOR HIS THIRD MOTION TO MODIFY OR CORRECT JUDGMENT AND SENTENCE.

“A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, *and post-conviction review.*” CrR 3.1(b)(2) (emphasis added). “A right to counsel may attach when making a CrR 7.8 motion after the court determines that the motion establishes grounds for relief.” *State v. Robinson*, 153 Wn.2d 689, 699, 107 P.3d 90 (2005). When bringing a motion under CrR 7.8, a defendant must support the motion “by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.” CrR 7.8(c)(1). “An affidavit is a ‘voluntary declaration of facts written down and sworn to by the declarant

before an officer authorized to administer oaths, such as a notary public.”  
*State v. Forest*, 125 Wn. App. 702, 706, 105 P.3d 1045 (2005) (*quoting*  
*Black’s Law Dictionary* 62 (8th ed. 2004)). “In the alternative,  
RCW 9A.72.085 contains a substitute for an affidavit: a party may submit  
an unsworn written statement that “[r]ecites that it is certified or declared  
by the person to be true under penalty of perjury.” *Id.* (alteration in  
original) (*quoting* RCW 9A.72.085(1)).

The trial court erred in failing to determine whether Mr. Reynolds’s third Motion to Modify or Correct Judgment and Sentence established grounds for appointment of counsel. Mr. Reynolds was entitled to appointed counsel on his motion because he properly alleged and supported his sentencing challenge. *See* CrR 7.8(c)(1). He argued he should have been sentenced based upon an offender score of zero. (CP 59). After stating this ground for relief, Mr. Reynolds included the “under penalty of perjury” language required by RCW 9A.72.085. (CP 60). He included further argument in support of his motion. (CP 61-65). Mr. Reynolds clearly requested counsel for purposes of his motion. (CP 66-67). Because the trial court did not decide Mr. Reynolds’s motion, the error in denying his request for counsel was not harmless. *Cf. Robinson*, 153 Wn.2d at 697-98 (holding that a denial of

counsel was harmless, where the appellate court reversed the denial of the defendant's motion under which he may have been entitled to counsel).

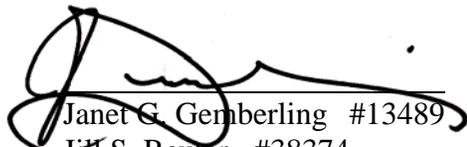
Accordingly, remand to the trial court for consideration of Mr. Reynolds's third Motion to Modify or Correct Judgment and Sentence should include directions to determine whether the motion establishes ground for appointment of counsel.

#### E. CONCLUSION

The trial court abused its discretion by failing to consider Mr. Reynolds's third Motion to Modify or Correct Judgment and Sentence, and it erred in not appointing counsel to Mr. Reynolds to assist him with this motion. The prosecutor committed misconduct by misrepresenting the grounds for Mr. Reynolds's motion to the trial court. This court should remand the case to the trial court to consider Mr. Reynolds's third Motion to Modify or Correct Judgment and Sentence, with appointed counsel for Mr. Reynolds.

Dated this 9th day of September, 2011.

GEMBERLING & DOORIS, P.S.



Janet G. Gemberling #13489  
Jill S. Reuter #38374  
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 29737-3-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
JESSE JAMES REYNOLDS,	)	
	)	
Appellant.	)	

---

I certify under penalty of perjury under the laws of the State of Washington that on September 9, 2011, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Andrew K. Miller  
prosecuting@co.benton.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on September 9, 2011, I mailed a copy of the Appellant's Brief in this matter to:

Jesse James Reynolds  
#340419  
Airway Heights Correction Center  
PO Box 2049  
Airway Heights, WA 99001

Signed at Spokane, Washington on September 9, 2011.

  
Janet G. Gemberling #13489  
Attorney for Appellant

# GEMBERLING DOORIS & LADICH

September 09, 2011 - 12:48 PM

## Transmittal Letter

Document Uploaded: 297373-ReynoldsOpenBr as filed.pdf

Case Name: Jesse J. Reynolds

Court of Appeals Case Number: 29737-3

Party Represented: Jesse J. Reynolds

Is This a Personal Restraint Petition?  Yes  No

Trial Court County: Benton - Superior Court # 10-1-00313-8

### Type of Document being Filed:

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_
- Response/Reply to Motion: \_\_\_\_
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- 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
- Other: \_\_\_\_\_

Proof of service is attached and an email service by agreement has been made to prosecuting@co.benton.wa.us.

Sender Name: Robert S Canwell - Email: [admin@gemberlingdooris.com](mailto:admin@gemberlingdooris.com)