

No. 30080-3 -III

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION III

FILED
July 09, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, Respondent

v.

DANA RUEL KLEIN, Appellant

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY

REPLY BRIEF

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TABLE OF CONTENTS

I. Issues on Reply1

II. Argument On Reply1

 A. Mr. Klein Properly Presented A Motion For
 Reconsideration Of The Court’s Earlier Ruling
 Denying An Evidentiary Hearing.

 1. Civil Rule 59 Does Not Apply
 To Criminal Cases.....1

 2. A Pro Se Complaint Must Be Held To
 A Less Stringent Standard Than A
 Formal Pleading Drafted By An
 Attorney.....2

 3. Mr. Klein Met The Threshold For An
 Evidentiary Hearing.4

 4. Mr. Klein Was Entitled To An Evidentiary
 Hearing On The Issue Of Whether The
 State Had Destroyed Or Released Potentially
 Exculpatory Evidence Without Giving Him
 Notice It Intended To Release or Destroy
 His Property.....5

 B. Under CrR 7.8 and *Smith*, Mr. Klein Retains The
 Option To Not Have His Motion Transferred
 As A Personal Restraint Petition.....7

III.	Conclusion	8
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TABLE OF AUTHORITIES

Washington Cases

<i>State v. Aguirre</i> , 73 Wn.App. 682, 871 P.2d 616, <i>rev. denied</i> , 124 Wn.2d 1028, 883 P.2d 326 (1994).....	4
<i>State v. Bebb</i> , 44 Wn. App 803, 806, 723 P.2d 512 (1986)	3
<i>State v. Keller</i> , 32 Wn. App. 135, 647 P.2d 35 (1982).....	1
<i>State v Smith</i> , 104 Wn.2d 497, 707 P.2d 1306 (1985).....	3
<i>State v. Smith</i> , 144 Wn. App. 860, 863, 184 P.3d 666 (2008).....	7
<i>Zimny v. Lovric</i> , 59 Wn. App. 737, 801 P.2d 259 (1990).....	2

U.S. Supreme Court Cases

<i>Erickson v. Pardus</i> , 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007).....	4
<i>Estelle v. Gamble</i> , 429 U.S. 97, 97 S.Ct. 285 (1976).....	3

Statutes

RCW 7.69.030(7).....	5
RCW 10.73.140	8
RCW 10.73.170(6).....	6
RCW 63.40.010	6

Rules

Civil Rule 59..... 1
Washington Rules of Appellate Procedure 1.2(a) 4

OTHER SOURCES

15A Wash. Prac. Handbook Civil Procedure § 65.1 (2011-2012
ed.)..... 2

I. ISSUES ON REPLY

- A. Mr. Klein Properly Presented A Motion for Reconsideration Of The Trial Court's Earlier Ruling.
- B. Under CrR 7.8 and *Smith*, Mr. Klein Maintains The Option Of Requesting The Trial Court To Not Transfer His Motion For Consideration As A Personal Restraint Petition.

II. ARGUMENT ON REPLY

- A. Mr. Klein Properly Presented A Motion For Reconsideration Of The Court's Earlier Ruling Denying An Evidentiary Hearing.

Mr. Klein stands on the argument and authority cited in appellant's opening brief, which is incorporated by reference.

- 1. Civil Rule 59 Does Not Apply To Criminal Cases.

In its response, the State has incorrectly cited CR 59 as authority barring Mr. Klein's motion for reconsideration at the Superior Court. (Brief of Respondent at 9). CR 59 does not apply to criminal cases, nor does it prohibit a party from submitting a motion to the trial court, requesting review of a decision. *State v. Keller*, 32 Wn. App. 135, 647 P.2d 35 (1982). Furthermore, even if it were applicable, "while the title of CR 59 adverts to motions for

new trial, reconsideration, and amendment of *judgments*, CR 59(a) (as amended in 2005) expressly recognizes that “any other decision or order may be vacated and reconsideration granted. Prior authority to the contrary, see, e.g., *Zimny v. Lovric*, 59 Wn. App. 737, 801 P.2d 259 (Div. 1 1990), should be deemed superseded by court rule.” 15A Wash. Prac. Handbook Civil Procedure § 65.1 (2011-2012 ed.). It is common practice in criminal trial courts for a party to submit a motion for reconsideration on a court ruling, providing the court with more facts and/or applicable law for redetermination of an issue.

In this case, the State argued against the initial motion and the court then denied it, in part because Mr. Klein incorrectly cited CrR 8.3 as a basis for the court to hold an evidentiary hearing. Further, the court held that although Mr. Klein had only recently discovered that the State had possession of his business records, it did not qualify as “newly discovered” evidence. (RP 25).

2. A Pro Se Complaint Must Be Held To A Less Stringent Standard Than A Formal Pleading Drafted By An Attorney.

In its response brief, the State has taken the position that Mr. Klein should not get a “second bite at the apple” by filing a motion

for reconsideration, citing to several cases regarding the standard to which a *pro se* litigant must be held. (Br. of Respondent at 11). The cases are easily distinguishable, as the cited cases reference the reviewability of issues on appeal.

In *Smith*, the concern was a *pro se* litigant attempting to raise an issue at the appellate court that was not reviewable. *State v Smith*, 104 Wn.2d 497, 507, 707 P.2d 1306 (1985). The Court held that a defendant proceeding *pro se* must comply with the applicable rules for reviewability. The issue in *Bebb* is similar to *Smith*. *State v. Bebb*, 44 Wn. App 803, 806, 723 P.2d 512 (1986). A *pro se* litigant sought to raise an issue for the first time on appeal after failing to object at trial. The Court there held neither counsel nor *pro se* defendant may remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time.

Here, assuming Mr. Klein's initial motion was wrongly based on a pre-conviction remedy, he corrected the motion for the court's reconsideration. Further, it is well-established that a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285 (1976); *Erickson*

v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081

(2007). This liberal view is also reiterated in the Washington Rules of Appellate Procedure 1.2(a):

“[t]hese rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands subject to the restrictions in rule 18.8(b).”

In the interest of justice, substance prevails over form.

3. Mr. Klein Met The Threshold For An Evidentiary Hearing.

In the motion for reconsideration, Mr. Klein properly based his motion on CrR 7.8, and supplied the court with information in the form of a Supplemental Declaration, and an accompanying Memorandum of Law. The clerk’s papers and documentation from the initial motion were incorporated.

The State argues Mr. Klein is not entitled to an evidentiary hearing based on CrR 7.8(b)(5), which grants relief under “any other reason justifying relief from the operation of the judgment.” (Br. of Respondent at 17). An extraordinary circumstance as contemplated under that subsection can relate to irregularities extraneous to the court’s action. *State v. Aguirre*, 73 Wn.App. 682, 688, 871 P.2d 616, *rev. denied*, 124 Wn.2d 1028,

883 P.2d 326 (1994). Here, the irregularity lies in events extraneous to the court's action: either the withholding of material exculpatory evidence or, a violation of Mr. Klein's due process rights if his attorney deprived him of his defense, that is, an alibi. While Mr. Klein was unable to produce affidavits from each potential witness, he did present other corroborative evidence that supports an evidentiary hearing. Outside of an evidentiary hearing, with witnesses under oath, Mr. Klein does not have the opportunity to build a record for review. Mr. Klein met the necessary threshold for an evidentiary hearing for a *Brady* violation, or a claim of ineffective assistance of counsel. (CP 79-84).

4. Mr. Klein Was Entitled To An Evidentiary Hearing On The Issue Of Whether The State Had Destroyed Or Released Potentially Exculpatory Evidence Without Giving Him Notice It Intended To Release or Destroy His Property.

In his motion for reconsideration, Mr. Klein outlined for the trial court the documentation of events that resulted in the records that were in his commercial truck either being destroyed or given to his ex-wife by law enforcement.

In its response, the State has relied on RCW 7.69.030(7) as a statutory basis for the release of Mr. Klein's items. However,

RCW 7.69.030(7) protects *victims, survivors of victims, and witnesses of crimes*; and requires that reasonable efforts be made to ensure that any stolen or other personal property be expeditiously returned by law enforcement or the superior court to those individuals, unless needed as evidence. Thus, it is inapplicable here.

The State has also cited to RCW 10.73.170(6) as authority for the premise “absent a specific order at sentencing, even admitted evidence has no specific retention time.” (Br. of Respondent at 8). RCW 10.73.170 is inapplicable, as it is a statute governing DNA testing requests by individuals convicted of a felony, currently serving a term of imprisonment. It is a guide for making a proper motion requesting DNA, and (7) specifically outlines:

“[A] sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved.”
RCW 10.73.70(7).

Mr. Klein contends that RCW 63.40.010 governs the release of his personal property. The statute specifically requires that when

property has been held as evidence in any court, “then, in that event, after sixty days from *when said case has been finally disposed of* and said property released as evidence by order of the court” the sheriff may dispose of it in enumerated ways. Here, a mandate has not issued in Mr. Klein’s case; the court did not order the property to be released. Further, Mr. Klein, himself, was never given notice that his property was to be released or destroyed, as shown by the documents he submitted with his motion.

B. Under CrR 7.8 and *Smith*, Mr. Klein Retains The Option To Not Have His Motion Transferred As A Personal Restraint Petition.

In the response brief, the State raises the issue for the first time that “[P]ursuant to CrR 7.8, the court was required to send Mr. Klein’s motion to the Court of Appeals and entry of an order denying the motion was error.” The State then urges this Court to remand with instructions to transfer the motion for consideration as a personal restraint petition. (Br. of Respondent at 21).

If a motion under CrR 7.8 is timely filed, 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” the superior court retains and hears the motion. Absent those

requirements, the motion is transferred as a personal restraint petition. *State v. Smith*, 144 Wn. App. 860, 863, 184 P.3d 666 (2008). Here, Mr. Klein's motion was timely filed, as there is no mandate issued in the original cause. Mr. Klein argues that resolution of his motion does require a factual hearing and the superior court should order an evidentiary hearing.

However, if this Court remands to the superior court with instructions to transfer the motion for consideration as a personal restraint petition, Mr. Klein is entitled to both notice and opportunity to object to the transfer. Such an action could infringe on his right to choose whether he wanted to pursue a personal restraint petition, subjecting him to the successive petition rule in RCW 10.73.140. *Smith*, 144 Wn. App. at 864.

III. CONCLUSION

Based on the foregoing facts and authorities, Mr. Klein renews his request for this Court to remand to the Superior Court, with instructions to conduct an evidentiary hearing.

Dated this 9th day of July 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Dana R. Klein, 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 July 9, 2012, to Dana R. Klein, DOC # 895508, Airway Heights Correctional Center, LB-47, PO Box 2049, Airway Heights, WA 99001-2049; and by email per agreement between the parties to Jessica M. Maxwell, Deputy Prosecuting Attorney, at: jessicaf@co.klickitat.wa.us.

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