

FILED
JUNE 7, 2013
Court of Appeals
Division III
State of Washington

No. 31271-2-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

JOSE ANTONIO MANAJARES,
Defendant/Appellant.

BRIEF OF RESPONDENT

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Chelan County Prosecuting Attorney

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I. FACTS

The defendant, Jose Manajares, pled guilty to two counts of unlawful imprisonment and signed a guilty plea statement on December 11, 2002. The defendant entered an Alford plea. (CP 3-9). Sentencing also took place on December 11, 2002. Mr. Manajares received a sentence of 41 days in the Chelan County Regional Jail. Mr. Manajares was also required to serve 12 months of community custody after his release from jail. (CP 10-19).

On or about November 15, 2012, through counsel, Mr. Manajares made a motion hearing to vacate his guilty plea. Mr. Manajares was not present at that hearing. The judge denied the defendant's motion in that he would not entertain a motion for relief without the defendant being present. (CP 140). Counsel for Mr. Manajares indicated at the time of the hearing that Mr. Manajares had been deported and was residing in Mexico. There is no indication that Mr. Manajares was deported on these charges, nor was there any indication as to when he was deported.

II. ISSUES AND ARGUMENT

A. THE SUPERIOR COURT CORRECTLY HELD THAT IT COULD NOT ENTERTAIN A MOTION TO VACATE WITHOUT MR. MANAJARES BEING PRESENT IN THE COURTROOM.

Counsel has continued to make an argument asking the court to make a decision as to whether the motion should be vacated. That is not the issue before the Court of Appeal in this matter. Superior Court Judge Small made one ruling in this case which indicated that he would not entertain a motion to vacate without the defendant being present.

Mr. Manajares felt that in 2002 he was unaware that he likely could be deported as a result of this conviction. In the statement of defendant on plea of guilty which was signed by Mr. Manajares (CP 3-9), in section I on page 4 of the statement it indicates that if the defendant is not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. On page 5 of the plea statement, the judge found that the

defendant's plea of guilt was knowingly, intelligently, and voluntarily made. The defendant understood the charges and consequences of the plea, and that there was a factual basis for the plea. The defendant was found guilty as charged. The plea statement was signed by Judge Bridges, the superior court judge at the time of the hearing.

Furthermore, on page 5 of the transcript included as Exhibit E to appellant's Memorandum of Authorities in Support of Motion to Vacate Guilty Plea (CP 20-117), the court indicated to Mr. Manajares that:

A plea of guilty to this count is grounds for deportation from the United States, Mr. Manajares, exclusion from admission to the United States and denial of naturalization. And if you plead guilty, you may not own, possess or have under your control a firearm until your right to do so is restored by a court of record. Do you understand all of that, sir?

THE DEFENDANT: (Through the interpreter)
Yes.

(CP 20-117, Exhibit E, p. 5, ln. 3-10).

With Mr. Manajares admitting he understood all of those things, he is clearly a witness in this matter and needs to be cross-examined. In order for that to be accomplished, Mr. Manajares' presence in court is necessary. He is clearly a witness who would

have to testify that he didn't understand any of what prior happened in court. Mr. Manajares' presence before the court is therefore necessary and his testimony to the issue that he didn't understand what the judge told him or what his attorney told him would certainly be a necessary part of the hearing. Rule 7.8 is silent as to the necessity of having the defendant present. However, a judge should have the ability to require a defendant's presence if they wish. Judge Small felt it necessary to have Mr. Manajares at the hearing.

B. PORTIONS OF APPELLANT'S BRIEF WERE NOT MADE PART OF THE RECORD AND SHOULD BE STRICKEN.

Portions of the brief of appellant should also be stricken as the appellant's motion to supplement with the second affidavit of David S. DeLong has been denied in a Commissioner's Ruling entered May 15, 2013. Counsel's brief includes Mr. DeLong's affidavit, as well as an affidavit of an immigration attorney, Michael Grim, which are not evidence in this case and should be stricken. A hearing was attempted to be held by the appellant and he was not able to present any of this information to the court. None of

that was made part of the record before the court and self-serving affidavits from either David DeLong or Michael Grim are not part of this record for appeal and should be stricken. Although, it is understood affidavits can be used to support a motion, these affidavits are not part of the record and should not be before the appellate court.

Appellant also appears to be relying upon these affidavits as a legal basis to allow the court to make a decision in the appeal. It is not an appropriate remedy to supplement affidavits as legal authority. Therefore, any mention to any affidavits of Mr. DeLong and Mr. Grim in this regard should be stricken.

In fact, the court has found, as cited by appellant, for allegations based on matters existing outside the record that the petitioner must demonstrate that he has competent, admissible evidence to establish the facts which entitle him the relief. In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Furthermore, in Personal Restraint of Pirtle, 136 Wn.2d 467, 965 P.2d 593 (1998), the court found that hearsay evidence presented to an appellate court in support of a personal restraint petition may not be considered by the court ruling on the motion. A claim that is raised in a personal restraint petition will not be sustained unless it is

substantiated by competent evidence in the record. Again, presenting only testimony from self-serving affidavits and the State's position of not being able to cross-examine the number one complaining witness, the defendant, the court made a finding that it would not entertain the motion until the defendant were able to appear in court so that the court can hear from him what he knew and what he didn't know.

C. THE APPELLANT'S PETITION FOR RELIEF IS UNTIMELY AND SHOULD BE TIME-BARRED.

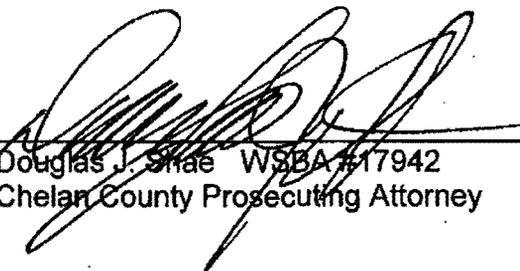
In addition, this appeal is not timely having been filed approximately 10 years after conviction. Thus, it should be time-barred. RCW 10.73.100 indicates that petitions filed after one year after the judgment and sentence has become final are time-barred unless the judgment and sentence is facially invalid or was entered without competent jurisdiction. In re Personal Restraint of McKiearnan, 165 Wn.2d 777, 203 P.3d 375 (2009). The appellant's petition for relief is untimely. The motion must be made within a reasonable time. CrR 7.8(b). The petition must therefore be dismissed.

III. CONCLUSION

The affidavits presented in this case by appellant are not legal authority and should be stricken from his brief. The court simply could not make a decision based upon anything in the affidavits without the defendant being present. The court did not indicate that it would not consider the petition to vacate if it were filed again. But without the defendant being present to determine what information he had at the time of his plea and to allow the State an opportunity to cross-examine as to what he did know and did say on the record, the court made a determination that this motion could not proceed. This petition is also time-barred and, therefore, the appeal should be denied.

DATED this 7th day of June, 2013.

Respectfully submitted,



Douglas J. Shae WSBA #17942
Chelan County Prosecuting Attorney

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DIVISION III

STATE OF WASHINGTON,
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JOSE ANTONIO MANAJARES,
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)
) No. 31271-2-III
) Superior Court No. 02-1-00593-5
)
)
) DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 7th day of June, 2013, I electronically transmitted to:

Renee S. Townsley
Clerk/Administrator
Court of Appeals, Div. III
500 N. Cedar Street
Spokane, WA 99201

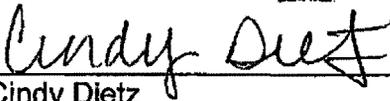
AND deposited in the United States Mail properly stamped and addressed envelopes directed to:

Brent A. De Young
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837

Jose Manajares
Glenda Pineda Valladares
El Tule
Municipio Tomatlan
Jalisco, Mexico
C.P. 98465

1 said electronic transmission and envelopes containing true and correct copies of
2 Response to Personal Restraint Petition.

3 Signed at Wenatchee, Washington, this 7th day of June, 2013.

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5 _____
6 Cindy Dietz
7 Legal Administrative Supervisor
8 Chelan County Prosecuting Attorney's Office
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