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January 30, 2015  
Court of Appeals  
Division III  
State of Washington  
NO. 32016-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

JOHN JOHNSON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITTITAS COUNTY

The Honorable Scott R. Parks, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in considering the merits and in denying appellant's motion for relief from judgment. CP 68-71.

2. The trial court erred in inviting and considering ex parte communication from the prosecutor in appellant's absence.

Issues Related to Assignments of Error

1. Where the trial court failed to follow the clear terms of CrR 7.8(c), is reversal and remand required?

2. Where the trial court invited and considered ex parte communication from the prosecutor, should this Court reverse and remand this case for consideration by a different judge?

B. STATEMENT OF THE CASE

On February 12, 2002, the Kittitas County prosecutor charged appellant John Johnson with second degree intentional murder while armed with a deadly weapon. CP 3-4. On September 20, 2002, the state amended the information to charge second degree felony murder, based on second degree assault, as an alternative. CP 5-6, 48-52.

Johnson was convicted of second degree murder by verdict dated February 10, 2003. CP 10. The court entered judgment and

imposed a 220-month sentence on February 24, 2003. The court also ordered 24-48 months of community custody. CP 11-22.

Johnson appealed. By opinion dated May 19, 2005, this Court affirmed the conviction. See State v. Johnson, No. 21861-9-III, noted at 127 Wn. App. 1033 (May 19, 2005). The mandate issued February 7, 2006.<sup>1</sup>

Johnson filed a personal restraint petition (PRP) on April 14, 2006. After remand for a reference hearing, this Court dismissed the PRP by order dated July 7, 2007. The certificate of finality was issued April 14, 2008. Supp. CP \_\_ (sub no. 145).

On May 3, 2011, Johnson filed a PRP raising a claim of newly discovered evidence. This court dismissed the PRP by order dated February 2, 2012, and the certificate of finality was issued September 20, 2012. Supp. CP \_\_ (sub no. 195).

On July 15, 2013, Johnson filed a motion for relief from judgment under CrR 7.8, which has led to this appeal. The motion raised four main claims. CP 25-42.

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<sup>1</sup> Many of the background facts stated herein are not subject to reasonable dispute and can be confirmed by a review of ACORDS computer records.

First, Johnson argued he was charged and arraigned under an amended information alleging second degree felony murder based on second degree assault. The judgment and sentence found him guilty of second degree felony murder, citing RCW 9A.32.050(1)(b). Because the Supreme Court concluded this is a nonexistent offense, Johnson argued the judgment is facially invalid. CP 25-26, 36-37, 48-54 (citing, inter alia, In re Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002); In re Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004)).

Second, Johnson argued he was denied of his right to a public trial and the open administration of justice when the judge held an in-chambers, off-the-record investigation and factfinding hearing to consider potential juror misconduct when two jurors were asked about the case by another juror's spouse. CP 26-28, 33-35, 46-47 (citing, inter alia, U.S. Const. Amend. VI; Const. art. 1, §§ 10, 22; Presley v. Georgia, 558 U.S. 209, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010); In re Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012); State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012); State v. Bone-Club, 128 Wn.2d 254, 258-59 (1995)).

Third, Johnson argued a juror was improperly seated because he was not a resident of Kittitas County and should have been

disqualified. CP 28, 37-38, 64-65 (citing, inter alia, Const. Art. 1, § 22; RCW 2.36.070; State v. Tingdale, 117 Wn.2d 595, 817 P.2d 850 (1991), and City of Bothell v. Barnhart, 156 Wn. App. 531, 234 P.3d 264 (2010), aff'd, 172 Wn.2d 223, 257 P.3d 648 (2011)). Because of this error, the judgment was void and relief from judgment, or at least a factual hearing, was necessary to properly resolve the issue. CP 38 (citing, inter alia, In re Scott, 173 Wn.2d 911, 917, 271 P.3d 218 (2012); State v. Smith, 144 Wash. App. 860, 863, 184 P.3d 666 (2008)).

Johnson's fourth claim argued that the sentence was void. The trial court initially imposed a 220-month prison term, followed by a variable 24- to 48-month term of community custody. As a result of 2009 amendments to RCW 9.94A.701, Johnson asserted that the Department of Corrections (DOC) had modified the trial court's initial sentence to reflect a determinate 36-month period of community custody. Johnson argued the sentence exceeded the standard range and the sentencing court's authority, and was therefore void. CP 28-29, 38-42, 54-63 (citing, inter alia, State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012); State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011); and U.S. Const. Amend. VI; Blakely v. Washington, 542 U.S. 296, 313-14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); State v.

Winborne, 167 Wn. App. 320, 329, 273 P.3d 454, rev. denied, 174 Wn.2d 1019 (2012); State v. Chouap, 170 Wash. App. 114, 285 P.3d 138 (2012)). In addition, DOC lacked authority to modify the original sentence. CP 39 (citing Dress v. Washington State Dep't of Corr., 168 Wn. App. 319, 325-36, 328, 279 P.3d 875 (2012)). Because significant changes in the law had occurred, and because Johnson had shown the sentence was void and facially invalid, the court should remand for resentencing within the proper standard range. CP 42.

Johnson also argued that the motion was timely because the judgment was facially invalid and void, that there had been intervening changes in the law, and that his sentence had been altered to a determinate sentence outside the lawful range. Johnson also had continually asserted his innocence, so these errors represented fundamental miscarriages of justice. CP 43-44 (citing substantial authority).

Johnson properly noted the motion for hearing on August 5, 2013, and properly served a copy on the state. Supp. CP \_\_\_ (sub no. 197, Notice of Hearing), (sub no. 199, Declaration of Service). Johnson also conditionally waived his personal appearance, stating that he remained in custody and was willing to waive his right to be present if the court limited its consideration to written pleadings

without oral argument or ex parte input from the state. In the alternative, Johnson sought to be present for the hearing and requested the appointment of counsel. Supp. CP \_\_\_ (sub no. 200, Conditional Waiver of Appearance).

The state sought and the court granted a continuance to August 19, 2013. Supp. CP \_\_\_ (sub no. 202, Motion and Affidavit; sub no. 203, Order of Continuance).

On August 19, 2013, the prosecutor appeared, but Johnson had not been transported for the hearing. She asserted that Johnson had previously appealed and filed PRPs. She said the state “completely objects” to Johnson’s motion, asserting there were procedural and substantive arguments the state “definitely wanted to respond to.” The prosecutor objected to Johnson’s request to decide the matter on the merits of filed pleadings without oral argument or ex parte input from the state. RP 2.

The court then stated “I’m just going to deny the motion. Prepare an order.” RP 2. The court also denied Johnson’s request for a transport order, stating “I’m not going to bring him here.” RP 2. “Prepare an order dismissing or denying all his requests.” RP 2-3.

The state did not timely prepare a written order. Johnson then contacted the trial court, and on October 16, 2013, filed a notice of

appeal. The written order denying Johnson's motion was finally filed December 2, 2013, and this Court then appointed counsel and set a perfection schedule for the appeal. CP 68-71.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY FAILING TO FOLLOW CrR 7.8(c) AND BY DENYING JOHNSON'S MOTION.

CrR 7.8(b) allows a party to seek relief from criminal judgment in a variety of circumstances. State v. Hall, 162 Wn.2d 901, 905, 177 P.3d 680 (2008). Subsection (c) governs the procedure for considering such motions. State v. Smith, 144 Wn. App. at 863. In 2007 the rule was amended to read:

**(c) Procedure on Vacation of Judgment.**

(1) *Motion*. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) *Transfer to Court of Appeals*. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not 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.

(3) *Order to Show Cause*. If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing

the adverse party to appear and show cause why the relief asked for should not be granted.

CrR 7.8 (emphasis added).

At the hearing, the prosecutor asserted that the state objected to the motion for substantive and procedural reasons. RP 2. But because the trial court abruptly and prematurely ruled on the motion, the state never offered those reasons.

The court's late-entered written order denying the motion does not illuminate any reasons for the court's decision, but states only "the defendant's motion is denied." CP 68. Although the court attached the transcript from the August 19 hearing to the order, the transcript is similarly opaque; the court tersely directed the prosecutor to "prepare an order dismissing all or denying a [sic] his requests." CP 70.<sup>2</sup>

In short, the court did not state whether the court found the motion to be timely, or instead barred by RCW 10.73.090 as untimely. The court offered no discussion as to any procedural or substantive reason for denying the motion.

Although the basis for the trial court's action is not clear, it is clear that the court erred in denying the motion. "It is the court's

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<sup>2</sup> The transcript filed with this appeal slightly modifies that oral statement: "[p]repare an order dismissing or denying all his requests." RP 2-3.

function . . . to decide whether a collateral challenge is timely. If the challenge is untimely, the court shall transfer it to the Court of Appeals.” State v. Flaherty, 177 Wn.2d 90, 93, 296 P.3d 904, 906 (2013). Unless the court first determined that the motion was timely, and either (1) Johnson “made a substantial showing” he is entitled to relief, or (2) “resolution of the motion will require a factual hearing,” the court was obligated to transfer the motion to this Court for consideration as a PRP. CrR 7.8(c); Smith, 144 Wn. App. at 863. The superior court can no longer dismiss a CrR 7.8 motion as clearly lacking merit. Smith, at 863.

The trial court’s ruling may be unclear, but the error is clear. This Court should remand the matter to the trial court for a proper determination under CrR 7.8(c)(2). Flaherty, 177 Wn.2d at 93; Smith, 144 Wn. App. at 863-64.

2. THE TRIAL COURT ERRED IN CONSIDERING EX PARTE COMMUNICATIONS WITHOUT PROVIDING JOHNSON NOTICE OR OPPORTUNITY TO BE HEARD.

The trial court also erred in considering the prosecutor’s oral remarks in Johnson’s absence. Article I, section 22 of the Washington State Constitution states that “[i]n criminal prosecutions the accused shall have the right to appear and defend in person.”

Washington courts have recognized that a defendant's right to “appear and defend” in person under the Washington State Constitution may be broader than the federal due process right to be present. State v. Irby, 170 Wn.2d 874, 885 n.6, 246 P.3d 796 (2011); State v. Jones, 175 Wn. App. 87, 107, 303 P.3d 1084 (2013). The Washington State Constitution’s right to appear and defend in person applies “at any time during trial that a defendant's substantial rights may be affected.” Jones, 175 Wn. App. at 107, 303 P.3d 1084; see also, State v. Fehr, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2015 WL 263640, at \*4 (No. 44643-0-II, Jan. 21, 2015).

The trial court asked the prosecutor questions and the prosecutor offered substantial oral answers and objections to Johnson’s motion. RP 2. Because this occurred outside of Johnson’s presence, these oral remarks were improper ex parte communications. Black’s Law Dictionary 1221 (7<sup>th</sup> Ed. 1999) (“ex parte proceeding” is “[a] proceeding in which not all parties are present or given the opportunity to be heard”); State v. Watson, 155 Wn.2d 574, 579, 122 P.3d 903 (2005).<sup>3</sup>

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<sup>3</sup> Watson provides several definitions of ex parte communications, including: “[a] communication between counsel and the court when opposing counsel is not present,” and “communications made by or to

Johnson had the right to due process of law. Const. art. 1, § 3; U.S. Const. amends. 5, 14. An unbiased judge and the appearance of fairness are hallmarks of due process. In re Murchison, 349 U.S. 133, 99 L. Ed. 942, 55 S. Ct. 623 (1955); Ward v. Village of Monroeville, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972); State v. Cozza, 71 Wn. App. 252, 255, 858 P.2d 270 (1993).

“The right to a fair hearing under the federal due process clause prohibits actual bias and the probability of unfairness.” State v. Chamberlin, 161 Wn.2d 30, 38, 162 P.3d 389 (2007) (quoting Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) and In re Murchison, 349 U.S. at 136). The appearance of fairness doctrine seeks to prevent “the evil of a biased or potentially interested judge or quasi-judicial decisionmaker.” State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). The appearance of fairness doctrine not only requires the judge to be impartial but “it also requires that the judge appear to be impartial.” Post, at 618 (quoting State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)).

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a judge, during a proceeding, regarding that proceeding, without notice to a party.” Watson, at 579-80.

The Code of Judicial Conduct prohibits judges from ex parte contacts with lawyers for one party.<sup>4</sup> Ex parte communications are

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<sup>4</sup> Revised in 2011, the rule prohibiting ex parte communications now provides:

Rule 2.9. Ex Parte Communications.

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending\* or impending matter,\* before that judge's court except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, or ex parte communication pursuant to a written policy or rule for a mental health court, drug court, or other therapeutic court, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge affords the parties a reasonable opportunity to object and respond to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying

communications to or from a judge “[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested.” State v. Watson, 155 Wn.2d at 579 (quoting Black's Law Dictionary 616 (8th ed.2004)).

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out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law\* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

CJC 2.9.

Johnson filed his motion well before the hearing date. The state sought more time to file a response to the motion, and the court granted a continuance. The state nonetheless filed no pleading, and instead offered oral objections at a one-sided hearing to which Johnson had not been transported and was not present. The court's consideration of the state's remarks and denial of Johnson's motion was erroneous.

The proper remedy for the court's improper consideration of the prosecution's ex parte remarks is remand for a hearing before a different judge. "Judges must disqualify themselves from hearing a case if they are actually biased against a party or if their impartiality may reasonably be questioned." Skagit County v. Waldal, 163 Wn. App. 284, 289, 261 P.3d 164 (2011) (citing In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056, rev. denied, 167 Wn.2d 1002 (2009)); accord, State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996) (quoted in Chamberlin, 161 Wn.2d at 393). Washington courts have recognized that a judge's acceptance of ex parte information requires recusal. In re Disciplinary Proceeding Against Sanders, 159 Wn.2d 517, 524, 145 P.3d 1208 (2006) (where a reasonable person would question a judge's impartiality following consideration of ex parte information, recusal was required); Sherman

v. State, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995) (recusal required where court received ex parte communications; Supreme Court remanded for new proceeding before different judge); Romano, 34 Wn. App. at 569-70 (court's ex parte inquiry "clouded the proceeding" requiring remand to a different judge). The trial court not only considered the prosecutor's ex parte communication, but acted on it and denied the motion without transporting Johnson to the hearing.

The proper remedy for this error is to set aside the order and remand for consideration by a different judge.

D. CONCLUSION

This Court should reverse the trial court's denial of the motion for relief from judgment and remand for consideration by a different judge.

DATED this 30<sup>th</sup> day of January, 2015.

Respectfully Submitted,

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