

FILED
April 28, 2015
Court of Appeals
Division III
State of Washington

No. 32016-2-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOHN E. JOHNSON,

Defendant/Appellant

Respondent's Brief

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RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

- 1. The trial court did fail to follow CrR 7.8(c) and the court will need to transfer the motion to the Court of Appeals for consideration as a Personal Restraint Petition.**

- 2. The trial court did not err by considering ex parte communications in this situation where the defendant requested what amounted to an ex parte decision, waiving his own presence, but asking for a decision from the Court “without any ex parte argument or input from the Plaintiff” and all the Plaintiff did was object to anything being done ex parte and offer up an order to transport the Defendant.**

I. STATEMENT OF FACT

On February 12, 2002, John Johnson was charged with Murder in the Second Degree. (CP 3-4) On February 10, 2003, he was convicted of that charge. (CP 10) A Judgment and Sentence was entered on February 24, 2003. (CP 11-22) As defendant indicates in his brief, the Court affirmed his conviction and a mandate was issued February 7, 2006. (See Brief of Appellant p. 2 and the Court of Appeals file No. 21861-9-III)

Mr. Johnson filed a personal restraint petition on April 14, 2006. It was eventually dismissed July 7, 2007, with a Certificate of Finality issued April 15, 2008. (CP 72-81)

Mr. Johnson filed a second personal restraint petition on May 3, 2011, and it was dismissed by order dated February 2, 2012, with a certificate of finality issued September 20, 2012. (CP 82-86)

Mr. Johnson filed a CrR 7.8 motion on July 15, 2013. (CP 24) In this motion, he arbitrarily chose August 5 as a date for hearing. He also filed a "Defendant's Conditional Waiver of Appearance" in which he waived his right to

appear in person, said that he wanted it to be without oral argument, and indicated he wanted no ex parte argument and no input from the Plaintiff. (CP 88-89) The prosecutor (and current respondent) had a previously long-scheduled two week vacation, which August 5 fell within, and was trying hard to get cases taken care of before leaving. (CP 90-91) The Prosecutor wanted to file a response and move the hearing and on July 29 requested 30 days to accommodate both the actual vacation, and time to properly respond and argue. (CP 91) The court did not grant the 30 days but set an argument for August 19, 2013. (CP 92)

On August 19, the State appeared and indicated that the prosecutor had a chance since getting back to look at the defendant's motion and that the State did want to respond to it. (RP 1) Since the Defendant had not been transported, the State DID NOT argue the case, but read to the Court from Defendant's motion that the Defendant wanted the hearing without oral argument. (RP 1-2) The State objected to this, indicated the State had procedural and substantive objections, and specifically voiced an objection to the Defendant's wanting the court to consider the motion without input from the plaintiff. (RP 2). The Court summarily decided to deny the motion, but the State tried to suggest the court transport the defendant to have a hearing that would involve both sides. The State specifically

said, “If you want, I have a transport order to bring him here.” (RP 2) The Court rejected that idea and orally denied the requests. (RP 2) The State did not immediately prepare a written order, but, after Mr. Johnson contacted the court, and after obtaining a transcript of the hearing, the State filed one. (CP 68-71)

ARGUMENT

- 1. The trial court did fail to follow CrR 7.8(c) and the court will need to transfer the motion to the Court of Appeals for consideration as a Personal Restraint Petition.**

According to CrR 7.8 (c), :

“(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.” (CrR 7.8 (c))

In previous days, the Superior Court could dismiss a CrR 7.8 motion if it did not establish grounds for relief or if it was untimely. However this rule, amended in 2007, now takes that authority away from the Superior Court and directs the court to transfer the case to the Court of Appeals, unless a few particular circumstances exist. *State v. Smith 144 Wn. App. 860 (2008)*. In fact, this result is reached even if the defendant’s motion is clearly untimely. *State v. Flaherty, 177 Wn.2d 90 (2013)*.

It is clear that the Court did not engage in the specific direction of the CrR 7.8 requirements. The Court did not determine whether the motion was time barred. It is the State’s position that the motion would indeed be barred by RCW 10.73.090. That statute indicates:

“(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.”

The Court of Appeals has previously found that the judgment is valid on its face, and the jurisdiction is not challenged. (CP 84) In 2013, this collateral attack on the judgment and sentence is well over a year from the mandate on February 7, 2006, and over a year from the Certificate of Finality issued April 15, 2008. Thus, the State believes it is untimely, and the Superior Court needs to be able to consider the timeliness.

The State also contends that the defendant has not made a substantial showing that he is entitled to relief or that resolution of the motion will require a factual hearing. The State also wishes to have the opportunity, in whatever court ends up taking the procedural and/or substantive case, to respond to the allegations in both written argument and oral argument, in opposition to the Defendant's motion before the trial court that the State not be allowed to provide input.

- 2. The trial court did not err by considering ex parte communications in this situation where the defendant requested**

what amounted to an ex parte decision, waiving his own presence, but asking for a decision from the Court “without any ex parte argument or input from the Plaintiff” and all the Plaintiff did was object to anything being done ex parte and offer up an order to transport the Defendant.

In the hearing on August 19, no specific arguments were advanced by the Prosecutor, since Mr. Johnson was not present. (RP 1-2) The prosecutor instead, merely referred to Mr. Johnson’s motion, indicated that the State would want to respond and that the State specifically objected to Mr. Johnson’s request that his motion be based on the merits of his filing, “without oral argument and without any ex parte argument or input from the plaintiff, meaning me. I totally object to that.” (RP 2)

The judge indicated he was just going to deny the motion. The State then suggested the court bring the defendant there so that both sides could argue, saying, “Otherwise issue order for transport to deliver the defendant here and Defendant’s person. If you want, I have a transport order to bring him here.” (RP 2)

It is clear that the trial court did not, as claimed in defendant/appellant's brief, actually consider the prosecutor's oral remarks in Mr. Johnson's absence. The prosecutor did not at that time actually ask for the motion to be denied. The prosecutor objected to the defendant's proposed procedure and said the State wanted to respond. It is ironic that the defendant asked specifically in his waiver of appearance that, "Defendant noted the action for hearing without oral argument and offers the Court the option of adjudicating the Motion for Relief from Judgment and Sentence based on the merits of the filings, without oral argument, and without any ex parte argument **or input from the Plaintiff...**" (CP 89, emphasis added), and now claims that the State's objection to that and proffer of a transport order was a substantive ex parte contact. In fact, the defendant, Johnson, himself, suggested the alternative of getting a transport order for the Defendant, which is exactly what the prosecutor offered to the court. Under this circumstance, where the Defendant wanted the Court to decide his argument without input from the State, or in the alternative to transport him, and where the State indicated that the State opposed the motion, objected to not being allowed input and offered a transport order, the State was obviously trying NOT to have any meaningful ex parte arguments, and was trying to get Mr. Johnson there. (See

RP 1-2) Absolutely no substantive argument was made.

As appellant indicates, on July 29, the State sought more time to file a response to the motion, indicating that it needed 30 days from then because the date fell while the prosecutor was going to be gone, and because of the length of the upcoming annual leave and press of cases having to be attended before that time, as well as the numerous issues and age of the file. (CP 90-91) But the court did not give the prosecutor thirty days, and instead set it right after the prosecutor's return. (CP 92) When the prosecutor returned, the prosecutor told the court, "I had a chance to look at it after I came back from vacation and I was able to determine that this is something that I definitely want to respond to." (RP 1) Considering the voluminous nature of the filing (CP 24-65), the myriad of issues, and the procedural status of the case (See Brief of Appellant and CP 24-65 for the many issues raised) it was not unreasonable that the State hadn't been able to properly respond, but wanted to be able to respond, wanted to object to having, under Mr. Johnson's scheme, no opportunity to give input, and wanted to bring Mr. Johnson back to the county so that both parties had time to carefully consider

the matter and respond.¹

The Court, perhaps in the interests of moving things along, had not previously given the State the requested time to respond, and then at the scheduled hearing, rather than transport the defendant, which would give everyone more time, simply denied the motion. However the Court did not hear any substantive argument at all and should not be automatically required to recuse itself from the simple inquiry required by CrR 7.8 (c). No substantive ex parte communication was made. No appearance of fairness such as that in *Sherman v. State*, 128 Wn.2d 164 (1995) existed in this case. The court spent no extra time looking at the facts, either ex parte or otherwise.

¹ The Appellant's raising an issue of the State's failure to file a written response to the defendant's motion, (see brief p. 14) is hardly reasonable, considering the fact that the State requested 30 days, but was going to be gone at least 14 of those days, that the State was not given 30 days, and that both Appellant and Respondent needed more than 30 days for these present briefs that do not discuss Mr. Johnson's numerous issues. The State indicated it wanted to respond fully (RP 1)

CONCLUSION

Since the Court neglected to follow the procedure of CrR 7.8 in determining whether the motion should be transferred to the Court of Appeals as a personal restraint petition, this case should be remanded for the Superior Court to make that determination and subsequently that transfer.

Since the Court did not listen to any substantive ex parte communication, but merely to the State's objection to the Defendant's proposed procedure and to notice of the State's desire to respond, the Court should not be forced to recuse itself from the CrR 7.8 duties.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "L. Candace Hooper".

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