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JANUARY 18, 2017  
Court of Appeals  
Division III  
State of Washington

NO. 34413-4-III

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

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THE STATE OF WASHINGTON

Respondent

v.

BRITTON MICHAEL HANSON

Petitioner/Appellant

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BRIEF OF RESPONDENT

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## I. APPELLANT'S ASSIGNMENTS OF ERROR

- A. MR. HANSON WAS DENIED HIS SIXTH AMENDMENT AND ARTICLE I RIGHT TO COUNSEL WHEN HIS APPOINTED ATTORNEY FILED AN *ANDERS* BRIEF IN SUPPORT OF HIS OWN MOTION TO WITHDRAW AS COUNSEL AND ADVOCATED AGAINST MR. HANSON'S CALL FOR RELIEF AT A CRITICAL STAGE IN THESE CRIMINAL PROCEEDINGS.
- B. THE TRIAL COURT ERRED IN GRANTING APPOINTED COUNSEL'S MOTION TO WITHDRAW AND THEN DENYING APPELLANT'S REQUEST TO APPOINT NEW COUNSEL TO ASSIST IN HIM PRESENTING HIS CLAIMS FOR RELIEF.

## II. ISSUES PRESENTED

- A. WAS MR. HANSON'S RIGHT TO COUNSEL IMPACTED GIVEN WHAT OCCURRED AT THE CRR 7.8 MOTION?
  - 1. IS A POST-JUDGMENT CrR 7.8 MOTION A CRITICAL STAGE IN A CASE ENTITLING A DEFENDANT TO REPRESENTATION BY COUNSEL?
  - 2. WERE THE ACTIONS OF MR. HANSON'S ATTORNEY AT THE CrR 7.8 HEARING APPROPRIATE?
- B. DID THE TRIAL COURT ERR WHEN IT GRANTED APPOINTED COUNSEL'S MOTION TO WITHDRAW AND DENIED THE APPELLANT'S REQUEST TO APPOINT NEW COUNSEL?

### III. STATEMENT OF THE CASE

On October 17, 2013 the Appellant, Mr. Hanson, was charged with the offenses of Attempted Murder in the First Degree with a Firearm Enhancement, Assault in the Second Degree with a Firearm Enhancement, and Unlawful Possession of a Firearm in the Second Degree. *See* CP 1. On March 4, 2014, an amended information was filed which added additional counts of Unlawful Possession of a Firearm in the Second Degree, one count of Leading Organized Crime, and one count of Felony Harassment – Threats to Kill. *See* CP 23.

Mr. Hanson was represented by attorney Christian Phelps during the pre-trial phase of this matter. On November 19, 2014 Mr. Hanson pleaded guilty to an amended information which charged the offenses of Leading Organized Crime – Inciting Criminal Profiteering, Assault in the Second Degree, and one count of Unlawful Possession of a Firearm in the Second Degree. *See* CP 51. At the time of the plea Mr. Hanson reviewed and signed a Plea Agreement and Statement of Defendant on Plea of Guilty. *See* CP 52 and 53. In addition to executing these written documents the court engaged in an extensive colloquy with Mr. Hanson at the time the pleas were accepted. RP 11/19/14 9 – 13. Mr. Hanson was sentenced to 75 months in prison. *See* CP 54.

On December 18, 2014 Mr. Hanson filed a Notice of Appeal but that matter was dismissed by the Court of Appeals. *See* CP 58 and 59.

On June 24, 2015 Mr. Hanson filed a pro se Motion to Withdraw Guilty Plea pursuant to CrR 7.8. In this motion Mr. Hanson alleged the following errors:

1. His offender score was not accurately calculated,
2. Trial counsel was ineffective and mislead him at the time the plea was entered,
3. That the plea was not made knowingly, intelligently, and voluntarily, and
4. He was improperly sentenced to 75 months when the paperwork indicated that the standard range for his offense was 55 to 57 months.

*See CP* at 61

With respect to the issues that he raised in his CrR 7.8 motion Mr. Hanson only provided a self-serving declaration. *See id.* He did not provide any additional information that corroborated his claims.

On February 2, 2016 the trial court appointed Dennis Morgan to represent the appellant for the purposes of a CrR 7.8 motion. Mr. Morgan reviewed Mr. Hanson's motion and the reasons he provided for why his pleas should be vacated. *See RP 4/5/16* at 26 – 27. After his review of

Mr. Hanson's claims, and conducting legal research into the issues, Mr. Morgan concluded that the only issue with merit that Mr. Hanson had raised related to scrivener's error in his judgment and sentence. *Id.*

On April 8, 2016 Mr. Morgan filed an *Anders* brief in the trial court. *See* CP at 80. Mr. Morgan set forth Mr. Hanson's claims in his brief as well as the relevant case law. *Id.*

On April 26, 2016 the court conducted a hearing with respect to the CrR 7.8 motion. RP 4/26/16. Mr. Morgan requested that the court review the reasons that Mr. Hanson had set forth and "...independently determine whether or not there's any basis." RP 4/26/16 at 33. The trial court heard from Mr. Morgan, the State, and Mr. Hanson. *See* generally RP 4/26/16. The court reviewed the materials which had been filed. *Id.* The court ultimately concluded that Mr. Hanson's claims did not have merit and denied his CrR 7.8 motion. *Id.* The court did agree that the Judgment and Sentence contained a scrivener's error and agreed that the proper remedy was to enter an order which corrected that error. *Id.* On May 9, 2016 two orders were filed. CP 89 and 90. One order denied Mr. Hanson's CrR 7.8 motion. CP 90. The other corrected the scrivener's error which Mr. Morgan had identified during his review of the case. CP 89.

#### IV. ARGUMENT

##### A. MR. HANSON'S RIGHT TO COUNSEL WAS NOT IMPACTED GIVEN WHAT OCCURRED AT THE CrR 7.8 MOTION.

##### 1. A POST-JUDGMENT CrR 7.8 MOTION IS NOT A CRITICAL STAGE IN A CASE ENTITLING A DEFENDANT TO REPRESENTATION BY COUNSEL.

Mr. Hanson was not denied effective assistance of counsel by Mr. Morgan at the CrR 7.8 hearing. A CrR 7.8 motion is not a critical stage of a proceeding at which a defendant is entitled to counsel.

The court of appeals reviews a claim of ineffective assistance of counsel de novo. *State v. White*, 80 Wash.App. 406, 410, 907 P.2d 310 (1995). The right to counsel is constitutionally guaranteed at all critical stages of a criminal prosecution. U.S. Const. Amend. VI; Wash. Const. art. 1, sec. 22; CrR 3.1(b)(2); *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). Denial of counsel during a critical stage of the proceedings is presumptively prejudicial. *United States v. Cronin*, 466 U.S. 648, 659, 104 S.Ct. 2039 (1984). It is well established, that there is no constitutional right to counsel in a post-conviction proceeding other than the first direct appeal as of right. *State v. Winston*, 105 Wn.App. 318, 321, 19 P.3d 495 (2001); *State v. Forest*, 125 Wn.App. 702, 708, 105 P.3d 1045 (2005).

The appellant cites to *State v. Chavez* and *State v. Davis* for the proposition that at CrR 7.8 motion is a critical stage of a criminal proceeding at which a defendant is entitled to counsel. Mr. Hanson's reliance on these two opinions is misplaced as both of those opinions addressed situations in which a defendant challenged the effectiveness of counsel's representation with respect to a CrR 4.2(f) motion. See generally *State v. Chavez*, 162 Wash.App. 432, 257 P.3d 1114 (2011), see also *State v. Davis*, 125 Wash. App. 59, 104 P.3d 11 (2005).

In *Chavez* a defendant entered a plea of guilty but was not immediately sentenced. See *State v. Chavez*, 125 Wash. App. At 435. The defendant attempted to have his plea set aside pursuant to a CrR 4.2(f) motion. See generally *id.* In *Davis*, the defendant pled guilty and the court attempted to sentence him but was unsuccessful. See *State v. Davis*, 125 Wash. App. at 60. The sentencing in *Davis* had to be set over. *Id.* Prior to the final sentencing the defendant filed a CrR 4.2(f) motion and requested that his plea be set aside. In both of those cases the Court of Appeals determined that a defendant is entitled to effective representation during a CrR 4.2(f) motion. See generally *State v. Chavez*, 162 Wash.App. 432, see also *State v. Davis*, 125 Wash. App. 59.

Unlike *Chavez* and *Davis* Mr. Hanson did not file a CrR 4.2(f) motion. Mr. Hanson pled guilty and was sentenced on the same day. Mr.

Hanson's motion to withdraw his guilty plea was brought pursuant to CrR 7.8. With respect to a CrR 7.8 motion the court in *State v. Davis* stated, "Under CrR 7.8, a defendant is only entitled to counsel if the motion is appealed directly to this court as a personal restraint petition. If Davis had filed a motion under CrR 7.8 with the superior court, he would not have been entitled to counsel." *State v. Davis*, 125 Wash. App. At 64.

Hr. Hanson's claim for ineffective assistance of counsel presupposes that he had a right to counsel in the first place. It is clear from the authority stated above that no such right exists when a defendant files a CrR 7.8 motion. Since Mr. Hanson had no constitutional right to counsel at the CrR 7.8 motion hearing there can be no claim for ineffective assistance of counsel.

## 2. THE ACTIONS OF MR. HANSON'S ATTORNEY AT THE CrR 7.8 HEARING WERE APPROPRIATE.

Regardless of whether this stage of the proceedings was critical Mr. Morgan's representation of Mr. Hanson was appropriate and effective. There is a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 335, 337, 899 P.2d 1251 (1995). Effective does not mean successful. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). The competency of counsel is not measured by the result. *Id.*

To prevail on an ineffective assistance claim, appellant must show that his attorney was not functioning as counsel as guaranteed by the Sixth Amendment. He must demonstrate errors so serious as to call into question the reliability of the result of the trial. *PRP of Gentry*, 137 Wn.2d 379, 400, 972 P.2d 1250 (1999), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden is on the defendant to show from the record a sufficient basis to rebut the strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 335, 337, (1995).

RPC 1.1 provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." However, RPC 1.1 does not exist in a vacuum. It must be read in conjunction with RPC 3.1 and RPC 3.3. RPC 3.1 provides,

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RPC 3.3 provides, in pertinent part, that a lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal...
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party

In the present case it was Mr. Hanson, not his attorney who filed the initial CrR 7.8 motion. In the trial court it is unusual for a defendant to prepare and file their own memorandum regarding a legal issue and then request legal counsel to argue that issue for them. Customarily trial counsel is able to research the facts and law surrounding an issue prior to making a decision whether or not it is meritorious. That did not occur in this case. Rather, Mr. Morgan was handed a set of issues and told to argue them regardless of whether they had any merit.

Mr. Morgan reviewed Mr. Hanson's reasons for why he believed his plea should be set aside. CP 80. Mr. Morgan conferred with Mr. Hanson regarding the basis for his motion and conducted independent investigation into the issues. *Id.* With respect to the bulk of Mr. Hanson's issues Mr. Morgan was unable to find valid legal basis to pursue the claims. *Id.*

Mr. Morgan provided the trial court the applicable law and facts. He requested the court independently analyze what had transpired to determine if an error had occurred. The court reviewed the applicable case law and facts and concluded that no error had occurred. Mr. Morgan was able to identify one error which had been made in the judgment and sentence. He brought this error to the court's attention and it was fixed. *See* CP 89.

In addition to reviewing the memorandum which was filed by Mr. Morgan the court also heard from Mr. Hanson at the time of the CrR 7.8 motion. *See* RP 35 - 41. The court listened to Mr. Hanson's arguments and concluded that they were without merit. It is clear that Mr. Hanson is dissatisfied that his CrR 7.8 motion was not successful. However an unsuccessful motion does not mean that an attorney's representation was not effective.

**B. THE TRIAL COURT DID NOT ERR WHEN IT GRANTED APPOINTED COUNSEL'S MOTION TO WITHDRAW AND DENIED THE APPELLANT'S REQUEST TO APPOINT NEW COUNSEL.**

As stated above, there is no right to counsel for purposes of a CrR 7.8 motion. Since there is no right to counsel at this stage, the trial court did not err by not appointing a new attorney after it had authorized Mr. Morgan to withdraw.

## V. CONCLUSION

The State respectfully requests that this Court find that a post-judgment CrR 7.8 motion is not a critical stage in a proceeding. The State requests that this court conclude that since this was not a critical stage in the proceeding that Mr. Hanson did not have a constitutional right to counsel. Since he did not have a constitutional right to counsel his attorney's representation could not have been ineffective. Alternatively, the State requests that this Court conclude that the actions of appointed counsel, Mr. Morgan, were appropriate and effective given what transpired at the trial court.

Respectfully submitted this 17<sup>th</sup> day of January, 2017

Tim Rasmussen, WSBA # 32105  
Stevens County Prosecutor



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Lech Radzinski, WSBA# 39437  
Stevens County Deputy Prosecuting Attorney  
Attorney for Respondent

**Affidavit of Certification**

I certify under penalty of perjury under the laws of the State of Washington, that I electronic filed the foregoing Brief of Respondent to the Court of Appeals, Division III; and mailed copies of said Brief by regular mail to David L. Donnan, WSBA #19271 of the Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101; and to Britton Hanson, DOC #874961, Washington State Penitentiary, 1313 N. 13<sup>th</sup> Ave., Walla Walla, WA 99362 on January 18, 2017.



Michele Lembcke, Legal Assistant  
for Lech Radzimski