

**FILED**

AUG 08 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

SUPREME COURT NO. 87751-3

No. 297217-III

**FILED**

AUG 15 2012

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
CRB

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

DANIEL FLAHERTY, Appellant

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PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

Petitioner, Daniel Flaherty, asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

## II. DECISION TO BE REVIEWED

Mr. Flaherty seeks review of the Court of Appeals decision filed February 28, 2012 and the decision denying the Motion for Reconsideration And Amending Opinion filed July 9, 2012. A copy of the Court's published opinion is attached as Appendix A. This petition for review is timely.

## III. ISSUES PRESENTED FOR REVIEW

- A. Does A Clerk Of The Court Have Authority To Not Accept A Properly Tendered Motion For Filing?
- B. Is It Within A Superior Court Judge's Authority To Decline To Allow The Filing Of A Motion Solely On The Basis Of Timeliness Under RCW 10.73.090 ?
- C. If A Trial Court Does Not Issue An Appealable Order, Is The Court Of Appeals Required To Treat The Notice Of Appeal As A Motion For Discretionary Review Under RAP 5.1(c)?

#### IV. STATEMENT OF FACTS

Daniel Flaherty was charged by amended information with one count of conspiracy to deliver a controlled substance and one count of third degree possession of stolen property for events that occurred on September 2, 2004. (CP 10). He pleaded guilty on June 30, 2005, and was sentenced to two days of jail with credit for two days served, along with court-imposed fines. (CP 11-13; 19-22).

On October 12, 2009, Mr. Flaherty was sentenced to 276 months in the Eastern District of Washington for a federal crime. (CP 56). Of the 276 months, 156 were a mandatory minimum, because of Mr. Flaherty's status as a "career offender," a classification based in part on his 2005 felony conviction in Spokane County Superior Court.

On November 1, 2010, Mr. Flaherty submitted a CrR 7.8 motion to vacate the judgment and sentence for the 2005 Spokane County conviction, along with a supporting memorandum of law. (CP 46-60). He requested vacation of the judgment and sentence or alternatively, an evidentiary hearing to investigate his claim that he received ineffective assistance of counsel in his 2005 plea agreement. (CP 56). The envelope containing the motion was

addressed to the Spokane County Clerk of the Superior Court, Thomas Fallquist. (CP 60).

Six weeks later, on December 14, 2010, Spokane Superior Court Judge Michael Price acknowledged in a letter the receipt of the pleadings and wrote:

“Please find enclosed pleadings which you forwarded to the court. Inasmuch as your request is time barred pursuant to RCW 10.73.090, the Court will take no further action on your request at this time.” (CP 45).

The court’s letter and a copy of the CrR 7.8 motion were filed with the clerk’s office. (CP 45-60). The original of the motion was apparently sent back to Mr. Flaherty along with the court’s letter.

Mr. Flaherty followed up with a Motion for Reconsideration to the Spokane County Clerk of the Superior Court dated December 30, 2010. (CP 65). In this motion, he advised the court that although the court had determined his motion was time barred, that under RCW 10.73.100(6), the statutory time limit was not applicable. (CP 62). In a letter dated January 11, 2011, the court responded:

“Dear Mr. Flaherty:

Please find enclosed pleadings which you forwarded to the Court dated December 30, 2011. [sic]. Inasmuch as the Court has ruled on your request in its December 14, 2010, correspondence to you, and your request is time barred pursuant to RCW 10.73.090, the Court will take no action on your request at this time.” (CP 61).

Mr. Flaherty appealed the denial of his motion. (CP 66). On appeal, the parties agreed that the trial court had violated CrR 7.8(c)(2), but disagreed on the remedy. The Court of Appeals based its decision on an issue not raised by either party: The Court held that it is “permitted procedure” under RCW 10.73.090(1) for a superior court to reject an untimely motion for filing. The Court further found that although the defendant’s motion was contained in the superior court record, it had never been “filed”; therefore, the judge’s ruling finding the petition untimely was not an appealable order. In a footnote of its published decision, the Court suggested that Mr. Flaherty could have sought discretionary review under RAP 2.3(b). A motion for reconsideration was filed with the Court, which was denied.

#### V. ARGUMENT

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes this Court

should accept review because the decision by the Court of Appeals, citing RCW 10.73.090 is inconsistent with the clear provisions of CrR 7.8(c)(2) and CR 5, court rules that govern procedural matters; the ruling is in conflict with rulings by other divisions of the Court of Appeals; and, it is a matter of substantial public interest because it is an unprecedented limitation on the ability of a defendant to appeal a superior court ruling. Whether a superior court can reject a post-conviction motion for filing based solely on untimeliness is an issue of first impression.

A. A Clerk Of The Court Must Accept A Properly Tendered Motion For Filing.

CR 5 governs service and filing of written motions in criminal proceedings. See CrR 8.4. CR 5(e) provides:

“The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him or her, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Papers may be filed by facsimile transmission if permitted elsewhere in these or other rules of the court, or if authorized by the clerk of the receiving court.

*The clerk may refuse to accept for filing any paper presented*

*for that purpose because it is not presented in proper form as required by these rules or any local rules or practice.*" (Emphasis added). See *State v. Robinson*, 104 Wn.App. 657, 665, 17 P.3d 653 (2001).

Further, the duties of a Clerk are defined by statute and include "to file *all* papers delivered to him or her for that purpose in any action or proceeding in the court as *directed by court rule or statute.*" RCW 2.32.050(4). (Emphasis added).

It is undisputed that Mr. Flaherty submitted his motion to the Superior Court Clerk, that it was in a proper format and clearly designated as a motion under CrR 7.8, and that he was not required to pay a filing fee. The clerk received the motion but neither recorded nor entered it. Rather, it was forwarded to the chief criminal judge. Under CR 5(e) and RCW 2.32.050(4), it is a non-discretionary, mandatory, ministerial duty of a Washington Superior Court Clerk to file a properly presented document.

In citing to RCW 2.32.050(4), the Court of Appeals emphasized that the clerk's duty to file properly presented papers is "directed by court rule or statute." *State v. Flaherty*, 166 Wn. App. 716, 719, 271 P.3d 371 (2012). The Court went on to note that under RCW 10.73.090(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.” *Flaherty*, 166 Wn. App. at 719.

The Court appears to have interpreted RCW 2.32.050(4) as giving the superior court the discretion *to reject for filing* a motion on the basis of timeliness, in a post-conviction matter, without the benefit of adversary briefing or argument on such complex issues as: whether the judgment is “valid on its face” (See *Personal Restraint of Scott*, 173 Wn.2d 911, 271 P.3d 218, (2012)); the date the conviction became final, thereby triggering the one-year period (See *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009); or whether any of the six exceptions enumerated in RCW 10.73.100 apply. Further, RCW 10.73.090 is a mandatory rule that acts only as a statute of limitation not a jurisdictional bar, and is subject to the doctrine of equitable tolling. (See *In re Bonds*, 165 Wn.2d 135, 140, 196 P.3d 672 (2008), where this Court addressed whether equitable tolling applied *under the facts* in *Bonds*).

Other than the decision in this case, it does not appear that any Washington court has treated the timeliness of a collateral attack as a prerequisite to *filing*, rather than as a matter that must

be decided by the court after the motion has been filed and litigated. This is an issue of first impression.

Where a statute, such as RCW 10.73.090, conflicts with a court rule in a procedural matter, the court rule must control. RCW 2.04.200 provides, "When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect." "If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Putnam v. Wenatchee Valley Med.Ctr. P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). Mr. Flaherty contends that if the duty of a court clerk, as defined in RCW 2.32.050(4) and CR 5(e), conflicts with RCW 10.73.090, in the procedural matter of whether the court clerk must file all properly presented papers, or only the ones on which there is no dispute between the parties about the timeliness of filing, the court rule controls. The superior court clerk was required to file the properly presented motion.

Even if the clerk of the court failed to file the properly tendered motion in the usual manner, under Washington law Mr. Flaherty's motion must be treated as "constructively filed." Mr. Flaherty contends that his motion was filed, or alternatively, should be treated as constructively filed: The judge ultimately transmitted the papers to the court clerk for filing, although not in the normal manner prescribed by CR 5. Rather than sending the clerk the original of the motion, the court apparently sent its letter and the original motion back to Mr. Flaherty and then forwarded copies of the motion and letter to the clerk for filing.

The court never ruled that Mr. Flaherty's motion should not be accepted for filing. The initial letter, dated December 14, 2010, stated only that the motion was time-barred and that "the court would therefore take no action" on it. (CP 45). The second letter, dated January 11, 2011, rejecting Mr. Flaherty's motion for reconsideration, stated "*the Court has ruled*" on Mr. Flaherty's motion in its December 14, 2010, correspondence. (CP 61). The court never suggested that any flaw in Mr. Flaherty's motion prevented it from being filed, and it was filed, notwithstanding the unusual manner.

The Court of Appeals finding that the motion was never filed is contrary to the holdings of Division 2 in *Stevens v. City of Centralia*, 86 Wn. App. 145, 936 P.2d 1141 (1997) and Division 1 in *Margetan v. Superior Chair Craft Co.*, 92 Wn. App. 240, 963 P.2d 907 (1998). In *Stevens*, a *pro se* plaintiff attempted to file a claim for damages with the clerk's office, but the clerk refused to accept it because it was not presented on a particular pre-printed form. By the time *Stevens* convinced the clerk to accept his claim as is, the filing deadline had passed. *Stevens*, 86 Wn. App. at 149-150. The Court found that his claim was "constructively accepted" at the point he first presented it to the correct clerk. The Court recognized, "To allow the clerk to refuse to accept what is otherwise a proper complaint would lead to an inequitable result." *Id.* at 152. In *Margetan*, the Court more generally resolved the issue. There the Court clearly stated, "The clerk of the court has no discretion in this regard. The clerk may not file a document without the filing fee or refuse to file a document accompanied by the filing fee. If the clerk could accept filing of an action without payment of a required filing fee, the clerk would have a degree of discretion contrary to the Legislature's intent as expressed in RCW 36.18.060. *Margetan*, 92 Wn. App. at 246.

Similarly, here Mr. Flaherty properly submitted his motion to the clerk of the court. The clerk had no discretionary authority to refuse to file the document. Any discrepancy in the manner in which Mr. Flaherty's motion was filed was not due to any deficiency on his part but rather, to the failure of the judge and court clerk to follow normal filing procedures. His motion should be treated as having been constructively filed. It would be inequitable to allow the court clerk's failure of duty to affect his right to appeal.

**B. A Superior Court Does Not Have The Authority To Reject A Motion For Filing Solely On The Basis Of Timeliness Under RCW 10.73.090.**

The Court of Appeals appears to have interpreted the trial court's action as a refusal to accept the motion for filing, rather than having made a ruling on it. As stated above, this is an incorrect interpretation of the trial court's actions. The trial court, in its denial of the motion for reconsideration, clearly stated, "Inasmuch as *the Court has ruled on your request* in its December 14, 2010, correspondence to you, and your request is time barred pursuant to RCW 10.73.090, the Court will take no action on your request at this time." (Emphasis added).

The court's ruling is contrary to the clear provisions of CrR 7.8(c)(2). The superior court here had no discretion to refuse to accept the motion for filing. CrR 7.8(c)(2) directs the superior court to follow a specific course of action when it determines that a motion to vacate judgment is untimely. The rule requires that 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 is entitled to relief or (ii) resolution of the motion will require a factual hearing.

Here, the superior court obviously considered and ruled on the timeliness of the motion, but rather than transfer it for consideration as a personal restraint petition, the court took no action at all. Contrary to the *Flaherty* decision, RCW 10.73.090(1) does not give the superior court discretion to simply refuse to file an untimely collateral attack. When the legislature stated that a collateral attack should not be "filed" more than one year after the judgment became final, it was creating a statute of limitations for litigants, rather than issuing an ultimatum to court clerks. *In re Bonds*, 165 Wn.2d at 140.

In *Flaherty*, the Court of Appeals stated that the decision to reject an untimely petition was a “permitted procedure”. If RCW 10.73.090(1) truly prohibits the *filing* of an untimely petition, then every petition that appears on its face to be untimely would have to be rejected. As stated above, the application of RCW 10.73.090(1) can be a complex matter requiring significant litigation to resolve. Moreover, even as RCW 10.73.090 is a bar to appellate court consideration of a post-conviction motion filed after the limitation period has passed, a petitioner may *still* have the issues considered if he can demonstrate that the petition is based on one of the exemptions enumerated in RCW 10.73.100. *In re Bonds*, 165 Wn.2d at 140.<sup>1</sup>

In this case, the Court of Appeals should have remanded the matter to the superior court to follow the proper procedure for Mr. Flaherty’s motion under CrR 7.8. The motion should not, however, be converted to a personal restraint petition without notice and opportunity for Mr. Flaherty to object to the transfer; as such action could infringe on his right to choose whether he wanted to pursue a personal restraint petition because he would then be subject to the

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<sup>1</sup> Mr. Flaherty’s motion made a plausible argument for an exception listed in RCW 10.73.100.

successive petition rule in RCW 10.73.140. *State v. Smith*, 144 Wn. App. 860, 864, 184 P.3d 666 (2008).

C. If A Trial Court Does Not Issue An Appealable Order, The Court Of Appeals Is Required To Treat The Notice Of Appeal As A Motion For Discretionary Review Under RAP 5.1(c).

After concluding the trial court's refusal to accept an untimely motion for filing is not an appealable order, the Court of Appeals stated: "A party could seek discretionary review of such a refusal, subject to the criteria provided by RAP 2.3(b). *Flaherty*, 166 Wn. App. at 719. Under RAP 5.1(c), entitled "incorrectly designated notice": "A notice of appeal of a decision *which is not appealable* will be given the same effect as notice for discretionary review." (Emphasis added). The Court of Appeals erred in simply dismissing Mr. Flaherty's appeal. If it was of the mind that the superior court's ruling was not appealable as a right, it was required to re-designate the notice of appeal as a notice for discretionary review, and permit Mr. Flaherty to address the discretionary review factors.

Those factors include: (1) The superior court has committed an obvious error which would render further proceedings useless;

(2) the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; and (3) the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court. RAP 2.3(b).

Here, if the superior court indeed ruled that Mr. Flaherty's motion could not be filed at all, then it committed an obvious error rendering further proceedings useless. The court had no authority to make such a ruling. Further, the court committed an obvious error in failing to follow the clear provisions of CrR 7.8(c)(2), which required the superior court to transfer a motion to vacate judgment to the Court of Appeals if it believed it to be untimely. Likewise, the superior court's actions were at least probable error and substantially limited the freedom of a party to act. If Mr. Flaherty's motion is treated as not having been filed at all, then he has no ability to act on that motion in any way.

Lastly, the superior court has clearly departed from the 'accepted and usual course of proceedings.' As discussed above, there does not appear to be any caselaw in Washington in which a

court has refused to file a CrR 7.8 motion simply because it believed the motion to be untimely. Such a ruling calls for review by an appellate court because it sets a dangerous precedent.

If this Court were to approve such a procedure, superior courts could insulate any number of rulings from appellate review. Nearly every action in the State of Washington involves some sort of statute of limitations. If superior courts are free to deny the filing of pleadings because the court believed the statute of limitations was not followed, the court is then vested with the power to prevent the litigant from appealing the judge's ruling regarding timeliness. If the published ruling in *Flaherty* stands, that may well become common practice.

Thus, even if the trial court did not issue an appealable order, the result in this case should be the same.

## VI. CONCLUSION

Based on the foregoing facts and authorities, Petitioner Flaherty respectfully urges that this Court grant review of these issues.

Dated this 8<sup>th</sup> day of August 2012.

Respectfully submitted,

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# APPENDIX A

Court of Appeals of Washington,  
Division 3.  
STATE of Washington, Respondent,  
v.  
**Daniel Allen FLAHERTY**, Appellant.

No. 29721-7-III.  
Feb. 28, 2012.

As Amended on Denial of Reconsideration July 9, 2012.

\*\*372 Marie Jean Trombley, Attorney at Law, Spokane, WA, for Appellant.

Mark Erik Lindsey, Spokane County Prosecuting Attorneys, Andrew J. Metts, III,  
Spokane County Pros. Offc., Spokane, WA, for Respondent.

SIDDOWAY, J.

\*717 ¶ 1 RCW 10.73.090(1) provides that “[n]o [untimely collateral attack] may be filed.” In this case, the superior court, having concluded that Daniel Flaherty's CrR 7.8 motion was untimely, refused to accept it for filing.

¶ 2 We conclude that the matter is not appealable and dismiss.

#### FACTS AND PROCEDURAL BACKGROUND

¶ 3 On November 1, 2010, Mr. Flaherty attempted to file a CrR 7.8 motion to vacate a 2005 judgment and sentence by mailing the motion and supporting materials to the Spokane County Superior Court. Mr. Flaherty's 2005 conviction was based on his plea of guilty to one count of conspiracy to deliver a controlled substance and one count of third degree possession of stolen property. His proposed CrR 7.8 motion argued that he entered the plea in 2005 only because encouraged to do so by his lawyer, based on a proposed punishment that would be extremely light. He contends that his lawyer never warned him that the felony conviction could become a predicate for “career offender” status under federal law. Reportedly it has had that consequence, significantly increasing his sentence in October 2009 for a federal crime. His proposed motion asked that the court vacate the 2005 judgment and sentence.

¶ 4 On December 14, 2010 the superior court returned Mr. Flaherty's motion papers as time barred pursuant to RCW 10.73.090.

\*718 ¶ 5 On December 30, 2010, Mr. Flaherty attempted to file a petition for rehearing, arguing that his motion was not untimely. On January 11, 2011, the superior court returned the petition, reiterating that the motion was time barred.

¶ 6 Mr. Flaherty filed a notice of appeal.

#### ANALYSIS

[1] ¶ 7 Under CrR 7.8(c)(2), a trial court must transfer a motion “filed by a defendant” to this court unless it determines that the motion is timely filed under 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.” In other words, once filed, it is only if the motion is timely and appears to have merit or requires fact finding that the superior court retains and hears the motion. In all other cases, for purposes of efficient judicial administration, the motion is transferred to this court.

¶ 8 The parties' briefing in this court proceeds on the assumption that Mr. Flaherty's motion was filed in superior court. Mr. Flaherty argues that because his motion was untimely, it should have been transferred to us and the superior court's failure to transfer \*\*373 was an abuse of discretion. Although he recognizes that we can and sometimes do convert an erroneously-processed CrR 7.8 motion to a personal restraint petition and consider its timeliness on that basis, Mr. Flaherty asks that we remand to the superior court instead, in light of the risk of prejudicing his ability to file a successive petition. See *State v. Smith*, 144 Wash.App. 860, 863, 184 P.3d 666 (2008).

¶ 9 The State agrees that the superior court did not follow the procedure required by CrR 7.8(c), but encourages us to dismiss the appeal in light of the untimeliness of the motion and the resulting harmlessness of the court's handling of the petition.

¶ 10 It has come to our attention, however, that the superior court did not *dismiss* Mr. Flaherty's motion as \*719 untimely; rather, it refused to accept the motion for filing on that basis. While copies of Mr. Flaherty's submissions were retained by the court, it is only the court's letters rejecting the submissions as untimely and returning them to Mr. Flaherty that were filed. Copies of Mr. Flaherty's materials are included in the court's file only as enclosures to the court's letters returning them to Mr. Flaherty.

[2] ¶ 11 RCW 10.73.090(1) states that “[n]o 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.” (Emphasis added.) Accord CrR 7.8(b) (motions under the rule are subject to timeliness requirements and are “further subject to RCW 10.73.090”). RCW 2.32.050(4) provides that it is the duty of the clerk of the superior court to “file all papers delivered to him or her for that purpose in any action or proceeding in the court *as directed by court rule or statute.*” <sup>FN1</sup> The superior court's decision to reject an untimely motion for filing was permitted procedure,

<sup>FN1</sup> We quote the current version of RCW 2.32.050(4), which was amended by Laws of 2011, chapter 336, section 45 to make the language gender neutral.

[3] ¶ 12 A trial court's refusal to accept an untimely motion for filing is not an appealable order. RAP 2.2. While the petitioner could seek discretionary review of such a refusal subject to the criteria provided by RAP 2.3(b), Mr. Flaherty has demonstrated no ground for discretionary review. <sup>FN2</sup> The matter has proceeded in error and should be dismissed.

<sup>FN2</sup> A petitioner who believes his or her CrR 7.8 motion has been refused for filing in error may also file a personal restraint petition directly in the Court of Appeals. RAP 16.3-16.15.

¶ 13 Dismissed.

WE CONCUR: KORSMO, A.C.J., and BROWN, J.

CERTIFICATE OF SERVICE

I, Marie Trombley, certify that on the 8th day of August 2012, I caused a true and correct copy of the Petition for Review to be served on the following by first class mail, postage prepaid to Daniel A. Flaherty, 09436-085, PO Box 800, Herlong, CA 96113; and by email per agreement between the parties to: Andrew Metts, Spokane County Prosecutor at [kowens@spokanecounty.org](mailto:kowens@spokanecounty.org).

Dated this 8<sup>th</sup> day of August 2012.

s/ Marie Trombley

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