

66147-7

66147-7

NO. 66147-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY W. KINER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY McCULLOUGH

BRIEF OF RESPONDENT

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~~COURT OF APPEALS DIV I
STATE OF WASHINGTON~~
FILED

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A. ISSUES PRESENTED

1. Did the trial court err in dismissing Kiner's 7.8 motion as time-barred?
2. Did Judge McCullough's refusal to recuse himself meet the criteria for discretionary review in this court?

B. STATEMENT OF THE CASE

The State generally accepts Kiner's recitation of facts as set forth in the May 12, 2011 brief to this court with a few points of clarification. Kiner notes that in February of 2009, before the Court of Appeals mandate issued, he *submitted* his CrR 7.8 motion. Br. of App. at 2. The State does not dispute that Kiner submitted his motion to the clerk but the motion was never filed and thus was not available to the public or parties via the electronic court record.¹

At some point, the State did receive a copy of the motion and asked the superior court to respond to the motion by transferring it to the Court of Appeals to be processed as a Personal Restraint Petition. CP 29. Yet, as evidenced by the

¹ The mandate is identified in Kiner's brief as sub. Number 98 in the electronic court record. However, a review of the record shows that there is no sub number corresponding to Kiner's CrR 7.8 motion. The lack of a sub number in the court file shows it was never actually filed and thus not available to anyone needing to access the motion. The motion is still not there.

docket, even at the time of the State's request, the CrR 7.8 motion was not filed in the court record. The trial court transferred the motion to the Court of Appeals where it was later dismissed for failing to pay filing fee or file a statement of finances. Kiner states that he attempted to re-file his CrR 7.8 motion on December 8, 2009 and April 9, 2010. Yet, he cannot cite to a clerk's paper or the trial court docket as support for this assertion because the CrR 7.8 motion wasn't filed in the court record at any point around these dates. Kiner instead cites to the letter issued by Richard D. Johnson which contains a recitation of the facts as argued by the parties.

C. ARGUMENT

1. KINER'S CrR 7.8 MOTION SHOULD HAVE BEEN TRANSFERRED TO THE COURT OF APPEALS FOR CONSIDERATION AS A PERSONAL RESTRAINT PETITION; IT SHOULD NOT HAVE BEEN DISMISSED.

The State concedes that the trial court erred in dismissing Kiner's CrR 7.8 motion as time-barred. Criminal Rule 7.8(c) provides as follows:

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)(2). The mandate from Kiner's direct appeal was entered on April 10, 2009, so Kiner's second CrR 7.8 motion was filed within the year time-limit authorized by the rule, so the motion should not have been dismissed as untimely. CP 21-22.

According to the rule, the trial court may retain and decide a timely motion if Kiner made a substantial showing he was entitled to relief or if a factual hearing was required. CrR 7.8(c)(2). The State believes there was no substantial showing that Kiner was entitled to relief and no factual hearing was required, so Kiner's motion should have been transferred to the Court of Appeals. However, the trial court never considered either of these questions. Thus, the State respectfully asks that the matter be remanded to the trial court for a determination as to whether Kiner has made a substantial showing that he is entitled to relief or a determination as to whether a factual hearing is required.² If these findings cannot be made, the motion must be transferred to the Court of Appeals.

² Mr. Kiner submitted a statement of additional grounds for review stating that his attorney did not address all the issues. Mr. Kiner claims that there were different and distinct CrR 7.8 motions submitted to the court. It appears impossible to determine this from the court record since the motions were not made part of the

Kiner incorrectly argues that on remand the trial court should set a time and place for a hearing at which the State should be required to show cause why Kiner's motion should not be granted. His argument ignores CrR 7.8(c)(2) which states that a show cause hearing is required only if the court determines that the defendant has made a substantial showing that he is entitled to relief or that the resolution of the motion will require a factual hearing. Since neither of those determinations has been made, Kiner's request is premature.

2. THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR RECUSAL DOES NOT MEET THE CRITERIA FOR DISCRETIONARY REVIEW.

The trial court properly denied the defendant's motion for Judge Leroy McCullough to recuse himself from the case. The trial court's denial of this motion does not meet the criteria for discretionary review by this Court. A decision resulting from a proceeding not mentioned specifically in RAP 2.2(a) is reviewable only under the discretionary review procedures established by RAP 2.3. In re Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989).

court record and available to the parties. Should this court find that there were separate identifiable motions, they can also be remanded.

According to RAP 2.3(b), the Court of Appeals may accept discretionary review of any act of the Superior Court not appealable as a matter of right only when:

- (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;
- (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; or
- (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

Not one of the above sections apply to Kiner's motion for recusal.

Kiner argues that he sought recusal because the trial court judge could no longer be fair and impartial in light of his prior erroneous ruling on the 7.8 motion and his efforts to defend that ruling. This is not a basis for recusal.

Nothing in the record shows that the trial court judge has attempted to defend his September 14, 2010 ruling. The trial court judge was simply responding to the writ filed against him in the

Washington Supreme Court. The judge was represented by a civil attorney from King County who explained why the judge had not made a ruling on Kiner's motions.

Kiner argues that this is another example of the judge's prejudice because it shows his presumed bias in favor of the prosecutor. Kiner may have disagreed with the representations of the court but nothing in the trial court judge's response to the writ establishes bias or an appearance of bias. It simply shows that somewhere between Kiner's submittal of his motion to the clerk and the clerk's submittal to the judge, there was a problem that resulted in the court being unable to address Kiner's motion. Ideally, the matter could simply have been resolved by the trial court requesting that Kiner provide a copy of his motion, but that did not occur.

However, it does not establish a basis for review under RAP 2.3

Kiner's brief cites several cases and statutes addressing the bias of a judge and the rights of a defendant concerning bias but fails to apply the cited law to facts in this case. In State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972), the court found no bias on the part of the trial court judge even though the judge had been involved in investigating the defendant's business both before and during his criminal trial. In State v. Carlson, 66 Wn. App. 909, 918,

833 P.2d 463 (1992), the State appealed from order of the Superior Court, King County, granting defendant's motion for new trial in prosecution for rape and child molestation. The court reversed and remanded, and defendant filed motion for reconsideration and to disqualify member of appellate panel. It held that the appellate judge's participation in program designed to prepare children who are alleged victims of sexual abuse for their appearance in court did not disqualify judge from hearing case involving child abuse, and the prosecutor's participation in the appellate judge's election campaign did not require judge's recusal on appeal in criminal case tried by deputy prosecutor. The court found no bias on the part of a judge sitting on case. Id. at 923.

Finally, Kiner argues the trial court judge incorrectly assumed that Kiner was merely seeking his one-time statutory right to pre-discretionary change of judge and denied the request on that basis rather than on the prejudice arguments made above. Kiner argues that this is obvious error under RAP 2.3(b)(1) and provides for discretionary review. However, Kiner has not established that it was an obvious error that rendered further proceedings useless. Nothing in the judge's ruling has rendered further proceedings

useless. Kiner is not entitled to review of the denial of the motion to recuse.

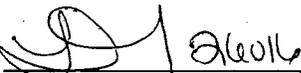
D. CONCLUSION

This Court should remand to the superior court for a determination of whether petitioner has established a basis for relief. The court should not review the motion for recusal.

DATED this 21 day of July, 2011.

Respectfully submitted,

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