

No. 66672-0-1

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

STATE OF WASHINGTON,
Respondent,

v.

CHRISTOPHER CHARLES LOY,
Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred in denying Mr. Loy's timely CrR 7.8 motion without reaching the merits.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

When an offender brings a timely post-conviction motion for relief from judgment in the trial court, the court must determine (1) whether the defendant has made a substantial showing that he is entitled to relief, and (2) whether resolution of the motion will require a factual hearing. If the answer to both questions is no, the court must transfer the motion to the Court of Appeals for consideration as a personal restraint petition. Where Mr. Loy filed a timely post-conviction motion for relief from judgment, did the trial court err in denying the motion without determining whether Mr. Loy had made a substantial showing he was entitled to relief and whether resolution of the motion would require a factual hearing?

C. STATEMENT OF THE CASE

In April 2003, following a jury trial, Mr. Loy was convicted of one count of first degree premeditated murder and one count of second degree felony murder. CP 9-17. The trial judge, the Honorable Donald Haley, sentenced Mr. Loy to 450 months in prison. CP 12-13.

Mr. Loy appealed. In an unpublished decision, this Court vacated Mr. Loy's conviction for second degree felony murder on the ground it violated the constitutional prohibition against double jeopardy. State v. Loy, No. 52355-4-I, 2004 WL 3037931, at *10 (Wn. App. Dec. 27, 2004). The Court also reversed the sentence and remanded for resentencing. Id. at *11.

On remand, a new judge, the Honorable J. Wesley Saint Clair, held a full resentencing hearing. The judge recalculated Mr. Loy's offender score and imposed a new sentence of 416 months. CP 21. A new judgment and sentence was entered on December 21, 2006. CP 18-26.

Mr. Loy appealed again. For the second time, in an unpublished opinion, this Court reversed Mr. Loy's sentence and remanded for resentencing. State v. Loy, No. 59358-7-I, 2009 WL 2871888 (Wn. App. Sep. 8, 2009); CP 29-35. The Washington Supreme Court denied review and the mandate was issued on September 14, 2010. CP 27.

Mr. Loy was again resentenced before Judge Saint Clair on February 7, 2011. Mr. Loy represented himself at the resentencing, with standby counsel. RP 3. Prior to the hearing, Mr. Loy provided

notice to the court and the State that he intended to move for a new trial. RP 3-4. The State filed a response to the motion. CP 55-59.

At the hearing, Mr. Loy argued he was entitled to a new trial because his constitutional rights were violated when the trial judge, Judge Haley, did not conduct an adequate colloquy with him before granting his motion to represent himself at trial. RP 5-6. The State argued the trial court should transfer the motion to the Court of Appeals for consideration as a personal restraint petition (PRP). RP 6.

Judge Saint Clair denied the motion for new trial without reaching the merits or transferring the motion to the Court of Appeals for consideration as a PRP. RP 7-10. Instead, Judge Saint Clair asserted he did not have authority to review a decision made by Judge Haley, because they were both superior court judges. Id. Judge Saint Clair believed he was "not the body to make that determination" and instead the decision should be made by the Court of Appeals. RP 8.

Judge Saint Clair proceeded to resentence Mr. Loy and imposed a new sentence of 388 months. CP 49. Mr. Loy now appeals Judge Saint Clair's denial of his motion for new trial.

D. ARGUMENT

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. LOY'S POSTCONVICTION MOTION WITHOUT ADDRESSING THE MERITS

Mr. Loy argued he was entitled to a new trial because his constitutional rights were violated when the trial judge engaged him in an inadequate colloquy before granting his motion to represent himself at trial. RP 5-6. The motion is properly characterized as a CrR 7.8(b) motion for relief from judgment.¹ When an offender brings a CrR 7.8 motion in the trial court, the court must address the merits of the motion to determine whether the defendant has made a substantial showing he is entitled to relief and whether an evidentiary hearing is required. CrR 7.8(c)(2). Because the trial court did not make those determinations, the case must be remanded with instructions to follow the requirements of CrR 7.8(c).

1. Mr. Loy's CrR 7.8 motion was timely. RCW 10.73.090(1) provides a CrR 7.8 motion is timely if filed within "one year after the judgment becomes final." Mr. Loy's judgment was not final at the

¹ Although Mr. Loy called the motion a "motion for new trial," CrR 7.5 ("New Trial") does not apply. In many respects, CrR 7.5 (new trial) and CrR 7.8 (relief from judgment) overlap. 4A Karl B. Tegland, Washington Practice: Rules Practice, CrR 7.8, at 538-39 (7th ed. 2008). Both rules authorize the trial court to grant relief from a conviction on the basis of procedural irregularities. Id. The principal difference between the rules is one of timing. Id. CrR 7.5 requires the motion be brought within 10 days after verdict or decision. CrR 7.5(b). Because Mr. Loy brought his motion more than 10 days after verdict, it is properly characterized as a CrR 7.8 motion.

time he brought his motion. Therefore, the CrR 7.8 motion was timely.

Mr. Loy's judgment was not final at the time he brought his CrR 7.8 motion because he had no sentence and therefore no judgment was in existence at the time. In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 954, 162 P.3d 413 (2007). This Court had reversed Mr. Loy's sentence and remanded for a full resentencing hearing. CP 29-35. "When a court reverses a sentence it effectively vacates the judgment because the '[f]inal judgment in a criminal case means sentence.'" Skylstad, 160 Wn.2d at 954 (quoting Berman v. United States, 302 U.S. 211, 212, 58 S. Ct. 164, 82 L. Ed. 204 (1937)); see also Skylstad, 160 Wn.2d at 950 ("Final judgment" means "the imposition of the sentence.") (citation omitted). Therefore, although this Court issued a mandate on September 24, 2010, after reversing Mr. Loy's sentence, Mr. Loy's judgment will not be final until both his conviction and sentence are *affirmed* and an appellate court issues another mandate terminating review. Id. As in Skylstad, because Mr. Loy's second appeal was still pending at the time of the resentencing hearing, "no final judgment was entered and the one-year limitation

had not yet begun." Id. In sum, Mr. Loy's CrR 7.8 motion was timely. Id.

2. A trial court must address the merits of a timely CrR 7.8 motion. CrR 7.8(c)(2) provides:

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.

Under the rule, the superior court must retain a timely CrR 7.8 motion if (a) the defendant makes a substantial showing that he is entitled to relief or (b) the motion cannot be resolved without a factual hearing. State v. Smith, 144 Wn. App. 860, 863-64, 184 P.3d 666 (2008). "Only when these prerequisites are absent may the superior court transfer a *timely* petition to this court for consideration as a personal restraint petition." Id. (emphasis in original). In other words, the rule requires the trial court to address the merits of a timely motion. If the defendant makes a substantial showing he is entitled to relief, the court *must* reach a decision on the motion. Id.

Previously, trial courts had greater discretion to either deny a CrR 7.8 motion or transfer it to the Court of Appeals. The current

version of CrR 7.8(c)(2) was enacted in 2007. Smith, 144 Wn. App. at 863. The former rule provided:

(2) Initial Consideration. The court may deny the motion without a hearing if the facts alleged in the affidavits do not establish grounds for relief. The court may transfer a motion to the Court of Appeals for consideration as a personal restraint petition if such transfer would serve the ends of justice. Otherwise, the court 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.

Former CrR 7.8(c)(2) (2003).

The principal reason for restricting a trial court's ability to transfer a CrR 7.8 motion to the Court of Appeals, and requiring the court to decide those motions that have potential merit, is to preserve an offender's ability to pursue post-conviction relief through a PRP. Converting a wrongly-transferred CrR 7.8 motion into a PRP can infringe on a defendant's right to choose whether to pursue a PRP. Smith, 144 Wn. App. at 864. Once a CrR 7.8 motion is converted into a PRP, the defendant is subject to the successive petition rule in RCW 10.73.140,² which severely limits his ability to obtain relief for constitutional violations. Id. By limiting

² RCW 10.73.140 provides, "[i]f a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition."

a trial court's authority to transfer a timely CrR 7.8 motion to the Court of Appeals, the 2007 revisions safeguard a defendant's right to choose whether to file a PRP and what issues to raise in the petition. Id.

At the same time, by restricting the trial court's discretion to deny a CrR 7.8 motion and requiring the court to transfer a motion that is procedurally barred, the rule ostensibly saves time and limits waste. In many cases, CrR 7.8 motions are filed by pro se defendants after the direct appeal and personal restraint processes have been exhausted. Tegland, Washington Practice, supra, at 542 (citing Drafters' Comment, 2007 Amendment to CrR 7.8(c)). When a trial court denies a CrR 7.8 motion, the defendant is entitled to court-appointed counsel because such an order is appealable under RAP 2.2. Id. But because often such motions are procedurally barred, there is little appointed counsel can do. Id. By requiring the trial court to transfer CrR 7.8 motions that are procedurally barred to the Court of Appeals for consideration as PRPs, substantial time and effort is saved. Id.

Thus, in order to give effect to the 2007 amendments to CrR 7.8(c), when a defendant files a CrR 7.8 motion, the trial court must address the merits of the motion. Only then can the trial court

determine whether the motion should be retained or transferred to the Court of Appeals for consideration as a PRP.

3. The trial court erred in denying the CrR 7.8 motion without addressing the merits, requiring vacation of the order and remand. As explained, when a trial court receives a timely CrR 7.8 motion, the court must determine whether the defendant has made a substantial showing he is entitled to relief and whether resolution of the motion will require a factual hearing. CrR 7.8(c)(2). If the answer to either question is yes, the court must reach a decision on the motion. Id.; Smith, 144 Wn. App. at 863-64.

Here, the trial court did not address the merits of Mr. Loy's motion. The court did not determine whether Mr. Loy made a substantial showing that he was entitled to a new trial on the basis of Judge Haley's deficient *pro se* colloquy. RP 7-10. Instead, Judge Saint Clair concluded he did not have authority to review Judge Haley's actions. Id. But one of the very purposes of CrR 7.8 is to provide the trial court with authority to review procedural irregularities that occurred earlier in the trial process. CrR 7.8(b)(1); Tegland, Washington Practice, *supra*, at 538-39. Such authority is not limited to the Court of Appeals. See State v. Madsen, 153 Wn. App. 471, 228 P.3d 24 (2009) (supreme court,

court of appeals and superior court have concurrent jurisdiction in habeas corpus proceedings wherein postconviction relief is sought (citing Toliver v. Olsen, 109 Wn.2d 607, 609, 746 P.2d 809 (1988)), rev. denied, 168 Wn.2d 1034, 230 P.3d 1061 (2010).

Thus, Judge Saint Clair was required to address the merits of Mr. Loy's motion and determine whether he made a substantial showing he was entitled to relief or whether an evidentiary hearing was required. Judge Saint Clair's decision to deny the motion without addressing the merits violated CrR 7.8(c).

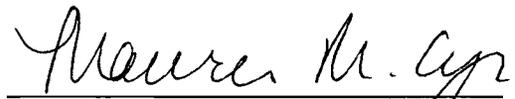
When a trial court denies a CrR 7.8 motion without complying with the requirements of CrR 7.8(c), the remedy is to vacate the order and remand with instructions to the superior court to enter an order complying with the rule. Smith, 144 Wn. App. at 864. Because Judge Saint Clair did not comply with the requirements of CrR 7.8(c), the order must be vacated and remanded with instructions to comply with the rule.

E. CONCLUSION

The trial court denied Mr. Loy's timely CrR 7.8 motion without determining whether he made a substantial showing he was entitled to relief or whether an evidentiary hearing was necessary.

The court's order must be vacated and remanded with instructions to comply with the requirements of CrR 7.8(c).

Respectfully submitted this 30th day of August 2011.



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66672-0-I
v.)	
)	
CHRISTOPHER LOY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF AUGUST, 2011, I CAUSED ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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