66147-7

66147-7

NO. 66147-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY KINER,

Appellant.

REC'D
MAY 12 2011
King County Prosecutor
Appellate Unit

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

The Honorable LeRoy McCullough, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's pro se CrR 7.8 motion to vacate and modify the judgment and sentence. CP 77-78.

2. The trial court erred in denying appellant's pro se motion for recusal of the trial judge. CP 77-78.

Issues Pertaining to Assignments of Error

1. CrR 7.8(c) requires the trial court to transfer to this Court a timely filed motion, or set a hearing for the adverse party to appear and show cause why the requested relief should not be granted. Where appellant submitted a timely CrR 7.8 motion to vacate judgment and sentence, supported by declaration, did the trial court err in summarily denying the motion as untimely?

2. Was it error to deny a motion for recusal on the sole ground that the judge had already made discretionary rulings when it is appropriate for a judge to recuse himself to avoid an appearance of fairness problem, even though the judge has already made discretionary rulings?

3. If appellant is not entitled to direct appeal of the denial of the motion to recuse, then should this Court grant discretionary review

under RAP 2.3(b)(1) because the basis for the denial constitutes obvious error rendering further proceedings useless?

B. STATEMENT OF THE CASE

In 2006, a jury convicted appellant Jeffrey Kiner of three counts of first degree child molestation and he was sentenced accordingly by the Honorable LeRoy McCullough. CP 8-19. Kiner's direct appeal failed, and a mandate terminating review was filed on April 10, 2009. CP 21-27.

In February 2009, before the appellate court mandate issued, Kiner submitted a pro se CrR 7.8 motion to vacate and modify his judgment and sentence. CP 34-47. Kiner's motion argued the evidence was insufficient to convict him of two of the charged counts, requested an evidentiary hearing be held in conjunction with his motion, and specifically requested the motion not be transferred to the Court of Appeals as a Personal Restraint Petition (P.R.P.) so as not to hamper his ability to file a P.R.P. in the future. CP 36 (citing State v. Smith, 144 Wn. App. 860, 184 P.3d 666 (2008)).

In response to Kiner's CrR 7.8 motion, on or about August 5, 2009, the State submitted a form letter to Judge McCullough requesting that the motion be transferred to the Court of Appeals as a P.R.P. CP 29. By order signed August 7, 2009, the court granted the State's request, converted Kiner's motion to a P.R.P., and transferred it to the Court of

Appeals. CP 30-31. As noted in a letter from Court of Appeals Administrator/Clerk Richard D. Johnson to the parties in the appeal,[1] Kiner's P.R.P. was dismissed on October 8, 2009, because he failed to pay the filing fee or submit a statement of finances. Kiner's motion to modify was denied without prejudice to file another P.R.P. with payment of the filing fee or statement of finances. CP 48-49; Appendix at 1.

As Mr. Johnson's letter reveals, Kiner attempted to re-file his CrR 7.8 motion on December 8, 2009, and again on April 9, 2010. Appendix at 2. On June 4, 2010, the Washington Supreme Court directed the trial court to act on Kiner's CrR 7.8 motion. Id.

On June 21, 2010, Kiner filed a motion asking Judge McCullough to recuse himself from hearing any post-trial motions in his case. Supp CP __ (sub no. 105, Motion and Affidavit to Recuse the Judge McCullough from Hearing Any of the Post-Trial Motions Due to Bias and Partiality, 6/21/10). Kiner argued that in light of the Washington Supreme Court's June 4th ruling, the appearance of fairness doctrine and due process considerations required Judge McCullough to recuse himself. Id. Kiner also filed an "Affidavit of Prejudice" stating he did not believe he could receive a "fair and impartial hearing before the Honorable Leroy [sic] McCullough." Supp CP __ (sub no. 106, 6/21/10).

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[1] A copy of Mr. Johnson's letter is attached as an appendix.

On August 12, 2010, the State filed a response opposing Kiner's motion to recuse, claiming it "failed to show any bias or appearance of unfairness" on the part of Judge McCullough. Supp CP __ (sub no. 110, State's Opposition to Defendant's Motion to Have Judge McCullough Recuse Himself from hearing Post-Trial Motions, 8/12/10). The following day the State submitted a letter to Judge McCullough claiming Kiner had failed to file anything for the court to act upon with regard to Kiner's convictions. Supp CP __ (sub no. 111, Letter from prosecutor to Judge McCullough, 8/17/10); see appendix at 2.

On September 10, 2010, Kiner filed a reply to the State's response, asserting that the State's arguments for why his recusal request should be denied were based on an inaccurate recitation of the record. CP 52-76.

On September 14, 2010, Judge McCullough entered an order denying both the motion to recuse and the motion to vacate and modify judgment and sentence. CP 77-78. The sole basis for denying the motion to recuse was that "the trial judge has previously made discretionary rulings on this matter." CP 78 (bullet "1."). As to the motion to vacate and modify judgment and sentence, Judge McCullough denied it on the basis that it was untimely, as it was filed "more than 24 months after" the date of sentencing. CP 78 (bullet "3."); appendix at 2. Kiner appeals both rulings. CP 81.

C. ARGUMENTS

1. IT WAS REVERSIBLE ERROR TO DENY KINER'S CrR 7.8 MOTION ON THE BASIS THAT IT WAS UNTIMELY.

RCW 10.73.090 provides:

> (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.
>
> (2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.
>
> (3) For the purposes of this section, a judgment becomes final on the last of the following dates:
>
> (a) The date it is filed with the clerk of the trial court;
>
> (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
>
> (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

Emphasis added.

Kiner's judgment and sentence was filed with the clerk of the trial court on November 6, 2006. CP 8. The mandate from the subsequent

direct appeal, however, was not issued until April 10, 2009. CP 21-22. As such, under RCW 10.73.090, Kiner had until at least April 9, 2010, to file a timely petition or motion for collateral attack his judgment and sentence.

Kiner filed his CrR 7.8 motion to vacate and modify his judgment and sentence on or about February 25, 2009. CP 34. This is well within the one-year time limit under RCW 10.73.090. Therefore, Judge McCullough erred in denying Kiner's motion on the basis that it was untimely. This Court should therefore reverse and remand for proper consideration of the merits of Kiner's motion.

On remand, the trial court should set a time and place for a hearing at which the State is required to show cause why Kiner's motion should not be granted. CrR 7.8(c)(3). In the alternative, if on remand the trial court determines Kiner has failed to make a substantial showing that he is entitled to the requested relief and that a factual hearing is not required to resolve the motion, then the court may transfer the motion to this Court for consideration as a personal restraint petition. CrR 7.8(c)(2). Such a re-characterization and transfer may not occur, however, without the trial court first notifying Kiner of the court's intent to recharacterize motion, warning him that the re-characterization could subject the motion to the second or successive motion rule, and providing Kiner the opportunity to

withdraw or amend the motion before transfer, as required under Castro v. United States, 540 U.S. 375, 383, 124 S. Ct. 786, 157 L. Ed. 2d 778 (2003); State v. Smith, 144 Wn. App. 860, 864, 184 P.3d 666 (2008).

2. IT WAS REVERSIBLE ERROR TO DENY KINER'S MOTION TO RECUSE ON THE BASIS THAT THE TRIAL COURT HAD ALREADY MADE DISCRETIONARY RULINGS.

RCW 4.12.040 grants parties the right to a change of judge by timely filing an affidavit of prejudice. RCW 4.12.050 provides an affidavit of prejudice is timely if it is "filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, . . . and before the judge presiding has made any order or ruling involving discretion . . .". See State v. Parra, 122 Wn.2d 590, 594, 859 P.2d 1231 (1993). If Kiner had sought recusal in this context, denial of that request would not have been error because it is clear Judge McCullough made numerous discretionary rulings in this matter before the request. This was not, however, the basis for Kiner's recusal motion. Rather, Kiner sought recusal on the basis that Judge McCullough could no longer be fair and impartial in light of his prior erroneous ruling on the CrR 7.8 motion and the subsequent efforts to defend that ruling. Supp CP __ (sub no. 105, supra). As such, whether prior discretionary rulings had been made was not the relevant criterion for deciding the motion.

A person accused of a crime has the right to due process of law. Const. art. I, § 3; U.S. Const. amends. 5, 14. An unbiased judge and the appearance of fairness are hallmarks of due process. In re Murchison, 349 U.S. 133, 136-38, 55 S. Ct. 623, 99 L. Ed. 942 (1955); Ward v. Village of Monroeville, 409 U.S. 57, 59-62, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972); State v. Cozza, 71 Wn. App. 252, 255, 858 P.2d 270 (1993). "No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause." RCW 4.12.040.

A party need not establish actual prejudice. It is sufficient that an appearance of impropriety exists. State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). As the Madry court explained:

> The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice. The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge.

8 Wn. App. at 70.

Disqualification of a judge is appropriate "in any proceeding in which the judge's impartiality might reasonably be questioned." Code of

Judicial Conduct (CJC) Canon 2, Rule 2.11(A).[2] The Canon lists several specific instances where a judge's duty to recuse is "clear and nondiscretionary." State v. Carlson, 66 Wn. App. 909, 918, 833 P.2d 463 (1992) (citing former "CJC Canon 3(C)(1)"). One such instance is when:

> The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

CJC Canon 2, Rule 2.11(A)(1).

"The test for determining whether a judge's impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts." Business Services of America II, Inc. v. WaferTech LLC, 159 Wn. App. 591, 600, 245 P.3d 257 (2011); Sherman v. State, 128 Wn.2d 164, 205-06, 905 P.2d 355, 378-79 (1995) (citing In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2d Cir. 1988), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989)). As the Sherman court explained, "[A]ctual prejudice is not the standard. The CJC recognizes that where a trial judge's decisions are tainted

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[2] A reorganization and revision of the Code of Judicial Conduct became effective January 1, 2011. Washington Court Rules, Volume I - State, 2011, at 53. As such, pre-2011 references to various canons will not coincide to post-reorganization references. For example, what is now "Canon 2, Rule 2.2(A)" was previously "Canon 3(D)(1)." There have also been modifications made to the wording of some of the provisions. E.g., compare former CJC Canon 3(D)(1)(a) to current CJC Canon 2, Rule 2.11(A)(1).

by even a mere suspicion of partiality, the effect on the public's confidence can be debilitating." Id.

Kiner argued Judge McCullough should recuse himself because of his personal bias in favor of the prosecutor, which he claimed was evident by the judge allowing the prosecutor to make false representation to the Washington Supreme Court in defending against Kiner's request for a writ of mandamus; a request that was eventually granted, thereby directing the trial court to properly consider the previously submitted pro se CrR 7.8 motion. Supp CP __ (sub no. 105, supra). Such bias falls within the criteria for non-discretionary disqualification under CJC Canon 2, Rule 2.11(A)(1).

Unfortunately, it appears Judge McCullough failed to recognize the actual basis for Kiner's motion, and instead assumed he was belatedly seeking to exercise his one-time statutory right to a pre-discretionary ruling change of judge. It was this erroneous assumption that constitutes reversible error.

To the extent this Court may conclude Kiner is not entitled to review of the denial of his motion to recuse by way of direct appeal, it should still review the issue by way of discretionary review. Discretionary review is warranted because Judge McCullough's denial of the motion constitutes obvious error that rendered further proceedings in the trial court useless. RAP 2.3(b)(1).

A court's failure to comprehend the correct legal rubric under with a matter must be considered constitutes obvious error. In re Dependency P.P.T., 155 Wn. App. 257, 270, 229 P.3d 818, review granted, 170 Wn.2d 1008, 249 P.3d 624 (2010); Washington State Dept. of Labor and Industries v. Davison, 126 Wn. App. 730, 736, 109 P.3d 479 (2005). Judge McCullough failed to comprehend Kiner's motion to recuse was brought under the appearance of fairness doctrine rather than the pre-trial one-time affidavit of prejudice rubric.

Judge McCullough's obvious error rendered further proceedings useless. Absent a determination that the judge could be fair and impartial in both actuality and appearance in ruling on Kiner's motions, the denial of the motion violated Kiner's due process rights. Const. art. I, § 3; U.S. Const. amends. 5, 14; In re Murchison, supra; Ward v. Village of Monroeville, supra; State v. Cozza, 71 Wn. App. at 255; RCW 4.12.040. Therefore, review is warranted. RAP 2.3(b)(1).

D. CONCLUSION

For the reasons stated, this Court should reverse the trial court's September 14, 2010 rulings, and remand for proper consideration of Kiner's motions.

DATED this 12th day of May, 2011.

Respectfully submitted,

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APPENDIX

RICHARD D. JOHNSON,
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State of Washington, Respondent v. Jeffrey W. Kiner, Petitioner

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The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on January 25, 2011, regarding petitioner's motion for discretionary review:

Jeffrey Kiner seeks review of a September 14, 2010 trial court order denying Kiner's CrR 7.8 motion to vacate and his motion for the trial court to recuse on the motion to vacate.

In 2006 Kiner was convicted and sentenced on three counts of first degree child molestation. Kiner appealed to this court, State v. Kiner, No. 59095-2-I. On March 10, 2008, a commissioner of this court granted a motion on the merits and affirmed the judgment and sentence, and on May 14, 2008, a panel of judges denied a motion to modify. The Supreme Court denied review, and the mandate issued on April 10, 2009.

In the meantime, in February 2009, Kiner filed a CrR 7.8 motion to vacate and modify the judgment and sentence. Kiner sought to vacate his convictions on two of the three counts, arguing there was insufficient evidence that the touching was done for the purpose of sexual gratification. The State took the position that the motion should be transferred to this court to be considered as a personal restraint petition, asserting that the motion was time barred under RCW 10.73.090 and that it raised a legal issue that could be resolved based on the existing record. On August 12, 2009, the trial court transferred the motion to this court to be considered as a personal restraint petition, In re Personal Restraint of Kiner, No. 63990-1-I. On October 8, 2009, the clerk dismissed the petition for failure to pay the filing fee or file a statement of finances. On November 20, 2009, a panel of this court denied Kiner's motion to modify without prejudice to file a personal restraint petition with payment of the filing fee or a statement of finances. The certificate of finality issued December 30, 2009.

In the meantime, on December 8, 2009, Kiner apparently refiled his CrR 7.8 motion. The State takes the position that Kiner never actually filed the motion. Kiner takes the position that he sent the motion to both the prosecutor and the superior court, whether or not it was actually filed and/or listed on the docket. Kiner made efforts to contact the superior court about his motion, and the September 14 trial court order refers to Kiner's April 2009 motion.

On March 29, 2010, Kiner filed a motion for a writ of mandamus in the Supreme Court. Subsequently, the State filed an answer, and Kiner filed a reply.

In the meantime, on April 9, 2010, Kiner apparently again attempted to file his CrR 7.8 motion. Again, Kiner and the State disagree as to whether the motion was ever actually filed and/or docketed. The trial court September 14 order refers to Kiner's April 2010 motion. In any event, the State filed a motion to transfer Kiner's motion to this court to be considered as a personal restraint petition. As it did previously, the State argued that the motion raised a legal issue that could be resolved on the existing record and that the motion was time barred under RCW 10.73.090.

On June 4, 2010, the Supreme Court granted Kiner's motion for the expenditure of public funds, waived the filing fee, granted Kiner's motion for a writ of mandamus, and directed the King County Superior Court to act on Kiner's CrR 7.8 motion. Kiner v. King County Superior Court, No. 84366-0.

On June 21, 2010, Kiner filed a recusal motion and affidavit, asserting the trial court should decline to rule on Kiner's motion to vacate due to alleged bias and partiality. The basis of Kiner's motion was that the State had made false statements regarding the timeliness of his motion and the trial court had failed to timely rule on the CrR 7.8 motion.

By letter to the trial judge on August 13, 2010, the State took the position that there was no affirmative relief the court could grant regarding Kiner's June 2010 motion, as it was not a collateral attack on his conviction, there was nothing before the court to transfer as a personal restraint petition, and that the court could either the deny the motion or choose not to act on it.

On September 14, 2010, the trial entered an order denying Kiner's CrR 7.8 motion to vacate and his motion for recusal. Regarding the motion to vacate, the trial court concluded it was untimely under RCW 10.73.090(1) as it was filed more than one year after the judgment and sentence. The court also ruled that Kiner presented no substantive challenge to the facial validity of the judgment and sentence and none was apparent on its face, see RAP 10.73.090(1), and that Kiner did not meet the high burden for equitable tolling, citing RCW 10.73.100 and caselaw.

Kiner seeks review of the September 14, 2010 order. After Kiner filed a notice of appeal, this court informed him that it would be treated as a notice of discretionary review. Kiner filed a motion for discretionary review, which was set for hearing on January 7, 2011.

As to timeliness, Kiner argues that his CrR 7.8 motion to vacate was not time barred because he filed it within one year of the mandate, see RCW 10.73.090(3)(b), and because his motion raises a challenge to the sufficiency of the evidence, which is an exception to the one year time bar, see RCW 10.73.100(4). Kiner also challenges the trial court's decision declining to recuse.

Although this court has so far treated Kiner's challenge as subject only to discretionary review, under RAP 2.2(a)(10) an order granting or denying a motion to vacate is appealable as a matter of right. In some instances, a trial court presented with a CrR 7.8 motion to vacate is required to transfer the motion to this court to be treated as a personal restraint petition. Here, when Kiner filed his first his motion to vacate in 2009, the trial court transferred it to this court. But when Kiner refiled it, the trial court ultimately denied the motion. Contrary to the positions it took below, the State now concedes that Kiner's CrR 7.8 motion was not time barred. The trial court entered an order of indigency authorizing Kiner's appeal at public expense except for the appointment of counsel. At this point, whether I grant discretionary review of the trial court's erroneous timeliness ruling, or treat the matter as an appeal of right, Kiner is now entitled to the appointment of counsel.

In its response to the motion for discretionary review, the State argues:

> Because the motion was improperly dismissed as time-barred, this Court can do one of two things. It can remand the CrR 7.8 motion back to the trial court for [it] to determine whether Kiner has made a substantial showing that he is entitled to relief or whether the motion is frivolous. However, it is the State's position that once the trial court reviews the motion, it will ultimately transfer it back to this court. Therefore, the second option is for this Court to review the motion and determine whether [Kiner] has made a substantial showing for relief. If this Court determines that the motion is frivolous, it can keep the motion here rather than transferring it to the trial court for the same determination.

The State's position is premature. Kiner seeks review of the trial court order denying his CrR 7.8 motion to vacate. The State now properly concedes that the trial court erred in dismissing the motion as time barred. Counsel shall be appointed on this appeal. Any issues regarding the potentially limited scope of the appeal shall be addressed by motion or in the party's briefs.

Now, therefore, it is

ORDERED that Nielsen, Broman & Koch is appointed to represent Jeffrey Kiner on this appeal; and it is

ORDERED that the clerk shall set a perfection schedule.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk