

NO. 36746-7-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

KEVIN D. MOORE,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 APR 15 PM 1:07
STATE OF WASHINGTON
BY NA DEP

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
The Honorable Chris Wickham, Judge
Cause No. 04-1-01815-7

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PM 4-14-08

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Moore's pro se motion pursuant to CrR 7.8 in part because his motion was made more than a year after Moore's judgment and sentence was entered but well before the entry of the mandate on March 17, 2008.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying Moore's pro se motion pursuant to CrR 7.8 in part because his motion was made more than a year after Moore's judgment and sentence was entered but well before the entry of the mandate on March 17, 2008? [Assignment of Error No. 1].

C. STATEMENT OF THE CASE

Kevin D. Moore (Moore) was charged by information filed in Thurston County Superior Court with one count of robbery in the first degree (a class A felony with a statutory maximum sentence of life). [CP 1].

Moore was tried by a jury, the Honorable Richard A. Strophy presiding. [Vol. I RP 4-207; Vol. II RP 211-367; Vol. III RP 371-465]. Moore was found guilty as charged. [CP 20].

The court sentenced Moore to a standard range sentence of 102-months based on an offender score of six including 18 to 36-months of community custody following his incarceration. [CP 43, 44-52; 11-10-05 RP 11-20]. Moore filed a direct appeal.

While his appeal was still pending, Moore, pro se, filed a CrR 7.8 motion regarding his sentence alleging that because he had been sentenced to the high end of his standard range any additional community custody beyond the sentence imposed constituted an exceptional sentence in violation of Blakely even though the statutory maximum for his crime was life. [CP 65-68]. On August 27, 2007, Moore's CrR 7.8 motion was heard by the court, the Honorable Chris Wickham presiding. [8-24-07 RP 3-10]. The court denied Moore's motion entering the following written order ex parte:

This matter came before the undersigned judge upon the motion of the defendant, pro se, on August 24, 2007. The Court ruled that insofar as the defendant alleges "mistakes" in the judgment, such are "time-barred"; that is, such motion must be filed not more than 1 year after the judgment was entered (in this case, November 10, 2005). Furthermore, the community custody range (18-36 months) coupled with the defendant's guideline sentence range, and sentence actually imposed (102 months) does not exceed the statutory maximum sentence of life imprisonment. Accordingly, it is hereby

ORDERED, that the motion of the defendant is Dismissed.

[Emphasis added]. [CP 77].

Timely notice of appeal was filed. [CP 69, 76]. This appeal follows. On March 17, 2008, the mandate was issued in this matter from the direct appeal originally taken from Moore's judgment and sentence. [Supp. CP 79].

D. ARGUMENT

- (1) THIS MATTER SHOULD BE REMANDED FOR REHEARING WHERE THE COURT DENIED MOORE'S PRO SE MOTION PURSUANT TO CrR 7.8 IN PART BY FINDING THAT THE MOTION WAS TIME BARRED WHERE THE MOTION WAS MADE MORE THAN ONE YEAR FROM THE TIME THE JUDGMENT AND SENTENCE WAS ENTERED, BUT MADE WELL BEFORE THE MANDATE WAS ISSUED ON MARCH 17, 2008.

An appellate court reviews a trial court's ruling on a CrR 7.8 motion for an abuse of discretion. State v. Forrest, 125 Wn. App. 702, 706, 105 P.3d 1045 (2005), *citing* State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). An abuse of discretion occurs when a trial court makes a decision not supported by the facts or makes a decision that is contrary to law. [Emphasis added]. State v. Williamson, 100 Wn. App. 248, 996 P.2d 1097 (2000), *see also* State ex rel Carroll v. Junker, 79 Wn.2d 12, 482 775 (1971) (a trial court's discretion is abused when the trial court's decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons).

Here, the trial court abused its discretion in denying Moore's pro se CrR 7.8 motion as its decision [CP 77], in part, is contrary to law in that Moore's motion was not "time-barred." Under RCW 10.73.090, Moore's motion was timely in that it was filed well before the mandate issued on

the direct appeal of this matter (March 17, 2008). [Supp. CP 79]. RCW

10.73.090 provides in pertinent part:

- (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 and sentence becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

...

- (3) For purpose of this section, a judgment becomes final on the last of the following dates:
 - (b) The date that an appellate court issues its mandate disposing of a timely filed direct appeal from the conviction....

Moreover, RCW 10.73.100 (5) and (6) specifically state that the 1-year time limit set forth in RCW 10.73.090 does not apply to situations including those where a defendant is alleging his sentence was imposed in excess of the court's jurisdiction or there has been a significant change in the law.

Here, while the judgment and sentence was entered on November 10, 2005, [CP 44-52], Moore timely filed a direct appeal of this matter for which the mandate did not issue until March 17, 2008. [Supp. CP 79]. After Moore's direct appeal was filed and still pending, Moore, pro se, filed CrR 7.8 motions on May 7, 2007, and August 7, 2007, [CP53-64, 65-68], both of which were filed well before the issuance of the mandate

on his direct appeal—Moore’s CrR 7.8 motions were timely—and raised issues as to the possibility that his sentence was in excess of the court’s jurisdiction, and a significant change in the law. As such, the trial court abused its discretion by denying Moore’s motion(s) as being “time-barred.” [CP 77].

This court should remand for a hearing on Moore’s pro se motion(s) pursuant to CrR 7.8 properly addressing all the issues he has raised.

E. CONCLUSION

Based on the above, Moore respectfully requests this court to reverse and remand for rehearing.

DATED this 14th day of April 2008.

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 14th day of April 2008, I delivered a true and correct copy of the Petition for Review to which this certificate is attached by United States Mail, to the following:

Kevin D. Moore
DOC# 734812
Airway Heights Corrections Center
P.O. Box 2109
Airway Heights, WA 99001

Carol La Verne
Thurston County Dep. Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502
(and the transcript)

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
08 APR 15 PM 1:07
BY DEPUTY

Signed at Tacoma, Washington this 14th day of April 2008.

Patricia A. Pethick
Patricia A. Pethick