

NO 36880-3-II

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

STATE OF WASHINGTON,

Appellant,

vs.

BOBBY D. BEASLEY, JR.,
Respondent.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY *[Signature]*
DEPUTY

APPEAL FROM THE MASON COUNTY SUPERIOR COURT
The Honorable Toni A. Sheldon, Judge
Superior Court cause #07-1-00139-5

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ANSWERS TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The State claims that the trial court erred in failing to disclose a local practice involving not presiding over trials in which local counsel were live fact witnesses whose credibility would be judged. The State makes no showing that there was such a practice pertaining to motions; there is no such published local rule; there is no showing that any such practice was in effect at the time of the hearing at issue; and there is no authority that any such practice, if there was one, necessitated the trial judge's recusal in a motion hearings based on written declarations. There was no error.

2. The State's Assignment of Error #2 essentially restates #1; #1 claims that the judge was required to disclose a local practice; #2 claims the trial judge erred by violating such a local practice. But, the State established only that there was some ten months after the decision appealed from, in a different case, mention of a local practice of recusal where a local attorney would be a live witness at trial. There was no showing that there was any similar practice for motions hearings based upon written declarations. There was no error.

3. The trial court did not err in denying the State's Motion to Vacate Judgment. This assignment of error by the State is essentially combines the State's assignments of error 1,2, and 4. As stated in those answers, there was no error.

4. The trial court did not err in failing to address a statement by Respondent's counsel; a court may summarily deny a CrR 7.8(b) motion if the motion and supporting affidavits do not establish grounds for relief; clearly the court considered the matter and gave it no credibility. There was no error.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1. Need a judge hearing a motion supported by written declarations disclose a local practice or policy that the judges recuse themselves from trials where a local attorney is a live witness?

No. 2. Need a judge hearing a motion supported by written declarations recuse herself because of a local practice or policy that the judges recuse themselves from trials where a local attorney is a live witness?

No. 3. Did the trial court violate the Code of Judicial Conduct, where it heard and decided a motion hearing, including declarations from both counsel and other witnesses?

No. 4. Did the trial court err in failing to set a fact-finding hearing before a visiting judge to consider a slip-of-the tongue misstatement that was clearly an accident and unintended and was immediately clarified, and neither the speaker nor the hearer understood the statement to be anything but a humorous misstatement?

C. STATEMENT OF THE CASE

The Respondent herein incorporates by reference his Statement of the Case set forth in his previously filed Brief of Respondent on Appeal.

As set forth in the Statement of Case in the Brief of Respondent on Appeal, Bobby Beasley moved the trial court to dismiss the prosecution against him pursuant to CrR 8.3(b). That motion was granted. The State filed a motion to reconsider, which was denied.

The State appealed the order of dismissal.

While that appeal was pending, almost a year after the order of dismissal, the State filed a Motion to Vacate Judgment pursuant to CrR 7.8(b) in the trial court, which was heard on October 23, 2008. (CP 173; RP 1-23). The trial court denied the State's motion. (CP 7).

The State then filed a second appeal on the denial of its Motion to Vacate Judgment, and this Court combined the two appeals.

D. ARGUMENT

1. Standard of Review. The standard for review of a trial court's decision on a CrR 7.8(b) motion is abuse of discretion. State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996); State v. Florencio, 88 Wn. App. 254, 258, 945 P.2d 228 (1997). "To hold that a trial court has abused its discretion, the record must show that the discretion exercised by the court was predicated upon

grounds clearly untenable or manifestly unreasonable.” State v. Olmsted, 70 Wn.2d 116, 119, 422 P.2d 312 (1966). Abuse of discretion will be found only where no reasonable judge would have ruled as the trial judge did. State v. Yarbrough, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009).

Here, the trial judge’s decision denying the State’s CrR 7.8(b) motion was both tenable and reasonable. It cannot be said that no reasonable judge would have ruled as the trial judge did; the trial judge made the appropriate and reasonable decision.

The State asserts that the trial judge should have vacated its earlier order dismissing the prosecution against Mr. Beasley for two reasons: (1) that the trial judge should have either disclosed what the State claims is a local practice that the trial judges recuse themselves from issues that require them to assess the credibility of local counsel, or that the trial judge should have recused herself on her own motion pursuant to that local practice; and (2) that the trial court should have directly addressed a statement by defense counsel that was clearly a slip-of-the-tongue, accidental and unintended misstatement in a private conversation off the record.

2. Alleged local practice or policy. The State claims that Judge Sheldon should have recused herself from hearing Mr. Beasley’s CrR 8.3(b) motion to dismiss, because, according to the State, the superior court judges have a local

practice to recuse themselves from matters where local attorneys are witnesses. However, the only evidence of such a local practice shows only that it might apply to a bench trial where a local attorney is a live fact witness. There is no evidence, authority, or logic to apply it to a motion hearing based on written declarations. Indeed, the court rules and case law contemplate that motions will often be decided on affidavits. State v. Robinson, 153 Wn.2d 689, 695, 107 P.3d 90 (2005).

The evidence that the State claims establishes such a local practice comes from a case in which neither Mr. Beasley nor defense counsel were involved, State v. Moore, Mason County Superior Court #08-1-001710-7, that occurred in June of 2008, about ten months after the order of dismissal. (CP 157).

In the transcript of a hearing in the Moore case, the trial judge stated that she would recuse herself from presiding over a trial because a local attorney was appearing as a witness against the defendant, for the State. The judge stated as follows:

That presents a problem for the Court, in that she's a local attorney appearing before us frequently, and the Court would need to recuse, or step back from trying the case. It's our policy also that Judge Sawyer would do the same, with a local attorney appearing, so we're not able to send the matter out to trial today because of that factor.

(CP 158).

When the defense attorney objected to a recusal, the judge stated as follows:

Alright, and maybe I misspoke with respect to the word policy. We don't have any written policy; it's just this Court's practice not to preside over cases in which there are fact witnesses that are local attorneys, and I have seen the same has occurred with Judge Sawyer.

(CP 159).

Subsequently, Judge Sawyer called the case and determined that he did not need to recuse himself because the jury would be the trier of fact and the parties agreed. (RP 170). Nothing in the transcript indicates how long this practice had been in effect. Nothing in the transcript indicates that it was in effect during the pendency of the Beasley case.

The State cites CP 178 for support for its claim that the practice had been in effect for "a long time". The State is referring to Mason County Clerk's sub-number 178 in the clerk's papers, which is page number 12 in the clerk's papers before this Court, and should be cited as CP 12. That document was filed by Deputy Prosecuting Attorney Reinhold Schuetz on November 14, 2008, and is entitled Declaration of Reinhold P. Schuetz in Support of Notice and Request Re Defendant's CR 11 Motion. In that declaration, Mr. Schuetz related a hearsay statement from Judge Sawyer, stated in pertinent part as follows:

That prior to his recent retirement, I inquired of the Honorable James Sawyer as to how long such local practice had been in effect. After a brief

pause, Judge Sawyer replied “A long time”. I made this inquiry in the court’s front office at the counter of and in the presence of Mason County Superior Court Administrator Geri Burt.

(CP 12). Mr. Schuetz’ declaration does not state when that conversation with Judge Sawyer took place, except to say it took place prior to the judge’s recent retirement.

Ninety days earlier, on August 15, 2008, Mr. Schuetz had filed a Declaration of Reinhold P. Schuetz in Support of Motion to Vacate Judgment. In that declaration, Mr. Schuetz also related a hearsay statement from Judge Sawyer, stated in pertinent part as follows:

That upon arriving in the main superior court courtroom that morning for trial call I was advised by other counsel that the Moore matter would not be going to trial. The reason given was that the two superior court judges were both recusing themselves due to local counsel Jeannette Boothe being a state’s witness in the Moore matter. That I initially confirmed this information with the Honorable James Sawyer in chambers.

(CP 154).

Mr. Schuetz appears to be referring to two separate off-the-record conversations with Judge Sawyer, although that is not completely clear, nor is it clear whether that occurred on the same date or on separate dates. It is also unclear whether opposing counsel in the Moore case was present for these conversations; there is no indication that he was; counsel for Mr. Beasley was not present.

In any case, the only evidence that the practice was not brand new was the hearsay declaration from Mr. Schuetz, quoting Judge Sawyer. It is interesting that Mr. Schuetz, Mason County's Chief Criminal Deputy Prosecuting Attorney, did not seem to know about this policy. That seems unlikely if indeed it had been around for any length of time.

On the other hand, the policy in question could easily have been a general policy used by most judges, where the judge will not hear a trial with a witness who is a close friend, associate, or relative of the judge. Mr. Schuetz did know about this general practice; indeed he mentioned it during argument on his motions to recuse and reconsider: Mr. Schuetz: "Obviously, the court just withdrew, as did Judge Sawyer also, when the Court's brother was a victim in a case that I tried, and that's an appropriate use of the canons." (RP 203).

In any case, the practice or policy of recusal could apply to trials where a local attorney would necessarily be a live witness. There is no authority to suggest it should apply to motions hearings based on affidavits or declarations; neither law nor logic would support that application.

The court rules, the case law, and standard courtroom practice in every county of the state show that motions under the court rules, including CrR 7.8(b) and CrR 8.3(b) motions, are to be supported by affidavit or declaration. State v. Robinson, 153 Wn.2d 689, 695, 107 P.3d 90 (2005).

Thus, every courtroom lawyer knows that his or her own affidavits and declarations will be used by a judge to decide motions in many instances, and the State made no objection to the procedure in this case. It would be an extremely burdensome and impractical construction of this practice to say that a judge cannot hear a motion based on affidavits from local counsel – which would be the great majority of her motions. In all such motions the judge must determine the relative credibility of the declarants. The State’s argument would lead to an absurd result.

3. Trial court’s failure to set a hearing on defense counsel’s statement before a visiting judge. Once Judge Sheldon ruled against the State on Mr. Beasley’s CrR 8.3(b) motion to dismiss, all of the State’s efforts turned toward trying to find a way to get a different judge. The case against Mr. Beasley was dismissed by order entered September 5, 2007. (CP 31-36).

The State filed a motion to reconsider and a motion to recuse Judge Sheldon on that same day. (CP 37); (CP 42-47). The motions to reconsider and to recuse were heard on September 18, 2007. (RP 197). The court denied both motions. (RP 165-266).

The State appealed the trial court’s denial of its motions to recuse and to reconsider within the 30 day deadline, and appealed the denial of its Motion to Vacate Judgment on January 30, 2009

The State is apparently not claiming that the trial judge erred in not vacating the judgment due to defense counsel's unfortunate slip of the tongue. The State appears to claim only that the trial court erred in not addressing that matter by setting it for consideration in front of a visiting judge.

However, a trial court has the authority to summarily deny a CrR 7.8(b) motion if the motion and supporting affidavits do not establish grounds for relief. The trial court may serve as an initial screener, much like the chief judge of the Court of Appeals would in a PRP. State v. Robinson, 153 Wn.2d 689, 695, 107 P.3d 90 (2005).

Thus, the trial court has no obligation to set a hearing where it finds that the motion and affidavits do not establish one of the grounds for relief listed in the rule. Moreover, an appellate court will not review a trial court's credibility determinations. State v. Radcliffe, 139 Wn. App. 214, 220, 159 P.3d 486 (2007). There is plenty of support in the record for a conclusion that the State's claim that the slip-of-the-tongue remark by defense counsel was exactly that – a meaningless slip of the tongue, including statements from the detective to which the remark was made that he did not consider the remark to be an admission of anything, but rather just a funny, accidental misstatement. (CP 16); (CP 22); (CP 106-107); (CP 144-145).

The State has cited only one section of the rule as its authority for its motion and this appeal, CrR 7.8(b)(5), which applies only in extraordinary circumstances not covered by other sections of the rule. CrR 7.8(b) does not apply to error of law or to correct the court's own mistake. Those must be addressed on appeal. CrR 7.8(b)(5) applies only in truly extraordinary circumstances. Extraordinary circumstances must relate to fundamental, substantial irregularities in the court's proceedings or to irregularities extraneous to the action of the court. State v. Littlefair, 112 Wn. App. 749, 772, 51 P.3d 116 (2002); State v. Aguirre, 73 Wn. App. 682, 688, 871 P.2d 616 (1994). "Final judgments in both criminal and civil cases may be vacated or altered only in those limited circumstances where the interests of justice most urgently require." State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989).

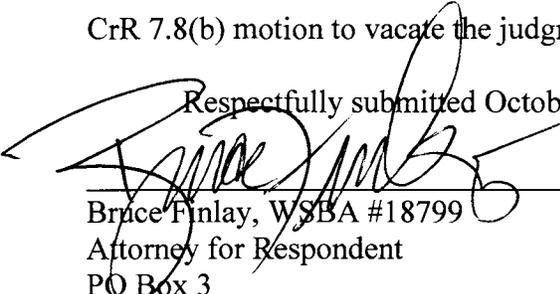
None of the reasons cited by the State can fairly be described as fundamental, substantial irregularities in the court's proceedings or to irregularities extraneous to the action of the court, or those limited circumstances where the interests of justice most urgently require that the judgment be vacated. The court's failure to recuse itself, where no request for recusal was made until after an adverse ruling, in a motions hearing that was decided on declarations from local counsel, out of town counsel, and many other persons, is not grounds to vacate under CrR 7.8(b); it is standard practice. The trial court's failure to set a

hearing before a visiting judge on the issue of an off-the-cuff, accidental statement by defense counsel, where the record fully supports a finding that the statement was nothing but accidental, is also not the type of substantial irregularity addressed by the rule.

E. CONCLUSION

Therefore, the State has not shown that the trial court erred in denying its CrR 7.8(b) motion to vacate the judgment. The rulings below should be affirmed.

Respectfully submitted October 1, 2009.



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DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
Petitioner,) No.36880-3-II
)
vs.)
) DECLARATION OF
) SERVICE RE:
BOBBY D. BEASLEY, JR,) SUPPLEMENATAL BRIEF
Respondent.) OF RESPONDENT
)
_____)

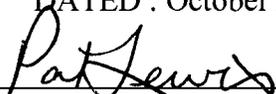
I, Pat Lewis, on October 2, 2009, mailed via the United States
Postal Service, first class and postage prepaid from Shelton, Washington,
the following documents:

Supplemental Brief of Respondent

to Mason County Prosecutor's Office; and to Bobby Beasley, Respondent

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED : October 2, 2009 at Shelton, Washington.



Pat Lewis, legal assistant for
Bruce Finlay

DECLARATION OF SERVICE-1

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