

No. 38430-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ERNEST BRAZZEL,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable Bryan Chuschcoff, Judge

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A. ASSIGNMENT OF ERROR

The superior court erred and violated the mandates of CrR 7.8(c)(2) by denying appellant's CrR 7.8 motion without holding a show cause hearing as required.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Under the current version of CrR 7.8(c)(3), when the defendant files a CrR 7.8 motion the trial court is required to either transfer the case to the Court of Appeals for a decision or hold a show cause hearing on the merits of the motion. Rather than holding such a hearing, the trial court in this case called for a written response from the prosecution and then dismissed the CrR 7.8 motion without a hearing. Did the court err in failing to hold the required show cause hearing and should this Court reverse and remand with instructions for such a hearing to be held?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Ernest Brazzel was charged with and convicted of first-degree assault and two counts of second-degree assault with enhancements in 1998. CP 1, 4-9; RCW 9A.36.011; RCW 9A.36.021; RCW 9.94A.125; RCW 9.94A.310; RCW 9.94A.370. He successfully appealed and, in 2001, was retried and found guilty of the same charges. CP 26-31, 86-92. The sentencing was held on August 17, 2001, after which Brazzel again appealed. CP 106-23; 1RP 1<sup>1</sup>; see 2RP 5-6. In June of 2004, this Court

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<sup>1</sup>The verbatim report of proceedings consists of four volumes, which will be referred to as follows:

The volume containing August 17, 2001, as "1RP;"  
the chronologically paginated volumes of October 12, 2007, February 4 and

affirmed. CP 124-35.

In 2007, the Ninth Circuit reversed Brazzel's first-degree assault conviction, granting his motion for a writ of habeas corpus on that count only. CP 148-60. On February 4, 2008, Brazzel entered a plea to a Fifth Amended Information which charged one count of first-degree assault. CP 138-47; 2RP 11. On March 18, 2008, the court then ordered Mr. Brazzel to serve a sentence of 204 months, consecutive to the sentences imposed on the second-degree assault convictions and enhancements, which still stood. CP 164-76; 2RP 11-12, 40.

On May 18, 2008, Mr. Brazzel filed a motion under CrR 7.8(b), asking the court to vacate the judgment and sentence based on an error in the offender score. CP 179-88. After calling for a response, the court denied the motion. CP 177-78, 190-95. Mr. Brazzel filed a notice of appeal which was eventually treated as a direct appeal and this pleading follows. See CP 204-21.

2. Facts relating to issues on appeal

After the 9<sup>th</sup> Circuit decision and further proceedings began on the first-degree assault conviction in superior court, Brazzel decided to enter a plea to a fifth amended information charging first-degree assault, with the understanding that the other convictions (for assault 2) were unaffected by the 9<sup>th</sup> Circuit proceedings and therefore still stood. 2RP 10-11.

In his CrR 7.8 motion, Brazzel asked for the judgment and sentence to be vacated and for a resentencing, arguing that the offender

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March 18, 2008, as "2RP."

score and standard range were not correct because a Tennessee conviction relied on in reaching the offender score had “washed out.” CP 179-88. More specifically, he argued that the Tennessee crime took place on November 30, 1990, he was sentenced May 22, 1991 and served 3 years of probation, and that he did not have another felony conviction until October 30, 1997. CP 179-88.

Three days after Brazzel’s motion was filed, on May 18, 2008, the superior court ordered the prosecutor’s office to file a response, based upon the court’s finding that “[t]he written materials establish a basis for further consideration.” CP 177-78. That response was filed on July 11, 2008. CP 190-95. On August 14, 2008, the court then denied Mr. Brazzel’s CrR 7.8 motion. CP 196-99.

On August 18, 2008, Mr. Brazzel filed a notice of appeal. CP 204-17. The trial court entered an order on August 22, 2008, declaring that the notice of appeal was untimely because it was an appeal of “the Judgment and Sentence of March 18, 2008.” CP 204-17. The court therefore ordered the matter transferred to this Court “pursuant to CrR 7.8(c)(2) to be handled as a personal restraint petition as the ends of justice will be served by such a transfer.” CP 206.

On October 2, 2008, this Court entered an order rejecting the transfer, stating that, “[o]nce the trial court entered its order denying relief, CrR 7.8(c)(2) no longer applied” to authorize transfer. CP 218-19. The court also questioned whether the trial court’s August 14, 2008, order denying the CrR 7.8 motion was “properly appealable” under the current version of the rule, because it appeared the trial court’s order complied

only “with the previous version of this rule rather than the amended rule.” CP 218. The Court declared that the trial court could only transfer the case if it issued an order which would “supersede the prior order denying relief” and issued “a new order transferring the motion that complies with the amended version of the rule.” CP 219. The case was thus ordered returned to the trial court for “further appropriate action.” CP 219.

On remand, the trial court rescinded its order of transfer to this Court, signed an order of indigency and ordered the clerk of the superior court to forward that order along with the Notice of Appeal as a direct appeal. CP 220-21. This pleading follows.

D. ARGUMENT

THE TRIAL COURT VIOLATED THE MANDATES OF  
CRIMINAL RULE 7.8(C)(2) WHEN IT DENIED MR.  
BRAZZEL’S MOTION WITHOUT CONDUCTING A  
SHOW CAUSE HEARING AS REQUIRED

CrR 7.8 provides a means for parties to seek relief from a judgment and sentence after it has been entered. Under the rule, a party may move to be relieved from a judgment or order upon any one of a number of bases, including mistakes. CrR 7.8(b)(1). A trial court’s ruling on a CrR 7.8 motion is reviewed for abuse of discretion. See State v. Larranaga, 126 Wn. App. 505, 509, 108 P.3d 833 (2005). A court abuses its discretion when it acts on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In this case, this Court should reverse the trial court’s denial of Mr. Brazzel’s CrR 7.8 motion, because the trial court abused its discretion in failing to follow the mandates of CrR 7.8 and hold a show cause hearing

on the merits of Brazzel's claims.

CrR 7.8 contains the procedure which must be followed when any motion under the rule is filed. Until 2007, the rule provided trial courts with the authority to 1) deny a CrR 7.8 motion without a hearing if the motion did not establish grounds for relief, or 2) set a hearing at which the adverse party had to show cause why the requested relief should not be granted, or 3) transfer the case to the court of appeals for consideration as a personal restraint petition if such a transfer would "serve the ends of justice." See State v. Smith, 144 Wn. App. 860, 862, 184 P.3d 666 (2008).

Since September 1, 2007, however, the rule now provides a different procedure. Id. The current version of the rule provides, in relevant part:

(2) 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.

(3) If the court does not transfer the motion to the Court of Appeals, it 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.

CrR 7.8(c).

Thus, under the new version of the rule, when a CrR 7.8 motion is filed, the superior court must first determine whether the motion is time barred under RCW 10.73.090. If so, the superior court must transfer the motion to the Court of Appeals. If not, the superior court must still transfer the CrR 7.8 motion to the appellate court unless it concludes that

the defendant has made a substantial showing he is entitled to relief or that a factual hearing needs to be held in order to decide the motion. In either case, if the superior court retains a CrR 7.8 motion, it is required by the mandatory language of CrR 7.8(c)(3) to set a time and place for a show cause hearing at which the merits of the motion will be heard.

In this case, the superior court failed to follow the mandates of the rule. As a threshold matter, the motion was not time-barred by RCW 10.73.090. Under that statute,

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.

RCW 10.73.090(1). Here, the judgment and sentence Brazzel was challenging in his CrR 7.8 motion was entered on March 18, 2008. CP 164-76. His motion was filed on May 21, 2008, far less than the year limit set forth in the statute. See CP 179-88.

As a result, because Mr. Brazzel's motion was not untimely under RCW 10.73.090, the superior court had the authority to retain the case - and rule on it - only if it first found either that Mr. Brazzel made a substantial showing he was entitled to relief or that the motion could not be decided without a factual hearing. CrR 7.8(c)(2). In either case, the court was required under CrR 7.8(c)(3) to set a date and time for a show cause hearing on the merits of the motion and enter an order to that effect.

But here, the court did not follow those requirements. After Brazzel's motion was filed, the court did not enter a finding that Brazzel had made a substantial showing he was entitled to relief or that the motion

could not be decided without a factual hearing. Nor did the court set a date and time for a show cause hearing on the merits of Brazzel's motion. Instead, the court entered an order finding that "[t]he written materials establish a basis for further consideration" and directed the state to file a response to the motion within 30 days. CP 177-78. And once that response was filed, the court entered an order denying Brazzel's motion "based upon the written material submitted," finding that the motion "fails to establish the legal criteria for granting a motion based upon CrR 7.8 and the relevant case law." CP 196-99.

Thus, the court acted without authority and abused its discretion in denying Brazzel's CrR 7.8 motion without holding a show cause hearing. See Smith, 144 Wn. App. at 863. This Court should reverse and remand with instructions for the trial court to hold a show cause hearing on the merits of Mr. Brazzel's motion, as required under CrR 7.8(c)(3).

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 5<sup>th</sup> day of July, 2009.

Respectfully submitted,



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