

COA NO. 41895-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ROY SCOTT,

Appellant.

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

The Honorable Michael J. Sullivan, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing appellant's renewed motion to withdraw his Alford¹ plea. 1CP² 161-62.³

2. The trial court erred in denying appellant a reference hearing on whether he should be allowed to withdraw his Alford plea. 1CP 161-62.

3. The trial court erred in entering conclusions of law "2" and "3" in its written "Findings of Fact, Conclusions of Law and Order Denying Defendant's Sundry Motions." 1CP 161-62.

Issue Pertaining to Assignments of Error

Appellant's previous post-conviction motion to set aside his Alford plea based on newly discovered evidence was never adjudicated on its merits. Did the trial court err in dismissing appellant's renewed motion under RCW 10.73.140?

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

² The first index to clerk's papers and supplemental index to clerk's papers are not sequentially paginated in relation to one another. "1CP" refers to the index filed 7/12/11. "2CP" refers to the supplemental index filed on 8/31/11.

³ The trial court's written "Findings of Fact, Conclusions of Law and Order Denying Defendant's Sundry Motions" is attached as appendix A.

B. STATEMENT OF THE CASE

In 2001, Richard Scott entered an Alford plea to one count of third degree child rape. State v. Scott, 150 Wn. App. 281, 283-84, 207 P.3d 495 (2009).⁴ In 2003, Scott filed a personal restraint petition, arguing his plea was invalid due to a miscalculated offender score. Scott, 150 Wn. App. at 285. The Supreme Court ordered the superior court to grant Scott his choice of remedy—withdrawal of his guilty plea or specific performance of the plea agreement. Id. at 285. Scott chose specific performance and was resentenced to a lower standard range of 20 months confinement in accordance with the original plea agreement. Id. at 286.

At that point, Scott had already served 24 months in prison and expected to be released from confinement. Id. at 286. Before his release, however, the King County Prosecutor's Office petitioned to have Scott involuntarily committed under chapter 71.09 RCW. Id. In 2007, the superior court entered an order involuntarily committing Scott. In re Detention of Scott, 150 Wn. App. 414, 418, 208 P.3d 1211, rev. denied, 167 Wn.2d 1014, 220 P.3d 209 (2009).⁵

⁴ In an Alford plea, the defendant does not admit guilt but concedes that a jury would most likely convict him based on the strength of the State's evidence. Scott, 150 Wn. App. at 294.

⁵ The Court of Appeals affirmed his indefinite civil commitment. Scott, 150 Wn. App. at 416-17.

In 2006, meanwhile, Scott moved to vacate his Alford plea conviction in the superior court based on newly discovered evidence that he did not commit the crime. Scott, 150 Wn. App. at 286-89. The Honorable Michael J. Sullivan denied Scott's motion to vacate without holding an evidentiary hearing. Id. at 289.

Scott appealed, arguing the trial court erred (1) in denying his motion as untimely; and (2) in failing to conduct an evidentiary hearing to determine the credibility of recent recantations by the alleged victim and two witnesses. Id. at 283. This Court agreed, vacated the superior court's order denying Scott's motion and remanded for a reference hearing to determine the credibility of Scott's "new evidence." Id. at 283, 299-300. The mandate issued on June 29, 2009. 1CP 51.

The reference hearing did not take place on remand. Delay was attributable to difficulty in securing witnesses, the appointment and withdrawal of attorneys assigned to represent Scott, and the need to ultimately determine whether Scott should be allowed to proceed pro se. 1CP 157-58 (FF 5, 6, 7, 8). On June 7, 2011, the court ordered Scott to be present for a June 11 hearing set for the purpose of deciding whether assigned counsel should be allowed to withdraw, new counsel should be appointed, or Scott should be allowed to represent himself. 1CP 158 (FF 8).

On June 8, Scott filed a handwritten document stating, without explanation, that he withdrew his motion to vacate. 1CP 59-60. That same day, assigned counsel faxed to the court a typewritten motion to strike the transport order and withdraw the initial motion to vacate the plea. 1CP 61-63.

On June 10, the trial court entered an order granting the motion to withdraw without a hearing. 2CP 1. The order stated in part "no further court action is required." 2CP 1. The court later entered an order clarifying its intent, which stated in part "[b]ecause this order terminates this case, the evidentiary hearing ordered by the Court of Appeals is not necessary." 2CP 19-20.

On June 14, Scott filed a document stating he withdrew his motion to withdraw his motion to vacate. 2CP 3-4. On July 15, assigned counsel filed a CrR 7.8 motion to vacate the order granting Scott's motion to withdraw his plea challenge. 2CP 5-18. In support, counsel argued Scott suffered from an anxiety disorder and that the earlier decision to withdraw the challenge came about due to Scott's fear of being harmed while in the county jail. 2CP 8-18. The court denied this motion because that circumstance did not constitute an extraordinary one entitling Scott to

relief under CrR 7.8. 2CP 26; 2RP⁶ 11-17. Assigned counsel was allowed to withdraw from the case. CP 160 (FF 11); 2CP 26. Scott did not appeal the order denying this CrR 7.8 motion. 1CP 160 (FF 11).

On August 18, Scott, acting pro se, filed another motion to vacate his conviction. 1CP 64-77. The State opposed the motion, asserting the latest motion to vacate was based on the same grounds that were raised in his 2006 motion to vacate and was therefore procedurally barred. 2CP 27-30. Scott subsequently filed additional evidentiary material in support of his motion to vacate. 1CP 78-112, 113-51, 152-53; 3RP 4-9, 11-12.

On December 15, 2010, a hearing was held on Scott's pro se motions to vacate his guilty plea. 1CP 156 (FF 1); 3RP. Scott argued he earlier moved to withdraw his motion to vacate the plea "without prejudice" because he had "new information" that his assigned counsel would not "present or go after." 3RP 12. Scott described this additional evidence as "above and beyond" what the Court of Appeals had already determined merited an evidentiary hearing. 3RP 11. Scott argued he was entitled to a reference hearing in lieu of vacating his guilty plea. 1CP 157 (FF 2).

⁶ The verbatim report of proceedings is referenced as follows: 1RP - 7/2/10; 2RP - 7/23/10; 3RP - 12/15/10; 4RP 2/25/11.

Judge Sullivan denied Scott's renewed motion to vacate his plea. 1CP 161-62.⁷ The court reasoned CrR 7.8 provides the only basis upon which a superior court could grant Scott's requested relief. 1CP 161 (CL 2). The court acknowledged CrR 7.8 contained a provision pertaining to newly discovered evidence, but noted any motion under CrR 7.8 is expressly subject to the procedural bars set forth in RCW 10.73.140. 1CP 161 (CL 2) (citing State v. Brand, 120 Wn.2d 365, 369, 842 P.2d 470 (1992)). The court relied on Brand for the proposition that "a court may not consider a CrR 7.8 motion if the movant has previously brought a collateral attack on similar grounds." 1CP 151 (CL 2) (quoting Brand, 120 Wn.2d at 370). The court therefore denied Scott's motion to vacate his plea on the basis that Scott previously brought a collateral attack on similar grounds and the evidence supporting the present motion did not

⁷ Scott did not pursue his motions to change the venue and the judge hearing his case at the December 15 hearing. 3RP 12; 1CP 157 (FF 2). The court did not rule on those motions because it considered them "withdrawn." 1CP 162 (CL 3). The motion to change judge was based on RAP 16.12. 3RP 12. A pro se motion for discretionary review on the issue of whether Judge Sullivan should hear the case under RAP 16.12 was pending at the time the trial court entered its written order denying Scott's renewed motion to vacate the guilty plea. 4RP 2-4, 8-12. On March 22, 2001, the Court of Appeals dismissed the motion for discretionary review as moot because the matter was now appealable. <https://acordsweb.courts.wa.gov/AcordsWeb/login.jsp> (accessed August 24, 2011).

differ significantly in either quantity or quality from the earlier evidence presented. 1CP 161 (CL 2). This appeal follows. 1CP 163-69.

C. ARGUMENT

1. SCOTT'S RENEWED MOTION TO VACATE HIS ALFORD PLEA ON GROUNDS OF NEW EVIDENCE IS NOT PROCEDURALLY BARRED BECAUSE HIS EARLIER MOTION WAS NOT DECIDED ON ITS MERITS.

RCW 10.73.140 does not bar Scott's renewed motion to vacate his Alford plea. The procedural bar against successive collateral attacks raising the same or similar ground for relief does not apply when the previous collateral attack was not adjudicated on its merits. The trial court misapplied RCW 10.73.140 in concluding otherwise. This case should be remanded for a reference hearing on Scott's renewed motion to vacate his Alford plea.

- a. The Trial Court's Conclusions Of Law Are Reviewed De Novo.

It is often stated that a trial court's denial of a CrR 7.8 motion is reviewed for abuse of discretion. See, e.g., State v. Madsen, 153 Wn. App. 471, 476, 228 P.3d 24 (2009). The trial court necessarily abuses its discretion when its decision is based on an erroneous view of the law or application of an incorrect legal analysis. Madsen, 153 Wn. App. at 476;

State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009); Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Underlying questions of law related to the denial of a CrR 7.8 motion are reviewed de novo. Madsen, 153 Wn. App. at 476. The trial court concluded, as a matter of law, that RCW 10.73.140 required dismissal of Scott's renewed motion to vacate his plea. 1CP 161 (CL 2). This appeal is based on issues of law and the superior court's application of the law to the facts in his case. Issues of law and the trial court's application of the law to the facts are reviewed de novo. State v. J.M., 162 Wn. App. 27, 255 P.3d 828, 831 (2011); State v. Haney, 125 Wn. App. 118, 123, 104 P.3d 36 (2005). The trial court's legal conclusion is entitled to no deference because the trial court is in no better position to interpret the law than the appellate court.

In dismissing Scott's renewed motion as a successive collateral attack on similar grounds, the trial court relied on its interpretation of Brand. 1CP 161 (CL 2). A trial court's interpretation of case law is reviewed de novo. State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004). The trial court also relied on its interpretation and application of RCW 10.73.140. 1CP 161 (CL 2). "The choice, interpretation, or application of a statute to a set of facts is a matter of law reviewed de novo." State v. Law, 110 Wn. App. 36, 39, 38 P.3d 374 (2002).

b. Scott's Renewed Motion To Vacate The Plea Is Not Barred As A Successive Collateral Attack.

A collateral attack on a criminal judgment includes any type of postconviction relief other than a direct appeal, such as a motion to withdraw a guilty plea. In re Pers. Restraint of Becker, 143 Wn.2d 491, 496, 20 P.3d 409 (2001). Motions to vacate under CrR 7.8(b) are the functional equivalent of personal restraint petitions and are subject to RCW 10.73.140's embodiment of the general rule against subsequent collateral attacks. Brand, 120 Wn.2d at 369; Becker, 143 Wn.2d at 496, 499.

A court may therefore refuse to consider a CrR 7.8(b) motion if the movant has previously brought a collateral attack on "similar grounds." Brand, 120 Wn.2d at 370. "[I]n the context of 'newly discovered evidence,' a collateral attack is based on 'similar grounds' unless the current evidence is significantly different in either quantum or quality from the evidence presented in a previous collateral attack." Id.

Scott's first motion to withdraw his Alford plea on grounds of newly discovered evidence qualified as a collateral attack. Becker, 143 Wn.2d at 496. Following the trial court's order granting the withdrawal of that first motion, Scott's renewed motion to withdraw his plea on the same or similar ground constituted another collateral attack. The trial court

dismissed that second collateral attack under RCW 10.73.140 on the ground that Scott had previously brought a collateral attack on similar grounds. 1CP 161 (CL 2).

The court's conclusion of law is wrong. The similar ground bar does not apply in the context of successive collateral attacks where the previous attack was never resolved on its merits.

RCW 10.73.140 provides:

If 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. . . If upon review, the court of appeals finds that the petitioner has previously raised *the same grounds for review*, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition.

(emphasis added).

Under RCW 10.73.140, a successive petition for similar relief or on similar grounds must be dismissed absent good cause shown. In re Pers. Restraint of Van Delft, 158 Wn.2d 731, 737, 147 P.3d 573 (2006). But "this is true only where the relevant issue was previously heard and determined on the merits." Van Delft, 158 Wn.2d at 738 (citing In re Pers. Restraint of Stoudmire, 145 Wn.2d 258, 263, 36 P.3d 1005 (2001)).

The issue presented in both the first and second motions is whether Scott should be allowed to withdraw his Alford plea on the basis of newly discovered evidence. That issue has never been adjudicated on its merits. The trial court, in dismissing Scott's subsequent motion to vacate his plea on grounds of RCW 10.73.140, failed to grasp this dispositive point.

"Ground" under RCW 10.73.140 means "a distinct legal basis for granting relief." In re Pers. Restraint of Johnson, 131 Wn.2d 558, 564, 933 P.2d 1019 (1997) (quoting In re Pers. Restraint of Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986)). For a subsequent collateral attack to qualify as an attack on the same or similar ground, "the prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application." Johnson, 131 Wn.2d at 564 (quoting Taylor, 105 Wn.2d at 688) (citing Sanders v. United States, 373 U.S. 1, 16, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963)). An adjudication on the merits means "if factual issues were raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing was held." Sanders, 373 U.S. at 16.

RCW 10.73.140 does not bar Scott's subsequent motion to vacate his guilty plea. He has not yet had an evidentiary hearing on the factual issues underlying his motion to vacate his guilty plea based on newly discovered evidence. Sanders, 373 U.S. at 16. His earlier collateral attack was never

adjudicated on its merits and is therefore not subject to the successive petition bar under RCW 10.73.140. Van Delft, 158 Wn.2d at 738; Johnson, 131 Wn.2d at 564; cf. Becker, 143 Wn.2d at 499-500 (petitioner's writ, treated as motion for relief under CrR 7.8(b), barred as successive collateral attack because it merely reiterated the same issues raised *and adjudicated* in original postconviction motion); Brand, 120 Wn.2d at 368, 370-71 (subsequent CrR 7.8 motion on same grounds of newly discovered evidence procedurally barred where earlier collateral attack was dismissed for failure to establish admissibility of newly discovered evidence).

The merits of Scott's motion cannot be determined in the absence of a reference hearing. That is why this Court originally remanded for that hearing to take place. A reference hearing is ordered when the merits of the motion cannot be made from the existing record. RAP 16.11, 16.12; see In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983) ("If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12.").

In balancing the competing interests of finality with the need to preserve constitutional liberties and remedy prejudicial error, the appellate courts "limit collateral review, but not so rigidly as 'to prevent the

consideration of serious and potentially valid claims." Brand, 120 Wn.2d at 368-69 (quoting In re Pers. Restraint of Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990)). Scott undoubtedly has a serious and potentially valid claim. This Court's decision remanding for a reference hearing on Scott's claim proves the point: "the chances of there being no competent evidence to support Scott's Alford plea are high, and the necessity of an evidentiary hearing is clear." Scott, 150 Wn. App. at 295. Nothing has changed in that regard. As recognized by the trial court, the evidence in support of Scott's renewed motion to vacate the plea does not significantly differ in terms of quantity or quality. 1CP 160-61 (FF 14), (CL 2).

The trial court's flawed dismissal of Scott's renewed collateral attack cannot stand. "Conclusion of Law 2" — that Scott's renewed motion was barred as a successive collateral attack under RCW 10.73.140 — is incorrect for the reasons set forth above. 1CP 161. In Conclusion of Law 3, the court determined "Mr. Scott's motions for funding for an investigator and for appointment of standby counsel are not germane, because the Court concludes that Mr. Scott has not made a sufficient threshold showing to allow this matter to go forward." 1CP 162 (CL 3). This portion of Conclusion of Law 3 is flawed because it rests on the presumption that Conclusion of Law 2 is valid.

The remedy is to vacate the trial court's dismissal order and again remand for a reference hearing on whether Scott should be allowed to vacate his Alford plea based on newly discovered evidence.

c. On Remand, A Different Judge Should Preside Over The Proceedings.

On remand, a different trial judge should preside over the reference hearing. Judge Sullivan has not once but twice erroneously denied Scott his right to have his claim for relief adjudicated on the merits. It is time for a different judge to handle this matter.

Due process requires not only that there be an absence of actual bias but that justice must satisfy the appearance of justice and impartiality. In re Custody of R., 88 Wn. App. 746, 762, 947 P.2d 745 (1997); State v. Madry, 8 Wn. App. 61, 62, 504 P.2d 1156 (1972); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. "Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised." State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983).

Reassignment to a different judge on remand is required here to preserve the appearance of fairness. The State, in responding to this brief, will undoubtedly criticize Scott for the delay on remand stemming from his inability to get along with assigned counsel and his vacillations both in

this regard and in his desire to proceed pro se. The State will also likely argue Scott has been disrespectful to the trial judge and is not deserving of relief.

There is an appearance that the trial judge has adopted a similar viewpoint. When Scott moved to withdraw his motion to set aside his plea without explanation, the judge made no inquiry into the circumstances of why that was being done after so many resources had been put into pursuing the motion to set aside the plea. The judge did not advise Scott of any potential procedural consequences from the withdrawal of his motion to withdraw the plea.

In later denying the CrR 7.8 motion to vacate the order allowing withdrawal of the motion to set aside the plea, the judge accused Scott of "playing with the Court." 3RP 14. The judge was clearly tired of dealing with Scott. 3RP 14-17. The judge's expressed animosity towards Scott supports reassignment. See Custody of R., 88 Wn. App. at 762 (remand for a hearing before a different judge to promote the appearance of fairness where dialogue showed judge's anger with a party coupled with improper denial of request for continuance).

The judge then clearly misapplied the law regarding successive collateral attacks in dismissing Scott's renewed motion. See Section 1. A. b.,

supra. These events raise the appearance that the judge's paramount interest is in dismissing the matter without a resolution on its merits.

These circumstances take on added significance in light of that fact that Judge Sullivan has already concluded Scott is not entitled to a new trial without even conducting an evidentiary hearing on the matter. Scott, 150 Wn. App. at 289-90, 293. Judge Sullivan could reasonably be expected to have substantial difficulty in overlooking his previously expressed findings on the matter. See State v. Talley, 83 Wn. App. 750, 763, 923 P.2d 721 (1996) ("On remand, we direct that Talley be sentenced by a different judge because the court's statement at the August 11 hearing that she had already decided to give him an exceptional sentence even though there had been no evidentiary hearing suggests she may have prejudged the matter."), aff'd, 134 Wn.2d 176, 188, 949 P.2d 358 (1998); State v. Cloud, 95 Wn. App. 606, 615-16, 976 P.2d 649 (1999) (trial court's consideration of improper evidence at post-trial hearing required remand before new judge "because it would be extremely difficult, if not impossible, for the trial judge who worked so hard on this case to discount everything that transpired in the first hearing"); State v. Sledge, 133 Wn.2d 828, 846, 947 P.2d 1199 (1997) (vacating trial court's disposition and remanding to trial court where Sledge may choose to withdraw his guilty

plea or have new disposition hearing before another judge in light of previous judge's expressed view of disposition).

The judiciary should avoid even mere suspicion of irregularity, or appearance of bias or prejudice. Chicago, Milwaukee, St. Paul and Pac. R.R. Co. v. Washington State Human Rights Comm'n, 87 Wn.2d 802,808-09, 557 P.2d 307 (1976). "[W]here a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." Sherman v. State, 128 Wn.2d 164, 205, 905 P.2d 355 (1995). Such is the case here. A different judge should preside over further proceedings on remand to comply with the appearance of fairness.

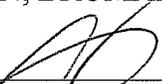
D. CONCLUSION

For the reasons stated, Scott requests that this Court vacate the dismissal of his renewed motion to vacate the guilty plea and remand for a reference hearing before a different judge.

DATED this 15th day of September 2011

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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APPENDIX A

FILED

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WASH. JUDICIAL BRANCH
CLERK OF COURT
PACIFIC COUNTY, WA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs.)
)
RICHARD ROY SCOTT,)
Defendant.)
_____)

NO. 01-1-00082-7
FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER DENYING
DEFENDANT'S SUNDRY
MOTIONS

17 The Court hereby enters the following Findings of Fact, Conclusions of Law,
18
19 and Order pertaining to the Defendant's motions which were heard on December
20
21 15, 2010.

22
23 **I. FINDINGS OF FACT**

24
25 1. A hearing was held in Pacific County Superior Court on December 15, 2010,
26
27 to address Richard Roy Scott's motions: (1) to vacate his guilty plea and
28
29 judgment and sentence; (2) to change venue; (3) to change the judge
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31 hearing this case; (4) to obtain funding for an investigator; and (5) to
32
33 proceed pro se and to have standby counsel appointed. Mr. Scott appeared
by telephone and represented himself. The State of Washington was

FINDINGS OF FACT &
CONCLUSIONS OF LAW - 1

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represented by David Burke, the Pacific County Prosecutor.

2. At the outset of the hearing on December 15, 2010, the defendant withdrew his motion to change venue and his motion to change the judge hearing this case. Mr. Scott also asserted that in lieu of vacating his guilty plea, he should be allowed to have a "reference" hearing. See Finding of Fact No. 4. The State opposed Mr. Scott's contention that a "reference" hearing should be scheduled.

3. Mr. Scott was acting pro se at the hearing on December 15, 2010, because his counsel, Mr. Peter Tiller, was given permission to withdraw from the case on July 23, 2010. Prior to Mr. Tiller being appointed to represent Mr. Scott, the defendant had been represented by Amanda Kleespie, Harold Karlsvik and Michael Turner. Mr. Tiller also previously represented Mr. Scott at the Court of Appeals.

4. In a collateral attack brought by Mr. Scott, the Court of Appeals in State v. Scott , 150 Wash. App. 281, 207 P.3d 495 (2009), ruled that Mr. Scott was entitled to a "reference" hearing to contest whether there was a sufficient factual basis to support his guilty plea.

5. After this ruling of the Court of Appeals became final, the Pacific County Superior Court held numerous hearings in an effort to comply with the ruling of the Court of Appeals. The "reference" hearing could not take place

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quickly because witnesses lived out of state, were otherwise unavailable, or their whereabouts were unknown.

6. Because of the difficulty the Court had in assessing the credibility of Mr. Scott and his contentions, the Court ordered on May 28, 2010, that Mr. Scott needed to be present at future hearings. The Court indicated that Mr. Scott would be transported from the Special Commitment Center on McNeil Island to the Pacific County Superior Court. Subsequent to this order, Mr. Scott objected to being transported, ostensibly due to his perceived fear of being accosted and harmed while being transported and housed at the Pacific County Jail.

7. On June 4, 2010, the Court signed an order stating that the "[d]efendant's actions have prevented the Court from hearing all def's [defendant's] motions in a timely manner."

8. On June 7, 2010, the Court signed an order that required Mr. Scott to be present in court on June 11, 2010. The Court inter alia stated: "The Court needs to observe the Defendant in person, conduct a colloquy with Defendant and then decide whether to allow Mr. Tiller to withdraw, appoint new counsel or proceed with Mr. Tiller acting as standby counsel and the Defendant representing himself." The Court made this ruling because time was of the essence; the "reference" hearing was scheduled for July 7, 2010,

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and there was only a small window available to address procedural and substantive issues.

9. On June 10, 2010, the Court signed an order quashing the transport order and striking the July 7, 2010 "reference" hearing. The Court addressed (1) Mr. Tiller's faxed motion to withdraw Initial Motion to Vacate Alford Plea and Motion to Strike Order of Transport and (2) Mr. Scott's own motion to withdraw his Motion to Vacate. The Court ruled that "[n]o further action is required."

10. Subsequently, on June 22, 2010, the State filed a motion seeking to clarify the order that was entered on June 10, 2010. This motion was heard on July 2, 2010, but a written order was not signed until July 16, 2010. Mr. Scott was present by telephone on July 2, 2010. On July 16, 2010, the Court tried to reach Mr. Scott by telephone at the Special Commitment Center, but Mr. Scott did not answer the telephone. Mr. Tiller was in court representing Mr. Scott. The Court clarified its order of June 10, 2010, to indicate that Mr. Scott's motion to withdraw his motion to withdraw his guilty plea is granted. The Court stated that "[b]ecause this order terminates this case, the evidentiary hearing ordered by the Court of Appeals is not necessary." The Court's order obviated any need for further hearings. Nevertheless, Mr. Tiller filed a motion for relief under CrR 7.8(b)(5).

- 1 11. The CrR 7.8(b)(5) motion that was filed by Mr. Tiller on July 16, 2010, was
2 heard on July 23, 2010. Once again, the Court tried to contact Mr. Scott at
3 the Special Commitment Center, but Mr. Scott did not answer the telephone.
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5 Mr. Tiller, however, was present representing Mr. Scott. The defendant's
6 motion under CrR 7.8(b)(5) was denied, and Mr. Tiller was allowed to
7 withdraw from the case.
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11 12. Mr. Scott had the opportunity to appeal the final decision of the Pacific
12 County Superior Court which granted Mr. Scott's motion to withdraw his
13 motion to withdraw his guilty plea. Mr. Scott, objected to this decision, but
14 he did not file a timely appeal with the Court of Appeals.
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18 13. Instead, Mr. Scott filed a new motion to vacate his guilty plea on August 18,
19 2010. He also filed additional motions which are listed in Finding of Fact no.
20 1. Mr. Scott claimed that he had uncovered newly discovered evidence.
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22 Subsequently, on December 7, 2010 and December 13, 2010, Mr. Scott filed
23 additional documentation to support his claim of actual innocence.
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27 14. The material provided by Mr. Scott for the hearing on December 15, 2010,
28 addresses the same issues that were litigated previously, viz., Mr. Scott's
29 assertion that he could not have committed the crime to which he pled
30 guilty. The evidence under penalty of perjury that was reviewed by the
31 Court does not differ significantly in either quality or quantity from the
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evidence presented previously.

II. CONCLUSIONS OF LAW

1. The Pacific County Superior Court has jurisdiction to hear this matter.
2. Although Mr. Scott does not refer to a court rule in making his motion to vacate his guilty plea, CrR 7.8(b) provides the only basis upon which a superior court could grant the defendant's requested relief. While CrR 7.8(b) does contain a provision pertaining to new discovered evidence, any

motion under CrR 7.8(b) is expressly subject to RCW 10.73.140 which provides:

If 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. . . .

State v. Brand, 120 Wash.2d 365, 369, 842 P.2d 470 (1992).

Thus, "a court may not consider a CrR 7.8(b) motion if the movant has previously brought a collateral attack on similar grounds." Id. at 370.

Because Mr. Scott previously brought a collateral attack on similar grounds, and because the present motion does not differ significantly in either the quantity or quality of the evidence presented, Mr. Scott's motion to vacate his guilty plea should be denied. Similarly, Mr. Scott should not be granted a "reference" hearing for the reasons listed above.

1 3. The Court only needs to consider Mr. Richard Roy Scott's renewed motion to
2 vacate his guilty plea, because the motions for change of venue and change
3 of judge were withdrawn by Mr. Scott. Mr. Scott's motions for funding for
4 an investigator and for the appointment of standby counsel are not
5 germane, because the Court concludes that Mr. Scott has not made a
6 sufficient threshold showing to allow this matter to go forward. Therefore,
7 these motions also should be denied.
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13 **III. ORDER**

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15 Mr. Richard Roy Scott's motions which were filed on August 18, 2010
16 and which were argued on December 15, 2010, are decided as follows:
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18 Mr. Scott's motion to vacate his guilty plea is denied. The Court also
19 denies Mr. Scott's latest request for a "reference" hearing. Mr. Scott's
20 motion for funding for an investigator is denied. Finally, Mr. Scott's motion
21 for the appointment of standby counsel is denied.
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24 DATED this 25th day of February, 2011.

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27 
28 JUDGE

29 Presented by:

30 David J. Burke
31

32 DAVID J. BURKE, WSBA#16163

33 Prosecuting Attorney

FINDINGS OF FACT &
CONCLUSIONS OF LAW - 7

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 41895-9-II
)	
RICHARD SCOTT,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF SEPTEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] DAVID BURKE
 ATTORNEY AT LAW
 P.O. BOX 45
 SOUTH BEND, WA 98586

- [X] RICHARD ROY SCOTT
 SPECIAL COMMITMENT CENTER
 P.O. BOX 88600
 STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF SEPTEMBER 2011.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

September 15, 2011 - 2:34 PM

Transmittal Letter

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Case Name:

Court of Appeals Case Number: 41895-9

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net