

**NO. 46557-4-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**KEVIN S. ROBINSON,**

Appellant.

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

The Honorable Marilyn Haan, Judge

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**SUPPLEMENTAL BRIEF OF APPELLANT**

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court failed to act within its authority when it refused to consider the merits of Mr. Robinson's CrR 7.8(b) motion.

2. The trial court's failure to rule on the merits of Mr. Robinson's CrR 7.8(b) motion, or transfer the motion to the Court of Appeals as a personal restraint petition, unduly delayed a decision, and relief, for Mr. Robinson.

3. The state is a party to Mr. Robinson's CrR 7.8(b) motion and this appeal.

B. SUPPLEMENTAL ISSUES

1. Whether the trial court erred when it failed to act within its authority to either (a) consider the merit of Mr. Robinson's CrR 7.8(b) motion or (b) transfer his motion to the Court of Appeals for consideration as a personal restraint petition?

2. Whether the Cowlitz County prosecutor filing the underlying criminal complaint, and its appearance and affirmative acts on Mr. Robinson's CrR 7.8(b) motion, made it a party to the motion and this appeal?

C. SUPPLEMENTAL FACTS

Mr. Robinson is unlawfully detained because of improper procedures at a Department of Corrections (DOC) community custody

violation hearing. The Brief of Appellant and Mr. Robinson's RAP 10.10 Statement of Additional Grounds for Review provide all the necessary facts.

D. ARGUMENT

**1. The trial court had subject matter jurisdiction to consider Mr. Robinson's CrR 7.8(b) motion.**

CrR 7.8(b) specifically allows a superior court to relieve a party from final judgment, order, or proceedings. CrR 7.8(b). The superior court has subject matter jurisdiction to consider the merits of a CrR 7.8 motion, or to transfer it to the Court of Appeals for consideration as a personal restraint petition. CrR 7.8(c)(2).

The filing of a personal restraint petition (PRP) is not the only proper means for an offender to appeal the result of a community custody hearing. *State v. Madsen*, 153 Wn App. 471, 475, 28 P.3d 24 (2009). The Supreme Court, Court of Appeals and superior courts have concurrent jurisdiction in habeas corpus proceedings wherein postconviction relief is sought. *Tolliver v. Olson*, 109 Wn.2d 607, 609, 746 P.2d 809 (1988).

A motion in the trial court under CrR 7.8(b) is the functional equivalent of a personal restraint petition in the Court of Appeals. *In re Pers. Restraint of Becker*, 143 Wn.2d 491, 499, 20 P.3d 409 (2001). Because of the similarity between the relief sought under CrR 7.8(b) and

via a personal petition, the superior court must exercise its discretion in determining which motions to hear and which to transfer: “[T]he trial court may serve as an initial screener, much like the chief judge of the Court of Appeals would in a PRP, prior to either transferring the motion to the Court of Appeals or evaluating the merits of a motion.” *State v. Robinson*, 153 Wn.2d 689, 695-96, 207 P.3d 90 (2005). While either a CrR 7.8(b) motion or a personal restraint petition is a proper route to post-conviction relief, in some cases a CrR 7.8(b) motion is the superior option because it can be addressed more quickly. *Cf. State v. Rowland*, 97 Wn. App. 301, 305-06, 983 P.2d 696 (1999) (defendant who challenged sentence via direct appeal would have been “better served” by the more expeditious option of filing a motion under CrR 7.8(b)).

**2. The trial court’s failure to take any action on Mr. Robinson’s CrR 7.8(b) motion denied him his right to have his timely motion heard.**

Mr. Robinson’s CrR 7.8(b) motion was timely. The state does not argue otherwise.

DOC ordered Mr. Robinson serve his maximum sentence in custody. CP 29. Mr. Robinson challenged the sanction through DOC’s two levels of appeal. CP 29-30. DOC denied the appeal on April 23, 2014. CP 29. Mr. Robinson filed his CrR 7.8(b) motion with the Cowlitz County Superior Court on June 13, 2014. CP 25.

CrR 7.8(c)(2) obliged the superior court to rule on the merits of the motion or transfer the motion to the Court of Appeals as a PRP. It did neither. RP 1-2; CP 126-27.

**3. The state is a party to the action and the proper respondent on appeal.**

The prosecutor, through its own actions, made itself a party to the CrR 7.8(b) motion. It filed the criminal charges that culminated in Mr. Robertson's guilty plea and community custody sentence. A party waives a claim of lack of personal jurisdiction by "consent[ing], expressly or impliedly, to the court's exercising jurisdiction." *In re Marriage of Steele*, 90 Wn. App. 992, 997-98, 957 P.2d 247 (1998). Moreover, the prosecutor did not stand aside when Mr. Robertson's CrR 7.8(b) motion appeared on a court docket. Rather, the prosecutor appeared, argued against the motion, and later presented the court with ex parte written findings of fact and conclusions of law supporting the court's refusal to take action on Mr. Robertson's motion. RP 1-2; CP 126-27.

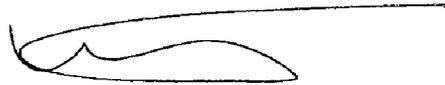
E. CONCLUSION

Mr. Robinson asks this court to guide his case in whatever direction it must to provide him with the most expedient resolution of the argument set forth in his well-documented CrR 7.8(b) motion. Each day

the merit of his argument is undecided is another day Mr. Robinson is unjustly incarcerated on an illegal community custody sanction.

Dated this 23rd day of October 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

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LISA E. TABBUT, WSBA #21344  
Attorney for Kevin S. Robinson

**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Supplemental Brief to: (1) Cowlitz County Prosecutor's Office at [appeals.co.cowlitz.wa.us](http://appeals.co.cowlitz.wa.us); (2) the Court of Appeals, Division II; and (3) I mailed it to Kevin Robinson/DOC# 764821, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 23, 2015, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344  
Attorney for Kevin S. Robinson

## COWLITZ COUNTY ASSIGNED COUNSEL

**October 23, 2015 - 1:35 PM**

### Transmittal Letter

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Case Name: State v. Kevin Robinson

Court of Appeals Case Number: 46557-4

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Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Supplemental 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

Petition for Review (PRV)

Other: \_\_\_\_\_

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