

**FILED**

NOV 23 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

No. 29008-5-III

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

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

BRYCE KEVIN DEGAGNE,  
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT  
HONORABLE ELLEN KALAMA CLARK

---

BRIEF OF APPELLANT

---

DAVID N. GASCH  
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Attorney for Appellant

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**A. ASSIGNMENT OF ERROR**

The trial court erred by failing to comply with CrR 7.8(c) when it summarily denied Mr. DeGagne's motion for a new trial based on newly discovered evidence.

*Issue Pertaining to Assignment of Error*

Did the lower court err in ruling on the merits and dismissing the motion without complying with the requirements of CrR 7.8(c)(2) and (3)?

**B. STATEMENT OF THE CASE**

In February 2008, Mr. DeGagne was convicted by a jury of first degree burglary and first degree robbery. CP 3. In 2009, the Court of Appeals affirmed the convictions but remanded the matter to vacate a no contact order. CP 21-28.

In March 2010, Mr. DeGagne filed a *pro se* CrR 7.8 motion for a new trial based on newly discovered evidence, as well as a motion for an evidentiary hearing, motion to appoint counsel, and motion to transport. CP 43-71. The motion for a new trial included supporting affidavits. CP 53-61. The superior court ruled on the merits and denied the motions by written order entered April 23, 2010, without a hearing. CP 41-42. This appeal followed. CP 72-74.

### C. ARGUMENT

**The lower court acted without authority in ruling on the merits and dismissing Mr. DeGagne's motion without complying with the requirements of CrR 7.8(c)(2) and (3).**

Prior to September 1, 2007, CrR 7.8 allowed a trial court to deny a motion for relief from judgment without a hearing if the facts alleged in the affidavits did not establish grounds for relief. Former CrR 7.8(c)(2). On September 7, 2007, CrR 7.8(c)(2) was changed to provide that a superior court may only rule on the merits of a motion when the motion is timely filed and either (a) the defendant makes a substantial showing that he is entitled to relief or (b) the motion cannot be resolved without a factual hearing. State v. Smith, 144 Wn. App. 860, 863, 184 P.3d 666 (2008). If any of the prerequisites are not met, the motion must be transferred to the Court of Appeals as a personal restraint petition. CrR 7.8(c)(2); Smith, 144 Wn. App. at 863.

Under CrR 7.8(c), the Supreme Court has set out a specific procedure for the initial consideration of Motions for Relief from Judgment. It states:

(1) Motion. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) Transfer to Court of Appeals. 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) Order to Show Cause. 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).

Under the plain language of this new rule, a superior court does not have authority to dismiss a CrR 7.8 motion if it is untimely under RCW 10.73.090. Instead, the superior court must transfer the motion to the appellate court for consideration as a personal restraint petition. Smith, 144 Wn. App. at 863.

Similarly, a superior court does not have authority to rule on the merits of a CrR 7.8 motion unless it first finds the motion is timely and either (a) the defendant makes a substantial showing that he is entitled to relief or (b) the motion cannot be resolved without a factual hearing. If either a substantial showing is made or there needs to be an evidentiary hearing, the superior court must conduct a show cause hearing to allow the opposing party to respond. CrR 7.8(c)(3). If these prerequisites are not met, i.e., the motion is timely but a defendant fails to make a substantial

showing or the court concludes there is no need for a factual hearing, the superior court is authorized to transfer the timely petition to the appellate court for consideration as a personal restraint petition. Smith, 144 Wn. App. at 863.

This Court reviews a ruling on a CrR 7.8 motion for abuse of discretion. State v. Gomez-Florencio, 88 Wn. App. 254, 258, 945 P.2d 228 (1997). A trial court abuses its discretion when it exercises discretion in a manner that is manifestly unreasonable or based upon untenable grounds. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). An abuse of discretion occurs where the court bases its decision on an incorrect legal standard. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Herein, the superior court t exceeded its authority by ruling on the merits and dismissing Mr. DeGagne's motion without compliance with the requirements of CrR 7.8. The case should be remanded to the superior court so that Mr. DeGagne's motion can be considered after application of the correct legal standard. Smith, 144 Wn. App. at 864.

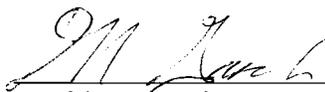
Should the State argue that this Court should simply convert Mr. DeGagne's motion to a personal restraint petition and consider it on its merits, this is not the proper remedy. In Smith, Division II held that a

defendant is entitled to both notice and an opportunity to object before a superior court transfers his motion to the Court of Appeals as a personal restraint petition. Smith, 144 Wn. App. at 864. This is so because conversion of the motion to a personal restraint petition “could infringe on his right to choose whether he wanted to pursue a personal restraint petition because he would then be subject to the successive petition rule in RCW 10.73.140 as a result of our conversion of the motion.” Id. Therefore, this Court should remand the matter to the Spokane County Superior Court for proper consideration of Mr. DeGagne’s motion under CrR 7.8.

**D. CONCLUSION**

For the reasons stated, the order must be vacated and the matter remanded to the superior court for consideration.

Respectfully submitted, November 22, 2010.

  
\_\_\_\_\_  
David N. Gasch, WSBA #18270  
Attorney for Appellant

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STATE OF WASHINGTON,	)	No. 29008-5-III
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	PROOF OF SERVICE
	)	(RAP 18.5(b))
BRYCE KEVIN DEGAGNE,	)	
	)	
<u>Defendant/Appellant.</u>	)	

I, David N. Gasch, do hereby certify under penalty of perjury that on November 22, 2010, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of Appellant's Brief and (to Appellant) a copy of the VROP consisting of four pages:

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