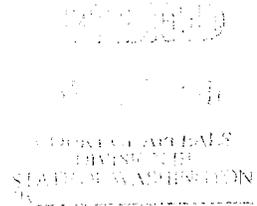


No. 29477-3-III

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



STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JOSE FLORES, aka ABEL ROCHA,
Defendant/Appellant.

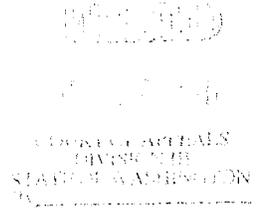
APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
HONORABLE ANNETTE S. PLESE

BRIEF OF 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 the appellant's motion to withdraw guilty plea.

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

On October 12, 2009, Mr. Flores pled guilty to five charges: first degree robbery while armed with a deadly weapon, first degree robbery, first degree burglary, attempted first degree robbery and second degree robbery. RP 26. He was thereafter sentenced. RP 36–38.

In November 2009 Mr. Flores sent a motion to withdraw his guilty plea to the Spokane County Superior Court. CP 45. In a follow-up letter postmarked February 8, 2010, Mr. Flores asked the court about the status of his motion and whether a court hearing date had been set. CP 45–46.

On February 11, 2010, the sentencing court acknowledged that the “Honorable Judge Plese received your letter regarding a withdrawal of your plea” and asked Mr. Flores whether he wanted a Public Defender appointed on his behalf, or would be hiring private counsel or acting *pro se*. CP 44. Mr. Flores requested a Public Defender. CP 48–49. By order

entered February 25, 2010, the trial court appointed counsel “to assist the above defendant in filing a motion to withdraw his plea.” CP 47.

Attorney Terence Ryan¹ was initially appointed, but indicated “he was not going to have the motion heard”. RP 41–42. On April 16, 2010, attorney John Nollette was appointed by the Public Defender’s Office as “special public defender to assist [Mr. Flores] on his motion to withdraw his pleas of guilty”. CP 57. On August 30, 2010, Mr. Nollette moved to withdraw as appointed counsel. CP 54–58.

On September 15, 2010, the trial court conducted a hearing on counsel’s motion to withdraw from the case. RP 39–44. Mr. Flores, who was incarcerated, participated by telephone. RP 40. Mr. Nollette explained why he was asking to withdraw as counsel:

... I was appointed by this Court to basically assist Mr. Flores in his attempts to withdraw his guilty plea. I was afforded an opportunity to have the transcript of the plea hearing. I sought out the records of the case and was able to obtain from both the prosecutor and the defense attorney, Mr. Ryan, who had represented Mr. Flores at the time of the plea, and obtained e-mails between the two offices.

I have thoroughly investigated the matter, and I’ve had correspondence with Mr. Flores at Clallam Bay [Corrections Center] and I can find no basis to make a motion to withdraw his guilty pleas based upon the records that I have.

So I move to withdraw from the case. ...

¹ Mr. Ryan was the public defender who represented Mr. Flores at the guilty plea and sentencing hearing. RP 2–39.

RP 40–41. In part the following colloquy took place:

THE COURT: So [Mr. Flores,] did you want to address anything with the Court before I make a ruling?

[MR. FLORES]: No. I just know I have a right to have counsel. I don't know, you know – even if my counsel if I'm getting a different one.

THE COURT: You got to speak really loud because it's hard to hear over the phone, but you indicated that you know that you have a right to counsel, and you wanted to know if you could get a different attorney. Is that your statement?

[MR. FLORES]: I mean, if he doesn't want to be my counsel, yeah, I would like to get some attorney.

THE COURT: Well, and the issue is that he did want to be your counsel. He agreed to take the case. He's investigated it, got copies of the transcripts of the hearing and can find no legal basis to file a motion to withdraw based on the transcripts and the paperwork that was presented to him.

At this time, if you want another attorney, you're going to have to hire your own. ...

RP 42–43.

The court signed an order allowing counsel to withdraw, determining that “Mr. Nollette has exercised due diligence in attempting to assist defendant in his motion to withdraw his guilty pleas ... and supports a finding that the client-attorney relationship should be terminated between Mr. Flores and counsel.” RP 43, CP 59–61.

Three weeks later, the superior court ruled on the merits and summarily denied Mr. Flores' motion to withdraw guilty plea without a hearing. The court stated only that “[g]ood cause exists. See affidavit of attorney appointed for purpose of motion to withdraw” and ordered that

the “motion to withdraw guilty plea is denied (no basis to make motion per attorney).” CP 62. The court made no finding whether the motion was timely or not. This appeal followed. CP 63–64.

C. ARGUMENT

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

If made after judgment, a motion for withdrawal of a guilty plea is governed by CrR 7.8. CrR 4.2(f). Prior to September 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). A decision is manifestly unreasonable if, based on the facts and the applicable legal standard, the decision is outside the range of acceptable choices.” In re Custody of Halls, 126 Wn. App. 599, 606, 109 P.3d 15 (2005) (citations omitted). 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 exceeded its authority by ruling on the merits and dismissing Mr. Flores' motion without compliance with the requirements of CrR 7.8. The court made no finding whether the motion was timely or not. The court ruled on the merits and summarily denied the motion. CP 62. Thus, the court obviously found the defendant failed to make a substantial showing he was entitled to relief. Similarly, the court evidently concluded there was no need for a factual hearing. Therefore, under the provisions of CrR 7.8, the court should have transferred the motion to the appellate court for consideration as a personal restraint petition. Smith, 144 Wn. App. at 863.

Should the State argue that this Court should simply convert Mr. Flores' motion to a personal restraint petition and consider it on its merits, State v. Smith holds that 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 superior court for proper consideration of Mr. Flores’ motion under CrR 7.8.

Remand is further appropriate because the superior court has a number of factual issues to resolve before ruling. There is no written motion to withdraw guilty plea in the court file. However, Mr. Flores indicated he timely sent such a motion to the superior court approximately one month after he pled guilty. CP 45.² The court acknowledged there was a motion (CP 44) and thereafter appointed counsel³. CP 47. Appointed counsel did not file any separate motion and was allowed to withdraw. CP 59–61. Thus, it was Mr. Flores’ *pro se* motion that the superior court ultimately denied without a hearing. CP 62.

² In correspondence with appointed counsel on appeal, Mr. Flores represents that he sent the motion while housed at the Washington Corrections Center in Shelton WA, that it is on file as being sent out through legal mail, that a staff member signed it as a witness, and that his copy was lost by staff when he was moved to another DOC institution in January 2010. Mr. Flores also conveyed his specific reasons for believing he should be allowed to withdraw his guilty plea.

³ It is unclear why the superior court appointed counsel for a post-sentence motion to withdraw guilty plea. Generally, a criminal defendant has no constitutional right to counsel in post-conviction proceedings other than the first direct appeal of right. State v. Forest, 125 Wn .App. 702, 707, 105 P.3d 1045 (2005).

No one apparently told Mr. Flores his written motion had not been filed. After appointed counsel had been allowed to withdraw, Mr. Flores sent the court a letter dated October 4, 2010, asking when and how a decision would be made on his motion to withdraw guilty plea now that he was going to be proceeding *pro se*. Supplemental CP 67.⁴ It is likely that this letter prompted the superior court *sua sponte* to enter its order denying the motion to withdraw guilty plea a few days later, on October 7, 2010. CP 62. The Spokane County Superior Court thereafter transferred this latest follow-up request to Court of Appeals, Division III, as a PRP. Supplemental CP 65, 68. This Court rejected the PRP transfer, intimating that Mr. Flores had remedies available to him other than a personal restraint petition. Appendix A (November 9, 2010 letter from Ms. Renee Townsley to Honorable Michael P. Price) (on file).

Mr. Flores' most apparent remedy is to have the superior court consider his *pro se* motion on its merits. The motion was timely sent to the court and either didn't arrive, was misfiled or was simply discarded. The superior court summarily denied his motion without knowing why Mr. Flores wished to withdraw the guilty pleas. On remand, Mr. Flores should be allowed to file a replacement motion to withdraw guilty plea so that the

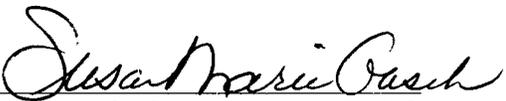
⁴ Undersigned counsel is filing a Supplemental Designation of Clerks Papers to include additional documents, and anticipates that this numbering of the pages will be accurate.

superior court may properly consider the merits of his *pro se* motion in the context of the requirements of CrR 7.8.

D. CONCLUSION

For the reasons stated, the order must be vacated and the matter remanded to the superior court for filing of a replacement motion and consideration of its merits in compliance with CrR 7.8.

Respectfully submitted April 8, 2011.


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Attorney for Appellant

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*The Court of Appeals
of the
State of Washington*



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November 9, 2010

Honorable Michael P. Price
Superior Court Judge
1116 W. Broadway Ave., Dept. 5
Spokane, WA 99260

Re: State of Washington v. Abel Rocha a/k/a Jose Flores
Spokane Superior Court No. 08-1-03317-2

Dear Judge Price:

Enclosed is the Order Transferring Case to the Court of Appeals and related documents sent to us for consideration as a personal restraint petition. For the reasons below, the transfer will not be accepted.

Pursuant to RAP 16.4(d), the appellate court will grant relief by a personal restraint petition only if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:slh
Enclosure

c: Jose Flores
#304444
1830 Eagle Crest Way
Clallam Bay, WA 98326

APPENDIX "A"