

29477-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSE FLORES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

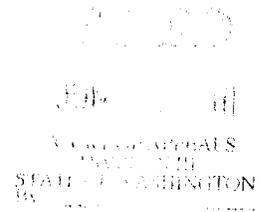
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
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Andrew J. Metts
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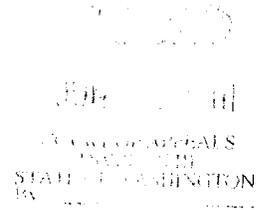
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INDEX

APPELLANT’S ASSIGNMENT OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....1

ARGUMENT.....3

 A. DEFENDANT’S LEGAL ACTIONS
 ARE NOT GROUNDED IN PROPER
 LEGAL PROCEDURES3

CONCLUSION.....7

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. SMITH, 144 Wn. App. 860,
184 P.3d 666 (2008)..... 4

COURT RULES

CrR 7.8..... 5, 6
CrR 7.8(c)(2)..... 5
RAP 2.1(a)(2)..... 3
RAP 2.3..... 3

I.

APPELLANT'S ASSIGNMENT OF ERROR

- A. 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.

II.

ISSUES PRESENTED

- A. IS DEFENDANT'S ACTION PROPERLY BEFORE THIS COURT?
- B. DID THE TRIAL COURT ERR BY SUMMARILY DISMISSING A TIMELY MOTION TO WITHDRAW AFTER RECEIVING A REPORT FROM AN INDEPENDENT ATTORNEY INDICATING THE MOTION HAD NO MERIT?

III.

STATEMENT OF THE CASE

The defendant pled guilty to First Degree Robbery, First Degree Robbery, First Degree Burglary, Attempted First Degree Robbery and Second Degree Robbery. RP 26. The pleas were entered on October 12,

2009. CP 31-43. On September 15, 2010, the defendant brought a motion to withdraw. RP 39.

Mr. John Nolette was appointed by the trial court to make an assessment on whether or not a basis existed for the defendant to withdraw his pleas. RP 40. On September 15, 2010, Mr. Nolette told the court that he examined the transcript of the plea hearing. RP 41. Mr. Nolette was able to get copies of communications between the defense and the prosecution. RP 41. Mr. Nolette stated he had thoroughly investigated the matter with correspondence from the defendant and had found no basis for withdrawal. RP 41.

The hearing was done telephonically and the defendant was given an opportunity to speak. His only statements had to do with obtaining counsel. RP 42.

The defendant filed this appeal on October 27, 2010.¹ CP 63-64.

¹ The State does not agree that this is an appeal as there is no procedural rule that allows a defendant to file motions in this court whenever he wishes. The State will occasionally refer to this action as an “appeal” only because that is what the defendant calls his action and the name is convenient.

IV.

ARGUMENT

A. DEFENDANT'S LEGAL ACTIONS ARE NOT GROUNDED IN PROPER LEGAL PROCEDURES.

The defendant has no automatic right to seek appeal of a voluntarily entered guilty plea. The defendant has not claimed that there was any lack of voluntariness involved in this plea.

Without any sort of inherent ability to seek review in this court, the defendant must seek redress under a motion for discretionary review pursuant to RAP 2.1(a)(2). The defendant has not addressed discretionary review. This means none of the requirements of RAP 2.3 have been discussed. This attempt to have a Superior Court motion heard, without first convincing this court that the elements of discretionary review have been met, is outside the Rules of Appellate Procedure.

The defendant has not filed a written motion to withdraw his plea. The defendant claims that his written motion was "lost" by the Department of Corrections. Brf. of App. pg. 8 FN 2. The only relevant document in the court file is a letter sent by the defendant to Judge Price requesting additional time to complete a motion. CP 65-69 This letter was dated October 4, 2010.

The “appeal” filed by the defendant should not exist in the first place as noted previously, but even if the defendant’s oral motion should now be heard, the defendant has nothing whatever to present to this court. The defendant’s lack of a written motion makes it very difficult to respond to the defendant’s generalities, but it is very clear that the defendant has not presented any reason to withdraw his plea. The defendant’s main reason for withdrawal appears to be because he wants to withdraw. Defense Attorney John Nolette was appointed to examine this case and he found nothing amiss. CP 57-58.

The defendant’s argument directed to CrR 7.8 are not well founded. The defendant asserts that the Superior Court made no finding that the defendant’s motion was timely. Brf. of App. pg. 7. This is not factually correct. An examination of the document dated October 22, 2010, shows that the Superior Court found the defendant’s motion to be timely. CP 65-69.

The defendant argues that trial court erred in summarily dismissing his CrR 7.8 motion.

The defendant relies heavily on the decision in *State v. Smith*, 144 Wn. App. 860, 184 P.3d 666 (2008). *Smith* is inapposite as that court was dealing with a situation in which defendant’s motion was time barred. *Id.* The fact that the defendant’s motion was time barred placed the

motion in a different part of CrR 7.8. The trial court in *Smith* did not have the authority to dismiss the defendant's motion. In this case the defendant's motion was found to be timely. CP 65-69.

Because the defendant's motion was found timely, the first requirement of CrR 7.8(c)(2) is met. CrR 7.8(c)(2). The next set of requirements apply if the motion is found timely and require that the defendant make a substantial showing that he or she is entitled to relief or the resolution of the motion will require a hearing. CrR 7.8(c)(2). Meeting all of the requirements would prevent the transfer of the defendant's motion to this court as a PRP.

Not all of the requirements of CrR 7.8(c)(2) have been met, so the trial court should have transferred the motion to this court for consideration as a PRP. Instead, the trial court denied the defendant's motion. CP 62. Then the Superior Court transferred this case to this court for consideration as a PRP. CP 65-69. So, while the process may have been somewhat unusual, the end result is in accord with CrR 7.8. The defendant's motion should be before this court as a PRP and it is.

The defendant asks that the Superior Court's order be vacated and this case remanded so that the defendant can file a replacement motion and further consideration by the Superior Court. Vacating the Superior Court's order (defendant does not state what order he wants vacated)

transferring this case as a PRP would be a waste of resources. The defendant is essentially asking for a “do over” so that he can file a new (and assisted) motion with an eye to having the trial court evaluate the new motion. In light of Att. John Nolette’s evaluation of the defendant’s plea withdrawal motion having no merit at all, it is unfair to allow the defendant another chance at withdrawing his guilty plea. This is especially so considering the fact that the defendant’s new motion will be untimely. The defendant wishes this court to “look the other way” and not recognize that the defendant is using a machination to obtain a new filing while having the new filing remain timely when the motion would otherwise be time barred. The State submits that these sorts of workings are not at all what was intended by CrR 7.8.

The defendant has been granted multiple attorneys at public expense. The motion to withdraw has been thoroughly evaluated and it has no merit. If the defendant wants to proceed to a PRP at this time, that seems like the most frugal use of resources. Allowing the defendant to start over is not a frugal use of resources.

The State respectfully requests that this court accept the transfer of this case from the Superior Court and then proceed under a PRP umbrella.

V.

CONCLUSION

For the reasons stated, the decisions of the trial court should be affirmed.

Dated this 1st day of June, 2011.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", is written over a horizontal line.

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent