

FILED

MAR 17 2011

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

NO. 29546-0-III

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

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STATE OF WASHINGTON,

Respondent,

v.

PATRICK LOWDEN,

Appellant.

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

The Honorable Allen C. Nielson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The Superior Court had no jurisdiction to deny appellant's CrR 7.8 motion.

Issue Pertaining to Assignment of Error

Where the Superior Court concludes that a CrR 7.8 motion has not been timely filed, or that it should be denied on its merits, it must transfer the motion to the Court of Appeals for consideration as a personal restraint petition (PRP). The Superior Court failed to do so in appellant's case. Should this Court now convert the motion to a PRP and address its merits?

B. STATEMENT OF THE CASE

In June of 1994, Lowden was convicted of murder in the first degree and sentenced to 320 months in prison. CP 5-17. His conviction was affirmed on appeal. CP 19-35.

In 2005, Lowden filed a PRP, arguing his conviction was based on inadmissible hearsay in violation of the Confrontation Clause and Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The petition was denied. See In re PRP of Lowden, No. 23879-2-III.

On August 23, 2010, Lowden filed a motion in the Superior Court to correct his judgment and sentence under CrR 7.8(b)(4),

arguing that because the combination of prison time and community custody imposed in his case exceeded the authorized maximum sentence for his crime, the judgment was invalid on its face. CP 36-72 (citing, among other authorities, State v. Zavala-Reynoso, 127 Wn. App. 119, 110 P.3d 827 (2005)).

The Stevens County Prosecutor's Office argued that Lowden's motion was untimely. CP 73-76. On November 10, 2010, the Superior Court issued an order finding the motion untimely and rejecting Lowden's argument on the merits. CP 97-99. Lowden timely filed a Notice of Appeal. CP 100-103.

C. ARGUMENT

THE SUPERIOR COURT LACKED JURISDICTION TO DENY LOWDEN'S CrR 7.8 MOTION.

CrR 7.8(c) sets forth the required procedure for motions challenging criminal judgments and provides:

(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.

CrR 7.8(c)(2).

Under this rule, “the 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 Court of Appeals] for consideration as a personal restraint petition.” State v. Smith, 144 Wn. App. 860, 863, 184 P.3d 666 (2008). Moreover, “the superior court may only rule on the merits of the motion when the motion is timely filed and either (a) the defendant makes a substantial showing he is entitled to relief or (b) the motion cannot be resolved without a factual hearing.” Id.

Based on the Superior Court’s order denying relief in Lowden’s case, the court concluded that *none* of the prerequisites necessary for it to decide his CrR 7.8 motion were met – as to the timing or the merits of the motion. Therefore, the court had no jurisdiction to deny the motion. Its only option was to transfer the motion to this Court for consideration as a PRP.

In Smith, the defendant’s CrR 7.8 motion was not automatically converted to a PRP because doing so – without prior notice and an opportunity to object in the Superior Court – could have had future collateral consequences for Smith. For example, it could have barred a later PRP filed in the Court of Appeals under the rules applicable to successive collateral attacks. Smith, 144

Wn. App. at 863. Since Lowden has previously filed a PRP, however, and his claims do not require resolution of factual disputes, there is no need for this Court to send his case back to the Superior Court before addressing his claims in a PRP.

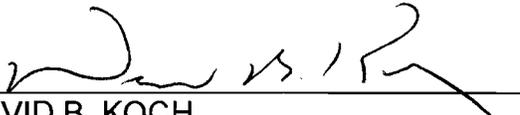
D. CONCLUSION

The Superior Court did not have jurisdiction to deny Lowden's CrR 7.8 motion. Its only option was to transfer the matter to this Court for consideration as a PRP.

DATED this 15<sup>th</sup> day of March 2011.

Respectfully Submitted,

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