

FILED

JUL 29 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 297217

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DANIEL A. FLAHERTY, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE MICHAEL PRICE

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
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I. ASSIGNMENT OF ERROR

The court erred when it failed to comply with the requirements of CrR 7.8 (c)(2) and (3).

Issue Related To Assignment of Error

Did the trial court err when it failed to comply with the requirements of CrR 7.8(c)(2) and (3)?

II. STATEMENT OF FACTS

Daniel Flaherty was charged by amended information with one count of conspiracy to deliver a controlled substance and one count of third degree possession of stolen property for events that occurred on September 2, 2004. (CP 10). He pleaded guilty on June 30, 2005, and was sentenced to two days of jail with credit for two days served, along with court-imposed fines. (CP 11-13; 19-22).

On October 12, 2009, Mr. Flaherty was sentenced to 276 months in the Eastern District of Washington for a federal crime. (CP 56). Of the 276 months, 156 were a mandatory minimum, because of Mr. Flaherty's status as a "career offender", a classification based in part on his 2005 felony conviction in Spokane County Superior Court.

On November 1, 2010, Mr. Flaherty filed a CrR 7.8 motion to vacate the judgment and sentence for the 2005 Spokane County conviction, along with a supporting memorandum of law. (CP 46-60). He requested vacation of the judgment and sentence or alternatively, an evidentiary hearing to investigate his claim that he received ineffective assistance of counsel in his 2005 plea agreement. (CP 56).

In December 2010, Judge Price acknowledged in a letter the receipt of the pleadings and wrote:

“Please find enclosed pleadings which you forwarded to the court. Insomuch as your request is time barred pursuant to RCW 10.73.090, the Court will take no further action on your request at this time.” (CP 45).

Mr. Flaherty filed a motion for reconsideration and the court responded on January 11, 2011:

“Please find enclosed pleadings which you forwarded to the Court dated December 30, 2011 (sic). Insomuch as the Court has ruled on your request in its December 14, 2010, correspondence to you and your request is time barred pursuant to RCW 10.73.090, the Court will take no action on your request at this time.” (CP 61).

Mr. Flaherty filed an appeal. (CP 66).

III. ARGUMENT

The Court Erred When It Did Not Follow The Procedural Requirements Of CrR 7.8 (c)(2) and (3).

CrR 7.8 prescribes the procedure for a Motion for Vacation of Judgment. It states in relevant part:

(c) Procedure on Vacation of Judgment.

(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 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.¹

¹ This rule was amended and effective on September 1, 2007.

Under this procedure, if a CrR 7.8 motion is *untimely* under RCW 10.73.090, the superior court is instructed to 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).

A ruling on a CrR 7.8 motion is reviewed for abuse of discretion. *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996). A court necessarily abuses its discretion if it based its ruling on an erroneous view of the law. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (citing *Wash. State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.* 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). Failure to exercise discretion is itself an abuse of discretion. *Bowcutt v. Delta North Star Corp.*, 95 Wn.App. 311, 320, 976 P.2d 643 (1999).

In this case, the superior court determined Mr. Flaherty's motion was untimely under RCW 10.73.090. (CP 45). But rather than transferring the motion to the Court of Appeals for consideration as a personal restraint petition under CrR 7.8, the court took no action at all.

If the superior court does not transfer an untimely motion to the Court of Appeals, it must 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. The court here did not take this action either. This is an abuse of discretion.

Alternatively, if a CrR 7.8 motion is *timely* the superior court may only rule on its merits if either (a) the defendant makes a substantial showing he is entitled to relief or (b) the motion cannot be resolved without a factual hearing. If any of the prerequisites are not met, the court must transfer the motion to the Court of Appeals as a personal restraint petition.

Mr. Flaherty argued his motion was timely because the Supreme Court's decision in *Padilla v. Kentucky*, --- U.S. ----, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), clarified (1) there is no distinction between direct and collateral consequences in defining the scope of constitutionally "reasonable professional assistance" and (2) counsel may engage in deficient performance by both failing to correctly advise a client of the consequences of a guilty plea, and also to the extent that he fails to provide any advice, as it pertains to the collateral consequence of deportation. If the superior court here did find his motion to be timely, the court could rule on its merits or transfer it to the Court of Appeals. Again, the

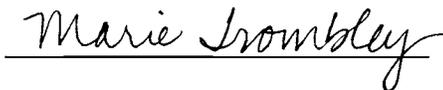
court took no action on the motion. This was an abuse of discretion.

This Court should remand the matter to the superior court to follow the proper procedure for Mr. Flaherty's motion under CrR 7.8. This Court should not convert Mr. Flaherty's motion to a personal restraint petition and consider its merits. The *Smith* court held that a defendant is entitled to both notice and opportunity to object to the transfer of the motion as such action "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." *Smith*, 144 Wn.App. 864.

IV. CONCLUSION

Based on the foregoing facts and authorities this matter should be remanded to the Superior court with instructions to follow the proper procedure for a CrR 7.8 motion.

Respectfully submitted July 29, 2011.



Marie Trombley, WSBA # 41410
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for appellant Daniel Flaherty, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the brief of appellant was sent by first class mail, postage prepaid on July 29, 2011, to Daniel A. Flaherty, 09436-085, Federal Corrections Institute, PO Box 800, Herlong, CA 96113; and emailed per agreement between the parties to Mark E. Lindsey, Spokane County Prosecutor, at kowens@spokanecounty.org.



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