

29721-7-III
COURT OF APPEALS
DIVISION III

FILED
Sept 16, 2011
Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL A. FLAHERTY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

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I.

APPELLANT'S ASSIGNMENT OF ERROR

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

II.

ISSUE PRESENTED

- A. Has the defendant shown any reason why this case is not time barred?

III.

STATEMENT OF THE CASE

For the purposes of this motion only, the State accepts the defendant's Statement of the Case.

IV.

ARGUMENT

The defendant faults the lower court for failing to follow the procedures provided for in CrR 7.8.

A CrR 7.8 motion is a collateral attack. RCW 10.73.090(2).

RCW 10.73.090 provides:

A defendant may obtain relief in a collateral attack on a judgment and sentence filed more than one year after finality only on the following grounds: (1) the judgment and sentence is invalid on its face; (2) the judgment and sentence was rendered by a court lacking competent jurisdiction; (3) newly discovered evidence; (4) the statute that the defendant was convicted of violating is unconstitutional; (5) the conviction is barred by double jeopardy; (6) the evidence was insufficient to support the conviction; (7) the sentence imposed was in excess of the court's jurisdiction; or (8) there has been a significant change in the law that is material to the conviction.

RCW 10.73.090(1), .100.

The statute of limitation set forth in RCW 10.73.090(1) is a mandatory rule that acts as a bar to appellate court consideration of personal restraint petitions filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
- (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100; *See also Shumway v. Payne*, 136 Wn.2d 383, 964 P.2d 349 (1998).

Putting a laser focus on the apparent reason for the defendant's motion, the defendant found himself sentenced to a lengthy stretch of time in the Federal system for a conspiracy to distribute a substance that included methamphetamine. In part, because the defendant had pled guilty some years earlier in Spokane County Superior Court to charges of conspiracy to deliver a controlled substance and third degree possession of stolen property, the defendant received 276 months in federal prison.

At this point the defendant would like to have this Spokane County conviction vacated. The defendant's reason for seeking a vacation of his guilty plea is a claim that his counsel was ineffective. According to the

defendant, the reason his counsel was ineffective was because his counsel, at the time of the plea in June of 2005, did not advise him that if he got convicted for a federal crime (which was initiated in September of 2008) he would receive mandatory minimum sentencing under federal law. What the defendant does not explain is how any counsel could know that the defendant would be sentenced on a crime in the Federal system that was not indicted until three plus years after the Spokane County guilty plea. The defendant would like to be able to remove any criminal history simply by committing a new crime and then claiming ineffective assistance of counsel on older crimes.

The defendant's arguments are less than logical. The defendant's reliance on *Padilla v. Kentucky*, 130 S.Ct. 1473, 176 L. Ed. 2d 284 (2010), is misplaced as at least in the *Padilla* case there was a foreseeable possible problem as the defendant was potentially deportable. There was at least a nexus. Under the logic put forth by the defendant in this case, no counsel would *ever* be effective as it is impossible to advise a client of potentialities of crimes that have not happened yet. In a manner not clear, the defendant claims that the holding in *Padilla* makes his motion timely. Nothing in the *Padilla* holding appears to bear on the question of timeliness.

Another apparent goal of the defendant on appeal is to use CrR 7.8 as a device to obtain an appeal. A CrR 7.8 motion is a collateral attack. RCW 10.73.090. Nothing in the language of CrR 7.8 provides that if the trial court does not follow the procedures set forth in the rule, the remedy is that the defendant receives an appeal instead of a Personal Restraint Petition.

The defendant states, "This court should not convert Mr. Flaherty's motion to a personal restraint petition and consider its merits." Brf. of App. pg. 6. This line makes it clear that the defendant wishes to convert a collateral appeal rule into a direct appeal rule with no supporting rationale. This request should be rejected.

The State agrees that the trial court should have followed the procedures contained in CrR 7.8(c). However, in light of the untimeliness of the defendant motion, both under the language of CrR 7.8 and under the constraints of RCW 10.73.090, 100, coupled with lack of merit, makes the trial court's failure to follow procedures of CrR 7.8(c) harmless and technical.

This case is no less time barred in this court than it was in the Superior Court. The motion has no more merit in this court than it did in the Superior Court. The defendant is free to file a personal restraint petition regardless of the actions (or inactions) of the Superior Court. The

defendant has not made a cogent argument showing harm from the trial court's actions. This motion should be dismissed.

V.

CONCLUSION

For the reasons stated, the motion of the defendant should be dismissed.

Dated this 16th day of September, 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
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Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
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DANIEL A. FLAHERTY,)
)
 Appellant,)

NO. 29721-7-III
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 16, 2011, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

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9/16/2011
(Date)

Spokane, WA
(Place)

Kathleen H. Green
(Signature)