

COURT OF APPEALS DIVISION III  
IN THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

NATHANIEL SHAFER, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF ASOTIN COUNTY

---

REPLY BRIEF OF APPELLANT

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I. Assignment of Error

A. The Superior Court Erred When It Failed To Comply With CrR 7.8(c) .

B. The Trial Court Erred When It Failed To Set An Evidentiary Hearing Where The Facts Alleged In The Appellant's Memorandum and Supporting Documentation Establish Legal Grounds For The Requested Relief.

Issue Related to Assignment of Error

Did the lower court err in finding Mr. Shafer's motion untimely, ruling on the merits, and dismissing Mr. Shafer's motion without complying with the requirements of CrR 7.8(c)(2) and (3) ?

II. Statement of Facts

Mr. Shafer relies on the statement of facts presented in the appellant's opening brief.

III. Argument

The Trial Court Exceeded Its Authority And Abused Its Discretion When It Failed To Follow The Procedural Requirements Of CrR 7.8(c)(2) and (3).

1. Standard of Review.

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). Where a trial court fails to follow CrR 7.8(c)'s mandatory procedure, it abuses its discretion. *State v. Flaherty*, 177 Wn.2d 90, 92-93, 296 P.3d 904 (2013); *State v. Smith*, 144 Wn.App. 860, 863, 184 P.3d 666 (2008).

2. Mr. Shafer's CrR 7.8 Motion Did Not Violate The Prohibition Against Serial Petitions.

A court may not consider a motion if the movant has previously brought an attack on the same or substantially similar grounds. *State v. Becker*, 143 Wn.2d 491, 496, 20 P.3d 409 (2001)(internal citation omitted). Summary dismissal is appropriate under RCW 10.73.140 *only* where the movant has previously filed a petition on the same or similar issues, or where the subsequent petition is entirely based on frivolous grounds. *In re personal restraint of Bailey*, 141 Wn.2d 20, 22, 1 P.3d 1120 (2000).

However, where the movant raises a new claim, which has not been previously raised and adjudicated, and is not entirely based on frivolous grounds, it is not a successive serial petition. *Becker*, 143 Wn.2d at 499.

As presented in appellant's opening brief, the subject of Mr. Shafer's recent 7.8 motion was not made on claims that have previously been adjudicated. The trial court's ruling that the motion

should be denied because it was a serial petition was based on an incorrect legal standard and thus, an abuse of discretion.

3. Requirements of CrR 7.8(c)

As argued in appellant's opening brief, CrR 7.8 prescribes the specific procedure for the initial consideration of Motions for Relief from Judgment. Under CrR 7.8, if the trial court finds the motion to be untimely under RCW 10.73.090, the trial court is directed to transfer the motion to the Court of Appeals for consideration as a personal restraint petition. *Smith*, 144 Wn.App at 863.

Likewise, the superior court has authority to rule on the merits of a CrR 7.8 motion if it first finds the motion timely 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. 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).

4. The Trial Court Abused Its Discretion When It Ruled The Motion Untimely , Failed to Follow The Procedural Requirements of CrR 7.8(c)(2) and (3) and Ruled On The Merits Of The Motion.

In this case, the trial court made the initial determination that the motion was time barred under RCW 10.73.090(1). The effect of finding a motion untimely is that it cannot be considered by the superior court on its merits. Rather, under CrR 7.8(c)(2), transfer of the motion to the Court of Appeals is nondiscretionary. *Flaherty*, 177 Wn.2d at 92-93. However, rather than transferring the motion to the Court of Appeals for consideration as a personal restraint petition, as required, the trial court here exceeded its authority by instead ruling on the merits and dismissing Mr. Shafer's motion.

The remedy is remand to the superior court so that Mr. Shafer's motion can be considered under the proper legal rule. *Smith*, 144 Wn. App. at 864. Further, this motion should *not* be converted to a personal restraint petition and considered on its merits by this Court. In *Smith*, the Court held the defendant is entitled to both notice and an opportunity to object before his motion is transferred as a personal restraint petition, 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". *Id.*

5. Alternatively, The Court Abused Its Discretion When It Ruled On The Merits Of A Timely Motion Without Conducting The Necessary Hearings.

In appellant's opening brief, Mr. Shafer argued his motion was timely based on new evidence. CrR 7.8 provides that if the motion *is timely*, but the defendant fails to make a substantial showing, or the court concludes there is no need for a factual hearing, the superior court is only authorized to transfer the timely petition to the appellate court for consideration as a personal restraint petition. *Smith*, 144 Wn App. at 863.

In order to make a ruling on the merits, the superior court was obligated to find the motion timely and then determine whether Mr. Shafer either made a substantial showing he was entitled to relief, or resolution of the motion would require 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. Otherwise, the motion is to be forwarded to the Court of Appeals as a personal restraint petition. CrR 7.8(c)(3). The superior court was not authorized to deny and dismiss the motion.

As noted above, the proper remedy is to remand to the superior court with instructions to follow the procedural requirements of CrR 7.8. Mr. Shafer respectfully asks the Court not to convert his motion to a personal restraint petition to consider its merits. He is entitled to both notice and an 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”. *Smith*, 144 Wn.App. at 864.

#### IV. Conclusion

Based on the foregoing facts and authorities, Mr. Shafer respectfully asks this Court to remand the matter to the superior court with instructions to follow the procedure for a CrR 7.8 motion, and to allow Mr. Shafer notice and opportunity to object to any transfer of his motion to the Court of Appeals.

Respectfully submitted this 11<sup>th</sup> day of August, 2015.

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for appellant Nathaniel Shafer, do hereby certify under penalty of perjury under the laws of the State of Washington, that a true and correct copy of the Reply Brief was sent by first class USPS mail, postage prepaid to:  
Nathaniel Shafer, DOC # 338175, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001; and to  
Curt Liedkie, Deputy Prosecuting Attorney for Asotin County, PO Box 220, Asotin, WA 99402

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