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APRIL 30, 2015
Court of Appeals
Division III
State of Washington

No. 32731-1-III

COURT OF APPEALS DIVISION III

IN THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

NATHANIEL SHAFER, Appellant

APPEAL FROM THE SUPERIOR COURT

OF ASOTIN COUNTY

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)(2) and (3).

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

A. 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) ?

B. Did the superior court err in failing to set an evidentiary hearing where the facts alleged in the appellant's memorandum and supporting documentation established legal grounds for the vacation of his conviction?

II. Statement of Facts

Nathaniel Shafer entered an Alford plea to first degree burglary, first degree kidnapping, and two counts of first-degree robbery on February 10, 2010. (CP 47-53). In February 2011, Mr. Shafer filed a CrR 7.8 motion to withdraw his guilty plea and correct his judgment and sentence. (CP 68-71). The trial court denied the

motion on the merits. (CP 72-75). Mr. Shafer filed a notice of appeal, and this Court affirmed the sentencing in an unpublished opinion filed August 21, 2012. (CP 76-77; 86-93). The mandate issued February 21, 2013. (CP 85).

In March 2013, Mr. Shafer filed another CrR 7.8 motion for correction of the community custody provisions. (CP 94-98). He filed a supplemental motion to withdraw his guilty plea based on insufficient factual basis. (CP 117-124). The trial court denied the motion on its merits. (CP 125-128). Mr. Shafer appealed the court's ruling. (CP 129). On appeal, the State conceded that his sentence was incorrect and on remand, the court amended the judgment and sentence. (CP 29-30;35). The mandate issued on September 29, 2014. (CP 37).

On August 11, 2014, prior to the issuance of the mandate, Mr. Shafer filed a CrR 7.8 motion to withdraw his Alford plea and vacate the judgment. (CP 1-20). He presented newly discovered evidence of an affidavit prepared by his alleged accomplice Joshua Hieronymus. Mr. Hieronymus averred that he was aware Mr. Shafer had been charged as his accomplice, but feared speaking out on Mr. Shafer's innocence, as he was concerned he himself would receive a more severe sentence. (CP 19-20). Mr. Shafer

argued that the newly discovered evidence, combined with evidence available at the time he entered his Alford plea established there was no factual basis for his conviction. (CP 5-6).

On August 21, 2014, by written order, the superior court ruled on the merits and denied the motion without a hearing. The court held:

> "this matter should be decided based on the written submittals and without oral argument or further hearing. The motion is untimely, it is not supported by competent evidence or applicable law..." (CP 31-34).

The court denied Mr. Shafer's motion on both procedural and substantive grounds. In denying the motion, the court wrote,

> "As the prosecution argues, the Defendant's requested relief violates the prohibition in RCW 10.73.140 against serial petitions and it is time barred by RCW 10.73.010 and CrR 7.8(b)." (CP 35)

The court went on to deny the motion on its merits as well, finding Mr. Hieronymus' affidavit was not credible, and his recent admission was not newly discovered evidence. (CP 34-35). Mr. Shafer filed a timely notice of appeal. (CP 36).

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).

Mr. Shafer contends the trial court abused its discretion in denying his motion on procedural and substantive grounds and failing to follow the procedural requirements of CrR 7.8.

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 .3d 904 (2013); *State v. Smith,* 144 Wn.App. 860, 863, 184 P.3d 666 (2008).

2. Denial of Motion Based On RCW 10.73.140 Was An Abuse of Discretion.

The court's ruling that Mr. Shafer's motion violated RCW 10.73.140 prohibiting subsequent petitions is error[1]. The cited

[1] RCW 10.73.140 provides in part: "If a person has previously filed a petition for personal restraint, the **court of appeals** will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petition did not raise the new grounds in the previous petition...".

statute is directed toward the procedure of consideration by the Court of Appeals of a personal restraint petition, not a CrR 7.8 motion in the superior court. An abuse of discretion occurs where the court bases its decision on an incorrect legal standard. *State v. Quismundo,* 164 Wn.2d 499, 504, 192 P.3d 342 (2008). The trial court's ruling 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)

CrR 7.8 prescribes the specific procedure for the initial consideration of Motions for Relief from Judgment. It states in relevant part:

> (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 (1) 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[2]. (Underline emphasis added).

Under the plain language of the rule, if a superior court determines the motion is untimely under RCW 10.73.090, it does not have authority to dismiss a CrR 7.8 motion. Rather, the superior court is instructed to transfer the motion to the Court of Appeals for consideration as a personal restraint petition. *Flaherty,* 177 Wn.2d at 92-93; *Smith,* 144 Wn. App. at 863.

In contrast, the superior court does have authority to rule on the merits of a CrR 7.8 motion if it finds the motion timely (not barred by RCW 10.73.090) 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).

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[2] This rule was effective on September 1, 2007. *State v. Smith,* 144 Wn.App. 860, 863, 184 P.3d 666 (2008).

If the prerequisites are not met, that is, the movant fails to make a substantial showing or the court concludes, as it did here, that 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.

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

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 RCW 10.73.090 is to provide that an untimely motion cannot be considered by a superior court on its merits. *Flaherty,* 177 Wn.2d at 92-93. Under CrR 7.8(c)(2), transfer of the time-barred motion to the Court of Appeals is nondiscretionary. *Flaherty,* 177 Wn.2d at 92-93.

Here, rather than transferring the motion to the Court of Appeals for consideration as a personal restraint petition, as required, the trial court exceeded its authority by ruling on the merits and dismissing Mr. Shafer's motion.

This case should be remanded to the superior court so that Mr. Shafer's motion can be considered after application of the proper legal standard. *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.*

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

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.

Here, Mr. Shafer argues his motion was timely for two reasons. First, under RCW 10.73.090, for purposes of the

collateral attack one-year time limit, a judgment becomes final on the date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction. RCW 10.73.090(3)(b). In this case, a mandate from the direct appeal was issued on February 21, 2013. (CP 85-93). However, the Asotin County Superior Court filed an Amended Judgment and Sentence on August 21, 2014 after Mr. Shafer successfully contested the community custody provisions on appeal. (CP 35). The mandate was issued September 29, 2014. (CP 37). Mr. Shafer filed the motion before the Court on August 11, 2014. (CP 1-20). Mr. Shafer's motion was timely.

Second, Mr. Shafer's motion was timely because the one-year time limit does not apply under these circumstances. CrR 7.8 provides that "the court may relieve a party from final judgment" based on "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5." CrR 7.8(b)(2). Under the same rule, where the motion is based on newly discovered evidence, the defendant must bring the motion within a reasonable time and within one year after the judgment, order, or proceedings. However, *where the motion is a collateral attack, such as a motion to withdraw a guilty plea, the*

one-year time limit does not bar the motion if the defendant acted with reasonable diligence in discovering the new evidence. RCW 10.73.090, .100. (Emphasis added).

Mr. Shafer contends that he could not have reasonably discovered or produced the new evidence earlier. Mr. Hieronymus held the keys to the information and as he stated in his affidavit, he did not previously speak on the matter because he feared he might receive a more severe punishment by speaking out on Mr. Shafer's innocence. (CP 19; see Appendix A).

In *Scott,* the Court noted that the defendant, who presented newly discovered evidence after the one-year date, was imprisoned and subject to a no-contact order regarding the recanting witness. *State v. Scott,* 150 Wn.App. 281, 290, 207 P.3d 495 (2009). There, the Court viewed the surrounding information and determined that it was unlikely that Scott could have done anything to bring about an earlier discovery of the new evidence. *Id.* Similarly, here Mr. Shafer and Mr. Hieronymous were both imprisoned, and under DOC policy were precluded from communicating with one another.

Under the circumstance where a motion is timely, and the court determines the movant has made a substantial showing or more facts are necessary to make a determination on the motion,

the superior court retains the motion and must hold a show cause hearing. Where the motion is timely and the superior court determines the movant has *not* made a substantial showing or an evidentiary hearing is unnecessary, the superior court is only authorized to transfer the motion to the Court of Appeals as a personal restraint petition. CrR 7.8(c)(2)(3).

Here, the superior court did make a specific finding, the motion was untimely. However, as Mr. Shafer argued in his motion and as above, the motion was timely. Thus, the superior court was obligated to either hold hearings or forward the motion as a personal restraint petition. 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 this Court not to convert his motion to a personal restraint petition to consider its merits. He 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" and thus be subject to the successive petition rule in RCW 10.73.140. *Smith,* 144 Wn.App. at 864.

IV. Conclusion

Based on the foregoing facts and authorities, Mr. Shafer respectfully asks this Court to remand this matter to the superior court with instructions to follow the proper procedure for a CrR 7.8 motion.

Respectfully submitted this 30th day of April 2015.

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APPENDIX A

AFFIDAVIT

STATE OF WASHINGTON)
) SS: AFFIDAVIT OF:
) Mr. JOSHUA P. HIERONYMUS.
COUNTY OF CLALLAM)

I, Joshua P. HIERONYMUS, DOC# 338174, declares under penalty of perjury, under the laws of the State of Washington, and to the laws of the United States of America, that the foregoing is true and correct SWORN UNDER: RCW § 9A.72.085, and 28 U.S.C. § 1746.

I, Joshua Paul Hieronymus, along with an accomplice did invade and robbed the house of Trevor Morton, on July 31st, 2009, at approximately 10 or 11 P.M. .
At no time before, during, or after the robbery was Nathaniel Shafer, aware, involved, or in anyway participate in the robbery of Trevor Morton's house.
I am aware that Nathaniel Shafer was charged with the home invasion robbery of Trevor Mortons Home and their after entered into a no contest or an Alford guilty plea with the State of Washington.
That I did not previously speak on this matter at the time we were arrested and charged as co-defendants in the home invasion robbery of Trevor Mortons Home, because I thought I could recieve a more severe sentence or punishment by speaking on the matter.
I am willing to testify in a court of law on behalf of Nathaniel Shafers actual innocence in this crime, and I am asking that Mr. Shafers circumstance be justly remedied, as he should not be punished due to my silence and failure to take responsibility for the crime.

DATED: June 17, 2014.

Signature J. Hieronymus

Print Name: Joshua P. Hieronymus.

(NOTARY BELOW) IN AND FOR THE STATE OF WASHINGTON.

I certify that I know or have satisfactory evidence that the above person JOSHUA P. HIERONYMUS, is the person who appeared before me, and said person acknowledge that he signed this instrument and acknowledged it to be his free and voluntary act for the uses and purposes in this instument.

DATED: JUNE 17, 2014.

Signature of NOTARY Barbara J. Gronseth

PRINT NAME: BARBARA J. GRONSETH

Notary Public State of Washington

MY COMMISSION EXPIRES:

Dec. 1, 2017

AFFIDAVIT OF:

Mr. Joshua P. Hieronymus. DOC# 338174

CC:

BARBARA J GRONSETH NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES DECEMBER 1, 2017

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 Brief of Appellant 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 Benjamin C. Nichols, Asotin County Prosecutor, PO Box 220, Asotin, WA 99402-0220.

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