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Jun 24, 2015
Court of Appeals
Division III
State of Washington

No. 32731-1-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

NATHANIEL R. SHAFER, Appellant.

BRIEF OF RESPONDENT

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I. SUMMARY OF ISSUES

1. DID THE APPELLANT'S MOTION VIOLATE THE PROHIBITION IN RCW 10.73.140 AGAINST SERIAL PETITIONS?

2. WAS THE APPELLANT'S MOTION TIME BARRED AND PROPERLY SUBJECT TO SUMMARY DENIAL THEREFOR?

3. DID THE APPELLANT MAKE A SUBSTANTIAL SHOWING THAT HE IS ENTITLED TO RELIEF?

4. WHERE THE REMEDY REQUESTED IS NOT AVAILABLE TO THE APPELLANT SHOULD THIS APPEAL BE DISMISSED?

II. SUMMARY OF ARGUMENT

1. THE APPELLANT'S MOTION WAS PROPERLY DENIED AS VIOLATIVE OF THE PROHIBITION IN RCW 10.73.140 AGAINST SERIAL PETITIONS.

2. THE APPELLANT'S MOTION WAS UNTIMELY AND PROPERLY SUBJECT TO SUMMARY DENIAL.

3. THE APPELLANT FAILED TO MAKE A SUBSTANTIAL SHOWING THAT HE IS ENTITLED TO RELIEF AND THE MOTION WAS THEREFORE PROPERLY DENIED.

4. THE REMEDY REQUESTED IS NOT AVAILABLE TO THE APPELLANT AND AS SUCH, THIS APPEAL SHOULD BE DISMISSED.

III. STATEMENT OF THE CASE

On August 1, 2009, at approximately 11:00pm, Joshua Heironymus and the Appellant, Nathaniel Shafer, forced entry into a residence in Asotin, Washington. Motion and Declaration for Order Determining Probable Cause, Clerks Papers (Hereinafter CP) CP 139 - 144. Heironymus was armed with a handgun and forced the occupants, Trevor Morton and Kayla Edmonson, onto a sofa while Shafer went into a bedroom and began removing items of property. *Id*. Hieronymus decided to tie the victims' hands with zip ties. *Id*. When he attempted to do so, Trevor fought with him, eventually liberating the gun from Hieronymus. *Id*. Shafer grabbed Trevor from behind and strangled him to unconsciousness. *Id*. The assailants then tied Trevor's and Kayla's hands with nylon zip ties. *Id*. Shafer and Hieronymus then left the residence, having taken five medicinal marijuana plants, other prescription controlled substances, electronic equipment and approximately two hundred dollars in cash. *Id*.

After the assailants left, Trevor was able to go to the kitchen, retrieve a knife, and cut the ties from his and Kayla's wrists. *Id*. Kayla then ran to a neighbor's and called 911. *Id*. Police took statements from the victims and were led to the residence of Hieronymus in Lewiston, Idaho. *Id*. In the early morning hours of August 2, 2009, officers responded to that location and from outside the residence,

heard Hieronymus and Shafer bragging about the crime and the use of the gun. *Id*. Officers contacted the two and placed each under arrest for violation of their respective Idaho parole. *Id*. A search warrant was obtained and many of the items taken in the robbery were recovered as well as clothing matching the descriptions of the robbers given by Kayla and Trevor. *Id*.

Shafer was charged by way of Information with Burglary in the First Degree, two counts of Kidnapping in the First Degree, and two counts of Robbery in the First Degree. Information, CP 134 - 138. The State also alleged that at the time of the commission of each of the above offenses, the Appellant or an accomplice was armed with a firearm, a fact which, if proven at trial or otherwise, would have added sixty months "hard time" to each count. *Id*. *See also* RCW 9.94A.533(3).

On February 10, 2010, the Appellant, in an effort to avoid twenty-five years of "hard time," entered into a negotiated plea agreement wherein the State agreed to consolidate the two charges of Kidnapping in the First Degree into a single count and further, agreed to withdraw all firearm enhancements. Plea Agreement, CP 41 - 42. The Appellant pled guilty, pursuant to the plea agreement, to one count of Burglary in the First Degree, one Count of Kidnapping in the First Degree, and two counts of Robbery in the First Degree. Statement of Defendant on Plea of Guilty, CP 47 - 56. The Appellant

agreed that his standard range for the most serious charge was one hundred eight (108) to one hundred forty-four (144) months. Id. Report of Proceedings 02/10/10 (*Hereinafter* RP) p. 7 - 8. No request or argument was made to treat the charges as same criminal conduct for scoring purposes. RP pp. 12 - 16. Instead, the Appellant requested a sentence at the low end of the standard range. Id. The Court sentenced the Appellant, pursuant to the plea agreement he had negotiated, to one hundred forty-four (144) months. Judgement and Sentence, CP 57 - 67. No direct appeal of the Judgement and Sentence or his conviction was filed by the Appellant.

On February 9, 2011, one day shy of one year after entry of the Judgement and Sentence, the Appellant filed two motions with the Trial Court seeking relief from his sentence. In the first, the Appellant sought to withdraw his pleas of guilty. Motion to Withdrawal of Guilty Plea, CP 71. Therein, the Appellant alleged ineffective assistance of counsel and set forth two grounds in support of his motion: 1) "Missadvice (*sic*) to plead guilty when told of actual innccence (*sic*)," and 2) "Missadvised (*sic*) of law of how much good time I would recieve (*sic*)." Id. The Appellant also filed a document entitled "Motion to Modify or Correct Judgement and Sentence." CP 68 - 70. Therein, the Appellant asserted that the charge of Kidnapping in the First Degree should have merged with the robbery charges and that his convictions violated Double Jeopardy. Id. The Trial Court denied the

Appellant's motions. Memorandum Decision Re: Motions for Post Conviction Relief, CP 72 - 75. In so ruling, the Trial Court found that his claims of ineffective assistance, as presented, were based solely on the Appellant's naked assertions and otherwise lacked factual support. *See id*. The Trial Court further found the Appellant's claims of merger and Double Jeopardy to be contrary to the legal authority of this State. *See id*. The Appellant then filed a Notice of Appeal. Amended Notice of Appeal, CP 43 - 46. On September 15, 2011 and while the appeal of the trial court's denial of the first two motions was pending, the Appellant filed his third motion seeking relief from judgement, claiming therein that the sentencing judge should have treated the offenses as "same criminal conduct." Affidavit in Support of CrR 7.8 Motion to Modify and Correct Judgment and Sentence, Brief in Support of Motion to Modify Judgment and Sentence Pursuant to CrR 7.8, CP 145 - 147, CP 148 - 170. This motion was denied and the Appellant took no appeal therefrom. Memorandum Decision Re: Motions for Post Conviction Relief, CP 82 - 84.

On August 21, 2012, the Court of Appeals rejected the appeal of the trial court's denial of his first two motions. *See* State of Washington v. Nathanial R. Shafer, 29774-8-III. He then petitioned to the Supreme Court for review which was likewise denied and mandate entered on February 20, 2013 terminating review. Mandate, CP 85 - 93.

On March 12, 2013, the Appellant filed his fourth challenge to his sentence, complaining that the trial court included a "Brook's Notation"[1] and that he was entitled to be resentenced. Motion and Declaration for Relief from Judgment Pursuant to CrR 7.8, CP 94 - 106. The Appellant's argument was premised on the misconception that "statutory maximum"[2] and the high end of the standard range are equivalent and therefore, because he was sentenced at the high end of the standard range, he sought to have his term of community custody term reduced to zero. *See id*. The State filed a responsive memorandum objecting to the motion on the grounds that the Appellant was in violation of RCW 10.73.140 and the prohibition against serial petitions, and was time barred pursuant to RCW 10.73.090. Plaintiff's Memorandum in Response to Defendant's Motion for Post Conviction Relief, CP 171 - 175.

The trial court did not address the State's procedural arguments and denied the Appellant's motion on its merits, ruling that, because the statutory maximum for these crimes was life in prison, the total sentencing imposed, including incarceration and community custody, did not exceed the statutory maximum. Memorandum Decision Re: Motions for Post Conviction Relief, CP 125 - 128. The

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[1] State v. Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009)

[2] *See* Blakely v. Washington, 42 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Appellant then filed notice of appeal. Notice of Appeal, CP 129 - 133. This appeal was ultimately dismissed as moot after the trial court entered an order amending the Judgement and Sentence by striking the "Brooks Notation"[3] by agreement of the parties and after leave was granted by the Court. Order Amending Judgment and Sentence, and Mandate, CP 35, 37. *See also* State v. Nathanial R. Shaffer, Court of Appeals 31801-0-III.

On August 1, 2014, and while the denial of his last motion was up on appeal, the Appellant filed this, his fifth motion for post relief. Motion to Modify Judgement and Sentence, CP 1 - 20. Therein the Appellant claimed that "newly discovered evidence" entitled him to an order setting aside the Judgement and Sentence and withdrawal of his guilty plea. *Id.* The "newly discovered evidence" consisted of an affidavit from his co-defendant, Joshua Hieronymus, which stated, without detail, explanation, or corroboration, that the Appellant was not the second assailant in the home invasion robbery and kidnapping, nor was he in any way involved. *Id.* The State objected, noting that the Appellant's request was time barred pursuant to pursuant to RCW 10.73.090, and violative of RCW 10.73.140 and the

[3]This was not the issue raised in the Appellant's motion to the trial court below but was raised for the first time on appeal by counsel appointed to assist the Appellant therein. The State initially and correctly objected pursuant to RAP 2.5 on the basis that the error complained of on appeal was not raised below, but recognized that the "Brooks Notation" was contrary to law and agreed to entry of an order amending the Judgment and Sentence in hope of avoiding future litigation.

prohibition against serial petitions. Plaintiff's Response to Motion for Post Conviction Relief, CP 21 - 28. The State further noted that the affidavit failed to meet the legal threshold for "newly discovered evidence." *Id*. The trial court agreed and denied the Appellant's motion, finding that the affidavit and proposed testimony did not constitute "newly discovered evidence." Memorandum Decision Re: Motions for Post Conviction Relief, CP 31 - 34. The Appellant once again appeals the denial of his motion for post conviction relief. For the reasons stated in the trial court's order of denial and as further discussed below, this Court should affirm the trial court's order of the and dismiss this appeal.

IV. DISCUSSION

1. THE APPELLANT'S MOTION WAS PROPERLY DENIED AS VIOLATIVE OF THE PROHIBITION IN RCW 10.73.140 AGAINST SERIAL PETITIONS.

The Appellant's motion was properly denied on the basis that it violates the prohibition in RCW 10.73.140 against serial petitions. RCW 10.73.140 states in pertinent 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 petitioner did not raise the new grounds in the previous petition.

Here, the Appellant has filed four prior collateral attacks pursuant to

CrR 7.8. He filed his first two motions on February 9, 2011, the third on September 12, 2011, the fourth on March 8, 2013 and the fifth, the motion at issue herein, on August 1, 2014.

The Appellant claims that RCW 10.73.140 does not apply since the latest motion is a collateral attack filed with the trial court pursuant to CrR 7.8 and not a personal restraint petition filed with the Court of Appeals. However, the Washington Supreme Court has already ruled that the prohibitions of RCW 10.73.140 apply to such motions. *See* In re Becker, 143 Wn.2d 491, 497, 20 P.3d 409 (2001). The Appellant has not previously raised the issues present in the fifth CrR 7.8 in any of the four prior collateral attacks. The only explanation provided by the Appellant as to why this issue was not and/or could not have been raised before relates to his claim that the "witness," Joshua Heirnymus, was not available to him before. For reasons discussed below relating to the Appellant's lack of diligence in "discovering" this new evidence, the Appellant cannot show that the issue raised herein could not have been raised in any of his four previous motions.

2. THE APPELLANT'S MOTION WAS UNTIMELY AND PROPERLY SUBJECT TO SUMMARY DENIAL.

The Appellant's motion was properly identified by the trial court as time-barred and therefore properly subject to summary denial. Requests for relief such as this should be filed within one year of entry

of the judgement. RCW 10.73.090 provides in pertinent part:

> (1) ***No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final*** if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
>
> (2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.
>
> (3) For the purposes of this section, a judgment becomes final on the last of the following dates:
>
> > (a) The date it is filed with the clerk of the trial court;
> > (b) The date that an appellate court issues it's mandate disposing of a timely ***direct appeal from the conviction;***

(*Emphasis added*). Here, no direct appeal was taken from the judgement, only the appeal of the Court's order denying the Appellant's first two motions pursuant to CrR 7.8. These motions weren't even filed until one day short of one year after entry of the Judgment and Sentence, well after the thirty day appeal period had expired pursuant to RAP 5.2. As such, the Appellant's Judgement became final on February 10, 2010.

The Appellant claims that the motion was filed within one year of the Judgment and Sentence becoming "final." To support this

argument, the Appellant points to two events. The first event cited is the issuance of the mandate disposing of his appeal of the trial court's denial of his fourth motion for relief which occurred on September 29, 2014, which occurred after he filed this last motion. The second event is the agreed order amending the Judgment and Sentence by striking the "Brooks Notation." Neither of these events resets the date of finality for this judgment and sentence.

First, the appeal disposed of in the Court's Mandate issued September 29, 2014 was not a "***direct appeal from the conviction***" but rather a direct appeal from the denial of his fourth motion pursuant to CrR 7.8. Further, contrary to the Appellant's claim, the appeal was not granted, but rather, dismissed as moot. The Appellant counters that the entry of the order amending the Judgment and Sentence which struck the "Brooks Notation" meant that the Judgment was no longer final. However, as stated by the Supreme Court:

> Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed.

In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). A stated by this Court:

> [The Appellant] ignores the motion proceedings and attacks the underlying judgment to try to leverage a limited right of review for abuse of discretion into a second chance for a full, direct appeal of the underlying judgment.

State v. Gaut, 111 Wn. App. 875, 881-882, 46 P.3d 832 (Div. III, 2002).

A motion pursuant to CrR 7.8 must likewise be filed within the time lines set forth therein. Specifically, CrR 7.8(b) provides:

> The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. ***A motion under section (b) does not affect the finality of the judgment or suspend its operation.***

(*Emphasis added*). Here, the Appellant's motion was not made within a reasonable time, nor was it filed within one year of entry of the Judgement and Sentence. The clear language of CrR 7.8, under which the Appellant's motion is brought and as cited above, should dispel any misunderstanding. A motion filed pursuant to CrR 7.8(b)(2) based upon newly discovered evidence must be filed within one year. As such, this motion is time barred under the rule.

The Appellant further claims that RCW 10.73.100 authorizes him to file this motion after one year. However, even under that statute, the Appellant must show that he acted with reasonable diligence in discovering the evidence and could not reasonably have discovered at an earlier time. Here, the Appellant merely claims that his incarceration and Hieronymus's fear of additional punishment prevented him from discovering this evidence. Taking these claims

at face value, this was evidence that the Appellant would have been aware of throughout the process. If the Appellant was not an accomplice to Heironymus in the commission of these crimes, the Defendant would have known that Hieronymus would be a key witness to his claim of innocence. Under the rules of professional conduct and the Fifth Amendment to the U.S. Constitution, he could not have had his attorney speak directly to Hieronymus so long as their respective cases were pending, due to the fact that Hieronymus was represented by counsel, but he certainly could have obtained a statement from Hieronymus at any time subsequent to February 10, 2010. Four and a half years passed since Hieronymus became an available witness to the Appellant's cause. The Appellant points to his own incarceration and makes vague reference to "DOC polices" as an excuse for the delay. Brief of Appellant, p. 10. The policies of DOC are matters outside the record and cannot be considered herein on appeal. *See* State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). However, it should be noted that the Appellant had, at the time he filed his last motion, been represented by at least four different attorneys since his sentencing.[4] Any one of these attorneys

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[4] As pointed out in the State's response to the Appellant's last motion, it had received a request for release of documents from the Appellant's trial counsel, Brian Thie, as late as July 28, 2010. On April 15, 2011, the Court of Appeals appointed David Donnan to represent the Appellant on his appeal from the trial court's denial of his first round of motions. Maureen Cyr subsequently appeared as co-counsel in that matter on June 1, 2011. Thus he was duelly represented from that date until the Mandate therein was issued on February 20,

could and most certainly would have assisted in obtaining a statement from his co-defendant. All this time has passed and the Appellant has been aware this entire time that Hieronymus was a key witness to his claim of alibi, yet no action has been taken for five years. This can hardly be characterized as diligence in obtaining this evidence; evidence of which he must certainly have been aware since his arrest on August 2, 2009. Under these circumstances, five years passage is not reasonable and the motion was therefore untimely.

3. THE APPELLANT FAILED TO MAKE A SUBSTANTIAL SHOWING THAT HE IS ENTITLED TO RELIEF AND THE MOTION WAS THEREFOR PROPERLY DENIED.

All procedural failures of the Appellant's motion for a new trial aside, the Appellant's supporting affidavit of Joshua Heironymus failed to establish entitlement to setting aside his pleas of guilt. The Appellant did not avail himself of a trial and instead pled guilty, *albiet*, by Alford[5] plea, to the crimes for which he was convicted. As such, the standards for the grant of a new trial on the basis of newly discovered evidence are heightened:

2013. Finally, David Gasch was appointed on August 22, 2013 and represented the Appellant on the last appeal up to the issuance of th Mandate therein on September 29, 2014. By the authors' calculations, the Appellant was been represented by an attorney for all but fourteen months of the five years that elapsed between the commission of these crimes and the trial court's denial of the Appellant's last motion, not including present counsel's representation on appeal herein.

[5]North Carolina v. Alford, 400 U.S. 25, 31, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970), *See also* State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976)

> Generally, if a petitioner enters a guilty plea, the petitioner must show that a new trial is necessary " 'to correct a manifest injustice,' " but "a guilty plea ... generally bars a later collateral attack based on newly discovered evidence." State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006) (quoting CrR 4.2(f)); In re Pers. Restraint of Reise, 146 Wn.App. 772, 783–84, 192 P.3d 949 (2008). Spencer, however, entered an Alford plea.
>
> Neither party disputes that with an Alford plea, a manifest injustice exists if the new evidence, when viewed in light of the entire record, changes the factual basis of the plea. *E.g.*, State v. Dixon, 38 Wn.App. 74, 77, 683 P.2d 1144 (1984). "In the context of an Alford plea, a manifest injustice exists if the newly discovered evidence, when viewed in balance with the record, changes the factual basis for the plea." In re Pers. Restraint of Ice, 138 Wn.App. 745, 749, 158 P.3d 1228 (2007) (*footnote omitted*), *review denied*, 163 Wn.2d 1008, 180 P.3d 784 (2008).

See In re Spencer, 152 Wn.App. 698, 708, 218 P.3d 924 (Div. II, 2009). In Ice, the defendant submitted an affidavit of an additional witness whose statement contradicted the three State's witnesses. In re Pers. Restraint of Ice, at 749. Therein, the Court found that independent evidence supported a finding of guilt and that this new and contradictory affidavit did not change the factual basis supporting the defendant's guilty plea. *Id.* at 750. Therefore, the defendant therein failed to demonstrate a manifest injustice. *Id.*

Even under the more liberal standards relating to a request for a new trial where guilt was previously determined after a trial, the Appellant's arguments necessarily fail. The standard for evaluating

"newly discovered evidence" is well established:

> A claim based upon "newly discovered evidence" may be considered only when the petitioner establishes that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of any one of the five factors is grounds for the denial of a new proceeding.

See In re Stenson, 150 Wn.2d 207, 217, 76 P.3d 241 (2003).

Under the first "element," the affidavit of Joshua Hieronymus is highly suspect and as a matter of law, would not "probably change the result a trial." It has long been recognized that, "New trials should not be granted on the uncorroborated statements of an accomplice." *See* State v. Peele, 67 Wn.2d 724, 731, 409 P.2d 663 (1966). Here, as in Peele, the Appellant offers only the uncorroborated declaration of his co-defendant. The affidavit offered by the Appellant is substantially less compelling than that offered by the defendant in Peele. There, the affiant co-defendant provided an affidavit that claimed that he and a person he specifically identified as Danny Cooper committed the robbery. *Id.* at 726. Mr. Hieronymus's affidavit does name his accomplice. His statement contains only conclussory claims of the Appellant's "actual innocense" and offers excuses for his own silence on this matter for the last five years. Hieronymus's affidavit is devoid of any details and cannot be corroborated.

The State's evidence, against the great weight of which the Appellant chose to plead guilty instead of facing a jury, included the testimony of the victims whose home was forcefully entered and who were brutally robbed, beaten and bound; the testimony of the officers who heard the Appellant and Mr. Hieronymus discussing the gun and the struggle with the victims; Amber Gallagher who stated that both Mr. Hieronymus and the Appellant admitted robbing the house in Asotin that very night; and the fact that the items taken in the robbery were recovered at the residence where the Appellant and Hieronymus were arrested within an hour of the crime with the clothing described by the victims. Mr. Hieronymus's affidavit is so devoid of credibility that it could not have any appreciable impact on the outcome of this case, much less change the factual basis for the Appellant's Alford plea.

While the affidavit was obtained since the Appellant was convicted, as discussed above, the Appellant was certainly aware that his co-defendant was a potential witness, and that he would have known whether or not the Appellant was present or participated. As such, the Appellant's arguments fail on the second prong; that the evidence was discovered since trial. He knew that is co-defendant was a witness when he pled guilty. Likewise on the third point, this dubious "smoking gun" evidence of claimed actual innocence was not

obtained until nearly five years after the crime. It certainly could have produced prior to his guilty plea and sentencing. At a minimum, it would have been available for a timely CrR 7.8 motion, through the exercise of any meaningful diligence on the Appellant's part. If there were a scintilla of truth therein, this affidavit would undoubtably have been obtained the same day Mr. Hieronymus pled guilty and waived his fifth amendment rights. The proffered affidavit of the co-defendant fails to meet the legal standards for newly discovered evidence, lacks sufficient credibility as a matter of law, and is otherwise insufficient to warrant setting aside the Appellant's Judgement and Sentence and his pleas of guilty. As such, the trial court reached the appropriate result in denying the Appellant's fifth motion.

4. THE REMEDY REQUESTED IS NOT AVAILABLE TO THE APPELLANT AND AS SUCH, THIS APPEAL SHOULD BE DISMISSED.

The Appellant then claims that, if the trial court was correct in determining that the matter was time barred and lacked merit, then the court's authority was limited to transferring the matter to this Court as a personal restraint petition (PRP). The Appellant cites to CrR 7.8(c)(2) for the proposition that the trial court cannot dismiss a time barred motion and must refer the matter to the Court of Appeals for consideration as a PRP. *See* State v. Smith, 144 Wn.App. 860, 184 P.3d 666 (Div. II, 2008). While this is the correct standard, the

Appellant's requested relief is beyond the scope of what remedy the law would provide.

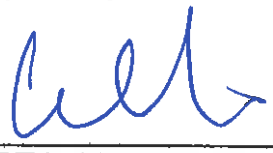
Specifically, despite the trial court's finding that the Appellant's motion was untimely and that he failed to make a substantial showing that he was entitled to relief, the Appellant requests that this Court remand this matter to the trial court to hold an evidentiary hearing on the matter. However, as asserted by the Appellant, the trial court's only proper action, having determined that the motion is untimely and that the Appellant failed to make "a substantial showing that he . . . is entitled to relief," is to transfer the matter to this Court for consideration as a PRP. Effectively, the Appellant is accusing the trial court of failing to play by the rules, and then asks this Court to remand the matter and instruct the trial court to not play by the rules. The trial court, having found that the matter is without merit and untimely, is obligated to transfer the matter as a PRP. The rule makes clear that either finding triggers the trial court's obligation to transfer the matter. This Court cannot, and should not, order the trial court to take action not authorized by the rule. Since the only available remedy has been specifically rejected by the Appellant, this Court cannot grant effective relief to the Appellant and as such, his refusal to play by the rules has rendered this appeal effectively moot. *See* In re Pers. Restraint of Sappenfield, 138 Wn.2d 588, 595, 980 P.2d 1271 (1999)(*"A case is moot if a court can no longer provide effective relief."*).

V. CONCLUSION

The Appellant was sentenced in this matter on February 10, 2010. The Appellant did not file a direct appeal of his conviction and sentence within 30 days as required by RAP 5.2(a). His motion pursuant to CrR 7.8 was untimely, barred as a serial petition and otherwise lacked merit. As such, denial of the motion, whether treated as a motion under CrR 7.8 or as a PRP, is properly subject to summary dismissal. Further, the Appellant's refusal to accept the available legal remedy renders his appeal moot. As such, this appeal should be dismissed. The State respectfully requests this court enter an order dismissing the appeal.

Dated this 28nd day of June, 2015.

Respectfully submitted,



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COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. NATHANIEL R. SHAFER, Appellant.	Court of Appeals No: 327311 **DECLARATION OF SERVICE**

DECLARATION

On June 24, 2015 I electronically mailed Ms. Trombley a copy of the BRIEF OF RESPONDENT in this matter to:

MARIE J. TROMBLEY
marietrombley@comcast.net

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on June 24, 2015.

Lisa M. Webber

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