

NO. 66672-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER CHARLES LOY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE WESLEY SAINT CLAIR

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A final judgment in a criminal case means that both the conviction and sentence are final. CrR 7.8(b) outlines the circumstances where a trial court may relieve a party from final judgment. CrR 7.8(c) delineates the procedure the court must follow when presented with such motion. When a motion for a new trial is made prior to sentencing, is the court required to analyze the motion pursuant to CrR 7.8(c)'s procedures for vacation of a final judgment?

2. Loy was convicted by a jury almost eight years prior to his February 4, 2011 sentencing. He had availed himself of two prior direct appeals and a prior motion for a new trial. Prior to imposition of sentence, he asked the court for additional time to prepare a motion for new trial. Did the trial court properly exercise its discretion when it denied Loy's motion to continue sentencing to allow him the opportunity to first present such motion?

B. STATEMENT OF THE CASE

In early 2003, Loy was convicted of first degree murder and second degree murder; he was sentenced to 450 months in prison. CP 9-13. On appeal, this Court vacated Loy's second degree

murder conviction and remanded the case for resentencing on the first degree murder charge. State v. Loy, No. 52355-4-I, 2004 WL 3037931 (Wn. App. Dec. 27, 2004). Loy was subsequently resentenced to 416 months in prison. CP 21. Loy appealed again, and on September 10, 2010, this Court vacated Loy's sentence and remanded the case for resentencing with a different offender score calculation. State v. Loy, No. 59358-7-I, 2009 WL 2871888 (Wn. App. Sep. 8, 2009); CP 27-35.

On February 4, 2011, Loy appeared before Judge Saint Clair to be sentenced for the third time. He represented himself at the hearing, although standby counsel was present. RP 3. At the outset, the prosecutor noted that Loy had previously indicated that he wanted to move for a new trial and have his standby counsel argue the motion. RP 4. The prosecutor indicated that she was unsure of the basis for such a motion, as Loy had provided no briefing. RP 4.

The court sought clarification from Loy directly. Loy indicated for the first time that he wished to raise the impropriety of the colloquy that the trial judge had conducted when allowing him to represent himself at trial. RP 5. Loy conceded that he had not yet

been able to obtain transcripts of that hearing, acknowledging that the court was "gonna [sic] want to see" those. RP 6.

Loy did not file a motion or briefing, nor did he state a factual or legal basis for his claim that the colloquy was improper. He stated, "if we can get a continuance, [standby counsel] can get [the transcripts], I can draw something up for your Honor and [the prosecutor]. . . ." RP 6. Noting that the case was old, that Loy had previously taken advantage of the appellate process, and that there were "issues with timeliness" and "notice to the other side," the court stated, "[I]f you're asking to continue this, so that you can present a more formal brief and transcript on the issue of adequacy of colloquy . . . that Motion is denied." RP 8-10.

The court proceeded to sentence Loy and imposed 388 months of confinement. CP 49. Loy appeals again, arguing that the sentencing court improperly denied his "motion" for a new trial. CP 36.

C. ARGUMENT

Loy contends that the trial court improperly denied a CrR 7.8(b) motion for relief without following the rule's procedural requirements of determining (1) whether the motion was timely, and

(2) whether he had made a substantial showing that he was entitled to relief or whether a factual hearing would be necessary to resolve the motion.

Loy's argument fails for two reasons. First, because he had not yet been sentenced, there was no final judgment to be relieved from, and Loy's "motion" is improperly characterized as a CrR 7.8(b) motion. As such, the trial court was under no obligation to consider the procedures outlined in CrR 7.8(c)(2). Secondly, Loy did not actually make a motion for a new trial; rather, he asked the court to continue his sentencing to allow him to brief the issue and obtain the transcripts necessary to support such a motion.

Because the court properly exercised its discretion when it denied Loy's motion to continue the sentencing, this court should reject Loy's arguments on appeal and affirm his sentence.

1. LOY'S "MOTION" FOR A NEW TRIAL WAS RAISED PRIOR TO IMPOSITION OF SENTENCE, THUS THE COURT WAS UNDER NO OBLIGATION TO FOLLOW THE PROCEDURES OUTLINED IN CrR 7.8(c)(2) FOR MOTIONS TO VACATE A FINAL JUDGMENT.

In a footnote, Loy characterizes his "motion for a new trial" as a motion for relief from judgment pursuant to CrR 7.8(b), rather

than as a motion for new trial under CrR 7.5. But CrR 7.8(b) applies to motions for relief from "final judgment," and a judgment is not yet final prior to the imposition of sentence. Therefore, Loy's characterization is erroneous. Instead, any request for a new trial made prior to sentencing is properly analyzed under CrR 7.5. The court did not err when it did not consider the procedures outlined in CrR 7.8(c)(2), as they apply to motions for relief brought after the imposition of sentence.

A motion for a new trial must be served and filed within 10 days of the verdict, unless the court exercises its discretion to extend the time for filing of the motion. CrR 7.5(b). The motion "shall identify the specific reasons in fact and law as to each ground on which the motion is based." Id.

By its very terms, CrR 7.8 applies solely to remedies available after entry of judgment and sentence. Specifically, if the court makes a finding of one of several enumerated bases, the court "may relieve a party from final judgment, order or proceeding." CrR 7.8(b) [emphasis added]. If sentence has not yet been imposed, then the judgment is not final. See In re Personal Restraint of Skylstad, 160 Wn.2d 944, 162 P.3d 413 (2007) (for purposes of deciding whether a collateral attack from the judgment

and sentence is timely, "final judgment" means both the conviction and sentence are final). If a sentence is reversed on appeal, the judgment is no longer final and the prior sentence ceases to be a final judgment.¹ Skylstad, 160 Wn.2d at 950-52 (citations omitted).

Motions made pursuant to CrR 7.8(b) are subject to the collateral attack provisions of RCW 10.73.090, .100, .130, and .140. CrR 7.8(b). A collateral attack is any request for "postconviction relief other than a direct appeal" and includes motions for a new trial. RCW 10.73.090(2). With specific exceptions, a collateral attack must be filed within one year of the final judgment. RCW 10.73.090(1). For purposes of calculating this statutory time-bar to collateral attacks (and thereby CrR 7.8 motions) a "judgment" becomes final on the date that it is filed with the clerk of the trial court, or on the date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction and sentence. RCW 10.73.090(3); Skylstad, 160 Wn.2d at 954.

CrR 7.8(c)(2) addresses the procedure to be followed when a defendant brings a post-judgment motion for relief:

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

¹ Loy acknowledges this, yet he does not address CrR 7.8(b)'s sole applicability to "final" judgments.

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.

In other words, the superior court must transfer a collateral attack to the court of appeals, unless it finds that the motion is timely and the defendant has made a substantial showing that he is entitled to relief or a hearing on the facts is necessary. CrR 7.8(c)(2).

Here, Loy came before the court to be sentenced, after twice previously having had his judgment vacated on appeal. At the sentencing hearing, almost eight years after the jury's verdict, and after a prior motion for new trial had been heard and resolved,² Loy informed the court that he wished to move for a new trial on the basis of an issue not previously raised. RP 5-6; CP 46-50. He provided no factual basis for the request, nor did he file a motion or affidavit stating the specific reasons in fact and law demonstrating that he was entitled to a new trial. Rather, he asked the court for more time to brief the motion and to gather the transcripts necessary to support it. RP 6. The court denied Loy's motion to continue the sentencing and imposed sentence. RP 10; CP 46-50.

² See CP 35 (in the decision on Loy's second direct appeal, this Court noted that Loy had also brought a motion for new trial, which had been heard by the court and denied).

Because Loy had not yet been sentenced when he raised the adequacy of his pro se colloquy, his judgment was not final, and his motion (if he made one) is not properly characterized as a CrR 7.8(b) motion for relief from final judgment. The court was under no obligation to follow CrR 7.8(c)(2)'s procedures on vacation of judgment. Loy's attempt to characterize his "motion" as a CrR 7.8(b) motion should be rejected.

2. EVEN IF A CrR 7.8(b) MOTION FOR RELIEF FROM FINAL JUDGMENT COULD BE MADE PRIOR TO SENTENCING, THE TRIAL COURT DID NOT IMPROPERLY DENY SUCH A MOTION BECAUSE LOY DID NOT MAKE ONE.

On appeal, Loy characterizes his oral motion for a new trial as a CrR 7.8(b) motion for relief from final judgment. He argues that the trial court erred by refusing to address the merits of a motion he claims to have made at his sentencing hearing. Loy asserts that the court was required to determine whether he had made a substantial showing that he was entitled to relief or whether an evidentiary hearing would be necessary to rule on his motion. But the trial judge did not deny a CrR 7.8(b) motion, as Loy did not actually make one. Rather, the court refused to continue the

hearing in order for Loy to make a motion for a new trial prior to his sentencing.

A motion to vacate judgment shall state the grounds on which the requested relief is based and be supported by affidavits that set forth the statement of facts or error on which the motion is based. CrR 7.8(c)(1). Black's Law Dictionary defines "affidavit" as a "voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." BLACK'S LAW DICTIONARY 66 (9th ed. 2009). Instead of a sworn affidavit, a defendant may provide an unsworn statement so long as it is made under penalty of perjury. RCW 9A.72.085(1).

Where a CrR 7.8 motion is based on a legal issue rather than disputed facts, the requirement of an affidavit may be less significant. However, the basis for the requested relief must still be decipherable to the court and opposing counsel. Otherwise, the court cannot engage in the analysis required by the rule: to determine if the defendant has made a substantial showing that he is entitled to relief or that the matter will require resolution of factual issues.

Here, Loy's entire argument is premised on a misunderstanding of the record, as he never actually made or filed

a motion for a new trial. Prior to the sentencing hearing Loy had apparently provided notice to the court and to the State that he wished to bring a "motion for new trial" and have his standby counsel, Brian Todd, argue the motion for him. RP 4. But Loy never filed such motion, and at the beginning of the sentencing hearing, Loy's intentions were still unclear to both the State and the court. Id. The court asked Loy for clarification as to what he was asking for, and Loy indicated for the first time that "my colloquy was improper. I should not have been allowed to proceed pro se at trial." RP 5. Acknowledging that the court would "want to see transcripts from that colloquy," Loy asked the court for additional time so that he could get them, and "draw something up for your Honor and [the prosecutor]." RP 6.

Despite the trial court's commentary regarding whether such a motion would be proper before the superior court or the court of appeals, it did not substantively deny a motion for relief based on an allegedly improper pro se colloquy. RP 7-10. Rather, the court stated, "[M]y position is going to be . . . if you're asking to continue [the sentencing hearing], so that you can present a more formal brief and transcript on the issue of adequacy of colloquy that Motion is denied." RP 10.

Contrary to Loy's assertion, the State did not request that "the motion" be transferred to the court of appeals for consideration as a personal restraint petition.³ See Brf. of Appellant at 3. Indeed there was nothing to transfer. Loy himself was asking for more time to put together his motion and supporting transcripts. RP 6. Rather, the State pointed out that despite two previous direct appeals, Loy was raising the propriety of his self-representation for the very first time that day, when they were present for sentencing. RP 6. The prosecutor indicated that imposition of sentence should not be delayed further and pointed out that Loy could always bring the issue of his pro se colloquy before the court of appeals. RP 6-7.

It is of no consequence that the sentencing court may have misapprehended its authority to review another judge's decision to allow Loy to proceed pro se. Because Loy did not actually bring a motion for a new trial, there was nothing for the court to review.

³ Loy states, "The State filed a response to the motion [for new trial]." Brf. of Appellant at 3. But he cites to the State's sentencing memorandum that dealt with the issue of Loy's offender score and does not address a motion for new trial. *Id.*; CP 55-59. Although the record is unclear, perhaps Loy means to refer to the fact that the State apparently filed a short brief regarding Loy's stated desire that his standby counsel argue a motion for new trial on his behalf, and the impropriety of such "hybrid representation." RP 4. What is clear from the record is that prior to the February 4th hearing, Loy had never alleged any deficiency in his pro se inquiry, and the State and the court were not clear on what Loy's argument for a new trial was based on. RP 4-6.

Loy's attempt to characterize the court's ruling as a substantive denial of a CrR 7.8(b) motion should be rejected.

3. THE COURT PROPERLY EXERCISED ITS DISCRETION TO DENY A CONTINUANCE OF SENTENCING TO ALLOW LOY THE TIME TO MAKE A MOTION FOR A NEW TRIAL.

The court did not err when it refused to continue the sentencing hearing to allow Loy time to brief his motion. A denial of a motion to continue sentencing is reviewed for abuse of discretion. State v. Herzog, 69 Wn. App. 521, 524-25, 849 P.2d 1235 (1993) (citing State v. Barnes, 58 Wn. App. 465, 471, 794 P.2d 52 (1990), aff'd in part, rev'd in part, 117 Wn.2d 701, 818 P.2d 1088 (1991)). A trial court abuses its discretion only when it bases its decision on untenable grounds or reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Here, the court did not abuse its discretion when it refused to continue the sentencing hearing. The court was under no obligation to consider an oral motion for a new trial that stated no legal or factual basis. CrR 7.5 requires that a motion for new trial shall identify the specific factual and legal grounds for the motion, and that the motion be "served and filed" within 10 days of the

verdict. CrR 7.5(b). Despite its inapplicability to presentencing motions, CrR 7.8 requires a motion stating the grounds upon which relief is sought, with supporting affidavits containing a concise statement of the facts or errors that the motion relies on. CrR 7.8(c)(1). Loy presented none of this. When it denied Loy's motion to continue the sentencing hearing, the court specifically noted the age of the case, that Loy had previously taken advantage of the appellate process, and that there were "issues with timeliness" and "notice to the other side." RP 8-10. The court engaged in a proper exercise of discretion when it denied Loy's request to continue his sentencing.

Additionally, based on the observations by the court regarding the procedural history of the case, it is unlikely that the court would have exercised its discretion to extend the 10-day filing requirement for a CrR 7.5 motion anyway. Although the court did not substantively deny a motion for a new trial, it could have simply denied such motion as untimely.⁴ Such a ruling would have been

⁴ Loy is not foreclosed from bringing a motion for relief from judgment based on the alleged inadequacy of his pro se colloquy. He is free to file a personal restraint petition in this Court or to bring a timely CrR 7.8(b) motion in the superior court once his judgment is final. Although the sentencing court may have misapprehended its ability to hear such a motion, both the State and the court acknowledged that Loy had avenues by which the merits of his motion could be addressed. RP 7, 10.

no more an abuse of discretion than the decision denying the continuance.

The court properly exercised its discretion when it refused to delay sentencing Loy for an eight-year-old homicide, simply to allow him additional time to bring a motion that would be untimely regardless. Loy has other means available to raise the issue of his pro se status. This Court should affirm his sentence.

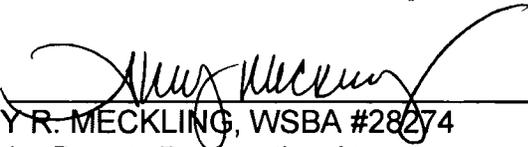
D. CONCLUSION

For the above stated reasons, this Court should affirm Loy's judgment and sentence.

DATED this 21 day of October, 2011.

Respectfully submitted,

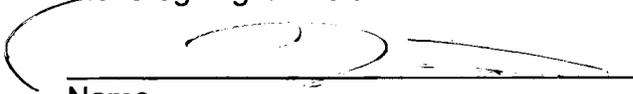
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. CHRISTOPHER CHARLES LOY, Cause No. 66672-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

10-27-11

Date