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NO. 67408-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

REC'D  
OCT 12 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JUDD DEEVER,

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mary I. Yu, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in denying appellant's CrR 7.8 motion to withdraw his plea of guilty on the basis it lacked jurisdiction.

Issue Pertaining to Assignment of Error

Does a superior court have jurisdiction to hearing a CrR 7.8 motion to withdraw plea of guilty?

B. STATEMENT OF THE CASE

On January 15, 2010, appellant Judd Deaver pleaded guilty to three felonies -- second degree assault, felony harassment and witness tampering -- and two misdemeanor violations of a court orders. CP 8-47. As part of the guilty plea on the felonies, Deaver stipulated there were aggravating factors that warranted imposition of an exceptional sentence above the standard range. CP 30-33.

On February 12, 2010, Deaver was sentenced by the Honorable Mary I. Yu. CP 49-56. The court imposed the 90-month sentence on the felonies requested by the prosecution. CP 52. On the misdemeanors, the court imposed 12-month concurrent suspended sentences, to be served consecutive to the felony sentences in the event the suspension is ever lifted. CP 57-59. Written findings of fact and conclusions of law regarding the exceptional sentence were filed February 26, 2010. CP 60-62. No direct appeal was taken by Deaver.

On July 27, 2010, Deaver filed a pro CrR 7.8 motion to modify or correct his felony judgment and sentence. CP 63-101. Deaver argued his sentence was incorrect because it was the result of prosecutorial misconduct at sentencing and an incorrectly calculated offender score. CP 67-68. Deaver requested all charges be dismissed with prejudice, or that he be resentenced under the standard range using a correct offender score, or that he be allowed to withdraw his guilty pleas. CP 75. Deaver noted the matter for a hearing on August 21, 2010, "or at the Court's earliest convenience." Supp CP \_\_ (sub no. 56, Notice of Motion Docket, 8/2/10).

In response, the prosecution filed a "Motion to Transfer Defendant's Motion to the Court of Appeals for Consideration as a Personal Restraint Petition." Supp CP \_\_ (sub no. 61, 8/19/10). It appears this motion was granted by Judge Yu without prior notice to Deaver. Supp CP \_\_ (sub no. 62, Order Transferring Defendant's Motion to Modify . . . to the Court of Appeals as a Personal Restraint Petition, 8/26/10); Supp CP \_\_ (sub no 63, Letter from Deaver to Judge Yu<sup>1</sup> dated September 15, 2010, 9/23/10).

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<sup>1</sup> In the letter Deaver expresses surprise that his motion was transferred without notice to him and without him having first received the prosecution's response.

On October 13, 2010, this Court issued an order dismissing Deaver's CrR7.8 motion/personal restraint petition (No. 65891-3-I), noting the issues raised were identical to those already pending in Court of Appeals No. 65795-0-I.<sup>2</sup> A certificate of finality was issued for Court of Appeals No. 65891-3-I on December 3, 2010.

On June 23, 2011, several pro se documents dated June 1, 2011 were filed in King County Superior Court by Deaver. These include a "Motion to Withdraw Plea of Guilty"<sup>3</sup> and supporting affidavit, a "Motion for Order to Show Cause", a "Motion to Transport", and a letter from Deaver requesting assistance from the court clerk ensuring all of the necessary documents had been filed and served on the correct entities in order to have his motion heard by the court on June 27, 2011. CP 104-127; Supp CP \_\_ (sub no. 71, Letter from Defendant, 6/23/11); Supp CP \_\_ (sub no. 70, Motion to Transport, 6/23/11). In a letter to the superior court clerk dated June 16, 2011, Deaver noting he had yet to receive confirmation his motion would be heard on June 27th, and that he had

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<sup>2</sup> Per ACORDS, it appears that on or about July 26, 2010, Deaver filed a CrR 7.8 motion in Judge Yu's court and a personal restraint petition with this Court, apparently raising the same issues.

<sup>3</sup> In this motion and supporting affidavit, Deaver argues for the first time that he was denied his right to direct appeal as a result of ineffective assistance of trial counsel. CP 109-127.

received nothing from the prosecution or the court regarding the status of his requests. Supp CP \_\_ (sub no. 66, Letter from Defendant, 6/23/11).

On June 22, 2011, Judge Yu signed an order denying Deaver's request to be transported and denying his motion to withdraw his guilty plea concluding, "this court does not have jurisdiction." CP 102-03. The order also notes Deaver had two identical claims "winding their way through the appellate courts[,]" and that one had been dismissed altogether and the other was pending in the Supreme Court. Id. Deaver appeals Judge Yu's June 22nd ruling. CP 128-32.

C. ARGUMENT

IT WAS REVERSIBLE ERROR TO DENY DEAVER'S CrR 7.8 MOTION ON THE BASIS THAT THE COURT LACKED JURISDICTION.

Judge Yu was mistaken when she concluded she lacked jurisdiction to hear Deaver's motion to withdraw his guilty plea. This Court should reverse.

"A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate." Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (quoting Restatement (Second) of Judgments § 11 (1982)). The superior court's subject matter jurisdiction derives from the state constitution. Diversified Wood Recycling, Inc. v. Johnson, 161 Wn. App.

859, 866, 251 P.3d 293 (2011). Article IV, section 6 of the Washington Constitution provides "The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court."

"The Supreme Court, Court of Appeals and superior court have concurrent jurisdiction in habeas corpus proceedings wherein post-conviction relief is sought." State v. Madsen, 153 Wn. App. 471, 475, 228 P.3d 24 (2009) (citing Toliver v. Olsen, 109 Wn.2d 607, 609, 746 P.2d 809 (1988)). "A motion in the trial court under CrR 7.8(b) is the functional equivalent of a personal restraint petition in the Court of Appeals." Madsen, 153 Wn. App. at 475.

Under Madsen, Judge Yu's court had jurisdiction to hear Deaver's Motion to Withdraw Plea of Guilty. The refusal to do so based on a finding of lack of jurisdiction is error that should be reversed.

D. CONCLUSION

For the reasons stated, this Court should reverse the trial court's June 22, 2011 rulings and remand for proper consideration of Deaver's motion.

DATED this 12th day of October 2011.

Respectfully submitted,

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Respondent,	)	
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v.	)	COA NO. 67408-1-I
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JUDD DEAVER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12<sup>TH</sup> DAY OF OCTOBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JUDD DEAVER  
DOC NO. 338354  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

**SIGNED** IN SEATTLE WASHINGTON, THIS 12<sup>TH</sup> DAY OF OCTOBER, 2011.

x *Patrick Mayovsky*