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Court of Appeals
Division II
State of Washington
6/24/2024 4:49 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
6/25/2024
BY ERIN L. LENNON
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SUPREME COURT NO. _____
COURT OF APPEALS NO. 57560-4-II Case #: 1032030

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WESTON GARRETT MILLER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable J. Andrew Toynbee, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Weston Garrett Miller, the appellant below, seeks review of the Court of Appeals decision State v. Miller, noted at 28 Wn. App. 2d 1073, 2023 WL 8433475 (2023), following the denial of reconsideration on May 23, 2024.¹

B. ISSUES PRESENTED FOR REVIEW

Miller fought for more than five years to obtain a copy of his client file and discovery, litigating the issue to the appellate courts to obtain relief denied by the trial court and his own trial attorney. When finally the documents became available, the prosecution intercepted attorney work product documents in violation of Miller's Sixth Amendment right to counsel. Miller had no pending claims before the trial court but brought a CrR 8.3 motion to dismiss.

Although the trial court denied the CrR 8.3 motion to dismiss (which has not been challenged by Miller on appeal),

¹ Pursuant to RAP 13.4(c)(9), a copy of the Court of Appeals slip opinion and the order denying reconsideration are attached as Appendix A and Appendix B to this petition, respectively.

the trial court also ruled that, in the alternative, any potential CrR 7.8 claims Miller had would not be timely, would not require a factual hearing, and could not be prejudiced by the government's intrusion into attorney-client privileged materials.

1. Because the government's intrusion presumptively prejudices any future CrR 7.8 claims Miller may bring, did the trial court err by prematurely and preemptively determining questions of timeliness and prejudice, should the state be required to demonstrate no possibility of prejudice beyond a reasonable doubt when and if Miller does bring CrR 7.8 claims, and should all portions of the trial court's findings, conclusions, and order pertaining to CrR 7.8 be reversed and stricken from the trial court's ruling?

2. Does the Court of Appeals decision directing a CrR 7.8 transfer, despite the trial court's never properly giving due consideration to the procedures outlined in CrR 7.8, violate CrR 7.8 procedures and conflict with case law regarding those

procedures, such that review should be granted pursuant to RAP 13.4(b)(1) and (2)?

C. STATEMENT OF THE CASE

This appeal stems from the trial court's denial of Miller's posttrial CrR 8.3(b) motion to dismiss based on the prosecution's posttrial intrusion into privileged documents. Although the trial court denied CrR 8.3(b) motion, the substantive claim Miller brought, the trial court nevertheless addressed hypothetically in the alternative whether Miller cleared the procedural bars of a collateral attack under CrR 7.8, without analyzing the factual context pertaining to Miller's more recent litigation to obtain his trial attorney's file.

Miller was convicted of first degree murder following a jury trial and four counts of second degree unlawful possession of a firearm following guilty pleas in June 2013. CP 10 (judgment and sentence), 102 (unchallenged finding of fact 1.1). The Court of Appeals affirmed his convictions in 2014 and the mandate issued in January 2015. CP 21-35 (mandate and slip opinion),

102 (unchallenged findings of fact 1.2 and 1.3); State v. Miller, noted at 184 Wn. App. 1502, 2014 WL 6790378 (2014). Miller filed a timely personal restraint petition in November 2015, which was dismissed by Division Two in January 2017 and which did not become final until August 29, 2018. CP 102 (unchallenged finding of fact 1.4), 114-20 (Court of Appeals order dismissing personal restraint petition).

Following his direct appeal and before filing his personal restraint petition, Miller attempted to obtain his client file and discovery files from his trial counsel. He eventually filed a motion to compel production of the client file and discovery materials in December 2018, attaching significant correspondence between him and his trial attorney in which he made repeated requests for these materials during the spring of 2015. CP 102 (unchallenged finding of fact 1.5), 121-37 (motion to compel). His trial attorney repeatedly declined his requests for these materials. CP 126-34. He filed a motion to compel his trial attorney to turn over these materials, citing, among other things,

State v. Padgett, 4 Wn. App. 2d 851, 424 P.3d 1235 (2018). CP 123-24. The trial court denied Miller’s motion to compel, noting that the attorney’s file was “no longer complete.” CP 36 (order), 102 (unchallenged finding of fact 1.5).

Miller appealed. CP 284. The Court of Appeals agreed with Miller and reversed the trial court, holding that, pursuant to Padgett, rules of professional conduct, and pertinent discovery rules, Miller was entitled to his client file and discovery. CP 40-43 (slip opinion), 102 (unchallenged finding of fact 1.6); State v. Miller, noted at 13 Wn. App. 2d 1102, 2020 WL 3270320 (2020). The Court of Appeals explicitly remanded the case to the trial court for production of Miller’s client file, including discovery subject to appropriate redaction, to Miller. CP 43.

On remand, the trial court finally granted Miller’s motion to compel and ordered Miller’s trial counsel to provide his entire client file to the prosecuting attorney’s office for appropriate redactions. CP 86-87.

Miller's trial counsel finally did so. In declarations prepared by trial counsel and his assistant, two sets of documents were provided to the prosecutor's office, a discovery set and a work product/privileged set. CP 69, 71, 73. The legal assistant indicated both sets were labeled and provided in manila envelopes to the prosecutor's office on June 25, 2020. CP 71, 73-74. Likewise, Miller's trial counsel declared that he delivered two separate envelopes to the prosecutor's office, one in a sealed envelope labeled "work product." CP 69.

According to the prosecutor's declaration, a cursory review of the documents occurred during the week of June 29, 2020 but the documents were not reviewed in earnest until July 6, 2020. CP 81. The prosecutor "picked up a large portion of documents that were rubber banded together" and noted "in surprise, that they appeared to be work product" as they included correspondence to a defense investigator. CP 81. The prosecutor indicated she placed the work product documents into an envelope and sealed them, noting "Resealed" next to the tape she

used to see them. CP 82. The prosecutor claimed that both sets of documents were in the same envelope, but also acknowledged that the packet of documents was processed by the prosecutor's front desk staff who "opened the material" provided by Miller's trial counsel. CP 81-82. In addition, Miller's trial counsel, who discussed the matter with the prosecutor's front desk staff, indicated that the front desk staff indicated that any materials delivered to the prosecutor's office, even if in a sealed envelope, would be opened and processed by the front desk and placed into a paralegal's or attorney's mailbox. CP 46-47.

Miller, who was eventually provided with a copy of the work product documents, provided a detailed description of the work product documents' contents. CP 64-66.

Miller was appointed counsel to assist him with the prosecutor's intrusion into attorney-client privileged documents and counsel filed a motion to dismiss the case based on CrR 8.3(b), chapter 5.60 RCW, and the Sixth Amendment. CP 44-60.

Relying on several cases involving the prosecutor's intrusion into attorney-client communications, including State v. Peña Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014), In re Personal Restraint of Amos, 1 Wn. App. 2d 578, 406 P.3d 707 (2017), and State v. Irby, 8 Wn. App. 2d 795, 415 P.3d 611 (2018), the defense argued that the intrusion into privileged documents that occurred in Miller's case was presumed prejudicial, the state could not overcome its burden of showing no possibility of prejudice beyond a reasonable doubt, and therefore dismissal of the prosecution was the appropriate remedy. CP 53-60; accord, RP 2-8.

The state's primary position was that CrR 8.3 did not apply to postconviction proceedings, relying primarily on State v. Basra, 10 Wn. App. 2d 279, 448 P.3d 1107 (2019). RP 8-13.

The court expressed concern about whether to treat the motion as a CrR 7.8 motion, noting "procedural confusion" between applying CrR 8.3 and CrR 7.8. RP 15. Ultimately, the trial court ruled that it would treat the motion as a CrR 8.3 motion

and noted that Basra prohibited such motions after the prosecution has concluded. RP 15-16; CP 102-03. The trial court also concluded that “[t]he other two bases for relief cited in the Motion [to Dismiss] were RCW 5.60 and the Sixth Amendment of [the] United States Constitution, neither of which provided a procedural provision for dismissal.” CP 102 (conclusion of law 2.1).

However, the trial court also discussed Miller’s motion to dismiss under CrR 7.8, entering the following conclusions of law:

2.3 In reviewing State v. Molnar, 198 Wn.2d 500, 497 P.2d 858 (2021), the Court considered whether it was necessary to treat Miller’s Motion to Dismiss as a CrR 7.8(b) motion rather than a CrR 8.3(b) motion. The Court determined under the circumstances in this case, including the different burdens of proof and potential strategic decisions for choosing one type of motion rather than the other, it was not incumbent upon the Court, nor a good idea for the Court to transfer this Motion to Dismiss to a post-conviction CrR 7.8(b) motion.

2.4 The Court considered, in the alternative, if Miller had filed the matter as a CrR 7.8(b) collateral attack. The Court found it would not have been timely, relying upon Molnar, CrR 7.8, and RCW 10.73.100. Miller’s matter had been final for

over five years, the exceptions in RCW 10.73.100 do not apply, and equitable tolling is not appropriate.

2.5 The Court also, in alternative considerations regarding a CrR 7.8(b) hearing found resolution did not require a factual hearing, noting the parties had not requested one, nor prepared for such a hearing.

2.6 Finally, in alternative consideration of what would occur, had Miller filed a CrR 7.8(b) motion, Miller did not make a substantial showing he was entitled to relief. Assuming, without finding such, that there was an intrusion to the attorney-client privilege, it took place after his conviction had been final with a direct appeal and a litigated personal restraint petition. Miller could not show prejudice to his right to a fair trial from such an intrusion.

CP 103.

Miller appealed from this order. CP 109-13. He made no argument that it was error to deny his CrR 8.3 motion. Br. of Appellant at 12. Instead, he challenged the trial court's conclusions of law pertaining to the availability of relief pursuant to CrR 7.8. In short, he argued that the only issue before the trial court was governmental misconduct raised under CrR 8.3 (and related constitutional and statutory claims) to invade attorney-

client privileged documents. Thus, he contended that the trial court's conclusions of law regarding CrR 7.8 were premature and incorrect because Miller had not attempted to seek any relief pursuant to CrR 7.8 and therefore did not explicitly or implicitly address the procedural facets of CrR 7.8.

Although the Court of Appeals acknowledged the pertinent facts, it construed Supreme Court and Court of Appeals precedent as requiring it to treat Miller's CrR 8.3 motion as a CrR 7.8 motion. Miller, slip op. at 2-8. Without addressing Miller's contentions regarding the timeliness of his motion, the Court of Appeals assumed that Miller's claims were untimely, given that that is what the trial court determined, and therefore his motion should have been transferred to the Court of Appeals for consideration as a personal restraint petition pursuant to RAP 7.8(c)(2). Miller, slip op. at 7-8. Therefore, the Court of Appeals remanded the case so that the trial court could transfer the case as a personal restraint petition. Id. at 9-10.

Miller moved for reconsideration, asserting that the Court of Appeals was committing the same error as the trial court: it was premature and erroneous to address the timeliness of any CrR 7.8 claim Miller might raise now when he hasn't raised one. Mot. for Reconsideration at 2-4. In the event that this motion must be treated as a CrR 7.8 motion, Miller specifically requested that the Court of Appeals allow Miller to address the timeliness and procedural propriety of his motion on remand. Mot. for Reconsideration at 2, 5-6. The requested answer from the state agreed that, because the normal CrR 7.8 were neither invoked nor applied in the case, the parties should have the opportunity to brief and argue timeliness issues on remand before the trial court transfers the case to the Court of Appeals as a personal restraint petition. Ans. to Mot. for Reconsideration at 2-3. Thus, the state conceded that Miller has not had a fair opportunity to address various procedural bars to collateral relief and should have this opportunity in the trial court. Ans. to Mot. for Reconsideration at 2-3.

Despite the parties' agreement that Miller should have an opportunity to make a record regarding the timeliness and other procedural correctness of his motion, the Court of Appeals denied the motion for reconsideration. Again, its decision directs the trial court to take no action on remand other than to transfer Miller's motion to the Court of Appeals for consideration as a personal restraint petition pursuant to CrR 7.8(c)(2).

D. ARGUMENT

1. **The Court of Appeals decision should be reviewed because, as the trial court identified, it creates and augments a "procedural confusion" in applying CrR 7.8 and conflicts with authority regarding properly processing CrR 7.8 motions**

All Miller seeks now is the opportunity to fully and fairly present claims as to why, if his motion must be treated as a CrR 7.8 motion, that his motion is not untimely or otherwise procedurally barred. The state agrees he should have this opportunity. The Court of Appeals decision misapplies CrR 7.8 to this case and conflicts with precedent governing the remedies

for an improperly processed CrR 7.8 motion, meriting review under RAP 13.4(b)(1) and (2).

The Court of Appeals decision leaves Miller in legal limbo with respect to any CrR 7.8 claims he might wish to pursue after his yearslong effort to obtain his client file and the impact of the government intrusion he alleges on such claims. As part of the process to get the file, the state improperly intercepted privileged material and Miller timely objected to this intrusion, moving to dismiss based on CrR 8.3, the Sixth Amendment and related case law regarding intrusions into attorney-client privileged communications, and the statutory privilege under chapter 5.60 RCW. These were his only arguments. The claims pertained only to the recent government intrusion that occurred in the process of providing him with his client file.

This was not and should not have been treated like a CrR 7.8(b) motion. The state concurs that “Miller did not file a CrR 7.8(b) motion.” Ans. to Mot. for Reconsideration at 2. Indeed, Miller did not treat his motion to dismiss as a collateral attack and

did not brief CrR 7.8 or argue against any of the procedural bars that normally apply to defeat collateral attacks. When the issue was raised in arguing the motion to dismiss, counsel conceded that the Basra decision suggested that Basra’s postconviction CrR 8.3 motion could perhaps be treated as an untimely CrR 7.8 motion. RP 14-15. But that was the extent of counsel’s discussion of CrR 7.8—no potential exceptions to the time bar or other procedural bars were asserted. This was not an ordinary CrR 7.8 motion but a challenge based on a specific and recent intrusion into confidential communications.

By invoking CrR 7.8 and denying CrR 7.8 relief to Miller on an alternative basis, the trial court erred.² The trial court ruled that Miller was not entitled to relief because his motion was untimely, given that his conviction became final five years prior

² The trial court itself concluded it was “not incumbent upon the Court, nor a good idea for the Court to transfer this Motion to Dismiss to a post-conviction CrR 7.8 motion.” CP 102. Given the nature of Miller’s argument regarding the government intrusion, Miller agrees with this sentiment. Miller disagrees with the trial court’s decision to nevertheless proceed to address CrR 7.8 in any way.

and neither RCW 10.73.100 exceptions nor equitable tolling applied. CP 103 (conclusion of law 2.4). The trial court also concluded that no factual hearing was required in part because no one had requested one and that there was no showing Miller was entitled to relief. CP 103.

These decisions were premature and incorrect. When and if Miller brings a collateral attack, that will be the time to address the potential timeliness of his claims and his potential entitlement to relief. Miller filed a direct attack against the government's recent intrusion by moving to dismiss. Miller has not assigned error on appeal to the trial court's denial of this motion pursuant to Basra. CP 102 (conclusion of law 2.1); RP 15-16; Br. of Appellant at 1, 12-13 (asserting that the trial court should merely have denied CrR 8.3 relief rather than address the motion under CrR 7.8); Reply Br. at 1-2 (addressing appealability argument that trial court erroneously reached CrR 7.8 issues). Had the trial court just denied CrR 8.3 relief pursuant to Basra, there would likely not have been an appeal, or not much of one.

The problem is that the trial court went on to address Miller's motion as though it was a CrR 7.8 motion, even though Miller had not addressed and had not been given an opportunity to address timeliness or any other criterion needed to obtain CrR 7.8 relief. The state has conceded, "Because the normal procedure for a trial court to review a CrR 7.8(b) motion was not employed, and the facts regarding timeliness for Miller are potentially more complex, allowing the parties to submit materials to the trial court regarding the timeliness issue would be appropriate on remand." Ans. to Mot. for Reconsideration at 3. Miller concurs with the state that this is the only way to "ensure that CrR 7.8 was fully complied with in Miller's matter." Ans. to Mot. for Reconsideration at 3.

The Court of Appeals decision should be reviewed because it overlooks and misapprehends the factual scenario, leading it to direct a CrR 7.8(c)(2) transfer without a meaningful opportunity for the parties to address the propriety of this transfer. Given that there was no real argument or discussion of CrR 7.8 in the trial

court, the trial court's conclusions of law applying procedural and substantive bars applicable to collateral attacks without a full and fair opportunity for Miller to address them, is a misapplication of CrR 7.8. It was premature and incorrect to apply CrR 7.8 to this situation without first requiring Miller to demonstrate that he was entitled to relief pursuant to CrR 7.8. Because the Court of Appeals promotes an incorrect application of CrR 7.8, in conflict with precedent, it should be reviewed pursuant to RAP 13.4(b)(1) and (2).

Miller agrees with the Court of Appeals decision insofar as it recognizes the importance of properly processing CrR 7.8 motions. Miller, slip op. 7-8 (citing State v. Molnar, 198 Wn.2d 500, 497 P.3d 858 (2021)). What the Court of Appeals misses is that it is impossible to properly process a CrR 7.8 motion in the abstract.

Without analyzing whether the trial court's timeliness determinations were correct in the circumstances here, the Court of Appeals holds that simply because the trial court found the

motion untimely, it “was required to transfer the matter to this court to be considered as a PRP.” Miller, slip op. at 8. But Miller could not have relied on documents he did not have when his judgment and sentence became final more than five years ago. The trial court’s timeliness decision does not make sense in a scenario where Miller did not have the documents in question to bring any claim until well after the normal one-year time bar had run. The Court of Appeals, like the trial court, erroneously counts timeliness from the date Miller’s conviction became final to bar claims based on documents he had no access to, despite his diligent efforts, until 2020.

The Court of Appeals decision claims that Miller raised no exception under RCW 10.73.100. Miller, slip op. at 7 n.2. On the contrary, Miller asserted that the trial court’s timeliness decision was premature because Miller recently obtained documents he did not have previously and so, if and when he does seek relief pursuant to CrR 7.8, he might be able rely on RCW 10.73.100(1)’s newly discovered evidence exception. Br.

of Appellant at 16. In addition, the Court of Appeals declined to address Miller's claim on appeal that equitable tolling might apply to overcome the time bar. Miller diligently pursued his client file for years despite his attorney's and court's refusal to provide it to him, circumstances wherein this Court has determined that equitable tolling is warranted. In re Pers. Restraint of Fowler, 197 Wn.2d 46, 54-57, 479 P.3d 1164 (2021). Br. of Appellant at 17.

The thrust of Miller's arguments was that he could not squarely address any procedural obstacle to his motion because he had not brought a CrR 7.8 motion at all or, if he had, he had not had an opportunity to address its procedural components. If and when Miller seeks CrR 7.8 relief, Miller *might* rely on any number of exceptions to the time bar or to other procedural bars. He still has not had an opportunity to squarely state his reliance on any exception because the trial court treated his motion as an untimely collateral attack even though he himself had not.

By forcing the CrR 7.8 transfer to occur, the Court of Appeals decision does not promote compliance with CrR 7.8, as it claims. Miller, slip op. at 7-8. The Molnar decision is clear about how to properly process a CrR 7.8 motion. 198 Wn.2d at 508-09. The court must transfer an untimely collateral attack to the Court of Appeals “without reaching the merits.” Id. at 509. In Molnar, no one noticed or argued the untimeliness of the motion for resentencing until the case reached the Supreme Court. Id. at 509-10. This was error. Id.

By contrast, here, the potential untimeliness of Miller’s motion did not go unnoticed. But there was no opportunity provided to Miller to address the question of timeliness based on the nature of Miller’s claim involving recent government misconduct. Because timeliness was noticed but still not adequately addressed, the trial court’s decision on timeliness did not comply with CrR 7.8. Miller was deprived of a procedure that truly addressed the question of timeliness. The Court of Appeals’ decision on timeliness, which similarly fails to address

Miller's unique circumstances, likewise fails to ensure compliance with CrR 7.8. Given the unique circumstances of this case, the Court of Appeals decision conflicts with CrR 7.8 and Molnar's emphasis on ensuring a correct CrR 7.8 procedure, meriting RAP 13.4(b)(1) review.

As the trial court reasoned, it did not make much sense to transfer Miller's motion about government misconduct to the Court of Appeals. CP 103 (conclusion of law 2.3 reasoning that, given differing burdens and strategic decisions in choosing an CrR 8.3 motion over a CrR 7.8 motion, it was unwise to transfer the motion under CrR 7.8). The trial court also noted some "procedural confusion" between applying CrR 8.3 and CrR 7.8 to these circumstances. RP 15. For this reason, the trial court both denied the CrR 8.3 motion on the merits and only alternatively considered CrR 7.8. CP 102-03. By considering CrR 7.8 alternatively in the hypothetical, the trial court never afforded an opportunity to make a concrete CrR 7.8 showing and did not comply with the procedures outlined in CrR 7.8. By refusing to

remedy this error on appeal and ensure that the trial court fully and properly consider the motion squarely as a CrR 7.8 motion, the Court of Appeals decision fails to ensure compliance with CrR 7.8, contravening the Molnar decision on which it claims to rely. RAP 13.4(b)(1).

In addition, the remedy for improperly processed CrR 7.8 motion is typically vacation of all findings and remand for a new hearing. State v. Robinson, 193 Wn. App. 215, 374 P.3d 175 (2016), is somewhat instructive. There, Robinson filed a CrR 7.8 motion challenging sanctions imposed by the Department of Corrections. Id. at 217. The trial court denied the motion when neither Robinson nor DOC were present, stating, “Robinson is directed to go through the appropriate procedures to appeal his sanctions from the DOC.” Id. In the written findings and conclusions the trial court entered, the court stated “it had no jurisdiction over the matter and that there was no legal basis to review the DOC sanctions,” and Robinson appealed. Id.

The Robinson court disagreed, first recognizing that the “superior court has subject matter jurisdiction to either hear and decide a CrR 7.8 motion or transfer it,” including “the ability to consider motions challenging sanctions imposed for community custody violations.” Id. at 218. The court then also noted that Robinson’s motion was untimely. Id. “But, under the mistaken conclusion that it lacked jurisdiction to decide Robinson’s motion, the superior court did not address the merits of that motion or hold a fact finding hearing.” Id. The remedy for this error was “vacating the findings of fact and conclusions of law on the motion for relief from judgment. The superior court then must hold a show cause hearing or transfer Robinson’s CrR 7.8 motion to this court for consideration as a personal restraint petition.” Id. at 219.

These procedures that the Robinson court required on remand are what are lacking in Miller’s case. If the court erred in processing a CrR 7.8 motion, then all of its findings regarding the motion should be vacated, and the court should following the

procedures of CrR 7.8. These procedures would allow the parties to make a full record regarding whether Miller's motion may be properly heard by the trial court or must be transferred as an untimely CrR 7.8 motion, exactly as both parties have requested. Mot. for Reconsideration at 5; Ans. to Mot. for Reconsideration at 3. The Court of Appeals decision not to vacate the trial court's conclusions of law regarding the CrR 7.8 issue and remand for a new hearing conflicts with the appropriate remedy identified in Robinson, meriting RAP 13.4(b)(2) review.

The Court of Appeals decision is also in tension with Basra. In Basra, Basra filed a CrR 8.3 motion to dismiss alongside a CrR 7.8 motion. 10 Wn. App. 2d at 281. The court transferred both motions as personal restraint petitions due to untimeliness. Id. The Court of Appeals transferred the CrR 8.3 motion back and the superior court denied it on the merits because the prosecution had concluded, prompting Basra to appeal. Id. at 281-82.

The Basra court agreed that CrR 8.3 relief is not available following judgment because a criminal prosecution is no longer ongoing, and therefore cannot be dismissed. Id. at 286. Addressing the procedure, the court held that “the trial court did not err in initially treating the collateral attack as a CrR 7.8 motion and transferring it to this court.” Id. at 288. But “[b]ecause the criminal prosecution was not ongoing and Basra had not succeeded in reopening the prosecution by, for example, prevailing on a CrR 7.8 motion, the superior court did not err in dismissing the motion as untimely.” Basra, 10 Wn. App. 2d at 288.

The Basra court thus recognized the potential that a CrR 8.3 motion to dismiss might not be untimely when the prosecution is reopened by prevailing on a separate CrR 7.8 motion. The Court of Appeals decision here completely forecloses this possibility. Whether or not the state can overcome the presumption of prejudice from its intrusion into privileged materials cannot be determined as yet. As discussed, it was

premature and incorrect for the trial court to discuss whether Miller is entitled to collateral relief and whether the state's intrusion into attorney work product documents prejudiced any of the relief to which he is entitled. The presumptive prejudice stemming from the state's intrusion does not vanish simply because Miller had not yet brought claims for collateral relief.

Miller's additional claims for collateral relief would be based on the documents he spent years attempting to obtain, the very documents improperly intercepted by the prosecution. Rather than preemptively foreclosing such claims or deciding hypothetically that the state's actions did not prejudice such claims, the trial court and Court of Appeals have done here, the trial court should decide the impact of the state's intrusions when it actually has claims for collateral relief before it, as Basra recognizes. When Miller brings CrR 7.8 claims, that is the point at which the state must be held to its burden under Amos, 1 Wn. App. 2d at 599, and Peña Fuentes, 179 Wn.2d at 819-20, of demonstrating that its intrusion into attorney-client

communications caused no possibility of prejudice beyond a reasonable doubt to any of the collateral relief Miller seeks. The Court of Appeals decision conflicts with Basra's recognition that misconduct claims might be timely considered in conjunction with actual CrR 7.8 claims, which also merits RAP 13.4(b)(2) review.

E. CONCLUSION

The Court of Appeals decision fails to recognize the unique factual scenario at issue here, and endorses a CrR 7.8 transfer even though Miller never intended to or believed he was bringing a CrR 7.8 motion. The Court of Appeals decision conflicts with CrR 7.8 and case law regarding the misapplication of the rule. This petition for review should be granted pursuant to RAP 13.4(b)(1) and (2).

DATED this 24th day of June, 2024.

I certify this document contains 4,944 words. RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

A handwritten signature in black ink, appearing to read 'Kevin A. March', written over a horizontal line.

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APPENDIX A

December 5, 2023

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

STATE OF WASHINGTON,

Respondent,

v.

WESTON GARRETT MILLER,

Appellant.

No. 57560-4-II

UNPUBLISHED OPINION

VELJACIC, J. — Weston Garrett Miller appeals the trial court’s order denying his motion to dismiss his convictions under CrR 8.3(b), chapter 5.60 RCW, and the Sixth Amendment of the United States Constitution. While Miller does not challenge the trial court’s conclusions of law regarding CrR 8.3(b), he argues that the court erred in applying CrR 7.8 because he did not request collateral relief in his motion. Miller also argues that the trial court erred in concluding that his motion was untimely, in not requiring a factual hearing, and in concluding that he did not make a substantial showing that he was entitled to relief. Miller further argues that the trial court erred in concluding that chapter 5.60 RCW and the Sixth Amendment did not provide a stand-alone procedural provision for dismissal at the postconviction stage. In a statement of additional grounds for review (SAG), Miller similarly challenges the trial court’s conclusions of law in its order denying his motion to dismiss under CrR 8.3(b).

The State argues that we should dismiss Miller's appeal because an order denying a defendant's CrR 8.3(b) motion is not appealable as matter of right. The State also argues that we should dismiss the appeal because the issues are moot.

We hold that the trial court did not err in treating Miller's CrR 8.3(b) motion as a CrR 7.8 motion because the motion was a collateral attack and because Miller specifically requested relief pursuant to CrR 7.8 at the hearing. We also hold that the trial court did not err in concluding that Miller's motion for collateral relief was untimely, in not requiring a factual hearing, and in concluding that he did not make a substantial showing that he was entitled to relief. Finally, because Miller's motion is a collateral attack, properly addressed under CrR 7.8, it should have been transferred to this court for consideration as a personal restraint petition (PRP). Accordingly, we do not reach the merits of Miller's Sixth Amendment and chapter 5.60 RCW arguments or his SAG; instead, we remand for the trial court to transfer the motion to this court for consideration as a PRP.

FACTS

In June 2013, Miller was convicted of murder in the first degree and four counts of unlawful possession of a firearm in the second degree. The trial court sentenced Miller to 360 months of confinement. Miller appealed his murder conviction and we affirmed. *State v. Miller*, No. 44966-8-II, slip op. at 14 (Wash. Ct. App. Dec. 2, 2014) (unpublished), <https://www.courts.wa.gov/opinions/pdf/D2%2044966-8-II%20Unpublished%20Opinion.pdf>. The mandate issued in January 2015.

In March 2015, following his direct appeal, Miller reached out to his trial counsel, Joseph Enbody, to acquire his client file and discovery materials. Enbody informed Miller that he had destroyed much of the file after the conclusion of the case. Enbody suggested that Miller could obtain much of the material he sought by submitting records requests to the Lewis County Superior Court and the Lewis County Prosecutor's Office.

In April 2015, Miller wrote a second letter to Enbody requesting his client file and discovery materials. Miller explained that he needed his client file to prepare a PRP. He also explained that he could not obtain the requested materials through a records request because he is indigent. Enbody again responded that he could not provide Miller his client file or discovery materials because he no longer possessed them.

In May 2015, Miller wrote a third letter to Enbody demanding his client file and discovery materials. Enbody reiterated that he could not do so because he did not possess the requested records.

In November 2015, Miller filed a timely PRP without the benefit of his client file or discovery materials. In January 2017, this court issued an order dismissing Miller's petition.

In December 2018, over three years after his correspondence with Enbody, Miller filed a motion to compel the production of his client file and discovery materials in trial court under the same cause number as the original charges. The trial court denied Miller's motion. Miller appealed, and Division One of this court reversed and remanded "for production of Miller's client file, subject to appropriate redaction." *State v. Miller*, No. 81391-9-I, slip. op. at 4 (Wash. Ct. App. June 15, 2020) (unpublished), <https://www.courts.wa.gov/opinions/pdf/813919.pdf>.

In June 2020, on remand, the trial court entered an order granting Miller's motion to compel. The order provided that,

Mr. Enbody shall turn over to the Defendant his entire client file to the Prosecuting Attorney's Office for a review of necessary redactions. Any work product in the client file shall be placed in a sealed envelope, labeled "attorney/client work product" and this shall not be opened or otherwise examined by the Prosecuting Attorney's Office. Upon completion of the redaction review, the Prosecuting Attorney's Office shall forward the materials to the defendant.

Clerk's Papers (CP) at 86-87.

Enbody testified via declaration that on June 25 he delivered two separate envelopes to the front desk of the prosecutor's office and, along with it, a cover letter. The cover letter read:

I enclose two sets of materials pursuant to the order of Judge Toynbee. The first set I have enclosed are what I believe to be non-work product materials from my files. As you know from prior correspondence my file is in no way to be considered complete.

Also separately enclosed are documents that I consider to be work product. If you have further questions, please don't hesitate to contact me.

CP at 71.

Sara Beigh, the deputy prosecuting attorney assigned to Miller's case, testified via declaration that the State received Enbody's letter and enclosed materials on June 26. Beigh stated that during the week of June 29, she conducted an initial, cursory review of the photographs to see if they included autopsy photos. Then, on July 6, Beigh conducted a review of Miller's file with J. Bradley Meagher present—the trial attorney for Miller's case. Beigh stated that, during this review,

While [deputy prosecuting attorney]Meagher looked on, I began to thumb through the file and we discussed that there were not many autopsy photos introduced during the trial. I then noted when I picked up a large portion of documents that were rubber banded together, in surprise, that they appeared to be work product. The cover letter appeared to be to James Armstrong, a private investigator. I did not read the letter, nor did I thumb through any of the materials. I put them down, looked at the other documents and noted one stack had a yellow sticky note that stated, "not work product."

CP at 81. Beigh then placed the work product material back into the mailing envelope and resealed the documents.

In July 2021, Miller filed a motion to dismiss his convictions under CrR 8.3(b), chapter 5.60 RCW, and the Sixth Amendment. He argued that the State's intrusion into privileged documents was presumed prejudicial, that the State could not overcome its burden to show no possibility of prejudice, and that dismissal was the appropriate remedy. The State in response argued that Miller's motion should be denied because CrR 8.3(b) did not apply in postconviction proceedings—rather, CrR 7.8 provided the sole mechanism for postconviction relief.

At the hearing, the trial court asked the parties whether it could treat Miller's CrR 8.3(b) motion as a CrR 7.8 motion. The State argued that the court did not have the authority to sua sponte address the motion under 7.8. Miller's counsel responded,

So in the *State v. Basra*,^[1] the Court actually does treat 8.3 as a 7.8. And how we know that is because then the Court relies on the one year timeline that 7.8 requires. And then they dismiss that motion based on untimely filing. So I would say that the Court in *State v. Basra*, which is two years, going on three years old, does allow the Court to transfer this to a post-conviction 7.8 on its own terms.

. . . .

I would just say that in *Basra*, it appears the Court had the option just to deny under the 8.3 for a finality of criminal prosecution and it didn't. Instead it treated it as a 7.8 and denied it based on timeliness. So I think the Court has the same authority as the Court outlined in *Basra*. So that—that is all I got there. Thank you.

Rep. of Proc.(RP) (Mar. 16, 2022) at 14-15.

On June 28, 2022, the trial court entered an order denying Miller's motion to dismiss. The court entered the following conclusions of law:

¹ 10 Wn. App. 2d 279, 448 P.3d 107 (2019).

2.1 This Motion to Dismiss was specifically brought under the procedural provision of CrR 8.3(b). The other two bases for relief cited in the Motion were RCW 5.60 and the Sixth Amendment of United States Constitution, neither of which provided a procedural provision for dismissal.

2.2 A Motion to Dismiss pursuant to CrR 8.3(b) cannot be brought after the prosecution has concluded. *State v. Basra*, 10 Wn. App. 2d 279, 285-86, 448 P.3d 107 (2019), *review denied*[,] 194 Wn.2d 1020 (2020). The criminal prosecution in Mr. Miller's case was concluded several years ago.

2.3 In reviewing *State v. Molnar*, 198 Wn. 2d 500, 497 P.2d 858 (2021), the Court considered whether it was necessary to treat Mr. Miller's Motion to Dismiss as a CrR 7.8(b) motion rather than a CrR 8.3(b) motion. The Court determined under the circumstances in this case, including the different burdens of proof and potential strategic decisions for choosing one type of motion rather than the other, it was not incumbent upon the Court, nor a good idea for the Court to transfer this Motion to Dismiss to a post-conviction CrR 7.8(b) motion.

2.4 The Court considered, in the alternative, if Mr. Miller had filed the matter as a CrR 7.8(b) collateral attack. The Court found it would not have been timely, relying upon *Molnar*, CrR 7.8, and RCW 10.73.100. Mr. Miller's matter had been final for over five years, the exceptions in RCW 10.73.100 do not apply, and equitable tolling is not appropriate.

2.5 The Court also, in alternative consideration regarding a CrR 7.8(b) hearing found resolution did not require a factual hearing, noting the parties had not requested one, nor prepared for such a hearing.

2.6 Finally, in alternative consideration of what would occur, had Mr. Miller filed a CrR 7.8(b) motion, Mr. Miller did not make a substantial showing he was entitled to relief. Assuming, without finding such, that there was an intrusion to the attorney-client privilege, it took place after his conviction had been final with a direct appeal and a litigated personal restraint petition. Mr. Miller could not show prejudice to his right to a fair trial from such an intrusion.

CP at 102-03. Miller appeals.

ANALYSIS

I. CrR 7.8

Miller argues that all portions of the trial court's order addressing CrR 7.8 should be reversed and stricken because he did not request collateral relief. We disagree.

“Generally speaking, a person seeking to challenge their conviction or sentence has 30 days in which to initiate a direct appeal.” *Molnar*, 198 Wn.2d at 508. “[A]ny form of postconviction relief other than a direct appeal’ is known as a ‘collateral attack.’” *Id.* (quoting RCW 10.73.090(2)). Thus, despite its form, a trial court does not err in treating a motion for postconviction relief as a collateral attack on a judgment and sentence. *See Basra*, 10 Wn. App. 2d at 288 (“Despite the form of Basra’s motion as a challenge under CrR 8.3(b), the trial court did not err in initially treating the collateral attack as a CrR 7.8 motion and transferring it to this court.”).

“Most collateral attacks must be brought within ‘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.’” *Molnar*, 198 Wn.2d at 508 (quoting RCW 10.73.090(1)). “A year after th[e] judgment is final, the statutory grounds for relief that may be raised are limited.” *In re Pers. Restraint of Fowler*, 197 Wn.2d 46, 49, 479 P.3d 1164 (2021); RCW 10.73.090, .100.² “The same time constraints apply whether the collateral attack is filed in superior court, the Court of Appeals, or [the Supreme Court].” *Molnar*, 198 Wn.2d at 508; CrR 7.8(b); RAP 16.8.1(b).

“Collateral attacks filed in superior court are governed by CrR 7.8, and ‘when a superior court receives a CrR 7.8 motion, it should follow the CrR 7.8(c) procedures.’” *Molnar*, 198 Wn.2d at 508-09 (quoting *State v. Waller*, 197 Wn.2d 218, 220, 481 P.3d 515 (2021)). CrR 7.8(c)(2) provides that,

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 (i) the defendant has made a substantial showing that they are entitled to relief or (ii) resolution of the motion will require a factual hearing.

² RCW 10.73.100 provides limited statutory grounds for when the one-year time bar does not apply; Miller does not raise any of the grounds in the statute.

“Therefore, if the superior court determines that the collateral attack is untimely, then the court must transfer it to the Court of Appeals without reaching the merits.” *Molnar*, 198 Wn.2d at 509.

Here, the trial court was correct that Miller’s CrR 8.3(b) motion was clearly a collateral attack on his convictions, not a CrR 8.3 motion. It was filed nearly five years after his judgment and sentence became “final” in January 2015. *See* RCW 10.73.090(3)(a). Miller labelling his motion as a CrR 8.3(b) motion does not change this conclusion because, as explained above, a “collateral attack” means “*any form* of postconviction relief other than a direct appeal.” RCW 10.73.090(2) (emphasis added).

Upon concluding that the motion is a collateral attack, we then turn to CrR 7.8(c)(2). Section (c)(2) requires the trial court to transfer a CrR 7.8(b) motion to this court for consideration as a PRP “unless the [trial] court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that they are entitled to relief or (ii) resolution of the motion will require a factual hearing.” *See State v. Smith*, 144 Wn. App. 860, 863, 184 P.3d 666 (2008).

Here, the trial court found that the motion was untimely.³ At that point, the trial court was required to transfer the matter to this court to be considered as a PRP. As our Supreme Court has emphasized, “[W]e must reiterate how important it is for superior courts to process motions for postconviction relief in accordance with CrR 7.8(c).” *Molnar*, 198 Wn.2d at 521. The trial court committed procedural error in dismissing the motion, rather than transferring it to this court as required by CrR 7.8(c)(2).

³ Though unnecessary, the trial court also found that Miller did not make a substantial showing that he was entitled to relief and that resolution of the motion did not require a factual hearing.

Based on the foregoing, we do not address Miller's arguments regarding the trial court's findings, the Sixth Amendment, and chapter 5.60 RCW. Additionally, Miller is not entitled to file a SAG in a PRP, so we do not address arguments raised therein. For the same reasons, we do not address the State's argument regarding appealability.

II. MOOTNESS

The State argues that Miller's appeal should be dismissed as moot because no relief can be granted to him and the appeal does not raise issues of continuing and substantial public interest. The State appears to argue that the issues are moot because the trial court did not actually rule on whether Miller is entitled potential relief under CrR 7.8. We disagree.

"An issue is moot if we can no longer provide effective relief for the claimed legal error." *State v. Booker*, 22 Wn. App .2d 80, 83, 509 P.3d 854 (2022). "We generally dismiss an appeal that raises only moot issues." *Id.*

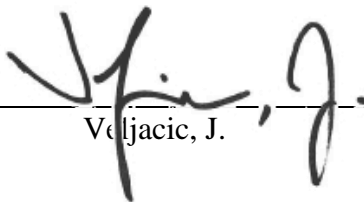
Here, the issue is not moot. The trial court addressed (in the alternative) whether Miller would be entitled to relief under CrR 7.8 in conclusions of law 2.4 to 2.6. Thus, the trial court did in fact rule on whether Miller was entitled to collateral relief under CrR 7.8 in its final order, which can impact a later PRP filed by Miller. It follows that we could grant Miller effective relief by remanding to the trial court with instructions to transfer the motion to this court for consideration as a PRP.

CONCLUSION

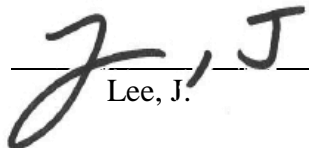
The trial court did not err in concluding that Miller's motion was a collateral attack, and therefore treating the motion as one under CrR 7.8(b). However, once it concluded that the motion was untimely, the trial court was required to transfer the motion to this court as a PRP; the trial court

erred in not doing so. Rather than reach the arguments on the merits presented by the parties, we remand for the trial court to transfer to this court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Veljacic, J.

We concur:


Lee, J.


Glasgow, C.J.

APPENDIX B

May 23, 2024

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

STATE OF WASHINGTON,

Respondent,

v.

WESTON GARRETT MILLER,

Appellant.

No. 57560-4-II


**ORDER DENYING MOTION
FOR RECONSIDERATION**

Appellant, Weston Garrett Miller, moves this court to reconsider its December 5, 2023 opinion. After consideration, this court denies the motion. It is

SO ORDERED.

Panel: Jj. Lee, Glasgow, Veljacic

FOR THE COURT:



Veljacic, A.C.J.

NIELSEN KOCH & GRANNIS P.L.L.C.

June 24, 2024 - 4:49 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v. Weston Garrett Miller, Appellant
Superior Court Case Number: 12-1-00145-1

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