

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHARLES C. HARTZELL, IV,

Appellant.

No. 39389-1-II

UNPUBLISHED OPINION

Armstrong, J. — A jury convicted Charles Hartzell of second degree assault and first degree unlawful possession of a firearm. He filed a motion under CrR 7.8(b) to vacate the judgment, stating that the prosecutor had committed fraud by including false information in the certification of probable cause. Instead of transferring the motion to us under CrR 7.8(c)(2), to be considered as a personal restraint petition, the trial court denied the motion. Hartzell appeals, arguing that the trial court erred in denying the motion rather than transferring it to us.¹ The State concedes he is correct.

We accept the State’s concession. Under CrR 7.8(c)(2), the trial court must transfer a motion brought under CrR 7.8(b) to us “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 he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.” While Hartzell’s motion is not time barred by RCW 10.73.090, because the mandate of his direct appeal has not yet issued, the trial court did not determine either that Hartzell made a substantial showing that he is entitled to relief or that resolution of his motion would require a factual hearing. Because it did

¹ A commissioner of this court initially considered Hartzell’s appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

not make either determination, it erred in denying Hartzell's motion rather than transferring it. *State v. Smith*, 144 Wn. App. 860, 863, 184 P.3d 666 (2008). We therefore vacate the order denying Hartzell's motion and direct the trial court to transfer the motion to us under CrR 7.8(c)(2), to be considered as a personal restraint petition.

In light of this decision, we decline to address Hartzell's statement of additional grounds in which he asserted that he had right to be present at the hearing when his CrR 7.8(c)(2) motion was denied and that the deputy prosecutor who prepared the certificate of probable cause should not have been permitted to represent the State.

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 pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Worswick, A.C.J.