IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD ROY SCOTT, Appellant.	No. 41895-9-II UNPUBLISHED OPINION

Van Deren, J. — Richard Scott appeals the trial court's denial of his second motion to vacate his conviction for third degree child rape because he had filed a previous motion to vacate based on similar grounds. Scott argues that the trial court erred because it had not considered his earlier motion on the merits. The State concedes that Scott's first motion was not considered on its merits and, accordingly, the existence of the prior motion was not a proper basis to deny Scott's second motion. But the State argues that we should affirm based on the "abuse of the writ" doctrine. We accept the State's concession based on our review of the record and the law, hold that the "abuse of the writ" doctrine does not apply, reverse the denial of Scott's motion to vacate, and remand to the trial court for an evidentiary hearing on the motion.

Scott also unconvincingly contends that (1) we should remand to a different judge and (2) his innocence is undisputed so there is nothing to be determined at an evidentiary hearing.

FACTS

In 2001, Scott entered an *Alford*[1] plea to one count of third degree child rape. *State v. Scott*, 150 Wn. App. 281, 283, 207 P.3d 495 (2009). In 2006, Scott moved to vacate his conviction based on newly discovered evidence. *Scott*, 150 Wn. App. at 286.

The new evidence included a declaration by Scott's alleged victim stating that the alleged victim had been incarcerated at the time of the alleged rape and a declaration from the victim's mother agreeing with the alleged victim's statement. *Scott*, 150 Wn. App. at 287. Scott also submitted excerpts from a police interview of an alleged witness to the crime, who told police that witnesses invented their accusations to get Scott "'locked up'" because they heard he was a child molester and because "'he's a queer you know, do whatever.'" *Scott*, 150 Wn. App. at 288 (quoting *Scott* Clerk's Papers at 336-39). And Scott presented a recent interview with an alleged witness whose description of the crime was inconsistent with the statements attributed to her in the State's 2001 probable cause affidavit. *Scott*, 150 Wn. App. at 288-89.

The trial court denied Scott's motion to vacate without holding an evidentiary hearing. *Scott*, 150 Wn. App. at 289. We reversed, holding that Scott was entitled to an evidentiary hearing to determine whether his new evidence was credible. *Scott*, 150 Wn. App. at 299. Because the witnesses were out of state, were otherwise unavailable, or their whereabouts were unknown, the hearing on remand could not occur quickly and because the trial court found it difficult to address Scott's credibility in the proceedings leading up to the evidentiary hearing, the trial court ordered Scott to be present for future hearings. The trial court accordingly issued an order to transport Scott from the Special Commitment Center[2] at McNeil Island to Pacific County

[1] *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (upholding validity of a guilty plea where defendant maintains innocence or refuses to admit guilt).

for a June 2010 hearing. Scott objected to being transported, ostensibly due to his fear of being assaulted while being transported and housed at the Pacific County jail.

In response to the transport order, Scott filed a motion to withdraw his pending motion to vacate his conviction and to quash the transport order. The trial court granted this motion and struck the evidentiary hearing based on Scott's withdrawal of his motion to vacate.

In July, Scott filed a motion to vacate the June trial court order granting his motion to quash the transport order and withdraw his motion to vacate his conviction. Scott argued that he moved to withdraw his motion to vacate due to anxiety at the prospect of being transported to Pacific County, and he submitted declarations supporting this assertion. The trial court denied Scott's motion, finding on the record that Scott knew the consequences of withdrawing his motion to vacate his conviction and that Scott was "playing with the Court" and attempting to control the proceedings. Report of Proceedings (RP) (Jul. 23, 2010) at 14.

In August, Scott filed a new motion to vacate his *Alford* plea and submitted additional declarations casting doubt on the factual basis for his plea. But the trial court denied his new motion because it alleged the same grounds as his previous motion to withdraw. Scott appeals the denial of his August motion to vacate.

[2] Scott stipulated to commitment as a sexually violent predator in 2007. *In re Det. of Scott*, 150 Wn. App. 414, 418, 208 P.3d 1211 (2009).

ANALYSIS

I. Dismissal of Subsequent Motion

Scott argues that the trial court erred in dismissing his August motion to vacate because he raised similar grounds in a motion that was not decided on its merits. The State correctly concedes this argument.

CrR 7.8(b) motions to vacate are subject to RCW 10.73.140, and under RCW 10.73.140 we will not consider a personal restraint petition when the petitioner has filed a previous petition on similar grounds. Thus, our Supreme Court has held that "a court may not consider a CrR 7.8 motion if the movant has previously brought a collateral attack on similar grounds." *State v. Brand*, 120 Wn.2d 365, 370, 842 P.2d 470 (1992). But in *In re Pers. Restraint of VanDelft*, our Supreme Court held that under RCW 10.73.140, collateral attack is not barred by a previous petition on similar grounds unless the previous petition was decided on the merits. 158 Wn.2d 731, 737-38, 147 P.3d 573 (2006) (citing *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 262-63, 36 P.3d 1005 (2001)). And because CrR 7.8 motions are also subject to RCW 10.73.140, this rule applies with equal force to Scott's motions to vacate.

Because Scott withdrew his previous CrR 7.8 motion to vacate, the trial court did not consider its merits. Accordingly, we agree with Scott and the State that the trial court erred by dismissing Scott's motion. We reverse the denial of Scott's motion to vacate and remand for the trial court to hold an evidentiary hearing on the motion.

II. Abuse of the Writ

The State argues that, although the trial court erred in dismissing Scott's motion to vacate because he had raised similar issues in his earlier motion, we should affirm the trial court's

dismissal under the "abuse of the writ" doctrine. The State argues that the record shows that Scott's courtroom behavior was "vexatious, harassing, and dilatory," which "disentitles" Scott to have his motion considered on the merits.[3] Br. of Resp't at 8-9. We disagree.

Under the "abuse of the writ" doctrine, a personal restraint petitioner who is represented by counsel throughout postconviction proceedings may not, in a successive petition, raise new issues that could have been raised in an earlier petition. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 363, 256 P.3d 277 (2011). The State argues that the "abuse of the writ" doctrine also bars petitions by litigants whose behavior is "vexatious, harassing, and dilatory." Br. of Resp't at 8. But Washington courts have never expanded the "abuse of writ" doctrine in this manner and our Supreme Court has consistently held that "abuse of the writ" simply bars successive personal restraint petitions raising new issues when the petitioner was previously represented by counsel. *See, e.g.*, *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 565, 243 P.3d 540 (2010); *VanDelft*, 158 Wn.2d at 738 n.2; *In re Pers. Restraint of Turay*, 153 Wn.2d 44, 48, 101 P.3d 854 (2004); *In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 145, 102 P.3d 151 (2004); *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 700, 9 P.3d 206 (2000); *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992).

The State relies primarily on *Sanders v. United States*, 373 U.S. 1, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963), which our Supreme Court cited favorably in *In re Pers. Restraint of Haverty*, 101 Wn.2d 498, 502-03, 681 P.2d 835 (1984). In *Sanders*, the Court held that when a prisoner presents a new ground for relief in a habeas corpus petition, the State may avoid review on the

[3] The State did not raise and the trial court did not consider this argument when it dismissed Scott's second motion to vacate. But we may affirm on a different ground than that relied on by the trial court if the record is sufficiently developed to fairly consider the issue. *State v. Villareal*, 97 Wn. App. 636, 643, 984 P.2d 1064 (1999).

merits only by showing that there has been an abuse of the writ. 373 U.S. at 17. The Court held, by way of example, that a prisoner abuses the writ by withholding a ground for relief in order to assert it in a subsequent petition; and the Court also held that a prisoner abuses the writ by abandoning a ground for relief at a hearing and reasserting it in a subsequent petition. *Sanders*, 373 U.S. at 18. The *Sanders* court concluded, "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." 373 U.S. at 18.

The State seeks to read the words "vex, harass, or delay" much more broadly than the actual holding in *Sanders.* 373 U.S. at 18. Read in context, it is clear that the Court used these words only to explain that splitting claims into multiple habeas petitions is an abusive tactic that disentitles the petitioner to collateral review. The Court did not hold that habeas petitions may be denied on the sole basis that the petitioner has behaved vexatiously in court or caused a delay in proceedings. Thus, *Sanders* does not support the State's argument. Moreover, the State does not cite nor does our research reveal any federal or state case denying collateral review of convictions for generally vexatious or dilatory courtroom behavior under the "abuse of the writ" doctrine.

The record affirms what the State argues, i.e., Scott has conducted himself rudely in a number of trial court proceedings, and that withdrawal of his earlier motion to vacate caused a delay in proceedings. But the State cites no precedent supporting its argument that such conduct alone precludes Scott from pursuing a collateral attack on his conviction. We reverse the denial

of Scott's motion to vacate and remand for an evidentiary hearing.[4]

III. Remand Before a Different Judge

Scott also argues that we should order that a different trial judge hear his motion to vacate on remand. We disagree.

The law requires both an impartial judge and a judge that *appears* impartial. *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). To promote the appearance of fairness, a different superior court judge should conduct proceedings on remand where it appears that the judge who earlier made decisions in the case will have difficulty setting aside either prior knowledge of a case or previously expressed opinions about a case. *See, e.g.*, *State v. M.L.*, 134 Wn.2d 657, 660-61, 952 P.2d 187 (1998) (remanding for resentencing before different judge when trial judge imposed excessive sentence without evidence that such sentence was warranted); *In re Custody of R.*, 88 Wn. App. 746, 763, 947 P.2d 745 (1997) (remanding for proceedings before different judge where trial judge expressed personal disapproval of party); *Madry*, 8 Wn. App. at 69-71 (remanding for proceedings before different judge where trial judge had information about defendant from judicial investigation of hotel that defendant managed).

Here, the trial judge has expressed no opinion and has no prior knowledge about the case that would be difficult to set aside. While the trial judge found that Scott was "playing with" the

[4] Although we need not address the issue, Scott incorrectly argues that CR 41 will prevent Scott from withdrawing and refiling his motion to vacate yet again. CR 41(a)(4) provides that a second voluntary dismissal of a civil case operates as a dismissal with prejudice. Scott reasons that because personal restraint petitions are civil matters, and because a CrR 7.8 petition is functionally equivalent to a personal restraint petition, CR 41 applies to a CrR 7.8 motion. But personal restraint petitions are appellate court proceedings to which superior court civil rules do not necessarily apply. *See In re Pers. Restraint of Benn*, 134 Wn.2d 868, 939 n.22, 952 P.2d 116 (1998). And there is no authority that any civil rules apply to a proceeding under CrR 7.8, regardless of their similarity to personal restraint petitions.

court and expressed a certain level of frustration with Scott's conduct throughout the proceedings, the trial judge expressed no personal animus towards Scott. RP (July 23, 2010) at 14; *cf. R.*, 88 Wn. App. at 763 (A remand before a different judge was appropriate where trial judge told party, "I don't like what you did."). And while the trial judge has ruled against Scott on a number of issues, nothing in the record suggests that the judge has already formed an opinion about the outcome of Scott's motion to vacate. While Scott argues that the trial judge's erroneous dismissal of his motion to vacate showed bias, an error in applying the law is not evidence of judicial bias. *Bus. Servs. of Am. II, Inc. v. WaferTech, LLC*, 159 Wn. App. 591, 600, 245 P.3d 257 (2011), *aff'd*, 174 Wn.2d 304, 274 P.3d 664 (2012).

Scott points to no facts and cites no cases requiring remand before a different trial judge. Scott cites *State v. Talley*, 83 Wn. App. 750, 763, 923 P.2d 721 (1996), where the court ordered remand for resentencing before a different judge becausee the prior judge had already decided to give Talley an exceptional sentence without holding an evidentiary hearing. The trial judge here has made no analogous prejudgment as to the outcome of Scott's motion to vacate. *See State v. Sledge*, 133 Wn.2d 828, 843, 846, 947 P.2d 1199 (1997) (remanding before different judge where trial judge already expressed opinion that exceptional juvenile disposition was appropriate).

Scott further cites *State v. Cloud*, 95 Wn. App. 606, 615-16, 976 P.2d 649 (1999), where the trial judge erroneously allowed Cloud's former counsel to intervene as a party to Cloud's claim that his former counsel rendered ineffective assistance. Because it would have been "extremely difficult, if not impossible" for the trial judge to set aside the information gained from the improper intervention, the *Cloud* court remanded for a new hearing before a different judge. 95 Wn. App. at 616. Here, in contrast, Scott does not argue nor does the record show that the

trial court had improperly obtained information about Scott's case that would be difficult for the trial court to set aside.

The trial court will be required to consider the merits of Scott's motion to vacate after hearing the evidence. The record does not reflect the trial court's prior opinion or knowledge about Scott's motion to vacate that would compel remand to a different judge to avoid violation of the appearance of fairness doctrine. Therefore, Scott's claim fails and we remand to the trial court for an evidentiary hearing on Scott's motion to vacate his *Alford* plea, without requiring a change of judge.

IV. Statement of Additional Grounds for Review (SAG)

Scott argues in his SAG that the prosecutor has conceded that no crime occurred. Scott does not cite to the record and we could not confirm that such a statement exists in the record.[5] While Scott is not required to cite the record in support of his arguments, he must inform us of the nature and occurrence of alleged errors. RAP 10.10(c). It appears that this claim is based on matters outside the record that we do not review. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Scott also argues that the declarations he has submitted conclusively establish his innocence and, thus, there are no issues to be determined at a hearing. His claim fails. The trial court must hold an evidentiary hearing to determine the weight and credibility of Scott's new evidence to determine whether to grant Scott's motion to vacate his conviction based on newly discovered evidence.

We reverse the denial of Scott's motion to vacate his conviction and remand for an

[5] Scott's SAG refers to "Exhibit 1," but no such exhibit supporting Scott's SAG appears in the record on review. SAG at 1.

evidentiary hearing on the motion.

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.

Van Deren, J.

We concur:

Quinn-Brintnall, J.

Johanson, A.C.J.