

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	No. 66147-7-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JEFFREY KINER,	)	UNPUBLISHED OPINION
	)	
<u>Appellant.</u>	)	FILED: January 9, 2012

Per Curiam. Jeffrey Kiner appeals an order denying his motion to vacate a judgment and sentence and his motion for the judge to recuse. We remand for further proceedings.

FACTS

In 2006, Kiner was convicted and sentenced for three counts of first degree child molestation. He appealed, and on March 10, 2008, a commissioner of this court granted a motion on the merits affirming the judgment and sentence. A panel of judges denied Kiner's motion to modify, the Supreme Court denied review, and the mandate issued on April 10, 2009. State v. Kiner, No. 59095-2-I.

In February 2009, Kiner filed a CrR 7.8 motion to vacate and modify the judgment and sentence. The State argued that the motion should be transferred to this court as a personal restraint petition because it was time barred and raised a legal

issue that could be resolved based on the existing record.

On August 12, 2009, the superior court transferred the motion to this court for consideration as a personal restraint petition. In re Personal Restraint of Kiner, No. 63990-1-I. In October 2009, this court dismissed the petition due to Kiner's failure to pay the filing fee or file a statement of finances. On November 20, 2009, a panel denied Kiner's motion to modify without prejudice to file another petition with the filing fee or a statement of finances. The certificate of finality issued December 30, 2009.

On December 8, 2009, Kiner apparently refiled his CrR 7.8 motion in the superior court.<sup>1</sup> Several months later, Kiner filed a motion for a writ of mandamus in the Supreme Court and a request for public funds.

On April 9, 2010, Kiner apparently again attempted to file his CrR 7.8 motion. Kiner and the State disagree as to whether that motion was ever filed and/or docketed.<sup>2</sup> In any event, the State filed a motion to transfer Kiner's motion to this court to be considered as a personal restraint petition. As it did previously, the State argued that the motion raised a legal issue that could be resolved on the existing record and that the motion was time barred under RCW 10.73.090.

On June 4, 2010, the Supreme Court granted Kiner's motion for the expenditure of public funds, waived the filing fee, granted Kiner's motion for a writ of mandamus,

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<sup>1</sup> The State claims Kiner never actually filed the motion. Kiner alleges that he sent the motion to both the prosecutor and the superior court and that he made efforts to contact the superior court about his motion.

<sup>2</sup> The order appealed refers to CrR 7.8 motions filed on December 8, 2009, and April 9, 2010.

and directed the King County Superior Court to act on Kiner's CrR 7.8 motion. Kiner v. King County Superior Court, No. 84366-0.

On June 21, 2010, Kiner filed a motion and affidavit requesting that the assigned judge recuse due to alleged bias and partiality.

On September 14, 2010, the superior court denied Kiner's CrR 7.8 motion and his motion for recusal. The court concluded the CrR 7.8 motion was untimely under RCW 10.73.090(1) because it was filed more than one year after the judgment and sentence.

Kiner moved for discretionary review of the September 14, 2010 order. In response, the State conceded the superior court erred in concluding the CrR 7.8 motion was time barred. A commissioner of this court ruled that the superior court's order was appealable either as a matter of right or via discretionary review and appointed counsel for Kiner.

#### DECISION

Kiner's counsel contends, and the State concedes, that the superior court erred in concluding that his CrR 7.8 motion was time barred and that the matter must be remanded for further proceedings. Because Kiner's December 8, 2009 and April 9, 2010 motions were filed within one year of the mandate on his judgment and sentence, we accept the concession. RCW 10.73.090.

Kiner also contends he is entitled to a show cause hearing on remand. But as the State correctly points out, a hearing is not required until the court first determines that Kiner has made a substantial showing of entitlement to relief or that resolution of

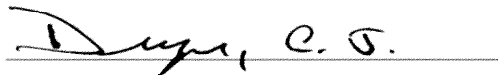
the motion requires a factual hearing. CrR 7.8(c)(2), (3).

Anticipating that the court may conclude on remand that the matter must be transferred to this court as a personal restraint petition, Kiner argues that a transfer cannot occur unless the court first gives him an opportunity to withdraw or amend his motion. This argument is premature.<sup>3</sup>

Finally, Kiner contends the superior court erred in denying his motion to recuse. He asserts, and the State does not dispute, that the superior court misconstrued his motion and never addressed his arguments regarding bias and partiality. The portion of the record before us indicates that the superior court did not address those arguments.<sup>4</sup> Accordingly, we remand this issue to the superior court for resolution solely on the record previously developed.<sup>5</sup>

Remanded for proceedings consistent with this opinion.

FOR THE COURT:

A handwritten signature in black ink, appearing to read "D. S. O.", is written over a horizontal line.

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<sup>3</sup> We note, however, that Kiner's reliance on Castro v. United States, 540 U.S. 375, 382-83, 124 S. Ct. 786, 157 L. Ed. 2d 778 (2003) for this argument is questionable. Under federal law, recharacterizing a pro se postconviction motion as a petition for habeas relief has adverse consequences in light of the federal limitation on second or successive petitions. Under Washington law, however, the limits on successive collateral challenges apply not only to personal restraint petitions, but also to motions in superior court. CrR 7.8(b); In re Personal Restraint of Becker, 143 Wn.2d 491, 496-97, 20 P.3d 409 (2001).

<sup>4</sup> Kiner cites supplemental clerk's papers in support of his characterization of his arguments below, but those clerk's papers have not been filed in this court.

<sup>5</sup> Kiner's argument that his CrR 7.8 motions raised distinct issues that the superior court failed to recognize should also be addressed to the court on remand.

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*Eden, J.*

*Jan, J.*