

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JAMES CANTY,

Appellant.

No. 41094-0-II
consolidated with
No. 41574-7-II

UNPUBLISHED OPINION

Penoyar, J. — Michael Canty appeals from the orders denying his belated motions to dismiss for a speedy trial violation. Concluding that the trial court erred by applying CrR 7.8 to Canty’s motions, we reverse with instructions to vacate those orders.¹

FACTS

In 2001, Canty was convicted of indecent liberties, first degree burglary, and second degree robbery. We affirmed his convictions and sentence in 2003. On July 15, 2009, Canty filed a motion to vacate his judgment and sentence under CrR 7.8(b)(3), asserting that the State had failed to disclose exculpatory information. On January 11, 2010, Canty filed another motion to vacate his judgment and sentence, asserting that his right to a speedy trial had been violated when the trial court allowed a late amendment to add the robbery charge. The trial court held a hearing on both motions, with Canty appearing telephonically. On May 24, 2010, the court denied both motions as time barred by RCW 10.73.090. But it then ruled that “this matter is transferred to the Court of Appeals for consideration as a personal restraint petition.” Clerk’s Papers (41094-0-II) at 78. We rejected the transfer, holding that the trial court cannot deny a CrR 7.8 motion and transfer it to this court. The trial court then

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

vacated its May 24, 2010 order and transferred Canty's CrR 7.8 motions to this court to be considered as a personal restraint petition.

On July 28, 2010, Canty filed a "Motion to Dismiss Pursuant to CrR 3.3(h)," asserting that his right to a speedy trial had been violated. On July 30, 2010, the trial court denied his motion on the basis that he had waived his right to speedy trial and that he had not objected to the trial date. He appeals from this order.

On November 10, 2010, Canty filed another "Motion to Dismiss Pursuant to CrR 3.3(h), again asserting that his right to a speedy trial had been violated when the trial court allowed a late amendment to add the robbery charge. On November 17, 2010, the trial court denied his motion with prejudice, ruling that the issue had been litigated and decided adversely to Canty. He appeals from this order as well. We consolidated his appeals.

ANALYSIS

Canty argues that the trial court erred by denying his motions without holding a hearing as CrR 7.8(c)(3) requires. He contends that upon the filing of a CrR 7.8 motion, the trial court must either transfer the motion to the Court of Appeals to be considered as a personal restraint petition under CrR 7.8(c)(2), or hold a hearing under CrR 7.8(c). As the trial court did neither, Canty argues that it erred. *State v. Smith*, 144 Wn. App. 860, 863, 184 P.3d 666 (2008).

The State concedes that the trial court erred by denying Canty's motions without holding a hearing. However, it asks that rather than remanding to the trial court, we convert Canty's appeals to a personal restraint petition. But there is no mechanism for such a conversion. The trial court must first vacate its July 30, 2010 and November 17, 2010 orders and then transfer Canty's motions to us under CrR 7.8(c)(2).

We reverse with instructions to vacate the July 30, 2010 and November 17, 2010 orders and to either transfer Canty's motions to us under CrR 7.8(c)(2) or hold a hearing on Canty's motions under CrR 7.8(c)(3).

In light of this disposition, we need not address Canty's statement of additional grounds.

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.

Penoyar, J.

We concur:

Van Deren, J.

Johanson, A.C.J.