

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

MARVIS J. KNIGHT,

Appellant.

No. 37443-9-II

UNPUBLISHED OPINION

Armstrong, J. — Marvis J. Knight appeals the superior court’s denial of his motion to vacate judgment for two counts of second degree assault and two counts of felony harassment. The superior court ruled on the merits of two claims and dismissed two as untimely. Knight argues that the trial court should have transferred the untimely claims to the Court of Appeals as a personal restraint petition. The State agrees, but argues the court should have transferred the entire motion. We reverse and remand.

**FACTS**

In April 2000, Marvis J. Knight was convicted of two counts of second degree assault and two counts of felony harassment. The superior court sentenced Knight to life in prison without possibility of parole under the persistent offender accountability act, RCW 9.94A.555. On September 4, 2007, Knight moved to vacate judgment under CrR 7.8.

Knight raised four arguments.<sup>1</sup> First, the information charging assault with intent to commit a felony omitted essential elements of the underlying offense. Second, the “to convict” jury instructions omitted essential elements of the underlying offense. Third, Knight’s convictions

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<sup>1</sup> Knight raised a fifth argument—failure to give the jury a unanimity instruction for the two counts of assault—but withdrew this claim at the hearing.

for felony harassment and second degree assault constituted double jeopardy. Fourth, insufficient evidence supported the assault convictions.

The State conceded the double jeopardy issue and the court amended the judgment by vacating the felony harassment convictions. The trial court denied the sufficiency of the evidence claim because we had ruled on that issue in Knight's direct appeal. The court dismissed the remaining issues as untimely, explaining that even if Knight's remaining arguments were not barred, it would have denied the claims on their merits.

On appeal, Knight argues that CrR 7.8 required the trial court to transfer the untimely claims to this court as a personal restraint petition. The State agrees, but argues that the superior court should have transferred the entire motion as untimely. Knight does not address whether his double jeopardy and insufficiency of the evidence claims were timely. The parties agree that this court should remand to the superior court so that Knight may choose whether to withdraw or transfer his motion.

## ANALYSIS

### I. Standard of Review

We review a trial court's decision on a motion to vacate for abuse of discretion. *In re Marriage of Scanlon*, 110 Wn. App. 682, 686, 42 P.2d 447 (2002).

### II. Knight's Motion to Vacate is Time Barred

A collateral attack on the judgment in a criminal case is barred if filed more than one year after the final judgment, unless the judgment is invalid on its face or the court lacked jurisdiction. RCW 10.73.090(1). A CrR 7.8 motion to vacate judgment is a collateral attack. RCW

10.73.090(2). Knight's judgment became final on March 7, 2003. *See* RCW 10.73.090(3)(b) (date appellate court issues its mandate disposing of a timely direct appeal). Knight's claims are therefore time barred unless either (1) the time bar does not apply because his judgment is facially invalid or the court lacked jurisdiction or (2) one of the six exceptions enumerated in RCW 10.73.100 applies. *See* RCW 10.73.090(1), .100. The superior court does not have authority to rule on claims that are time barred, and must transfer such claims to the Court of Appeals as a personal restraint petition. CrR 7.8(c)(2).<sup>2</sup>

Knight does not contest that the time bar applies. Although his double jeopardy and insufficiency of the evidence claims fall within two of the exceptions listed under RCW 10.73.100, the statute applies only if Knight's motion is "based solely" on the enumerated exceptions. RCW 10.73.100; *In re Pers. Restraint of Hankerson*, 149 Wn.2d 695, 699-700, 72 P.3d 703 (2003). If some asserted grounds for relief fall within an exception and others do not, then the motion is a "mixed motion" and the court will not decide claims under RCW 10.73.100. *Hankerson*, 149 Wn.2d at 700, 702–03. Because two of Knight's claims do not fall within an exception, Knight submitted a mixed motion and RCW 10.73.100 does not apply. All of Knight's claims are therefore time barred, and the superior court should have transferred the motion to the Court of Appeals as a personal restraint petition. CrR 7.8(c)(2). The superior court exceeded its authority by ruling on Knight's double jeopardy and insufficiency of the evidence claims and dismissing the remaining claims.

We remand Knight's remaining claims to the superior court. It is necessary to remand,

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<sup>2</sup> A former version of the rule did not require superior courts to transfer untimely motions to the Court of Appeals. The revised rule became effective on September 1, 2007. *Compare* former CrR 7.8 (2003) *with* CrR 7.8 (2009). Knight filed his motion September 4, 2007.

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rather than simply convert the present appeal into a personal restraint petition, to avoid infringing on Knight's right to choose whether to pursue a personal restraint petition or withdraw his motion. *See State v. Smith*, 144 Wn. App. 860, 864, 184 P.3d 666 (2008).

Reversed and remanded.

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.

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Armstrong, J.

I concur:

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Houghton, P.J.

Quinn-Brintnall, J. (concurring in the result) — I agree that our decision in *State v. Smith*, 144 Wn. App. 860, 864, 184 P.3d 666 (2008), requires that we remand the remainder of Marvis J. Knight's CrR 7.8 motion to the superior court. I write separately to express my disagreement with the holding in *Smith* and to call for correction to the situation that needlessly causes confusion and is a strain on limited judicial and taxpayer resources.

Although constitutional due process rights do not require it, Washington courts provide multiple avenues of review for use by those convicted of crimes. *See* RAP 2.2 (direct appeal); Title 16 RAP (personal restraint petitions); CrR 7.5 (motion for new trial); CrR 7.8 (motion for relief from judgment); *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000) (no federal due process right to appeal a criminal conviction); *State v. Thompson*, 93 Wn. App. 364, 368, 967 P.2d 1282 (1998) (statute providing indigent criminal offenders right to counsel at public expense not limited to state constitutional right of direct appeal). Through these procedures, the legislature and the reviewing courts have made a concerted effort to allow each person convicted of a crime and held to answer for that crime a reasonable time in which to seek a full and fair review of their conviction. RCW 10.73.090, .140 (successive petition). The, I believe unintended, result is a conundrum created by the interplay between CrR 7.8(c)(2) as amended on September 1, 2007, and *Smith* that allows a person convicted of a crime to receive the assistance of counsel at taxpayer expense not only for the initial adjudication, direct appeal, and—on showing of good cause in a personal restraint petition—collateral attack, but also for an appeal of an untimely and procedurally defective post-trial motion.

Limited judicial resources must be divided between those exercising their right to direct appeal of their convictions and those seeking to collaterally attack their mandated convictions multiple times. In my opinion, procedures that facilitate full direct review but limit multiple collateral attacks on final judgments enhance, rather than violate, due process. Moreover, as I believe *Smith* demonstrates, the hypertechnical parsing of speculative remedies based on a defendant's ignorance of the law necessitates the expenditure of scarce resources to untimely and procedurally defective post-trial collateral proceedings without an adequate showing of basis or need. Further, by facilitating review of untimely and procedurally defective post-trial motions, *Smith* departs from the established principle that Washington courts hold pro se litigants to the same standard as attorneys. *See, e.g., State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987) (pro se defendants must conform to substantive and procedural rules and courts are under no duty to inform a pro se defendant of the relevant rules of law); *State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985) (a pro se litigant must comply with all applicable procedural rules).

*Smith*, 144 Wn. App. 860, and CrR 7.8(c)(2) do not enhance a convicted offender's access to a just and fair review of his conviction. To the contrary, as applied, CrR 7.8(c)(2) and *Smith*, 144 Wn. App. 860, require the courts to process, circulate, and review at least preliminarily untimely and deficient applications two and three times. Careful and complete direct review of convictions timely appealed requires that courts firmly and consistently enforce the procedural rules that streamline and limit avenues of collateral attack to those constitutional errors resulting in actual prejudice or nonconstitutional errors demonstrating "a fundamental defect which inherently results in a complete miscarriage of justice." *In re Pers. Restraint of Cook*, 114

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Wn.2d 802, 812, 792 P.2d 506 (1990). Although I believe the majority opinion and our decision in *Smith*, 144 Wn. App. 860, violate this principle, I am constrained to follow them until the rules are amended to eliminate confusion.

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QUINN-BRINTNALL, J.