



THE SUPREME COURT OF WASHINGTON

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| In re the Personal Restraint of |) | No. 97564-7 |
| |) | |
| JOHN GARRETT SMITH, |) | O R D E R |
| |) | |
| Petitioner. |) | Court of Appeals |
| |) | No. 53515-7-II |
| |) | |

Department I of the Court, composed of Chief Justice Fairhurst and Justices Johnson, Owens, Wiggins and Gordon McCloud, considered this case at its December 3, 2019, Motion Calendar. This matter was commenced in the Clark County Superior Court when John Garrett Smith filed a CrR 7.8 motion for relief from judgment. The superior court transferred that motion to Division II of the Court of Appeals for consideration as a personal restraint petition. The Court of Appeals found the petition was successive under RCW 10.73.140 but not time-barred, and transferred it to the Supreme Court. In the Supreme Court, Smith filed a "MOTION TO CORRECT SIGNIFICANT ERROR PRESENTED ON THE FACE OF TRANSFER ORDER FROM COURT OF APPEALS TO SUPREME COURT", which was also set for consideration by the Department.

In the petition, Smith seeks relief in the form of a retrial based on a breach of the merger doctrine. After trial, Smith was convicted of attempted second degree murder and second degree assault, with related special allegations of domestic violence. The trial court found that the attempted second degree murder and the second degree assault offenses constituted the same

criminal conduct for offender score purposes, and merged the assault with the attempted murder. However, the court entered judgment for both crimes. The State has conceded that the conviction for second degree assault should be vacated. After consideration, the Department unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's personal restraint petition is granted only to the extent that the second degree assault conviction should be vacated. Therefore, this matter is remanded to the Clark County Superior Court which is directed to vacate the second degree assault conviction and enter an amended judgment and sentence. Other relief requested in the petition is denied.

The motion to correct significant error is also denied.

DATED at Olympia, Washington, this 4th day of December, 2019.

For the Court

Fairhurst, C.J.
CHIEF JUSTICE

August 21, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint of:
JOHN GARRETT SMITH,
Petitioner.

No. 53515-7-II

ORDER TRANSFERRING
PETITION TO SUPREME
COURT

John Garrett Smith seeks relief from personal restraint imposed following his 2015 conviction for attempted second degree murder and second degree assault. In this, his sixth petition,¹ he argues that his second degree assault conviction is barred by double jeopardy.

Under RCW 10.73.140:

No, Entire Cause is barred.

If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition.

Because Smith has previously filed a personal restraint petition, this petition is successive under RCW 10.73.140. *In re Pers. Restraint of Bell*, 187 Wn.2d 558, 563, 387 P.3d 719 (2017). If a petition is successive under RCW 10.73.140 and not time-barred by RCW 10.73.090(1), we must transfer the petition to the Supreme Court. *Id.*; see also *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 362, 256 P.3d 277 (2011).

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¹ See Order Dismissing Petitions, *In re Pers. Restraint of Smith*, Nos. 51955-1-II, 52035-4-II, 52096-6-II and 52611-5-II (consolidated) (Nov. 14, 2018) and Order Transferring Petition to Supreme Court, *In re Pers. Restraint of Smith*, No. 53445-2-II (Jul. 2, 2019).

RCW 10.73.090(1) requires that a personal restraint petition be filed within one year of the judgment becoming final. Smith's judgment and sentence became final on October 9, 2018, when the United States Supreme Court denied his petition for a writ of certiorari. RCW 10.73.090(3)(c). He filed his sixth petition on April 9, 2019, within one year after his judgment and sentence became final.² His petition is not time-barred and therefore must be transferred to the Supreme Court. Accordingly, it is hereby

ORDERED that Smith's petition is transferred to the Supreme Court for its consideration.

Myers, C.J.
Chief Judge

cc: John G. Smith
Aaron T. Bartlett

PRP → Public Records Act
violation of Due Process

² Smith filed a CrR 7.8 motion for relief from judgment with the trial court. That court transferred his motion to us under CrR 7.8(c) to be considered as a personal restraint petition.

53515-7-II

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Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

| | | |
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| STATE OF WASHINGTON, |) | |
| |) | |
| Plaintiff, |) | NO. 13-1-01035-6 |
| |) | |
| vs. |) | FINDINGS OF FACT, |
| |) | CONCLUSIONS OF LAW, AND |
| |) | ORDER TRANSFERRING CrR 7.8 |
| |) | MOTION FOR RELIEF FROM |
| |) | JUDGMENT TO COURT OF |
| |) | APPEALS, DIVISION II |
| |) | |
| JOHN GARRETT SMITH, |) | [CrR 7.8(c)(2)] |
| |) | |
| Defendant. |) | [CLERK'S ACTION REQUIRED] |

This matter came on regularly before the undersigned judge of the above-entitled court on the motion of the defendant, John Garrett Smith, for CrR 7.8 relief from judgment. The motion was filed with the Clark County Clerk on April 11, 2019. The court has reviewed the records and files herein, and the motion listed above. Based upon this review, the court makes the following Findings of Fact:

FINDINGS OF FACT

1. On June 3, 2013, John Garrett Smith was arrested in Clark County, Washington and booked into the Clark County Jail on suspicion of assault in the second

degree. The defendant made his first appearance on the charge of assault in the second degree on Tuesday, June 4, 2013.

2. In Clark County Cause No. 13-1-01035-6, the defendant, John Garrett Smith, was originally charged by information with one count of assault in the second degree. The information was amended on October 17, 2014, to charge the defendant with attempted murder in the first degree, with an alternative charge of attempted murder in the second degree, assault in the first degree and with an alternative charge of assault in the second degree. The defendant entered pleas of not guilty to all charges.

3. A bench trial was heard before Judge Robert Lewis on December 1-3, 2014. At the conclusion of trial, the court found the defendant not guilty of attempted murder in the first degree and assault in the first degree. The court found the defendant guilty of attempted murder in the second degree and assault in the second degree. The trial court entered written findings of fact and conclusions of law in support of these decisions. On January 30, 2015, the court sentenced Smith to a standard range sentence.

4. The defendant filed a timely notice of appeal on February 9, 2015. That appeal was assigned Docket No. 472058 in the Court of Appeals, Division 2 and Docket No. 939233 in the Washington Supreme Court. The defendant's convictions were affirmed and the Washington Supreme Court issued its mandate on January 18, 2018.

5. On November 30, 2015, the defendant filed a CrR 7.8 motion for relief from judgment. On January 4, 2016, the trial court transferred the motion to the Court of Appeals pursuant to CrR 7.8 (c)(2). The motion was assigned Docket No. 484030. On February 19, 2016, the Court of Appeals entered an order terminating review. The Court of Appeals issued a certificate of finality on March 29, 2016.

12.11.13

No. of challenge my intended charge

CrR 3.2.1(b)

6. On June 18, 2018, the defendant filed a challenge to jurisdiction, affidavit for mandatory discharge and deliverance and a motion for show cause. These documents asserted that the trial court did not determine that probable cause existed to detain Smith within 48 hours of his arrest and that the trial court lacked valid jurisdiction to proceed in this case as a result of this failure. The trial court denied a request for an evidentiary hearing and transferred the motion to the Court of Appeals pursuant to CrR 7.8 (c)(2), The motion was assigned Docket No. 519551 in the Court of Appeals, Division 2 and Docket No. 966150. The Court of Appeals terminated review on November 14, 2018 and the Supreme Court denied discretionary review on January 28, 2019. A certificate of finality has not been issued with regard to this motion.

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7. On April 11, 2019, the defendant filed a CrR 7.8 motion for relief from judgment. The motion seeks relief in the form of retrial based upon the defendant's assertion that his convictions for both attempted murder in the second degree and assault in the second degree constitute double jeopardy and are barred by the United States and Washington State constitutions.

Based upon the foregoing Findings of Fact, the court enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The defendant's motion is a motion for relief from judgment and sentence, made pursuant to CrR 7.8.
2. The motion is time barred by RCW 10.73.090. The motion is not timely filed, pursuant to the requirements of CrR 7.8 (b).

1 No

3. The defendant has not made a substantial showing that he is entitled to relief from the judgment and sentence entered on January 30, 2015. The trial court's conviction of the defendant on these two charges did not violate the prohibition against double jeopardy.

4. Resolution of this motion does not require a factual hearing. The trial court's basis for convicting the defendant of attempted murder second degree and assault in the second degree, and the judgment and sentences imposed as a result of these convictions, are documented in the trial court's file and the record of proceedings.

Based on the foregoing Findings of Fact and Conclusions of Law, now, therefore, it is hereby ORDERED, ADJUDGED and DECREED as follows:

ORDER

1. The defendant's CrR 7.8 motion for relief from judgment, filed April 11, 2019, is transferred to the Court of Appeals, Division II, for consideration as a personal restraint petition, as required by CrR 7.8 (b)(2).

2. The court shall mail a copy of this order to the defendant and to deputy prosecuting attorney Aaron Bartlett.

Dated this 22nd day of April, 2019:

/s/ ROBERT A. LEWIS

Judge Robert A. Lewis