

NO. 42774-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DEREK E. GRONQUIST,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Appellee.

RESPONDENT'S ANSWERING BRIEF

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I. INTRODUCTION

Derek Gronquist, a Washington State prisoner, appeals the denial of his motion to vacate a portion of the Clallam County Superior Court's December 18, 2009, Order. Mr. Gronquist's original claims stemmed from two public records requests responded to by the Department of Corrections (the Department) on July 31, 2007, and October 26, 2007, respectively. In its October 26, 2007, response, the Department properly claimed an exemption for withholding surveillance video tapes requested by Mr. Gronquist.

On August 1, 2008, Mr. Gronquist filed a *pro se* civil complaint alleging a violation of the Public Records Act (PRA) and amended his Complaint asserting that the Department violated the "Free Speech Clause of Article I, Section 5 of the Washington State Constitution." On December 18, 2009, the court determined that the Department properly withheld video surveillance tapes pursuant to RCW 42.56.240(1), and dismissed all Mr. Gronquist's PRA claims with prejudice on January 3, 2011¹.

On August 5, 2011, Mr. Gronquist filed his motion to vacate a portion of the trial court's December 18, 2009, Order. However, the trial court's December 18, 2009, Order was not a final judgment and

¹ The court allowed Mr. Gronquist to proceed on his remaining Article I, Section 5 claim.

the court properly denied his motion to vacate by affirming the Department's exemption for video surveillance tapes. As a result, Mr. Gronquist's appeal should be dismissed because it is premature or, alternatively, the trial court's Order should be affirmed.

II. COUNTER STATEMENTS OF THE ISSUES

1. Does the Appellant have basis for appeal when the trial court's December 18, 2009, Order was not a final judgment and its January 3, 2011, Order did not resolve all pending claims?

2. Did the lower court properly exercise its discretion when it denied Appellant's motion to vacate?

III. STATEMENT OF THE CASE

A. Factual History

On July 30, 2007, the Department received a PRA request from Mr. Gronquist requesting records pertaining to undocumented alien workers employed by correctional industries. CP 247. The Department investigated the request and determined that there were no responsive records. CP 248. The Department responded to Mr. Gronquist and notified him that no responsive documents existed in a letter dated July 31, 2007. *Id.*

On August 9, 2007, the Department received a second PRA request from Mr. Gronquist requesting records "concerning an assault and/or

extortion attempt that happened to me at the Clallam Bay Corrections Center on June 17, 2007.” *Id.* Among other records, this request specifically sought “the surveillance video of C-Unit from 6:00 am to 2:00 p.m. of June 17, 2007,” as well as “[t]he surveillance video of the chow hall used for C-Unit inmates on and for the breakfast meal on June 17, 2007.” *Id.*

The Department responded in a letter dated August 9, 2007, acknowledging receipt of the request and estimated that it may take twenty (20) business days to review and assemble the requested records. CP 249. The Department also requested clarification as to some of the documents requested by Mr. Gronquist. *Id.* On August 27, 2007, the Department received a follow-up letter from Mr. Gronquist clarifying the items specified in the Department’s August 9, 2007, letter. *Id.* The Department acknowledged Mr. Gronquist’s clarification in a letter dated August 30, 2007, and estimated up to twenty (20) more business days to review and assemble responsive records. *Id.*

On September 24, 2007, the Department sent Mr. Gronquist a letter notifying him that ninety-six (96) pages of responsive records had been located. *Id.* After receiving payment from Mr. Gronquist for copying and postage, the Department sent Mr. Gronquist a letter acknowledging his payment and enclosing the records responsive to his

request on October 26, 2007. CP 249-50. Included with the responsive documents was a denial of disclosure form notifying him that prison surveillance tapes are exempt from public disclosure under RCW 42.56.420 and would be withheld. CP 250.

B. Procedural History

On August 1, 2008, Mr. Gronquist, filed a *pro se* civil complaint alleging violation of the PRA. CP 435-39. In his complaint, Mr. Gronquist specifically alleged that the Department violated the PRA when a number of documents were improperly withheld from him after he filed public records requests on July 24, 2007, and August 5, 2007. CP 435-38. On July 27, 2009, Mr. Gronquist filed an amended complaint. CP 319-27. In his amended complaint, Mr. Gronquist only added one new claim by asserting that the Department violated the “Free Speech Clause of Article I, Section 5 of the Washington State Constitution” when the records sent to him in response to a public records request were seized. CP 323-24.

Mr. Gronquist filed a motion to show cause in June 2009, and the trial court entered findings and an order on Mr. Gronquist’s PRA claims on December 18, 2009. CP 337-429; CP 125-27. The court determined the merits of Mr. Gronquist’s PRA claims, including the conclusion that

the Department properly withheld surveillance video tapes pursuant to RCW 42.56.240(1). CP 126.

On October 8, 2010, the Department filed a motion to dismiss, and the trial court entered an Order granting partial dismissal of Mr. Gronquist's claims on January 3, 2011. CP 118-24; CP 98-99. The Court dismissed all of Mr. Gronquist's PRA claims with prejudice, but it allowed him to proceed with his Article I, Section 5 claim. CP 98-99. Mr. Gronquist filed a motion for reconsideration, and the court denied his motion for reconsideration on January 18, 2011. CP 100-03; CP 97.

On August 5, 2011, Mr. Gronquist filed a motion to vacate a portion of the trial court's December 18, 2009, Order under Civil Rule (CR) 60(b)(4). CP 19-96. Mr. Gronquist's sole claim was that information obtained in an unrelated matter demonstrated that the video tape he requested was not preserved, and the court's decision was based upon fraud perpetrated by the Department and its counsel. CP 25-30. On September 28, 2011, the trial court entered an Order denying Mr. Gronquist's motion to vacate. CP 11-12.

Mr. Gronquist filed a notice of appeal on October 28, 2011. CP 8. Mr. Gronquist did not file a motion for discretionary review even though he still had one claim pending. *See* CP 98-99. At the time of

filing his opening brief, Mr. Gronquist had not provided a final judgment for all his claims or an order satisfying the requirements of CR 54(b).

IV. STANDARD OF REVIEW

A trial court's decision denying a motion to vacate under CR 60(b) is reviewed for an abuse of discretion. *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). “An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons.” *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995); *see also Mitchell v. Washington State Institute of Public Policy*, 153 Wn. App. 803, 821-22, 225 P.3d 280 (2009). “A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)); *Mitchell*, 153 Wn. App. at 822.

However, review of a trial court’s denial of a CR 60(b) motion is limited to the appropriateness of the denial, and the merits of the underlying judgment are not before the appellate court. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 451 n.2, 618 P.2d 533 (1980). The exclusive procedure to attack an allegedly defective judgment is an appeal of the

judgment. *Bjurstrom*, 27 Wn. App. at 451. Thus, CR 60(b) may not be used to obtain correction of errors of law. *Id.*

V. ARGUMENT

A. Appellant's Appeal Is Premature

Mr. Gronquist's appeal of the trial court's order denying his motion to vacate is premature. The court's January 3, 2011, order did not dismiss all of Mr. Gronquist's claims, and the court did not make an express determination that there was no reason to delay Mr. Gronquist's appeal. Therefore, Mr. Gronquist's appeal should be dismissed.

An order that does not determine all claims in a complaint can only be appealed if requirements of CR 54(b) and RAP 2.2(d) are satisfied. *See Pepper v. King County*, 61 Wn. App. 339, 344-46, 810 P.2d 527 (1991). Under CR 54(b), a court must make an express determination, supported by findings, that there is no just reason to delay the appeal and that it is entering a final judgment. *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 881, 567 P.2d 230 (1977); *Pepper*, 61 Wn. App at 345-46.

Additionally, CR 60(b) is not the proper avenue to request revision of an interlocutory order. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 300-01, 840 P.2d 860 (1992). Moreover, a party's erroneous reliance on CR 60, and a trial court's consideration of the matter as a CR 60(b) motion, does not alter a trial court's power to modify an order and the

erroneous use of CR 60(b) does not bind the appellate court to an erroneous view of the law. *Id.* at 301.

Here, the trial court's January 3, 2010, order did not resolve all of Mr. Gronquist's claims. *See* CP 98-99. In fact, the order specifically allowed Mr. Gronquist to proceed with his Article I, Section 5 claim. *Id.* Additionally, the court's order denying Mr. Gronquist's motion to vacate did not contain the necessary language to certify the issue for interlocutory appeal as required by CR 54(b). *See* CP 11-12; *see also Washburn*, 120 Wn.2d at 300-01. Neither the trial court's January 3, 2011, Order nor its September 28, 2011, Order resolved all pending claims, and neither order satisfied the requirements of CR 54(b). *See* CP 98-99; CP 11-12.

Furthermore, Mr. Gronquist's motion to vacate challenged the court's December 18, 2009, Order. *See* CP 19. The trial court's December 18, 2009, Order did not dispose of any of Mr. Gronquist's claims. *See* CP 125-27. It was essentially an order containing findings of fact and conclusions of law related to his motion to show cause. *Id.* The trial court did not enter any judgment on the merits of Mr. Gronquist's claims until January 3, 2011. *See* CP 98-99. Therefore, Mr. Gronquist's appeal is untimely because the trial court's Order denying Mr. Gronquist's motion to vacate was not a final appealable judgment and his appeal should be dismissed.

B. The Trial Court Did Not Abuse Its Discretion In Denying Appellant's Motion To Vacate

The trial court did not abuse its discretion in denying Mr. Gronquist's motion to vacate. CR 60(b) authorizes a trial court to vacate a judgment for fraud, misrepresentation, or other misconduct of an adverse party. CR 60(b)(4). However, it does not permit a party to assert an underlying cause of action for fraud that does not relate to the procurement of the judgment. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). "Thus, the alleged fraudulent conduct or misrepresentation must *cause* the entry of the judgment" *Lindgren*, 58 Wn. App. 588 at 596 (emphasis in original); *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 777 P.2d 1056 (1989). "The party attacking a judgment under CR 60(b)(4) must establish the fraud, misrepresentation, or other misconduct by clear and convincing evidence." *Id.*

Here, Mr. Gronquist has failed to show the trial court abused its discretion because he did not present the court with any evidence of fraudulent conduct or misrepresentation by the Department. Mr. Gronquist argues that the Department deceived the court. Opening Brief at 11-12. However, Mr. Gronquist's allegations are unsupported by the record and the trial court's December 19, 2009, Order was not based on any facts asserted by Mr. Gronquist.

In its December 18, 2009, Order, the court found that the Department “properly claimed 42.56.240(1) as an exemption for [not] disclosing surveillance video tapes to the Plaintiff.” CP 126. This Order was issued after the court received briefing from both parties concerning Mr. Gronquist’s show cause motion. *See* CP 137-44; CP 145-48; CP 149-77; CP 178-312; CP 337-429. The court was well aware of the Department’s asserted exemption under RCW 42.56.240 for non-disclosure of prison surveillance videos. CP 126.

Additionally, the Department never set forth specific facts about the video that was the subject of Mr. Gronquist’s request. *See* CP 185-87; CP 191-94; CP 137-44. Prison safety and security requires that all surveillance tapes be exempt from public disclosure, therefore there was no discussion about the specifics of the tape Mr. Gronquist sought, nor was there a need to review the tape prior to denying its disclosure. CP 140-42; CP 289-92. Moreover, the Department asserted that Mr. Gronquist’s request for video surveillance would reveal the specific intelligence information about the camera requested, such as “whether the camera works, records, the quality of the tape, the scope of the camera, the cycle of the recording, and the maneuverability of the camera.” CP 140; CP 289-92. These security concerns were clearly identified to the trial court by the Department and non-disclosure of surveillance video tapes is

appropriate under RCW 42.56.240(1). *See Fischer v. Department of Corrections*, 160 Wn. App. 722, 254 P.3d 824, *cert denied* 172 Wn.2d 1001 (2011).

Lastly, Mr. Gronquist also asserts that the trial court applied the wrong legal standard in its decision to deny his motion to vacate. Opening Brief at 12-17. However, review of a trial court's denial of a CR 60(b) motion is limited to the appropriateness of the denial, and the merits of the underlying judgment are not before the appellate court. Therefore, Mr. Gronquist's focus on the merits of the Department's PRA exemption is misplaced and it is not relevant to the Court's abuse of discretion analysis.

Therefore, the trial court did not abuse its discretion because Mr. Gronquist has not established fraud, misrepresentation, or other misconduct by clear and convincing evidence. Additionally, Mr. Gronquist has failed to show that the Department's alleged fraudulent conduct or misrepresentation caused the entry of the trial court's December 18, 2009, Order. Consequently, the trial court's Order denying Mr. Gronquist's motion to vacate should be affirmed.

VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that Mr. Gronquist's appeal be dismissed. In the alternative, the

Department respectfully requests that the lower court's Order denying Mr. Gronquist's motion to vacate be affirmed.

RESPECTFULLY SUBMITTED this 9th day of May, 2012.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing Respondent's Brief on all parties or their counsel of record as follows:

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