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No. 71054-1-I
King County Superior Court No. 13-2-14928-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CHRISTOPHER PIRIS,
Appellant,

v.

ALFRED KITCHING, et al.,
Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard D. Eadie, Judge

APPELLANT'S OPENING BRIEF

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The trial court erred in concluding that, in a case alleging malpractice only at sentencing, the plaintiff must first establish that he was "actually innocent" of the criminal charges charges.

II.
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Where a criminal defense attorney's error at sentencing results in the client serving 13 months in excess of the correct sentence, must the client establish his "actual innocence" of the crime before suing his attorney?

III.
STATEMENT OF THE CASE

Christopher Piris pled guilty to first degree rape of a child. The crime was alleged to have occurred when Piris was 13 years old. The victim was Piris's 10-year-old stepbrother. CP 175-187. Respondent Albert Kitching worked for the Society of Counsel for Accused Persons (SCRAP). He represented Piris in the Superior Court. CP 186, 191.

Piris committed the offense while a juvenile, but charges were not filed until after he turned 18. CP 238. At his initial sentencing, defense counsel pointed out that if Piris had been convicted as a juvenile, his

standard range would have been "up to 100 weeks" in detention. CP 239. Defense counsel argued that Piris's age at the time of the offense and the delay in reporting constituted mitigating factors. CP 240. The original sentencing judge did not find a basis to go below the standard range. But, after hearing the presentations of the State and defense, the judge said:

> What I am going to do, however, is I am going to sentence you to the bottom of the standard range which is...159 months.

CP 69. Unfortunately, the parties miscalculated that sentencing range as 159 to 211 months. CP 45. The correct sentencing range was 146 to 194 months.

Piris appealed. Eric Nielsen of Nielsen, Broman and Koch represented Piris in this Court. In the appeal, after persuasively pointing out the error in the standard range, Mr. Nielsen urged a remand for resentencing. He wrote:

> If the trial court had understood the standard range to be 146 to 194 months, it seems likely that it would have imposed the bottom of the range – 146 months.

CP 88.

On February 14, 2000, this Court reversed, in a per curiam opinion, the improperly calculated sentence. CP 193-194. That opinion states:

> Piris asks that his sentence be vacated and the case remanded for resentencing. The State concedes that Piris is

> entitled to be sentenced under the 1993 statute and agrees the case should be remanded for resentencing. We have reversed the record and find the State's concession is well taken.

CP 194.

Piris's sentence was vacated and the case was remanded for resentencing. According to Piris, he never heard from Nielsen regarding the reversal. His case was never set for resentencing. As a result, Piris served all 159 months.

In May 2012, Piris was summoned to the King County Superior Court for a probation violation. In reviewing the file, the new sentencing judge[1] realized that the sentence had been vacated and Piris had never been resentenced. He then sentenced Piris to 146 months in jail. CP 199. No one appealed or challenged this new sentence.

Piris then sued both his trial and appellate lawyers alleging negligence. CP 151-155.

The lawyers moved for summary judgment on two grounds. First, they argued that Piris could not sue because he cannot "prove his actual innocence of the charges." Second, they argued there was no claim because Piris was sentenced "within the lawful range that could be

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[1] The original sentencing judge had retired by that time.

imposed for the crimes he committed." CP 221-225.[2] The trial court granted the motion stating: "the basis for the dismissal is the 'actual innocence' requirement as set out in *Ang v. Martin*, 154 Wn.2d 477, 483-484, 114 P.3d 637 (2005)." CP 249. This timely appeal followed. CP 263-64.

IV.
ARGUMENT

The "issue of guilt or innocence is relevant, if the client's complaint is the fact of conviction, *rather than the severity of the sentence or other consequences*." 771 R. Mallen & J. Smith, *Legal Malpractice* § 26.13 (2007 Edition) (emphasis added).[3] But "actual innocence" is "not relevant if the attorney's error concerns the extent or severity of the

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[2] Judge Eadie did not address this argument and the defendants did not cross-appeal. But the defendants are collaterally estopped from arguing that the initial sentence of 159 months was the "lawful" sentence in this case. The "lawful" sentence in this case is the one imposed on May 7, 2012. *See Dillon v. Seattle Deposition Reporters, LLC*, 316 P.3d 1119 (Wash. Ct. App. Jan. 21, 2014) (setting forth elements of collateral estoppel). Moreover, both attorneys took the position that that the 159 month sentence was *not* the lawful sentence in all of the previous proceedings.

[3] Mallen and Smith have frequently been cited with approval by the appellate courts of this state. *See, e.g., Hipple v. McFadden*, 161 Wn. App. 550, 255 P.3d 730, *review denied*, 172 Wn.2d 1009, 259 P.3d 1108 (2011); *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 200, 225 P.3d 990 (2010); *Lavigne v. Chase, Haskell, Hayes & Kalamon*, P.S., 112 Wn. App. 677, 683, 50 P.3d 306, 309 (2002); *Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 97 Wn. App. 901, 109 Wn. App. 436, 988 P.2d 467 (1999), *amended on denial of reconsideration*, 33 P.3d 742, *review granted*, 141 Wn.2d 1001, 10 P.3d 404 (2000).

sentence." *Id.* Thus, where, as here, a plaintiff alleges that his attorney's negligence resulted in a sentencing error, he has met his initial burden if he alleges: (i) that defendant's negligence resulted in a legally impermissible sentence, and (ii) that he obtained post-conviction sentencing relief. *Id.* This Court has adopted this sound principle in *Powell v. Associated Counsel for Accused (Powell I),* 125 Wn. App. 773, 106 P.3d 271, *review granted, cause remanded*, 155 Wn.2d 1024, 123 P.3d 120 (2005) and *Powell v. Associated Counsel for the Accused, (Powell II)*, 131 Wn. App. 810, 129 P.3d 831 (2006), *opinion adhered to on reconsideration.*

Powell pleaded guilty to solicitation to deliver a material in lieu of a controlled substance, in violation of RCW 69.50.401(c). The offense was a gross misdemeanor, for which the maximum term of confinement is one year. But at the sentencing hearing, Powell was erroneously sentenced for a Class C felony to 38.25 months of confinement. Powell obtained post-conviction relief from this Court and the erroneous sentence was corrected. He was subsequently released after serving 20 months.

Powell promptly sued his lawyers. The trial court dismissed the legal malpractice action and he appealed. But this Court reversed, concluding that even though, in some cases, a criminal defendant must demonstrate actual innocence in order to recover damages against his

criminal defense lawyer, sentencing malpractice cases did not include such a requirement. This Court said:

> Although we have no particular quarrel with the innocence requirement generally, we agree with Powell that its application in this case is unfair. And we observe that postconviction relief, in this instance, has not entirely provided Powell with what competent representation arguably should have afforded in the first instance. Powell has served substantially more time than the trial court was authorized to impose for a gross misdemeanor. We conclude that blind application of the innocence requirement to the facts of this case would go beyond the public policy to be served by the innocence requirement.
>
> The policy to be served is that regardless of the attorney's negligence, a guilty defendant's conviction and sentence are the direct result of his own perfidy, and no one should be permitted to take advantage of his own wrong. But "an innocent person wrongfully convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss."
>
> Powell's situation is closer to that of an innocent person wrongfully convicted than of a guilty person attempting to take advantage of his own wrongdoing. Powell has no quarrel with having been incarcerated for the period of time justified by the gross misdemeanor that he pleaded guilty to having committed. In sum, we decline to extend the innocence requirement to these facts, for to do so would not serve the public policy ....

Powell I, 125 Wn. App. at 777-78 (internal citations omitted).

The lawyers in *Powell* sought review in the Washington State Supreme Court just before that Court issued its decision in *Ang v. Martin*, supra. The Washington Supreme Court entered a brief order granting

review and remanding for consideration in light of *Ang. Powell v. Associated Counsel for Accused*, 155 Wn.2d 1024, 123 P.3d 120 (2005).

On remand, this Court reiterated its previous position. The Court said:

> Because the reasons articulated in *Ang* for requiring a plaintiff to prove his innocence as part of a legal malpractice claim are not applicable in Powell's situation, we reaffirm our prior opinion.

Powell II, 131 Wn. App. at 811. Again, the Court stated that none of the policy concerns that mandated the adoption of the "innocence" requirement in *Ang* were present in a case where the client's only argument was that trial counsel's negligence resulted in the client serving a sentence longer than that ultimately imposed in the case.

In *Powell II*, 131 Wn. App. at 813, the Court reasoned that our state Supreme Court cases imposing an "innocence" requirement – including *Ang v. Martin* – stemmed from the defendants' representation during the guilt or innocence phase of the plaintiffs' criminal trials. In contrast, Powell did not contest his guilt, and the allegations of malpractice stemmed entirely from his attorneys' failure to object to the court sentencing him to a much longer sentence than allowed by law. This Court reasoned that the justifications for requiring proof of actual

innocence do not apply in an action complaining about the severity of the sentence.

This case is indistinguishable from *Powell I and II*. In the *Powell* cases, this Court held that because Powell served more than the maximum sentence for the crime he committed, harm caused by his unlawful restraint was not the direct consequence of his own bad act. The harm was caused by his lawyers' failure to properly ascertain the correct sentence.

The same is true here. Piris served the illegal sentence of 159 months. The additional 13 months he served was due, not to his behavior, but to errors committed by his lawyers.

In *Powell*, this Court noted that Powell's legal malpractice action did not discount or compete with the procedural protections afforded the criminal justice system. Powell secured his release from unlawful restraint using criminal justice procedures. But the criminal justice system provided him no remedy for the harm suffered by serving eight months longer than the crime required. *Powell II*, 131 Wn. App. at 814.

The same is true here. Piris filed a notice of appeal and his sentence was corrected by this Court. But because of the failures of his attorneys, both in miscalculating his standard range initially and in failing to reset the matter for resentencing once the unlawful sentence was

vacated, Piris suffered by serving 13 months longer than his crime required.

In *Powell II,* this Court said that Powell's complaint was not that he simply "could have gotten a better deal." *Powell II*, 131 Wn. App. at 814. Powell was entitled to be lawfully sentenced.

The same is true here. Piris was entitled to be lawfully sentenced. This Court recognized that when it reversed and remanded his case for a new sentencing hearing.

As with *Powell,* Piris's lawsuit will not have a chilling effect on the defense bar. Presumably, there are few cases where an illegal sentence is reversed on appeal where that reversal goes unnoticed by any of the lawyers and the Court for 12 years. To the contrary, Piris's suit will remind the defense bar, the prosecution and the Superior Court to be mindful of the fact that their mistakes can result in significant harm to people – even those sentenced to lengthy prison terms.

Finally, in *Powell II*, 131 Wn. App. at 815 this court said:

> [R]ecognizing a limited exception to the rule requiring proof of actual innocence should not cause a flood of nuisance litigation. The highly unusual alleged facts of this case, whereby an alleged egregious error by defense counsel allowed a defendant to be sentenced to a term substantially longer than the maximum term allowed by statute, and the defendant actually served time in prison beyond the correct maximum term, are not likely to occur with any frequency.

The same is true in this case. It is highly unusual for a criminal defendant to be sentenced erroneously, receive relief, but be denied a timely resentencing in the trial court. Despite the errors in this case, this sort of failure is not likely to occur with any frequency. But, because it did happen to Piris – through no fault of his own – he is entitled to sue those responsible for his damages.

Judge Eadie was simply incorrect as a matter of law when he dismissed this case on summary judge by citing *to Ang v. Martin*. This Court clearly said in the *Powell* cases that *Ang* has no application to a legal malpractice claim where the client alleges that his attorney's negligence resulted in a sentencing error, that lawyer's negligence resulted in a legally impermissible sentence and the client obtained post-conviction sentencing relief.

V.
CONCLUSION

For the reasons argued above, this Court should reverse the summary judgment order dismissing Piris's claims of attorney malpractice.

DATED this 13th day of February, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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