

FILED
SUPREME COURT
STATE OF WASHINGTON
8/20/2018 11:55 AM
BY SUSAN L. CARLSON
CLERK

No. 96075-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RICHARD LEE,

Petitioner,

v.

CITY OF SEATTLE, ET AL.,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I INTRODUCTION

The Court of Appeals correctly determined that the widow and daughter of Kurt Cobain, the former lead singer of Nirvana, had a Fourteenth Amendment substantive due process right to prevent the dissemination of images of Mr. Cobain's dead body as it was found almost twenty-five years ago. Relying on this right, the court correctly determined that the death-scene images of Mr. Cobain were exempt from disclosure under Washington's Public Records Act (PRA). These conclusions were consistent with cases from this Court, the United States Supreme Court, the U.S. Court of Appeals for the Ninth Circuit and with the PRA. Because none of the criteria set out in RAP 13.4(b) are met, there is no need for this Court to review the Court of Appeals' unpublished decision.¹

II RESTATEMENT OF ISSUE

Assuming the Court of Appeals should have reached the issue, did it correctly determine that the death-scene images of Mr. Cobain were exempt from disclosure under the PRA?

¹ In a letter dated July 19, 2018, the Clerk of this Court noted that it construed Petitioner Richard Lee's "Motion and Declaration For Waiver of Civil Fees and Surcharges" as a motion to waive the filing fee. Because Mr. Lee paid the Superior Court and appellate court filing fees for the prior proceedings in this case, and his only excuse for his failure to provide sufficient information to this Court about his purported indigency is an unspecified and unsubstantiated fear that Mr. Cobain's widow will apparently harm him if he does, the City has serious reservations as to whether Mr. Lee meets the procedural and substantive requirements set forth in RAP 15.2.

III RESTATEMENT OF THE CASE

The City adopts the Restatement of the Case set forth by the Cobains, and further adopts the Court of Appeals discussion of the relevant facts contained in the unpublished opinion. *See* Opinion at 2-4. For example, there is no dispute that the City provided Mr. Lee with its entire investigative file, except for the death-scene images and certain redactions that Mr. Lee no longer challenges on appeal. *See id.* at 3

IV ARGUMENT

Mr. Lee's Petition should be denied because not only did the Court of Appeals correctly decide this case, none of the criteria set forth in RAP 13.4(b) are satisfied.² While difficult to decipher, Mr. Lee's argument appears to be that even if the Cobains possessed a constitutional right to prevent the dissemination of the death-scene images of Mr. Cobain, the PRA nevertheless requires disclosure of those documents. This is wrong.

A. Procedural problems counsel against review.

Before turning to the merits, it is important to note that the Court of Appeals correctly held that Mr. Lee waived his right to challenge the trial

² While Mr. Lee references RAP 13.4, *see* Petition at 5; his Petition never explains which specific criteria is satisfied. As best as the City can tell, Mr. Lee is relying on RAP 13.4(b)(3) and/or (4), because he does not argue that the unpublished decision conflicts with other any other decisions issued by other Courts of Appeals, this Court or the United States Supreme Court.

court's substantive due process ruling by failing to address the issue in his opening brief or assign error to the trial court's ruling in this regard. *See* Opinion at 4-7. Because of this ruling, the remainder of the Court of Appeals' decision regarding the merits is non-precedential dictum, and therefore review is not warranted under RAP 13.4(b)(3) and (4). Indeed, the Court of Appeals recognized as much by noting that it was only addressing the merits "because of the near quarter-century of tenacity that Lee has displayed in pursuing his theory that Mr. Cobain was murdered, we believe it will suit the parties' interest for us to expound upon the wisdom and propriety of the trial court's order." Opinion at 7.

Consequently, this case presents an extremely poor vehicle for this Court to address the interplay between constitutional rights and the PRA. To properly do so, this Court would have to excuse Mr. Lee's undisputed procedural errors, which without question put both the City and the Cobains at a procedural disadvantage. Review should be denied on this basis alone.

B. The Court of Appeals correctly determined that the death-scene images were exempt from disclosure.

It is axiomatic that statutory rights, like PRA disclosure rights, must yield to constitutional imperatives. *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013) ("We have recognized that the PRA must give way to constitutional mandates."); *Nissen v. Pierce County*, 183

Wn.2d 863, 884, 357 P.3d 45 (2015) (“Of course, the public’s statutory right to public records does not extinguish an individual’s constitutional rights in private information.”); *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 808, 246 P.3d 768 (2011) (agreeing that U.S. Constitution is an “other laws” under the PRA). Recognizing this, the Court of Appeals correctly determined that the substantive component of the Fourteenth Amendment’s due process clause acts as an “other statute” under RCW 42.56.070(1) and therefore can be the basis for properly exempting a public record from disclosure. *See* Opinion at 13-14. Mr. Lee does not challenge this determination; rather, he seems to argue that his statutory PRA right trumps the Cobains’ constitutional rights. This, of course, is not the law because the PRA does not, nor could it, trump the privacy rights protected by the United States Constitution, which is the supreme law of the land.

Notwithstanding this basic tenet of constitutional law, the purpose and structure of the PRA supports the conclusion that constitutional privacy rights are protected under the PRA. When the PRA was enacted, the people did so “mindful of the right of individuals to privacy.” *Nissen*, 183 Wn.2d at 887 (2015 (citation and quotation omitted); *see also* RCW 42.56.070(1) (requiring agencies to delete information “to prevent an unreasonable invasions of personal privacy interests protected by this chapter[.]”). And this Court has recognized “[t]he general purpose of the exemptions to the

Act's broad mandate of disclosure is to exempt from public inspection those categories of public records most capable of causing substantial damage to the privacy rights of citizens." *Limstrom v. Ladenburg*, 136 Wn.2d 595, 607, 963 P.2d 869 (1998). Given this, it is completely consistent with the PRA's purpose and structure to conclude, as the Court of Appeals did, that once a party establishes that their constitutional rights will be destroyed by disclosure, the PRA will not mandate disclosure. *See, e.g., Roe v. Anderson*, No. 3:14-CV-05810 RBL, 2015 WL 4724739, at * 3 (W.D. Wash. Aug. 10, 2015) ("The PRA, by design, cannot violate the Constitution, and constitutional protections[.]"). If it were otherwise, as Mr. Lee suggests, then the PRA would trump the Federal (or State) Constitution.

The Court of Appeals dictum that the Cobains have a constitutional right to prevent the dissemination of the death-scene images of Mr. Cobain is correct, and consistent with decisions from this Court, the United States Supreme Court and the U.S. Court of Appeals for the Ninth Circuit.

For example, in *Reid v. Pierce County*, this Court held that the immediate relatives of a decedent have a protectable privacy interest in the autopsy records, including photographs, of the decedent grounded in maintaining the dignity of the deceased. 136 Wn.2d 195, 212, 961 P.2d 333 (1998). Likewise, the United States Supreme Court's decision in *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004),

supports the Court of Appeals' conclusion. There, Vincent Foster Jr., deputy counsel to President Clinton, committed suicide in a public park and an individual submitted a FOIA request for death-scene photos because he (like Mr. Lee) questioned the adequacy of the government's investigation into the death. Relying on the "well-established cultural tradition acknowledging [that] a family's control over the body and death images of the deceased has long been recognized at common law," the Court held that personal privacy extends to the memory of the deceased by close family members. *Id.* at 168. This is so because surviving family members "seek to be shielded by the exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased." *Id.* at 166.

Building on *Favish*, the U.S. Court of Appeals for the Ninth Circuit held, like the Court of Appeals here, that the substantive component of the Fourteenth Amendment's due process clause provides a constitutional right to control the dissemination of images of a dead relative. *Marsh v. County of San Diego*, 680 F.3d 1148, 1153 (9th Cir. 2012). In *Marsh*, a retired assistant district attorney kept a photocopy of an autopsy photo of a 2-year old boy from a case he tried, and years later turned over the photo and a related memo to a newspaper and television station. *Id.* at 1152. When the

boy's mother sued, the court held that the family had a constitutional right to control the dissemination of the images. *Id.* at 1155.

Marsh did not limit its holding to statutory rights or the common law; rather, it looked to constitutional principles. Initially, the court noted that a common law right rises to the level of a constitutional right if it is “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty.” *Id.* at 1154 (quotation omitted). *Marsh* then looked to *Favish*’s recognition that “[t]he well-established cultural tradition acknowledging a family’s control over the body and death images of the deceased has long been recognized at common law.” *Id.* (quoting *Favish*). Consequently, the Ninth Circuit concluded that a family member’s right to privacy in their loved one’s death images is protected by substantive due process because “[f]ew things are more personal than the graphic details of a close family member’s tragic death. Images of the body usually reveal a great deal about the manner of death and the decedent’s suffering during his final moments—all matters of private grief not generally shared with the world at large.” *Id.* Thus, the court held that the “public display of death images [is] the kind of conduct that is likely to cause the family profound grief and therefore shocks the conscience and offends the community’s sense of fair play and decency.” *Id.* at 1155 (quotations omitted). The Court of Appeals’ decision in this case properly relied on *Marsh* in concluding

that disclosing the death-scene images would violate the Cobains' constitutional rights.³ *Reid*, *Favish*, and *Marsh* all support the Court of Appeals' decision in this case because they all recognize that family members of a deceased individual have a common-law and constitutional privacy interest that would be violated by disclosing death-related photos and records of deceased loved ones.

While the PRA mandates broad disclosure of public record, its mandate "is not absolute" because its "exemptions are provided solely to protect relevant privacy rights or vital governmental interests that sometimes outweigh the PRA's broad policy in favor of disclosing public records." *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 432, 327 P.3d 600 (2013) (citation omitted). Interpretations of the PRA must "be grounded in" this policy and it must be construed to "avoid absurd results." *Id.* at 431. Here, the Court of Appeals' conclusion that the PRA did not mandate the destruction of the Cobains' constitutional right is correct as a matter of law and consistent with the PRA. Review should be denied.

³ While Mr. Lee spends considerable energy explaining why he believes the death-scene images do not show any blood, that is beside the point. The constitutional right to control the disposition of images of a loved one's deceased body does not turn on the "gory" or "graphic" nature of those images. Rather, it turns on the deeply-rooted right to control the disposition of a loved one's body.

V CONCLUSION

For the foregoing reasons, and for those explained by the Cobains,
Mr. Lee's Petition should be denied.

RESPECTFULLY SUBMITTED this 20th day of August 2018.

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DECLARATION OF SERVICE

I, Marisa Johnson, certify under penalty of perjury under the laws of the State of Washington and the United States that, on the date below, I served the document to which this Certificate is attached to the parties listed below via email:

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Dated this 20th day of August 2018.

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SEATTLE CITY ATTORNEY'S OFFICE - GOVERNMENT AFFAIRS

August 20, 2018 - 11:55 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96075-5
Appellate Court Case Title: Richard Lee v. City of Seattle, et al.
Superior Court Case Number: 15-2-19452-6

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