

NO. 64350-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS MILLER,

Appellant.

2010 AUG 24 PM 4:19

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

The Honorable Ellen J. Fair, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT BASED ITS DECISION PARTLY ON AN ERRONEOUS VIEW OF THE LAW.

A trial court abuses its discretion when its decision is based, even in part, on the wrong legal standard or facts unsupported by the evidence. See Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 344-45, 858 P.2d 1054 (1993). In Fisons, the lower court denied discovery sanctions based “in part” on four incorrect legal rationales. Id. at 344-45. The appellate court also found “many” of the factual bases for the trial court’s decision were unsupported by the record. Id. at 345. After elucidating the proper legal standard, the court reversed the denial of sanctions and remanded to determine the appropriate amount. Id. at 356.

The court should reverse in this case as well because the trial court’s decision was similarly based in part on its incorrect understanding of the law. The State’s brief appears to conflate two very different inquiries. The question is not whether sufficient evidence existed to support the court’s decision; Miller does not challenge the sufficiency of the evidence. The question is whether this court would have made the same decision without the erroneous understanding of the law.

In support of its argument to the contrary, the State cites T.S. v. Boy Scouts of America, 157 Wn.2d 416, 431-32, 138 P.3d 1053 (2006), State v.

Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989), and State v. Badger, 64 Wn. App. 904, 827 P.2d 318 (1992). None of these cases supports the State's position.

In T.S., the Boy Scouts appealed a discovery order, arguing the trial court abused its discretion by failing to apply the balancing test from Snedigar v. Hodderson, 114 Wn.2d 153, 158, 786 P.2d 781 (1990). T.S., 157 Wn.2d at 418. The court held there was no abuse of discretion because the Snedigar test did not apply. Id. T.S. merely stands for the proposition that there is no abuse of discretion when the court did *not* actually apply the wrong legal standard. Here, the State does not dispute that the court's legal analysis of the remaining community custody time was incorrect.

The State appears to rely on the T.S. court's statement that a trial court's decision is based on untenable grounds when it is "reached by applying the wrong legal standard." See Brief of Respondent at 12; T.S., 157 Wn.2d at 424. But often there are many legal and factual components to a single decision. The State appears to argue that a court only abuses its discretion when every legal and factual basis for the decision is incorrect. But T.S. does not support that assertion.

Nor does Jackman. In Jackman, the trial court granted a new trial based on several theories, all of which the appellate court found legally insufficient. 113 Wn.2d at 776. The trial court abused its discretion in

granting a new trial based on jury misconduct, newly discovered evidence, and the prosecutor's misstatement during closing argument. Id. at 779-83. Because, under the circumstances, none of the stated grounds warranted a new trial, the new trial order was reversed and the guilty verdict reinstated. Id. at 774.

But the State's citation to Jackman is also to no avail because like T.S., Jackman does not stand for the assertion that a court may properly base its decision on a partial misapprehension of the law. Merely because in Jackman all of the legal grounds for the new trial were insufficient does not mean that no abuse of discretion exists where only part of the court's legal analysis is wrong.

Finally, the State quotes the Badger decision that "These admissions constitute evidence of serious noncompliance which, standing alone, would support revocation." 64 Wn. App. at 909. The Badger opinion involves two separate lines of attack on the trial court's decision. First, Badger argued the court improperly considered hearsay and without that hearsay, there was insufficient evidence of the violations. Id. at 907-09. The court concluded the hearsay was properly admitted and even without it, Badger's admissions were sufficient evidence of the violations. Id. at 908-09.

The quotation cited in the State's brief occurs in this context, the court's discussion of a challenge to the sufficiency of the evidence of the

violation. See Brief of Respondent at 13 (quoting Badger, 64 Wn. App. at 909). Miller makes no such challenge and this quote is inapposite to the issues raised on this appeal. Badger actually supports Miller's position because, despite the clearly sufficient evidence of the violations, the court went on to reverse the SSOSA revocation because the court "expressed doubt" about whether it had discretion to impose sanctions in lieu of revocation. 64 Wn. App. at 910.

In considering whether to revoke Miller's SSOSA, the court below stated,

[T]he fact that this behavior has occurred so late in the game is extremely unfortunate for Mr. Miller, and in a lot of ways, it's probably unfortunate for the community, because the Court is being put in a position where Mr. Miller is probably going to be incarcerated beyond what's actually necessary, given his level of risk.

RP 101-02. This statement indicates the court would likely have considered other options, would have found revocation was not necessary if it were not "so late in the game," *i.e.* if there were more community custody time remaining.

The T.S. court explained judicial discretion is judgment exercised "with regard to what is right and equitable under the circumstances and the law." 157 Wn.2d at 423 (quoting State ex rel. Clark v. Hogan, 49 Wn.2d 457, 462, 303 P.2d 290 (1956)). When, as here, the court labored under a

misapprehension regarding the circumstances or the law, there has not been a proper exercise of discretion. Because it is likely the trial court would not have revoked Miller's SSOSA had it correctly understood the remaining term of community custody, this Court should reverse the revocation and remand so the trial court may exercise its discretion.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Miller requests this Court reverse the order revoking his SSOSA.

DATED this 24th day of August, 2010.

Respectfully submitted,

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v.)	COA NO. 64350-9-1
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF AUGUST 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WALTER SOWA
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- [X] NICHOLAS MILLER
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SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF AUGUST 2010.

x *Patrick Mayovsky*

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