

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

IN RE PERSONAL RESTRAINT OF BOB R. KASEWETER  
BOB R. KASEWETER,  
Petitioner/Appellant

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

The Honorable Robert A. Lewis, Judge

APPELLANT'S REPLY BRIEF

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## A. ARGUMENT

In his opening brief, Bob Kaseweter argued that the trial court erred in denying his personal restraint petition because (1) James Shirk's testimony at Mr. Kaseweter's trial was perjured, (2) Mr. Shirk's recantation at a subsequent reference hearing was reliable, and (3) insufficient independent evidence remains to support the convictions. In its response brief, the State does not address the fact that James Shirk's original testimony was perjured. Nor does the State provide any argument regarding the sufficiency of the remaining evidence. The State argues only that the recantation was unreliable because James Shirk's testimony has changed consistently with that of his brother, Donovan.

The State fails to apply the proper legal standard for evaluating reliability. A review of the appropriate factors reveals that the recantation was reliable. Furthermore, the State ignores the fact that a new trial must be granted based on James Shirk's perjury at the original trial, regardless of his credibility at the reference hearing. Because Bob Kaseweter's convictions depended on the perjured testimony of one of the actual perpetrators of the crimes, his personal restraint petition must be granted.

1. THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE CIRCUMSTANCES SURROUNDING JAMES SHIRK'S RECANTATION AT THE REFERENCE HEARING AS CONTRASTED WITH THE CIRCUMSTANCES SURROUNDING HIS TRIAL TESTIMONY.

a. In determining the reliability of a recantation, the trial court must consider the circumstances surrounding the witness's recantation and the original testimony. Because it did not properly consider the total circumstances of the case, the trial court's finding that James Shirk's recantation was unreliable was an abuse of discretion. See State v. Macon, 128 Wn.2d 784, 802, 911 P.2d 1004 (1996). In evaluating the reliability of a witness's recantation, a court examines both the circumstances surrounding the witness's recantation, and the reliability of the original trial testimony. In re Landon, 69 Wn. App. 83, 92-93, 848 P.2d 724 (1993). Important factors to consider include the witness's age, the reasons for recanting, relevant facts at the time of the recantation and the passage of time between the testimony and the recantation. Macon, 138 Wn.2d at 801-03 (finding that the trial court properly considered the total circumstances by examining these factors). A court should also consider whether the recantation came about as the result of undue influence, coercion, or improper motive. In re Clements, 125 Wn. App. 534, 644 n.3, 106 P.3d 244 (2005). It is

only through this reasoned analysis that a court can assess the reliability of a recantation.

b. The trial court did not consider relevant factors, including the changes in James Shirk's circumstances and his reasons for recanting, when it assessed the reliability of his recantation. The State does not address the Macon / Clements factors in its response brief. A review of these factors demonstrates the reliability of the recantation.

Uncontroverted testimony established that James Shirk turned his life around in the fifteen years between his recantation at the reference hearing and his testimony at Mr. Kaseweter's trial. At the time of the reference hearing, James Shirk was married, living in Idaho, working in construction and clean from alcohol and drugs. 10/25/06 RP 13-14; 21-22. At the reference hearing, five witnesses described him as trustworthy, honest, dependable, and as a person who is motivated to do the right thing. 10/25/06 RP 4-13, 98-116; Ex. 3, track 3, Ex. 3, track 4; see Opening Brief 16-20. Both of his former supervisors at Traveler's Oasis Truck Plaza, where James was previously employed, described James as being credible, very honest, and dependable. 10/25/06 RP 100-113. His wife, Vickie,

testified that since she met James in 2000, James had abstained from drugs and alcohol and that she can “always count on him to tell [her] the truth.” 10/25/06 RP 9-10.

This description of James Shirk stands in stark contrast to the attributes used to describe Shirk at the time of Mr. Kaseweter’s trial. During that time, he snorted methamphetamine and drank alcohol on a daily basis. 10/25/06 RP 19-20. At the reference hearing, James Shirk candidly admitted to his past behavior: “I’d lie, I’d cheat, I’d steal. . . I did whatever it took to get what I thought I needed.” Id. at 20. At the time of Mr. Kaseweter’s trial, James Shirk needed to avoid a lengthy prison term. He initially faced 25 years for the crimes he committed. 6/15/93 RP 102-04. However, in exchange for testifying against Mr. Kaseweter, the prosecutor offered him significantly less time – only nine months. Id. For someone who put himself first, this was an easy choice to make. If lying got him what he wanted, lying in court was a risk worth taking.

It was manifestly unreasonable for the trial court to fail to take into consideration any of the above circumstances surrounding James Shirk’s trial testimony and his recantation of that testimony. The trial court’s order makes no mention of the character witnesses who testified to James Shirk’s credibility at the reference hearing.

CP 34-46; see Opening Brief 15-19. Nor did it acknowledge the changes – including six years of sobriety (03/25/06 RP 20) – that James Shirk had made in his life. The trial court abused its discretion by acting “without consideration of and in disregard of the facts.” In re Dyer, 157 Wn.2d 358, 363, 365-66, 139 P.3d 320 (2006) (Indeterminate Sentencing Review Board abused its discretion by disregarding the evidence presented at a parole hearing and denying parole).

It was also manifestly unreasonable for the court to not consider the reasons for James Shirk’s recantation. His sobriety, his age, his stability, as well as the passage of time between his testimony and the recantation, establish that he was more mature, had better judgment, and had greater motive to tell the truth than he did at the time of his original testimony. James Shirk testified that he wanted to “clear the record” and “clear his conscious” because he did not want an innocent person to have to serve time for a crime that the person did not commit. 10/25/06 RP 45-46. The recantation was the product of his growing remorse and his desires to reform his life, and to make amends – a process that requires some time to bear fruit.

As the court properly noted, James Shirk was not subject to undue influence or motive or coercion when he made his recantation, circumstances which the Clements court found to weigh heavily on a reliability determination. Clements 125 Wn. App. 644 n.3 The trial court concluded that the circumstances surrounding the recantation “do not suggest improper influence or coercion.” CP 44. The court emphasized that James Shirk did not have any contact, directly or indirectly, with Mr. Kaseweter and that Mr. Kaseweter did not exert any influence over him. CP 44-45. Finally, the court noted that there “is no indication he [James] was promised anything or threatened in some way if he did not change his statement.” Id.

The State fails to address any of the above factors, as required under Macon and Clements and instead argues that the recantation is unreliable because James Shirk recanted only to support his brother. See Response at 7. But at the reference hearing, James Shirk testified he had not talked with his brother since the crime. 10/25/06 RP 18. He was not expecting to revisit the details of the crime when he received a visit from Steve Lewis and Hebert Filer in 2003 – in fact he initially thought the two men were police officers or bounty hunters. 10/25/06 RP 72, 30, 93.

Although James Shirk first said that his trial testimony was accurate during the 2003 meeting, he came forward with the truth after realizing that Donovan Shirk had lied to him about Mr. Kaseweter's involvement in the crimes. 10/25/06 RP 44-45.

After reading Donovan Shirk's declaration clearing Bob Kaseweter of any wrongdoing, James Shirk realized "the punk lied to me." 10/25/06 RP 44. He went on to testify about his next thoughts:

You [Donovan] made me believe it was someone else that was behind it when it was all you to begin with, and then I got someone else to go to jail.

Id.

James Shirk then realized that he needed to do the right thing by admitting that his testimony was false. 10/25/06 RP 42-44. Three years after speaking with Lewis and Filer, James Shirk testified at the reference hearing, under oath and subject to cross-examination, that his original trial testimony was false. 10/25/06 RP 13-68. He came forward with the truth, even though he knew he could face perjury charges for changing his trial testimony. 10/25/06 RP 54-55; 79.

The trial court's conclusion that "Donovan's influence over James continues" has no support in the record. See CP 45. It was

an abuse of discretion to use this conjecture as the primary basis for its reliability determination. In re Dyer, 157 Wn.2d at 365-66 (Indeterminate Sentencing Review Board abused its discretion by disregarding the evidence presented at a parole hearing and basing its denial of parole primarily on speculation and conjecture); see also State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007) (trial court abuses discretion when it relies on unsupported facts). The magnitude of the court's error is compounded by its failure to take into consideration the testimony of numerous character witnesses, the changes in James Shirk's life, his motivation for recanting and the lack of coercion – all relevant factors under Macon and Clements.

The trial court correctly noted that its task was to determine whether the recantation "would be persuasive to a reasonable jury considering all the evidence." CP 44. However, it was untenable for the court to conclude that James Shirk's recantation was not the type of evidence that would be persuasive to a jury. Id. Any reasonable juror would find the testimony of a married, hard-working, sober, honest, individual more persuasive than that of a methamphetamine and alcohol addict, who was testifying to avoid a 25-year prison sentence. By ignoring the weight of the evidence

supporting the recantation, while focusing on a factor based on conjecture, the trial court abused its direction.

c. James Shirk's original testimony was perjured and a new trial should be granted. The State's response brief also fails to address the fact that regardless of the reliability of James Shirk's testimony at the reference hearing, a new trial must be granted because his testimony at Mr. Kaseweter's trial was perjured. The trial court found that James Shirk "has changed his version of events on several occasions, in each instance to coincide with Donovan Shirk's version of events." CP 45. At the reference hearing, James Shirk agreed that this was true with respect to his testimony at Mr. Kaseweter's original trial; that is, he perjured himself because Donovan made him believe Mr. Kaseweter was involved. 10/25/06 RP 44.

A new trial must be granted if perjured testimony influenced the jury's decision because perjured testimony violates a defendant's due process rights. Jackson v. Virginia, 443 U.S. 307, 314-16, 99 S.Ct. 2781, 61 L.Ed. 560 (1979). James Shirk's testimony at trial provided the only direct evidence of Mr. Kaseweter's guilt. It indisputably influenced the jury's decision. Accordingly, Mr. Kaseweter must be granted a new trial.

2. THE TRIAL COURT ERRED IN CONCLUDING THAT INDEPENDENT EVIDENCE BEYOND JAMES SHIRK'S PERJURED TESTIMONY SUPPORTED MR. KASEWETER'S CONVICTIONS.

As discussed in Mr. Kaseweter's opening brief, absent James Shirk's original, perjured testimony, insufficient independent evidence supported Mr. Kaseweter's convictions. Opening Brief at 20-28. The State did not address this argument at all in its response brief. Its only comment on the issue was the following:

The trial court went on from there to discuss the independent corroborative evidence of Kaseweter's involvement in these crimes. It was the final conclusion of the judge that James Shirk's recantation was not the type of evidence which would justify a new trial.

Response Brief at 6-7. This conclusory statement is inadequate to rebut Mr. Kaseweter's showing that insufficient independent evidence remains to uphold the convictions.

The State conceded at the reference hearing that the only direct evidence linking Mr. Kaseweter to the crimes was James Shirk's original perjured testimony and that "the rest is circumstantial evidence." 10/25/06 RP 143. The State also acknowledged that without James Shirk's testimony it would be "difficult" for the State to prove beyond a reasonable doubt that Mr. Kaseweter committed these crimes. 10/25/06 RP 141. The State is

right. Indeed, it would not only be difficult for the State to prove its case, but there would be insufficient evidence as a matter of law to support the convictions. See Opening Brief at 20-28. Accordingly, Mr. Kaseweter's Personal Restraint Petition should be granted.

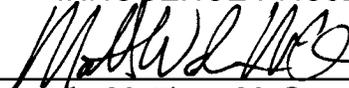
B. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Kaseweter respectfully requests that this Court reverse the trial court order denying his personal restraint petition, and remand for a new trial.

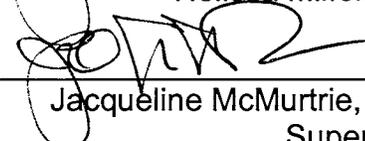
Dated this 8<sup>th</sup> day of February, 2008

Respectfully Submitted,

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IN RE THE PERSONAL RESTRAINT  
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BOB R. KASEWETER,  
Petitioner.

COA No. 36234-1-II

**CERTIFICATE OF SERVICE**

I certify that on the 8th day of February, 2008, I caused a true and correct copy of the foregoing Reply Brief to be served upon the following individuals, by depositing same in the United States Mail, first class, postage prepaid:

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