

NO. 36846-3-II

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

2009 JAN 21 PM 6

FILED
COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ROY SCOTT,

Appellant.

09 JAN 23 AM 11:40
STATE OF WASHINGTON
BY DA
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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

The Honorable Michael J. Sullivan, Judge

REPLY BRIEF OF APPELLANT

DANA M. LIND
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. <u>Scott Acted With Reasonable Diligence in Discovering the New Evidence.</u>	1
2. <u>D.H.'s Affidavit and Dufour's Recent Statement, if True, Constitute Material Facts not Previously Presented that Would Require Vacation of Scott's Conviction.</u>	5
B. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Collins,
45 Wn. App. 541, 726 P.2d 491 (1986) 6

State v. D.T.M.,
78 Wn. App. 216, 896 P.2d 108 (1995) 2, 6

State v. Gosser,
33 Wn. App. 428, 656 P.2d 514 (1982) 7

State v. Macon,
128 Wn.2d 784, 911 P.2d 1004 (1996) 1, 6

State v. Rolax,
84 Wn.2d 836, 529 P.2d 1078 (1974),
overruled on other grounds,
Wright v. Morris,
85 Wn.2d 899, 540 P.2d 893 (1975) 6

Wright v. Morris,
85 Wn.2d 899, 540 P.2d 893 (1975) 6

A. ARGUMENT IN REPLY

The state agrees its three key witnesses against Scott have since recanted their testimony. Brief of Respondent (BOR) at 20. The state also agrees that "recantation may be generally considered 'newly discovered evidence[.]'" BOR (citing State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996)). Nevertheless, the state argues Scott is not entitled to his day in court "based upon the time delay in bringing this latest motion and the unreliability of the 'recantations' by various witnesses." BOR at 20. The state's arguments should be rejected.

1. Scott Acted With Reasonable Diligence in Discovering the New Evidence.

As the state points out, Scott filed the motion to vacate in October 2005, approximately two and one-half years after the resentencing and about four years after the original sentencing. But the period of time passed is not dispositive. Whether Scott acted with reasonable diligence during that time is the dispositive issue. Under the circumstances of this case, this Court should find Scott acted with reasonable diligence.

Since Scott's original sentencing in 2001, up until at least May 2003, when he was resentenced, the state had no idea of D.H.'s whereabouts. Any suggestion that Scott, who was incarcerated and prohibited from contacting D.H., was in a better position to locate D.H. than the state

would be absurd. Moreover, Scott had no reason to believe D.H. would recant his 2001 statements to police. See Brief of Appellant (BOA) at 29 (citing State v. D.T.M., 78 Wn. App. 216, 896 P.2d 108 (1995) ("Given the consistency of M.J.'s statements throughout the investigation and pretrial proceedings, her recantation could not have been discovered before trial with the exercise of due diligence"))).

As Scott later declared, it was not until he went pro se in the involuntary commitment case that his investigator was able to locate D.H. in Oregon. CP 148. It was not until that time Scott had the resources and the reigns to direct the investigation. Under the circumstances, Scott acted with reasonable diligence in discovering D.H.'s and the other witnesses' new testimony.

The state claims otherwise, however, writing: "nothing prevented Scott from having a trial when the Washington Supreme Court granted his PRP in April 2003." BOR at 24. The state's argument should be rejected as disingenuous. The Supreme Court ordered the lower court to grant Scott's choice of remedy "unless the court finds, after an evidentiary hearing, that there are compelling reasons not to allow the chosen remedy." CP 42. The state argued the remedy of withdrawal would pose a hardship on the state because D.H.'s whereabouts were unknown. CP 273.

Accordingly, there is no guarantee the court would have allowed Scott to withdraw his plea had he not instead agreed to specific performance.

And significantly, at the time of Scott's choice, opting for specific performance would have entitled him to immediate release. BOA at 7. It was not until after the state filed the involuntary commitment petition that Scott would have not only the motivation but the resources to hire a private investigator to find D.S. Scott should not be penalized for relying upon what arguably was an illusory promise of immediate release.

Moreover, the state's characterization of Scott's motion to vacate as a "third bite of the apple" is incorrect. Mr. Scott was misinformed about the standard range for his offense at the time of his plea. CP 7, 230, 236. Scott's right to resentencing should not be held against him when it was the state that misinformed him in the first place. Scott's motion to vacate is more aptly characterized as a first bite. He had no reason to believe D.H. would change his story until he actually did so during the interview held in connection with the involuntary commitment proceeding -- a proceeding instituted by the state, not Scott.

Counsel for the state asserts it would pose an undue hardship on the state to allow Scott to withdraw his plea because "[a]t this point, the trail obviously has gone cold, and the State would not be able to pursue

additional charges if Mr. Scott were returned to the status quo ante." BOR at 26. In support of this bald assertion, the state cites to nothing in the record. In fact, the record shows the state -- through its investigator in the civil commitment proceeding -- successfully located Johan Fernlund and Connie Dufour. CP 339; RP (3/30/07) 4-5. Significantly, Dufour was previously believed dead. CP 189. Accordingly, the record belies the state's claim "the trail obviously has gone cold."

The state concedes, "Scott on his own would have had a very difficult time conducting an investigation because he was incarcerated." BOR at 28. Yet it claims Scott "could have made a timelier request to have a new lawyer appointed to investigate any possibility of witness 'recantations.'" Id.

But Scott did make a "timelier request" for an attorney. As part of his motion to vacate filed in 2005, Scott also objected to Turner's motion to withdraw as his attorney. CP 59-62. In his motion, Scott insisted that instead of moving to withdraw, Turner should move to vacate Scott's conviction based on the new testimony of D.H. Scott obtained through his civil commitment investigator. CP 59-62, 67-69, 148. The court nonetheless granted Turner's motion to withdraw. RP (10/7/05) 3.

Thereafter, in March 2006, when Scott had yet to receive news on his pro se motion to vacate, he contacted the Pacific County Superior Court Clerk about the status of his motion. CP 64-65. Shortly thereafter, on April 10, 2006, Scott filed a renewed motion to vacate, to appoint an attorney and for oral argument. CP 67-69. He later supplemented the motion with supporting exhibits. CP 74-80. A hearing was finally held, a briefing schedule set and Karlsvik appointed as Scott's attorney. BOA at 11-13. Due to the ongoing nature of the investigation, Karlsvik needed additional time to synthesize the material gathered and write the brief. RP (12/8/06) 4. The circumstances show Scott diligently pursued his motion to vacate once he obtained D.H.'s recanted testimony. This Court should therefore reach the merits of his motion for relief.

2. D.H.'s Affidavit and Dufour's Recent Statement, if True, Constitute Material Facts not Previously Presented that Would Require Vacation of Scott's Conviction.

As argued in Scott's opening brief, D.H.'s affidavit, if true, would constitute a material fact not previously presented that would require vacation of the conviction. It proved either that no sexual contact occurred; or that no sexual contact occurred during the charging period, because D.H. was out-of-state at the time. Similarly, Dufour's most recent statement that the sexual contact she observed occurred in May, if true, would constitute

a material fact not previously presented that would require vacation of the conviction. It proved the sexual contact occurred when D.H. was of legal age. Scott was therefore entitled to an evidentiary hearing to determine the reliability of this new evidence. BOA at 17-29.

As the state points out, the trial court does not abuse its discretion denying a motion to vacate where the court has determined the new evidence is not reliable. BOR at 30. The state claims the trial court did not abuse its discretion in Scott's case because it found Scott's new evidence unreliable. BOR at 31. Scott disagrees the court's oral ruling included a reliability determination.

Assuming arguendo this Court disagrees, however, Scott disputes the court's ability to make a reliability determination based on a cold record consisting of affidavits and written statements. The cases cited in Scott's opening brief show an evidentiary hearing is necessary to determining reliability. BOA at 19-25 (citing State v. Macon, 128 Wn.2d 784, 911 P.2d 1004 (1996); State v. Rolax, 84 Wn.2d 836, 529 P.2d 1078 (1974), overruled on other grounds, Wright v. Morris, 85 Wn.2d 899, 540 P.2d 893 (1975); State v. D.T.M., 78 Wn. App. 216, 896 P.2d 108 (1995)).

Otherwise, the Court of Appeals would itself engage in credibility determinations, which it clearly does not. See State v. Collins, 45 Wn.

App. 541, 548, 726 P.2d 491 (1986) (trial judge is in best position to weigh probative value of evidence because the trial judge personally observes the testimony, and the appellate court reviews only a cold record); State v. Gosser, 33 Wn. App. 428, 434, 656 P.2d 514 (1982) (trial judge is in better position to determine whether juror should be struck for cause because trial judge personally observes juror's demeanor and answers to questions, while appellate court reviews only the cold record). Without holding an evidentiary hearing, the trial court could not possibly determine which was more credible -- D.H.'s initial statement to police or his recent recantation. The same is true of Dufour's conflicting statements.

Although Scott stated he and D.H. had sex, he did not say when. D.H. now states he was out-of-state until after he turned age 16. Accordingly, D.H.'s new testimony does not conflict with Scott's statements. Moreover, it is corroborated by Dufour's most recent statement that she walked in on Scott and D.H. in May, just before Scott's arrest. This new evidence, if believed, shows no crime occurred because D.H. was of the age of consent in Washington.

The state makes much of the fact D.H. also recently stated no sex occurred. However, there could be any number of reasons he so stated.

Perhaps embarrassment. This contradiction merely underscores the need for an evidentiary hearing.

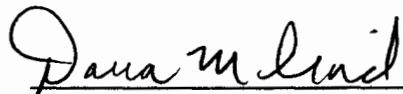
B. CONCLUSION

For the reasons stated herein and in appellant's opening brief, the trial court erred in denying the motion to vacate in the absence of holding an evidentiary hearing to determine the reliability of the new evidence.

DATED this 21st day of January, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DANA M. LIND, WSBA No. 28239
Office ID No. 91051

Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State V. Richard Scott

No. 36846-3-II

Certificate of Service by Mail

On January 21, 2009, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

David Burke
Attorney at Law
PO Box 45
South Bend WA 98586-0045

Richard Scott
SCC
PO Box 88600
Steilacoom, WA 98388

Containing a copy of the appellant's reply brief, re Richard Scott
Cause No. 36846-3-II, in the Court of Appeals, Division II, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



John Sloane
Office Manager
Nielsen, Broman & Koch
Done in Seattle, Washington

1-21-09
Date

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JAN 21 PM 4:53

FILED
COURT OF APPEALS
DIVISION II
09 JAN 23 AM 11:40
STATE OF WASHINGTON
BY  DEPUTY