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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 37229-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

CLYDE RAY SPENCER, Petitioner

Appeal from the Superior Court of the State of Washington
for Clark County
Clark Co. Superior Court Cause No. 85-1-00007-2

REPLY TO RESPONSE TO PERSONAL RESTRAINT PETITION

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I. Reply to Response to Personal Restraint Petition

In his personal restraint petition, the petitioner has presented evidence that demonstrates a manifest injustice warranting withdrawal of his guilty plea based on sworn statements recanting the sole evidence which formed the factual basis supporting the conviction. In addition, petitioner presented other new exculpatory evidence concerning physical examinations that had been conducted on the alleged victims which were inconsistent with the allegations which formed the basis of the charges against petitioner.

II. Issues of Credibility of the Recantations Must be Determined by a Reference Hearing

In its response, the state submits that the claim by petitioner's son is not credible. In support of this claim, the respondent does not submit any sworn testimony of any type. Rather it simply states a conclusion that because of the passage of time from when petitioner's son first made the alleged incriminating statements such "raises concerns about the veracity and credibility of the recantation" (Response, pg. 5).

Petitioner's son, Matthew Spencer, was 9 years old at the time of the original allegation. He is now 30 years old. He was never placed under oath to give any prior testimony, rather his alleged prior statements were based on interviews with the police. He has now submitted a declaration under oath

indicating the statements contained therein were made of his own free will without any threat, promise or inducement or pressure put upon him. He further states that he has had no contact with his father from 1985 until 2005 after his father, the petitioner, had been released from prison.

Petitioner's son, Matthew Spencer's declaration is not equivocal in any sense. He states: "I can state unequivocally that I was never molested in any manner at any time by my father." More importantly, he describes the tactics used by the investigating detective to coerce into making statements against his father. He indicates that after intense pressure by the detective, he made up specific details of what his father did based on what the detective asked him. He states: "None of this was true."

One of the aspects of the charges that was particularly important was an allegation that petitioner's son, Matthew Spencer, was present when the petitioner allegedly abused Matthew Spencer's sister, Kathryn, and step-brother, Matthew Hansen. Matthew Spencer clearly states in his declaration, "I have never observed my father having any sexual contact with my sister or step-brother, Matt Hansen. Nor did either of them ever tell me that he did so."

Matthew Spencer was the oldest of the three alleged victims and thus the most likely to have a clear memory of events that took place during the time period of the alleged charges.

Respondents citation to In re Personal Restraint of Clements, 125 Wn.App. 634, 106 P.3d 244 (2005) is misplaced because the factual situation in Clements is clearly distinguishable. Clements had entered an Alford guilty plea to the charge of residential burglary and fourth degree assault based on statements made by his former girlfriend who later after Clements had entered a plea of guilty, attempted to recant her statements. Although the girlfriend had given a video taped recantation statement to the defense attorney, she refused to testify at an evidentiary hearing indicating an assertion of her right to remain silent. The girlfriend's original statement was corroborated by her 14 year old son. At the hearing on the motion to withdraw the guilty plea, the trial judge assumed the girlfriend's retraction was credible but ruled that un-retracted evidence established a sufficient factual basis for the plea and thus denied the motion to withdraw.

In contrast, in petitioner's case, the only evidence to support the charges against him are the statements of the alleged victims. There were no

independent, non-victim witnesses nor any physical evidence to corroborate the allegations.

Respondent also mis-characterizes the recantation by petitioner's daughter, Kathryn Spencer. Contrary to the respondent's assertion that this is not a recantation but "merely an indication that she doesn't remember, or does not want to remember," Kathryn Spencer states: "I have absolutely no memory of my father ever having sexually abused me or inappropriately touch me in anyway whatsoever. I believe that if my father had in fact engaged in the type of sexual abuse described in the detective's reports and in the charges brought against my father, I would remember such actions." She goes on to state that she also "has absolutely no memory of ever having observed my father engage in any sexual misconduct of any kind with either my brother, Matt Spencer, or my step-brother, Matt Hansen." Thus, she not only disavows any abuse to herself, she says she has no memory of witnessing the petitioner abuse her brother or stepbrother.

In this case, there was no trial. There were also no recordings of the alleged victim's original allegations. The factual basis for the Alford guilty pleas were the reports from the detective of interviews with the three alleged victims.

Although recantations have been held to be inherently questionable, State v. Macon, 128 Wn.2d 784, 801, 911 P.2d 1004 (1996), a recantation may in some circumstances be grounds for a finding of manifest injustice. Much depends upon whether the recanted evidence was the sole basis for conviction. If so, it is an abuse of discretion to deny a new trial. State v. Rolax, 84 Wn.2d 836, 838, 529 P.2d 1078 (1974).

III. Additional Unique Circumstances in this Case Warrant a Remand for a Reference Hearing

In addition to the petitioner having entered an Alford plea in this case, there are additional unique troubling circumstances adding to the finding of manifest injustice which warrant a remand to the Superior Court for a reference hearing to make factual findings.

First, as outlined in the petition, there was a failure to disclose medical evidence in the form of physical examinations conducted upon two of the three alleged victims. The issue of the medical evidence was first raised in a prior personal restraint petition and federal habeas petition. At the time that the federal habeas petition was heard, neither petitioner's son, Matthew Spencer, or daughter, Kathryn Spencer had recanted their original statements. The failure to disclose the exculpatory medical findings coupled

with the new statements from Matthew and Kathryn Spencer add weight to the basis for allowing the withdrawal of the Alford pleas.

A second unique circumstance requiring remand for a reference hearing concerns the manner in which the original statement from Kathryn Spencer was taken. Exhibit 3 to the petition filed herein is a report issued by former Senior King County Prosecuting Attorney Rebecca Roe on November 22, 1984 questioning the manner in which Kathryn Spencer had given her original statement. In her report, Deputy Prosecutor Roe reports in part: "The child appears from police reports to be extremely reluctant to talk about facts. Sharon Krause had to spend several hours one on one with the victim." Ms. Roe indicated "there are inconsistencies" and also described other problems with the case. She notes "if it happened more than one time to account for inconsistent explanations, I would expect ejaculation at some point being described."

Another troubling aspect of this case as pointed out by former Washington State Governor Gary Locke in his commutation of sentence concerns the relationship between the supervising investigating officer and Mr. Spencer's wife at the time of the investigation. In the excerpt from former detective Sharon Krause's deposition submitted as Exhibit 4,

detective Krause admits she was aware of the romantic relationship going on at the time of the investigation between her supervisor and Mr. Spencer's wife.

IV. Alleged Victim Matthew Hansen

The third of the three alleged victims in this case was Mr. Spencer's stepson, Matthew Hansen. Of the sixteen counts to which Mr. Spencer entered Alford pleas, seven counts involved Matthew Hansen, however, three of those seven counts (count 10, count 13 and count 14) involved allegations that Mr. Spencer was complicit in or solicited sexual contact between Matthew Hansen and either Matthew Spencer or Kathryn Spencer.

In its statement to the court to support a factual basis for the plea, the prosecuting attorney represented "again, most of these incidents occurred with all three children being present in Mr. Spencer's house...". (Ex. 11, page 23). Both Matthew Spencer and Kathryn Spencer now swear they have no memory of observing any sexual abuse of Matt Hansen.

V. Necessity of a Reference Hearing

The courts have recognized the unique circumstances that are attendant with an Alford plea. A defendant considering an Alford plea undertakes a risk benefit analysis. After considering the quantity and quality

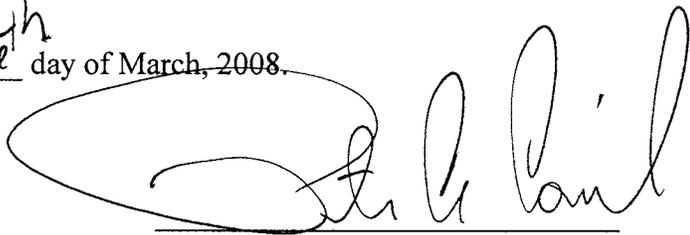
of the evidence against him, and acknowledging the likelihood of conviction if he goes to trial, he agrees to plead guilty despite his protestation of innocence, to take advantage of plea bargaining. Because the defendant professes innocence, the court must be particularly careful to establish a factual basis for the plea. Ordinarily when a defendant pleads guilty, the factual basis for the offense is provided at least in part by the defendant's own admissions. With an Alford plea, however, the court must establish an entirely independent factual basis for the guilty plea, a basis which substitutes for an admission of guilt. State v. D.T.M., 78 Wn.App. 216, 220, 896 P.2d 106 (1995).

In D.T.M., the court concluded that "we believe the court should have held an evidentiary hearing to evaluate [the witness's] credibility. If she were to adhere to the facts in her recantation while under oath in open court and subject to cross examination, Rolax, Powell and York would require the court to permit D.T.M. to withdraw his guilty plea and proceed to trial." D.T.M., 78 Wn.App. at 221; see also, State v. Powell, 51 Wash. 372, 98 P.941 (1909); State v. York, 41 Wn.App. 538, 704 P.2d 1252 (1985).

Conclusion

It is well recognized that in the context of an Alford plea as the petitioner entered in this case, a manifest injustice exists if newly discovered evidence when viewed in balance with the record changes the factual basis for the plea.. See, State v. Dixon, 38 Wn.App. 74, 77, 683 P.2d 1144 (1984). Here, the factual basis for the plea depended upon all three of the alleged victims. Two of those alleged victims have come forward and indicated not only that they were not sexually abused by the petitioner, but they did not observe sexual abuse by the petitioner against either of the other alleged victims. This case should be remanded for reference hearing to the Superior Court to make findings of fact regarding the credibility of these recantations. If the recantations are found to be credible after in-court testimony under oath and subject to cross examination, petitioner should be allowed to withdraw his pleas of guilty.

DATED this 24th day of March, 2008.

A handwritten signature in black ink, appearing to read "Peter A. Camiel", written over a horizontal line.

Peter A. Camiel, WSBA 12596
Attorney for Clyde Ray Spencer

In The Court of Appeals for the State of Washington
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IN RE THE MATTER OF THE PERSONAL RESTRAINT)
OF CLYDE RAYMOND SPENCER,)
Petitioner.)

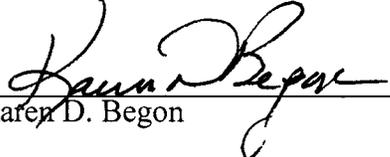
Case No. 37229-II

Certificate of Mailing

I, Karen D. Begon, being employed by the law firm of Mair & Camiel, certify that on March 27, 2008, I mailed a postage paid envelope containing petitioner's Reply to Response to Personal Restraint Petition and Opening Brief to the following individual:

Arthur Curtis
Clark County Prosecutor
P.O. Box 5000
Vancouver, WA 98666

Dated this 27th day of March, 2008.


Karen D. Begon

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