

FILED

AUG 09 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 28195-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent/Cross-Appellant

v.

PAUL STATLER,

Appellant/Cross-Respondent

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

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

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A. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING MR. STATLER'S MOTION FOR A NEW TRIAL BASED ON ANTHONY KONGCHUNJI'S POST-TRIAL ADMISSION THAT HE AND ANOTHER GROUP OF MEN COMMITTED THE CRIMES.¹

In his opening brief, Mr. Statler argued that he must be granted a new trial based on the post-trial recantation of co-defendant Anthony Kongchunji, who admitted he committed the crimes with a different group of young men from those convicted in this case. The other group of young men had been caught red-handed during another robbery that was extremely similar to the one at issue in this case.

Mr. Kongchunji's written statements and testimony at a later trial clearly exculpated Mr. Statler of any involvement in this incident. The trial court erroneously denied Mr. Statler's motion for a new trial by applying the wrong legal standard to the question of whether the co-defendant's recantation would probably change the result. Because the recantation is material, not merely impeaching, and probably would have changed the result of the trial, a new trial must be granted.

In response, the State sets up a straw man and knocks it down. It states, "nothing in this record shows why Anthony Kongchunji had to be believed, let alone why that evidence was so compelling that all of the

¹ Mr. Statler raised four additional arguments in his opening brief and will rest on that brief for those arguments.

contrary evidence would have to be disregarded.” Br. of Resp’t at 6. Mr. Statler does not claim that a future jury is required to believe Mr. Kongchunji or that a future jury is required to disregard the other evidence that was presented and that would presumably be presented again. Rather, the question is whether the result probably would be different if that same evidence plus the new evidence were presented to a jury. See State v. Davis, 25 Wn. App. 134, 140-41, 605 P.2d 359 (1980) (a new trial should be granted if probable result of jury hearing new evidence combined with previously introduced evidence would be either acquittal or conviction on a lesser offense). Obviously, the jury on the case regarding the April 21st incident did believe Mr. Kongchunji. A jury must be given the same opportunity to hear Mr. Kongchunji’s testimony in this case. The result in the case on the April 21st incident shows that the result would probably be different in a new trial on the instant charges.

The cases the State cites are inapposite. Br. of Resp’t at 6-7. Harper and Evans involved dueling experts who presented different opinions about undisputed facts. State v. Harper, 64 Wn. App. 283, 293-94, 823 P.2d 1137 (1992); But there was no new evidence about the underlying facts themselves. Instead, there was “simply a question of expert witness competency.” Harper, 64 Wn. App. at 293 (quoting State

v. Evans, 45 Wn. App, 611, 617, 726 P.2d 1009 (1986) (Reed, J., concurring)).

In contrast, there is new evidence meriting a new trial in this case because Anthony Kongchunji's recantation goes to the crucial facts at issue in the trial: who committed the crimes. He would not present testimony giving an opinion as to previously presented facts, but would present factual testimony about what actually occurred. The recantation is therefore newly discovered evidence, unlike the mere expert testimony at issue in Harper and Evans. See State v. Scott, 150 Wn. App. 281, 294 & 297, 207 P.3d 495 (2009); In re Personal Restraint of Smith, 80 Wn. App. 462, 469, 909 P.2d 1335 (1996); State v. D.T.M., 78 Wn. App. 216, 896 P.2d 108 (1995).

The Evans court also concluded that the new expert opinion offered probably would not have changed the result in that case. Evans, 45 Wn. App. at 614. But that is because the defense had already put on an expert in the original trial (whose testimony the jury disbelieved), and the new expert's opinion was exactly the same, if "more definite." Id.

Here, in contrast, no one testified as to the defense theory of the case at the original trial, and it is clear that Anthony Kongchunji was believed by the jury at the subsequent trial on the April 21 robbery. As explained in the opening brief, unlike in most newly discovered evidence

cases, one need not engage in an analysis of hypothetical scenarios here. In the April 21 case, although Matt Dunham again accused Mr. Statler and his co-defendants of having committed the crimes, Mr. Kongchunji testified that he, the Dunham brothers, and Nicholas Smith were responsible. The jury found Mr. Kongchunji credible enough to raise a reasonable doubt, and acquitted Mr. Statler. Mr. Kongchunji's testimony changed the result in that case and probably would change the result of a new trial in this case.

Goforth supports Mr. Statler's argument, not the State's. State v. Goforth, 33 Wn. App. 405, 655 P.2d 714 (1982) (cited in Br. of Resp't at 6). There, a jail inmate who roomed with the defendant claimed to have committed the crime for which the defendant was convicted, and on this basis the defendant moved for a new trial. Id. at 407. But the trial court properly denied the motion because (1) two eye-witnesses had identified the defendant as the perpetrator, (2) the defendant did not look like the person who later claimed to have committed the crime, and (3) the new witness was not credible because he shared a room at the jail with the defendant. Id. at 409.

The circumstances of this case are the opposite: (1) none of the four eye-witnesses identified Mr. Statler; (2) the description one eye-witness gave of the shooter (very tall, pale, and skinny) matched the

Dunham brothers, not Mr. Statler; (3) Mr. Kongchunji was good friends with the Dunhams and was placed near Matthew Dunham in jail, thus rendering his original story suspect and his recantation credible; and (4) the jury on the subsequent trial on the April 21 incident believed Mr. Kongchunji and disbelieved Matthew Dunham. Thus, under Goforth, Mr. Statler should be granted a new trial.

The State's citation to the 1966 case of State v. Peele is similarly unavailing. Br. of Resp't at 6-7 (citing State v. Peele, 67 Wn.2d 724, 409 P.2d 663 (1966)). There, as in Goforth, multiple eye-witnesses had identified the defendant as the perpetrator, rendering the post-trial exculpatory statement of the co-defendant not credible. Peele, 67 Wn.2d at 727-28. Furthermore, the co-defendant had testified at trial that he did not participate in the crime, and the jury did not believe him. Id. at 731. In contrast, the jury at the trial in which Anthony Kongchunji testified did believe him, and no eye-witnesses identified Mr. Statler as the perpetrator of the crimes. Thus, like Goforth, Peele supports Mr. Statler's argument that a new trial must be granted in this case.

As explained thoroughly in Mr. Statler's opening brief, the five Williams factors are satisfied in this case, and a new trial is required in the interest of justice. Br. of Appellant at 16-27; State v. Williams, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). A recantation is newly discovered

evidence that could not have been discovered earlier, irrespective of whether the human being who eventually recanted was available during trial. Scott, 150 Wn. App. at 294 & 297; Smith, 80 Wn. App. at 469; D.T.M., 78 Wn. App. 216. The trial court mistakenly focused on Mr. Kongchunji's availability at the time of trial. His availability is of no moment because his statements up to that point (including his "free talk" and his guilty plea) implicated the defendants, and he refused to recant because he had been threatened with additional charges. His post-trial recantation – both in a letter to Duane Statler and on the stand at the trial on the April 21st robbery – is newly discovered evidence.

Mr. Kongchunji's recantation is not merely impeaching because it is substantive evidence about the identity of the perpetrators. Evidence that is merely impeaching would go only to Matthew Dunham's credibility, and not to the facts at issue in the case. For example, evidence that Mr. Dunham had a prior conviction for theft, or testimony that Mr. Dunham had lied about a different evidence, would be merely impeaching. But Mr. Kongchunji's testimony is substantive evidence on a material fact at issue – the identity of the perpetrators. See State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), aff'd 123 Wn.2d 877, 872 P.2d 1097 (1994) (the identity of an offender and his presence at the crime scene is a material element that must be charged and proved beyond a

reasonable doubt); Cf. State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010) (evidence of alleged rape victim's sex acts on the night in question should have been admitted because it was not offered merely to impeach her credibility but to prove consent).

Tegland explains the difference: "If X testifies for the plaintiff that the light was green, and Y testifies for the defendant that the light was red, the testimony of Y is nothing more than substantive evidence offered to rebut the plaintiff's theory of the case." 5A K. Tegland, Washington Practice, Evidence § 607.17 at 407-08 (5th ed. 2007) (emphasis added). Although Y's contradictory testimony may also cast doubt on X's credibility, its primary purpose is to provide substantive evidence on the disputed facts at issue in the case. Id.

In sum, Mr. Kongchunji's recantation was not merely impeaching, but was substantive, material, and critical. See D.T.M., 78 Wn. App. at 221 (recantation of complaining witness "is clearly material and is not merely cumulative or impeaching").

Finally, Mr. Kongchunji's testimony would probably change the result, as discussed above. Given the result of the trial on the April 21 robbery, this conclusion cannot reasonably be disputed. No eye-witnesses identified Mr. Statler, the eye-witness who described the shooter described a person who looked like the Dunham brothers, and the jury at the

subsequent trial on the April 21 robbery believed Mr. Kongchunji, not Matthew Dunham. If a new trial is not warranted based on the recantation in this case, it will never be warranted in any case. This Court should reverse.

2. THE SENTENCING COURT OPERATED WELL WITHIN ITS DISCRETION IN IMPOSING AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE WHICH RESULTED IN A TOTAL SENTENCE OF “ONLY” 498 MONTHS.

The State cross-appealed Mr. Statler’s sentence, complaining that even though Mr. Statler was sentenced to **over 40 years** for crimes he may well not have committed, the sentencing court abused its discretion in running the assault sentences concurrently, thereby sentencing Mr. Statler to 41.5 years instead of 49.25 years. This argument is without merit.

Although RCW 9.94A.589(1)(b) provides that sentences for serious violent offenses run consecutively rather than concurrently, RCW 9.94A.535 allows the trial court to impose concurrent sentences if “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.” RCW 9.94A.535(g); In re the Personal Restraint of Mulholland, 161 Wn.2d 322, 331, 166 P.3d 677 (2007). RCW 9.94A.010, in turn, lists the following purposes of the Sentencing Reform Act (“SRA”):

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve him or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community

RCW 9.94A.010. Thus, under circumstances such as those presented in Mr. Statler's case, trial courts have "the discretion to impose a mitigated exceptional sentence." Mulholland, 161 Wn.2d at 332 (noting trial court had discretion to impose concurrent sentences where defendant was convicted of multiple counts of first-degree assault).

A reviewing court may not reverse an exceptional sentence unless it finds "(a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly

too lenient.” RCW 9.94A.585(4). This Court affirms that the reasons supplied by the sentencing court are supported by the record unless the findings are “clearly erroneous.” State v. Sanchez, 69 Wn. App. 255, 258, 848 P.2d 208 (1993), review denied, 122 Wn.2d 1007. Whether the reasons justify a mitigated sentence is reviewed de novo, and whether the sentence is clearly too lenient is reviewed for abuse of discretion. State v. Smith, 124 Wn. App. 417, 436, 102 P.3d 158 (2004), review granted on other grounds and affirmed, 159 Wn.2d 778 (2007). “The trial court reserves broad discretion to decrease a sentence” under RCW 9.94A.535(1)(g)). Id. at 437. The sentencing court does not abuse its discretion unless it imposes a sentence “that no reasonable person would have imposed.” State v. Calvert, 79 Wn. App. 569, 579, 903 P.2d 1003 (1995).

Where the difference between the effect of the first crime at issue and the effect of the combined crimes is “nonexistent, trivial or trifling, the multiple offense policy should not operate; rather, the sentencing judge should be permitted to give an exceptional sentence downward on grounds that the operation of the multiple offense policy ... results in a presumptive sentence that is clearly excessive.” Sanchez, 69 Wn. App. at 261 (internal quotation omitted). “None of these purposes [listed in RCW 9.94A.010] is served by the multiple offense policy when the difference

between the effects of the first act and the cumulative effects of the subsequent acts is de minimis.” State v. Hortman, 76 Wn. App. 454, 464, 886 P.2d 234 (1994), review denied, 126 Wn.2d 1025 (1995).

Thus, in Sanchez, this Court held the sentencing court operated within its discretion in imposing an exceptional sentence below the standard range where the defendant was convicted of three counts of delivery of cocaine, all of which occurred within a nine-day span. 69 Wn. App. at 261. Similarly, in Hortman, “the trial court exercised the very authority granted by the legislature in [current RCW 9.94A.535(g)] under facts essentially indistinguishable from those in Sanchez.” Hortman, 76 Wn. App. at 463. In Calvert, this Court affirmed an exceptional downward sentence where the defendant was convicted of five counts of forgery that took place over several days. Calvert, 79 Wn. App. at 582.

This Court concluded:

Considering the close relationship in time, intent and scheme of the several forgeries, we find that the sentencing court was within the authority granted in [current RCW 9.94A.535(g)] when it found that the minimal cumulative effects of the crimes were substantial and compelling reasons for imposing an exceptional sentence.

Id. at 583.

Under Calvert, Hortman, and Sanchez, the trial court properly imposed concurrent sentences for Mr. Statler’s two assault convictions.

The two convictions were based on two shots fired in rapid succession at the bumper of a car. 3 RP 157-59. The difference between the effect of the first shot and the effect of the two shots combined is de minimis. Thus, running the 93-month sentence for the second assault concurrent with the 138-month sentence for the first assault was appropriate and well within the trial court's discretion. Sanchez, 69 Wn. App. at 261; Hortman, 76 Wn. App. at 463; Calvert, 79 Wn. App. at 583.

This is especially so in light of the purposes of the SRA. See RCW 9.94A.010. Mr. Statler received a sentence of over 40 years even with this exceptional downward sentence. If the punishment is not proportionate to the seriousness of the offense and Mr. Statler's limited criminal history, it is because the sentence is too high, not too low. Even as the sentence stands, it is not commensurate with the punishment imposed on Mr. Statler's co-defendants, because Mr. Statler is serving a mandatory 30-year sentence on the weapon enhancements alone. It was appropriate for the trial court to mitigate the effect of this disparity by running the assault sentences concurrently. Even with the exceptional down, Mr. Statler is serving far more time than Mr. Gassman, who is serving 26 years, and twice as much as Mr. Larson, who is serving 20. 6 RP 45. The public is not better protected by a 49-year sentence than by a 41-year sentence. Either way, Mr. Statler may well spend the rest of his

life in prison. A longer sentence would also frustrate the purpose of offering Mr. Statler the opportunity to improve himself and reduce his risk of reoffense. Finally, it does not make frugal use of the state's resources to incarcerate a person for an additional 93 months. In light of these considerations, combined with the minimal cumulative effect of the second assault, the trial court operated well within its discretion in imposing concurrent sentences for counts two and three.

B. CONCLUSION

For the reasons set forth above and in his opening brief this Court should reverse Mr. Statler's convictions and remand for a new trial.

DATED this 6th day of August, 2010.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Appellant

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DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 28195-7-III
v.)	
)	
PAUL STATLER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **AMENDED REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY, DPA	(X)	U.S. MAIL
SPOKANE COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
1100 W. MALLON AVENUE	()	_____
SPOKANE, WA 99260-0270		

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF AUGUST, 2010.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710