

FILED
MAR 29 2012
COURT OF APPEALS
DIVISION III
SPokane, Washington

30110-9-III

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LUCAS J. MERRILL, APPELLANT

(IN RE THE MATTER OF MATTHEW HARGET)

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
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Stephen W. Garvin
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

- 1a. The trial Court erred by finding that Mr. Harget's illegal conduct wasn't protected by the impracticality exception to the victim's right's statute.
- 1b. The trial court erred by rejecting the claim that Mr. Harget's second illegal contact with the victims was solely to investigate his own misconduct.
- 1c. The trial court erred by finding that Mr. Harget acted in bad faith.
- 1d. The trial court erred by implying that Mr. Harget could have sought court intervention prior to his second illegal contact with the victims.
- 2a. The trial court erred by imposing a sanction for Mr. Harget's illegal conduct and by not equating the sanction with a civil liability as discussed at RCW 7.69.050.
- 2b. The trial court erred by imposing a sanction.

II.

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Did the trial court abuse its inherent discretion when it imposed sanctions?
2. Did the trial Court properly find that defense counsel twice knowingly violated State law and the victim's rights?
3. Has there been a showing of exigency sufficient to justify either of Mr. Harget's illegal contacts with the victims?
4. Does RCW 7.69.050 expressly deal with a civil right of action?

III.

STATEMENT OF THE CASE

The criminal defendant, Lucas J. Merrill, was charged with multiple counts of assault for discharging a firearm at the home of the Gertlers. CP 1-2. The Information was filed on November 12, 2009. Mr. Harget represented Mr. Merrill. CP 61-64. On November 18, 2009, the victims of the assault signed written notice that sought to rely upon the protections of the victim's rights statute. CP 52-55.

The notice of the victim's desire to have a victim advocate was served on Mr. Harget on November 24, 2009. CP 52-55. The Gertler's

never gave any indication of changing their mind about their desire to have a victim's rights advocate present. CP 52-55.

It is not disputed that Mr. Harget had two contacts with the victims in this case. CP 61-64. The Gertlers indicated that during the first contact, Mr. Harget did not appropriately identify himself as a defense attorney and that they had no idea that they were talking to the criminal defendant's attorney. CP 52-55. The Gertler's indicated that during his second contact, Mr. Harget would not take no for an answer and that "[Mr. Harget] wouldn't listen to me, so after telling him three times that I didn't want to talk, I finally had to hang up on him." CP 52-55.

The trial court reviewed the conduct of Mr. Harget and found that Mr. Harget refused to recognize the right of the victim's to have a victim's advocate present and that "...Mr. Harget admits that he disregarded the statute and the protections set forth therein." CP 61-64.

The trial court found that it had authority to impose an appropriate sanction under RCW 2.28.150, *State v. Gassman*, 160 Wn. App. 12, 248 P.3d 91 (2011) quoting *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996), and *State v. S.H.*, 102 Wn. App. 468, 8 P.3d 1058 (2000). CP 61-64.

IV.

ARGUMENT

1. THE SUPERIOR COURT HAS AUTHORITY TO ORDER SANCTIONS WHICH SHOULD ONLY BE REVERSED UPON A FINDING OF ABUSE OF DISCRETION.

“Every court of justice has power ... [t]o enforce order in the proceedings before it, ... [and][t]o provide for the orderly conduct of proceedings before it.” RCW 2.28.010(2)-(3). “When jurisdiction is ... conferred on a court or judicial officer all the means to carry it into effect are also given[.]” RCW 2.28.150.

Where sanctions are not expressly authorized, “the trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation.” *In re Firestorm 1991*, 129 Wn.2d at 139 (applying the principles embodied in CR 11, CR 26(g), and CR 37 to CR 26(b) violations). “[D]ecisions either denying or granting sanctions ... are generally reviewed for abuse of discretion.” *Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). But the “choice of sanctions remains subject to review under the court’s inherent authority applying the arbitrary, capricious, or contrary to law standard of review.” *Butler v. Lamont Sch. Dist.*, 49 Wn. App. 709, 712, 745 P.2d 1308 (1987).

The Court has inherent authority to assess sanctions for bad faith litigation conduct. *Wilson v. Henkle*, 45 Wn. App. 162, 174, 724 P.2d 1069 (1986). This includes the power to impose sanctions for inappropriate and improper conduct. *Wilson*, 45 Wn. App. at 173.

The record in the Superior Court shows that Judge Moreno engaged in a thoughtful process to review the misconduct and fashion an appropriate sanction with due process to Mr. Harget. This finding and sanction should not be reversed absent an abuse of discretion.

2. THE TRIAL COURT PROPERLY FOUND THAT DEFENSE COUNSEL TWICE KNOWINGLY VIOLATED STATE LAW AND THE VICTIM'S RIGHTS.

The law in Washington requires that victim's rights be honored and protected to the same degree that the rights of criminal defendant's are protected.

In recognition of the severe and detrimental impact of crime on victims, survivors of victims, and witnesses of crime and the civic and moral duty of victims, survivors of victims, and witnesses of crimes to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state, the legislature declares its intent, in this chapter, to grant to the victims of crime and the survivors of such victims a significant role in the criminal justice system. The legislature further intends to ensure that all victims and witnesses of crime are treated

with dignity, respect, courtesy, and sensitivity; and that the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants.

RCW 7.69.010.

Crime victims have a right that any contact with defense counsel occur with an advocate present. RCW 7.69.030(10). Victim's rights are further safeguarded by the Washington State Constitution. Wash. Const. art. I, § 35.

Judge Moreno found, and it is undisputed, that the victims¹ in the case, the Gertlers, had asserted their right to have an advocate present at any prosecution or defense interview via a written demand signed on November 18, 2009. CP 61-64. Further, it is undisputed that this demand was provided to Mr. Harget on November 24, 2009. CP 61-64. Finally, the Court found that Mr. Harget contacted both victims' without an advocate being present on two separate occasions. CP 61-64. The Court found that Mr. Harget disregarded the statute and the protections for victims set forth in State law. CP 61-64.

It is clear that during both contacts the victims had absolutely no interest in speaking with Mr. Harget. CP 52-55. Indeed, during the first

¹ Defense counsel mistakenly refers to the Gertler's as "alleged victims" disregarding the fact that Mr. Merrill has pled guilty to felonious assault on the Gertler's house and has been sentenced. CP 122-131 and CP 132-142.

contact Mr. Harget did not make clear to the victims who he was and they thought they were talking to a member of the office of the Prosecuting Attorney. CP 52-55. In order to terminate the second illegal phone call the victim had to hang up the phone to stop Mr. Harget from “pestering her”. CP 52-55. The Court found that any alleged uncertainty about the victim’s assertion of their rights was made crystal clear during the first contact. CP 61-64. Judge Moreno found that “[t]hrough no stretch of the imagination was [Mr. Harget] justified in contacting them a second time without the presence of an advocate. CP 61-64.

3. THERE IS NO SHOWING OF EXIGENCY.

In this case the record is clear and uncontested that the first illegal contact with the Gertler’s occurred on April 7, 2011. CP 61-64. At the time this contact was made, the trial date was April 18th. CP 97. Far from the assertion by counsel that this was the 11th hour before trial, this was in fact eleven days before trial. The simple fact is that even if the case had not been continued on April 8, 2011, which it was, there is no showing that it was impractical or even difficult to arrange a proper interview with the victim’s in the eleven days then existing prior to the trial date. Further, there has been no showing that case couldn’t be continued to accommodate necessary interviews, indeed, the case was in-fact continued

on April 8, 2011, without objection from the State or the Court and the case was continued yet again on May 13, again without objection from the Court or the State. CP 120 and CP 121. The case was not finally resolved with Mr. Merrill's plea until January 30 of 2012. CP 122-131 and CP 132-142.

In a similar way there has not been any showing whatsoever that there was any existing urgency requiring defense counsel to ignore the victim's rights prior to the second contact on May 13, 2011. In short, there was no exigency such as to justify the willful violation of victim's rights. There isn't even a claim of exigency regarding the second illegal contact which the trial court noted that "[t]hrough no stretch of imagination was [Mr. Harget] justified in contacting [the victims] a second time without the presence of the advocate. CP 61-64.

4. RCW 7.69.050 EXPRESSLY DEALS WITH A CIVIL RIGHT OF ACTION.

The express terms of RCW 7.69.050 concern a civil right of action and determines that one is not created by the victim's rights statute. This clause does not address the issue of sanctions for violating the victim's right's statute.

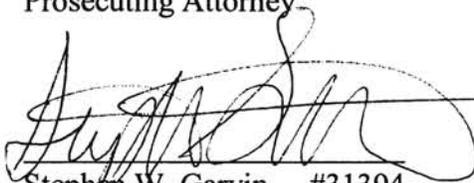
V.

CONCLUSION

Victim's rights are important. The Washington legislature has declared that they should receive the same vigorous protection as any criminal defendant's rights. For the foregoing reasons the State asks the Court to affirm the thoughtful decision of the Superior Court that Mr. Harget engaged in illegal and improper contact with the victim's in this case. Indeed, the State would respectfully submit that this court is directed by RCW 7.69.010 to extend vigorous protections to the victim's rights of the Gertlers.

Dated this 29 day of March, 2012.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Stephen W. Garvin", written over a horizontal line.

Stephen W. Garvin #31394
Deputy Prosecuting Attorney
Attorney for Respondent