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Court of Appeals
Division III
State of Washington

NO. 345335

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

STATE OF WASHINGTON

PLAINTIFF/APPELLANT,

V.

TARA J. AMMONS

DEFENDANT/RESPONDENT

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. **The trial court's factual findings are not supported by substantial evidence in the trial court record.**

Respondent asserts that Appellant has not assigned error to any specific findings of fact. *Brief of Respondent*, pg. 7. However, this is not correct. Appellant has clearly indicated that the assignment of error is to Findings numbers 15 and 23, specifically that Respondent was not given the option to “opt-out” of Drug Court. *Opening Brief of Appellant*, pg. 9.

Factual findings are erroneous where not supported by substantial evidence in the record. *In re Davis*, 152 Wn.2d 647, 679 (2004). The defendant attacking a judgment has the burden to show they are entitled to relief. *In re Quinn*, 154 Wn.App. 816, 831 (Div.1, 2010) citing *In re PRP of Gentry*, 137 Wn.2d 378, 409 (1999) and *In re PRP of Runyan*, 121 Wn.2d 432, 452 n. 16 (1993). The burden is on Respondent to produce substantial evidence to support her claim that he was not given the option to opt-out of Drug Court.

Respondent argues that the trial court simply made its factual finding based on its determination of credibility of the witnesses' declarations. *Brief of Respondent*, pg. 6. However, it is unclear how exactly the court could have made determinations of credibility when all evidence was in the form of sworn Declarations by members of the

criminal justice system and there is no mention of credibility by the trial court judge. Furthermore, Respondent is simply asking this Court to find that credibility equates to substantial evidence, even where there is no basis for determinations of credibility and the court's own findings of fact are self-contradictory.

Even if the court made its determination based on the credibility of the Declarations provided, the question still remains- was the trial court's finding that Respondent was not given the option to "opt-out" supported by substantial evidence in the record? A review of the entire record indicates that the *only* piece of evidence to support this factual finding is the Supplemental Declaration of Mike Lynch which indicates:

Contrary to the statements in the Declaration of Karl Sloan dated 5/6/2016, Ms. Ammons did not have the opportunity to leave the drug court track and contest her charges through the normal criminal track. ... [CP 14]

This single statement in a Declaration is not substantial evidence.

The only way the trial court could establish this as a factual finding would be for the court to assume at the outset that absent proof to the contrary, Respondent was not given that option. This lack of evidence in support of the factual finding and the court's statements that there is no evidence Respondent *was* given the option to opt-out further shows that the trial court shifted the burden and began its analysis assuming

Respondent was not given such an opportunity and placed the burden on the State to prove otherwise. When the State could not, the court simply assumed Respondent had not been given that opportunity. (See Appellant's Opening Brief).

The trial court must start with an open mind, and the Respondent must prove with substantial evidence, not with the lack of evidence to the contrary by the State, that she was not given the option to opt-out. If Respondent could not provide substantial affirmative proof, the court should not be able to make a factual finding. Respondent asks this Court to look to the record and find that the trial court's factual finding numbers 15 and 23 are not supported by substantial evidence in the record.

II. The trial court's reliance on CrR 7.8(b)(1) is inconsequential to whether the court violated separation of powers under *Aguirre*.

Respondent asserts that the trial court did not violate the separation of powers when it allowed Ms. Ammons to withdraw her Drug Court Agreement. Respondent argues this based on the fact that the trial court made its ruling based on CrR 7.8(b)(1) in addition to CrR 7.8(b)(5), whereas the court in *Aguirre* made its ruling based only on CrR 7.8(b)(5). *State v. Aguirre*, 73 Wn.App. 682, 686 (Div.1 1994). However, the trial court's reliance on CrR 7.8(b)(1) is inconsequential to the analysis under *Aguirre*.

The rationale of *Aguirre*, is that a trial court cannot use its authority to seep into the realm of the Governor, who has the sole power to pardon. *Id.* at 688. The court’s ruling in *Aguirre* was not based on the fact that the court relied on CrR 7.8(b)(5) as opposed to some other statute or court rule; the ruling was based on the *reason* the court granted the defendant’s vacation.

“However broad a trial judge’s discretion may be under CrR 7.8(b)(5), it is not so broad as to intrude on the power to pardon vested solely in the Governor. The trial judge’s use of CrR 7.8(b)(5) to forgive Aguirre-Colindres his crimes for the sole purpose of affecting his deportability status violated the doctrine of separation of powers under the State Constitution.”

Id. at 688.

The court rule the trial court relied on in *Aguirre* was simply the means to the trial court’s end; it is the end that violates the separation of powers, not the means. Whether the trial court relied on CrR 7.8(b)(5) or some other court rule as the means to its end, the end is still that the court sought to overturn the judgment for the purposes of affecting the defendant’s deportability.

The record is clear in the current case that the trial court only allowed Ms. Ammons to withdraw her Drug Court Agreement because the court felt the current position Ms. Ammons was in was unfair and not

“equitable.” This makes the trial court’s rationale fall squarely within the realm of *Aguirre*.

The trial court’s rationale in this case was identical to that in *Aguirre*. Respondent did not seek to withdraw her Drug Court Agreement and vacate her Judgment and Sentence until deportation proceedings had begun. [CP 82, 166-168] Ms. Ammons’ counsel’s argument in favor of the motion was based almost exclusively on the fact that she is now facing deportation proceedings. [RP 21:5-9, CP 97-165]. Even Ms. Ammons’ Drug Court attorney argued in his Declaration that Ms. Ammons should be permitted to withdraw her Agreement and “plead guilty to an immigration safe offense.” [CP 93]

The trial court judge’s comments make clear that the court’s ruling was based on what the court felt was equitable and fair to Ms. Ammons given her current deportation proceedings. [CP 11:21, RP 62:14-18]. The trial court stated

[T]here is an aspect, and I’m going to use the word equity here, there’s an aspect of – when we tend to talk about equity here, this Court is of a mind that equity talks about fairness, full disclosure, full understanding in aspects of this. That’s from the Court’s perspective, is a form of equity. A person that has basically her entire life resided in the United States, married, had children, yes...[RP 62:14-23]

Whether you characterize it as a mutual mistake from the contract point of view, this Court just, just feels compelled,

as the Court said before, I can't treat her as a faceless individual... [RP 63:4-8]

Based on the oral statements of the trial court judge, it is clear the court's ruling, the court's *end*, was to relieve Ms. Ammons of her current deportation proceedings and the Court used the court rules it felt it had available as means to justify that end. *Aguirre* does not allow this and the trial court violated separation of powers when it made such a ruling.

III. Respondent did not act with due diligence and the trial court applied equitable tolling incorrectly to toll the wrong period of time.

Respondent argues that the court did not err in concluding Ms. Ammons' motion was not time-barred. The burden is on the defendant to prove that an exception to the RCW 10.73.090 one year limitation applies. *State v. Schwab*, 141 Wn.App. 85, 90 (Div.2 2007). Respondent cannot show either that she exercised due diligence or that there was bad faith or deception by the State or trial court. Furthermore, the trial court improperly applied the doctrine on equitable tolling by tolling an unlawful period of time.

Equitable tolling may only be applied when "the plaintiff exercises diligence." *In re Carlstad* 150 Wn.2d 583, 593 (2003); *State v. Littlefair*, 112 Wn.App. 749, 759 (Div.2, 2002) citing *State v. Duvall*, 86 Wn.App.

871, 875 (1997) review denied 134 Wn.2d 1012 (1998); *In re Bonds*, 165 Wn.2d 135, 141 (2008).

Respondent has provided no evidence, and Respondent does not even argue in their response brief, that she used due diligence in raising this issue. The three cases cited by Respondent to support that equitable tolling was appropriate do not support her claim because, unlike Respondent, the defendants in those cases all acted promptly to raise their asserted issues.

In *In re Hoisington*, 99 Wn.App. 423 (Div.3, 2000), the defendant had raised his claimed issue in two prior appeals and a personal restraint petition. *Id.* at 431. The court applied equitable tolling based on the defendant's three prior attempts to raise the issue, and the court's failure to address the issue. *Id.*

In *Duvall*, 86 Wn.App. 871, the defendant's attorney signed off on a restitution order without the approval or presence of the defendant. When the defendant found out about the order, he moved immediately to vacate the order which was granted and a new order was subsequently entered. *Id.* at 873. The order was entered out outside the then 60 day (now 180 day) time limit. *Id.* Because the State and court had relied on defense counsel's representation that the restitution amount was agreed, and all parties acted with due diligence to remedy the defect, the court

applied equitable tolling, in the State's favor, to toll the 60 day time limit.

Id. at 876.

In *Littlefair*, 112 Wn.App. 749, the defendant entered a guilty plea after not being informed by his attorney that he may be subject to deportation proceedings. *Id.* at 755. The defendant was not made aware of his immigration consequences until two years later when he was contacted by Immigration and Naturalization Service. *Id.* The defendant moved to withdraw his guilty plea six months later. *Id.*

In *Hoisington, Duvall*, and *Littlefair*, the defendants had all acted promptly in addressing the issues that confronted them. However, Respondent was notified while she was still in Drug Court, and no later than March 28, 2008, that she faced potential immigration consequences. [CP 9:15-17] Respondent was terminated from Drug Court and Judgment was entered on April 3, 2009. [CP 181] Counsel was appointed in immigration court in 2011. [CP 82] Respondent's deportation proceedings were actually closed in 2011 and she was released from custody. [CP 82] Respondent's deportation proceedings were re-opened four years later in 2015 and Mr. Safar was hired to represent Respondent on this issue in July of 2015. [RP 56:5-6] Respondent's motion to vacate was filed March 16, 2016, seven years after entry of the judgment. [CP 166-168, 97-165]

Based on the record, Respondent did not act with due diligence in raising the issue before the court. She was advised in 2008 that immigration consequences were possible and she did not raise the issue then. She did not raise the issue while she was in deportation proceedings, even after counsel was appointed for her in 2011. She did not raise the issue when her initial deportation proceedings were closed and she was released from custody. She did not raise the issue while she was out of custody for four years. It was not until 2015 when her deportation proceedings were re-opened and Mr. Safar was hired or 2016 when the motion was filed that Respondent even raised this issue for the first time. Respondent is not entitled to equitable tolling because she did not act with due diligence in raising the issue. *Carlstad* 150 Wn.2d at 593; *Littlefair*, 112 Wn.App. at 759; *Bonds*, 165 Wn.2d at 141. See also *In re Haghghi*, 178 Wn.2d 435 (2013) (defendant denied equitable tolling because he was aware of the issue when he filed his initial appeal and nothing prevented him from raising the current issue in his initial timely appeal).

Respondent is also not entitled to equitable tolling because there is no showing of “bad faith, deception, or false assurances.” *Carlstad* 150 Wn.2d at 593; *Littlefair*, 112 Wn.App. at 759; *Bonds*, 165 Wn.2d at 141. Respondent points to the trial court’s decision not to enforce the Drug Court rules prohibiting non-citizens from participating and their refusal to

give Respondent an option to back out of the drug court agreement.

Appellant adamantly denies this to be the case as the record simply does not support that Respondent was not given the option to opt out.

Regardless, none of the individuals involved knew that Respondent was not a U.S. citizen when she entered Drug Court. [CP 9:8-9] Respondent claims bad faith by the Judge letting Respondent into Drug Court against policy and then not letting her back out. However, Respondent's argument is self-contradictory. Nobody knew she was not a U.S. citizen when she entered. The record is clear that the Judge *allowed* her to stay in Drug Court against policy, which means Respondent wanted to remain in Drug Court. [CP 9:20-23] Respondent now claims that it was bad faith to allow her to remain in Drug Court, which is what Respondent wanted herself.

Equitable tolling is not meant to extend to "garden variety claims of excusable neglect." *Littlefair*, 112 Wn.App. at 759; *Bonds*, 165 Wn.2d at 141; *Haghighi*, 178 Wn.2d at 447-448. Courts routinely disfavor equitable tolling. See *Carlstad* 150 Wn.2d 583 (defendant not entitled to equitable tolling for failure of prison staff to timely mail PRP not an act of bad faith); *Bonds*, 165 Wn.2d 135 (delay in filing PRP due to court of appeals delay in appointing counsel was not bad faith to allow equitable tolling). The Supreme Court in *Bonds* even questioned whether the Court

of Appeals should have applied equitable tolling in *Littlefair. Bonds*, 165 Wn.2d at 142. In Respondent’s case, the “mistake” was at most excusable neglect by all parties, but in reality was a mistake invited by Respondent with her desire to remain in Drug Court after learning of her immigration status and failing to ever raise this issue for more than seven years.

Finally, as pointed out in Appellant’s Opening Brief, and seemingly glossed over by Respondent, if the court applies equitable tolling, the court may only toll the time from the plea (or entry of Drug Court Agreement) until the time the defendant is notified of the consequences. “The one-year time period in RCW 10.73.090 should be equitably tolled from the date of [a defendant’s] plea [] to the date on which he first discovered that deportation was a consequence of his plea.” *Littlefair*, 112 Wn.App.. at 763.

Respondent argues that equitable tolling was properly applied to exclude the time up until July 2015 when Respondent was appointed a representative to assist her. The implication of this argument is that *Littlefair* allows the court to exclude all time from the plea or entrance of Drug Court Agreement, until the defendant speaks with counsel about how to address the consequences. If this is how equitable tolling works, a defendant could simply delay seeking advice from counsel and could then come back and argue that all that time should be excluded because they

did not know how to remedy the situation. This would completely undermine the finality of judgments. Equitable tolling is only appropriate when consistent with the purpose of the underlying statute and the purpose of RCW 10.73.090 is to require post-conviction collateral attacks to be brought timely and to promote finality of judgments. *Bonds*, 165 Wn.2d at 141. Respondent's argument completely undermines the purpose of RCW 10.73.090.

The trial court excluded all time up until the court felt Respondent could make a decision about what remedy she wanted to pursue. [RP 63:17-64:16] According to *Littlefair*, if the court does apply equitable tolling, the court only excludes the time period up until the defendant is made aware of the consequences. Equitable tolling does not allow the court to exclude all of the time period up until the date the defendant chooses to have a meaningful discussion with someone about those consequence. Here, the consequences are that Respondent faced potential deportation. She was advised of those consequences before ever even being terminated from Drug Court. Equitable tolling only excludes the time from when Respondent entered into her Drug Court Agreement until she learned of the consequences. Therefore, since more than seven years have passed since that date, her motion was time barred under RCW 10.73.090.

CONCLUSION

Appellant requests this Court reverse the trial court's order vacating the Drug Court Agreement and vacating the Judgment and Sentence and reinstate the Judgment and Sentence entered April 3, 2009.

Dated this 14 day of March, 2017

Respectfully Submitted:



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PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 15th day of March, 2017, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Reply Brief of Appellant:

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