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COA No. 35555-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

TYE SHEATS,

Appellant,

v.

CITY OF EAST WENATCHEE, DOUGLAS COUNTY,
CITY OF WENATCHEE, CHELAN COUNTY, THE
WENATCHEE WORLD NEWSPAPER,

Respondents.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The court erred by ordering that portions of the polygraph report of Officer Tye Sheats in his application to become a City of Wenatchee police officer should be disclosed (1) to defense counsel as *Brady* material and under the Public Records Act (PRA) and (2) to anyone else asking for it under the PRA because it was *Brady* material.

Issue Pertaining to Assignment of Error

1. Did the court err by ordering that portions of the polygraph report of Officer Sheats in his application to become a City of Wenatchee police officer should be disclosed (1) to defense counsel as *Brady* material and under the PRA and (2) to anyone else asking for it under the PRA because it was *Brady* material?

II. STATEMENT OF THE CASE

These facts were recited by the court in its decision:

The Douglas County Prosecuting Attorney received the entire polygraph report from the City of Wenatchee, as it was determined by the City of Wenatchee that the material contained therein was most likely required to be disclosed under *Brady*. As a result, the Douglas County Prosecuting Attorney reviewed the polygraph report in its entirety and redacted those portions that the Prosecuting Attorney did not feel required it to disclose under *Brady*. The Court has reviewed the polygraph report and the redacted polygraph report and agrees with the Douglas County Prosecuting

Attorney and other public agencies that the material contained in the redacted version of the polygraph report is required to be disclosed to defense Counsel in order to comply with *Brady*. [Confid. CPs]. The other information that was not disclosed by the Prosecuting Attorney is not relevant to any *Brady* material and would not be disclosed under *Brady*. As the information is required to be disclosed to defense Counsel, this Court believes it would be required to be disclosed to anyone else who may ask for the same under the Public Records Act. The redacted report is a public record subject to disclosure and has already been published to the general public by the Wenatchee World. (CP 150-51).

Background regarding the disclosure of such information was set forth in the declaration of Officer Sheats' counsel in support of his ex parte motion for an order temporarily enjoining release of materials:

- 2) My client, Tye Sheats, is currently employed as a police officer with the East Wenatchee Police Department.
- 3) As relayed to me by my client, he has no recorded or documented criminal history.
- 4) My client had previously applied for employment with the Wenatchee Police Department and because of that application had to submit to a background investigation, to include a polygraph examination as mandated by RCW 43.101.095(2).
- 5) A polygraph examination was conducted by Everett Polygraph Services, LLC and a report was sent to the Wenatchee Police Department on or about May 13,

2016.

6) On June 2, 2017, Assistant City Attorney Danielle R. Marchant notified the Douglas County Prosecutor's Office of potential impeachment evidence obtained from the polygraph report of the plaintiff. Eventually, Ms. Marchant provided a heavily redacted copy of the pre-employment polygraph report to both the Douglas County Prosecutor's Office and the East Wenatchee City Attorney's Office.

7) On or about July 17, 2017, Jefferson Robbins, a reporter with the Wenatchee World newspaper, made a public records request to the City of East Wenatchee for "All disciplinary records, citizen complaints and ethics complaints pertaining to East Wenatchee Officer Tye Sheats.

8) On July 17, 2017 the East Wenatchee City Attorney, Devin Poulson, informed my client that Mr. Robbins had requested this information and that unless he received an injunction from the court before July 27, 2017, he would release a redacted copy of the pre-employment polygraph report, pursuant to the Public Records Act. (CP 3-4).

Finding good cause, the court issued a temporary order enjoining the City of East Wenatchee, Douglas County, City of Wenatchee, and Wenatchee World newspaper from "disclosing or obtaining the requested report and/or information taken from the report while the court [reviewed] the petition." (CP 8).

Douglas County moved to dissolve the temporary injunctive order. (CP 9). Officer Sheats responded. (CP 25-29, 34-39). In a

declaration, the Douglas County deputy prosecutor outlined how the public records request and *Brady* issue arose:

e. As part of that discussion [about a temporary injunction] I told [Officer Sheats' counsel] the history of how our office was notified of the issue: 1) that we had received a communication from City of Wenatchee Attorney Danielle Marchant of a potential *Brady* issue; 2) that Ms. Marchant then sent us a letter containing her summary of a polygraph exam; 3) that we filed a motion for subpoena duces tecum in the case of *State v. Gensinger* to obtain a copy of the actual polygraph report; 4) that I had sent notice to Mr. Sheats, but that Mr. Sheats did not respond; 5) that this Court granted the motion for the subpoena duces tecum; 6) that the City of East Wenatchee emailed the polygraph report to me; 7) that Prosecuting Attorney Steven Clem created a redacted version of the polygraph report; 8) and that I had disclosed the redacted polygraph report to defense attorneys in cases in which Mr. Sheats was identified as a potential witness for the State. (CP 41).

The parties then entered an agreed amended temporary order on motion for injunction, providing in pertinent part:

1. Respondents City of East Wenatchee, City of Wenatchee and Douglas County are hereby temporarily restrained from dissemination of copies of the unredacted and redacted polygraph report prepared by Everett Polygraph Services, LLC, dated May 13, 2016, in response to the public records requests from The Wenatchee World; and
2. Respondents City of East Wenatchee, City of Wenatchee and Douglas County may, in order to comply with prosecution constitutional and ethical duties, hereafter temporarily disseminate redacted

copies of the polygraph report prepared by Everett Polygraph Services, LLC, dated May 13, 2016, to defense counsel in each criminal case in which Tye Sheats is identified as a prosecution witness, so long as a motion for protective order is made to limit defense counsel's use of the redacted polygraph report to use in that criminal case and to prohibit further dissemination of the redacted polygraph report to third parties, including defense counsel's client. (CP 49).

This agreed temporary order was effective until the hearing on the merits. (*Id.*).

Thereafter, the court decided the material in the redacted polygraph report was required to be disclosed to defense counsel under *Brady* and accordingly was also required to be disclosed to anyone asking for it under the PRA. (CP 4). It also decided disclosure of the entire polygraph report, other than the redacted report for purposes of *Brady*, was prohibited as exempt. (CP 153). Officer Sheats does not challenge this part of the court's order. This appeal follows. (CP 170).

IV. ARGUMENT

A. The court erred by ordering that portions of the polygraph report of Officer Sheats in his application to become a City of Wenatchee police officer should be disclosed (1) to defense counsel and others as *Brady* material and (2) to anyone asking for

it under the PRA because it was *Brady* material.

The appellate court reviews all agency actions taken or challenged under the PRA de novo. RCW 42.56.550(3). Under its provisions, courts “shall take into account the policy . . . that free and open examination may cause inconvenience or embarrassment to public officials or others.” *Id.* Where, as here, the record consists of declarations, memoranda, and other documentary evidence, the reviewing court is in the same position as the trial court. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

A public record is virtually any record related to the government’s conduct or performance. *Nissen v. Pierce County*, 183 Wn.2d 863, 874, 357 P.3d 45 (2015). The PRA’s disclosure provisions must be construed liberally and exemptions narrowly. *Progressive Animal Welfare Soc’y*, 125 Wn.2d at 251. The starting point is “the proposition that the act establishes an affirmative duty to disclose public records unless the records fall within specific statutory exemptions.” *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 36, 769 P.2d 283 (1989). The party attempting to avoid disclosure has the burden of proving an exemption applies. *Ameriquest Mortg. Co. v. Office of Att’y Gen.*, 177 Wn.2d 467, 486-

87, 300 P.3d 799 (2013). The PRA was enacted to ensure broad disclosure of public records. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978).

Officer Sheats was required to take a polygraph examination. RCW 43.101.095(2). He contends the redacted polygraph report is exempt from disclosure under RCW 42.56.250(1) and (2):

The following employment and licensing information is exempt from public inspection and copying under this chapter:

(1) Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination;

(2) All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant; . . .

Furthermore, WAC 139-07-040(1)(d) provides in pertinent part that “[t]est information and results should be considered confidential within the screening process to be used exclusively by the county, city, or state law enforcement agency to assist with the selection of their applicant.”

When statutory language is unambiguous, the court looks

only to the language to determine legislative intent as construction is not required when the meaning is plain. *State v. Delgado*, 148 Wn.2d 723, 726-27, 63 P.3d 792 (2003). In RCW 42.56.250(1), the term “other examination data” is plain and unambiguous. It means any other data used to administer an employment examination, in addition to test questions and scoring keys. Officer Sheats’ responses to the test questions prompted inquiries used in administering the polygraph and are thus “other examination data” exempt from disclosure. See *Belenski v. Jefferson County*, 187 Wn. App. 724, 743-44, 350 P.3d 689 (2015), *rev’d on other grounds*, 186 Wn.2d 452, 378 P.3d 176 (2016).

The trial court distinguished *Rush v. High Springs*, 82 So.3d 1108, 1110 (Fla. 2012), because the Florida statute, similar to Washington’s, included language exempting answers to test questions. RCW 42.56.250(1) does not expressly state answers to test questions are exempt from disclosure. Rather, it uses the broader language, “other examination data.” Answers to questions are clearly encompassed by that language. The trial court erred by finding the exemption in RCW 42.56.250(1) did not apply.

This result comports with the policy in RCW 42.56.250(2) exempting from public disclosure “[a]ll applications for public

employment, including the names of applicants, resumes, and other related material submitted with respect to an applicant.” It makes no sense to prevent disclosure of applicants’ names but permit disclosure of polygraph answers. Like the exemption for “test questions, scoring keys, and other examination data,” the exemption for “all applications for public employment” is plain and unambiguous. *Delgado*, 148 Wn.2d at 726-27. Under RCW 42.56.250(2), Officer Sheats’ application for public employment included “other related material submitted with respect to an applicant” and that provision clearly encompasses polygraph answers. The trial court erred by ordering disclosure of the redacted polygraph report disclosing the officer’s name and answers to polygraph questions.

This case presents the tension between the PRA and the criminal law requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963). Suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. at 87.

To establish a *Brady* violation, the defense must show (1) the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the prosecution either willfully or inadvertently; and (3) the evidence must be material. *State v. Davila*, 184 Wn.2d 55, 69, 357 P.3d 636 (2015) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed.2d 286 (1999)). It is the prosecution's duty to seek out exculpatory and impeaching evidence held by other government actors. *Davila*, 184 Wn.2d at 71. Evidence is material under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. *Id.* at 73.

The trial court determined the redacted polygraph report of Officer Sheats contained material required to be disclosed under *Brady* and "anyone else who may ask for the same under the Public Records Act." (CP 151). The redacted polygraph report may have to be disclosed as *Brady* material to certain criminal defendants and defense counsel, but *Brady* does not similarly require disclosure under the Public Records Act to "anyone else" since the material is indeed exempt under RCW 42.56.250(1) and

(2). Indeed, the City of Wenatchee had earlier taken a similar position in response to the Douglas County Prosecuting Attorney's PRA request for East Wenatchee Police Officer Sheats' pre-employment polygraph examination. (CP 20).

Under *Brady*, the prosecution must disclose evidence favorable to the accused, either exculpatory or impeaching. *Davila*, 184 Wn.2d at 69. The trial court decided the impeachment evidence against Officer Sheats reflected in the redacted polygraph report was required to be disclosed to defense counsel. The court's decision was overbroad because a fair reading of it ordered blanket disclosure to defense counsel if Officer Sheats was involved. But disclosure should have been ordered on a case-by-case basis as *Brady* requires the evidence to be material. 373 U.S. at 87. Evidence is material under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. *Davila*, 184 Wn.2d at 73.

Not every police action where Officer Sheats may have been involved requires a *Brady* disclosure. Depending on his official function, he may have only been a backup officer or observer having no substantive role in the criminal case where he would not

even be called as a witness. Whether such evidence is material and required to be disclosed under *Brady* must be determined in each individual case.

Officer Sheats enjoys the right to privacy under article 1, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. Under the PRA, “[p]ersonal information in files maintained for employees . . . of any public agency to the extent that disclosure would violate their right to privacy” is exempt. RCW 42.56.230(3). A person’s right to privacy thereunder is violated only if disclosure of information about the person would be highly offensive to a reasonable person and is not of legitimate concern to the public. RCW 42.56.050. In general, this right of privacy relates only to the intimate details of one’s personal and private life. *Spokane Police Guild*, 112 Wn.2d at 48.

An individual has a privacy interest whenever information revealing unique facts about those named is linked to an identifiable person. *Tiberino v. Spokane County*, 103 Wn. App. 680, 689, 13 P.3d 1104 (2000). The disclosure of the behavior revealed by Officer Sheats in the polygraph report would be highly offensive to a reasonable person as none of that behavior resulted

in recorded or documented criminal history and certainly implicates his privacy interest since he was specifically identified. (CP 6-7). Furthermore, this information was not of legitimate concern to the public in general as it was not official misconduct and exempt under RCW 42.56.250(1) and (2). See *DeLong v. Parmelee*, 157 Wn. App. 119, 157-58, 236 P.3d 936 (2010), *dismissed on remand*, 164 Wn. App. 781, 267 P.3d 410 (2011).

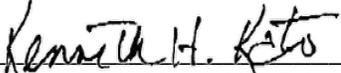
A blanket disclosure under *Brady* to “anyone else who may ask for the [redacted polygraph report] under the Public Records Act” should not trump Officer Sheats’ constitutional right to privacy that is embodied in the PRA and its specific exemptions. *Brady* does not mandate disclosure to the public in general and only requires disclosure to defense counsel when Officer Sheats’ redacted polygraph report is material impeachment evidence as determined on a case-by-case basis. The trial court erred by reasoning that disclosure of *Brady* material necessarily required disclosure under the PRA, not only to defense counsel but anyone else asking for it. The report is exempt from disclosure under the PRA and *Brady* considerations are inapplicable to the general public. U.S. Const. amend. IV; Wash. Const. art. 1, § 7; RCW 42.56.250(1) and (2).

V. CONCLUSION

Based on the foregoing facts and authorities, Officer Sheats respectfully urges this Court to reverse the decision of the trial court ordering blanket disclosure under *Brady* to (1) defense counsel of the redacted polygraph report and (2) anyone else asking for the same report under the PRA.

DATED this 6th day of March, 2018.

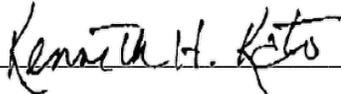
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on March 6, 2018, I served a copy of the brief of appellant through the eFiling portal on Devin Poulson, Steven Clem, Erin McCool, Douglas Shae, and Danielle Marchant at their respective email addresses.



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