

Nos. 356868 & 358534

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

FILED

MAR 13 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,
Respondent,

vs.

CAMERON J. PETERSON,
Appellant.

APPELLANT'S OPENING BRIEF

RICHARD D. WALL, #16581
Attorney for Appellant

Richard D. Wall, P.S.
Attorney at Law
1604 W. Dean
Spokane, WA 99201
(509) 747-5646

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Court Rules

CrR 4.8passim
CrR 7.8passim

I. ASSIGNMENTS OF ERROR

1. The Trial Court Erred by Refusing to Issue a Subpoena for Medical Records that May Provide a Basis for Granting a New Trial.

ISSUES:

1. Does the Superior Court have authority under CrR 4.8 to Issue a Subpoena at the request of a defendant post conviction?

Answer: Yes. The Superior Court Criminal Rules apply "in all criminal proceedings." CrR 1.1 Nothing in the language of CrR 4.8 suggests that it applies only to pre-conviction proceedings, and the Superior Court does not lose jurisdiction over a criminal proceeding simply because the defendant has been found guilty.

2. Is a defendant who seeks to vacate his conviction by filing a motion under CrR 7.8 entitled to discovery of information that is reasonably likely to provide grounds for granting a new trial.

Answer: Yes. A motion to vacate a conviction is clearly a "criminal proceeding." Therefore, the issuance of a subpoena is available to a defendant unless the materials or testimony sought is beyond the scope of discovery or the subpoena is otherwise subject to being quashed or modified under CrR 4.8(b)(4).

II. STATEMENT OF THE CASE

Appellant/Defendant Cameron Peterson was found guilty by a jury of Second Degree Assault on December 4, 2015. CP 7. The charge arose out of an incident that occurred at the Special K Tavern in April 2015. At trial, the State presented several witnesses who testified that Peterson struck the alleged Victim, Gregory L. Zielke, Sr., over the head with a bottle, glass or other object. One witness described the blow to Mr. Zielke as resulting in a "gash" that caused significant bleeding. CP 40 - 41. Peterson denied striking Zielke on the head.

Following the alleged assault, Zielke was transported to Sacred Heart Medical Center hospital for the purpose of having him examined for possible head injury. CP 53. The lead investigator on the case, Det. Turman, faxed a request to the hospital for Zielke's medical records. CP 56. Those records were never introduced at Peterson's trial, and Peterson's appointed counsel did not request the records through discovery or otherwise attempt to obtain the records.

Peterson appealed his conviction, however, his counsel on appeal did not raise as an issue the failure of Peterson's trial attorney to obtain Zielke's medical records pertaining to the alleged assault or to present those records at trial. CP 43 - 47. Following the denial of his appeal, Peterson made repeated efforts to obtain copies of those records from the

Public Defender and from the Spokane Police Department. None of those efforts were successful. (Declaration of Cameron Peterson in Support of Motion for Relief from Judgment, p. 2).

Peterson then sought to have the Court issue a subpoena duces tecum to Sacred Heart Medical Center to obtain the records. CP 36. In support of that request, Peterson claimed that he had not assaulted Zeilke as described by the witnesses and the medical records would likely not show any injury to his head consistent with the testimony at trial. CP 37-38. Peterson's request for a subpoena was denied. Peterson filed a Notice of Appeal from that denial. CP 87.

Peterson then filed a motion to vacate his conviction pursuant to CrR 7.8(b) and requested the issuance of a subpoena to obtain the records in support of his motion. That motion was transferred to this Court pursuant to CrR 7.8(c)(2) for consideration as a personal restraint petition. This Court granted Peterson's motion to consolidated his personal restraint petition with his appeal.

III. STANDARD OF REVIEW

Discovery orders, including orders granting or denying a motion to quash a subpoena, are reviewed for an abuse of discretion. *Republic of Kazakhstan v. Does 1 - 100*, 192 Wn.App. 773, 781, 368 P.3d 524 (2016).

A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or reasons. *Id.*

IV. ARGUMENT

1. The Trial Court Abused its Discretion by Refusing to Issue the Requested Subpoena on the Grounds that CrR 4.8 Applies Only to Pre-Conviction Proceedings.

Peterson's request to the Superior Court for issuance of a subpoena was made pursuant to CrR 4.8(c). The purpose of requesting to subpoena was to obtain the records of an examination of the victim, Gregory L. Zielke, Sr., at Sacred Heart Medical Center following the alleged assault. The motion was supported by a declaration setting forth the following facts:

Peterson had been convicted at trial of second degree assault on Zielke;

One of the State's witnesses testified that Zielke sustained a "gash" on his head that caused significant bleeding as the result of being struck by Peterson;

Zielke was transported from the scene to Sacred Heart Medical Center specifically for the purpose of having him examined for any injuries to his head;

The records from of Zielke's examination at Sacred Heart Medical Center were not obtained by Peterson's attorney and were not produced at trial;

The medical records were not part of the State's case file and apparently had never been obtained from Sacred Heart Medical Center; and

The records were critical to Peterson's defense because they would likely show Zielke had not sustained any injury to his head consistent with the testimony at trial.

The State responded to the motion by arguing that CrR 4.8 applies only to pre-trial discovery. The State also argued that Peterson's request could be made only pursuant to a motion to vacate his conviction under CrR 7.8(5), which would be timed barred.

At the hearing on Peterson's motion, the trial court requested additional briefing and set a briefing schedule. Both Peterson and the State submitted additional briefs addressing whether CrR 4.8 or the

criminal discovery rules generally are applicable to post-conviction proceedings. Peterson cited cases from Washington and other jurisdictions stating that a defendant is entitled to discovery following conviction upon a showing that the requested discovery is likely to prove entitlement to other relief. CP 64 - 67; See, *In re Gentry*, 137 Wn.2d 378, 972, P.2d 1250 (1999), see also, *State v. O'Brien*, 214 Wis.2d 328, 340-43, 572 N.W.2d 870 (1997)(defendant entitled to post-conviction discovery upon showing that the evidence is material and there is a reasonable probability of a different outcome); *State v. Lewis*, 656 So.2d 1248, 1250 (Fla. 1994)(post-conviction discovery allowed upon a showing of good cause); *Land v. State*, 775 So.2d 847, 852 (Ala. 2000)(appropriate standard for granting post-conviction discovery request is good cause). The State argued that CrR 4.8 applies only to pre-trial proceedings because the rule states "the court in which an action is pending or before which attendance is required" may issue a subpoena for production. CP 68 - 72. According to the State's reading of that language, there is no action "pending" once a finding of guilt has been entered. CP CP 71. The trial court adopted the State's reasoning in denying Peterson's motion. CP 83 - 84.

The State's argument is without merit. A criminal proceeding does not cease to exist upon the entry of a conviction. The criminal rules

specifically apply to all proceedings in the trial court that may follow the entry of a finding of guilt and/or entry of judgment against the defendant. See, CrR 7.1 through 7.8. The trial court clearly retains jurisdiction authority to deal with a variety of post-conviction matters, including entry of judgment and sentence, enforcement of any and all orders entered by the court, and post-conviction motions. See, CrR 7.8(b) and RCW 10.73.90, 100, and 130. Thus, a criminal case remains "pending" well after entry of a guilty verdict.

The State's argument also fails to consider that the criminal rules are to be viewed in relation to the type of procedure involved and the purpose of securing simple, fair, and inexpensive justice. See, *City of Seattle v. Crockett*, 87 Wn.2d 253, 256, 551 P.2d 740 (1976). Limiting the application of CrR 4.8 and the criminal discovery rules in general to pre-conviction proceedings only complicates a defendant's ability to seek justice, increases the costs to both the parties and the court, and reduces the effectiveness of the rules.

Here, for example, the State argues that Peterson cannot obtain a subpoena to allow him access to Zielke's medical records unless he first institutes some kind of post-conviction proceeding so that there is an action "pending" before the court. However, Peterson's ability to pursue

post-conviction relief depends upon his ability to get access to those records in order to demonstrate prejudice from his trial attorney's failure to obtain the records and use them at trial. Allowing Peterson to conduct limited discovery prior to seeking post-conviction relief simplifies the process and promotes justice.

Denying Peterson any right to discovery on the grounds that there is no action "pending" before the court serves no purpose other than to increase the difficulty of pursuing post-conviction relief and/or foreclosing such relief altogether.

In response to the denial of his request for a subpoena, Peterson filed a motion to vacate his conviction under CrR 7.8, thereby creating a "pending" action. Not surprisingly, the State responded by arguing that "[by] filing this motion without any new evidence to present to the court, the defendant has put the cart before the horse." In other words, according to the State, Peterson is not entitled to a subpoena to obtain evidence in support his motion without first filing the motion. At the same time, his motion is without merit because it is not supported by evidence he cannot get without a subpoena. A classic Catch-22 situation.

This is not justice. Peterson was convicted of a serious felony assault based on testimony that he struck Zielke on the head with an object

with sufficient force to knock him out. According to the police reports, Zeilke was taken to the hospital specifically for the purpose of being examined for a head injury. No one, not the police, not the prosecutor, not Peterson's own attorney, bothered to get those records to see if the medical evidence was consistent with the testimony at trial. All Peterson is asking for is the opportunity to see the records and, if they support his claim of ineffective assistance of counsel, to be allowed to present them in support of his motion.

Peterson's request is not idle speculation. He has consistently maintained his innocence and denied striking Zielke as described by the State's witnesses. Therefore, there is a reasonable probability the medical records will not show any injury to Zielke consistent with the testimony presented at trial. Application of the Criminal Rules in a manner that denies access to those records is contrary to the intent and purpose of the rules. The trial court erred by refusing Peterson's request for a subpoena.

2. Appellant is Entitled to Use the Criminal Discovery Rules to Obtain Evidence Necessary to Support a Request for Post-Conviction Relief.

In addition to arguing that Peterson's motion to vacate his conviction was not supported by any new evidence, the State argued that

Peterson was not entitled to use the discovery rules to obtain such evidence. The State also argued that discovery was not available to Peterson unless and until the trial court granted the motion. (Response to Motion for Relief From Judgment, p. 2 - 4)

Not only does the State's argument foreclose any possibility of relief to Peterson, it also creates a process that results a needless waste of time and judicial resources. According to the State's analysis, a defendant who seeks discovery of facts needed to support a motion under CrR 7.8 would have to first file a personal restraint petition with this Court without the supporting evidence. Theoretically, this Court would then have to transfer the case to the Superior Court to allow additional discovery and to make any necessary findings of fact. It is unclear what, if anything, would be accomplished by requiring a defendant to initially seek relief in this Court, rather than going directly to the Superior Court where discovery can be ordered and factual findings made prior to any ruling on merits of the motion.

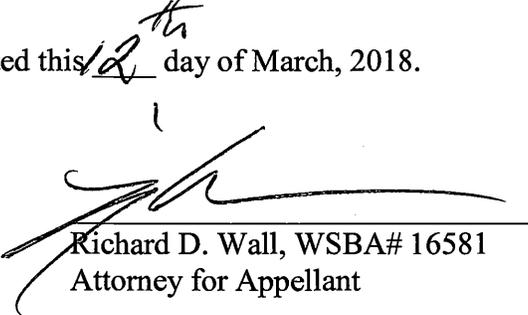
The State incorrectly characterized Peterson's motion as being based in part on newly discovered evidence. In fact, Peterson's motion is based solely on a claim of ineffective assistance of counsel at trial resulting from his attorney's failure to obtain readily available evidence

critical to his defense. When such a claim is raised, the use of the court's subpoena power or other means of discovery may be the only way a defendant can obtain such evidence post-conviction. To completely foreclose any type of post-conviction discovery by a defendant as the State would have this Court do, will simply mean that all such claims will be denied regardless of whether a particular claim has merit.

CONCLUSION:

For the foregoing reasons, this Court should reverse the trial court's order denying Appellant's request for issuance of a subpoena and should remand this matter to the trial court with instructions to issue the requested subpoena forthwith.

Respectfully submitted this th12 day of March, 2018.



Richard D. Wall, WSBA# 16581
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of March 2018, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was sent via legal messenger to:

Jennifer J. Zappone
Deputy Prosecuting Attorney
Spokane County Prosecuting Attorney's Office
1100 W. Mallon
Spokane, WA 99260

And via US Mail, postage prepaid to:

Cameron J. Peterson
4907 E. Fairview
Spokane, WA 99217

A handwritten signature in cursive script, appearing to read "Jennifer J. Zappone", written in black ink.