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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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CECILIA BURTON,

Appellant,

v.

CITY OF SPOKANE,

Respondent

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**BRIEF OF RESPONDENT  
CITY OF SPOKANE**

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## I. INTRODUCTION

Appellant Cecilia Burton brought a lawsuit against the City of Spokane seeking to compel the Spokane Police Department to release to her physical evidence collected during a murder investigation. As the murder is unsolved and the case is open and active, the City refused her demand. While precedent does not appear to address this precise scenario -- a family member demanding police release physical evidence from an ongoing homicide investigation -- decisions under the Washington Public Records Act ("PRA") properly guided the trial court's decision on the City's Motion to Dismiss. In the PRA context, courts have repeatedly refused to step into the shoes of law enforcement and decide what information is important for effective policing; instead leaving that decision in the hands of law enforcement. Additionally, the City has a duty under the due process clause of the Fourteenth Amendment and Article I, section 3 of the Washington Constitution to preserve evidence of crimes.

It is the City's position that the concerns of compromising effective law enforcement repeatedly espoused in the PRA cases are even more pronounced in this matter as Appellant seeks to have physical evidence, as opposed to documents, released to her prior

to the completion of a homicide investigation. The trial court properly determined Appellant failed to state a claim for which relief can be granted and dismissed her claims against the City.

## **II. RESPONDENT'S ASSIGNMENT OF ERROR**

Respondent asserts the trial court made no error.

## **III. RESTATEMENT OF ISSUES**

Respondent believes the lone issue is whether the trial court erred in granting Respondent's CR 12(b)(6) Motion to Dismiss.

## **IV. STATEMENT OF CASE**

On or about June 26, 2016, Appellant's son, Melvin Rouse, II, was the victim of a homicide in Spokane. As noted, the crime is unsolved. SPD collected various pieces of evidence from the scene, including a number of Mr. Rouse's personal effects. Appellant brought suit "to recover from the police personal belongings of her dead son." See CP 0048. The personal belongings are identified as "personal jewelry, personal wallet and contents, and other items." CP 0004. As Mr. Rouse's homicide is unsolved and the investigation remains ongoing, SPD personnel refused Appellant's demand that Mr. Rouse's property be released to her. Id.

On August 22, 2019, the City brought a CR 12(b)(6) Motion to Dismiss Appellant's Complaint (CP 0006) for failure to state a claim for

which relief can be granted. On September 9, 2019, the trial court inadvertently signed and entered an order granting the City's Motion to Dismiss. On October 4, 2019, (CP 0061) the inadvertent order was vacated. On October 2, 2019, Appellant responded to the City's Motion (CP 0048); the City submitted a reply on October 4, 2019 (CP 0055). Following oral argument on October 11, 2019, the trial court granted the City's Motion to Dismiss, commemorated in an order dated October 18, 2019 (CP 0065). On December 9, 2019, the trial court denied Appellant's Motion for Reconsideration.

#### **V. STANDARD OF REVIEW**

A trial court's decision on a motion to dismiss is reviewed de novo. Gaspar v. Peshastin Hi-Up Growers, 131 Wash. App. 630, 634 (2006).

#### **VI. ARGUMENT**

Following Mr. Rouse's murder, SPD investigated the scene. Various pieces of evidence were collected and are currently stored at the City's property evidence facility. The items included "personal jewelry, personal wallet and contents, and other items." CP 0004. While no arrest has been made, the case remains open and active. Appellant demanded Mr. Rouse's personal items be released to her and "the Spokane Police Department refuse[d] to return those items

to her, based, it appears, on a claim that the investigation is ongoing.”<sup>1</sup> Id.

Undersigned counsel’s review of Washington case law does not reveal a case where a family member sought to have police release physical evidence from an ongoing homicide investigation prior to the conclusion of the matter. There is, however, robust case law regarding requests for records from open and active police investigations under the PRA. Such precedent properly guided the trial court.

“Open and active police investigation is a unique public service requiring unique safeguards from premature disclosure.” White v. City of Lakewood, 194 Wn. App. 778, 789 (2016). In Cowles Pub. Co. v. Spokane Police Dep’t,<sup>2</sup> the Washington Supreme Court held that it was “reluctant to have the courts second-guess law enforcement agencies regarding release of sensitive information in unsolved cases.” The Cowles court continued:

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<sup>1</sup> Appellant’s Complaint made additional reference to SPD’s “refusal” to return Mr. Rouse’s personal items. See, e.g., CP 0004 (“The refusal of the police to provide Cecilia Burton with her son’s personal property has caused her substantial emotional distress and the expenses of two trips from California to Spokane. The refusal continues to aggravate Ms. Burton’s emotional sufferings.”).

<sup>2</sup> 139 Wn.2d 472, 477 (1999) *as amended on denial of reconsideration* (Jan. 7, 2000).

Requiring a law enforcement agency to segregate documents before a case is solved could result in the disclosure of sensitive information. The determination of sensitive or nonsensitive documents often cannot be made until the case has been solved. This exemption allows the law enforcement agency, not the courts, to determine what information, if any, is essential to solve a case.

Id. In Sargent v. Seattle Police Dep't,<sup>3</sup> the Supreme Court outlined why such a policy is needed, stating “[i]n the context of a criminal investigation...the public would be better served by keeping the requested information confidential so that the police could finish their investigation and catch the perpetrator.” In recognition of such valid policy considerations, RCW 42.56.240(1) categorically exempts from disclosure all “information contained in an open active police investigation file.” Seattle Times Co. v. Serko, 170 Wn.2d 581, 593 (2010); Wade’s Eastside Gun Shop, Inc. v. Dep’t of Labor & Indus., 185 Wn.2d 270, 281 (2016) (Recognizing that RCW 42.56.240(1) categorically exempts from disclosure all “information contained in an open active police investigation file”); *see also* Ameriquest Mortgage Co. v. Office of Attorney Gen. of Washington, 177 Wn.2d 467, 492 (2013) *and* Prison Legal News, Inc. v. Dep’t of Corr., 154 Wn.2d 628, 657 (2005) (A “blanket exemption” exists for ongoing

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<sup>3</sup> 179 Wn.2d 376, 392-93 (2013).

investigations). Nondisclosure of information from open and active cases is “essential to effective law enforcement.” Newman v. King County, 133 Wn.2d 565, 573 (1997).

The facts of Newman, *supra*, exemplified the deference afforded law enforcement regarding disclosure in open investigations. In 1994, the plaintiff (a reporter) made a request under the PRA for documents related to an unsolved, twenty-five-year-old murder. Id. at 568. With the exception of the initial incident report, King County denied the request, asserting that the investigatory file was exempt under the PRA as it was an active and ongoing police investigation. Id. The reporter filed suit under the PRA. Id. at 569. The trial court found for the reporter and ordered the investigatory file released; King County appealed to the Supreme Court. Id. The Supreme Court reversed, concluding that even though the murder was “a ‘cold case’ murder where no suspect had yet been identified” it was still an “open investigation” and, as such, disclosure would “compromise effective law enforcement.” Id. Contrasted with Newman, Mr. Rouse’s murder is not a “cold case” and occurred much more recently (2016) than 25 years ago. Additionally, rather than documents, Appellant seeks tangible pieces of evidence gathered from the scene of the unsolved homicide. The Supreme Court’s concern in Newman about

compromising effective law enforcement through the release of investigatory information is even more pronounced under the facts of this case.

Additionally, under the due process clause of the Fourteenth Amendment and Article I, section 3 of the Washington Constitution, law enforcement must preserve evidence “that might be expected to play a significant role in the suspect’s defense.” State v. Wittenbarger, 124 Wash.2d 467, 474-75 (1994) (citing California v. Trombetta, 467 U.S. 479, 488 (1984)). Material exculpatory evidence is that evidence which, before its destruction, has apparent exculpatory value and is of “a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” Wittenbarger, 124 Wash.2d at 475. If the State fails to preserve material exculpatory evidence, the trial court must dismiss criminal charges. Id. The duty to disclose and preserve evidence favorable to the defense applies to the prosecution as well as to “others acting on the government’s behalf.” Barfield v. Carter, 2007 WL 737363, at \*8 (W.D. Wash. Mar. 5, 2007) (Kyles v. Whitley, 514 U.S. 419, 437 (1995)). The City’s Motion to

Dismiss (CP 0006) provided examples of convictions occurring many years after a crime was committed.<sup>4</sup>

Appellant's Complaint alleged two causes of action against the City: negligence and conversion. To succeed on her negligence claim, Appellant must prove that the City's conduct fell below the standard established by law for the protection of others against unreasonable risk of harm.<sup>5</sup> The facts of this matter, however, show quite the opposite. By refusing Appellant's request for Mr. Rouse's personal items, the City complied with its formal obligations, outlined above, to preserve and maintain evidence in anticipation of a future prosecution regarding Mr. Rouse's murder. Further, Appellant offered no case law

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<sup>4</sup> See e.g., State v. McConnell, 178 Wn. App. 592, 599 (2013) (The defendant was not charged in connection with a 1998 rape until 2011); State v. Small, 404 P.3d 543, 544 (App. 2017), *review denied*, 190 Wn.2d 1014 (2018) (The defendant was not charged with 1998 homicide and 2006 sexual assault until 2010); State v. Athan, 160 Wn.2d 354, 362 (2007) (The defendant was not charged with 1982 murder until 2002). There are even cases where a wallet -- one of the pieces of evidence Appellant seeks to have turned over to her -- was the critical piece of evidence in a criminal proceeding. See People v. Jernigan, 2013 WL 6680904, at \*4 (Cal. Ct. App. Dec. 18, 2013) (*unpublished but not offered for precedential value*) (The defendant's 2011 conviction for 1986 murder was largely based on DNA found on the victim's wallet); see also People v. Carlson, 2017 WL 25490, at \*1 (Cal. Ct. App. Jan. 3, 2017) (*unpublished but not offered for precedential value*) (Blood found on the 1984 homicide victim's purse led to a conviction in 2011).

<sup>5</sup> 16 Wash. Prac., Tort Law And Practice § 2:1 (4th ed.).

demonstrating a duty exists on behalf of the City to release evidence from the scene of Mr. Rouse's murder to her. This was unquestionably reasonable behavior. As to Appellant's conversion claim, conversion is defined as "a willful interference with a chattel without lawful justification, whereby a person entitled to possession of the chattel is deprived of the possession of it."<sup>6</sup> The City not only had a "lawful justification" for refusing Appellant's request for Mr. Rouse's items but an affirmative obligation to preserve and maintain evidence gathered from the crime. Appellant did not allege a viable conversion claim.

In her Brief, Appellant asserted the trial court erred when it: 1) failed to acknowledge the existence of hypothetical facts that supported the legal sufficiency of her claim;<sup>7</sup> and 2) failed to give consideration to Appellant as a survivor of a crime under RCW Ch. 7.69.<sup>8</sup> Regarding the former, in her Motion for Reconsideration, Appellant speculated that items of Mr. Rouse's personal items sought by Appellant have been lost by SPD. First, Appellant offered no facts in support of her speculation (and, no facts exists because the allegation is untrue). Second, and more importantly, it is irrelevant; the

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<sup>6</sup> 16 Wash. Prac., Tort Law And Practice § 14:16 (4th ed.) (string cite omitted).

<sup>7</sup> See Appellant's Brief at pg. 6.

<sup>8</sup> Id. at pg. 9.

blanket exemption on disclosure of information during an open and active criminal investigation means that the City is under no obligation to itemize each piece of evidence or offer an explanation for non-production. The investigation into Mr. Rouse's death remains open and active and, accordingly, Appellant has no entitlement to the physical evidence she seeks to have released to her. As to her second argument -- that the trial court failed to consider her rights as a victim under RCW Ch. 7.69 -- RCW 7.69.030 outlines the "Rights of victims, survivors, and witnesses," stating:

"There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have the following rights, which apply to any criminal court and/or juvenile court proceeding...

(7) To have any stolen or other personal property expeditiously returned by law enforcement agencies or the superior court ***when no longer needed as evidence.***"<sup>9</sup>

As indicated, Mr. Rouse's "personal jewelry...wallet, and other items" are currently maintained as evidence in the homicide. Appellant was denied no rights under RCW Ch. 7.69.

Unfortunately, the City has no estimate of when someone may be charged with Mr. Rouse's homicide. Until that point, however, it

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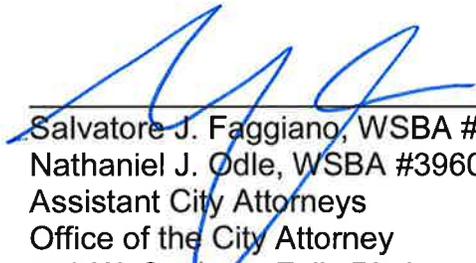
<sup>9</sup> Emphasis added.

needs to retain evidence from the crime. Doing so is not negligent nor does it constitute conversion; instead the City complies with due process obligations under both Washington and federal law. Appellant failed to state a claim for negligence or conversion and her Complaint was properly dismissed by the trial court.

## VII. CONCLUSION

For the reasons stated above, the City respectfully requests the Court affirm the trial court's dismissal of Appellant's Complaint.

DATED this 11<sup>th</sup> day of June, 2020.



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CERTIFICATE OF SERVICE

I CERTIFY that on this 11th day of June, 2020, I caused to be mailed a true and correct copy of the foregoing BRIEF OF RESPONDENT, CITY OF SPOKANE to be delivered to the parties below in the manner noted:

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