

NO. 80720-5

THE SUPREME COURT OF WASHINGTON

KITSAP COUNTY DEPUTY SHERIFF'S GUILD, and DEPUTY
BRIAN LA FRANCE and JANE DOE LA FRANCE, and the
marital community composed thereof,

Petitioner,

vs.

KITSAP COUNTY and KITSAP COUNTY SHERIFF,

Respondents.

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STATE OF WASHINGTON
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ON APPEAL FROM DIVISION II OF THE COURT OF APPEALS

KITSAP COUNTY and KITSAP COUNTY SHERIFF'S
SUPPLEMENTAL BRIEF

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
JACQUELYN M. AUFDERHEIDE
Chief Deputy Prosecuting Attorney
Attorneys for Kitsap County and
Kitsap County Sheriff
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992

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I. INTRODUCTION

One need only look to reports of police corruption in Mexico to appreciate the societal benefits of recognizing a public policy of police honesty. One need not look very hard to find that such a public policy exists in Washington State. Several statutes and court decisions express our State's public policy for truthful police officers, and an arbitration decision that requires a Sheriff to reinstate a deputy sheriff untruthful found to have engaged in multiple episodes of untruthfulness contravenes this public policy. The Supreme Court should put police officers and grievance arbitrators on notice that public policy is violated when a collective bargaining agreement or arbitration decision interpreting it requires reinstatement of an officer found to be untruthful.

II. ISSUES

Issue No. 1. Whether the Court of Appeals properly held that the arbitrator offended public policy and exceeded his jurisdiction and authority under the collective bargaining agreement when he required the Sheriff to reinstate Deputy LaFrance's employment after concluding by clear, cogent, and convincing evidence that LaFrance was guilty of multiple episodes of untruthfulness.

Issue No. 2. Whether the arbitrator exceeded his jurisdiction and authority under the collective bargaining agreement when he shifted well-

established state and federal law as to the burden of proving a disability, requiring the employer to prove by clear, cogent, and convincing evidence that Deputy LaFrance was not disabled.¹

III. STATEMENT OF THE CASE

Kitsap County Sheriff Deputy Brian LaFrance made false statements to the Sheriff's office about case reports, files, property, and evidence in connection with criminal matters he was handling and to supervisors investigating him for misconduct. CP 1239.

The Guild and LaFrance attempt to trivialize LaFrance's lies and attribute them to his alleged mental health problems, which neither he nor anyone else, including the Guild, knew existed. CP 1249-1250. However, LaFrance's untruthfulness was not about trivial or minor matters, and a police officer should not be allowed to justify his lying, after the fact, by alleging they were caused by a disability.

LaFrance's misrepresentations were about matters integral to the performance of his duties as a law enforcement officer. LaFrance lied to his supervisors about the location of case files and reports, and the status of cases, reports, and warrants. CP 966-969, 1223-1224, 1227-1233.

LaFrance told his Field Training Officer that files in the trunk of his patrol vehicle were personal materials when the truth was that they were case

¹ The Court of Appeals did not address this second issue raised by the County.

files belonging to the Sheriff's Office. CP 967, 1224-1225, 1231. He told investigators that a deputy prosecuting attorney told him to hold off filing a case because of a pending civil action, which LaFrance knew to be untrue. CP 967. LaFrance lied when he told his supervisor that he had returned his firearm to Inventory Control. Sheriff's Office personnel later found it in an unlocked drawer in LaFrance's office. CP 968, 1223, 1231.

During a search of LaFrance's patrol vehicle, LaFrance would not allow his sergeant to examine or remove CD-ROMs and floppy disks being stored there, claiming that they were personal items and utility disks dealing with old DOS commands. CP 967, 1224-1226. Some of the disks were marked "KCSO" and "SPD Vice." CP 967, 1225-1226. When it became apparent that the sergeant was going to examine the disks and CD-ROMs, LaFrance stated that there was a possibility that they could contain pornographic images relating to the work he had been doing in detectives investigating pornography. The disks and CD-ROMs were later found to contain pornographic images, including contraband child pornography. CP 968, 1218-1219. LaFrance's change of story was a willful attempt by Deputy LaFrance to deceive investigators searching his patrol vehicle.

When LaFrance was reassigned to patrol, he was ordered to separate himself from any further investigations involving detective cases and to return all evidence, cases and property to detectives immediately.

Later he was observed downloading files from the County server onto a squad room computer. When asked what he was doing, he lied, telling a sergeant that he was simply transferring a repository of notes that were primarily phone lists, copies of email, and articles. Later, investigators discovered that LaFrance had actually downloaded pornographic images, including child pornography, onto the squad room computer for no investigative reason. CP 968, 1232.

The Sheriff's office charged LaFrance with false statements and other misconduct and terminated his employment. CP 1229-1230. The Guild and LaFrance grieved the discharge, and the grievance was advanced to arbitration. CP 1229, 1233.

During arbitration, the Guild and LaFrance for the first time attributed LaFrance's misconduct as a consequence of a mental health impairment that should have been obvious to the Sheriff's office. CP 1249-1250. The arbitrator upheld all of the Sheriff's charges of misconduct, including the charges of untruthfulness, but overturned the penalty, ruling, inter alia, the Sheriff failed to establish by clear, cogent, and convincing evidence that a reasonable employer would not have known of LaFrance's alleged disabilities. CP 1251, n. 75. The County and Sheriff appealed the arbitrator's decision by petitioning the Superior Court for a writ of certiorari. CP 1078. The trial court denied the petition,

CP 1586, and the County appealed. CP 1576. The Court of Appeals agreed with the County that the arbitrator offended public policy by reinstating LaFrance's employment after concluding that LaFrance was guilty of untruthfulness. The Guild and LaFrance then petitioned this court for review of the Court of Appeals' decision.

IV. ARGUMENT

A. **Washington State Recognizes the Public Policy for Truthful Police Officers.**

As public officers, deputy sheriffs are required by law to be truthful during the performance of their public duties. RCW 42.20.040 states: "Every public officer who shall knowingly make any false or misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor." In finding that "LaFrance was guilty as charged," the Arbitrator found that LaFrance made false and/or misleading statements during an official investigation by the Sheriff's Office. CP 39.

The public has an important interest in its law enforcement officers to give frank and honest replies to questions relevant to his fitness to hold public office. RCW 9A.76.175 states "[a] person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor." "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the

discharge of his or her official powers or duties.” *Id.* Again, the Arbitrator found that LaFrance made false or misleading statements to Sergeants and Lieutenants conducting an official investigation. CP 39.

When LaFrance lied during the disciplinary investigation, LaFrance also may have violated RCW 9A.76.020 which provides that “[a] person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.” LaFrance’s untruthfulness was intended to conceal his actions from investigating officers, and such concealment was intended to obstruct Sergeants and Lieutenants charged with investigating LaFrance’s misconduct. CP 39.

When LaFrance lied to officers in order to prevent them from recovering files and records belonging to the Sheriff’s office, LaFrance probably engaged in official misconduct. RCW 9A.80.010 states: “(1) A public servant is guilty of official misconduct if, with intent to obtain a benefit or to deprive another person of a lawful right or privilege: (a) He intentionally commits an unauthorized act under color of law; or (b) He intentionally refrains from performing a duty imposed upon him by law. (2) Official misconduct is a gross misdemeanor.” CP 39.

LaFrance swore and affirmed that he would perform his duties truly, faithfully and impartially. A deputy's reputation for truth and veracity must be above reproach. The failure of a deputy to provide truthful statements during an official investigation impairs the Sheriff's Office's ability to properly and fully investigate Office regulations. CP 971-974. Not only does reinstatement of an untruthful deputy sheriff corrodes the public's confidence in its police force. Untruthful officers subject public entities to the risk of liability and they should not be entrusted with the formidable authority that deputy sheriffs are granted under chapter 36.28 RCW.

Washington's laws support a conclusion that it offends public policy to employ law enforcement officers who have a record of untruthfulness in the performance of their public duties. The effect of the Court of Appeals' public-policy decision is that if officers are found to be intentionally untruthful, a grievance of their termination will be limited to the issue of whether the untruthfulness was proven. If so, no arbitration panel or judicial authority will be able to reduce the penalty.

B. Brady and its Progeny Provides Supports for Public Policy Against Reinstatement of a Deputy Found to be Untruthful.

Prosecutors have a constitutional duty to turn over exculpatory information voluntarily to defense counsel. *United States v. Agurs*, 427

U.S. 97, 96 S.Ct 2392, 49 L.Ed.2d 342 (1976); *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002) ([W] expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery). There is no difference between exculpatory and impeachment evidence for *Brady* purposes. *United States v. Bagley*, 473 U.S. 667, 676-677, 105 S.Ct. 3375, 87 L.Ed.2d 481(1985).

The law of *Brady* leaves no doubt. If LaFrance is reinstated to his position as a deputy sheriff, then in any criminal matter where LaFrance will be a witness, the prosecuting attorney will be required to disclose his record of untruthfulness. His record of untruthfulness is likely to affect the credibility of his testimony as to probable cause to conduct a search, as to the location of evidence at a crime scene, as to statements made by a suspect or witness to LaFrance, as to LaFrance's own reported behavior, and as to his own reported observations. Considering LaFrance's established and recorded history of untruthfulness, it is highly likely that a jury may refuse to accept any evidence offered by LaFrance and thereby refuse to convict the defendant. If LaFrance is the only law enforcement witness in a criminal proceeding, it is unlikely that the case will be charged. CP 1026-1029.

The arbitrator's decision required that LaFrance be reinstated to his position as a deputy sheriff. However, neither a court nor a sheriff can require a prosecutor to use a police officer as a witness. If the Sheriff is required to reinstate LaFrance, the likely result is that criminals will avoid prosecution while the public pays wages to an employee who is useless as a deputy sheriff. This is not a case where he can be reassigned to perform non-law enforcement duties. Any attempt to do so would likely itself give rise to a grievance by LaFrance and the Guild.

The law of *Brady* evidences a strong public policy condemning untruthfulness and dishonesty of police officers. The policy of *Brady* commands against reinstatement of a police officer who has been found to have engaged in multiple episodes of untruthfulness.

C. Public Policy Against Reinstatement of an Untruthful Police Officer Dominates Over Public Policy Favoring the Finality of Arbitration Awards.

The Court of Appeals' opinion correctly recognized that while public policy favors the finality of arbitration awards, dominant public policy commands against reinstatement of a police officer found to have engaged in multiple episodes of untruthfulness. This is one of those rare cases where a dominant public policy is grounds for refusing to enforce an arbitrator's interpretation of a collective bargaining agreement. *See W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 765, 103 S.Ct. 2177, 76

L.Ed.2d 298 (1983); *Aramark Facility Services v. Service Employees Intern. Union, Local 1877*, AFL CIO 530 F.3d 817, 823 (9th Cir. 2008) (The narrow, public policy exception to the generally deferential review of arbitration decisions is the “now-settled rule that a court need not, in fact cannot, enforce an award which violates public policy”) (quoting *Stead Motors v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1209 (9th Cir.1989) (en banc); *Virginia Mason Hosp. v. Washington State Nurses Ass'n*, 511 F.3d 908, 917 (9th Cir. 2007); and *Local Union No. 77, Intern. Broth. of Elec. Workers v. Public Utility Dist. No. 1, Grays Harbor County*, 40 Wn.App. 61, 66, 696 P.2d 1264, 1268 (1985).

In evaluating a public policy argument, courts “must focus on the award itself, not the behavior or conduct of the party in question.” *Aramark Facility Services v. Service Employees Intern. Union, Local 1877*, AFL CIO 530 F.3d 817, 823 (9th Cir. 2008) Importantly, the public policy inquiry proceeds by taking the facts as found by the arbitrator.

Accordingly, in evaluating whether the arbitrator's award violated public policy here, the court should not revisit the arbitrator’s factual findings.²

² For example, ignoring the rule that an appellate court does not reach the merits of the case when reviewing an arbitration proceeding, *Clark County Public Utility Dist. No. 1 v. International Broth. of Elec. Workers*, 150 Wn.2d 237, 245,

“Where more than one public policy is germane to an arbitration award, [courts] must engage in balancing of the relevant policies to determine whether to apply the public policy exception to vacate the arbitral award.” *Virginia Mason Hosp. v. Washington State Nurses Ass’n*, 511 F.3d 908, 917 (9th Cir. 2007) (holding that arbitrator's award prohibiting a hospital from implementing its mandatory flu immunization policy unilaterally without collective bargaining with the nurses' union is

76 P.3d 248 (2003), the Guild's Petition for Review reargues the merits of the case that was before the arbitrator, and offers an interpretation of the Arbitrator's findings and conclusions which is inaccurate and misleading. For example, the Guild states that LaFrance was a “good, long term deputy” without mentioning that the arbitrator found that “[d]uring his fourteen year tenure with Kitsap County, Officer LaFrance was disciplined several times . . . and “counseled” on his performance evaluation.” CP 1216 (pg. 7). The Guild states that the arbitrator found that Lt. Harris had a personal relationship with a prostitute. The arbitrator made no such finding (and in fact, no prostitution charges have ever been filed against Stevie Collins, the woman Harris had a relationship with). What the arbitrator actually found is that LaFrance believed Harris had a relationship with a prostitute as part of his wide-ranging and “fanciful” conspiracy theory. CP 1248 (pg. 41). The Guild misleads when it states that the arbitrator found that Harris “lifted” a file, when in fact the arbitrator found that Lt. Harris “removed” the file from LaFrance's office. The Guild misstates the arbitrator's finding by stating that Harris “effectively recommended LaFrance's discharge,” when instead the arbitrator found it likely that Harris had no apparent reason to seek LaFrance's discharge because LaFrance had already been reassigned from detectives to patrol away from Harris's supervision. The Guild states that the arbitrator set aside LaFrance's termination “in favor of a written warning.” In fact, the arbitrator awarded “three final written warnings”, and reinstated LaFrance with benefits but without back pay subject to passing fitness for duty exams. CP 1253-54. The Guild states that the arbitrator rejected the County's contention that LaFrance was intentionally untruthful. This, too, misstates the arbitrator's findings. The arbitrator's decision discusses at least ten incidents of untruthfulness. CP p. 32. Reviewing the evidence from the clear, cogent, convincing standard, the arbitrator found that “Deputy LaFrance was guilty as charged”, CP 1246, and that “LaFrance was guilty of much more than a few isolated episodes of untruthfulness.” CP 1247. Indeed, the arbitrator found

not contrary to the array of relevant public policies, taken together, and allowing the arbitration decision to stand).

As at least one commentator has recognized, every person involved in the criminal justice system relies on police honesty:

- Under the application of the fellow officer and collective knowledge doctrines, police officers rely on the validity of information provided to them by fellow officers.
- Supervisors render decisions based on information received from officers.
- According to the tenets of community policing, citizens are urged to communicate and cooperate with law enforcement officials. If they trust and respect police officers, the ability to garner their support will only be enhanced.
- Prosecutors depend on honest reports, statements, and affidavits when prosecuting criminals.
- Judges rely on honesty in evaluating warrants.
- Jurors determine guilt or innocence and often liability based on an officer's investigation and testimony.

significant commonalities among the many charges leveled against LaFrance, one of which was “[u]ntruthfulness.” CP 1252.

Spector, Elliot, *Chief's Counsel: Should Police Officers Who Lie Be Terminated as a matter of Public Policy?* *The Police Chief*, vol. LXXV, no. 4 (April 2008).

If all parties in the criminal justice system believe that police officers would not lie at the risk of losing their careers, issues of credibility regarding police will be greatly reduced, leading to more successful prosecutions, a reduced number of constitutional violations, and fewer liability cases and losses. In addition, officers will be increasingly reluctant to cover for fellow officers who have committed acts of misconduct because of increased moral and ethical standards as well as the risk of discipline. If lying for a fellow officer will lead to almost certain termination, such a policy might in time eliminate the “code of silence” completely. *Id.*

Some might argue that lying is a natural part of law enforcement work. Officers may lie while working undercover and while conducting investigations and interrogations, as well as when using trickery for legitimate law enforcement purposes. However, a clear line can be drawn between sanctioned lying and prohibited lying. That clear line could be that police officers found to have lied intentionally in an official document such as a police report, statement, or affidavit or in an official proceeding such as an internal affairs investigation, administrative hearing, or in court

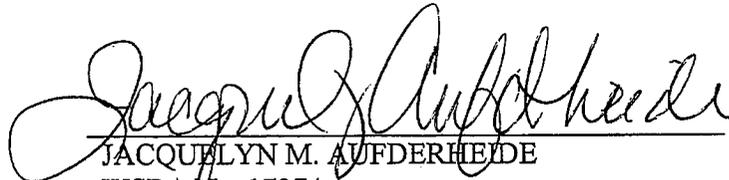
will be terminated as a matter of public policy, as such officers cannot work effectively and should therefore not be allowed to work within the law enforcement profession. *Id.*

V. CONCLUSION

An explicit well-defined and dominant policy exists here and that policy specifically militates against requiring the Sheriff to reinstate LaFrance's employment. For the reasons discussed here and in the County's briefs in the record, Kitsap County and the Kitsap County Sheriff respectfully request that the Court affirm the opinion of the Court of Appeals.

Respectfully submitted this 2nd day of September, 2008.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney



JACQUELYN M. AUFDERHEIDE
WSBA No. 17374
Chief Deputy Prosecuting Attorney
Attorney for Respondent/Cross-Appellant
KITSAP COUNTY and
KITSAP COUNTY SHERIFF

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