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SUPREME COURT  
STATE OF WASHINGTON

2008 DEC 23 P 3:04

No. 80720-5

FILED  
JAN 02 2009

BY RONALD R. CARPENTER  
IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON  
CLERK.

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

(Court of Appeals Division II, No. 34321-5-II)

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KITSAP COUNTY DEPUTY SHERIFF'S GUILD, and Deputy Brian  
LaFrance and Jane Doe LaFrance, and the marital community composed  
thereof,

Petitioner,

v.

KITSAP COUNTY AND KITSAP COUNTY SHERIFF,

Respondents.

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AMICUS CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION  
OF MUNICIPAL ATTORNEYS IN SUPPORT OF RESPONDENTS,  
KITSAP COUNTY AND THE KITSAP COUNTY SHERIFF

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A. IDENTITY OF AMICUS CURIAE

Amicus is the Washington State Association of Municipal Attorneys (hereinafter WSAMA) the organization of municipal attorneys representing the cities and towns across the State, (hereinafter Amicus).

B. STATEMENT OF CASE

Amicus, WSAMA references and incorporates herein the Statements of the Case as set forth in the pleadings of the Respondents, Kitsap County and the Kitsap County Sheriff.

C. SUMMARY OF ARGUMENT

As harsh as it sounds, there are some people who, through their own misconduct, cannot and should not be allowed to hold certain positions. An attorney who converts client funds for his own purposes has engaged in conduct which could deprive him or her of the opportunity to practice law. See *Matter of Disciplinary Proceedings Against Immelt*, 119 W.2d 369, 831 P.2d 736 (1992), citing *In re Hankin*, 116 Wn.2d 293, 295-296, 804 P.2d 30 (1991). Additionally, individuals who have committed certain offenses or engaged in conduct which resulted in orders by disciplinary authorities of conduct against vulnerable persons may be precluded from employment within areas where contact with those vulnerable persons is involved. See RCW 18.20.125 and 35.61.130.

So too, law enforcement officers who lie on official records or in testimony under oath or in any official capacity whatsoever cannot be law enforcement officers. Their *Brady* disability is a permanent scar. The question in this case, when reduced to its most common denominator, is “was LaFrance dishonest in his official reports or testimony/statements made in an official capacity?” The answer, even as determined by the arbitrator, was yes. LaFrance cannot thereafter be a law enforcement officer who would ever have to testify in court on a criminal case or prepare a report that would be the basis for any criminal prosecution. A law enforcement officer that cannot accomplish any one of those tasks cannot be a law enforcement officer.

Pivotal to the case before this court is not just a question of whether an arbitrator could make a ruling contrary to the public policy against having law enforcement officers who are “*Brady* cops,” but whether any public agency should be required to maintain the employment of a law enforcement officer who, even the arbitrator in this case has agreed, was dishonest in his official capacity in certified reports or in testimony or in statements made in an official capacity while under oath.

As the Respondents, Kitsap County and Kitsap County Sheriff’s Office, stated in their Supplemental Brief, “[p]rosecutors have a constitutional duty to turn over exculpatory information voluntarily to

defense counsel,” citing *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) cited at pages 7 and 8 of Respondents’ Supplemental Brief. Respondents also pointed out that there is no difference between exculpatory and impeachment evidence for *Brady* purposes, citing *United States v. Bagley*, 473 U.S. 667, 676-677, 105 S.Ct. 3375, 87 L.Ed.2d 481(1985), also cited in Respondents’ Supplemental Brief at page 8.

Additionally, Rules 4.7(a)(3) of the Superior Court Criminal Rules (CrR) and the Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) both state that the prosecuting attorney shall disclose to defendant’s counsel, any material or information within the prosecuting attorney’s knowledge, which tends to negate defendant’s guilt as to the offense charged. In this regard, there is a difference between the due process right to discovery and the discovery required under court rules. A criminal defendant’s constitutional due process right to discovery extends only to exculpatory evidence. *Brady v. Maryland* (*supra*); *State v. Blackwell*, 120 W.2d 822, 828, 845 P.2d 1017 (1993). The duty of the prosecutor under the above court rules is thus more extensive.

As indicated by the Respondents in their Supplemental Brief, at page 8, the effect of *Brady* leaves no doubt as it would apply to this case. If LaFrance were 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/statements as to the probable cause to conduct a search, as to the location of evidence of a crime scene, as to statements made by a suspect or witness to LaFrance, as to LaFrance's own reported behavior and at his own reported observations.

The Respondents go on to say:

[C]onsidering 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, cited in Respondents' Supplemental Brief, page 8.

I would submit even further that if LaFrance is a witness, even if not the only witness, the prosecution of any criminal charges would be vulnerable as LaFrance's history of dishonesty will likely become the focal point of attention, even if there are other officers who testified as witnesses in the case. The defense argument to the jury would question how anything that LaFrance said can be believed in light of his history of dishonesty; how can

one believe anything he says now when he, a law enforcement officer, previously testified in court, under oath, dishonestly, and his official reports, also under oath were dishonest?

The public policy implications have been very capably addressed in the Respondents' Briefs, but it deserves supplementation insofar as, depending on how this Court decides the issues, any law enforcement agency could similarly be required to maintain on its employment rolls a person who through his or her own dishonesty cannot perform the tasks required of the job. That is not right, and no law enforcement agency should be saddled with an employee who created his or her own disability to perform the job.

D. ARGUMENT

Under both the Washington State and Federal constitutions, it is a violation of a criminal defendant's due process rights for the state to withhold exculpatory evidence. The fact that an officer testifying in a defendant's case has lied in prior cases is exculpatory evidence and must be disclosed every time that officer testifies. It is against public policy to require a government to keep an officer on the force whose proven dishonesty is an issue in every investigation and in every court case. Such an individual lacks a fundamental characteristic of a police officer, honesty, on which the entire judicial system relies.

1. Due Process Requires Disclosure of Exculpatory Evidence.

The United States Supreme Court held in *Brady v. Maryland*, (supra), that the prosecution must disclose material exculpatory evidence to criminal defendants. In the context of *Brady*, exculpatory evidence is material if there is a reasonable probability that, if it had been disclosed to the defense, the result of the trial would have been different. *In re Personal Restraint of Gentry*, 137 Wn.2d, 378, 396, 972 P.2d 1250 (1999).

2. Police Officer Dishonesty Is Material, Exculpatory Evidence.

In determining if an officer's past untruthfulness is material exculpatory evidence, one must address two questions. First, could the disclosure of the officer's past lying change the outcome of a case that relies on that officer's testimony/official statements (in his or her official capacity), and second, is it possible for the passage of time to lessen the impact of the lie, making it immaterial? Can the implications of that dishonesty ever be too old to be relevant?

In answer to the first question, it is difficult to conceive of an instance in which knowledge of an officer's past dishonesty would not impact the outcome of any case where the veracity of the officer were involved, particularly where that dishonesty involved a police report, testimony or

statements presented to a court or any thing involving the officer's official duties. An officer's statements and testimony is often central to the prosecution's case, and withholding information relating to that officer's lack of truthfulness would foreclose a significant line of argument for the defense. The defense attorney may legitimately want to inquire about that dishonesty, to impugn the officer's character or infer dishonesty in the case at hand.

If the jury believed that one statement by the officer or one piece of evidence collected by the officer could have been falsified, the entire outcome of the case could change. If a police officer lied previously, the defense would want to be able to argue that the officer may be lying again. More than just that, if the officer lied in a report and/or in testimonial statements going to the court, the case against the defendant may be unjustly stronger where that officer's statements (reports and/or testimony) are used to show or infer guilt of that Defendant. That defendant may be unwittingly deprived of his or her constitutionally guaranteed rights of due process. But even if the officer's reports and testimony are not, in and of themselves as crucial to the case, a police officer who lies on reports or in testimony or in any official capacity whatsoever may likewise have falsified the facts by – dishonestly – excluding evidence that did not support the case as the dishonest officer wants it to go. That would certainly be the “exculpatory” argument offered by defense

counsel, if that official dishonesty is known/disclosed. Prosecutors must be able to depend on honest – unimpeachable officers (as to their honesty). The criminally accused are also entitled to police who are honest – who do not lie about the facts of their cases, and society and our system of justice must be based on the concept that the police investigating crimes and who direct criminal investigations toward (or away from) a particular suspect act in a fair, honest manner.

3. Someone Who Cannot be Trusted Cannot be a Police Officer.

Turning to the second question, whether time can lessen the impact of an officer's dishonesty, making it immaterial, the answer must be no. The very nature of law enforcement, and the trust that the legal system must place – must be able to place – in an officer, makes it impossible for a known liar to be an effective member of a law enforcement agency. This is more critical than just the fact that the individual officer may have been dishonest, that dishonesty travels through his or her career to potentially disrupt the reliability, credibility, believability or veracity of every single statement coming from that officer thereafter. Since those statements are the framework of the law enforcement duties as they relate to criminal cases, the primary function of police work would be disabled. Nor can the prosecutor rely on the officer's future truthfulness. In law enforcement, not only is there

the obligation on the part of the public agency to prosecute cases properly, something that cannot be done if the law enforcement officers lie in their reports and testimony or in any official capacity, the obligation of the prosecuting agency to provide exculpatory and impeachment evidence which it has in its possession, even in the hands of the law enforcement agency, not just the prosecutors' office, a law enforcement officer who lies poses the potential for exculpatory or impeachment evidence in every case thereafter.

4. Public Policy Directs That a Police Officer Who Lies Cannot Continue to Serve as an Officer.

Public policy is not a precisely defined term, and, in fact, may not be amenable to an exact definition. *See generally* Brachtenbach, *Public Policy in Judicial Decisions*, 21 Gonz.L.Rev. 1 (1985-1986). However, many cases shape the concepts that indicate with clarity its purposes of protecting society. Provisions are void if they violate public policy, meaning that it is against the public good or is injurious to the public. *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 753-54, 845 P.2d 334 (1993); *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 483, 687 P.2d 1139 (1984).

“The term ‘public policy,’ ... embraces all acts or contracts which tend clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of

security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.” *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 432, 932 P.2d 1244 (1997) citing *LaPoint v. Richards*, 66 Wn.2d 585, 594-95, 403 P.2d 889 (1965). See also *State Farm General Ins. Co. v. Emerson*, (supra); *Makinen v. George*, 19 Wash.2d 340, 354, 142 P.2d 910 (1943) (“[p]ublic policy in its broad sense is that principle of law holding that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good”). With that, it cannot be reasonably argued that society is not harmed when those hired to protect society from criminals (the police) engage in dishonesty in the performance of their official duties. In this regard, prosecutors and criminal defense attorneys must agree; society cannot have police officers who lie in their reports and/or in their testimony or in any official capacity.

The public policy necessity of a public agency being able to terminate a law enforcement officer who lies is reasonable and conforms to the demands of public policies. Many professions have fundamental requirements, without which a person cannot perform the duties of that profession. In some cases, this fundamental requirement is codified into a licensing requirement. Without such a license, one cannot practice medicine, drive large commercial vehicles, or practice law. Sometimes the parameters

are set by restrictive statutes, *e.g.*, RCW 18.20.125 and 35.61.130. In other cases, such as that of a police officer, that fundamental requirement relates to the nature of the person him or herself.

Regardless of how society measures these fundamental requirements, someone lacking the requirements cannot be a member of a profession. Different professions have different aspects and facets of their work that might be more critical and the absence of which might be more pivotal to the inability of the person to function. For instance, obviously, a long haul truck driver who loses his driver's license and thus his job due to some misconduct such as reckless driving or driving while under the influence of intoxicants should not be able to keep his or her job as a long haul truck driver where that is the purpose for the person's employment.

The harsh realities are that it may be that certain professions impose greater duties and responsibilities on conduct than do others. For instance, attorneys have an absolute obligation to preserve their trust accounts. Many attorneys have lost their license because of the failing to do so. So too, police must tell the truth when preparing their official reports and testifying in court. The freedom from unjust arrest and incarceration of those who may otherwise be wrongfully accused – or convicted depends on and demands that.

In law enforcement, a police officer may not always use the best judgment, may drive more recklessly than might have been preferred and may make mistakes in various different aspects of police work. That doesn't necessarily disqualify the officer from being a police officer. However, if the police officer lies, and particularly lies in his or her representation of matters either on official reports or in testimony or in any official capacity, that is a disability that jeopardizes every single case that that the officer may touch.

Persons accused of a crime – something for which they may be deprived of their liberty – deserve to have their cases (the cases against them) investigated by officers who will accurately and honestly represent in reports and in testimony what that investigation discloses. If a police officer is unwilling to abide by that almost sacred responsibility, that police officer should not be a police officer.

Law enforcement officers who lie in their reports and/or on the stand cannot be law enforcement officers. The cases of those officers should not be something that the public agency has to contend with, because even in those cases where the lying law enforcement officer did not lie (in a particular case), the defense would be entitled to assert that where this witness (a law enforcement officer) lied previously, the jury may wonder or have argued to it the possibility that the officer lied again in this case. That occupationally

related responsibility may pose for law enforcement officers a greater responsibility in that area but it is the responsibility that goes with the job. Again, law enforcement officers may make mistakes, may do things that were not expedient or prudent, but lying in reports or on the stand cannot be tolerated by the prosecuting agency, by the criminally accused and by society. A police officer who cannot function as a police officer should not be maintained in the job of a police officer and public policy promotes the agency's termination of that officer because of the conduct that makes him or her unable to serve.

Finally, the 9th Circuit Court of Appeal ruled in its very recent case, *Tennison v. City and County of San Francisco*, --- F.3d ----, Westlaw 5120755 (C.A.9 (Cal.)), 08 Cal. Daily Op. Serv. 14,818 (2008), that withholding exculpatory evidence and manufacturing and presenting perjured testimony during a criminal investigation and prosecution can give rise to *Brady*<sup>1</sup> complaints and civil rights claims. That puts prosecuting jurisdictions in the position of seeing the effects of police dishonesty hit them from two directions, in the collapse of criminal prosecution cases and in filing of civil claims. If these jurisdictions are helpless to rid themselves of dishonest police officers, that creates an impossible dilemma. That is not fair. The

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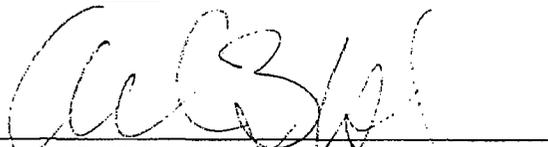
<sup>1</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

only solution, the solution that promotes the legitimate public policy of ensuring that police act properly and honestly in protecting society, is for these jurisdictions to be able to cull out from the ranks of their police agencies those officers who are dishonest in their official capacities.

E. CONCLUSION

For all of the reasons set forth above, and those presented by the Respondents, Kitsap County and the Kitsap County Sheriff, Amicus beseeches this Court to uphold the Court of Appeals' Decision and recognize the impossible dilemma that would result for both the prosecution and defense in criminal cases were the Court of Appeals reversed. Our system of criminal justice demands the same. The system will not work unless it can depend upon the unquestionable honesty of those who have the power to put people in jail.

Respectfully submitted this 23<sup>rd</sup> day of December, 2008.

  
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