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COURT U.
DIVISION III
STATE OF WASHINGTON
By _____

Sup. Ct. No. _____
COA No. 280543

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

TYLER WILLIAM GASSMAN,

Defendant,

DAVID R. PARTOVI, Respondent and Real Party in Interest.

PETITION FOR REVIEW

STEVEN J. TUCKER
Prosecuting Attorney
Spokane County

Brian O'Brien
Deputy Prosecuting Attorney

Attorneys for Petitioner

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. IDENTITY OF PETITIONER

Petitioner, State of Washington, was the plaintiff in the Superior Court, and the appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals decision filed February 17, 2010 (after granting respondent's motion to publish), which affirmed the lower court's sanction in favor of Tyler W. Gassman's attorney (David Partovi) against the Petitioner. A copy of the court's opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

- (1) Is the award of the \$2000 sanction against the Prosecutor and in favor of Mr. Partovi supportable under either CrR 2.1(d) or the inherent authority of the court?

IV. STATEMENT OF THE CASE

On July 25, 2008, Detective Marske prepared an affidavit to support criminal charges from a belatedly reported robbery, assault, and attempted murder. CP 22-23. The person coming forward and giving the detectives the information was a criminal participant in the crimes, a getaway driver

identified in the affidavit as MD (a juvenile male). CP 23. He had come forward to obtain a plea bargain. RP 6. lines 18-26, RP 7, lines 15-20. The victims of these crimes had not reported the crimes that had taken place three months earlier, because the robbery had occurred during their attempted illegal drug transaction - they were "not the most forthcoming individuals to say, hey, I was just robbed of my cash that I was going to make an illegal drug transaction for." RP 8, lines 6-12.

Based upon the information obtained from the cooperating criminal participant, the detectives were able to contact these recalcitrant victims. CP 22-23. The original affidavit supporting the filing of the Information stated that Eric C. Weskamp and Clifford Berger could testify that this drug deal/robbery occurred "on or about April 15, 2008." CP 22. The original report/affidavit also indicated that someone known to Mr. Berger only as "Kyle" was with Berger and helped Berger chase the robbers. CP 22-23. This affidavit was signed July 25, 2008, over three months after the robbery/assault took place. CP 23. The criminal information was filed by the State on July 28, 2008. It alleged that the offenses were committed by the defendant, "on or about April 15, 2008." CP 40-42.

Respondent Attorney Mr. Partovi's client, Tyler Gassman, was arraigned on August 5, 2008.¹ That same date the State's omnibus application was signed and ordered by the court. CP 46-48. Among other things, the court ordered that if the defendant was going to rely on an alibi, he must state so and furnish a list of the alibi witnesses and their addresses. CP 46-48, #2 and # 21. The court ordered that such information be supplied at least 10 days before the omnibus hearing. *Id.*

The criminal investigation continued. On October 29, 2008, Detective William Francis was able to contact the "Kyle" mentioned by Mr. Berger. CP 76-78 at 77. Detective Francis contacted Kyle Williams and obtained a statement. *Id.* Detective Francis advised Williams that he was trying to ascertain a more exact date of the alleged robbery. Williams explained that he had received a phone call from a "Rob" at 01:08 on April 18th, 2008. CP 78. Based on that phone call Williams believed that the robbery might have occurred about an hour to an hour and a half prior to the call. CP 78. A copy of Detective Francis' report dated October 31, 2008, containing this information was sent to defense counsel on or about November 4, 2008. CP 75. The report containing this information was sent

¹ Clerk's Papers, page 44, CP 44 hereinafter.

to Jo Blaney, the Records Clerk for the Spokane County Public Defenders Office.² CP 82.

On November 20, 2008, Detective Francis again met with Williams regarding this case. CP 79-80. At that time, Williams provided Detective Francis with a copy of his T-Mobile cellular phone records for the date of April 18, 2008. *Id.* Williams again reiterated that the person named “Rob” was with victim Eric Weskamp at the time of the robbery and that he received a call from “Rob” a couple hours following the incident. *Id.* A copy of Detective Francis’ November 20 report containing this information was sent to defense counsel on or about December 10, 2008. CP 75; CP 82 (showing receipt by the Public Defender).

On the morning of the day of trial, January 12, 2009, the state moved the court to amend the information to “more closely pinpoint the date of the offense by two days, to “on or about April 17” from “on or about April 15.” RP 3. Mr. Partovi objected to the amendment, alleging he was being sandbagged, that he had prepared his case on an alibi defense and that now they found out on the morning of trial that it is the “wrong day.” RP 3; RP

² Because Mr. Partovi was hired by the public defender’s office to handle Mr. Gassman’s case, the discovery was provided to the Public Defenders Office who then distributed it to the attorney involved in the case. See CP 82, listing “For: David R. Partovi” and listing the dates police report additional are received and then sent to Mr. Partovi. See also RP 67-70 (Prosecutor Mr. Cruz explain the procedure to the Court)

20, line 17. The Court responded that after she had heard Mr. Cruz's explanation, it did not appear that there was any malicious intent on Mr. Cruz's part to sandbag the defendants. RP 15, lines 12-20. The court continued the amendment issue to the afternoon.

At the afternoon hearing, Mr. Partovi admitted that the defense attorneys had met on the weekend before trial, had reviewed the reports that indicated that the offense date may be April 17th, and that one of the attorneys, Ms. Nordtvedt, had been telling him that she thought the State may move to amend the date to the 17th. RP 22. The Court questioned Mr. Partovi regarding his alibi defense and he admitted that he never filed one and that he had been sloppy with following the rules.³ On further inquiry by the Court it became clear that Mr. Partovi had not filed any notice of alibi leading the court to ask one of the codefendants attorneys to explain the proper procedure in an alibi response.⁴ Mr. Partovi then alleged that an

³ The following occurs at RP 23-24:

THE COURT: Now you indicate, I think you have indicated that you were contemplating presenting an alibi defense.

MR. PARTOVI: Sure.

THE COURT: Did you serve notice of that?

MR. PARTOVI: I don't think it was written. It's always been the case in all three of the trials. I have given a witness list.

THE COURT: So the State is not the only one who has been a little sloppy.

MR. PARTOVI: I think that's correct, Judge. I think that's correct.

⁴ The following occurs at RP 25:

omnibus application had not been made by the state.⁵ However, an omnibus application had been made by the state and the notice of alibi procedure was ordered by the court on August 5, 2009. CP 46-48.

After hearing from the attorneys regarding the motion to amend, the court stated it could not overemphasize that this confusion was an example of the breakdown in our criminal justice system based on a lack of resources and budget constraints. RP 38. The court found all parties at fault, stating: “[t]his is an alarming situation on both sides, attorneys not following the rules.” RP 38, line 24-25; and RP 39, lines 11-12 (“I think the State did some sloppy stuff. Some of the defense was kind of sloppy.”)

COURT: Mr. Partovi, did you not serve written notice of your alibi defense on the State to sandbag Mr. Cruz?

MR. PARTOVI: Let me tell you what I -- and you tell me whether I served written notice of an alibi defense. On November 17, I gave him handwritten notes of names, phone numbers, summary of testimony of all three alibi witnesses.

THE COURT: What's the -- Ms. Nordtvedt, what's the rule on alibi defense?

MS. NORDTVEDT: I know you have to -- I know you should serve written notice like in response to an omnibus application. That's how I generally do it.

⁵ Regarding the omnibus application at RP 25, lines 19-23:

MR. PARTOVI: Judge, I am not trying to suggest I have done every step in this case timely and perfectly. For the record, I would note I was not given omnibus application or discovery request that's not -- it's just -- this has been messy.

The court reviewed the amendment rule, CrR 2.1(d), and cases dealing with that rule. The court found there was no prejudice to the defense in allowing the amendment because they still had time to prepare within the confines of the speedy trial rule. RP 40–41 (“Those cases to me indicate and say that there is no prejudice where there is still time to prepare a defense.”) The court continued the case to February 2, 2009, to allow the defendants sufficient time to prepare their defenses. RP 41. The court then *sua sponte* ordered \$8000.00 in sanctions against the State for the careless, non-purposeful handling of the cases, stating that the court did not think the defendants should bear the financial burden of further preparation. *Id.* The court cautioned all counsel that they all would be expected to follow the rules in the future.⁶

⁶ “I am continuing these cases based on the need for the defense to prepare sufficient defense to the first Monday in February, which is February 2nd. I am also sanctioning the State for what I consider to be, and I am not willing to say it was purposeful, but certainly a careless handling of these cases, and again, I'm very cognizant of the fact that the State has too many cases, as do defense counsel. But we have to stop and be more careful. And the court is guilty of the same thing. These past months with our caseloads, we all have to be more careful.

Saying that, I don't think the defendants should bear the financial burden and defense counsel the financial burden of going down one road and then finding out the defense is somewhere else. So, I am awarding as sanctions attorney fees payable to each defendant's counsel or their office in the case of the public defender's office of \$2,000. So that's an \$8,000 sanction against the State. I'm cautioning all counsel and, henceforth, you will be expected to follow the rules, each and every one of you.”

At the next scheduled hearing, January 21, 2009, Mr. Partovi presented an order granting the motion to amend the information, continuing the trial date and imposing sanctions. CP 24-25; RP 56-57. After interlineating that the defendants had sufficient time to prepare for trial, the court signed the order. *Id.* It then chastised Mr. Partovi because he had not filed a notice of alibi.⁷ He filed one the next day. CP 52.

The state moved the court to reconsider the sanctions. CP 27-115. A hearing was held on the motion. RP 73-234. The court informed the parties that it was only dealing with the sanctions that were imposed in this case and was not dealing with what happened in the defendant's other cases. RP 80-

RP 41-42.

⁷RP 63:

CRUZ: But the State was unaware of any alibi from Mr. Gassman or Mr. Kongchunji. The State understood it as just essentially complete denial.

THE COURT: So Mr. Partovi, in your omnibus application, did you state that you were going to present an alibi?

MR. PARTOVI: In my omnibus response?

THE COURT: Yes.

MR. PARTOVI: Judge, I don't know that I received an omnibus application from the State in this case.

THE COURT: You are supposed to tell them if you're relying on an alibi. Did you?

MR. PARTOVI: I don't recall.

MR. CRUZ: I looked at the file and I didn't see anything in Mr. Gassman's file as of Friday.

81;⁸ RP 189 lines 12-20. The court reiterated that it had never believed the amendment had been done purposefully, or to "hide the ball." RP 89.⁹ The court also stated that regardless of whether the defense attorneys had done what they were supposed to do, or had properly prepared the cases in the first place, the issue was who had to pay for the additional time spent by the attorneys. RP 132.¹⁰

⁸ COURT: I want to be real clear with everybody, this isn't an appeal. This isn't a motion for reconsideration on the underlying cases. It really has nothing to do with them except as to the procedures that were followed and the ultimate issue of whether or not the court should reconsider its order imposing sanctions in the form of attorney fees because the State didn't provide the amended information to defense counsel until the morning of trial.

⁹ THE COURT: I want to be real clear, Mr. O'Brien. I have never, and I think I was very careful in saying, I have never thought anybody was purposeful in terms of hiding the ball.

¹⁰ THE COURT: But what happened, Mr. O'Brien, is, of course, that Ms. Nordtvedt, Mr. Partovi, and Mr. Note had to spend more time getting ready. Now, let's just say maybe that was because they weren't, didn't prepare enough in the first place or they didn't do what they were supposed to do or whatever.

MR. O'BRIEN: I am not pointing fault, Your Honor.

THE COURT: But they had to spend more time getting ready and start talking to their clients about, okay, it wasn't the 15th, what were you doing on the 17th.

MR. O'BRIEN: Right. Well, let's say that that's correct. I am not -- again, I am not complaining about what --

THE COURT: But Mr. O'Brien, the issue to me is who should pay for that extra time.

At the hearing, attorney Timothy Note, whom had expressed shock at the time of the amendment on January 12, 2009, now admitted having not been shocked with the amendment because he had reviewed the additional investigation by Detective Francis prior to the information amendment. RP 196-97 (not his job to “undumb the prosecutor.”)

The court then considered what amount of sanctions should be assessed and considered the contracts the respective attorneys had with their clients. RP 211-236. Respondent attorney Mr. Partovi informed the court that his contract on this case was as a conflict attorney for the Spokane County Public Defenders Office. He was paid \$1,400 and was paid an additional \$200 per day for time in trial. RP 218-19. He informed the court that he had spent 10 hours or less as a result of the amendment of the information. RP 219.

The court denied the motion for reconsideration after explaining its reasoning:

I'm not saying that Mr. Cruz did anything on purpose to be difficult. Here is what I think happened is the same thing I think happened that I thought at the time is that everybody has too much to do and it just got away from them. And we can't allow that because the State has a responsibility to be, you know, you have huge, huge, power and you have to be very, very, careful not to abuse that power. And I think what happened in this case, and I think from the reading of all the files, is that people started getting on each other's nerves. But I don't think that that meant that Mr. Cruz did that on purpose. I don't think that for a minute.

He has appeared in front of this court for a number of years and I have never found him to be anything but totally above-board and professional and responsible. The reality is the State's actions in not moving to amend the Information in a more timely fashion incurred some expenses for folks and they shouldn't have to absorb it. The State should absorb it. It's as simple as that.

RP 236, lines 6-20.

The State timely appealed the sanction award to Attorney Partovi. The court of appeals affirmed the sanction award in an unpublished opinion. Attorney Partovi moved to publish the decision, claiming the decision either determined unsettled law, modified or clarified the established principle of law, or determined a new question of law. Motion to Publish, Appendix B, pages 3-6. It was Attorney Partovi's position that the Court:

clarified the established principle of law in *S.H.* [102 Wn. App. 468, 8 P.3d 1058 (2000)] that the trial court has inherent power to govern the litigation conduct before it in imposing sanctions not only for a finding of bad faith or conduct tantamount to bad faith but for carelessness which a trial court finds inappropriate and improper.

The court published the decision. Appendix A.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations governing the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that three of those criteria are implicated in this case: the decision is in conflict with decisions of the

Supreme Court, and with decisions of the Court of Appeals. RAP 13.4(b)(1) & (2). The decision presents issues of substantial public interest to attorneys and courts and other participants in the legal system that should be determined by the Supreme Court. RAP 13.4(b)(4).

The primary consideration for reviewing the Court of Appeals decision is to provide guidance for trial courts, attorneys, and any pro se litigants coming before the courts of our state. The Court of Appeals decision authorizes the imposition of sanctions under the inherent authority of the court for conduct that is neither intentional, nor purposeful, nor tactically motivated, but merely careless. Because review of a sanction award is under an abuse of discretion standard, and because such an award can now be maintained under a finding of mere "carelessness," the trial courts are unrestrained from entering such awards whenever they deem a pleading, an appearance, or an argument "careless." What little review is available under an abuse of discretion standard is diluted by the term "careless," a term not limited by the synonyms "casual, inattentive, negligent, or unobservant." THE NEW AMERICAN ROGET'S THESAURUS 57 (revised ed. 1978).

A. THE COURT OF APPEALS DECISION AUTHORIZES SANCTIONS FOR A FINDING THAT A PARTY WAS "CARELESS." THE DECISION THEREBY CONFLICTS WITH DECISIONS OF THIS COURT, AND OTHER APPELLATE COURTS, THAT REQUIRE A FINDING OF "BAD FAITH" BEFORE A COURT EXERCISES ITS INHERENT AUTHORITY IN IMPOSING SANCTIONS. THEREFORE, REVIEW IS APPROPRIATE PURSUANT TO RAP 13.4(b)(1), (2) & (4).

In the instant case, the trial court considered the question of whether the State had engaged in bad faith litigation conduct. The trial court specifically and repeatedly held there was no bad faith involved in its award of sanctions, and refused to enter any finding other than the state was "careless." See RP 15, lines 12-20; (court stating that after Mr. Cruz's explanation it did not appear that there was any malicious intent on Mr. Cruz's part to sandbag the defendants); RP 41-42 (state was careless not purposeful); RP 89 (court reiterated that it had never believed the amendment had be done purposefully, or to "hide the ball."); RP 236, lines 6-20 (court never thought it was purposeful, "I thought at the time is that everybody has too much to do and it just got away from them. . . . But I don't think that that meant that Mr. Cruz did that on purpose. I don't think that for a minute. He has appeared in front of this court for a number of years and I have never found him to be anything but totally above-board and professional and responsible."); CP 124-129 (denying Defendant Gassman's

CrR 8.3 motion to dismiss, holding there was no animus, evil intent or purposeful misconduct on the part of the State); CP 24-25 (order continuing case and imposing sanctions, finding carelessness); CP 118 (order denying reconsideration, state did not act on purpose in late amendment, but was careless).

This Court has held that a court must find bad faith before imposing sanctions under the inherent authority to control litigation. See *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 783, 10 P.3d 1034 (2000);¹¹ *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 798, 557 P.2d 342, 344 (1976).¹² Both Division I

¹¹ *In re Recall of Pearsall-Stipek*, 141 Wn.2d at 783:

In *Pearsall-Stipek* we held that a recall petitioner should not be made to pay an elected official's attorney fees merely because the petitioner has brought a "frivolous recall petition." *Pearsall-Stipek*, 136 Wash.2d at 266, 961 P.2d 343 ("potential chilling effect could undermine the Legislature's intent that citizens be able to freely initiate recall efforts.") However, we also held that under our inherent equitable powers and CR 11 "attorney fees may be awarded against a petitioner who brings a recall petition in bad faith." *Id.* at 267, 961 P.2d 343. Bad faith in this context refers to "intentionally frivolous recall petitions brought for the purpose of harassment." *Id.* at 266, 961 P.2d 343.

¹² *Hsu Ying Li v. Tang*, 87 Wn.2d at 798:

We do recognize a number of equitable exceptions to the no-attorney-fees rule. A court may award attorney fees if the losing party's conduct constitutes bad faith or wantonness. *Public Util. Dist. No. 1 v. Kottsick*, *supra*, 86 Wn.2d at 390, 545 P.2d 1; *State ex rel. Macri v. Bremerton*, *supra* 8 Wn.2d at 113, 111 P.2d 612. This

and Division II of the Court of Appeals require a trial court to make a finding of bad faith before imposing sanctions under their inherent authority to control litigation. See *Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, WL 175340, 3-4 (Wn. App. Div. 2, No. 39589-4-II Jan. 19, 2011) quoting *State v. S.H.*, 102 Wn. App. 468, 8 P.3d 1058 (Div. I 2000).¹³

Because the trial court considered the allegations of bad faith, and specifically made findings that no bad faith was present, the trial court's record is clear. However, the appellate court, left with the inability to find from the record a finding of bad faith, simply concludes its discussion of this issue by stating, "[h]ere, unlike in *S.H.*, the court expressly found in its order, 'the State was careless in handling certain aspects of this case.' CP at 25. This is sufficient to support the court's imposition of sanctions." Opinion, at p. 6.

exception does not apply to the present case as the trial court did not find any bad faith conduct on the part of respondent.

¹³ *Geonerco Inc. v. Grand ridge Properties IV, LLC, supra*, pages 8-9:

However, a court must find bad faith in order to exercise these inherent powers. See *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 267, 961 P.2d 343 (1998). Moreover, a court must "exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *Chambers*, 501 U.S. at 50, 111 S.Ct. 2123;[.]

This holding, authorizing a finding of “careless[ness]” to support the imposition of sanctions under the inherent authority of the court, untethers the rule requiring a finding of bad faith from its very foundation:

Bad faith. The opposite of “good faith,” generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive. Term “bad faith” is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity: it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will. *Stath v. Williams*, Ind. App., 367 N.E.2d 1120, 1124.

BLACK’S LAW DICTIONARY 127 (5th ed. 1979).

There is a material difference between misconduct and negligence. “Misconduct” is commonly defined as an “intentional wrongdoing” while “negligence” is defined as an unintentional careless act or omission. WEBSTER’S NEW COLLEGIATE DICTIONARY 734, 769 (1977). The appellate decision makes these distinctions meaningless. This new “careless rule” thereby becomes an amorphous “fee shifting rule” not otherwise authorized before this opinion. Any litigant may become responsible for the other sides fees on a finding of carelessness. This is of concern to all who come before our courts. Accordingly, the State respectfully requests that this Court take review of the Court of Appeals decision pursuant to RAP 13.4(b)(1), (2) & (4).

B. BECAUSE THERE WAS NO VIOLATION OF CrR 2.1(d), AND BECAUSE THE RULE DOES NOT CONTAIN A PROVISION AUTHORIZING AN AWARD OF SANCTIONS, THE TRIAL COURT'S SANCTION AWARD WAS BASED ON AN ERRONEOUS VIEW OF THE LAW AND CONFLICTS WITH *BRYANT V. JOSEPH TREE, INC.*, 119 WN.2D 210, 829 P.2D 1099 (1992). THEREFORE, REVIEW IS APPROPRIATE PURSUANT TO RAP 13.4(B)(1) & (4).

The rule on amendments of an information, CrR 2.1(d) does not authorize a monetary sanction, and moreover, by its own language contemplates amendments up until the close of trial.¹⁴ While acknowledging that “[h]ere, the State properly requested to amend the information under CrR 2.1(d)”¹⁵ and then (in the criminal appeal) holding that “[c]hanging an offense date by just two days would be covered under the ‘on or about’ language[.]”¹⁶ the appellate court seemingly authorizes a monetary sanction under a rule that neither authorizes a monetary sanction, nor was violated in the first place.

The award of sanctions is not supportable if it is based on CrR 2.1(d), a rule that authorizes an amendment up until the close of the state’s case and

¹⁴ CrR 2.1(d) provides:

(d) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

¹⁵ Opinion, page 5.

¹⁶ *State v. Gassman*, No. 28194-9-III, page 15.

under circumstances where, again by application of the rule, the court itself makes a finding of no prejudice to the defendant. If CrR 2.1(d) is violated, the remedy is to deny the amendment.¹⁷ Compare *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992).

In *Bryant*, a lawsuit was filed by Mrs. Bryant seeking to invalidate the transfers of property by her husband. The respondents to the lawsuit filed a motion for a more definite statement as allowed under CR 12(e), the comparable civil rule to CrR 2.1(c) governing a motion for a bill of particulars.¹⁸ Mrs. Bryant filed an amended complaint. Trial court

¹⁷ *State v. Wilke*, 28 Wn. App. 590, 595, 624 P.2d 1176 (1981) (“Moreover, there already exists a body of law protecting criminal defendants from last minute amendments to informations which result in prejudice or surprise. See CrR 2.1(d); *State v. Brown*, 74 Wn.2d 799, 447 P.2d 82 (1968)”).

¹⁸ **CR 12(e) provides:**

Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in that pleading will further the efficient economical disposition of the action, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just

CrR 2.1 (c) Bill of Particulars, provides:

The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.

Judge Huggins dismissed the amended complaint because the motion for a more definite statement had not been complied with. Later, a different judge, Judge Pechman, awarded CR 11 sanctions to the respondents against Mrs. Bryant's attorneys based upon their signing of the amended complaint. In affirming the appellate court's reversal of these CR 11 sanctions, the court held:

If the respondents violated a court rule, they violated CR 12(e), not CR 11. CR 12(e) requires attorneys to comply with a court's order for a more definite statement. *Judge Huggins imposed the proper sanction under this rule when she dismissed the amended complaint without prejudice.* See CR 12(e). CR 11 sanctions are not appropriate where other court rules more properly apply. See *Clipse v. State*, 61 Wn. App. 94, 808 P.2d 777 (1991) (misleading discovery disclosures may not be sanctioned under CR 11, but can be sanctioned under CR 26(g)'s provisions which govern discovery requests).

Bryant v. Joseph Tree, Inc., 119 Wn.2d at 223 (emphasis added).

The *Bryant* analysis is equally applicable here. Because there was no violation of CrR 2.1(d), and because the rule does not contain a provision authorizing an award of sanctions, the trial court's sanction award was based on an erroneous view of the law. That constitutes an abuse of discretion. *Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993).

The sanction award affirmed in this case will have a chilling effect on civil litigants and prosecutors filing any motion or pleading, properly filed

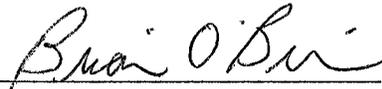
under a court rule, because a court may find that the pleading could have been filed earlier, or some aspect of the pleading or motion is deemed "careless." Accordingly, the State respectfully requests that this Court take review of the Court of Appeals decision pursuant to RAP 13.4(b)(1) & (4).

VI. CONCLUSION

Petitioner asks this Court to grant review, reverse the Court of Appeals, and affirm the judgments pursuant to RAP 13.4(b)(1), (2) or (4).

Respectfully submitted this 21st day of March, 2011.

STEVEN J. TUCKER
Prosecuting Attorney



Brian O'Brien #14921
Senior Deputy Prosecutor
Attorney for Petitioner

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON,)	No. 28054-3-III
)	
Appellant,)	ORDER GRANTING
v.)	MOTION TO PUBLISH
)	COURT'S OPINION OF
TYLER W. GASSMAN,)	JANUARY 6, 2011
)	
Respondent.)	

THE COURT has considered respondent's motion to publish the court's opinion of January 6, 2011, and the record and file herein, and is of the opinion the motion to publish should be granted.

Therefore,

IT IS ORDERED, the motion to publish shall be granted and the opinion filed by the court on January 6, 2011 shall be modified on page 1 to designate it is a published opinion and on page 6 by deletion of the following language:

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

DATED:

Panel: Jj. Brown, Sweeney, Kulik

FOR THE COURT:

TERESA C. KULIK
CHIEF JUDGE

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 28054-3-III
)	
Appellant,)	
)	Division Three
v.)	
)	
TYLER W. GASSMAN,)	PUBLISHED OPINION
)	
Respondent.)	
)	

Brown, J. — The State appeals sanctions imposed in favor of Tyler W. Gassman's attorney by the trial court for a late information amendment; the State contends the court lacked a sufficient basis for the sanctions. We disagree and affirm.

FACTS

The State charged Mr. Gassman with first degree robbery; two counts of attempted first degree murder, or in the alternative first degree assault; and two counts of drive-by shooting. The information stated the events occurred "on or about April 15, 2008." Clerk's Papers (CP) at 40. Multiple crimes and co-defendants are involved.

On July 25, 2008, an investigating officer filed a report, indicating that two witnesses could testify that the incident occurred "on or about April 15, 2008." CP at 22. Upon further investigation, detectives learned one of the co-defendants called a friend soon after the incident. Phone records revealed the call came in at 1:08 a.m. on April 18, 2008. Based on that phone call,

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State v. Gassman

detectives suspected the actual offense date was April 17. Additional reports were filed on October 31, 2008 and November 20, 2008, reflecting the date change. These reports were forwarded to the Spokane County Public Defender's Office (SCPDO) on November 4, 2008 to be picked up by David Partovi, Mr. Gassman's attorney.

The SCPDO contracted with Mr. Partovi as a conflict attorney to represent Mr. Gassman. The SCPDO agreed to pay him \$1,400 with an additional \$200 per day for trial time. Because the SCPDO hired Mr. Partovi, discovery was provided to the SCPDO, who then distributed it to Mr. Partovi. Mr. Gassman's defense counsel prior to Mr. Partovi forwarded letters to the State from potential alibi witnesses.

On January 12, 2009, the day of trial, the State requested to amend the information from April 15, 2008 to "on or about April 17, 2008." CP at 13. Mr. Partovi objected to the amendment, alleging he was being sandbagged, that he had prepared his case on an alibi defense, and now on the morning of trial the State wanted to change the date. The court responded after it had heard the prosecutor's explanation, "it doesn't appear to me . . . there was any malicious intent on the part of [the prosecutor] to sandbag you." Report of Proceedings (RP) at 15.

Mr. Partovi admitted he was aware new reports indicated an offense date of April 17, and that he was warned by one of the co-defendant's counsel that the State may amend. Mr. Partovi admitted he did not file a written notice of alibi defense. The court commented both sides were "not following the rules." RP at 38. The court then

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reviewed CrR 2.1(d) and cases dealing with that rule and found there was no prejudice to the defense in allowing the amendment, but ordered \$2,000 in sanctions against the State to be paid to Mr. Partovi. In its written order, the court found, “the State was careless in handling certain aspects of this case and that carelessness will result in additional work for . . . defense counsel.” CP at 25.

The court denied the State’s reconsideration request, finding “the State . . . was careless in handling certain aspects of this case.” CP at 118. The court denied Mr. Gassman’s request for dismissal based on prosecutorial misconduct, finding no misconduct tainted the case, “other than . . . the State’s failure to amend the information in a more timely manner.” CP at 124-25.

A jury found Mr. Gassman guilty of first degree robbery; two counts of first degree assault and two counts of drive-by shooting; the court imposed a mitigated exceptional sentence. The State appealed the sanctions.

ANALYSIS

The sole issue is whether the trial court erred by abusing its discretion in ordering sanctions against the State. The State contends no basis exists for this order.

We review a trial court’s decision to impose sanctions for abuse of discretion. *Phys. Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). Likewise, the denial of a motion for reconsideration is reviewed under the abuse of discretion standard. *Rivers v. Wash. State Conference of Mason Contractors*, 145

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Wn.2d 674, 685, 41 P.3d 1175 (2002). Discretion is abused when it is exercised in a manifestly unreasonable manner or on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In *State v. Beliz*, 104 Wn. App. 206, 211-12, 15 P.3d 683 (2001), this court recognized a trial court's discretion when presented with misconduct to either dismiss or impose sanctions.

Under CrR 2.1(d), a trial court may permit the State to amend an information any time before verdict if the defendant's substantial rights are not prejudiced. Here, the State properly requested to amend the information under CrR 2.1(d), but the court found "the State was careless in handling certain aspects of this case." CP at 25. We look to whether substantial evidence supports a court's finding. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The record shows the State was aware the investigating officers filed a new report in late October 2008, stating that the actual defense date was likely April 17, 2008. The record shows defense counsel forwarded letters from alibi witnesses to the State. Yet, the State waited until the day of trial to request to amend. Defense counsel objected, noting he was planning an alibi defense in reliance on the April 15 charging date. The court noted the State had no malicious intent. Thus, the evidence in the record supports the court's finding that the State's conduct was improper.

Additionally, "the trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation." *State v. S.H.*, 102 Wn. App.

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State v. Gassman

468, 473, 8 P.3d 1058 (2000) (quoting *In re Firestorm 1991*, 129 Wn.2d 130, 139, 916 P.2d 411 (1996)). Relying on *S.H.*, the State argues the court must make an explicit finding of bad faith before using its inherent authority to impose sanctions. In *S.H.*, the trial court used its inherent authority to sanction litigation conduct. 102 Wn. App. at 475. The appellate court noted the record supported the inference that the judge deemed counsel's conduct to be inappropriate and improper. *Id.* at 479. Such conduct is "tantamount to a finding of bad faith." *Id.* But, without an express finding of improper conduct, the court remanded the matter. *Id.* Here, unlike in *S.H.*, the court expressly found in its order, "the State was careless in handling certain aspects of this case." CP at 25. This is sufficient to support the court's imposition of sanctions.

The State's decision to request to amend the information almost two months after learning the officers thought the offense date was April 17, 2008, and being aware that the defense planned to call alibi witnesses was tenable grounds to impose sanctions. Given all, the trial court did not abuse its discretion.

Mr. Gassman requests attorney fees and costs on appeal, citing RAP 18.1 and RAP 14.2. RAP 18.1 allows for an award of attorney fees, "if applicable law grants to a party the right." RAP 18.1(a). Mr. Gassman fails to cite the necessary applicable law. To the extent he is the prevailing party, his request for costs would ordinarily be granted, but Mr. Gassman is an indigent appellant. "An Indigent [appellant] may not recover costs from the State for expenses paid with public funds." RAP 14.3(c). Thus,

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Mr. Gassman's requests for attorney fees and costs are denied.

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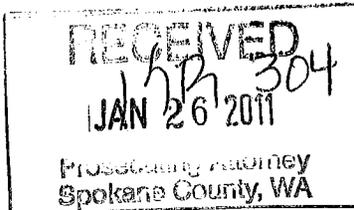
Affirmed.

Brown, J.

WE CONCUR:

Kulik, C.J.

Sweeney, J.



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 280543
)
 v.) MOTION TO
) PUBLISH
 TYLER GASSMAN,)
)
 Appellant.)

I. IDENTITY OF MOVING PARTY

Appellant Mr. Tyler Gassman asks for the relief designated in Part II by and through his counsel, the Real Party in Interest.

II. STATEMENT OF RELIEF SOUGHT

Publication of the Court's opinion filed on January 6, 2011.

III. FACTS RELEVANT TO MOTION

The State of Washington appealed the lower Court's *sua sponte* imposition of sanctions for the careless handling of various aspects of the trial case. The State relied on *State v. S.H.*,

102 Wn. App. 468, 8 P.3d 1058 (2000) in arguing that the lower Court was required to make an specific finding that the State acted in bad faith or in a manner tantamount to bad faith. On appeal this Court affirmed, holding that the careless handling of aspects of the case was sufficient grounds to support an imposition of sanctions. *Court's Opinion at 5.*

IV. GROUNDS FOR RELIEF

In *State v. Fitzpatrick*, 5 Wash.App 661, 668-9, 491 P.2d 262 (1971) (*review denied*, 80 Wash2d 1003) the Court determined that, "Opinions of the Court of Appeals should be published:

(1) Where the decision determines an unsettled or new question of law or constitutional principle.

(2) Where the decision modifies, clarifies or reverses an established principle of law

(3) Where the decision is of general public interest or importance.

(4) Where the case is in conflict with a prior opinion of the Court of Appeals.

(5) Where the decision is not unanimous."

Mr. Gassman, or his counsel as the real party in interest, submits the Court's decision in this matter either determines unsettled law or modifies or clarifies the established principle of law in *State v. S.H.*, 102 Wn. App. 468, 8 P.3d 1058 (2000) and is of general public interest or importance as set forth below.

Both parties and this Court relied heavily on the established principle of law in *State v. S.H.*, 102 Wn. App. 468, 8 P.3d 1058 (2000) that a trial court has inherent authority to control litigation conduct. The foundation of that principle, however, was squarely tested by the similar but slightly different facts in the instant case.

It is the Respondent's position that the Court clarified the established principle of law in *S.H.* that a trial court has inherent power to

govern the litigation conduct before it in imposing sanctions not only for a finding of bad faith or conduct tantamount to bad faith but for carelessness which a trial court finds inappropriate and improper.

If such an interpretation was not the established principle of law from *S.H.*, the ruling here may be said to be a modification of that principle from requiring a finding of bad faith or conduct tantamount to bad faith to requiring only a finding of inappropriate or improper carelessness. If this is the case, the Court's opinion modifies the ruling in *S.H.* and should be published. *State v. Fitzpatrick*, 5 Wash.App at 669.

Alternatively, if inappropriate and improper carelessness was not a basis for the imposition of sanctions under *S.H.*, this Court's opinion may be said to determine an unsettled or new question of law. Either way, the issue is of general public interest or importance because it

ultimately governs the specific standards of conduct by which the State is required to carry out the people's business and the extent to which the Judiciary is empowered to control that conduct.

V. CONCLUSION

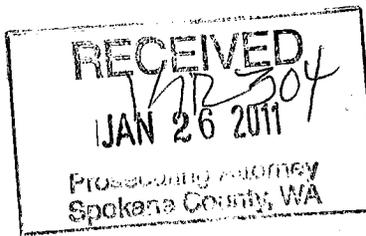
Because the opinion clarifies, modifies or determines a question of law previously unsettled in Washington and because it is of general public interest or importance, it should be published.

Respectfully submitted on Wednesday, January 26, 2011.

PARTOVI LAW, P.S.

A handwritten signature in black ink, appearing to read "DAVE I. PARTOVI", is written over a horizontal line. The signature is somewhat stylized and includes a large loop at the beginning.

David R. Partovi, WSBA #30611
Attorney for the Appellant
Real Party in Interest



JAN 25 2011
STATE OF WASHINGTON

CERTIFICATION

I certify under penalty of perjury under the laws of the State of Washington that the facts set out in part III above are true

PARTOVI LAW, P.S.



David R. Partovi #30611

I certify under penalty of perjury under the laws of the State of Washington that on this day I personally served a copy of this document to the prosecutor listed below by hand-delivering a copy to the Spokane County Prosecutor's Office and having a copy conform stamped.

Brian C. O'Brien
1100 W. Mallon Avenue
Spokane, WA 99260

Signed at Spokane, Washington, on Wednesday, January 26, 2011.



David R. Partovi #30611