

NO. 89657-7

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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In re Personal Restraint

Petition of

ZAHID A. KHAN,

Petitioner.

RESPONSE TO AMICUS CURIAE BRIEF OF
WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

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 ORIGINAL

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I. ISSUES

The amicus curiae brief discusses the following issues:

(1) May a Chief Judge of the Court of Appeals dismiss a personal restraint petition without making a finding that the petition is frivolous?

(2) What standards should this Court apply to a finding that a petition is frivolous?

II. STATEMENT OF THE CASE

The facts are set out in the State's Response to Personal Restraint Petition, at 3-13.

III. ARGUMENT

A. THE ISSUES RAISED BY AMICUS CURIAE ARE MOOT.

The issues raised by amicus curiae relate to whether this personal restraint petition was properly dismissed by the Chief Judge. This question is moot. Because this court granted review, the case will now be argued before the full court. Since the petitioner will receive a full hearing on the merits of his petition, the Chief Judge's action will not affect the outcome of the case.

This court may review a moot case if "matters of continuing and substantial public interest are involved." Westerman v. Cary, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994). No such issues are

involved here. The Chief Judge's action was based on the former version of RAP 16.11(b). This court amended that rule effective September 1, 2014. The court also adopted a new rule authorizing dismissal of petitions that are "clearly frivolous." RAP 16.8.1(b) (effective 9/1/14). Because the governing rules have already been amended, any decision construing the old rule will be of limited value. This is particularly true where the relevant determination – whether a petition is "frivolous" – is highly fact-specific.

In the future, the Chief Judges of the Court of Appeals will probably dismiss many personal restraint petitions as frivolous under RAP 16.11(b) or as "clearly frivolous" under RAP 16.8.1(b). If the Chief Judges need additional guidance on how to make this determination, there will be ample opportunity for this court to provide it. There is no need for this court to decide a moot issue under a repealed rule.

B. A PETITION IS FRIVOLOUS IF IT RAISES NO ISSUES THAT ARE REASONABLY DEBATABLE.

If this court chooses to consider the issue, it should determine that the Chief Judge's action was correct. That action was governed by the former version of RAP 16.11(b):

The Chief Judge determines at the initial consideration of the petition the steps necessary to

properly decide on the merits the issues raised by the petition. If the issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits. If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits for a reference hearing. The Chief Judge may enter other orders necessary to obtain a prompt determination of the petition on the merits.

The procedure provided by this rule was derived from the former rule for post-conviction relief, CrR 7.7. See Task Force Comment to RAP 16.11, quoted in 3 Tegland, Rules Practice at 373 (8th ed. 2014). Under that rule, the Chief Judge could dismiss a post-conviction petition under two circumstances. A petition could be frivolous on its face, in which case it could be dismissed without calling for an answer. Or it could be shown to be frivolous by reference to matters of record or of which the court can take judicial notice. In that situation, the petition could be dismissed on consideration of the answer. Wright v. Morris, 85 Wn.2d 899, 902-03, 540 P.2d 893 (1975).

Neither RAP 16.11 nor the cases decided under former CrR 7.7 provide a definition of "frivolous." In other contexts, however, that term has been given a consistent definition:

An appeal is frivolous when the appellate court is convinced that it presents no debatable issues upon which reasonable minds might differ, and if there is no reasonable possibility of reversal.

Del Guzzi Const. Co. v. Global Northwest, Ltd., 105 Wn.2d 878, 889, 719 P.2d 120, 126 (1986).

This definition makes sense in the context of personal restraint petitions as well. A determination that a petition is not "frivolous" has two consequences. First, the petitioner is entitled to either consideration by a panel or a reference hearing. RAP 16.11(b). Second, the petitioner is entitled to appointment of counsel, if he is indigent and has not filed a previous collateral attack on the same judgment. RCW 10.73.150(4). As a result, a decision that the petition is not frivolous significantly increases the time and expense required to resolve the petition.

If the issues raised in the petition are reasonably debatable, this time and expense is necessary. If the debatable issue is legal in nature, it must be resolved by a panel of appellate judges. If it is factual, it must be resolved by a trial judge. In either case, the court will need the participation of counsel on both sides to make a proper decision.

On the other hand, if the issues are not reasonably debatable, the additional time and expense is unnecessary. Further argument, with or without the participation of counsel, is not likely to lead to a different result. In this situation, the only proper procedure is to dismiss the case promptly. This saves the court's and the public's resources for cases in which they would be useful.

Amicus curiae asks this court to imply the standards for *imposition of sanctions* for filing a frivolous appeal:

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Brief of Amicus Curiae at 2-3, citing Green River Comm. Coll., Dist. No. 10 v. Higher Education Personnel Bd., 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986). Of these five propositions, (3) and (5) are applicable to dismissals under RAP 16.11(b). The other three propositions are not applicable

Proposition (1) is that a civil appellant has a right to appeal. This is not true of a personal restraint petitioner. He has the right to *file* a petition, but there is no right to have it considered in any particular way.

Proposition (2) is that "all doubts should be resolved in favor of the appellant." There is no basis for applying this rule in the context of personal restraint petitions. The petitioner bears the burden of proving actual and substantial prejudice from constitutional error. In re Yates, 180 Wn.2d 33, 40 ¶¶ 15-16, 321 P.3d 1195 (2014). That rule is incompatible with any presumption in favor of the petitioner.

Proposition (3) is that the record should be considered as a whole. This does apply to personal restraint petitions. As pointed out above, a petition that is not frivolous on its face may nonetheless be frivolous in light of the whole record. Wright, 85 Wn.2d at 902-03 (construing from CrR 7.7).

Proposition (4) is that affirmance does not necessarily mean that the appeal was frivolous. This proposition is relevant to a determination of sanctions, because that determination is made *after* the case is resolved on the merits. A determination under RAP

16.11(b) is, however, made prior to any other substantive determinations. In this situation, proposition (4) is irrelevant.

Finally, proposition (5) is essentially identical to the definition of "frivolous" set out in Del Guzzi Construction. As discussed above, this definition is applicable to determinations under RAP 16.11(b).

In short, if this court feels it necessary to define the term "frivolous" as used in former RAP 16.11, it should use the standard definition of that word: a petition is frivolous if it presents no debatable issues upon which reasonable minds might differ, and if there is no reasonable possibility of relief. This determination should be made in light of the record as a whole. Other considerations are irrelevant to this determination.

C. BECAUSE THE PERSONAL RESTRAINT PETITION PROVIDED NO ADMISSIBLE EVIDENCE TO SUPPORT ITS ALLEGATIONS, THE CHIEF JUDGE PROPERLY DISMISSED IT AS FRIVOLOUS.

As discussed above, it is unnecessary to apply the frivolousness standard in this case, since it is irrelevant at this stage of the proceedings. Since this court will consider the case en banc, the petition should be dismissed if the petitioner has failed to

establish an entitlement to relief. Whether or not his claims were reasonably debatable no longer makes any difference.

If, however, this court chooses to apply the standard, it should conclude that the Chief Judge was correct. Because so many arguments have been raised in this case, it is easy to lose sight of the fundamental flaws in the petitioner's claims:

1. Appointment Of Interpreter.

The petitioner specifically framed this claim as one of ineffectiveness of counsel. P.R.P. at 14. Ineffective assistance cannot be established if counsel's conduct can be characterized as legitimate trial strategy. State v. Grier, 171 Wn.2d 17, 33 ¶¶ 42, 246 P.3d 1260 (2011). As the Chief Judge pointed out, proceeding without an interpreter allowed the jury to hear the petitioner's testimony in a way that supported his theory of the case. Order Dismissing P.R.P.at 5. Because the failure to request an interpreter was a strategic decision, it cannot support a claim of ineffective assistance.

2. Prosecutorial Error In Cross-Examining Defendant And Ineffective Assistance In Failing To Object To That Cross-Examination.

As the Chief Judge pointed out, the petitioner raised claims on direct appeal of both ineffective assistance of counsel and

prosecutorial misconduct. Order Dismissing P.R.P. at 6-7. He cannot re-litigate these claims via personal restraint petition absent a showing that doing so is in the interests of justice. In re Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). Nor can he escape this bar by alleging different facts or different legal theories in support of these claims. Id. at 329.

3. Ineffective Assistance Of Counsel In Failing To Obtain Expert Concerning Likelihood Of Injury.

As the Chief Judge pointed out, the petitioner failed to establish that any qualified expert would have testified to these facts. Order Dismissing P.R.P at 9. To obtain relief via personal restraint petition, “the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. In re Rice, 118 Wn.2d 876, 886, 826 P.2d 1086 (1992). The declaration of the petitioner’s “expert” set out no basis for his conclusion in either relevant experience or scientific principles. The petitioner therefore did not show that his claim of ineffectiveness was supported by any *admissible* evidence.

In short, the petitioner failed to establish any evidentiary support for any of his allegations. Under the standards established by this court, unsubstantiated allegations are insufficient to warrant

relief via personal restraint petition. Rice, 118 Wn.2d at 885-86. The Chief Judge proper determined that the petition presented no debatable issues and established no reasonable possibility of relief. He therefore acted properly in dismissing the petition.

Respectfully submitted on January 29, 2015.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re Personal Restraint
Petition of:

ZAHID A. KHAN,

Petitioner.

No. 89657-7

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RESPONSE TO AMICUS CURIAE BRIEF OF
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I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to: Jeffrey Erwin Ellis, jeffreyerwinellis@gmail.com; Suzanne Lee Elliott, suzanne-elliott@msn.com; David B. Zuckerman, David@DavidZuckermanLaw.com;

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of January, 2015, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

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Please accept for filing the following attachment: State's Response to Amicus Curiae Brief of Washington Association of Criminal Defense Lawyers

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Thanks.

Diane.

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