Cause No. 317226

COURT OF APPEALS
STATE OF WASHINGTON
(Div. III)

STATE OF WASHINGTON

Plaintiff–Appellee,

v.

LUCAS JAMES MERRILL

Defendant–Appellant,

SUPERIOR COURT No. 09-1-041904
SPOKANE COUNTY
HONORABLE MARYANN C. MORENO

FOLLOWING REMAND

OPENING BRIEF

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This appeal challenges the imposition of sanctions against counsel representing a criminal defendant charged with seven counts of Attempted First Degree Assault. This is the second appeal in the matter. The original appeal was remanded on November 8, 2012, for the entry of findings and conclusions regarding the safe-harbor provisions in RCW 7.69.030(10) and whether Attorney Harget's conduct constituted bad faith under the statute. CP 42.

Following a brief evidentiary hearing on March 8, 2013, the lower court entered a two-page Memorandum Opinion on Remand. (CP 42-43). The court held that Harget was acting within the safe-harbor when he contacted the victims on the first occasion. While stating that Harget had options and noting its criticism of his decisions, the lower court held that Harget's first contact occurred under circumstances supporting the safe-harbor exception. CP 43. The court further held, however, that the *second* contact was a violation of the statute.

> It is difficult to accept by any stretch of the imagination that after learning that the Gerlars did not want contact with him without the victim advocate and that the state was seeking sanctions for his previous contact, that Mr. Harget could possibly believe that it would be acceptable to ignore the statute and its requirements.

CP. 43. The court further stated, "It is difficult to fathom why Mr. Harget would contact the Gerlars for the second time, knowing their position." CP 43.

The court reimposed the sanction for the second contact under 7.69.030, noting as well, that while Harget may not have intended to harm the victims, "the integrity of the justice system depends in part upon all its members to protect the rights not only of the accused but of the victims as well." CP 43.

The facts are set forth in general terms in this Court's unpublished opinion dated November 8, 2012 in case No. 30110-9-III (*Harget I*). At the evidentiary hearing held on March 8, 2013, additional facts were adduced regarding Harget's seeking and following the advice of his supervisors prior to re-contacting the victims. This testimony was entered into the record as among the factors affecting Harget's good faith decision to twice contacting the victims in the underlying criminal matter without first securing the presence of a victim-advocate.

a. ASSIGNMENTS OF ERROR

Appellant Harget raises the following assignments of error:

Error 1: The trial court erred in concluding that Attorney Harget's second contact with the alleged victims constituted "bad faith." This erroneous conclusion arose as follows:

a. Regarding Attorney Harget's second contact with the alleged victim, the trial court erred in disregarding — prior to this Court's ruling in *Harget I*[1] — Harget's belief that an interview

[1] Unpublished decision entered November 8, 2012 in case No. 30110-9-III.

to *discuss a sanctions motion against him* was under the same statutory restrictions as an interview to *discuss the defendant's alleged violent offense.*

b. The trial court erred in determining that Attorney Harget acted in bad faith and was sanctionable under the court's inherent authority because his actions, if unchecked, would affect the integrity of the court by encouraging future abuses. CP 43.

Issue 1: Is the lower court permitted to disregard evidence material to Harget's belief — at the time of his second contact — that his purpose (to prepare his defense to the sanctions motion) was not governed by the statute prohibiting defense or prosecution interviews of victims of violent crime?

Issue 2: Where the record indicated only disputed interpretations between the County Prosecutor and the Public Defender's offices but not individual ill-will, contumacy, or an unjustified attempt to reconcile the statute, was there sufficient evidence for the lower court to find that Harget's conduct affected the integrity of the court or that there was any likelihood of future abuse?

Error 2: The trial court erred in failing to consider that Attorney Harget's second contact with the alleged victims was made in

accordance with the recommendations of his two supervisors who jointly met and determined Harget's course of action.

c. The evidence that Harget was following his supervisors' lead was uncontested.

d. Harget's actions were not intended to affect the integrity of the courts; it is uncontested that he acted in order to defend himself against the State's motion for sanctions.

Issue 3: In light of the victim's ready willingness to speak directly with Harget and the State's hearsay complaints regarding the first contact, was Harget's decision to follow supervisors' instructions to recontact the victims (after he was no longer counsel of record for the defendant) in order to advance his defense against the pending motions material to the determination of good faith such that the lower court's failure to take these matters into consideration constituted an abuse of discretion under *State v. SH*?

B. STATEMENT OF THE CASE & PROCEEDINGS

The respondent is an attorney who represented Lucus Merrill. *Harget I*, slip op. at 2. The victims elected to exercise rights under chapter 7.69 by signing a Notice of Victim's Intent to Rely on RCW 7.69.030(10), which provides that a victim's advocate be present for "any prosecution or defense

interviews." *Harget I*, slip op. at 2. CP 1-2, 61. The underlying criminal prosecution was continued numerous times and the trial court indicated to the parties that there would be no further continuances. On the eve of the trial readiness hearing, 16 months after the victims presented their notices, plea discussions broke down under circumstances that caused defense counsel to want to speak with the victims regarding their alleged objection to the tentative agreement. Knowing the agreement had been approved by the County Prosecutor (and opposed by the deputy), Harget faced a dilemma created by the deputy's unresponsiveness. CP 42, and see CP 5, 7 (seven emails from Harget to deputy, all without response). The matters appeared to defense counsel to be time sensitive and likely to cause unnecessary delay in the trial if he did not make the contact without first securing the presence of a victim advocate as required by 7.69.030(10).

Defense counsel spoke with the victims. CP 7:18-25, CP 30 (email summarizing conversation). They knew they were speaking with an attorney but, in a later hearsay declaration by the victim's advocate, stated that they thought he was the prosecutor. In any event, they advised that they did not object to Harget's proposed plea agreement as approved by Tucker. This was contrary to the information given him by the deputy. CP 7:22-23. Harget immediately related to the deputy prosecutor the fact of the contact and his

concerns over the derailed plea discussion. CP 7:25. The County Prosecutor's office deemed the contact "illegal" and focused instead on the possible violation of RCW 7.69.030. CP 34 (email dated 5-13-11 from deputy to Harget). The County Prosecutor alerted Harget's supervisors that the office was concerned over the violation of RCW 7.69 and asked for a written apology. CP 3:4. Harget and his supervisors met and prepared an apology which was promptly sent in to the County Prosecutor. The apology did not suffice and the Prosecutor's office bought a motion for sanctions against Mr. Harget. CP 3:4-10. Upon learning of the sanctions motion, Harget again met with this supervisors who advised him to re-contact the victims so he could prepare a response to the sanctions motion. 2:22 to 3:1. Harget and an in-office investigator contacted the victims a second time and it is uncontested that the second contact soley addressed the sanctions issue.

At the original sanction hearing, the trial court determined that Mr. Harget's two calls independently merited sanction as being violations of RCW 7.69.030(10).

On November 8, 2012, this Court issued its unpublished memorandum decision. This Court first noted that the safe-harbor provision had not been applied by the lower court.

> [T]he court could not properly find that Mr. Harget "disregarded" the Gertlars' right without considering RCW

> 7.69.030(10)'s safe harbor. If the trial court concludes that the safe harbor did not apply, then it can consider whether Mr. Harget acted in bad faith. That very fact specific conclusion would turn on the *notices* Mr. Harget received, the *timing* of his contacts [with] the *trial and hearing dates*, the *purpose* for Mr. Harget's contacts, and whether Mr. Harget relied in *good faith* on the safe harbor.

Harget I, slip op. at 6-7 (italics added to identify safe-harbor inquiry).

This Court then turned to Harget's second argument, that his second contact was not covered by the statute because he was not calling to conduct an "interview" as a lawyer representing a party, but as a person who was the subject of a pending sanctions motion. This Court determined that the term "interview" was sufficiently broad to cover Harget's second contact, regardless of his purpose. *Harget I*, slip op. at 7. This Court held that the Harget's two contacts with the victims fell under the statute as interviews. The decision noted that the term "interview" was found in a commonly used dictionary, that its common usage was broad enough to encompass counsel's conduct and that counsel's interpretation was "hyper technical" at the least and would at most "ignore the purpose of the statute to protect and support victims of violent crime." *Harget I*, slip op. at 7-8.

The Court then remanded the matter for further proceedings to determine whether Mr. Harget relied on the safe-harbor language and,

before imposing a sanction, the lower court had to make a finding that Mr. Harget did or did not act in bad faith. *Harget I*, slip op. at 8.

On March 8, 2013, the trial court held an evidentiary hearing at which one of Harget's supervisors testified. RP 30-41. The parties noted the pre-existing declarations by the supervisors which were included by reference. RP 36. The court took argument, and recessed to take the matter under advisement. RP 44-45.

On May 13, 2013, the lower court issued its opinion. The court held:

- that counsel Harget did not violate RCW 7.69.030(10) when he placed his first call to the victims, as he was entitled to the safe-harbor provision, CP 42-43; but,
- that the second call was not covered by the safe-harbor provision because Harget "presented no evidence" that his interview was pursuant to the safe-harbor or that he relied on that clause. Harget "was aware that the Gertlars wanted [to] be interviewed with the victim advocate... [he] ignored their wishes and rights pursuant to statute. His actions were inappropriate and improper, and thus, in bad faith." CP 43; see *Wilson v. Henkle*, 45 Wn. App. 162, 173-74 (1986) (court has inherent authority to sanction inappropriate and improper

conduct). The court specifically stated that the second call was "an attempt to defend himself from the threat of sanctions from unwanted prior contact." CP 43. The court noted that under "no stretch of its imagination" could it be acceptable to have made the second contact and that it found the contact "difficult to fathom." The lower court did not address (1) the testimony and declarations submitted by Harget wherein he specifically set forth his consultations with his supervisors, nor (2) his good faith belief, at the time of the second call, that a contact to discuss his pending sanctions was not covered by 7.69.030(10).

ARGUMENT

I. THE FACTS ARE INSUFFICENT TO FIND BAD FAITH: HARGET ACTED IN DEFENSE OF MOTION TO SANCTION HIM; COUNSEL SOUGHT DIRECTION FROM TWO SUPERVISORS WHO CONCURRED HE NEEDED TO RE-CONTACT THE VICTIMS; HIS PURPOSE WAS TO "DEFEND HIS PRIOR CONDUCT" NOT TO INTERVIEW VICTIMS ABOUT A VIOLENT CRIME AND, AT THAT TIME, SUCH CONTACT WAS NOT A CLEARLY FORBIDDEN

Standard of Review This Court reviews interpretation of statutes and court rules under the *de novo* standard. *State v. Armendariz*, 160 Wn.2d 106, 110 (2007). The review standard for the imposition of sanctions in discovery

disputes is abuse of discretion. *Washington State Physicians Insurance Exchange v. Fisons*, 122 Wn.2d 299, 338 (1993). Abuse of discretion occurs if the court's order is manifestly unreasonable or based on untenable grounds. *Holbrook v. Weyerhauser Co.*, 118 Wn. 2d 306, 315 (1992).

a. The safe-harbor elements were correctly applied to Harget's original contact and that contact was held to be within the safe harbor provisions of 7.69.030(10)..

This Court's remand set forth a series of elements at slip opinion page 7 to determine whether the safe-harbor applied. See, *supra* at 6-7, italics added to emphasize distinct elements. Phrase by phrase we see the elements belong to the safe-harbor analysis:

(1) "notices...received" refers to the statute's notice requirement;

(2) "timing of the contacts" as opposed to "trial/hearing dates" refers to the safe-harbor's elements of practicality and undue delay;

(3) the "purpose" of the contacts refers to the reason for the contact, as it must at least be an interview under the statute (presumably something distinct from a social contact or some other *de minimus* contact); and, finally,

(4) the court must consider whether counsel "relied in good faith on the safe harbor", a subjective test.

On remand, the lower court made the requisite analysis. It followed this

Court's multi-element test for the safe-harbor as applied to Harget's first contact.

The lower court considered the existence of the notices, the timing of the contacts against the backdrop of the impending readiness hearing, the purpose of the contact, and Harget's subjective reliance on the statute's exemption. CP 42-43. The lower court held it could not say Harget acted outside the safe-harbor when he made the first contact. CP 42-43. This is not to say the lower court reserved criticism: the court noted that Mr. Harget had options that should and could have been taken. On balance, however, the lower court held that the safe-harbor provision applied. CP 42-43.

The lower court then moved on to the second contact. Here, the court committed error. It failed to consider Harget's good faith belief that RCW 7.69.030(10) did not apply to his second call. As shown next, Harget advanced two lines of reasoning that the statute was not applicable. The court ignored both.

b. Harget agrees that the second call was not eligible for safe-harbor protection but asserts he had three reasons to believe at the time of the call that the contact was appropriate.

Harget's argument, plainly set forth in the record[2] and not contradicted by any evidence, asserted that his second call was not to conduct a defense interview of victims of violent crime. The purpose was to prepare for his defense of the State's attempt to sanction him for conduct that, by the way, turned out not to be a violation. Harget asserts three reasons in support of his good faith: (1) his office's interpretation of RCW 7.69.030(10) as not applying to a contact regarding sanctions against a lawyer; (2) his belief from the first contact that the victims were in fact willing — at least presently — to speak with an attorney regarding the plea discussions without an advocate present; and (3) his supervisor's instruction to contact the victims in order to defend himself.

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[2] Harget raised this argument in section II of his opening brief in *Harget I*. Although rejected, Harget's interpretation was not held to be frivolous or motivated by bad faith. The fact remains that Harget and his office did not see his call seeking help to defend *himself* as covered by the restrictions on defense or prosecution interviews of victims of a violent crime.

c. The lower court ignored analysis of Harget's actual defense of good faith for the second call, believing that if Harget's conduct was outside the safe-harbor it therefore was in bad faith.

After dispensing with the safe-harbor issue, the lower court based the sanction for the second call on an additional factor, concluding that Harget's call affected "the integrity of the court and, if left unchecked, would encourage future abuses." CP 43.

This test arises from the decision in *State v. SH*, 102 Wn.App. 468, 474 (2000). The rule in *State v. SH*, however, does not support the lower court's sanctions here.

In *State v. SH,* the Division 1 court ruled that an eleventh hour request by a juvenile for diversion violated a specific rule requiring the decision on diversion to be made as expeditiously as possible. 102 Wn.App. at 472-73. The appellate court held that the trial court had the inherent power to impose sanctions against an attorney for inappropriate and improper conduct. *Id.*, at 474. This was true, even when a specific pleading did not violate Rule 11. *Id.* Thus, bad faith could be established by an attorney's "delaying or disrupting litigation," or where conduct "affects 'the integrity of the court and, [if] left unchecked, would encourage future abuses.' " *Id.*, citation omitted.

The facts of *State v. SH* involved an allegation of bad faith when the public defender association failed, *without justification*, to adhere to the

mandate in RCW 13.40.080(10) which requires that the election for diversion be made "as expeditiously as possible." *Id.*, at 478 (citing RCW 13.40.080(10)). The requirement for an expedited diversion decision is not limited by any other language in the statute. The mandate has no exemptions, such as the exemption in provision two of RCW 7.69.030(10). Furthermore, there is no language suggesting the potential for a waiver of RCW 13.40.080(10) requirements. Because the statute's requirement was inflexible, and plainly ignored, and ignored without any articulated justification, the *SH* court found bad faith. In doing so, the *SH* court rejected the respondent's arguments that RPC 3.1 permits greater leeway for abuse by counsel in a criminal case. *Id.*, at 479.

d. The lower court's findings were without substantial evidence and the conclusions an abuse of discretion.

None of the factors considered in *State v. SH* (violation of Rule 11, deliberate violation of statutory mandate, abuse of RPC 3.1) are present in this instance and the evidence does not support a finding of bad faith.

At the time Harget made the second call, he was facing a personal attack by the prosecutor's office. In response, he met with his supervisors and sought direction. CP 1-3, RP 36:15. At that time there was no case (published or unpublished) saying that RCW 7.69 applied to defense counsel responding to a sanctions motion. Mr. Harget's two supervisors believed that prohibition

against counsel interviewing victims in a violent crime did not plainly apply to an interview about a pending motion against the defense lawyer. [3]Knowing that the victims had spoken with counsel freely, they *advised* Mr. Harget to re-contact the family to determine whether the hearsay statements alleged to have been made by them were accurate and not unduly influenced by the prosecutor's interpretation of the statute.[4] In so doing, Mr. Harget was, at that point in time, mindful that the victims willingly spoke with him without asserting any claim to their right to the presence of a victim advocate.

This is not a hyper-technical dodge. Harget did not blithely make the second call. He met with both his supervisors and together they made a decision, that Harget needed — with an office investigator present — to directly contact the witnesses against him.

Harget knew he was the subject of the matter: not his client. Harget understood that his conduct was in question: not his client's. From the standpoint of the Public Defender supervisors, and in his own view, Harget's contact was not the type of contact covered by the statute.

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[3] Again, the Public Defenders office and Mr. Harget do not stint this Court's ruling but merely point out that no one had the benefit of the decision at the time.

[4] Recall that at the prosecutor's briefs to this Court referred to Harget's first call, now vindicated, as "illegal". Respondent's Brief, filed 4-2-12, at 7. The prosecutor vigorously opposed the application of the safe-harbor provision to the first call and rejected any suggestion that he acted within the proper limits of his duties.

Harget and his supervisors turned out to be wrong. This Court held that the term "interview" covers Harget's second call and the victims were entitled to the protection of 7.69.030(10) even when the purpose was to address Harget's conduct. *Harget I,* slip op. at 7. Harget does not argue otherwise or stint in his understanding of the import of this Court's ruling. But the issue before the trial court on remand was whether Mr. Harget was acting in bad faith when *he took the direction from Mr. Scott and Mr. Boe and called the victims a second time*. The lower court simply ignored this evidence and concluded that failing to establish the safe-harbor, Mr. Harget must have acted in bad faith.

Thus, the evidence before the lower court does not properly support a finding that Mr. Harget acted in bad faith. He acted in consultation, with his superiors, and limited the call to his personal concerns.

This Court did not rule in *Harget I* that Harget or his supervisor's thinking was unreasonable, reckless or deliberate of rights without justification. The issue of Harget's good faith actions was on the table. The lower court, however, ignored evidence material to good or bad faith. Having concluded that the safety-valve did not apply, the lower court ended its analysis and found a violation. It did not consider un-contradicted material evidence that:

1. Harget personally knew that the victims had been willing to speak

with him during the original call;

2. that the prosecutor and the in-house victim's advocate were incensed by his first call (despite Harget's vindicated reliance on the safe-harbor provision) and exercised sole access to the victims; and,

3. that the State was representing, without direct evidence from the victims that the victims had not waived the statute's protections.

The only factual point from Harget's defense that the lower court did acknowledge was Harget's admission that his second call was solely taken to preserve his self-interest. CP 43. Whereas the violation in *State v. SH* was made without justification or excuse, here the respondent set forth detailed thinking and consultation to support his struggle to act in accordance with procedures and fairness.

Counsel for Harget asserts that he can locate no case in which a matter of first impression has merited sanctions where there was no evidence of ill will or contumacy. See CP 43 ("While Mr. Harget may not have intended to harm the Gertlars by his actions..."); RP 35:2-17.

CONCLUSION

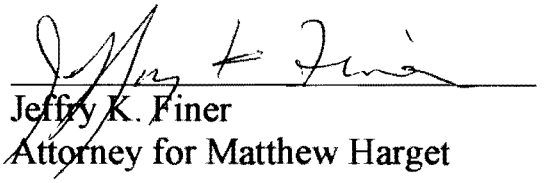
The fact that Harget was acting properly when he made the first contact has bearing on his state of mind when he made the second contact.

Harget was not acting in callous or reckless disregard of rights or with a purpose to harm. He acted with careful (if ultimately overruled) reflection upon the circumstances actually in play. From his point of view, the Gertlars were eligible for coverage under RCW 7.69 as alleged victims of violent crime but his need to re-contact them was not as victims of violent crime but as alleged victims of his first (now-vindicated[5]) contact.

For the reasons set forth above, Attorney Harget respectfully asks this Court to reverse the lower court's order regarding sanctions.

DATED THIS 4th day of November, 2013.

Law Offices of JEFFRY K FINER



Jeffry K. Finer
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[5] If not a violation, and if taken to advance his client's interests in a high-stakes case, Mr. Harget's conduct was consistent with his difficult, vexing, and constitutionally protected duties under the Sixth Amendment. The State's at times shrill characterizations ("clear and uncontested that the first illegal contact with the Gertlars occurred on April 7, 2011") against Mr. Harget are painful to read. There is no knowing what prosecutors or the in-house advocate said to the Gertlars about Mr. Harget but it is chilling to consider that the Spokane County Prosecutors office attacked Mr. Harget despite his apology. CP 3. It should be noted that the apology scrupulously avoided criticism of the deputy for his repeated failures to respond and did not accuse him of misconduct despite the disturbing indication that the deputy's version of the victim's position was inconsistent with the statements given directly to Mr. Harget during his first contact. RCW 7.69.030(10) is intended to give victims an emotional shield, not prosecutors a tactical sword.

CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 4 day of November, 2013. I caused the foregoing *Opening Brief* to be served via USPS, postage prepaid on the following:

Stephen Garvin
Spokane County Prosecutors Office
1100 W. Mallon
Spokane, WA 99260

DATED this 4 day of November, 2013.

Danette Lanet