

**FILED**

DEC 06 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

31722-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LUCAS J. MERRILL, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENT OF ERROR

1. The Appellant claims that the Superior Court abused its discretion in finding that defense counsel acted in bad faith.

II.

ISSUES

- A. The standard of review is abuse of discretion.
- B. The trial Court has twice properly found that defense counsel knowingly violated State law and victim's rights.

III.

STATEMENT OF THE CASE

The sole remaining issue concerns defense counsel's second contact with the victim's in this case where he knowingly circumvented their request for a victim advocate. CP 43. This contact was intentional. CP 43. The Court found there was no justification for the second contact. CP 43. Defense counsel knowingly ignored the victim's right's statute and it's requirements. CP 43. Mr. Harget's actions were inappropriate and improper and constitute a bad faith violation of victim's rights. CP. 43.

#### IV.

#### ARGUMENT

##### A. THE SUPERIOR COURT HAS AUTHORITY TO ORDER SANCTIONS WHICH SHOULD ONLY BE REVERSED UPON A FINDING OF ABUSE OF DISCRETION.

“Every court of justice has power ... [t]o enforce order in the proceedings before it, ... [and] [t]o provide for the orderly conduct of proceedings before it...” RCW 2.28.010(2)-(3).

“When jurisdiction is ... conferred on a court or judicial officer all the means to carry it into effect are also given[.] ...” RCW 2.28.150.

Where sanctions are not expressly authorized, “the trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation.” *In re Firestorm 1991*, 129 Wn.2d 130, 139, 916 P.2d 411 (1996) (applying the principles embodied in CR 11, CR 26(g), and CR 37 to CR 26(b) violations). “[D]ecisions either denying or granting sanctions ... are generally reviewed for abuse of discretion.” *Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). But the “choice of sanctions remains subject to review under the court's inherent authority applying the arbitrary, capricious, or contrary to law standard of review.” *Butler v. Lamont Sch. Dist.*, 49 Wn. App. 709, 712, 745 P.2d 1308 (1987).

The Court has inherent authority to assess sanctions for bad faith litigation conduct. *Wilson v. Henkle*, 45 Wn. App. 162, 174, 724 P.2d 1069 (1986). This includes the power to impose sanctions for inappropriate and improper conduct. *Wilson*, 45 Wn. App. at 173.

The authority of the Superior Court in this case is well founded and has previously been recognized by The Court of Appeals in Washington, Division III in this very case. *State v. Merrill*, No. 30110-9, *slip op.* at 5 (Div. 3. Nov. 8, 2012). That opinion also recognized that the second contact with the victim's falls was protected by RCW 7.69.030(10), *Id at 7-8*.

The evidence shows that Judge Moreno engaged thoughtful consideration of the issues. CP 42-43. Contrary to the assertions of defense counsel the evidence on the record shows that Judge Moreno carefully considered the question of bad faith by defense counsel during the first and second illegal contact with the victims. CP 42-43. The record shows that, while Judge Moreno disapproved of Mr. Harget's actions with regards to the first contact she did find that it was covered by the impracticability provisions of RCW 7.69.030(10). CP 43. The Court specifically found that Mr. Harget knew, prior to his second contact, that the victim's had voiced complaints about his contact and did not want to speak with him. CP 43 Judge Moreno has twice reviewed the second contact between Mr. Harget and the victims and has twice found this act to be in bad faith. Her ruling recites in detail her reasoning. CP 42-43.

B. THE TRIAL COURT PROPERLY FOUND THAT  
DEFENSE COUNSEL KNOWINGLY VIOLATED  
STATE LAW AND THE VICTIM'S RIGHTS.

The law in Washington requires that victim's rights be honored and protected to the same degree that the rights of criminal defendant's are protected.

In recognition of the severe and detrimental impact of crime on victims, survivors of victims, and witnesses of crime and the civic and moral duty of victims, survivors of victims, and witnesses of crimes to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state, the legislature declares its intent, in this chapter, to grant to the victims of crime and the survivors of such victims a significant role in the criminal justice system. The legislature further intends to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity; and that the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants.

RCW 7.69.010.

Crime victims have a right that any contact with defense counsel occur with an advocate present. RCW 7.69.030(10). Victim's rights are further safeguarded by the Washington State Constitution. Wash. State Const. Art. I, § 35.

The Court of Appeals has already found that the second contact between Mr. Harget and the victims falls within the ambit of the victim's rights statute. *State v. Merrill*, No. 30110-9, *slip op.* at page 7-8 (Div 3. Nov. 8, 2012). Judge

Moreno has twice found that the second contact was in violation of the statute and was done in bad faith given the totality of the facts. CP 43. Her ruling should not be reversed.

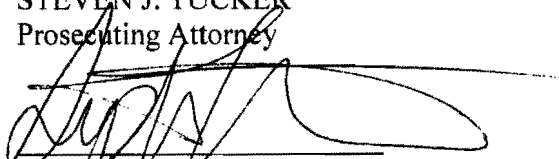
V.

### CONCLUSION

Having twice been found to have acted in bad faith the appellant now seeks to have this Court find an abuse of discretion by the Trial Court. With respect to the Court of Appeals it is far removed from the fact finding process. Judge Moreno has twice found a violation of state law and that, particularly for the second contact, that it was made in bad faith. This Court should respect her ruling and uphold the finding and sanction. For the foregoing reasons the State asks the Court to affirm the thoughtful decision of the Superior Court that Mr. Harget engaged in illegal, improper, and bad faith contact with the victim's in this case.

Dated this 6<sup>th</sup> day of December, 2013.

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