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No. 71054-1-I

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

CHRISTOPHER PIRIS,
Appellant,

v.

ALFRED KITCHING, et al.,
Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard D. Eadie, Judge

APPELLANT'S REPLY BRIEF

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I. REPLY ARGUMENTS

A. A PLAINTIFF IN A LEGAL MALPRACTICE ACTION ALLEGING SENTENCING ERRORS ONLY IS NOT REQUIRED TO DEMONSTRATE "ACTUAL INNOCENCE"

All Respondents concede that "actual innocence" is "not relevant if the attorney's error concerns the extent or severity of the sentence." *Id.* Where, as here, a plaintiff alleges that his attorney's negligence resulted in a sentencing error, he has met his initial burden if he alleges: (i) that the attorney's negligence resulted in a legally impermissible sentence, and (ii) that he obtained post-conviction sentencing relief. *Id.* They do not dispute that this Court has adopted this sound principle in *Powell v. Associated Counsel for Accused (Powell I),* 125 Wn. App. 773, 106 P.3d 271, *review granted, cause remanded*, 155 Wn.2d 1024, 123 P.3d 120 (2005), and *Powell v. Associated Counsel for the Accused, (Powell II)*, 131 Wn. App. 810, 129 P.3d 831 (2006), *opinion adhered to on reconsideration.*

B. A SENTENCE THAT EXCEEDS THE STANDARD SENTENCING RANGE AS SET FORTH IN RCW 9.94A IS A SENTENCE THAT EXCEEDS "THE MAXIMUM TERM ALLOWED BY STATUTE"

The Respondents hang their hat on the notion that Piris cannot sue his lawyers because the "exception" to "the innocence requirement" applies only to "circumstances where the defendant was sentenced to and served a sentence beyond the maximum sentence authorized by

Washington law." Brief of Respondent Kitching at 14. They then assert that Piris did not serve "a sentence longer than that authorized by Washington law." *Id.* They are wrong.[1]

The SRA became effective in 1984. It attempted to create more certainty and uniformity in sentencing, to make sentencing more dependent upon the crime committed and criminal history of the offender, and to reduce the discretion of trial judges. David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 Crime & Just. 71, 84-87 (2001). The SRA utilizes objective criteria to establish sentencing ranges.

Under Washington's Sentencing Reform Act, the first step in a SRA sentencing proceeding is to determine the sentencing range. The SRA directs the trial court to determine an offender score and seriousness level for each conviction being sentenced. The defendant's offender score is calculated using prior and other current offenses under the statutory formula of RCW 9.94A.525. The seriousness level of the offense is determined by RCW 9.94A.515. The sentencing grid in RCW 9.94A.510

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[1] The Respondents also assert that Piris does not dispute that his 1998 sentence was lawful. That, too, is wrong. Piris has consistently argued his sentence in 1998 was unlawful.

then prescribes a standard sentencing range based on the offender score and seriousness level.

The difference of a single point may add or subtract years to an offender's sentence. Therefore, our Supreme Court has stated that an accurate interpretation and application of the SRA is of "great importance to both the State and the offender." *In re LaChapelle*, 153 Wn.2d 1, 6, 100 P.3d 805, 808 (2004). The Court has stated:

> [A] sentencing court acts ***without statutory authority ... when it imposes a sentence based on a miscalculated offender score.*** Moreover, a sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice. This is true even where the sentence imposed is actually within the correct standard range, if the trial court had indicated its intent to sentence at the low end of the range, and the low end of the correct range is lower than the low end of the range determined by using the incorrect offender score.

In re Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618, 622 (2002) (citations omitted, emphasis added). In another case, the Supreme Court found that a judgment and sentence was invalid when it was plain that the trial judge had miscalculated the petitioner's offender score and sentenced the offender based on a washed out prior offense. *In re LaChapelle*, 153 Wn.2d at 6. Sentences based upon incorrect offender scores are not only appealable, but can be reviewed via a personal restraint petition.

The sentence imposed on Piris in 1999 was invalid on its face and without statutory authority. It was unlawful. Just as in *Powell*, the sentence exceeded the maximum that could lawfully be imposed.

As argued in Piris's opening brief, Judge Eadie got it wrong. *Powell* is controlling. Piris is not "benefiting" from "his own bad act." Rather, he rightfully complains that, but for the negligence of his trial and appellate counsel, he would not have been held in state prison for an additional 13 months.

C. *OWENS V. HARRISON*[2] HAS NO APPLICATION TO THE ISSUES IN THIS CASE

In *Powell*, the court said that in a case where the defendant has served substantially more time than the trial court could impose, the blind application of the innocence requirement goes beyond the public policy to be served by the innocence requirement. It specifically disavowed the application of *Owens* to such a case.

> On these facts, we conclude that the innocence requirement articulated in *Falkner v. Foshaug* 108 Wash.App. 113, 29 P.3d 771 (2001) and its progeny—*Ang v. Martin*, 118 Wash.App. 553, 76 P.3d 787 (2003), review granted, 151 Wash.2d 1039, 95 P.3d 352 (2004), and *Owens v. Harrison*, 120 Wash.App. 909, 86 P.3d 1266 (2004)—does not require dismissal of the lawsuit as a matter of law.

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[2] *Owens v. Harrison*, 120 Wn. App. 909, 911, 86 P.3d 1266, 1267 (2004).

Powell I, 125 Wn. App. at 774. *Owens* has no application to this case.

D. NIELSEN'S REPRESENTATION DID NOT END WHEN THE APPEAL CONCLUDED

The Washington State Office of Public Defense contracts with Nielsen and Nielsen, Broman and Koch. Their website tells appellate contractors: "If the Court of Appeals remands for further proceedings, it may be necessary to seek appointment of counsel to conduct the mandated proceedings." *See* www.opd.wa.gov/index.php/program/appellate/8-app/13-a-after. The site provides forms for a "Post Appeal Motion for Appointment of Counsel and an Order Authorizing Appointment of Counsel in Accordance with Appellate Mandate." It was Nielsen's responsibility to see that trial counsel was notified that a resentencing was necessary.

E. THE RESPONDENTS NIELSEN AND NIELSEN, BROMAN AND KOCH ARE BARRED FROM ASSERTING THAT PIRIS'S SENTENCE WAS "LAWFUL" UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL

> Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.

Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). Courts consider whether the earlier position was accepted by the court, and whether assertion of the inconsistent position results in an unfair

advantage or detriment to the opposing party. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007).

In *State v. Piris*, 44783-1-I, Respondents Nielsen and Nielsen Broman and Koch, argued that:

> A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score.

CP 85. They were correct and as a result, Piris's sentence was reversed.

Now, however, they are arguing to this Court the opposite – Piris's sentence was lawful to avoid liability. Surely, Nielsen is not suggesting that he misled this Court in the appeal. Nielsen's assertion in this Court in 1999 that Piris's sentence was invalid clearly contradicts his current argument that the sentence was lawful. It would be manifestly unfair for this Court to allow Nielsen to now assert that the sentence was lawful in order gain dismissal of the malpractice claim.

F. THIS COURT SHOULD REJECT KING COUNTY'S ARGUMENT THAT PIRIS'S CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS FOR ATTORNEY MALPRACTICE

In the trial court, Defendants Nielsen and Nielsen, Broman and Koch, filed a summary judgment motion predicated on one ground – that Piris failed to prove that he was "actually innocent" of the charges. In Defendants view this was a prerequisite to any claim of malpractice. King

County filed a 2-page "joinder" in that motion. King County raised no statute of limitations arguments in that "joinder."

In King County's response brief, the County for the first time argues that Piris's action is barred by the general three-year statute of limitations for legal malpractice actions. Response at pages 6-9. King County cites to *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061, 1064 (2003). *Plein* states:

> Generally, an appellate court may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof.

(Citations omitted). King County, however, neglects to point out that the *Plein* decision limits this Court's power to affirm on any basis. *Plein*'s caveat states:

> The parties must have had a full and fair opportunity to develop facts relevant to the decision.

Id., citing *Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976).

Piris has not had a full and fair opportunity to dispute any of the "facts" asserted by the County on this issue. The County could have filed a motion for summary judgment asserting this claim in the trial court, but instead waited until its responsive brief in this appeal. There are numerous factual issues involved in determining the proper statute of

limitations. Because resolving the factual disputes is reserved to the jury, the County's tactic is troubling. It suggests that the County deliberately waited to raise the statute of limitations issue in this Court hoping the factual disputes might be more readily overlooked here than in the Superior Court.

King County's insertion of the statute of limitations in this appeal also should be disregarded because there is no support for the County's claim that the record is "undisputed." The County states that

> by no later than February 14, 2000, Piris was fully aware that his sentence was computed contrary to statute and that he possessed a right to be resentenced for his crimes.

Response Brief at 8. The record is clear that Piris never knew he had prevailed on appeal before he appeared in King County Superior Court for resentencing in May 2012. It defies reason to suggest that Piris knew that he was entitled to a resentencing that would have resulted in a reduction of his sentence, but elected to serve an additional 13 months in prison.

The County's claim that Piris's lawsuit is barred by the statute of limitations is based upon the incorrect assertion that Piris "discovered" his injury in February 2000. That assertion is based on Nielsen's answers to his interrogatories. But Nielsen's answers are equivocal. He has no independent proof he informed Piris that he had prevailed on appeal. He does not state he recalls his actions in Piris's case. Instead, his answers

state he would have sent Piris a copy of the opinion based upon his "invariable habit, custom and practice." CP 98-99. The only other "fact" that the County relies on is that one letter from the Court of Appeals indicates that Piris was "cc'ed" on the transmittal of the Court's opinion. That letter does not indicate where the correspondence was sent or whether Piris received the letter.

These assertions fall far short of proving that Piris had actual notice of his right to be resentenced before May, 2012. Instead, they indicate there are significant factual disputes that would foreclose summary judgment.

The County also incorrectly asserts that the "continuous representation rule" does not apply. This is in part because the County has not cited the relevant and controlling authority regarding the rule.

The continuous representation rule tolls the statute of limitations until the end of an attorney's representation of a client in the same matter in which the alleged malpractice occurred. *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.,* 109 Wn. App. 655, 663, 37 P.3d 309, 315 (2001), *review denied*, 146 Wn.2d 1019, 51 P.3d 88 (2002). The rule prevents attorneys from defeating a malpractice claim by continuing to represent a client until the statute of limitations has expired. *Id.* at 662. This purpose cannot be served if tolling ends when the attorney

unilaterally abandons representation or ceases to remedy an error without the client's knowledge or consent. *Hipple v. McFadden*, 161 Wn. App. 550, 559, 255 P.3d 730, 734, *review denied*, 172 Wn.2d 1009, 259 P.3d 1108 (2011). In *Hipple*, this Court adopted the reasoning in *Gonzalez v. Kalu*, 140 Cal.App.4th 21, 31, 43 Cal.Rptr.3d 866 (2006), for determining when an attorney's representation has ended.

In *Gonzalez*, the lawyer claimed to end the attorney-client relationship, but the client disputed receiving notice of the termination and alleged that she still believed the attorney was pursuing her claim. The court concluded that resolution of when the representation ended was a question of fact and that where there is unilateral withdrawal or abandonment, the representation ends "when the client actually has or reasonably should have no expectation that the attorney will provide further legal services."

> We adopt the *Gonzalez* approach. Running the statute of limitations from the first break in continuity of the relationship does not protect an injured client where the attorney abandons representation. The *Gonzalez* rule, which accounts for the client's reasonable expectations, is an appropriate standard to apply because it furthers the stated objective of preventing an attorney from being able to wait out an alleged malpractice claim.

Hipple, 161 Wn. App. at 559-60 (citations omitted). Under this test, there is no bright-line rule for determining when representation ends and "particular circumstances most often present an issue of fact." *Id.* at 558.

Again, the County's assertions regarding the continuous representation rule fall far short of proving that Piris knew that neither Nielsen nor Kitching would not take any further action after this Court reversed his sentence. Summary judgment would be inappropriate because this issue involves disputed issues of fact that have not yet fully developed.

II. CONCLUSION

This Court must reverse.

DATED this 21st day of July, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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