

NO. 35243-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

PAUL D. MAKI,

Appellant.

FILED
CRA
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
JAN 11 2011
SEASIDE, WA

ON APPEAL FROM THE
SUPERIOR COURT OF PACIFIC COUNTY

Before the Honorable Michael Sullivan, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the Appellant's motion for new trial based on an audiotape recording the Appellant made of the execution of the search warrant on March 29, 2006.

2. The trial court erred in denying the Appellant's (second) motion for new trial based on counsel's failure to challenge the sufficiency of the search warrant affidavit.

3. The trial court erred in entering an order denying the Appellant's motion for new trial.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Was a new trial required where an audiotape made of the execution of the search warrant was ignored by trial counsel? Assignments of Error No. 1 and 3.

2. Did the trial court err in denying the motion for new trial based on newly discovered evidence were the audiotape existed prior to trial but was "constructively hidden" by trial counsel by the attorneys' unwillingness to listen to the tape all the way through and unwillingness to seek to introduce the tape as evidence at trial? Assignments of Error No. 1 and 3.

3. Did the trial court err in denying the (second) motion for new trial, alleging ineffective assistance of counsel due to counsel's failure

to challenge the sufficiency of the search warrant affidavit, based on the reasons contained in § 1 and § 4 of the Opening Brief of Appellant? Assignments of Error No. 2 and 3.

C. STATEMENT OF THE CASE

1. Procedural history:

This Court has granted leave for supplemental briefing on the trial court's denial of Maki's motion for new trial based on newly discovered evidence.

Maki was found guilty of two counts of third degree assault on July 5, 2006. After the conviction, new counsel appeared and moved for new trial on July 14. CP at 38-40. In an affidavit attached to the motion, Maki's new counsel represented that Maki made an audio recording at the time of his arrest that "would clearly indicate that the arresting officers misrepresented the facts at the time of arrest, specially pertaining to the alleged assault on an officer." CP at 39.

Maki's motion also asserted, *inter alia*, in his motion that Lopez-Servin pleaded guilty to a sex offense two days prior to trial, which was not disclosed to defense counsel, and that Lopez-Servin "was operating under some sort of alias." CP at 40.

The motion was heard by Judge Sullivan on July 14, 2006. Maki submitted through new counsel that he made a potentially exculpatory

audio recording of his arrest on March 29, 2006 that was not introduced at trial by his previous attorneys. RP (7.14.06) at 3. Counsel argued that the audiotape demonstrates that there was reasonable doubt as to whether there was an assault on Officer Ron Davis and also pertained to the credibility of the officer's testimony. RP (7.14.06) at 3. Counsel argued that the tape falls within the scope of Criminal Rule 7.5¹ because Maki's

¹ RULE 7.5 NEW TRIAL

(a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

(1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;

(2) Misconduct of the prosecution or jury;

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;

(4) Accident or surprise;

(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;

(6) Error of law occurring at the trial and objected to at the time by the defendant;

(7) That the verdict or decision is contrary to law and the evidence;

(8) That substantial justice has not been done.

When the motion is based on matters outside the record, the facts shall be shown by affidavit.

(b) Time for Motion; Contents of Motion. A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.

prior counsel “would not even listen to the tape or allow it to even attempt to be entered” and it was therefore “constructively hidden from his use at trial because counsel would not allow it to be entered” RP (7.14.06) at 8.

Counsel filed a second motion for new trial on July 20, alleging that both of Maki’s previous attorneys were ineffective for failing to move to suppress under CrR 3.6 evidence seized as a result of a search warrant issued on March 29. RP (7.28.06) at 11. CP at 41-45, 46-48.

The first motion was revisited on July 28, 2006. Defense counsel provided a copy of the audiotape recording to the State. RP (7.28.06) at 3. The deputy prosecutor noted that he had not listened to the tape, but had read a transcript of the recording provided by defense counsel. RP (7.28.06) at 3. The audiotape and transcript were entered as Exhibits 1

The motion for a new trial shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Affidavits. When a motion for a new trial is based upon affidavits they shall be served with the motion. The prosecution has 10 days after such service within which to serve opposing affidavits. The court may extend the period for submitting affidavits to a time certain for good cause shown or upon stipulation.

(d) Statement of Reasons. In all cases where the court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record which cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(e) Disposition of Motion. The motion shall be disposed of before judgment and sentence or order deferring sentence.

and 2, respectively. RP (7.28.06) at 7. Appendix B-1 through B-26 of the Opening Brief of Appellant.

Judge Sullivan stated that he needed to read the transcript of the March 29 audiotape and took the matter under advisement. RP (7.28.06) at 12, 29.

Judge Sullivan entering the following Memorandum Opinion on February 9, 2007:

The Court heard Defendant's Motion For A New Trial on July 28, 2006, and a subsequent hearing was held on August 25, 2006, regarding post-sentence release. At the August 25, 2006 hearing, the Court denied Defendant's Motion for Bond Pending Appeal. Evidently, a written order was never presented nor was this matter noted for presentation of a written order. Defendant's counsel on appeal has brought this to the Court's attention.

In order to bring continuity to the court file, the Court in this memorandum decision denies both the Defendant's Motion For A New Trial and Defendant's Motion for Bond Pending Appeal.

The Court shall sign an Order Denying both Defendant's Motion for a New Trial and Motion for Bond Pending Appeal.

CP at 80-81.

The court also entered the following Order Denying Defendant's Motions:

Defendant's (1) Motion for a New Trial, and (2) Motion for Bond Pending Appeal are both denied pursuant to the Court's memorandum decision dated February 9, 2007.

CP at 79.

D. ARGUMENT

1. **THE TRIAL COURT ERRED IN REFUSING TO GRANT MAKI'S MOTION FOR A NEW TRIAL WHERE THE AUDIOTAPE WAS "CONSTRUCTIVELY HIDDEN" DUE TO PREVIOUS COUNSEL'S REFUSAL TO LISTEN TO OR OFFER THE TAPE AS EVIDENCE, CONSTITUING NEWLY DISCOVERED EVIDENCE.**

- a. **Motions for new trial are trusted to the discretion of the trial judge.**

Counsel for Maki moved for a new trial based upon sentencing counsel's the discovery that his client made a tape recording of the execution of the search warrant on March 29. CP at 38-40. The trial court judge heard argument on the matter on July 14 and July 28, 2006.

Counsel's first motion does not refer to a specific Court Rule, but during argument the argument centered around the applicability of CrR 7.5(3). RP (7.14.06) at 7-8.

CrR 7.5, which governs motions for new trial, provides in pertinent part:

- (a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

...

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial[.]

To be entitled to relief under CrR 7.5, the evidence (1) must be such as would probably change the result; (2) must have been discovered since trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) must be material and admissible; (5) must be more than merely cumulative or impeaching. *State v. Barry*, 25 Wn. App. 751, 757, 611 P.2d 1262 (1980); *State v. Evans*, 45 Wn. App. 611, 613-14, 726 P.2d 1009 (1986), *rev. den.* 107 Wn.2d 1029 (1987). Maki contends he has made a sufficient showing under each of the elements to compel the conclusion he was entitled to relief.

A trial court's ruling on a new trial motion should be reversed when the trial court abuses its discretion. Lesser deference is owed a decision not to grant a new trial than a decision to grant a new trial. *State v. Briggs*, 55 Wn. App. 44, 60, 776 P.2d 1347 (1989); *State v. York*, 141 Wn. App. 538, 543, 704 P.2d 1252 (1985).

b. The audiotape constitutes newly discovered evidence under CrR 7.5(3).

It is uncontested that the audiotape existed at the time of trial. Maki submits that he told his previous attorneys about the tape and that he wanted it played to the jury, and that it therefore was “constructively

hidden” by his previous counsel's actions. When the motion was argued, the State argued that the tape did not fit within the scope of CrR 7.5(3), that it was within the discretion of trial counsel not to introduce the tape, and that it did fit the requirements of Chap. 9.73 RCW.

c. Was the tape available for use at trial and discoverable by exercise of reasonable diligence?

For a new trial to be granted on the ground of newly discovered evidence, the evidence must be such that it could not have been discovered by the defendant with reasonable diligence and would probably have changed the result of the trial had it been presented. *State v. Taylor*, 22 Wn. App. 308, 318, 589 P.2d 1250, *rev. denied*, 92 Wn.2d 1013 (1979).

Here, the tape clearly existed and was known to Maki, but Maki was prevented from using it due to the actions of his trial attorney. According to the affidavit of sentencing attorney Jack Micheau, Maki “requested prior attorneys Thomas Keehan and Andrew Monson to attempt to introduce the tape as evidence pertaining to at least the assault on an officer charge. Both attorneys declined to listen to the entire tape or make any effort to admit it or even determine its admissibility.” CP at 38-40.

This does not run afoul of the discussion by this Court of the meaning of “newly discovered evidence” in *Riofta v. State*, 134 Wn.App.

669, 142 P.3d 193 (2006). Regarding the definition of newly discovered evidence in the context of an ineffective assistance of counsel claim, this Court noted:

"New" means "having existed ... but a short time," "having originated or occurred lately," "recent, fresh," "having been seen or known but a short time although perhaps existing before." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1522 (2002). Black's Law Dictionary defines "new" as "recently come into being" or "recently discovered." BLACK'S LAW DICTIONARY 1068 (8th ed.2004).

Riofta, 134 Wn.App. at 682-83.

The interests of justice and the dictates of the constitutional right to due process of law require a flexible application of this diligence standard to give sufficient deference to the limitations of Maki's situation. U. S. Const. amend. V, XIV; Wash. Const. art. I, § 3. It is in order to satisfy these constitutional due process and harmonize various statutory provisions regarding the time for seeking a new trial based upon newly discovered evidence, this Court found that the reasonable diligence standard of RCW 10.73.100(1) controls. See *State v. Brand*, 65 Wn. App. 166, 170-72, 828 P.2d 1 (1992). Maki did not control the decision to seek to introduce the tape; according to the affidavit of Mr. Micheau, prior trial counsel refused to listen to the entire tape. The trial court abused its discretion in concluding to the contrary and denying Maki's motion.

d. The audiotape, if admissible, would probably change the result of Count II.

The evidence contained in the tape shows the demeanor of the police throughout the execution of the search warrant, up to the assault alleged by the State in count II. The police would not answer Maki's questions and would not tell them why they were there. The police appeared aggravated and impatient with Maki. Appendix B-1 through B-2.

Evidence of this type could have swayed the jury as to whether Ron Davis was assaulted.

The trial court is certainly in a position to utilize the knowledge and insight it gained from presiding over the trial in ruling on whether newly discovered evidence would be likely to result in a different outcome. *State v. Barry*, 25 Wn. App. at 758. Nevertheless, the appellate court, with the benefit of its ability to examine the relative weight of the evidence from a more detached perspective, is in a better position to appreciate the significance of the evidence at issue.

e. The newly discovered evidence was not merely cumulative or impeaching.

Under CrR 7.5, a new trial will not ordinarily be granted when the only purpose of the new evidence is to impeach the testimony of witnesses. *State v. Hutcheson*, 62 Wn. App. 282, 300, 813 P.2d 1283 (1991), *rev. den.*, 118 Wn.2d 1020 (1992). "Because the standard is that evidence be not 'merely' cumulative, it will not be deemed cumulative

simply because part of its content was discovered or duplicated at trial, so long as the testimony contains additional elements which contribute significantly to a defendant's case." *People v. Barber*, 445 N.E.2d 1146, 1149 (Ohio App. 1982).

Here, while some of the tape would clearly impeach the officers, the main thrust of the evidence supports the defense theory that Maki did not kick or otherwise assault Ron Davis, and that in fact it was the police who were antagonistic and uncooperative during the execution of the warrant. The newly discovered evidence satisfies the legal test for granting a new trial. The court erred in denying Maki's motion for a new trial.

The trial court is vested with broad discretion in ruling on a motion for new trial under CrR 7.5 based upon newly discovered evidence, or when "substantial justice has not been done." *State v. Castro*, 32 Wn. App. 559, 565-66, 648 P.2d 485, *rev. denied*, 98 Wn.2d 1007 (1982). The denial of a motion for new trial will not, therefore, be reversed absent manifest abuse of that discretion. *State v. Dawkins*, 71 Wn. App. 902, 906-07, 863 P.2d 124 (1993) (affirming the trial court's granting of motion for new trial).

The court abuses its discretion, however, when its exercise is manifestly unreasonable or based upon grounds that are untenable. An

arbitrary exercise of discretionary authority without regard to what is right and equitable under the circumstances and the law, and which is not directed toward a just result according to the conscience of the court constitutes abuse of discretion. *State v. Grant*, 10 Wn. App. 468, 471, 519 P.2d 261 (1974). Here, Judge Sullivan did not rule for six months after the motions were argued. He cites no basis for his ruling and does not differentiate between the first and second motion filed by Maki's counsel. Maki contends the denial of his motions was improper because it was done without regard to equitable resolution and denies the just result that is the goal of our legal system.

In sum, Maki's motions for new trial satisfied each of the requirements developed by the courts of this state. The trial court's denial of Maki's request under these circumstances was a manifest abuse of discretion warranting the attention of this Court.

f. Remand for a reference hearing is appropriate.

Questions regarding the admissibility of the newly discovered evidence and its potential effect on the trier of fact are best resolved in the trial court. If Judge Sullivan's decision below was based on a application RCW 9.73.030—and it is impossible to know the basis of his ruling from the Memorandum Opinion and Order filed on February 9, 2007—the

proper remedy for this court is remand for further hearing. See *State v. Smith*, 80 Wn. App. 462, 470-71, 909 P.2d 1335 (1996). Maki therefore requests the Court allow for such further evidence gathering as may be necessary to substantiate his claim.

2. APPELLANT ASSIGNS ERROR TO THE ORDER DENYING NEW TRIAL, INsofar AS IT PERTAINS TO THE SECOND MOTION FOR NEW TRIAL.

The lower court's order refers only to the "Motion for New Trial" in the singular, and it is unclear whether the court's ruling refers to only one of the motions, or whether the court's ruling is global and refers to both motions for new trial.

In an abundance of caution, Maki assigns error to the court's order of February 9 insofar as it pertains to the second motion for new trial, alleging that trial counsel was ineffective for failure to challenge the search warrant affidavit. The argument pertaining to this assignment is presented at § 1 and §4 of the Opening Brief of Appellant.

F. CONCLUSION

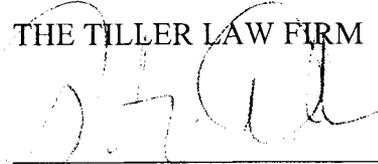
For the foregoing reasons, Paul Maki respectfully requests that this Court reverse the judgment of the trial court.

/ / /

DATED: March 16, 2007.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in dark ink, appearing to read "P. Tiller", is written over the printed name of the law firm.

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APPELLANT'S BRIEF
STATE OF WASHINGTON
BY *YUN*

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CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original Supplemental Brief of Appellant mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Paul D. Maki, Appellant, and David Burke, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on March 16, 2007, at the Centralia, Washington post office addressed as follows:

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