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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 36846-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ROY SCOTT,

Appellant.

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

The Honorable Michael J. Sullivan, Judge

BRIEF OF APPELLANT

DANA M. LIND
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to vacate his conviction.

2. The trial court erred in ruling appellant's newly discovered evidence did not justify disrupting his 2001 plea agreement.

3. The trial court erred in ruling appellant's motion to vacate was not timely.

Issue Pertaining to Assignments of Error

Whether the trial court erred in denying appellant's motion to vacate his conviction without holding an evidentiary hearing to determine the reliability of his newly discovered evidence?

B. STATEMENT OF THE CASE

On May 15, 2001, the Pacific County prosecutor charged appellant Richard Roy Scott with one count of third degree child rape allegedly committed against D.H. (born 4/12/85) between February 1 and March 31, 2001, when D.H. was nearly 16 years old.¹ CP 1; RCW 9A.44.079. According to the affidavit of probable cause filed May 11, the investigation began on May 7, 2001, when Susan Brisby telephoned the Ilwaco High School vice-principal about an allegation made by her friend Connie

¹ The age of consent in Washington is 16 years. RCW 9A.44.079.

Dufour. CP 145. At some undisclosed date, Dufour reportedly told Brisby she and Yohan Fernlund walked in on Scott and D.H. having sex in Scott's residence at the end of February or beginning of March 2001. CP 144-45. The vice-principal informed the school's counselor who contacted the Long Beach police department. CP 145.

Officer Shaun Harmon located Dufour, who gave a written statement. CP 145. Dufour claimed she did not report the incident sooner because her father told her not to become involved and because she supposedly left for about nine weeks for medical treatment. CP 145.

The affidavit further alleged that Harmon observed an interview between D.H. and social worker Jim Miller On May 10, 2001. D.H. reportedly told Miller that since April 2000 until recently, he and Scott regularly had sex. CP 143; Supp. CP ___ (sub. 51, State's Response to Defendant's Motion to Withdraw Plea, 6/15/06), Ex. 2. Harmon arrested Scott on May 10, 2001. CP 145; Supp. CP ___ (sub. 51, State's Response to Defendant's Motion to Withdraw Plea, 6/15/06), Ex. 2.

Ironically, police were dispatched to a possible burglary in progress at Scott's residence ten days later. CP 322. Upon arrival, police encountered what one officer described as the "lovely Haynes clan," including D.H., taking things from Scott's residence. The Haynes claimed

they had Scott's permission. Scott refuted that claim when dispatch contacted him at the jail. Police told the Haynes to put everything back and not return. CP 322.

Police contacted Scott in jail soon thereafter, as a number of forged checks drawn on Scott's bank account were passed around town. CP 313, 317. Although someone named Jeremy Gray passed many of the checks, D.H. admitted he "was at Scott's house, & tried to pass forged checks at credit union." CP 323.

While in jail, Scott also learned from local business owners (Bailey Saw Shop) that equipment associated with Scott's lawn care business was in jeopardy. Supp. CP __ (sub. no. 15, Letter, 6/22/01). Scott gave the Saw Shop permission to retrieve and safe keep his equipment. The Saw Shop owners found most of it at the Haynes' residence, but Kevin Brisby returned more of Scott's equipment to the Saw Shop several months later. CP 353, 355, 357. Brisby's wife Susan -- the one who initiated the investigation against Scott -- admitted she and her husband, who formerly worked for Scott, took over Scott's good clients and started their own lawn care business. CP 360.

Pursuant to a plea agreement entered May 25, 2001, Scott entered an Alford² plea in exchange for the prosecutor's agreement to "terminate investigation of defendant and not file additional charges." CP 3, 15, 208. For purposes of his plea, Scott did not check the box allowing the court to review the police reports or probable cause statement to find a factual basis for the plea. CP 15. Stating in his own words what made him guilty, Scott merely wrote: "Alford." CP 15. As Scott told the court at the plea hearing, he chose not to fight the charge because: "I don't see a chance if winning."³ CP 219.

In anticipation of sentencing, Scott participated in an interview with corrections officer Bumps on June 15, 2001. CP 18-23. According to Bumps, Scott reported D.H. repeatedly asserted he was 18 years old, and D.H.'s parents confirmed. CP 20. Scott reported that one night after D.H. propositioned him, they had sex. According to Bumps' report, Scott "reported that in the morning, Ms. Dufour and another juvenile male came

² North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

³ Although the court did not set forth a factual basis for the plea (CP 219-20), such a requirement is procedural and not subject to collateral attack. In re Personal Restraint of Hews, 108 Wn.2d 579, 592 & n.2, 741 P.2d 983 (1987) (citing United States v. Timmreck, 441 U.S. 780, 60 L. Ed. 2d 634, 99 S. Ct. 2085 (1979)).

into his residence, observed them dressing, and reported the incident to police." CP 20.

Before writing his report, Bumps made "repeated efforts" to contact D.H., but to no avail. Bumps' letter to D.H.'s last known address was returned as "not deliverable." CP 19. Despite Bumps' inability to reach D.H., Bumps nevertheless recommended an exceptional sentence based on an alleged pattern of abuse. CP 22.

At sentencing on July 6, 2001, the parties agreed Scott's offender score should have been calculated as three points yielding a standard range of 26-34 months, rather than one point yielding a standard range of 15-20 months as the plea agreement stated. CP 7, 230, 236.

The court asked about Bumps' efforts to contact D.H. Bumps explained his letter was returned and D.H.'s phone number was not in service. CP 234. Bumps likewise had no way to reach D.H.'s parents. They were evicted twice in the last three months and may have returned to their home state, Montana. CP 235.

The court asked Scott if he read Bumps' recommendation. Scott reiterated that D.H. represented himself as 18 years old. D.H. wanted to rent a room from Scott, but Scott did not agree until D.H.'s parents confirmed his age. CP 234. When asked if he and D.H. had sex, Scott

answered three times over a period of about three weeks. CP 235-36. The court imposed the high end of the standard range, recognizing there was no factual basis for an exceptional sentence.⁴ CP 237.

On May 15, 2003, the Washington Supreme Court granted Scott's personal restraint petition challenging his Alford plea as invalid due to the mistake in the stated standard range. CP 42. The Court ordered the lower court to grant Scott's "choice of remedy (withdrawal of the guilty plea or specific performance of the plea agreement) unless the court finds, after an evidentiary hearing, that there are compelling reasons not to allow the chosen remedy." CP 42. In its response to Scott's PRP, the state had argued the withdrawal remedy would pose a hardship to the state because it had no way to contact D.H.

If specific performance is not the remedy, the State suggests that withdrawal of the plea and a trial would be a hardship on the State, as alluded to in the transcript of the sentencing hearing . . . when the Court asked questions about the whereabouts of the victim and no one knew even at that time in July of 2001 where the victim could be

⁴ As pointed out in Scott's sentencing memorandum, the court could not consider facts beyond those admitted in the plea agreement. CP 26; see, e.g., former RCW 9.94A.370(2) ("[f]acts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range except upon stipulation or when specifically provided for [by statute]"); State v. Barnes, 117 Wn.2d 701, 707, 818 P.2d 1088 (1991) (the real facts doctrine excludes consideration of uncharged crimes or crimes charged but later dismissed).

located (victims often disappear once they know a case is being pleaded out).

CP 273.

In an effort to accommodate on remand, Scott offered to choose specific performance:

I'd like to make this less expensive and easier by withdrawing the right to change my plea. If you agree to 20 months and two years of community custody.

Supp. CP __ (sub. no. 28, Letter, 5/16/03).

The state agreed, and Scott was resentenced on May 13, 2003, to 20 months of incarceration and 36-48 months of community custody. CP 46-57; RP (5/16/03). Because Scott already served 24 months and the statutory maximum is five years, his attorney asserted the judgment should indicate that Scott's period of incarceration plus community custody could not exceed the statutory maximum. In other words, community custody could not exceed 36 months. RP (5/16/03) 3-4. The prosecutor assured that DOC would "figure all that out when he gets back to their custody and they will release him as soon as they get all those conditions put on him." RP (5/16/03) 4-5.

Just four days later, however, the King County prosecutor's office -- ostensibly upon learning of Scott's impending release -- "subsequently decided" to petition for Scott's involuntary commitment as a sexually

violent predator. CP 298. The state initiated the involuntary commitment proceeding on May 19, 2003. CP 298.

The Supreme Court issued a certificate of finality for Scott's PRP on November 4, 2004. Supp. CP __ (sub. no. 34, Certificate, 11/4/04). Scott's trial attorney Michael Turner filed notice of his intent to withdraw on September 15, 2005. CP 58. On October 7, 2005, Scott filed a pro se Objection to Withdrawal and Motion to Vacate the Conviction. CP 59-62. In his motion, Scott asserted D.H. "had finally been found and that he was 18 at the time of the alleged child rape in the 3rd degree." CP 59. Scott had since located D.H. in Oregon on work release. CP 61.

Approximately three weeks before Turner's motion to withdraw, Scott parlayed this new evidence to Turner. Scott objected that instead of moving to withdraw, Turner should move to vacate Scott's conviction. CP 59-62. Significantly, the state was relying on the "erroneous 2001 Child Rape 3 Alford plea" in its civil commitment case against Scott.⁵ CP 60. Regardless, the court granted Turner's motion to withdraw. RP (10/7/05) 3.

⁵ Under chapter 71.09 RCW, the state is not required to plead and prove a recent overt act if, at the time the commitment petition is filed, the offender is incarcerated for conduct that would qualify as a recent overt act. See, e.g., In re Detention of Albrecht, 147 Wn.2d 1, 51 P.3d 73 (2002).

Although the court allowed Turner to withdraw, Scott pursued the motion to vacate on his own. In March 2006, Scott wrote the Pacific County Superior Court Clerk to inquire about the status of his motion to vacate. CP 64-65. The clerk sent Scott all court documentation since his motion was filed. Supp. CP ___ (sub. no. 41, Letter, 3/9/06). Included would have been the state's response filed in December, arguing Scott's motion should be denied because it failed to specify how the new evidence satisfied the requirements of CrR 7.8.⁶ CP 63.

⁶ CrR 7.8 provides in relevant part:

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

· · ·
(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

· · ·
The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to **RCW 10.73.090, .100, .130, and .140.**

(Emphasis added.)

The referenced statutes in bold set forth a number of rules governing collateral attacks on appeal. RCW 10.73.100(1) contains exceptions to the one-year time limit for collateral attacks, one of which is "newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion[.]"

On April 10, 2006, Scott filed a renewed motion to vacate, to appoint an attorney and for oral argument, which included a tape recording made by Scott's private investigator of an interview of D.H. and his mother in Oregon on October 16. CP 67-69. According to Scott's attached declaration, during the interview, D.H. denied sexual contact between him and Scott and stated he was of age regardless. Scott also asserted Johan Fernlund had recently indicated he never saw Scott and D.H. have sex. CP 68. Contemporaneously with his motion, Scott wrote the court clerk to request notation of his motion. Supp. CP __ (sub. no. 43, letter, 4/10/06).

On June 1, 2006, Scott filed supporting exhibits, consisting of declarations signed under penalty of perjury on May 11, 2006, by D.H. and his mother, Marsha McCrumb. CP 74-80. D.H. declared the rape charge was "false;" Scott never attempted to engage in sexual activity with D.H. CP 75. D.H. claimed that when Long Beach police officers interviewed him, he told them "nothing had happened between Mr. Scott and myself." CP 76. Regardless, D.H. was arrested in February 2001 for assaulting a police officer in Great Falls, Montana, and incarcerated there until May 2001. CP 75. McCrumb confirmed D.H. was incarcerated in Montana from February to May 2001. CP 78.

A hearing was held on June 9, 2006, with Scott participating by telephone. RP (6/9/06). The court directed Scott to contact the Court Administrator to set a briefing schedule. RP (6/9/06) 8-9.

A week later, the state filed its second response arguing Scott's motion should be denied. First, the state claimed Scott's motion was time-barred, since his case became final on May 15, 2004, one year after Scott's resentencing.⁷ Supp. CP __ (sub. no. 51, State's Response, 6/15/06). Second, the state argued the equities favored denial because the state purportedly could not reconstruct its 2001 case or resume investigations foregone as a result of the plea agreement, and because Scott chose specific performance rather than withdrawal in 2003. Third, the state claimed Scott's new evidence lacked credibility because it was contrary to D.H., Dufour and Fernlund's 2001 statements and inconsistent with Scott's statements at sentencing, during an interview in the commitment proceeding,⁸ and on an internet posting Scott allegedly wrote.⁹ Finally,

⁷ As set forth in a preceding footnote, however, the one year time limit of CrR 7.8 is modified by RCW 10.73.100(1), which contains an exception to the one-year time limit for collateral attacks, one of which is "newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion[.]"

⁸ According to the transcript of an interview, Scott said D.H. had sex with him. Supp. CP __ (sub. no. 51, State's Response), exhibit B.

the state argued Scott failed to prove due diligence in discovering the new evidence. Supp. CP __ (sub. no. 51, State's Response, 6/15/06).

A hearing on Scott's motion was scheduled for July 27. Supp. CP __ (sub. no. 53, Notice of Hearing, 6/21/06). On July 10, however, Scott moved for an extension of time to respond to the state's brief. Supp. CP __ (sub. no. 58, Motion, 7/10/06). Attached was a letter to Scott from his private investigator detailing his efforts to reach Yohan Fernlund. After leaving his card at the doorstep of Fernlund's last known address, PI Alwin Farr received a phone call from Fernlund. Fernlund remembered his 2001 statement to officer Harmon. When Farr asked if what he said was true, however, Fernlund admitted: "No it was not. I fuckin' said that stuff because all the other kids were already saying it." Fernlund admitted that he did not see Scott have sex with D.H. or anyone else. Although Fernlund barely remembered Connie Dufour, he "sure the hell never went into Scotty's house with her[.]" Fernlund promised to speak to Farr again the next evening. Farr called several times, but Fernlund did not answer. Supp. CP __ (sub. no. 58, Motion, 7/10/06).

⁹(...continued)

⁹ In the posting attributed to Scott, someone wrote: "Dustin (15) has moved in more or less." Supp. CP __ (sub. no. 51, State's Response), exhibit 9.

Two weeks before the scheduled hearing, the court appointed Harold Karlsvik to represent Scott on the motion to vacate. RP (7/21/06) 2. Due to his recent appointment, Karlsvik needed additional time to prepare and struck the upcoming hearing. RP (7/21/06) 2-4.

A status hearing was held December 8, 2006. Karlsvik indicated the investigation was ongoing and he needed additional time to synthesize the "voluminous material" gathered and write his brief, which would support Scott's earlier motion. RP (12/8/06) 4.

Karlsvik filed his Memorandum in Support of Defendant's Motion to Vacate Judgment and Sentence on March 27, 2007. CP 171-367. Inter alia, Karlsvik argued new evidence consisting of D.H.'s declaration denying any sexual contact¹⁰ and Fernlund's recantation denying seeing any sexual contact justified relief.¹¹ CP 189-94. Although Dufour could not be located and was believed deceased, Karlsvik argued her 2001 statement lacked credibility since she claimed she walked in on Scott *with Fernlund*,

¹⁰ Karlsvik attached a transcript of Farr's interview with D.H. in which he denied any sexual contact with Scott. CP 308-12.

¹¹ Karlsvik attached the transcript of the state's investigator Chuck Pardee's interview of Fernlund for the civil commitment case in which Fernlund admitted he and other juveniles lied to police "to get him [Scott] locked up" because they did not like him "since he's a queer[.]" CP 339.

and initially claimed she saw D.H.'s brother -- not D.H. -- with Scott.¹²
CP 189.

As Karlsvik summarized, the new evidence undermined the three key sources upon which Scott's conviction was based. CP 192. And as Karlsvik pointed out, the new evidence could not have been discovered any sooner by the exercise of due diligence, because D.H.'s whereabouts were unknown since before Scott's sentencing until recently. CP 196. Regardless, there was a no contact order in place prohibiting Scott from contacting either D.H. or his family. CP 148, 295.

As Scott later declared, it was not until he went pro se in the civil commitment case that his investigator was able to locate D.H. CP 148. Scott sought to confirm D.H.'s age at the time of the allegation. CP 152. Upon finding D.H., Scott filed the motion to vacate. CP 148.

Karlsvik argued Scott was entitled either to a new trial or to an evidentiary hearing to determine whether D.H. and Fernlund were credible. CP 194 (citing State v. D.T.M., 78 Wn. App. 216, 896 P.2d 108 (1995) (where defendant's conviction based solely on the testimony of a now recanting victim, court should hold an evidentiary hearing to evaluate the

¹² Karlsvik attached the police statement of school counselor Carolyn Yellohawk to whom Dufour made these claims. CP 300-01.

recanting victim's credibility and grant a new trial if he or she adheres to her recantation under oath in open court and subject to cross-examination)).

By the time of the hearing on March 30, the King County prosecutor had located Connie Dufour. RP (3/30/07) 4. The court granted Karlsvik a short extension to review a number of documents associated with Dufour's discovery. RP 4-12. In vain, Karlsvik himself had engaged three investigators to find Dufour. CP 164-65; RP (3/30/07) 5.

Karlsvik filed a supplemental memorandum arguing that Dufour's recent interview with the prosecutor's office proved Scott committed no crime. CP 368-97. In the interview, Dufour maintained that she walked in on Scott and D.H. CP 379. However, she claimed she reported the incident to police that same day and Scott was arrested "instantly."¹³ CP 381-82. Since Scott was arrested on May 10, 2001, and D.H. turned 16 years old on April 12, 2001, whatever Dufour claimed to have seen must have occurred when D.H. was 16 years old. Accordingly, assuming arguendo Dufour was truthful about seeing something, it was not a crime. CP 369.

¹³ In her original statement to police, Dufour wrote the incident occurred in February or March, 2001. However, "February" was written on top of the letter "M," which had been crossed out. CP 302. Karlsvik argued the crossed out "M" corroborated Dufour's current statement indicating she walked in on Scott and D.H. in May. RP (5/11/07) 15.

The state responded that witnesses' recantations do not automatically justify plea withdrawal. Supp. CP __ (sub. no. 111, State's Supplemental Response, 3/29/07). According to the state, D.H.'s recantation was suspect since it contradicted his 2001 statement and Scott's statement that the two had sex. Finally, the state argued Scott's new evidence could have been discovered in 2003 when his case was remanded from the Supreme Court. Id.

The court heard argument on May 11, and issued a written ruling denying the motion to vacate on June 7, 2007. According to the court, the key witnesses' changed testimony was not sufficient to overcome Scott's "intelligent, knowing and voluntary Alford plea." CP 97. The court elaborated that Scott was represented at the time of his plea, and the record did not suggest Scott did not understand he was pleading pursuant to a plea negotiation. Moreover, Scott was given the opportunity to withdraw his plea in 2003, but chose not to. In the court's opinion, the state was entitled to the benefit of its bargain. CP 97.

Addressing the newly discovered evidence, the court found it was "not unique or compelling to justify vacating the conviction." CP 98. "Often, complaining witnesses change their testimony at a later date for a variety of reasons," according to the court. CP 98. In the court's

opinion, Scott failed to demonstrate that D.H.'s statements at the time they were made were untrue. CP 98. Regardless, the court found Scott's motion untimely under CrR 7.8. CP 98.

Scott filed a motion to reconsider and request for an evidentiary hearing. CP 109-17. As part of the motion to reconsider, Scott attached the transcript of a more recent interview of D.H. undertaken as part of the civil commitment proceeding. CP 122-33. In this statement, D.H. reiterated that he was out-of-state beginning in February 2001, and did not return until he was 16 years old.¹⁴ CP 123, 125.

The court summarily denied the motion to reconsider, and Scott timely appealed. CP 134, 139-40.

C. ARGUMENT

THIS COURT SHOULD REMAND FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE RECANTATION TESTIMONY OF THE THREE KEY WITNESSES IS RELIABLE AND THEREFORE ENTITLES SCOTT TO WITHDRAW HIS ALFORD PLEA.

Scott's Alford plea was based on the testimony of three key witnesses: D.H., who alleged he and Scott regularly had sex since D.H.

¹⁴ D.H.'s recent interview corroborated his prior declaration that he was out-of-state during the charging period. See CP 75. While D.H. previously stated he was incarcerated in Montana from February 2001 until the end of March, whereas he stated in this interview he moved to Idaho in February 2001, the two statements are not necessarily inconsistent. CP 75, 126.

was fifteen; Connie Dufour who claimed she witnessed Scott and D.H. having sex in February or March 2001, when D.H. was fifteen; and Yohan Fernlund who likewise claimed he witnessed Scott and D.H. having sex when D.H. was fifteen. All three have since recanted their testimony, albeit in different ways.

D.H. now asserts he never had sexual contact with Scott, never said otherwise, and regardless, was out-of-state during the charging period. Dufour now asserts she walked in on Scott and D.H. immediately preceding Scott's arrest in May 2001, when D.H. was 16. Fernlund now asserts he never walked in on Scott and D.H., period.

If believed, this new evidence would have changed the outcome of the trial for either one of two reasons: it shows the allegation of sexual contact never occurred; or, assuming there was sexual contact, it shows the contact was lawful since D.H. was of legal age. The trial court therefore erred in denying the motion to vacate without first granting Scott an evidentiary hearing to determine the reliability of this new evidence. This Court should remand to allow Scott his day in court.

Under CrR 7.8, the court may relieve a party from final judgment based on newly discovered evidence "which by due diligence could not have been discovered in time to move for a new trial under rule 7.5[.]" CrR

7.8(b)(2). Rule 7.5 allows a defendant to move for a new trial within ten days of the verdict or decision based on newly discovered evidence, "which the defendant could not have discovered with reasonable diligence and produced at trial[.]" CrR 7.5(a)(3), (b). Although CrR 7.8(b)(2) provides a one-year time limit for motions brought based on newly discovered evidence, the rule was amended in 1991 to indicate that CrR 7.8 motions are "further subject to RCW 10.73.090, .100, and .140." CrR 7.8(b); State v. Brand, 65 Wn. App. 166, 170, 828 P.2d 1 (1992). These statutes provide an exception to the one-year time limit for collateral attacks based on "newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion." RCW 10.73.100(1); Brand, 65 Wn. App. at 166. ("previous 1-year limitation for filing a motion based on newly discovered evidence under CrR 7.8(b)(2) is superseded by the newly incorporated statutory provisions).

Recantation may be generally considered newly discovered evidence. State v. Macon, 128 Wn.2d 784, 789, 911 P.2d 1004 (1996). To obtain a new trial based upon newly discovered evidence, a defendant must prove that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely

cumulative or impeaching. Macon, 128 Wn.2d at 800 (citing State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)). A new trial may be denied when any one of these factors is absent. Macon, 128 Wn.2d at 800.

Additional factors must be considered when newly discovered testimony is in the nature of testimonial recantation. Macon, at 804. When a defendant is convicted upon the testimony of a witness who later recants, the trial court must first determine whether the recantation is reliable before considering a defendant's motion for a new trial based on the recantation. Id. When a defendant's conviction is based solely upon the testimony of a recanting witness, the trial court does not abuse its discretion if it determines the recantation is *unreliable* and denies the motion for a new trial. But when a defendant's conviction is based solely upon the testimony of a recanting witness, and the trial court determines the recantation is *reliable*, the trial court must grant the motion for a new trial. Id.

In this case, the court made no reliability determination regarding the recantation testimony of the three key witnesses. Rather, it held that Scott's new evidence was not sufficient to justify disrupting the plea bargain originally struck in 2001. The court's reasoning was in error. A review of analogous cases shows that despite Scott's plea, the trial court could not

outright deny Scott's motion for a new trial based on the newly discovered evidence without holding an evidentiary hearing to determine its credibility. Assuming the credibility of the newly discovered evidence, the cases also show that Scott would be entitled to withdraw his plea despite his 2001 agreement. See, e.g., State v. Rolax, 84 Wn.2d 836, 529 P.2d 1078 (1974), overruled on other grounds, Wright v. Morris, 85 Wn.2d 899, 540 P.2d 893 (1975) (modifying procedure for post-conviction relief sought in appellate court); State v. D.T.M., 78 Wn. App. 216, 896 P.2d 108 (1995); State v. Macon, 128 Wn.2d 784 (1996).

The seminal case addressing a motion for a new trial based on newly discovered evidence is State v. Rolax. Rolax was convicted of assaulting his cousin, Hardison, despite Rolax's claim of self defense. At trial, Hardison testified that he was unarmed and stabbed by Rolax. Rolax admitted the stabbing but testified Hardison attacked him with a broken glass ashtray. Two witnesses supported Rolax's version of events. For whatever reason, the jury did not believe Rolax's self defense claim. More than a year after his conviction, Rolax sought post-conviction relief, based on Hardison's recently executed affidavit admitting his trial testimony was false and asserting that Rolax in fact acted in self defense. Hardison explained he lied as a result of the prosecutor's threat to jail him as a

material witness should he refuse to press charges. The Court of Appeals dismissed the petition. Rolax, 84 Wn.2d at 836-37.

In reversing the Court of Appeals, the Supreme Court reasoned that Hardison's affidavit, *if true*, "may constitute a material fact" not previously presented that would require vacation of the conviction. Rolax, 84 Wn.2d at 837-38. In so holding, the court distinguished several cases cited by the state, reasoning: "These cases stand for the proposition that when there exists *independent* evidence corroborating that of the witness who later seeks to recant his testimony, it is within the sound discretion of the trial court to determine whether to grant a new trial." Rolax, 84 Wn.2d at 838 (emphasis in original).

Significantly, the court held it could not determine based on the record whether independent evidence supported the conviction absent an evidentiary hearing:

On the record before this court, we cannot definitively ascertain whether the defendant was convicted solely upon the basis of Hardison's now recanted testimony or whether there was independent corroborative evidence upon which the conviction could rest. This determination must be left to the trial court. . . .

After a hearing on the merits of the claim, the court shall determine whether the testimony was, in fact, perjured and, if so, whether the jury's verdict of guilty was likely to be influenced thereby. In the event the court finds the testimony was perjured and the jury influenced thereby, the judgment of the Superior Court in the second degree assault

conviction should be vacated and a new trial ordered. If the Superior Court determines that no perjury occurred or that such perjury was harmless error, the relief requested shall be denied.

Rolax, 84 Wn.2d at 838-39.

Following the Supreme Court's rationale in Rolax, Division Three remanded for an evidentiary hearing to determine the credibility of the recanting witness in State v. D.T.M., 78 Wn. App. 216 (1995). Similar to Scott, D.T.M. entered an Alford plea to first degree child molestation pursuant to a plea agreement after his stepdaughter accused him of trying to rape her. D.T.M., 78 Wn. App. at 217. Shortly after D.T.M.'s plea, his stepdaughter admitted she lied because she was mad at D.T.M., and got the idea to accuse D.T.M. of rape after watching a TV movie. D.T.M., 78 Wn. App. at 218.

Like Scott, D.T.M. moved to withdraw his Alford plea based inter alia on newly discovered evidence under CrR 7.8(b), specifically his stepdaughter's recantation. The trial court nevertheless disagreed that the stepdaughter's recantation satisfied the requirements of CrR 7.8(b). D.T.M., 78 Wn. App. at 219.

Upon examining the requirements for a new trial based on newly discovered evidence under CrR 7.8(b), however, the appellate court reversed:

Moreover, M.J.'s out-of-court recantation, if true, meets all five criteria of State v. Williams, supra. . . . Since her allegations provided the sole factual basis for D.T.M.'s conviction, her direct recantation would probably change the outcome of a new trial. Given the consistency of M.J.'s statements throughout the investigation and pretrial proceedings, her recantation could not have been discovered before trial with the exercise of due diligence.

D.T.M., 78 Wn. App. at 221.

As in Rolax, however, the court held an evidentiary hearing was necessary to determine whether a new trial was warranted based on the recanting victim's testimony:

Although Washington courts have required a new trial when an essential witness recants under oath in open court, they have not always done so when the witness recants by affidavit. State v. Landon, 69 Wn. App. 83, 92, 848 P.2d 724 (1993). The court's decision here was based on oral argument. Under the circumstances, and considering D.T.M.'s persistent assertions of innocence, we believe the court should have held a hearing to evaluate M.J.'s credibility. If she were to adhere to the facts in her recantation while under oath in open court and subject to cross examination, Rolax . . . would require the court to permit D.T.M. to withdraw his guilty plea and proceed to trial.

D.T.M., 78 Wn. App. at 221 (footnote omitted).

Accordingly, despite D.T.M.'s Alford plea, he was entitled to an evidentiary hearing to determine the reliability of his stepdaughter's recantation. If proven reliable, D.T.M. was likewise entitled to withdraw his plea despite his prior plea agreement.

In Macon, the Supreme Court approved of the evidentiary hearing procedure required by Rolax and D.T.M.:

When a defendant is convicted upon the testimony of a witness who later recants, the trial court must first determine whether the recantation is reliable before considering a defendant's motion for new trial based upon the recantation. Whether there is independent corroborating evidence to support the recanting witness' original testimony is not a controlling factor. Recantations are inherently suspect and when the trial court, after careful consideration, has rejected such testimony, or has determined that it is of doubtful or insignificant value, its action will not lightly be set aside by an appellate court.

Macon, 128 Wn.2d at 804 (citation omitted).

Important to the Supreme Court's denial of Macon's motion to vacate was the trial court's determination -- after an evidentiary hearing -- that T.S.' recantation was *unreliable*. Macon, 128 Wn.2d at 795, 804-05.

Scott's conviction was not based solely on the testimony of one recanting witness but on the testimony of three recanting witnesses. As held in Rolax, in D.T.M., and approved in Macon, the trial court was required to hold an evidentiary hearing to determine the reliability of the recantation testimony before denying Scott's motion for relief from judgment.

First, similar to the circumstances in Rolax and D.T.M., D.H.'s affidavit, *if true*, would constitute a material fact not previously presented that would require vacation of the conviction. It proved either that no sexual contact occurred, period; or that no sexual contact occurred during the charging period, because D.H. was out-of-state at the time.

In response, the state may argue that Dufour and Ferlund's statements provide independent corroborative evidence of D.H.'s now recanted testimony, because both said they walked in on Scott and D.H. at a time when he was 15 years old. Any such argument should be rejected because Dufour has since recanted and admitted that she walked in on Scott and D.H. at a time when D.H. was 16 years old, rendering what she claimed she saw as consensual; and significantly, Ferlund has completely recanted walking in on Scott with anyone. Accordingly, as in Rolax and D.T.M., the lower court was in no position to weigh -- without an evidentiary hearing -- whether Scott's conviction could rest on independent evidence corroborating D.H.'s now recanted statement, especially since that corroborating evidence is now entirely suspect. See, e.g., State v. Arnold, 81 Wn. App. 379, 914 P.2d 762 (1996) (after hearing testimony, court unable to determine whether recantation reliable; however, independent

corroborative evidence -- that had not been recanted -- provided necessary factual support for the conviction).

The state may also point to Scott's statements to CCO Bumps and during the commitment proceeding as independent corroborative evidence. Any such argument should be rejected. The trial court should determine, after an evidentiary hearing, whether D.H.'s denial of sexual contact is credible, despite Scott's contrary statements. Only Scott knows the motivation underlying his statements, whether based on truth or some other concern. D.H.'s recantation may be entirely truthful. Without the opportunity to observe D.H. testify in open court subject to cross examination, the trial court cannot possibly determine.

Whether Scott's statements conflict with D.H.'s assertion that no sexual contact occurred, Scott's statements do not conflict with Dufour's most recent statement that the sexual contact she observed occurred when D.H. was age 16. Scott has asserted throughout these proceeding that D.H. was of legal age. Under Rolax, D.T.M. and Macon, Scott is entitled to an evidentiary hearing not only to determine the reliability of D.H.'s recantation but to determine the reliability of Dufour's. Dufour's recantation likewise constitutes a material fact not previously presented that would require vacation of the conviction. Rolax, 84 Wn.2d at 837-38.

If believed, it shows that no crime occurred because the sexual contact occurred when D.H. was 16. The trial court therefore erred in denying Scott his day in court to prove the reliability of the newly discovered evidence.

Second, the three key witnesses' recantation was discovered after trial. The state's only complaint below was that it could have been discovered by due diligence in 2003, when the Supreme Court remanded the case for Scott's choice of remedy, specific performance or plea withdrawal. But the state's own pleadings belie the state's claim. In response to Scott's PRP, the state vehemently argued that plea withdrawal would pose a hardship to the state because the state had no means to locate D.H. If the state had no means to locate D.H., Scott certainly had no means to locate him either, especially in light of the no contact order prohibiting him from contacting D.H. or his family. In essence, the state's due diligence argument contradicted its position on remand from the Supreme Court. In fact, as a result of the state's "hardship" claim, which arguably could be construed as a bait and switch, Scott accepted specific performance at the time. The state's disingenuous argument should be rejected.

Third, as in D.T.M., the complainant made multiple statements in advance of the plea hearing that he and Scott had sex. Supp. CP __ (sub. no. 51, State's Supplemental Response), Ex 2. There was therefore no reason for Scott to believe at the time of the plea that D.H. would change his repeated statements. Scott similarly had no reason to believe Dufour would alter the time frame she allegedly saw Scott and D.H. See, e.g., D.T.M., 78 Wn. App. at 221 ("Given the consistency of M.J.'s statements throughout the investigation and pretrial proceedings, her recantation could not have been discovered before trial with the exercise of due diligence"). It was not until Scott went pro se in his civil commitment proceeding and gained strategic control of the case that he successfully contacted D.H. through his investigator.

And it was not until that time that D.H. recanted his testimony in more than one way, i.e. that no sexual contact occurred and that no sexual contact could have occurred during the charging period because D.H. -- as confirmed by his mother -- was out-of-state. Upon learning of D.H.'s recantation, Scott immediately filed his pro se motion to vacate. Because Scott's motion was filed as soon as possible upon learning of D.H.'s recantation -- which later led to the discovery of the other two primary witnesses' recantation evidence -- Scott's motion to vacate could not have

been filed any sooner by the exercise of due diligence. The trial court erred in holding otherwise.

In short, Scott's new evidence, if true, established that no crime was committed because: no sexual conduct occurred, period; D.H. was out-of-state during the charging period; or any sexual conduct that occurred was legal because D.H. was of the age of consent in Washington. This newly discovered evidence was material and not merely impeaching or cumulative. At the very least, Scott was entitled to an evidentiary hearing to determine its reliability.

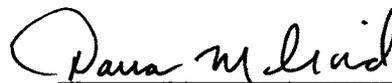
D. CONCLUSION

This Court should reverse the lower court's denial of Scott's motion to vacate and remand for an evidentiary hearing. If the reliability of the recantation evidence is proven, Scott is entitled to withdraw his plea.

DATED this 29th day of August, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DANA M. LIND, WSBA No. 28239
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 36846-3-II
)	
RICHARD ROY SCOTT,)	
)	
Appellant.)	

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF AUGUST 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] DAVID BURKE
ATTORNEY AT LAW
P.O. BOX 45
SOUTH BEND, WA 98586

- [X] RICHARD ROY SCOTT
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF AUGUST 2008.

x 

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