

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

No. 38767-1-II

Washington court of Appeals
At Division II

KEVIN MICHAEL MITCHELL,
Appellant,

AND

WASHINGTON DEPARTMENT OF CORRECTIONS,
Respondent.

REPLY BRIEF OF APPELLANT

ORIGINAL

KEVIN MICHAEL MITCHELL (1-207/308)
Appellant Pro Per, WITHOUT PREJUDICE
[SCCC 880933 ARR/TDC
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PM 7-10-09

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I. REPLY DISCUSSION

A. OBJECTION TO RESPONDENT INTRODUCING NEW THEORY ON REVIEW THAT WAS NEVER INTRODUCED IN TRIAL COURT.

Respondent WASHINGTON DEPARTMENT OF CORRECTIONS ("WDOC") relies significantly upon a new theory throughout its response brief which was never introduced in the trial court.

Both RAP 2.5(a) and common law prohibit a party from introducing new theories on review. An appellate court will not consider a new issue, theory or argument on appeal when such was never presented in the trial court. *Lindblad v. Boeing Co.*, 108 Wn.App 198, 31 P.3d 1 (2001); *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978). The purpose for this rule is to ensure fairness to the trial court and the opposing party. *Espinoza v. City of Everett*, 87 Wn.App 857, 943 P.2d 387 (1997). RAP 2.5(a) specifies three exceptions to this rule, yet none of which are applicable here. An appellate court will address the substantive issue only if one of the exceptions applies. *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996).

This new theory further fails as it misrepresents the law in effect at the relevant time. The new issue, as stated by WDOC is that "Mitchell never filed a proper records request." Resp. Brief at 10. WDOC bases this falsity upon the 2008 amendment of Washington Administrative Code ("WAC") 137-08-090. The applicable portions of WDOC's administrative procedures

in effect when Mitchell submitted both Public Records Act ("PRA") requests stated that each facility Public Disclosure Coordinator ("PDC") could receive PRA requests. See WAC 137-08-080 (filed 1982).

As both of Mitchell's requests were submitted on May 02, 2007 (CP 40) and July 01, 2007 (CP 52), and both being sent to the designated Public Disclosure Coordinator for the facility, Id., Mitchell did in-fact submit both requests in accordance with the regulations in effect at the time.

Based upon the foregoing, this court is requested to disregard WDOC's new theory presented on review that claims Mitchell never submitted his requests properly as this new theory is both improperly presented for the first time on review and it grossly misrepresents the applicable law in effect at the time of Mitchell's requests.

B. NUMEROUS RECORDS ARE BEING SILENTLY WITHHELD.

WDOC continues to simply state that "all responsive documents for both requests have been provided" (Resp. Brief at 8), yet fails to explain to this court that multiple forms of requested records have never been produced.

WDOC does not dispute that a request must be construed liberally. App. Brief at 10-11. See also *LaCedra v. Executive Office for U.S. Attorneys*, 317 F.3d 345 (D.C. Cir. 2003) (Request which asked for "all documents pertaining to" criminal case, and then listed specifically requested items, should

have been construed by agency as requesting all documents concerning the case, not just specific items); *Medoff v. US CIA*, 464 F.Supp 158, (D.C.N.J. 1978) (Requests under Freedom of Information Act "FOIA" must be liberally construed).

Further, an agency should not use the exact wording of the request as a means of withholding records. See *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970), cert. den., 400 US 824 (Requirement of FOIA that request specifies "identifiable records" calls for reasonable description, but is not to be used as method of withholding records).

Here, WDOC has narrowly construed Mitchell's request under SCCC-947 (CP 40) by only looking at the amendment of such request (CP 50). This amendment, by its own wording, removed a portion from the original request (CP 40) and inserted a re-worded portion. See CP 50; App. Brief at 10-11.

WDOC acknowledges that the separate requests were for different time-frames. Resp. Brief at 7-8. See also App. Brief at 8-11.

No explanation is given by WDOC as to how either request was interpreted, but clearly we can see how counsel for WDOC uses her interpretation as a defense tactic by only discussing the June 14, 2007 amendment of SCCC-947 (CP 50), and refusing to even mention the initial request. CP 40. In line with common law and the PRA's requirement of liberal construction, it is imperative for agencies to harmonize and liberally construe PRA requests so as to ensure all records are disclosed.

The Attorney General's Model Rules regarding the PRA gives clear advise on this issue: "An agency must conduct an objectively reasonable search for responsive records." WAC 44-14-04003(9). We must ask why this guidance was implemented and neither WDOC nor it's counsel abide by such guidance.

Finally, WDOC does not provide any explanation as to why all five (5) responses under PDU-655 failed to refer to SCCC-947 nor even discuss the subject matter of SCCC-947. See App. Brief at 9. The excuse that "we simply forgot" could reasonably be excused if such were an isolated incident, yet five (5) separate omissions by the same individual is a statistical improbability and points towards the truth in this case: WDOC refused to respond to SCCC-947. Clearly we can see by glancing at the evidence that the responses by WDOC under PDU-655 refer only to Mitchell's request assigned to that racking number. CP 52-64.

Based upon the foregoing, WDOC has failed to satisfy its burden of proving that all responsive records have been released to Mitchell. The trial court's finding that all records under SCCC-947 have been provided is therefore in error.

C. WDOC DOES NOT DENY RESPONSE LETTER WAS BACKDATED.

WDOC has never denied Mitchell's claim that the initial response to SCCC-947 was intentionally backdated, as evidenced by the postmark date on the envelope. App. Brief at 12; Resp. Brief at 14; CP 13, 16.

WDOC instead attempts to place the burden upon Mitchell, which is incorrect, as WDOC bears the burden of proving compliance with the PRA by clear and convincing evidence. RCW 42.56.550(1). And again, WDOC attempts to discredit Mitchell's evidence improperly for the first time on review. The evidence is clear that WDOC backdated the May 08, 2007 letter, as the postmark date on the envelope containing the request was postmarked May 16, 2007. CP 13, 16. WDOC still does not deny this fact, even on appeal. Resp. Brief at 14.

Mitchell's position is well supported by common law. In the absence of an express finding of fact, a presumption arises that the party having the burden of proof has failed to sustain that burden. *SSG Corporation v. Cunningham*, 74 Wn.App 708, 875 P.2d 16 (1994). See App. Brief at 12.

"Uncontroverted evidence should ordinarily be taken as true, and uncontradicted evidence which is not improbable or unreasonable cannot be disregarded[.]" 32A CJS § 1329 (Evidence 1996).

In line with this court conducting a de novo review, this court is further authorized to consider an issue clearly raised in the trial court which was not ruled upon. *Sarruf v. Miller*, 90 Wn.2d 880, 586 P.2d 466 (1978). Further, in lieu of simply remanding this issue, this court has authority to make such findings relating to this issue as the record is sufficient to decide this issue. See *Shinaberger ex rel.*

Cambell v. LaPine, 109 Wn.App 304, 34 P.3d 1253 (2001).

Simply put, WDOC has again failed to satisfy it's burden of proving it did not intentionally backdate the initial response letter under SCCC-947. No solid evidence has been presented to support it's blind assertions, thereby failing to satisfy the burden of proof.

D. MINIMUM PENALTY AMOUNT WAS AN ABUSE OF DISCRETION.

The trial court's imposition of the minimum statutory penalty was based on untenable reasons as described in the foregoing and in Mitchell's opening brief. The trial court erroneously found only a 42 day delay by WDOC when in fact this delay is continuing even to this day.

As the recent Yousoufian IV opinion (App. Brief at 9) has been withdrawn, we must then follow the guidance set forth in Yousoufian III, 137 Wn.App 69, 151 P.3d 243 (2007), which established a four-tier system for determining a sufficient statutory penalty based upon an agency's culpability.

The facts of this case satisfy the elements of the harshest penalty available: Willful misconduct. This severe degree of culpability is defined as "the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one as the duty to do when he or she has actual knowledge of the peril that will be created and intentionally fails to avert injury." Yousoufian III, 137 Wn.App at 79 (quoting WPI 14.01).

Here, WDOC had intentionally altered the date on the May 08, 2007 response letter, refused to respond to Mitchell's clarification letter dated June 14, 2007, and silently withheld records from Mitchell based upon an erroneous interpretation of the request, as amended. Each of these actions were and continue to be carried out by WDOC intentionally, and even to this day, fails to correct it's errors. Further, in addition to the PRA's explicit mandates for broad disclosure, RCW 42.52.050(4) provides that "No state employee may intentionally conceal a record if the employee knew the records was required to be released under chapter 42.56 RCW, was under a personal obligation to release the record, and failed to do so." See also App. Brief at 9 regarding silent withholding.

Even more puzzling, is that WDOC concedes that Mitchell's amended request was "clear" (Resp. Brief at 13) yet this would then amount to an admission by WDOC that the amended request was intentionally narrowly construed.

Mitchell even requested WDOC to "please respond timely" in his June 14, 2007 clarification letter. CP 50.

Presumably the trial court imposed the minimum penalty based upon the erroneous "slight delay of 42 days", yet we can plainly see there is far more than a slight delay. The trial court based the minimum penalty upon the above untenable reason, and as such, abused it's discretion.

A proper penalty to be imposed would fall within the willful

misconduct range as delineated in Yousoufian III, which states the purpose for this harsh penalty region: "[I]nstances where the agency acted willfully and in bad faith would occupy the top end of the scale. Examples of bad faith would include instances where the agency refused to disclose information it knew it had a duty to disclose in an intentional effort to conceal government wrongdoing and/or harm members of the public. Such examples fly in the face of the [PRA] and thus deserve the harshest penalties." Yousoufian III, 137 Wn.App at 80. As detailed below, WDOC's conduct was is bad faith.

E. FINDING OF GOOD FAITH IS UNSUPPORTED.

The trial court's finding that WDOC's actions were done in good faith is unsupported by the record. CP 65-66. This alleged finding is probably linked to the trial court's finding that WDOC only committed a slight delay, which as described above, is based upon untenable grounds. As such, this finding is also based upon untenable grounds as the foregoing details the presence of bad faith which continues to be exhibited by WDOC. As such, this finding is unsupported by substantial evidence in the record.

Finally, as a test for the presence of bad faith of WDOC, Mitchell proposed a question to WDOC in his brief at page 14. The question asked WDOC what excuse would be construed for failing to respond to SCCC-947 if Mitchell had never sent his request under PDU-655? WDOC had failed this test

because not even an attempted answer was provided anywhere in it's responding brief. Clearly WDOC does not have a logical reason for it's refusal to respond to SCCC-947, and the excuse provided is highly unreasonable. The presence of bad faith by WDOC is evident in light of the above.

F. COSTS AND STATUTORY ATTORNEY FEES ON APPEAL.

Contrary to WDOC's legally incorrect statement that "the PRA makes no mention of awarding attorney fees on review" (Resp. Brief at 15), common law interpreting the PRA's liberal cost provision explicitly authorize such.

See PAWS v. UW, 125 Wn.2d 243, 884 P.2d 592 (1994) (PAWS II) (Attorney fees provided to party who prevails in action against agency includes attorney fees incurred on appeal). See also Doe I v. WSP, 80 Wn.App 296, 908 P.2d 914 (1996) (same).

As remand will be a necessary means for obtaining an increased penalty and to order WDOC to release the remaining requested records, Mitchell will thus be the prevailing party on review, therefore entitling him to costs incurred on review.

Further, RCW 4.84.080(2) provides for a statutory attorney fee for the prevailing party who obtains a judgment in the court of appeals, which will be the case here. By law, Mitchell is entitled to this statutory attorney fee.

Based upon the above, Mitchell will be the prevailing party entitled to costs and statutory attorney fee under RAP 14.1 et seq. and RCW 4.84.080(2).

II. CONCLUSION

Following the above issues, we can see the bad faith and willful misconduct being continuously exhibited by both WDOC as well as it's counsel. Both of Mitchell's requests were in-fact properly submitted to the appropriate official. WDOC has conceded that Mitchell's amended request was clear, yet continues to silently withhold records based upon an unreasonable interpretation of Mitchell's request. The excuse that WDOC simply forgot to reference SCCC-947 when allegedly responding to such under PDU-655 is completely unreasonable. Finally, the minimum penalty imposed fails to implement a deterring effect upon WDOC and it is based on the untenable ground that WDOC acted in good faith and only committed a slight delay when relasing all records.

This court is requested to issue an opinion which clarifies the issue of how an agency is to interpret a PRA request. Further, this court is asked to remand this case back to the trial court and ordering WDOC to release all responsive records requested by Mitchell under SCCC-947. Finally, this court is asked to vacate the minimum penalty in favor of an appropriate penalty comparable to WDOC's culpability.

Dated this 07th day of July, 2009.

ORIGINAL

~~UNDER PROTEST~~
~~1-207/308 ARR~~
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STATE OF WASHINGTON
BY [Signature]
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Washington court of Appeals
At Division II

KEVIN MICHAEL MITCHELL,)	
Appellant,)	No. 38767-1-II
)	
AND)	DECLARATION OF SERVICE BY MAIL
)	
WDOC,)	GR 3.1(c)
Respondent.)	

The undersigned affirms under penalty of perjury that the following documents:

- 1) Appellant's Reply Brief;

along with a copy of this declaration, were logged as institutional legal mail, with first-class postage prepaid, addressed to each of the following:

WA Court of Appeals, Div. 2	Sara J. Olson, AAG
David Ponzoha, Clerk	Counsel for WDOC
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The undersigned affirms the foregoing documents were mailed on the 07th day of July, 2009.

Dated: 07/07/2009

UNDER PROTEST -
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