

Cause No. 301109

**COURT OF APPEALS
STATE OF WASHINGTON
(Div. III)**

STATE OF WASHINGTON

Plaintiff-Appellee,

v.

LUCAS JAMES MERRILL

Defendant-Appellant,

SUPERIOR COURT No. 09-1-041904
SPOKANE COUNTY
HONORABLE MARYANN C. MORENO

REPLY BRIEF

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ARGUMENT

I. HARGET'S INITIAL CONTACT WAS NOT INVESTIGATION; HIS SECOND CONTACT WAS NOT ON BEHALF OF DEFENDANT MERRIL

Unchallenged facts are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). In this case the lower court, based upon proffers by both the State and Attorney Harget, addressed Harget's first to the adult victims and found that "[t]he discussion focused on resolution of the case." CP 61. The statute in question does not limit defense counsel from discussing "resolution of the case" with victims. The provision governs contact for the purpose of "prosecutorial or defense interviews". RCW 7.69.030(10). Attorney Harget did not violate this provision by his first contact with the adult victims regarding their position on resolution of the case. As to the second contact, the undisputed fact is that Harget and colleagues contacted one of the Gertlars (not both), to inquire about the petition against himself, not on behalf of his client. CP 79-80, 49-51.

II. AT THE TIME OF THE FIRST CONTACT, AWAITING A VICTIM ADVOCATE WOULD HAVE BEEN IMPRACTICAL AND CAUSED UNNECESSARY DELAY

At the point when Attorney Harget first contacted the adult victims, the State had just advised him of the collapse of negotiations, the business day was ending, the next morning was pretrial conference, and the court had

previously indicated that no further continuances would be granted. CP 28-29.

Attorney Harget has argued below and in his Opening Brief that under these circumstances, both alternatives to the safe-harbor language were met: it was neither practical to delay contacting the adult victims about the plea, and there was a high that failing to contact the victims could result in an unnecessary delay of the proceedings. Where *either* practicality or unnecessary delay is a factor, the statute's restrictions on counsel do not apply.¹ In this instance, both factors were present.

The State's response argues, at 7-8, that a continuance was nevertheless granted on the morning following Attorney Harget's contact. This fact is correct, but immaterial to the circumstances facing Harget at the time he called the victims.² The safe-harbor test is not worded in a fashion that requires prescience: at the point in time that Attorney Harget

¹ This subsection applies if practical *and* if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case. RCW 7.69.030(10).

² The State does not contest that:

- a. There was an order stating that the case would receive no further continuances.
- b. The final pretrial hearing was the next morning.
- c. The prosecutor's emails arrived near the close of business and indicated a collapse of plea negotiations.

CP 28-29.

contacted the adult victims he had no reason to believe that the State would seek a continuance nor that the lower court would grant one. The message from the State on the question of the pretrial conference was succinct: “Call the case ready” and “no plea in district court”. CP 28. This was the 5pm situation facing Attorney Harget. His conduct should be measured against his reasonable beliefs and information

III. SUBSEQUENT CONTINUANCE DOES NOT FORECLOSE THE SAFE HARBOR DEFENSE

The State’s response does not directly address Attorney Harget’s argument that the lower court failed to consider the safe harbor provision of RCW 7.69.030(10). Rather, the State argues that the error was harmless (“no exigency”) because the safe harbor would not apply in view of the continuance granted the State on the next day. State’s Brief at 7-8.

The State’s argument fails. First, the record demonstrates that the lower court did not overrule the safe-harbor: the lower court utterly ignored it.

When a victim of a violent crimes invokes their right to the presence of an advocate at any prosecution or defense interview, that right shall be honored.”

CP 63 (lower court’s written memorandum opinion). The trial court noted no exceptions, exemptions, issues of practicality, or even the existence of the safe-harbor provision.

Second, the fact that the State made a motion to continue trial at the next day's pretrial conference was not known to Attorney Harget at the time he determined that it was not practical to delay contacting the alleged³ adult victims. Minutes before Harget contacted the victims, the State emailed him and said that the State would call the case "ready." CP 28:8.

The State's argument, that there was no time pressure on Harget due to the continuance filed the next day, is disingenuous. At the time of the first contact Attorney Harget knew that the State intended to call the case ready, that the plea had fallen through, and that the court had previously said there would be no more continuances. CP 28-29. The State has never disputed these facts.

Harget also knew, as of the closing minutes on the evening before at the final pretrial conference, that one of the adult victims was opposed to a settlement in district court. CP 28:12-22. In his judgment, a contact with

³ The State objects to the reference to the Gertlars as "alleged" victims given defendant Merrill's later plea to non-violent felonies. The subsequent plea is not material to this appeal: at the time of the events in question the Gertlars were "alleged" victims. If the State insists on hindsight, it should be pointed out that the Mr. Merrill's ultimate conviction would not trigger RCW 7.69. See, CP 122-131, 132-142. Harget asserts, instead, that the correct view of the safe-harbor should be counsel's objectively reasonable understanding of the facts in play at the time of the contact with the alleged victims.

the adult victims to discuss the plea terms was appropriate but that waiting for a victim advocate's presence, at that late hour, was impractical and could result in an otherwise needless delay.

IV. ALLEGED VICTIMS KNEW THEY WERE SPEAKING WITH COUNSEL

The State argues, at 3 of its Response, that the Gertlars did not know they were speaking with the defense when Harget first called.⁴ This is immaterial insofar as their 16-month old notice indicated that they chose only to speak with either the prosecution and defense with a victim's advocate present. The statute, itself, covers both prosecution and defense interviews. Had the Gertlars wished to have no interviews with any counsel — as provided for in the statute — it would not matter whether it was the State or the defense seeking to interview them. Their apparent willingness to speak with a lawyer about the case [uncontested at least as to the first contact] belies the State's assertion that they gave "no indication" of having changed their minds about the no-contact notice. Response Br. at 3. Harget asserts that, under the circumstances known to

⁴ This portion of the record is problematic as the Gertlars themselves did not testify nor provide sworn statements regarding their contact with Attorney Harget. Other than Harget's first party references, CP 43-46, the the victims' version of their contact was presented third-hand by the victim's advocate. CP 52-55.

him at the time, he was acting within his obligations to his client and in violation of no rule, order, or statute when he contacted the Gertlars.

V. RULE BARRING INTERVIEWS DOES NOT BAR “ALL CONTACTS”

The State next concedes that Attorney Harget’s telephone calls to the adult victims were “contacts”, not “interviews.” The State notes: “Mr. Harget had two contacts with the victims in this case. CP 61-64.” Response Br. at 3. “Finally, the Court found that Mr. Harget contacted both victims without an advocate being present on two separate occasions. CP 61-64.” Response Br. at 6. The concession is significant. The statute under which the lower court imposed sanctions expressly limits “interviews”. While the term is not defined, it appears to relate to questions posed to the alleged victims regarding the conduct of the defendant. The statute does not forbid “contact”, nor does it forbid speaking with a victim about matters relating to the disposition of a case.

The State, however, appears to conflate the term “contact” with the term “interview.” The State’s attempt to rewrite the statute is wrong in principal, wrong in fact, and wrong tactically. If the statute’s bar on *interviews* (absent an advocate) is interpreted to possibly apply to other types of *contacts* between counsel and victims, the ambiguity of the terms would trigger the rule of lenity. E.g., *State v. Bunker*, 144 Wn.App, 407,

420 (2008). As it is, Attorney Harget relies on the broader rule, emphasized in *Bunker*, that statutory language is not to be twisted out of recognition. In *Bunker*, the Court noted that the competing interpretations must be plausible. *Id.* Here the plain language of the statute makes the State's argument implausible: the legislature did not bar attorneys from all contacts with victims, only from interviews.⁵

VI. HARGET'S ACTIONS WERE TAKEN WITH FULL REGARD TO THE OBLIGATIONS OF HIS PROFESSION AND THE TEXT OF THE STATUTE

The State's next argument claims that Harget "refused to recognize the right of victims to have a victim's advocate present", Response Br. at 3. This is incorrect. Harget's argument, set forth in his Opening Brief, is not that victims enjoy no right to an advocate's presense, but that the advocate's presense is conditioned on multiple prerequisites: that the session be an interview, that it not be impractical to have an advocate present, that having an advocate present would not result in undue delay.

⁵ If the State insists on rewriting the statute, then the standard of review is much higher. To uphold the State's interpretation, the standard of review is *de novo*. *State v. Salavea*, 151 Wn.2d 133, 140 (2004).

Next, the State argues, at 5-6 of its Response Brief, that RCW 7.69.050(10) must be enforced “to the same degree” as the courts honor the rights of criminal defendants. This misleads the court: the enabling statute does not make victim’s right co-equal or consonant with the rights of criminal defendants. The statute states that the rights of victims should be protected “in a manner no less vigorous”. RCW 7.69.010. The distinction matters: according to the State’s argument, “to the same degree” provides the basis for its next sentence: “[c]rime victims have a right that *any* contact with defense counsel occur with an advocate present. RCW 7.69.030(10).” (Emphasis added). Response Br. at 6.

This is an egregious overreach. The statute does not limit “any contact.” Vigorous enforcement does not mean that the rights and concepts of assertion of the privilege, waiver, protection from uncounseled confrontation, etc. applies to victims. This Court need not explore the impact that such a far-reaching statute would have: the statute in question calls for equality in effort (“vigor”) not in substance (“degree”).

The State ultimately defends the trial court’s authority to impose sanctions, citing to RCW 2.28.150, Civil Rule 11 and civil discovery case-law for support. Response Br. at 3. Attorney Harget does not contest that a

judge has the authority to impose sanctions under RCW 2.28.150. He does assert, however, that there is no basis for the lower court's finding that he acted in bad faith; for the lower court's failure to consider the statute's safe-harbor provisions; for the lower court not to consider the facts known to Harget during his first contact with the Gertlars; for the lower court to consider the second contact as an investigation of the facts concerning his client.

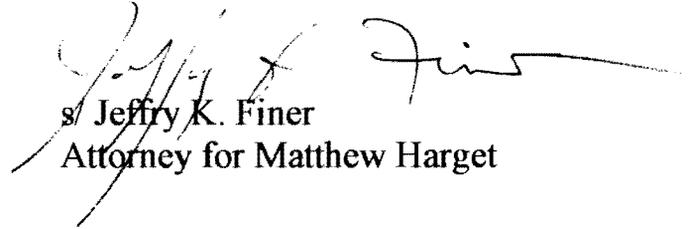
The wholesale adoption of civil discovery and Rule 11 sanctions is unwarranted and unwise. In a proper case, RCW 2.28.150 is a sufficient source of authority so long as it complies with the Sixth Amendment and the ethical requirements of the criminal defense bar. In this case, the lower court did not address or consider the defendant's right to effective counsel and a speedy trial as limitations on the application of RCW 7.69.030(10). Presumably, the legislature itself made this balance and on that basis withdrew the protections of the statute in cases whenever impracticality or unnecessary delay tip in favor of the defendant.

CONCLUSION

For the reasons set forth above, Attorney Harget respectfully asks this Court to reverse the lower court's order and dismiss the State's petition for sanctions with prejudice.

DATED THIS 2nd day of May, 2012.

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