

No. 30659-3

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**  
**Dec 12, 2012**  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON, Respondent

v.

SYLVESTER C. LOPEZ, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF WALLA WALLA COUNTY

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REPLY BRIEF OF APPELLANT

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I. FACTS IN REPLY

Mr. Lopez stands on the facts cited in appellant's opening brief and incorporates them by reference. He adds the following.

1. The Record Does Not Establish A Years-Long Ongoing Feud Between Mr. Lopez And His Neighbors.

The respondent's brief characterizes the event context: "the assault arose in the context of a years-long, "ongoing feud" between the defendant and his neighbors." (Br. of Resp. at 2). The record reflects the following exchange between Mr. Montes and the state's attorney:

Q. Okay. Do you ever see the neighbors getting into fights with the Lopezes?

Mr. Montes: Years before, yes.

Q. Do you think they are always picking on the Lopezes?

Mr. Montes: Yes.

Q. And how do you know that?

Mr. Montes: Because, you know, looking at us, making gang signs, and all kinds of stuff. (CP 35-36);

Ms. Pimental's affidavit gave a second-hand, somewhat unclear report of the conflict as follows:

"He (Raul Montes) claimed that there had been ongoing feud with particular neighbor of Sylvester's was the day after the shooting." (CP 115-16).

2. Mr. Montes Did Not Say That Mr. Lopez Took The Gun Away From Him.

The response brief cites Mr. Montes as testifying that “The defendant took the gun away from him, and Mr. Montes fled.” (Br. of Resp. at 3). The testimony is as follows:

Q. And where were you when you shot the gun in the air?

Mr. Montes: By the fence.

Q. Okay. In which house?

Mr. Montes: Um, Sylvester’s house.

Q. Okay. And where was Sylvester at that time, do you know?

Mr. Montes: Well, he was inside, then the bullet – when he hears the boom, then they cover, they they go inside.

Everybody went outside, took the gun away from me.

Q. And what did Sylvester do when he came outside?

Mr. Montes: He grabbed me and took me inside.

(CP 28).

3. Mr. Montes Did Not Opt To Wait For The May 2000 Trial To Make His Testimony Known And Was Not Uniquely Available To The Defense.

The State’s response brief, in its discussion of Mr. Montes’ confession, offered the following:

“Instead, at the recommendation of defense counsel and while the Defendant sat in jail for several months, Mr. Montes opted to wait for the May 2000 trial in order to surprise everybody with his statement.” (Br. of Resp. at 4).

The record is as follows:

Q. Well, after you gave your statement to the attorney, you went and talked to the police just to make sure right,?  
Mr. Montes: Well, the attorney told me to wait until it comes to court, so it can be in, you know.  
Q. Just kind of surprise everybody at the last minute; is that what you mean?  
Mr. Montes: What do you mean surprise at the last minute?  
Q. You mean come into court and tell the story?  
Mr. Montes: I was going to be here yesterday, but I couldn't make it, but it was not a surprise. (CP 40).

The respondent's brief asserts that Mr. Montes could not be found by the State to be interviewed by police, while the defense had ready access to Mr. Montes before trial. (Br. of Resp. at 7).

However, in a pretrial letter to the State's attorney, dated February 24, 2000, the defense attorney notes that not only was the State aware of the affidavit, but also the contact information:

"We discussed that Raul Montes has signed an affidavit and will testify to the same facts as contained therein. You indicated that you did not care and that you did not believe him, although you have not interviewed him. Obviously, I am not impressed by your apparent lack of regard for your duties to do justice in the cases you prosecute. At least that is my interpretation of it. You indicated that you would like to have Raul Montes' address and phone information to send detectives out to interview him. This phone number I have for Mr. Montes is ....." CP 69.

At trial, the following exchange occurred:

Q. –do you remember when you gave that affidavit to Karen Koehnstedt? (defense counsel).

Mr. Montes: I don't really remember. It's been kind of an old thing.

Q. Okay. Some time in January?

Mr. Montes: Around in there.

Q. Since that time – And that was filed; correct?

Mr. Montes: Yeah.

Q. Okay. Since that time, have the police ever come out to you looking for you to find out –

Mr. Montes: No.

Q. –what else, what other light you could shed on this?

Mr. Montes: No, nobody.

Q. Okay. So they never came out to see you in February, March, or April of this year at all?

Mr. Montes: No. Even I was in jail. I was two days in jail. They didn't even come out to talk to me.

Q. Okay. But your affidavit was in the court file –

Mr. Montes: Yeah. It was in the court file.

Q. - - all that time? Okay. So when you gave this affidavit you didn't have any intention of ambushing anyone?

Mr. Montes: No.

(CP 46).

## II. ISSUE ON REPLY

### A. Mr. Lopez's Motion Was Not Time-Barred Under CrR

7.8 and RCW 10.73.100.

## III. ARGUMENT

Mr. Lopez stands on the argument and authority cited in appellant's opening brief, which is incorporated by reference.

A. Mr. Lopez's Motion Was Not Time-Barred.

In the response brief, the State has raised the argument that Mr. Lopez did not act with reasonable diligence in obtaining Ms. Pimental's information and thus, his motion was time-barred and the appeal should be dismissed. (Br. of Resp. 5-9). Respectfully, this argument is without merit, and appears to be based on a mischaracterization of some facts within the record, and speculation about facts not within the record. (Br. of Resp. 6-9).

1. Mr. Lopez's Motion Is Based Solely On One Of The Enumerated Exceptions In RCW 10.73.100 And CrR 7.8 And Is Not Time-Barred.

CrR 7.8(b)(2) provides in pertinent part:

"On motion and upon such terms as are just, the court may relieve a party from 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;"

and continues:

"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".

Under CrR 7.8, a superior court has authority to rule on the merits of a motion if it finds the motion is timely, and either (a) the defendant makes a substantial showing he is entitled to relief; or (b) the motion cannot be resolved without a factual hearing. CrR 7.8(c)(2). Here, the superior court did not find the motion to be untimely, held a hearing, and ruled on the motion for a new trial. Moreover, if the superior court had found the motion to be untimely, CrR 7.8(c)(2) directs the superior court to transfer the motion to the Court of Appeals for consideration as a personal restraint petition<sup>1</sup>.

Even as RCW 10.73.090 is a bar to appellate court consideration of a post-conviction motion filed after the one-year time limit, a petitioner may still have the issues considered if he can demonstrate that the petition is based solely on one of the exemptions enumerated in RCW 10.73.100. Mr. Lopez made a plausible argument for an exception listed in RCW 10.73.100(1): newly discovered evidence.

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<sup>1</sup> However, under Washington case law, a CrR 7.8 motion should not be converted to a personal restraint petition without notice and opportunity for the petitioner to object to the transfer. *State v. Smith*, 144 Wn. App. 860, 864, 184 P.3d 666 (2008).

2. The Evidence Was Newly Discovered And Could Not Have Been Obtained Earlier With Reasonable Diligence.

Ms. Pimental's affidavit stated that she spoke to an "investigator" prior to the time Mr. Lopez was charged in January 2000. (CP 116). Ms. Pimental averred that with the exception of that conversation, she never spoke to anyone else about Mr. Montes' confession. The record reflects that a defense investigator was not requested until sometime after February 24, 2000. (CP 70). After Mr. Lopez became aware of Ms. Pimental's October 2011 affidavit, he acted quickly in filing a public disclosure request in November 2011, requesting copies of any statements given by Ms. Pimental. The record contains the response to his request, that is, the state had no statements by Ms. Pimental. "Diligence is a fact and not a conclusion, and to show it circumstances must be so set forth that the court, rather than the party, can say that there was diligence." *State v. Fackrell*, 44 Wn.2d 874, 880, 271 P.2d 679 (1954) (citing *State v. O'Brien*, 66 Wn. 219, 224, 110 P. 609 (1911)). Mr. Lopez had no information prior to October 2011 that would have led him to know of the existence of Ms. Pimental's conversation with Mr. Montes.

Mr. Lopez relies on the remaining arguments and authorities as presented in Appellant's Opening Brief.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Lopez respectfully asks this court to reverse the superior court's denial of his motion and grant him a new trial.

Dated this 12<sup>th</sup> day of December 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Sylvester C. Lopez, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Reply Brief was sent by first class mail, postage prepaid on December 12, 2012 to: Sylvester C. Lopez, DPC # 630876, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326; and by email per agreement between the parties to: Theresa Chen, Deputy Prosecuting Attorney at: [tchen@wapa-sep.wa.gov](mailto:tchen@wapa-sep.wa.gov).

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