

30659-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
NOV 13, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

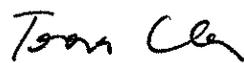
SYLVESTER C. LOPEZ,

Appellant.

APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:


by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99301
(509) 545-3561

TABLE OF CONTENTS

	Page No.
I. <u>IDENTITY OF RESPONDENT</u>	1
II. <u>RELIEF REQUESTED</u>	1
III. <u>ISSUES</u>	1
IV. <u>STATEMENT OF THE CASE</u>	1
V. <u>ARGUMENT</u>	5
A. <u>The Challenge is Time Barred</u>	5
B. <u>The Superior Court Did Not Abuse Its Discretion In Denying The Motion For New Trial</u>	9
1. The Pimentel affidavit will not change the result of trial.....	10
2. The defense may have discovered the Pimentel affidavit <i>before</i> trial.....	12
3. The defense did not exercise due diligence	14
4. The court did not rule on the materiality of the evidence.....	15
5. The Pimentel affidavit is merely cumulative.....	15
VI. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

State Cases

Page No.

<i>State v. Lopez</i> , 147 Wn.2d 515, 55 P.3d 609 (2002)	1, 2
<i>State v. Lopez</i> , 107 Wn. App. 270, 27 P.3d 237 (2001)	2
<i>State v. Mullen</i> , 171 Wn.2d 881, 259 P.3d 158 (2011)	9
<i>State v. Williams</i> , 96 Wn.2d 215, 634 P.2d 868 (1981)	9

Statutes and Rules

Page No.

CrR 7.5.....	5n
CrR 7.8.....	5, 6
ER 403	9
ER 801	9
ER 803	10
RCW 10.73.090	6
RCW 10.73.100	6

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no abuse of discretion occurred in the trial court's determination of the CrR 7.8 motion.

III. ISSUES

1. Is the Defendant's CrR 7.8 motion time barred?
2. Did the court abuse its discretion in denying the CrR 7.8 motion for relief from judgment based on a claim of newly discovered evidence?

IV. STATEMENT OF THE CASE

In May 2000, the Defendant Sylvester Cantu Lopez, Sr. was convicted by Walla Walla jury of two counts of assault in the first degree, two counts of assault in the second degree, and one count of unlawful possession of a firearm and received a sentence of life without the possibility of parole. CP 2, 16, 111; *State v. Lopez*, 147 Wn.2d 515, 518-

19, 55 P.3d 609 (2002); *State v. Lopez*, 107 Wn. App. 270, 273, 27 P.3d 237 (2001). The assault arose in the context of a years-long, “ongoing feud” between the Defendant and his neighbors. CP 35-36, 115-16.

The conviction for unlawful possession of a firearm was vacated on appeal. CP 2, 16, 111; *State v. Lopez*, 147 Wn.2d at 519; *State v. Lopez*, 107 Wn. App. at 277. Also, the POAA (Persistent Offender Accountability Act) sentence was reversed, because the State failed to provide supporting evidence for one of the prior strike offenses. CP 2, 16; *State v. Lopez*, 147 Wn.2d at 519-20; *State v. Lopez*, 107 Wn. App. at 278-80. The matter was remanded for sentencing on the existing record, without opportunity for the State to enhance the record. *State v. Lopez*, 147 Wn.2d at 523; *State v. Lopez*, 107 Wn. App. at 279-80. ACORDS shows the mandate issued on January 24, 2005. The Defendant was resentenced on February 5, 2003. CP 2, 16, 111; *State v. Lopez*, 147 Wn.2d at 519-20. “This judgment was also appealed.” CP 112. ACORDS shows that the mandate on the resentencing issued August 29, 2006.

The Defendant filed a CrR 7.8 motion, alleging insufficient evidence to support his conviction. CP 2, 16-17, 112. He has also filed three personal restraint petitions. CP 3, 17-18.

The current appeal is from the superior court's denial of the Defendant's second CrR 7.8 motion, served on the State on December 4, 2011. CP 3, 18, 106-17. Mr. Lopez has argued that there is newly discovered evidence implicating Raul Montes in the shootings – in the form of an October 5, 2011 affidavit by Raquel Pimentel claiming that twelve years ago Mr. Montes confessed to the shooting. CP 112-17.

The prosecutor responded at length. CP 15-47, 48-59, 60-65, 66-70. The prosecutor pointed out that Mr. Montes' statements to another person would be inadmissible hearsay at Mr. Lopez's trial. CP 19. However, Mr. Montes testified at trial in 2000, confessing to the shooting and denying the Defendant's involvement – testimony which was considered by the jury in convicting the Defendant. CP 24-47.

Mr. Montes was a defense witness. CP 25-47. He has known the Lopez family for many years and was close with them. CP 29, 35. He may even be the Defendant's son-in-law. CP 53, 115. Mr. Montes testified that on the day of the shootings he was visiting at the Defendant's house and had been drinking since 10 AM. CP 28, 30. He testified that he took a gun and shot it into the air. CP 33-34. The Defendant took the gun away from him, and Mr. Montes fled. CP 28, 44.

Mr. Montes testified that he was the one who shot the gun, not the

Defendant, and that he signed an affidavit at defense counsel's office in January 2000 confessing to the weapon discharge. CP 36-40. However, he never made a statement to police. CP 39-41. 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. CP 39. His affidavit and his testimony regarding the Defendant's whereabouts during the shooting were inconsistent. CP 41-43.

Three months before trial, police investigated an accusation by the Defendant's wife naming Mr. Montes as the shooter. CP 52-53, 63. They could not locate Mr. Montes. CP 53. However, they presented the neighbors with a new photo line-up. CP 56. The neighbors were very familiar with the Defendant, having been involved in a years-long feud with him. CP 35-36, 115-16. They also knew Mr. Montes by name. CP 39. The neighbors identified Mr. Montes as being present during the shootings, but continued to identify the Defendant, and not Mr. Montes, as the shooter. CP 53-54, 56-57, 63. The neighbors also told police that the Defendant's brother Ruben Lopez had approached witnesses and offered them \$200 each to drop charges against the Defendant. CP 53.

At the CrR 7.8 hearing, the superior court agreed with the

prosecutor, finding that the evidence was not new but cumulative and, as hearsay, was not admissible. RP 7. The court also found that Ms. Pimentel's affidavit would not change the verdict. RP 8. The motion for relief from judgment was denied. CP 92-93, RP 8.

V. ARGUMENT

A. THE CHALLENGE IS TIME BARRED.

The Defendant's challenge is time barred, because it was raised more than one year after verdict and sentence and more than one year after mandate.

The Defendant made his motion under CrR 7.8(b)(2) and (5). CP 108. Subsection (2) regards "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5."¹ Subsection (5) is the generic "any other reason justifying relief from the operation of the judgment."

CrR 7.8 requires that:

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. A motion under section (b) does not affect the finality of the

¹ CrR 7.5 has a time requirement of ten days after the verdict or decision.

judgment or suspend its operation.

CrR 7.8(b). In other words, the Defendant was required to bring this claim by May 2001. Instead, the motion was received in December 2011.

RCW 10.73.090 also has a one-year time limit – from the date of mandate, which was either 2005 (from appeal of conviction) or 2006 (from appeal of resentencing). The Defendant does not meet this time limit either.

RCW 10.73.100 has an exception to the time bar for 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). Because the Defendant did not act with reasonable diligence, the exception does not apply.

The Defendant did not act with reasonable diligence, because he could have discovered this information. Mr. Montes was a defense witness, not a State witness. The Defendant had sole access to Mr. Montes. He could have discovered from Mr. Montes the names of everyone he had confessed to.

The State could not find Mr. Montes. CP 39, 53, 69. According to Mr. Montes, defense counsel counseled him not speak with police, but to wait to be summoned to court – in other words, defense counsel prevented

Mr. Montes from being questioned by police. CP 40. The defense, on the other hand, had ready access to Mr. Montes. The Defendant and his family were related to Mr. Montes by marriage and saw him several times a month. CP 35. He walked right in to defense counsel's office and stayed long enough to make a printed, signed, and sworn confession. This defense interview occurred *after* the Defendant had been arrested.² In other words, it occurred after Mr. Montes' 1999 admission to Ms. Pimentel. CP 115-16. Defense was able to summon Mr. Montes to court.

Consider also that it is likely that defense counsel actually was in possession of Ms. Pimentel's statement *before trial*. Before trial, an "investigator" came to talk to Ms. Pimentel at work. CP 116. Law enforcement officers tend to refer to themselves by rank, e.g. sergeant, detective (CP 48, 60), where private investigators are simply called investigators (CP 70). The prosecutor explained that whoever this investigator was, s/he was not affiliated with the prosecution. RP 6 (the first time police spoke to Ms. Pimentel was *after* they saw her 2011 affidavit and then only to verify her signature). There was no mention of

² The Defendant was arrested January 15, 2000 (CP 37), and Mr. Montes signed the defense affidavit on January 18, 2000 (CP 36). *See also* CP 42 (defense counsel arguing that "it's obvious that [the Defendant] was in jail for this crime when [Mr. Montes signed the affidavit]").

Ms. Pimentel in the prosecutor's file. CP 82 ("No reference to Raquel Pimentel or to any statement made by her exists in our file."). Moreover, because police did not have access to Mr. Montes, the State would have no way of knowing of Ms. Pimentel's relationship to Mr. Montes or that she possessed any relevant information – much less where she worked. But defense counsel Karen Koehmstedt was using an investigator in this case through the end of February 2000, i.e. for six weeks following the conversation with Mr. Montes.³ CP 70. It is reasonable to conclude that the investigator who contacted Ms. Pimentel before trial worked for the defense.

If this is the case, then Ms. Pimentel's statement is not even newly

³ The Defendant has suggested that it could not have been a defense investigator, because the prosecutor has concluded that Ms. Pimentel was contacted before charges were filed, therefore, before defense could request appointment of an investigator at public expense. CP 73. It is possible that counsel could hire an investigator *before* requesting public reimbursement, especially where the investigator worked for the attorney's office. CP 70. It is also possible that the prosecutor has misinterpreted Ms. Pimentel's affidavit. It states "I told no one of this until an[] investigator came to talk to me at work. I was convinced that Sylvester would not be charged after the testimony I gave. I was later shocked and disturbed that Sylvester was actually convicted." CP 116. The prosecutor interpreted Ms. Pimentel's statement to mean that an investigator contacted her before the charging date of January 11, 2000. CP 18. However, it is possible that Ms. Pimentel, a lay person, is not using the language of "testimony" and "charge" with the specificity that a lawyer does. "Would not be charged" may also mean "charges would be dropped."

discovered. Defense counsel had the information all along, but opted not to use it in the previous trial – probably because it is inadmissible hearsay (ER 801) and needlessly cumulative of Mr. Montes’ own affidavit and testimony (ER 403).

Because defense alone had access to Mr. Montes and, therefore, information regarding his previous confessions, if defense did not discover this information within a year of verdict, it did not exercise due diligence. The time bar mandates dismissal of the appeal.

B. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR NEW TRIAL.

The Defendant argues that the superior court abused its discretion in denying the CrR 7.8 motion. Brief of Appellant at 6.

The parties agree that abuse of discretion is the standard of review. Brief of Appellant at 6; *State v. Mullen*, 171 Wn.2d 881, 906, 259 P.3d 158 (2011). The parties also rely on *State v. Williams*, 96 Wn.2d 215, 634 P.2d 868 (1981), which requires that a defendant must satisfy *all* five factors before a new trial will be ordered based on newly discovered evidence. Brief of Appellant at 6-7. The *Williams* factors require that the new evidence: (1) will probably change the result of the trial; (2) was only 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. *State v. Williams*, 96 Wn.2d at 222-23.

1. The Pimentel affidavit will not change the result of trial.

The Defendant argues that court abused its discretion in finding the affidavit to be inadmissible hearsay. Brief of Appellant at 7. If the evidence is inadmissible, it certainly will not change the result of trial.

The Defendant argues that Mr. Montes' statement to Ms. Pimentel meets a hearsay exception, namely excited utterance under ER 803(a)(2). Brief of Appellant at 7. First, this was not argued to the trial court. Therefore, there was no ruling on this argument and there can be no abuse of discretion where there was no ruling.

Second, even if this argument had been made, it is unlikely that the statement would have been admitted as an excited utterance. The actual confession was made the *day after* the event. Mr. Montes called Ms. Pimentel on the day of the event "in a frantic stage" to ask for a ride following "a situation that turned out bad." CP 115. This earlier conversation sounds like an excited utterance. However, the relevant conversation, which is the admission of shooting, did not occur until the next day after Mr. Montes would have had time to calm down. CP 115. Ms. Pimentel's statement does not describe this later conversation as

having indicia of excitement. Rather, Mr. Montes rationally related a long series of events, complete with history of feuding. Then the pair engaged in a long argument, during which Mr. Montes set out his reasons (risk of deportation, loss of child custody) to avoid responsibility. And finally he instructed to her to keep his secret. The details in this discussion suggest that Mr. Montes was not “under the stress of excitement,” but quite considered in his thinking. So serious was this conversation that Ms. Pimentel was persuaded and did not speak to anyone until approached by an investigator. Although this exception was not argued to the superior court, certainly the court would have tenable reason to reject it.

The Defendant argues that Mr. Avila’s affidavit includes information that can be described as an excited utterance, which, if admitted, would change the outcome of trial. Brief of Appellant at 8, 14. First, the Defendant never argued to the trial court that Mr. Montes’ statement to Mr. Avila was an excited utterance. Therefore, there was no ruling on this argument and there can be no abuse of discretion where there was no ruling.

Second, the Defendant never argued to the trial court that Mr. Avila’s statement was the newly discovered evidence, but only Ms. Pimentel’s statement. CP 106-17. Mr. Avila is the Defendant’s own

brother-in-law. CP 112. After Mr. Avila ran into Ms. Pimentel, he communicated her information to the Defendant. CP 112. The Defendant has only alleged that Ms. Pimentel's her statement is newly discovered. CP 114.

Mr. Avila's affidavit appears for the first time in a *reply* brief. CP 87-88. Therefore, it is not the basis of the motion, but responsive to the State's brief. According to Mr. Lopez, it was offered for a specific and limited reason: "to provide proof that had the state disclosed the investigative report of Ms. Pimental prior to trial, the result of the trial would have been different." CP 74. Mr. Avila's affidavit was offered in reply not as "newly discovered evidence" to be offered in rebuttal to Mr. Montes' testimony, but to explain how a juror's affidavit was solicited.

The court did not abuse its discretion by not addressing arguments which the Defendant did not raise.

2. The defense may have discovered the Pimentel affidavit before trial.

The Defendant argues that court abused its discretion in finding that the evidence is not *newly discovered*. Brief of Appellant at 11. However, this is not the finding of the court. The court found the evidence to be cumulative and inadmissible. RP 8. The court found the evidence

would not change the verdict. RP 8. There is no ruling on this factor of when the information was discovered. As the court noted, the absence of any one of the five factors is sufficient to deny a motion for new trial. RP 8.

However, if the court had found that this second factor was absent, it would be a tenable finding. According to Ms. Pimental, an investigator took her statement *before* trial. In other words, this statement was not discovered for the first time after trial. It is not newly discovered.

The Defendant suggests that the prosecutor had the statement, but withheld it from the defense. CP 73; Brief of Appellant at 12. As explained, *supra*, the opposite appears more likely. RP 6 (the first time police spoke to Ms. Pimental was *after* they saw her 2011 affidavit and then only to verify her signature); CP 82 (“No reference to Raquel Pimental or to any statement made by her exists in [the prosecutor’s] file.”).

The Defendant claims that CP 70 demonstrates that no defense investigator was on the case until after February 24, 2000. Brief of Appellant at 12. This is not what the correspondence states. Rather, it states that with the change of counsel, there will need to be a change of investigator. CP 70 (“In regard to the investigator, I will no longer be on

this case after the hearing on Monday, February 24, 2000. Thus, I cannot agree to use the investigator associated with my office at no charge.”).

As explained *supra*, the State had no knowledge of Ms. Pimentel’s relationship to Mr. Montes and no knowledge that she had anything of value to offer in the investigation of this offense. The only link to this information was through Mr. Montes. Only Mr. Montes and Ms. Pimentel knew about their conversation, because he had instructed her to keep his secret. And she kept his secret, she says, until an investigator approached her. Therefore, in order for the investigator to know about Ms. Pimentel, the investigator would have had to have received information from Mr. Montes. And only defense had access to Mr. Montes. CP 69 (defense providing prosecutor with Mr. Montes’ phone number). He was their witness and they had instructed him *not* to speak to police. CP 40. Mr. Montes testified repeatedly that he did not speak to police. CP 39-40, 46-47. The investigator had to be a defense agent. Therefore, this evidence was known to the defense before trial and was not newly discovered.

3. The defense did not exercise due diligence.

On the matter of due diligence, the trial court made no ruling, relying instead on other *Williams* elements. The Defendant does not challenge the court’s ruling on this basis. However, as discussed *supra* at

6-7, the Defendant had sole access to Mr. Montes (a defense witness who signed a confession in defense counsel's office) and would have learned this information before trial with due diligence.

4. The court did not rule on the materiality of the evidence.

The Defendant's appeal challenges the court's discretion in ruling against the CrR 7.8 motion. On this point, materiality, the trial court made no ruling, relying on other *Williams* elements. Therefore, the Defendant can make no challenge on this basis.

5. The Pimentel affidavit is merely cumulative.

The Defendant argues that court abused its discretion in finding the affidavit to be merely cumulative. Brief of Appellant at 10. But the evidence that Mr. Montes made a confession is not new. Ms. Pimentel's statement is certainly cumulative of Mr. Montes' own testimony and affidavit taking responsibility for the shooting. Mr. Montes testified that he, and not the Defendant, committed the shooting.

There were many reasons for the jury not to believe Mr. Montes. He had been drinking since 10AM. He ran away after the Defendant took the gun, so as to be unaware of events, which may have followed. It was the Defendant who had the ongoing feud with his neighbors (motive), not Mr. Montes. The Defendant's community (Mr. Montes included) was

motivated to protect the Defendant from getting a third strike offense. And most importantly, the neighbors were familiar with both Mr. Lopez and Mr. Montes and were confident in their identification of the shooter.

In the face of this, the Defendant's suggestion that the direction of the discharge made all the difference is unlikely, Mr. Blue's statement (CP 91) notwithstanding. As Mr. Montes explained, by testifying and taking blame he was risking arrest. CP 45. Therefore, it would be understandable that any confession he made, no matter how well-intentioned, would minimize the offense. The court had a tenable reason to find Ms. Pimentel's affidavit of Mr. Montes' confession merely cumulative of the confession Mr. Montes made before the jury.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the trial court's denial of the CrR 7.8 motion.

DATED: November 13, 2012.

Respectfully submitted:

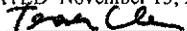


Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Marie Trombley
<marietrombley.comcast.net>

Sylvester C. Lopez, #630876
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED November 13, 2012, Pasco, WA


Original filed at the Court of Appeals, 500 N.
Cedar Street, Spokane, WA 99201