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Court of Appeals
Division III
State of Washington

NO. 33179-2

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ROBERT E. LARSON,, TYLER W. GASSMAN,
AND PAULE. STATLER,

Plaintiffs/ Appellants,

v.

STATE OF WASHINGTON,

Defendant/Respondent.

ANSWER TO BRIEF OF AMICI CURIAE

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I. INTRODUCTION

The Wrongful Conviction Act (the Act) was correctly interpreted by the court who found that Appellants had failed to show they were eligible for compensation. The amici brief filed in this matter by the Innocence Network and the American Civil Liberties Union of Washington (ACLU) largely repeats arguments which were already thoroughly raised in Appellants' brief and refused in the State's Opening Brief.

Amici's primary argument, woven throughout its brief, is that the trial court ignored the remedial purpose of the Act when interpreting its provisions to deny compensation. Amici is incorrect because the court appropriately applied the statutory requirements to Appellants' case and correctly determined that they did not qualify. The trial court was well aware of the remedial purpose of the Act, and viewed the evidence presented through a remedial lens, and still concluded that Appellants failed to meet their burden. This Court should affirm.

II. ARGUMENT

Amici contend that "the trial court ignored the remedial purpose of the Act when interpreting its provisions to deny compensation to the *Larson* plaintiffs." Amici brief at p. 3. Amici fail to recognize that this

maxim espouses a general principle, one that is logically and legally subject to reasonable limits.

“Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress.”). *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984).

Courts have explained that because tenets regarding the interpretation of remedial statutes provide only generalized philosophical principles these concepts have limited application in deciding actual cases.

The maxim that remedial statutes should be construed liberally is useless in deciding concrete cases. Every statute is remedial in the sense that it alters the law or favors one group over another. . . . But after we determine that a law favors some group, the question becomes: How much does it favor them? Knowing that a law is remedial does not tell a court how far to go. Every statute has a stopping point, beyond which, Congress concluded, the costs of doing more are excessive—or beyond which the interest groups opposed to the law were able to block further progress. A court must determine not only the direction in which a law points but also how far to go in that direction.

Stomper v. Amalgamated Transit Union, Local 241, 27 F.3d 316, 320 (7th Cir. 1994).

A reviewing court interpreting a remedial statute may not simply disregard or act contrary to a statute’s plain language, nor may it fail to

give proper deference to a trial court's finding of fact and conclusions of law following a trial. Thus, amici's arguments that the trial court erred are without merit because the trial court acted in accordance with the rules of statutory construction in interpreting the Act, and its findings and conclusions that Appellants had failed to prove they were actually innocent are supported by substantial evidence.

A. Appellants failed to meet their burden of proving that their convictions were vacated and dismissed on the basis of significant new exculpatory evidence.

1. A court interpreting a remedial statute may not disregard or act contrary to a statute's plain language.

Amici contend that the trial court erred when it interpreted RCW 4.100.060(1)(c)(ii) as "requir[ing] the vacation of the judgment of conviction and order of dismissal of the charges to be based upon significant new exculpatory information." Amici brief at p. 14 citing CP 421. Although this issue was already thoroughly briefed by both parties in the opening briefs,¹ amici raise it again to argue that the remedial nature of the Act warrants rejecting the plain language and the obvious meaning of the statute. Amici's argument fails, because the trial court properly interpreted the Act in accordance with the rules of statutory interpretation.

¹ See State's Opening Brief, pp. 10-22.

In order to prevail on their wrongful conviction claim Appellants had the burden of establishing by clear and convincing evidence that they met the requirements of RCW 4.100.060(1)(c)(ii) which provides:

The claimant's judgement of conviction was reversed or vacated and the charging document dismissed on the basis of significant new exculpatory information or, if a new trial was ordered pursuant to the presentation of significant new exculpatory information, either the claimant was found not guilty at the new trial or the claimant was not retried and the charging document dismissed.

The rules of statutory construction require a reviewing court to rely solely on statutory language if that language is unambiguous. *State v. Avery*, 103 Wn. App. 527, 532, 13 P.3d 226 (2000). "Courts may not rewrite or add statutory language." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Here, the Act's plain language required Appellants to show that their convictions were reversed or vacated or that a new trial was ordered pursuant to the presentation of "significant new exculpatory information." Here, there is no ambiguity about the requirement of significant new exculpatory information.

On December 14, 2012, Judge Michael Price vacated Appellants' convictions pursuant to Criminal Court Rule 7.8(b)(5). P's Ex's 13, 14, 15. Judge Price subsequently entered Findings of Facts and Conclusions of Law and Order. P's Ex. 16, 17, 18. These conclusions of law explicitly state that Appellants' convictions were being vacated because they "have

shown they were denied their constitutional right to effect [sic] assistance of counsel.” P’s Ex. 16, 17, 18 at p. 6. Judge Price subsequently dismissed Gassman and Statler’s charges because “there is insufficient evidence to proceed with trial.” P’s Ex’s 20, 21. Larson’s complaint was also dismissed on the same basis.²

Judge Cooney found that Appellants had failed to meet the requirements of RCW 4.100.060(1)(c)(ii), explaining that “[a]bsent from Judge Price’s findings of fact and conclusions of law are any findings or conclusions stating the vacations of convictions were based on significant new exculpatory information.” CP 421. Indeed, the convictions were vacated based exclusively on the conduct of counsel that occurred in the past, and Appellants did not submit anything that was shown to be actual new exculpatory information. This ruling should be affirmed, because ineffective assistance of counsel was the sole basis upon which Appellants’ judgements were vacated. P’s Ex. 16, 17, 18 at pp. 6-9.

Judge Cooney also correctly concluded that Appellants had failed to prove by clear and convincing evidence that the charging documents were dismissed on the basis of significant new exculpatory information as required by RCW 4.100.060(1)(c)(ii). The record shows that the charges

² It is unclear from the signature which judge signed Larson’s dismissal order and there is no stamp underneath the signature indicating the judge’s name.

were dismissed because “there is insufficient evidence to proceed with trial,” not because there was “significant new exculpatory evidence.” P’s Ex’s 19, 20, 21.

Amici contend that Judge Cooney should have simply ignored the language in the dismissal order and presumed the dismissals were based on the existence of significant new exculpatory information. This argument fails. Courts must make decisions based on the records and evidence before it, not based on speculation. Amici’s conclusory claim that the charges were dismissed based on significant new exculpatory information is pure conjecture, and flies in the face of the record. Neither Amici nor Appellants have provided any evidence to support this claim.

Further, the dismissal order’s statement that “there is insufficient evidence to proceed with trial” is supported by the facts and circumstances surrounding this case. These crimes were committed over five years before the State was faced with the option of a retrial. The assault and robbery victims were drug users and drug dealers who were so uncooperative none of them even reported the crimes to the police. At least one of them, Joni Jeffries, has since died. These circumstances support the determination that there was insufficient evidence to proceed to trial over five years after the crimes occurred.

Amici assert Appellants should not be bound by the language of the dismissal orders because the State presented the dismissal orders. This argument lacks merit for because Judge Price, who presided over Appellants' motions to vacate and entered the findings of fact and conclusions of law, affirmed the reason the charges were dismissed when he signed at least two of the dismissal orders neither of which said anything about significant new exculpatory information.

Courts are bound to make their decisions based on the records and evidence before them, and they may not make decisions based on conjecture or unsupported conclusions. Generalized principles guiding the interpretation of remedial statutes may not be used to disregard or circumvent evidence rules statutory construction rules. Judge Cooney's ruling interpreting and applying RCW 4.100.060(1)(c)(ii) conformed with the rules of statutory construction and was based on the evidence that was presented. The ruling should therefore be affirmed.

2. Amici's overly broad proposed definition of "significant new exculpatory information" would lead to unintended and absurd results.

Amici contend the trial court erred by too narrowly construing the term "significant new exculpatory information." The State has already addressed the trial court's interpretation of this language on pages 13 to 16 of its opening brief. Therefore, the State is limiting its response here to

addressing amici's proposal that "significant new exculpatory information" should be defined as "information that was available but not used at trial." Amici brief at p. 10.

This court should reject amici's overly broad definition as it would lead to unintended and absurd results. Amici's proposal would allow a defendant who fails to introduce certain evidence at trial to later claim his conviction should be reversed or vacated based on "information that was available but not used at trial." In essence, this definition would allow a criminal defendant who pursued an unsuccessful trial strategy or who chose to not pursue certain potentially helpful evidence to later seek monetary compensation from the State should his conviction be vacated. In analogous contexts, case law has already rejected the broad interpretation proposed by amici.

Evidence that is readily obtainable but not pursued prior to or during trial does not entitle a petitioner to a new trial. *See In re the Personal Restraint of Copland*, 176 Wn. App. 432, 451, 309 P.3d 626 (2013) (post trial expert opinion that petitioner did not fire the gun that killed the victim does not constitute "newly discovered evidence" because opinion was based on facts available at trial). This is especially true when a petitioner chooses to not pursue ascertainable evidence in favor of a different trial strategy.

State v. Barry, 25 Wn. App. 751, 760, 611 P.2d 1262 (1980), is illustrative. In *Barry*, the defendant was convicted of robbery and moved for a new trial based on post-trial affidavits from several witnesses claiming that someone else committed the robbery. The court of appeals affirmed the trial court's decision denying a new trial. The court explained among other things that the evidence was not "newly discovered" because some of the basic underlying information was known to the Defendant before trial and he chose not to more fully explore or pursue it before or during trial. The court further explained that "[w]here the allegedly newly discovered evidence was known to the defense and readily obtainable by it before or during the trial and the defense trial strategy was not to utilize such known or obtainable evidence during the trial, the decision by the defense to change its strategy after an unfavorable verdict does not render the evidence 'newly discovered.'" *Id.* at 760, citing *United States v. Soblen*, 203 F.Supp. 542, 565 (S.D.N.Y. 1961)(footnote omitted), *aff'd*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944, 82 S. Ct. 1585, 8 L. Ed. 2d 810 (1962).

This is precisely what occurred in Appellants' case regarding the testimony of Anthony Kongchunji. Appellants chose not to call Kongchunji to testify in their criminal trial for the Cataldo robbery even though he was available to testify. See *State v. Larson*, 160 Wn. App. 577,

587, 249 P.3d 669 (2011) where the court explains the defendant's decision not to call Kongchunji to testify was a legitimate strategy given that Kongchunji identified Larson, Statler and Gassman as his accomplices in the Cataldo robbery on at least two separate occasions. After their convictions were vacated and the charges dismissed, Appellants then called Kongchunji as a witness in their wrongful conviction trial. Judge Cooney, in addition to finding Kongchunji not credible, also properly rejected the argument that Kongchunji's testimony constituted "new" information because everything Kongchunji testified to was available during the criminal trial when no one called him. CP 427.

Amici's proposal to allow Appellants to pursue wrongful conviction claims based on information that was available but not used at trial is overly broad and inconsistent with other legal mechanisms that allow an accused to seek other remedies. As discussed in the State's Opening Brief, such remedies include the ability to seek a new trial under CrR 7.5 or a vacation of one's sentence under CrR 7.8. These court rules require the accused to show that the new evidence they are presenting could not have been discovered with reasonable diligence before or during trial. This reasonable standard, which should be applied to the Wrongful Conviction Act's "significant new exculpatory information" requirement,

allows for fair and reasonable remedies for the wrongly convicted without also creating avenues for absurd results.

B. Amici's claim that the trial court misinterpreted the Act's "clear and convincing" burden of proof standard is not supported by the record.

To prevail in a claim filed under the wrongful conviction compensation act a plaintiff must show by "clear and convincing evidence" that he is "actually innocent" of illegal conduct for which he was previously convicted. RCW 4.100.020(2)(a), 4.100.060(1)(d). For purposes of the Act, "a person is 'actually innocent' of a felony if he or she did not engage in any illegal conduct alleged in the charging documents[.]" RCW 4.100.020(2)(a).

Amici contend that the trial court misinterpreted the Act's "clear and convincing" proof standard. This argument repeats an argument made in Appellants' Opening Brief. The State has already thoroughly responded to this argument in pages 28 to 30 of the State's Opening Brief. Nevertheless, it bears repeating that the trial court's order explicitly stated that "the burden of proof required under RCW 4.100.060(1) is "clear and convincing evidence." CP 415. The trial court further explained that "substantial evidence must be 'highly probable' where the standard of proof in the trial court is clear, cogent, and convincing evidence." CP 415, citing *Dalton v. State*, 130 Wn. App. 53, 666, 124 P.3d 305, 312 (2005)

quoting *In re Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997).

Amici claim the court imposed a higher standard of proof when it referred to habeas case law which also uses the term “actual innocence.” This claim is without merit, because it improperly conflates the burden of proof (“clear and convincing”) with an element (“actual innocence”) that Appellants failed to prove.

“Actually innocent” is one of the elements Appellants had to prove, and “clear and convincing” is the degree of proof they had to prove this element by. The trial court understood this distinction. “In order to obtain judgement under the Wrongly Convicted Person statute, the plaintiffs are required to show by clear and convincing evidence that: ... They did not engage in any illegal conduct alleged in the charging document[.] CP 414. The court’s order concludes: “[T]he Court concludes that the plaintiffs have not proven by clear and convincing evidence the elements of ... RCW 4.100.060(1)(d) – did not engage in any illegal conduct alleged in the charging documents. Therefore, the Court enters judgment in favor of the State.” CP 431.

The trial court’s order clearly identified the standard of proof that Appellants had to meet as being “clear and convincing evidence.” CP 415. The term “actual innocence” appears elsewhere in the Act. Amici’s

argument that reviewing case law regarding the Act's "actual innocence" language raised the Act's clear and convincing standard of proof is without merit.

C. Appellants failed to prove they are actually innocent, and the amici brief fails to show otherwise.

Amici's claim that the trial court gave "short shrift to the *Larson* Plaintiff's innocence claim" is unfounded. Amici brief at p. 16. The trial court ruled that Appellants had failed to prove by clear and convincing evidence that their "judgement of conviction was reversed or vacated and the charging document dismissed on the basis of significant new exculpatory information" as required to prevail under RCW 4.100.060(a)(c)(ii). Judge Cooney was authorized under RCW 4.100.040(1)(c)(ii), a different part of the Act, to summarily dismiss Appellants' claim for failing to meet this standard. Instead, he afforded them the opportunity to fully present their claims at trial.

In their motion to vacate, Appellants presented untested and one-sided claims to Judge Price. Judge Price vacated their convictions, finding they received ineffective assistance of counsel. Judge Price noted in passing that their claims were "potentially exculpatory." But once Appellants claims were scrutinized under the lens of a trial they were found to be unpersuasive and not at all exculpatory.

Judge Cooney found at the wrongful conviction trial that “limited evidence was presented that was not put before the jury in the criminal trial.” CP 414. Under the scrutiny of an adversarial trial where the veracity of mere claims are tested, the “limited evidence” Appellants presented was unpersuasive. Thus, the trial court properly denied Appellants’ wrongful conviction claim.

The wrongful conviction trial court found that two of Appellants’ star witnesses, Kongchunji and Neilson, were wholly unpersuasive. Moreover, the court not only found the “limited evidence” presented by Appellants to be unimpressive, but also emphasized that two of the appellants, Statler and Gassman, were not credible.

Amici claim the testimony of Anthony Kongchunji is exonerating despite overwhelming evidence to the contrary. Amici’s brief omits the fact that Kongchunji initially told police the Appellants committed the Cataldo robbery with him. See *State v. Larson*, 160 Wn. App. at 587 where the court explains the defendant’s decision not to call Kongchunji to testify was a legitimate strategy given that Kongchunji identified Larson, Statler and Gassman as his accomplices in the Cataldo robbery on at least two separate occasions. Kongchunji did not recant his statements identifying Appellants as his accomplices until he was transported from

prison against his will to testify at the wrongful conviction trial six years after a jury convicted Appellants.³ See State's Opening brief pp. 30-33.

At the wrongful conviction trial, Kongchunji testified repeatedly that he did not remember anything and that he did not want to be in court before finally recanting his earlier statements inculcating Appellants. RP 204, 227-29, 242, 245, 250, 257-58. Appellants and Amici claim Kongchunji exonerated them by recanting his initial statement inculcating them in the Cataldo robbery and assault. But in fact, Kongchunji admitted he would not testify to *anyone* committing the Cataldo robbery with him because he had to return to prison after his testimony, and "it's not healthy to be a snitch" there. RP 237-38. Kongchunji's recantation amounts to self-preservation, not to credible evidence that his initial statements identifying the Appellants as the Cataldo robbers were untrue.

The trial court properly found that Kongchunji presented no new information, because everything he testified to was available during the criminal trial when no one called him to testify. CP 427. The court gave "virtually no weight to Mr. Kongchunji's testimony because of his numerous convictions for theft, robbery and burglary and his constantly

³ Amici's claim that Kongchunji was "threatened and badgered to not testify" is wholly unsupported by the record and has already been rejected by the court of appeals. *State v. Larson*, 160 Wn. App. at 591.

changing and conflicting statements.” CP 427. Kongchunji’s testimony did nothing to exculpate Appellants.

The wrongful conviction trial court also found that Appellant Statler was not credible, and that the testimony of his supporting witness Shane Neilson was unpersuasive. Evidence at the criminal trial established that Statler had knowing possession of the shotgun used in the Cataldo robbery. Appellants claimed in their motion to vacate that Shane Neilson, who was not called to testify at the criminal trial, had exculpatory information regarding Statler’s knowledge and possession of the shotgun. P’s Ex. 16, 17, 18 at p. 5. But once Neilson’s testimony was actually presented at the wrongful conviction trial the court found it had no exculpatory value. CP 429. The court also emphasized that Statler’s testimony was not credible.

The Court finds it compelling that the firearm used in the commission of a similar robbery was found at Mr. Statler’s residence. Mr. Statler denied knowing the firearm was in his residence. The Court deemed this testimony unpersuasive given the conflicting testimony of Det. McCrillis, Mr. Neilson, and Mr. Statler on the issues scrutinized based upon his convictions for felony crimes of dishonesty.⁴ CP 419.

The wrongful conviction trial court also found that Gassman’s alibi testimony that he *never* left the residence without his girlfriend *for an*

⁴ Statler was convicted in 2003 of Robbery in the First Degree while armed with a deadly weapon. Gassman was his codefendant. RP 169.

entire year was not credible because it was unbelievable in and of itself, and also in light of Gassman's convictions for felony crimes of dishonesty.⁵ CP 429.

To prevail on their wrongful conviction claim Appellants had to show by clear and convincing evidence that they are actually innocent of the Cataldo robbery and assault. Each Appellant individually asserted an alibi which the trial court found insufficient to establish actual innocence. See CP 428-29 concluding that Gassman's alibi was not credible and that Larson and Statler's alibi did not establish they could not have committed the crimes.⁶

The fact that a statute is remedial does not alter the canons of judicial review of a trial court's findings and conclusions following a bench trial. These rules require a reviewing court to defer to the trier of fact regarding conflicting testimony, witness credibility and the persuasiveness of evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Further, when a party challenges a court's findings following a bench trial, the non-moving party "is entitled to the benefit of

⁵ Gassman was convicted in 2003. of Attempted Robbery in the First Degree. RP 158. Statler was his co-defendant.

⁶ "The Court does not find it credible that Mr. Gassman resided with Ms. Holder for an entire year and never left the residence without her. [and] Surely, the robberies may well have taken place prior to Mr. Larson's work commitment of 9:45 p.m. and Mr. Statler's breath testing of 10:00 p.m." CP 428-29.

all evidence and reasonable inferences therefrom in support of the findings of fact entered by the trial court.” *Mason Mortgage America, Inc.*, 114 Wn.2d 842, 853, 792 P.2d 142 (1990).

This court should defer to the trial court’s findings that two of the appellants and several of their chief witnesses were not credible. Further, because substantial evidence supports the trial court’s findings and conclusions, its ruling denying the Appellants’ claims should be affirmed.

III. CONCLUSION

The intent to provide remedial relief does not mean that the rules of statutory construction, deference to trial court findings and conclusions following a trial and the burdens of proof may be compromised or ignored.

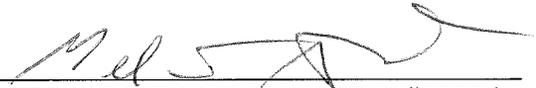
Appellants failed to meet two essential elements necessary to prevail in a claim filed under the wrongful conviction compensation act. First, none of the appellants met their burden of proving by clear and convincing evidence that their convictions were vacated and the charging documents dismissed on the basis of significant new exculpatory information. Second, none of the appellants proved by clear and convincing evidence that they are actually innocent of the crimes they were convicted of in 2009.

For the foregoing reasons, the State requests that this Court affirm the trial court's order denying each Appellants' wrongful conviction claim.

RESPECTFULLY SUBMITTED this 25th day of January, 2016.

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DECLARATION OF
SERVICE

I, Kelly Hadsell, declare as follows:

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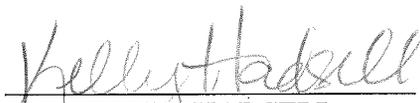
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of January, 2016, at Seattle, Washington.


KELLY HADSELL