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Appellate Court Number 280543-III

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

FILED
FEB 11 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON, APPELLANT

v.

TYLER WILLIAM GASSMAN, DEFENDANT

DAVID PARTOVI, RESPONDENT AND Real Party in Interest.

RESPONSE BRIEF

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COMES NOW THE RESPONDENT, and submits the following response to Appellant's brief and assignments of error.

I. ASSIGNMENT OF ERROR

Contrary to the state's assignments of error, the trial court did not err by assessing attorney fees against the Prosecutor and State, in the amount of \$ 2,000, based upon it's determination that the state's failure to amend information in a more timely fashion caused the defense to incur additional, unnecessary and unwarranted expenses and attorney fees.

II. ISSUE PRESENTED

Was the trial court's award of attorney fees in the amount of \$ 2,000, following a determination that the state's failure to amend information in a more timely fashion caused the defense to incur additional, unnecessary, and unwarranted expenses and attorney fees, an abuse of discretion, based upon untenable grounds, unsupported by the record, and / or outside the court's inherent authority ?

III. STATEMENT OF THE CASE

Despite the Appellant's self-serving argument that there was no bad faith at the Trial Court level, the record on appeal shows that the Trial Court had read

all of the files and was therefore aware of and considered all of the following facts when exercising its inherent authority to impose attorney's fees. VRP 236:14.

- After prosecutors for the State falsified a certificate in support of dismissal of the first prosecution, a law enforcement officer for the State then falsified a Probable Cause Affidavit supporting their re-filing of the same set of facts. (CP 136:15-18).
- That prosecution was then dismissed by prosecutors for the state during the State's case in chief when it was learned that a police report exculpating the defendants had never been provided to defense attorneys. (CP 137: 8-12).
- Prosecutors for the State declined to engage in plea negotiations and instead filed a baseless complaint to the Washington State Bar Association after defense counsel proposed a release-dismiss agreement. As this court is aware, a criminal defendant has a due process right to plea negotiations. *State v. Moen*, 150 Wn.2d 221, 76 P.3d 721 (2003). (CP 137:2-5).
- Prosecutors for the State sought to create a conflict within the public defender's office by serving a subpoena on a deputy public defender during one of the trials alleging he was a chain of custody witness on a piece of evidence the State knew the deputy public defender had custody of many months prior. That witness' name did not appear on a witness list or pretrial report and he had not even been contacted prior to being served

the subpoena during the trial in which he was to give testimony. (CP 137:13-15; 15-16; 18-20).

- Prosecutors for the State then dismissed that particularly egregious home invasion burglary (and shooting) ex parte during jury selection, without notice to the victims or defense counsel. There was no reason to dismiss the case, making it apparent that it was done in the in an effort to bring a new series of firearm-enhanced Class A felonies to trial on the very next business day. (CP 137:26; CP 138:3-4; 5-8)
- On the day of the newly sprung trial, Prosecutors for the State then sought to change the alleged offense date in an effort to circumvent alibi evidence based on information the State had known about for many months. (VRP 3:3-24)
- In awarding fees, the Trial Court relied primarily on this last and final egregious act but made clear that it had read and thus considered all of the files in exercising its inherent authority to regulate the lawyers before it. VRP 236:6-24.
- It is apparent from the record that no supervising attorney was present with the assigned prosecutor until after the Court exercised its inherent authority to impose terms. Thereafter a supervising lawyer materialized as well as “a dozen senior prosecutors” due to what the Trial Court called “blood in the water.” VRP 127:4-11.

IV. ARGUMENT

1. **Standard of Review**

Decisions either denying or granting sanctions are generally reviewed for abuse of discretion. *Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 338, 858 P.2d 1054 (1993). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Id.* A court also retains broad discretion as to the nature and scope of the award, which can include the full amount of attorney's fees. *Watson v. Maier*, 64 Wn. App. 889, 899, 827 P.2d 311 (Div. II, 1992).

2. **Bad Faith and Inherent Authority**

Despite the Appellant's attempts to wriggle away from it, this record on appeal is replete with some of the worst bad faith (hopefully) in recorded jurisprudence. This record shows a pattern of government officials knowingly making false statements under oath to their courts and taking ex parte action under false pretenses to dismiss prosecutions, the underlying factual scenarios of which likely altered the minds and lives of the victims irreparably, simply for litigation advantage in other cases which deprived defendants of notice and due process. It's shocking that the government would insist on bringing their actions so far into the light of day as to place this record before this Court risking further reprimand and possible publication. This bravado is a testament to the lack of

accountability that is so built into our system as to render clear perjury acceptable. Sadly, such appears to be the state of our entire republic and one is left simply to wonder if, when and where it will ever stop.

On the specific facts and record before this court, there is clear bad faith or at the very least conduct tantamount to bad faith but the Trial Court painstakingly chose to avoid making such a finding. Under such a factual scenario, *State v. S.H.*, 102 Wn. App. 468, 475-6, 8 P.3d 1058 (2000) is the best source of law regarding the boundaries of the legal requirements of a specific finding of bad faith.

Appellant cites *State v. S.H.*, at 475-476 for the proposition that “the court may not impose sanctions unless it finds bad faith.” Brief of Appellant p. 20. But on the preceding pages of the opinion, the Division 1 Court quoted at length from multiple primary sources of Washington law for the general proposition that Courts of justice have considerable power to ensure order, enforce orders, control litigation and generally carry into effect the jurisdiction conferred on it. *State v. S.H.*, at 473 (quoting RCW 2.28.010 & 150 and *In re Firestorm 1991*, 129 Wn.2d 130, 139 P.2d 411 (1996)). Division 1 also pointed out that “[N]o Washington case has expressly held that a finding of bad faith is required before a court may invoke its inherent authority to sanction litigation conduct” then went on to note that the U.S. Supreme Court requires something tantamount to bad faith in the record to precede imposition of sanctions under the court’s inherent authority.

State v. S.H., at 474 citing, *inter alia*, *Wilson v. Henkle*, 45 Wash.App 162, 174, 724 P.2d 1069 (1986).

In *State v. S.H.*, Division 1 held that it is not necessary for a court to make a specific finding using the term “bad faith” to characterize a counsel’s conduct in order to award sanctions (which would include attorney fees or costs). *State v. S.H.*, 102 Wn. App. at 474-476. It is sufficient that counsel’s conduct was tantamount to bad faith, regardless of whether the term “bad faith” was utilized. *Id.* A party may demonstrate bad faith or conduct tantamount to bad faith by, *inter alia*, **delaying** or disrupting litigation. *Id.* (Emphasis added). A finding of “inappropriate and improper” conduct is also tantamount to bad faith. *Id.* In continuing its investigation of Federal and foreign state jurisprudence to flush out this issue, Division 1 noted the appropriateness of sanctions, “if an act affects ‘the integrity of the court and, [if] left unchecked, would encourage future abuses.’” and “if ‘the very temple of justice has been defiled’ by the sanctioned party’s conduct.” *State v. S.H.* at 475 (citing *Gonzales v. Surgidey*, 120 N.M. 151, 899 P.2d 594, 600 (1995), *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) and *Goldin v. Bartholow*, 166 F.3d 710, 723 (5th Cir. 1999)). Here, the record on appeal shows clear delay, far more than inappropriate and improper conduct and a gross defiling of our temples of justice.

The Trial Court’s findings were based around the need to control the litigants’ conduct when it imposed fees on the State for delaying litigation by

waiting months to change the alleged offense date. In the courtroom, the State relied on inadvertence, but in the entire record on appeal, their actions showed malicious calculation in contravention of the Oath of Attorney, the Rules of Professional Conduct and Due Process of Law.

The Trial and Appellate Courts' inherent power to sanction is governed not always by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. *State v. S.H.*, at 475 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. at 43). To contravene this control on the record before this Court would only encourage future abuses.

If, as the Appellant suggests, the Trial Court failed to make a finding tantamount to bad faith, the appropriate remedy would be remand, not reversal. *State v. S.H.* at 476 (citing *Primus Automotive Fin. Servs., Inc. v. Batarsee*, 115 F.3d 644, 649 (9th Cir. 1997)). Where, as here, the record is "replete with evidence of tactical maneuvers undertaken in bad faith" remand is not necessary. *State v. S.H.*, at 476 (quoting *Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd.*, 760 F.2d 1045, 1051 (9th Cir. 1985)).

The factual scenario that Divison 1 reviewed in *Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd.*, supra, was similar to the record before this Court. There, the Trial Court had not made a factual finding of bad faith and the Appellant argued that remand was required; the 9th Circuit disagreed. *Id.* at 1051.

After explaining that, as here, the case law generally requires a finding of bad faith, the 9th Circuit went on to point out that the Appellant was given a full hearing with ample opportunity to explain himself and the Court of Appeals was left with an unambiguous record indicating improper tactical devices. *Id.* Thereafter, the Court held that, “A [trial] court’s failure to make express findings does not require a remand if ‘a complete understanding of the issues may be had [from the record] without the aid of separate findings.’” *Id.* (citations omitted). The Court of Appeals reasoned that, “To remand this case to the [trial] court would elevate form over substance.” *Id.* Elevation of form over substance is precisely the argument Appellant makes here. That is, because the Trial Court failed to use the term “bad faith” the imposition of sanctions was therefore erroneous. Such is not the law.

3. Attorney’s Fees

Appellant alleges that CrR 2.1 does not permit the sanction of attorney’s fees entered by the Trial Court. In point of fact, CrR 2.1 is silent as to what remedy and certainly does not prohibit a sanction of attorney’s fees. The rule’s silence on this point further supports the broad discretion conferred upon a Trial Judge by the case law.

Here, the Trial Court’s award of \$2,000 was reasonable in that it limited the fees (or sanctions) to the amount reasonably expended in responding to that sanctionable conduct which caused the defense to incur fees, in this instance the

delay in filing the amended information. See, generally, *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 418, 157 P.3d 431 (2007). None of the other, far more horrendous conduct directly caused any increase in the amount of time, and thus fees, necessary to mount a defense.

When the Trial Court imposed sanctions in the form of attorney's fees, it specified and articulated on the record the sanctionable conduct which lead to increased cost. Such is required under Washington Law. *Id.* The Trial Court stated that the "State has a responsibility, . . . and has a huge, huge power . . . and has to be careful not to abuse that power." And, "the reality is that the State's actions in not moving to amend the information in a more timely fashion incurred some expenses for [the defense] and they shouldn't have to absorb it . . . the State should absorb it . . . it's as simple as that." VRP 236:6-24.

Although a Trial Court is given wide discretion in imposing sanctions and the amount of those sanctions, in order to withstand appeal there must be a sufficient record for review accompanied by findings of fact. *Tribble v. Allstate Ins.*, 134 Wn. App. 163, 171, 139 P.3d 373 (2006). Here, the Trial Court did not abuse its discretion, it exercised its discretion on articulated grounds, making a more than adequate record over many days of hearings to allow this appellate Court to affirm the award and deny the State's request for reversal or remand.

4. Attorney's Fees on Appeal

RAP 18.1 allows the appellate court to award reasonable attorney's fees to the party that prevails on review. Costs may also be awarded to the party that substantially prevails on appeal. RAP 14.2. Based on the intentional malfeasance, abuse of power and delay in filing the amended information and filing a baseless appeal, the Respondent requests this Court award reasonable attorney's fees and costs incurred in responding to this appeal and supplementing the record for review.

V. CONCLUSION

Based upon the foregoing, Respondent respectfully requests this court affirm the Trial Court's award of \$2,000 assessed against the State. This Court should disregard Appellant's self-serving and red-herring arguments proffered to support its request for reversal or remand and also award Respondent additional fees and costs incurred in responding to this appeal in an amount to be determined at a later hearing.

DATED: February 11th, 2010.

PARTOVI LAW

By: 

DAVID PARTOVI, WSBA 30611
RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2010, a true and correct copy of
the foregoing was delivered directly to the following:

Brian O'Brien
Public Safety Building
1100 West Mallon Street
Spokane, WA 99260-0270

A handwritten signature in black ink, appearing to read 'DANE' followed by a vertical line and 'ALBY'.

DAVID PARTOVI