

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2011 OCT 10 P 2:05
BY RONALD R. CARPENTER

Sup. Ct. No. 85801-2


CLERK

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

TYLER WILLIAM GASSMAN,

Defendant,

DAVID R. PARTOVI, Respondent and Real Party in Interest.

SUPPLEMENTAL BRIEF OF PETITIONER

STEVEN J. TUCKER
Prosecuting Attorney
Spokane County

Brian O'Brien
Deputy Prosecuting Attorney

Attorneys for Petitioner

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

TABLE OF CASES AND AUTHORITIES iv

I. INTRODUCTION

Petitioner, State of Washington, respectfully submits this supplemental brief as permitted by RAP 13.7(d)1

II. ISSUES PRESENTED

(1) Is the award of a \$2000 sanction supportable under the inherent authority of the court, where the trial court specifically found that a party’s oversight was only careless, and not purposeful?1

(2) Is the award of a \$2000 sanction supportable under CrR 2.1(d), where the court finds no prejudice to the defendant and allows the amendment?1

(3) Is the sanction award really an attorney fee shifting mechanism which is not contemplated by the criminal or civil rules?1

III. STATEMENT OF THE CASE.....1

IV. ARGUMENT.....5

1. The sanction award is not supportable under the trial court’s inherent power to impose sanctions because the court found there was no bad faith or improper motive involved.5

2. A monetary sanction is not supportable under the amendment rule, CrR 2.1(d), especially when the rule was not violated.....9

3.	The sanction award appears to be an attorney fee shifting mechanism which is not contemplated by the criminal or civil rules.....	10
V.	CONCLUSION.....	12

TABLE OF CASES AND AUTHORITIES

CASES

Washington Cases

<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992)	9, 10, 11, 12
<i>Geonerco, Inc. v. Grand Ridge Properties IV, LLC</i> , 159 Wn. App. 536, 248 P.3d 1047.....	6
<i>Hsu Ying Li v. Tang</i> , 87 Wn.2d 796, 557 P.2d 342 (1976).....	5
<i>In re Recall of Pearsall-Stipek</i> , 141 Wn.2d 756, 10 P.3d 1034 (2000).....	5
<i>State v. Gassman</i> , 160 Wn. App. 12,248 P.3d 91 (2011)	8 fn.7
<i>State v. S.H.</i> , 102 Wn. App. 468, 8 P.3d 1058 (Div. 1, 2000)	6
<i>State v. Wilke</i> , 28 Wn. App. 590, 624 P.2d 1176 (1981)	9 fn8
<i>Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).....	8, 10

Federal Cases

<i>Alyeska Pipeline Service Co. v. Wilderness Society</i> , 421 U.S. 240, 95 S.Ct. 1612 (1975).....	10, 11
<i>Barber v. Miller</i> , 146 F.3d 707 (9 th Cir. 1998)	7
<i>Chambers v. NASCO, Inc.</i> , 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)	6
<i>Primus Automotive Fin. Servs. v. Batarsee</i> , 115 F.3d 644, (9 th Cir.1997)	6
<i>Roadway Express Inc. v. Piper</i> , 447 U.S. 752, 100 S.Ct. 2455 (1980).....	6

United States v. Stoneberger, 805 F.2d 1391 (9th Cir. 1986).....6
Zambrano v. City of Tustin, 885 F.2d 1473 (9th Cir. 1989)7

COURT RULES

CR 11 9-11
CR 129
CrR 2.1(d) *passim*
RAP 13.7(d).....1

I. INTRODUCTION

Respondent, State of Washington, respectfully submits this supplemental brief as permitted by RAP 13.7(d).

II. ISSUES PRESENTED

- (1) Is the award of a \$2000 sanction supportable under the inherent authority of the court, where the trial court specifically found that a party's oversight was only careless, and not purposeful?
- (2) Is the award of a \$2000 sanction supportable under CrR 2.1(d), where the court finds no prejudice to the defendant and allows the amendment?
- (3) Is sanction award really an attorney fee shifting mechanism which is not contemplated by the criminal or civil rules?

III. STATEMENT OF THE CASE

The underlying criminal action involved recalcitrant victims who failed to report a robbery because the robbery occurred during their attempted purchase of unlawful drugs.

The robbery was not reported for three months. When it was investigated, the exact date of the robbery was not clear - perhaps because this type of drug transaction does not involve signed invoices or regular

hours of employment. The victims placed the time of the robbery on or about April 15, 2008.

Further investigation revealed that the event *may* have taken place nearer the 17th of April 2008. The defendants were timely provided discovery of the evolving investigation.

On the weekend before trial the defense attorneys met and anticipated that the state may move to make the information more certain as to the date of the offense. RP 22.

However, at the time the state moved to amend, as anticipated by the defense attorneys, these same attorneys expressed what could be described as surprise at the amendment.¹

¹ Mr. Partovi objected to the amendment, alleging he was being sandbagged, that he had prepared his case on an alibi defense and that now they found out on the morning of trial that it is the “wrong day.” RP 3; RP 20, line 17. The Court responded that after she had heard Mr. Cruz’s explanation, it did not appear that there was any malicious intent on Mr. Cruz’s part to sandbag the defendants. RP 15, lines 12-20. The court continued the amendment issue to the afternoon.

At the afternoon hearing, Mr. Partovi *admitted* that the defense attorneys had met on the weekend before trial, had reviewed the reports that indicated that the offense date may be April 17th, and that one of the attorneys, Ms. Nordtvedt, had been telling him that she thought the State may move to amend the date to the 17th. RP 22. The Court questioned Mr. Partovi regarding his alibi defense and he *admitted* that he never filed one and that he had been sloppy with following the rules. RP 23-24. On further inquiry by the Court it became clear that Mr. Partovi had not filed any notice of alibi, leading the court to ask one of the codefendants attorneys to explain to Mr. Partovi the proper procedure for an alibi response. RP 25.

After hearing from the attorneys regarding the motion to amend, the court stated it could not overemphasize that this confusion was an example of the breakdown in our criminal justice system, a breakdown that was based on a lack of resources and budget constraints. RP 38. The court found all parties at fault, stating: “[t]his is an alarming situation on both sides, attorneys not following the rules.” RP 38, line 24-25; and RP 39, lines 11-12 (“I think the State did some sloppy stuff. Some of the defense was kind of sloppy.”)

The court reviewed the amendment rule CrR 2.1(d), and found there was no prejudice to the defense in allowing the amendment. The court continued the case to allow the defendants sufficient time to prepare their defenses. RP 41. The court then *sua sponte* ordered \$8000.00 in sanctions against the State for being careless in requesting an amendment of the information.²

² “I am continuing these cases based on the need for the defense to prepare sufficient defense to the first Monday in February, which is February 2nd. I am also sanctioning the State for what I consider to be, and I am not willing to say it was purposeful, but certainly a careless handling of these cases, and again, I'm very cognizant of the fact that the State has too many cases, as do defense counsel. But we have to stop and be more careful. And the court is guilty of the same thing. These past months with our caseloads, we all have to be more careful.

Saying that, I don't think the defendants should bear the financial burden and defense counsel the financial burden of going down one road and then finding out the defense is somewhere else. So, I am awarding as sanctions attorney fees payable to each defendant's counsel or their office

The State moved for reconsideration of the sanction award. The court denied the motion for reconsideration after explaining its reasoning:

I'm not saying that Mr. Cruz did anything on purpose to be difficult. Here is what I think happened is the same thing I think happened that I thought at the time is that everybody has too much to do and it just got away from them. And we can't allow that because the State has a responsibility to be, you know, you have huge, huge, power and you have to be very, very, careful not to abuse that power. And I think what happened in this case, and I think from the reading of all the files, is that people started getting on each other's nerves. But I don't think that that meant that Mr. Cruz did that on purpose. I don't think that for a minute. He has appeared in front of this court for a number of years and I have never found him to be anything but totally above-board and professional and responsible. The reality is the State's actions in not moving to amend the Information in a more timely fashion incurred some expenses for folks and they shouldn't have to absorb it. The State should absorb it. It's as simple as that.

RP 236, lines 6-20.

in the case of the public defender's office of \$2,000. So that's an \$8,000 sanction against the State. I'm cautioning all counsel and, henceforth, you will be expected to follow the rules, each and every one of you.”
RP 41-42.

IV. ARGUMENT

1. **The sanction award is not supportable under the trial court's inherent power to impose sanctions because the court found there was no bad faith or improper motive involved.**

This Court has held that a court must find bad faith before imposing sanctions under the inherent authority to control litigation. See *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 783, 10 P.3d 1034 (2000);³*Hsu Ying Li v. Tang*, 87 Wn.2d 796, 798, 557 P.2d 342, 344 (1976).⁴

³ *In re Recall of Pearsall-Stipek*, 141 Wn.2d at 783:

In *Pearsall-Stipek* we held that a recall petitioner should not be made to pay an elected official's attorney fees merely because the petitioner has brought a "frivolous recall petition." *Pearsall-Stipek*, 136 Wash.2d at 266, 961 P.2d 343 ("potential chilling effect could undermine the Legislature's intent that citizens be able to freely initiate recall efforts.") However, we also held that under our inherent equitable powers and CR 11 "attorney fees may be awarded against a petitioner who brings a recall petition in bad faith." *Id.* at 267, 961 P.2d 343. Bad faith in this context refers to "intentionally frivolous recall petitions brought for the purpose of harassment." *Id.* at 266, 961 P.2d 343.

⁴ *Hsu Ying Li v. Tang*, 87 Wn.2d at 798:

We do recognize a number of equitable exceptions to the no-attorney-fees rule. A court may award attorney fees if the losing party's conduct constitutes bad faith or wantonness. *Public Util. Dist. No. 1 v. Kottsick*, *supra*, 86 Wn.2d at 390, 545 P.2d 1; *State ex rel. Macri v. Bremerton*, *supra* 8 Wn.2d at 113, 111 P.2d 612.

Both Division I and Division II of the Court of Appeals require a trial court to make a finding of bad faith before imposing sanctions under their inherent authority to control litigation. See *Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 159 Wn. App. 536, 544, 248 P.3d 1047 (Div. 2, 2011) quoting *State v. S.H.*, 102 Wn. App. 468, 8 P.3d 1058 (Div. 1, 2000).

Federal courts also require a finding of bad faith before sanctions may be imposed under the court's inherent authority. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). "Because of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44, citing *Roadway Express Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455 (1980)).

The Ninth Circuit "insist[s] on the finding of bad faith because it ensures that restraint is properly exercised, ... and it preserves a balance between protecting the court's integrity and encouraging meritorious arguments." *Primus Automotive Fin. Servs. v. Batarse*, 115 F.3d 644, 649 (9th Cir.1997). The Ninth Circuit has repeatedly refused to find bad faith in the absence of improper motive. See *United States v. Stoneberger*, 805 F.2d 1391 (9th Cir. 1986) (the Court refused to find an attorney's repeat tardiness constituted bad faith); See also *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989)(the Court refused to uphold sanctions for an

attorney's inadvertent or negligent disregard for local court rules); See *Barber v. Miller*, 146 F.3d 707 (9th Cir. 1998)(the Court refused to uphold sanctions for an attorney's reckless conduct without "something more," such as bad faith).

In the instant case, the trial court repeatedly and emphatically held there was no bad faith involved in its award of sanctions this case. It found there was no malicious intent or intent to sandbag the defendants.⁵ It held that the "late" amendment by the state was careless, but not purposeful.⁶ Additionally, the trial court held that there was no animus, evil intent or purposeful misconduct on the part of the State. CP 124-129 (Order denying Defendant Gassman's CrR 8.3 motion to dismiss).

Because these findings are synonymous to finding of no bad faith and antithetical to a finding of bad faith, any sanction award based upon the court's inherent authority to impose sanctions is a mistake of law and therefore an abuse of discretion. "A trial court abuses its discretion when

⁵ RP 15, lines 12-20; (court stating that after Mr. Cruz's explanation it did not appear that there was any malicious intent on Mr. Cruz's part to sandbag the defendants); RP 89 (court reiterated that it had never believed the amendment had be done purposefully, or to "hide the ball.").

⁶ RP 41-42 (state was careless not purposeful); RP 236, lines 6-20 (court never thought it was purposeful, "I thought at the time is that everybody has too much to do and it just got away from them."); CP 24-25 (order continuing case and imposing sanctions, finding carelessness) CP 118 (order denying reconsideration, state did not act on purpose in late amendment, but was careless)..

its order is manifestly unreasonable or based on untenable grounds. A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (internal footnotes omitted).

The trial court's orders contain not the slightest ambiguity - the orders use the word “careless.” If the order were ambiguous regarding bad faith, then a review of all of the proceedings would demonstrate that the court intended the term careless, and refused to use the term purposeful, a necessary prerequisite to a finding of bad faith. To read the trial court orders as a de facto finding of bad faith - as the appellate court has⁷ - requires turning a blind eye to the trial court's explicit directions. To morph a finding of careless[ness] into a finding a finding of bad faith does harm to language, logic and the law, - it twists the contours of plain meaning.

⁷ *State v. Gassman*, 160 Wn. App. 12, 17, 248 P.3d 91 (2011).

2. A monetary sanction is not supportable under the amendment rule, CrR 2.1(d), especially when the rule was not violated.

The award of sanctions is not supportable if it is based on CrR 2.1(d), a rule that authorizes an amendment up until the close of the state's case and under circumstances where, again by application of the rule, the court itself makes a finding of no prejudice to the defendant. If CrR 2.1(d) is violated, the remedy is to deny the amendment.⁸ Compare *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992).

In *Bryant*, a lawsuit was filed by Mrs. Bryant seeking to invalidate the transfers of property by her husband. The respondents to the lawsuit filed a motion for a more definite statement as allowed under CR 12(e), the comparable civil rule to CrR 2.1(c) governing a motion for a bill of particulars. Mrs. Bryant filed an amended complaint. Trial court Judge Huggins dismissed the amended complaint because the motion for a more definite statement had not been complied with. Later, a different judge, Judge Pechman, awarded CR 11 sanctions to the respondents against Mrs. Bryant's attorneys based upon their signing of the amended

⁸ *State v. Wilke*, 28 Wn. App. 590, 595, 624 P.2d 1176 (1981) ("Moreover, there already exists a body of law protecting criminal defendants from last minute amendments to informations which result in prejudice or surprise. See CrR 2.1(d); *State v. Brown*, 74 Wn.2d 799, 447 P.2d 82 (1968)").

complaint. In affirming the appellate court's reversal of these CR 11 sanctions, this court held:

If the respondents violated a court rule, they violated CR 12(e), not CR 11. CR 12(e) requires attorneys to comply with a court's order for a more definite statement. *Judge Huggins imposed the proper sanction under this rule when she dismissed the amended complaint without prejudice.* See CR 12(e). CR 11 sanctions are not appropriate where other court rules more properly apply. See *Clipse v. State*, 61 Wn. App. 94, 808 P.2d 777 (1991) (misleading discovery disclosures may not be sanctioned under CR 11, but can be sanctioned under CR 26(g)'s provisions which govern discovery requests).

Bryant v. Joseph Tree, Inc., 119 Wn.2d at 223 (emphasis added).

The *Bryant* analysis is equally applicable here. Because there was no violation of CrR 2.1(d), and because the rule does not contain a provision authorizing an award of sanctions, the trial court's sanction award was based on an erroneous view of the law. That constitutes an abuse of discretion. *Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993).

3. The sanction award appears to be an attorney fee shifting mechanism which is not contemplated by the criminal or civil rules.

Under its inherent power, a federal district court may only assess attorney's fees against counsel in very narrowly drawn circumstances. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259, 95 S.Ct. 1612, 1622 (1975). In *Alyeska*, the Supreme Court affirmed that

“American Rule” that absent express statutory authority, bad faith or willful disobedience of a court order, each party should bear the cost of its own attorneys' fees. *Alyeska*, 421 U.S. at 260. The Court emphasized that Congress had not “extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted.” *Id.* at 260.

Washington State follows the American rule. Even CR 11 sanctions are not to be used as a fee shifting mechanism but, rather, are used as a deterrent to frivolous pleadings. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 220. The trial court’s final statements expressly articulate the reason for the sanction – to shift the cost of preparation of the defendant’s cases to the State.

And I think what happened in this case, and I think from the reading of all the files, is that people started getting on each other's nerves. But I don't think that that meant that Mr. Cruz did that on purpose. I don't think that for a minute. He has appeared in front of this court for a number of years and I have never found him to be anything but totally above-board and professional and responsible. The reality is the State's actions in not moving to amend the Information in a more timely fashion incurred some expenses for folks and they shouldn't have to absorb it. The State should absorb it. It's as simple as that.

RP 236, lines 6-20.

The appellate courts decision can only have a chilling effect on those prosecutors and defense attorneys seeking to advance meritorious

claims. Compare *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 219 (“However, the rule [CR 11] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.). The rule announced allows for fee shifting on an ad hoc basis.

V. CONCLUSION

For the reasons stated herein and in the previous briefing, the order awarding sanctions should be reversed.

Respectfully submitted this _____ day of October, 2011.

STEVEN J. TUCKER
Spokane County Prosecuting Attorney

Brian O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent