

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 20, 2011, 2:23 pm
BY RONALD R. CARPENTER
CLERK

CAPITAL CASE

No. 86084-0

RECEIVED BY E-MAIL *byh*

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

V.

JOSEPH T. McENROE,

Petitioner.

BRIEF OF AMICUS CURIAE, MICHELE KRISTEN ANDERSON

COLLEEN E. O'CONNOR
DAVID P. SORENSON
Attorneys for Amicus Curiae
Society of Counsel
1401 E. Jefferson Street, suite 200
Seattle, Washington 98122
(206) 322-8400

ORIGINAL

INDEX

A. INTEREST OF AMICUS CURIAE.....1

B. ISSUE ADDRESSED BY AMICUS.....2

C. STATEMENT OF THE CASE.....3

D. ARGUMENT.....4

A Defendant Whose Motion Seeks Relief Adverse to His Codefendant Should Not Be Allowed to Seal Documents Submitted In Support Of That Motion From the Codefendant and Should Not Be Permitted To Withdraw The Documents From the Record If The Court Denies The Request To Seal

E. CONCLUSION.....12

TABLE OF AUTHORITIES

Table of Cases

FEDERAL

Beck v. Alabama
447 U.S. 625, 637-38, 100 S.Ct. 2382, 2390, 65 L.Ed.2d 392 (1980).....4

Bruton v. United States,
391 U.S. 123, 126, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).....6

Draper v. Washington,
372 U.S. 487, 488-89, 83 S.Ct. 774, 9 L.E.2d 899 (1963).....10

Lockett v. Ohio,
438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978).....4

Powell v. Alabama
287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55 (1932).....4

WASHINGTON STATE

Bennett v. Smith Bunday Berman Britton, PS
156 Wn. App. 293, 308-309, 234 P.3d 236 (2010), review granted, 170 Wn.2d 1020, 245 P.3d 774 (Jan. 05, 2011) (No. 84903-0).....7

State v. Cronin
142 Wn.2d 568, 14 P.3d 752 (2000).....6

Draper v. Washington
372 U.S. 487, 488-89, 83 S.Ct. 774, 9 L.E.2d 899 (1963).....10

John Doe v. Puget Sound Blood Center
117 Wn.2d 772, 780-81, 819 P.2d 370 (1991).....9

Morgan v. Hart,
84 Wash. 496, 147 P. 26 (1915).....6

Rufer v. Abbott Laboratories
154 Wn.2d 530, 114 P.3d 1182 (2005).....7,8

Saari v. Wells Fargo Express Co.
109 Wash. 415, 419, 186 P. 898 (1920).....10

Seattle Times Co. v. Ishikawa
97 Wn.2d 30, 36, 640 P.2d 716 (1982).....7, 11

| | |
|---|----|
| <u>State v. Benn</u> | |
| 120 Wn.2d 631, 661, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993)..... | 4 |
| <u>State v. Bone-Club</u> | |
| 128 Wn.2d 254, 259, 906 P.2d 325 (1995)..... | 7 |
| <u>State v. Campbell</u> | |
| 103 Wn.2d 1, 13-15, 691 P.2d 929 (1984)..... | 4 |
| <u>State v. Jenkins</u> | |
| 53 Wn. App. 228, 231, 766 P.2d 499 (1989)..... | 10 |
| <u>State v. Larson</u> | |
| 62 Wn.2d 64, 66-67, 381 P.2d 120 (1963)..... | 10 |
| <u>State v. Lord</u> | |
| 117 Wn.2d 829, 888, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992)..... | 4 |
| <u>State v. Melton</u> | |
| 63 Wn. App. 63, 68, 817 P.2d 413 (1991), review denied, 118 Wn.2d 1016, 827 P.2d 1011 (1992)..... | 10 |
| <u>State v. Roberts</u> | |
| 142 Wn.2d 471, 14 P.3d 713 (2000)..... | 6 |
| <u>Wolfkill Feed & Fertilizer Corp. v. Martin</u> | |
| 103 Wn. App. 836, 841, 14 P.3d 877 (2000)..... | 10 |
| <u>Yakima County v. Yakima Herald-Republic</u> | |
| 170 Wn.2d 775, 246 P.3d 768 (2011)..... | 5 |

Constitutional Provisions

FEDERAL

U.S. Const. amend. IV.....4
U.S. Const. amend. XIV.....4

WASHINGTON STATE

Const. art. 1, §3.....4
Const. art. 1, §10.....9

Rules and Regulations

WASHINGTON STATE

GR 15.....5, 6, 7
LGR 15.....3, 5

A. INTEREST OF AMICUS CURIAE

Amicus Michele Kristen Anderson is the codefendant of the Petitioner Joseph McEnroe in a pending death penalty trial in King County Superior Court. Ms. Anderson has a critical direct personal stake in the outcome of this proceeding, to wit: defending her constitutional right to be fully informed of and to respond to any and all motions that affect her rights, including the pending motion concerning the order of trials.

Mr. McEnroe and Ms. Anderson are each charged with six counts of Aggravated First Degree Murder and the State has given notice that it will seek the death penalty in the event they are convicted as charged. The cases have been severed for trial and the issue presented in this appeal stems from the State's motion to have Mr. McEnroe's case proceed first to trial. Mr. McEnroe, whose counsel have represented him since the charges were filed in late December 2007, asserts that Ms. Anderson, whose current lead counsel was only appointed to the case in late November 2010, should proceed first to trial. Moreover, Mr. McEnroe seeks to present his reasons for determining Ms. Anderson's trial date in documents that he asks be sealed and not made available to Ms. Anderson and her attorneys.

In order to fully respond to the State's motion and Mr. McEnroe's response in this capital case, Ms. Anderson and her attorneys must have access, as the state and federal constitutions require, to all information that

the trial court will review in connection with the pending motion that affects her case. Mr. McEnroe should not be permitted to withdraw his documents in the event the trial court denies the motion to seal. Rather, the trial court should review Mr. McEnroe's documents *in camera* and provide a copy to Ms. Anderson of all information that is material and relevant to her case.

B. ISSUE ADDRESSED BY AMICUS

This Court's website defines the issue in this case as: Whether a party who requests the sealing of documents submitted in support of a motion may withdraw the documents from consideration if the court denies the request to seal? In deciding that issue in a capital murder trial involving codefendants, Ms. Anderson urges the Court to recognize that a defendant's constitutional right to review and respond to all evidence presented adverse to her interests far outweighs any right of a party to seal, from a codefendant against whom he is seeking relief, the very evidence upon which he relies as a basis for that relief. This Court should further recognize that allowing a party to withdraw documents that have been reviewed by the trial court in anticipation of making a decision which affects the rights of a codefendant, the codefendant's right to an adequate record of proceedings will be compromised.

C. STATEMENT OF THE CASE

Ms. Anderson agrees with the statement of facts as set forth in the pleadings filed to date by the petitioner and the prosecuting attorney. In addition, she provides the following supplemental facts from the trial court record. Ms. Anderson joined in Mr. McEnroe's motion to waive LGR 15 in the trial court. However, by joining in the argument, Ms. Anderson did not (and does not) agree that documents or information supporting Mr. McEnroe's motion to have his trial proceed after Ms. Anderson's trial should be sealed as to Ms. Anderson. *See* Codefendant Anderson's Motion for Permission to be Named a Party in Interest and be Given Permission to File Responsive Pleadings, filed in this Court on or about August 9, 2011.¹

In view of the fact that this Court has accepted review and the issue is now framed as "whether a party who requests the sealing of documents submitted in support of a motion may withdraw the documents from consideration if the court denies the request to seal," Ms. Anderson's constitutional rights are implicated. Mr. McEnroe's documents must be unsealed (at least in part) as to Ms. Anderson so that she can thoroughly understand the issue and adequately respond to his motion that her trial

¹ Ms. Anderson did not join Petitioner's motion for discretionary review because her counsel determined that the trial court's ruling allowing 30 days to appeal a denial of a motion to seal did not unduly prejudice Ms. Anderson.

should proceed first. Mr. McEnroe should not be able to withdraw a document that is intended to form the basis of the trial court's decision on his motion.

D. ARGUMENT

A Defendant Whose Motion Seeks Relief Adverse to His Codefendant Should Not Be Allowed to Seal Documents Submitted In Support Of That Motion From the Co-Defendant and Should Not Be Permitted To Withdraw The Documents From the Record If The Court Denies The Request To Seal.

Due process, guaranteed by the Fifth and Fourteenth amendments to the United States Constitution and Article 1, §3 the Washington Constitution, guarantee the right to a fair trial. The right to a fair trial includes the right to counsel and "effective aid in the preparation of a case for trial." *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55 (1932); *State v. Campbell*, 103 Wn.2d 1, 13-15, 691 P.2d 929 (1984). The United States Supreme Court has repeatedly indicated that heightened scrutiny must be applied in capital cases. *Beck v. Alabama*, 447 U.S. 625, 637-38, 100 S.Ct. 2382, 2390, 65 L.Ed.2d 392 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978). *See also, State v. Benn*, 120 Wn.2d 631, 661, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993), citing *State v. Lord*, 117 Wn.2d 829, 888, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992) (applying a heightened level of scrutiny to claims of error associated with penalty phase issues in capital cases).

This Court should decline to modify GR 15 and/or LGR 15 to create a remedy that would allow a party to withdraw documents in the event a court denies a motion to seal. Trial courts should be able to provide a copy, or a redacted copy, to the codefendant in the event the trial court finds the documents contain information that is relevant to the codefendant's interests.

In general, Ms. Anderson agrees that accused persons should not have to disclose confidential work product and/or attorney client privileged information to the prosecuting attorney and the public until such time his counsel decides to present such evidence at trial. *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011). However, in cases involving codefendants, even where their cases have been severed for trial, both defendants should be provided a means of asking the trial judge to conduct an *in camera* review of documents sought to be filed under seal where they relate to pending motions that affect the rights of both parties. Such review would be limited to determining whether one defendant is in possession of information that is relevant and material to the other defendant's interests and, if so, the court would reveal that information to defense counsel. Otherwise, the defendants will not be able to adequately respond to motions, such as that under consideration here, determining which case proceeds first to trial.

Courts are often called upon to balance the competing interests of codefendants. *Bruton v. United States*, 391 U.S. 123, 126, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *see also, Morgan v. Hart*, 84 Wash. 496, 147 P. 26 (1915) (“it has long been settled that adverse interests as between codefendants may be ... decided,” upon a hearing and an opportunity of asserting their rights). Codefendants charged with capital murder are in an especially precarious position. *See, e.g., State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). Thus, where one codefendant (Mr. McEnroe) is in possession of information that is relevant and material to the other codefendant (Ms. Anderson), and asks the trial court to make a ruling that affects the constitutional rights of Ms. Anderson based upon his undisclosed information, her due process rights to counsel and to a fair trial will be jeopardized.

GR 15 (c)(1) provides, in relevant part:

In a criminal case ... the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable[.]

Subsection (2) goes on to provide:

After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that

the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.

In providing notice and an opportunity to respond to a request to seal, GR 15(c) indicates that such documents have not yet become a part of the court record.

In this case, Mr. McEnroe seeks to submit documents for the trial court's consideration in support of his motion to proceed to trial after Ms. Anderson. In *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982), this Court set forth criteria for courts to consider in determining whether to limit public access to court hearings and whether to seal documents filed with the court. *See also, State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). In *Bennett v. Smith Bunday Berman Britton, PS*, 156 Wn. App. 293, 308-309, 234 P.3d 236 (2010), *review granted*, 170 Wn.2d 1020, 245 P.3d 774 (Jan. 05, 2011) (No. 84903-0), the Court of Appeals held that the *Ishikawa* criteria apply to documents filed with a court under seal if the documents "in some way become part of the court's decision-making process."

In *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005), this Court held that "any records that were filed with the court in anticipation of a court decision (dispositive or not) should be sealed or continue to be sealed only when the court determines - pursuant to *Ishikawa*

- that there is a compelling interest which overrides the public's right to the open administration of justice." *Rufer*, 154 Wn.2d at 549. The documents sought to be sealed here are clearly relevant to the trial court's decision-making process on the issue of which defendant proceeds first to trial. In arguments made in the trial court and in pleadings filed in this Court, Mr. McEnroe has stated that he wants his trial to proceed after Ms. Anderson's because "it is highly likely that information regarding Ms. Anderson's mental condition will be disclosed at her trial, and if convicted, at her capital sentencing proceeding, which would be very important to Mr. McEnroe's mitigation case." *See Declaration In Support of Accelerated Review or Stay Pending Decision on Discretionary Review*, at 2. He would not make such statements based on pure speculation.

Thus, counsel for Ms. Anderson has cause to believe that Mr. McEnroe is in possession of information that is material and relevant to Ms. Anderson's case, and due process requires that she be given an opportunity to respond. To the extent the proposed sealed documents relied upon by the trial court in deciding whether Mr. McEnroe or Ms. Anderson should proceed first to trial, the documents inform the court's decision-making process. That decision in turn impacts Ms. Anderson's constitutional trial

rights. Accordingly, Mr. McEnroe's documents contain information relevant to Ms. Anderson and should not be sealed as to her defense counsel.

In addition to her due process rights, Ms. Anderson and the public have the right to open access to the courts pursuant to Article I, §10 of the Washington Constitution, which precludes Mr. McEnroe from being able to withdraw his documents. In *John Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 780-81, 819 P.2d 370 (1991), this Court held that open justice under Article I, §10 "is not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rest all the people's rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations. Indeed, the very first enactment of our state constitution is the declaration that governments are established to protect and maintain individual rights." As the State points out, the federal courts that have enacted a rule permitting withdrawal of a document were not presented with the constitutional issue of open access. *See* Brief of Respondent at 13.

Finally, as noted by the State, there is a substantial risk of prejudice to Ms. Anderson in the event Mr. McEnroe is permitted to present to the court and later withdraw his documents from the record. First, as discussed

above, if denied the opportunity to review his documents, Ms. Anderson will not be able to adequately respond to the motion.

Second, Ms. Anderson is entitled to a record of sufficient completeness for appellate review. *Draper v. Washington*, 372 U.S. 487, 488-89, 83 S.Ct. 774, 9 L.E.2d 899 (1963); *State v. Larson*, 62 Wn.2d 64, 66-67, 381 P.2d 120 (1963). If Mr. McEnroe is able to withdraw his documents, there will not be a sufficient record which an appellate court can review and rely upon in considering the issue of whether the trial judge actually disregarded withdrawn evidence when making a decision about the order of the trials. Mr. McEnroe may respond that trial judges are presumed to follow the law and act impartially. However, in cases where the issue of whether inadmissible evidence was disregarded has been raised, the disputed evidence is actually in the court record for appellate review. *See, e.g., State v. Melton*, 63 Wn. App. 63, 68, 817 P.2d 413 (1991), *review denied*, 118 Wn.2d 1016, 827 P.2d 1011 (1992) (judge able to disregard inadmissible confession); *State v. Jenkins*, 53 Wn. App. 228, 231, 766 P.2d 499 (1989) (judge able to disregard inadmissible hearsay); *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000) (judge able to disregard briefing on outcome of arbitration); *Saari v. Wells Fargo Express Co.*, 109 Wash. 415, 419, 186 P. 898 (1920) (“Although we ordinarily adopt findings of the trial judge upon conflicting facts, we are not

compelled to do so, if we conclude they are not supported by a preponderance of the evidence”). Here, if Mr. McEnroe is permitted to withdraw his documents, there will be no record for review. Accordingly, to the extent Mr. McEnroe’s documents contain information relevant to Ms. Anderson the documents should, at a minimum, be placed in the court record under seal.

In sum, Ms. Anderson has no objection to the court’s sealing Mr. McEnroe’s documents subject to the *Ishikawa* criteria, as long as the trial court provides a copy, in whole or redacted, to Ms. Anderson if they contain information relevant and material to her case.² However, in the event the court denies the motion to seal, Ms. Anderson asserts that Mr. McEnroe should not be permitted to withdraw his documents from the record.

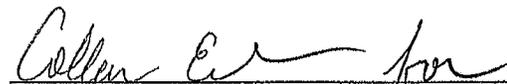
² Mr. McEnroe’s privacy rights and attorney-client information can be adequately protected by a protection order prohibiting Ms. Anderson from disclosing his documents to the prosecution or the public.

E. CONCLUSION

For all of the foregoing reasons, Ms. Anderson asks this Court to decline Mr. McEnroe's request to allow a party who requests the sealing of documents submitted in support of a motion to withdraw said documents from consideration if the court denies the request to seal. To the extent this Court determines the rule needs clarification, Ms. Anderson respectfully suggests this Court clarify that trial courts may review sealed documents *in camera* and provide codefendants who are defending their lives in a capital trial an opportunity to review said documents in order to fully and adequately respond to motions that have a direct impact on their constitutional rights.

Respectfully submitted this 20 day of October, 2011.


Colleen E. O'Connor, WSBA No. 20265


David P. Sorenson, WSBA No. 27617

Attorneys for *Amicus Curiae*, Michele Anderson