71054-1

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No. 91567-9

No. 71054-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

CHRISTOPHER PIRIS,

Appellant,

vs.

ALFRED KITCHING and JANE DOE KITCHING, husband and wife and their marital community, SOCIETY OF COUNSEL REPRESENTING ACCUSED PERSON (SCRAP), ERIC NIELSEN and JANE DOE NIELSEN, husband and wife and their marital community, NIELSEN BROMAN & KOCH PLLC,

Respondents.

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STATE OF WASHINGTON
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KING COUNTY'S RESPONSE BRIEF

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I. INTRODUCTION

Under *Ang v. Martin*, 154 Wn.2d 477, 482, 114 P.3d 637 (2005), a plaintiff convicted of a crime who has received a sentence within the maximum range cannot prevail on a legal malpractice claim unless he proves "actual innocence" by a preponderance of the evidence. Summary judgment was properly granted to the defendants in this legal malpractice action because appellant Piris raised no material issue supporting his actual innocence. Moreover, the trial court should be affirmed on another ground readily supported by the record because Piris' action was filed far outside the applicable statute of limitations.

II. FACTS

Piris was charged by information with three counts of Rape of a Child in the First Degree. CP 40-43. On September 25, 1998, Piris entered a plea of guilty to two counts of Rape of a Child in the First Degree, with an agreement to dismiss the third count. CP 26-38. He acknowledged in the plea that his crime carried a maximum penalty of life in prison. CP 30. The Statement of Offender on Plea of Guilty lists a standard range of 159 to 211 months, CP 30, but acknowledges that the

prosecutor would be seeking imposition of a 211 month incarceration sentence. CP 32.

At sentencing, on May 18, 1999, Judge Mertel imposed a standard range sentence of 159 months. CP 56-67. He rejected a defense request for an exceptional sentence downward. CP 56. The court determined to sentence Piris "at the bottom of the standard range which is . . . . 159 months." CP 69. He confirmed with the Deputy Prosecutor that 159 was the correct lower boundary. *Id.* Piris was then remanded to the custody of the Department of Corrections.

In June 1999, Piris appealed the trial court's sentence. CP 77. His appeal brief pointed out a problem in how the offender score was calculated due to a change in the applicable statute. CP 81-89. The State conceded this error. CP 93.

On February 14, 2000, this Court issued its opinion vacating Piris' incorrect sentence and remanding the case for re-sentencing. CP 90. As is the practice at the Court of Appeals, on the same date, a copy of the decision was sent directly to Piris. CP 91.

In addition, Piris' appellate counsel, Mr. Nielsen, averred – in accord with his "invariable habit, custom and practice" – that he sent a copy of the appellate decision along with a letter of explanation to his

client. CP 99. Mr. Neilsen also claimed that he would have sent his client a copy of the mandate and possibly communicated with him by phone. *Id.*

On April 7, 2000, the mandate issued to the King County Superior Court. CP 95. Unfortunately, the resentencing required by the mandate never took place and the error was never brought to the attention of the Superior Court.

Following his release from DOC custody, Piris violated his post-release supervision conditions. CP 136-139. In late March 2012, he was incarcerated after he was terminated from sex offender treatment. CP 138. He was also violated for consuming alcohol. *Id.*

The legal error in failing to resentence Piris was discovered when he came before the court for his violation behaviors. On May 7, 2012, Judge Bradshaw (who had replaced the now-retired Judge Mertel) re-sentenced Piris to 146 months with credit for time served. CP 126-131.

On March 28, 2013 – over 13 years after this Court issued its resentencing opinion -- Piris initiated a legal malpractice complaint against his trial counsel and appellate counsel. CP 151-155. King County was not named in the original complaint, but was added to this action in late August 2013 through plaintiff's second amended complaint.

On October 4, 2013, Judge Eadie granted Defendant Nielsen et al.'s motion for summary judgment. CP 267. The ruling, which was

based on the *Ang* case, dismissed plaintiff's action against all defendants, including King County.[1] *Id.* After reconsideration was denied, Piris filed a timely Notice of Appeal. CP 263-54.

III. ISSUES

A. Did the trial court correctly grant summary judgment under the *Ang* decision when Piris failed to present any evidence of his actual innocence? Yes.

B. Should this Court affirm when the record is undisputed that plaintiff waited over 13 years to file this legal malpractice action? Yes.

IV. LEGAL ARGUMENT

A. DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT BECAUSE PIRIS PRESENTED NO EVIDENCE OF HIS ACTUAL INNOCENCE

King County joins in the briefing submitted by defendant Kitching and SCRAP that the "actual innocence" rule of *Ang* bars Piris' action. *See* Response Brief of Kitching and SCRAP at 5-15. In this case, Piris' maximum sentence was life in prison. Although his initial sentence of 159 months was based on an incorrect standard range, it fell within the revised

[1] Summary judgment may be granted to a nonmoving party "if it becomes clear that he or she is entitled thereto" and the original moving party has had an adequate opportunity to present materials and argument in rebuttal. *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn. App. 231, 236, 189 P.3d 253, 256 (2008)(*quoting* 14A Karl B. Tegland, Washington Practice: Civil Procedure § 25.13, at 100 (2003)). In this case, the *Ang* argument worked to the benefit of all defendants because plaintiff's claims were centered in malpractice.

standard range and well-within the maximum sentence of life. Because *Ang* controls, Piris made no showing of "actual innocence," and Piris does not satisfy the narrow exception recognized in *Powell v. Associated Counsel for the Accused*, 125 Wn.App. 773, 106 P.3d 271 (2005), the trial court correctly granted summary judgment for defendants.

The public policy considerations recognized in *Ang* are well-served under the facts of this case. It is entirely speculative to claim that Judge Mertel would have re-sentenced Piris to the very bottom of the standard range (had the matter come back before the court in 2000 per the mandate), rather than the 159 month sentence that was originally issued by Judge Mertel. The original 159 month standard range sentence was deemed just by Judge Mertel, and remained an available, legal sentence on remand under the corrected standard range. There is no reason to assume that Judge Mertel would have altered Piris' sentence on remand. After all, Judge Mertel specifically declined to impose a sentence of less than 159 months when he rejected the defense request for an exceptional sentence downward. CP 56. The fact that Judge Bradshaw later determined to re-sentence Piris to 146 months does not inform how Judge Mertel would have acted if the remand had happened in 2000.

In this light, the rules requiring a defendant to prove actual innocence, or an illegal sentence *outside the maximum term* make sense.

Having committed a serious violent offense, Piris opened himself up to any sentence within the standard range, or the maximum term. It is Piris' own admitted conduct that caused his lawful sentence. Judge Mertel determined that 159 months was a sentence justified by Piris' criminal conduct and there is no proof available to Piris to demonstrate that he would have received a lesser sentence upon timely remand proceedings. Because the likely length of plaintiff's re-sentence by Judge Mertel is beyond proof (i.e. entirely speculative), and a guilty plaintiff/criminal defendant is barred from assigning responsibility to others (including his attorneys), the trial court correctly granted summary judgment.

The *Ang* decision dictates this result. As such, this Court should affirm.

B. PIRIS' ACTION WAS WELL OUTSIDE THE STATUTE OF LIMITATIONS

It is well established in Washington that "an appellate court may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof." *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061, 1064 (2003). *Accord Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn. App. 231, 240, 189 P.3d 253, 258 (2008)("The appellate court may

affirm the trial court on any theory supported by the record, even if the trial court did not consider it.").

"The statute of limitations for a legal malpractice action in Washington is three years." *Huff v. Roach,* 125 Wash.App. 724, 729, 106 P.3d 268 (2005). The purpose of such limitation periods is to protect the defendant and the courts from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost. *Douchette v. Bethel Sch. Dist. No. 403,* 117 Wn.2d 805, 813, 818 P.2d 1362 (1991). A party must exercise reasonable diligence in pursuing a legal claim and, if such diligence is not exercised in a timely manner, the cause of action will be barred by the statute of limitations. *Reichelt v. Johns–Manville Corp.,* 107 Wn.2d 761, 772, 733 P.2d 530 (1987).

The statute of limitations begins to accrue when the plaintiff has a right to seek legal relief. *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 816, 120 P.3d 605, 608 (2005). Washington follows the "discovery rule" in legal malpractice actions:

> Under the discovery rule, the statute of limitations in a legal malpractice action begins to accrue when the client " 'discovers, or in the exercise of reasonable diligence should have discovered the facts which give rise to his or her cause of action.' " For the discovery rule to apply, the plaintiff need not know of the legal cause of action itself. Rather, she must know the facts that give rise to that cause of action. In addition, she must know the facts supporting each essential element of the cause of action before the limitations period begins to accrue.

Id. at 816-17 (footnotes omitted).

Although the discovery rule sometimes raises questions of fact, the current case allows its application as a matter of law to affirm the judgment of the trial court. *Id.* at 818 (where "reasonable minds could not differ, [the discovery rule] is a question of law."). Here, the record is undisputed that Piris was sent a letter from this Court on February 14, 2000, which informed him that (1) he was sentenced under the wrong statute, and (2) he was entitled to a remand for re-sentencing. CP 90-91. The record also shows that appellate counsel, Mr. Neilsen, sent Piris a copy of the favorable appellate decision with a letter of explanation. CP 99.

Thus, by no later than February 14, 2000, Piris was fully aware that his sentence was computed contrary to statute and that he possessed a right to be resentenced for his crimes. Because Piris "knew, or should have known, of the facts underlying [his] cause of action at the time the events were occurring, the statute of limitations began to accrue when the events took place." *Cawdrey,* 129 Wn. App. at 818. His decision to wait until March 28, 2013 before filing his malpractice action – over 13 years *after* he was notified of this Court's decision in his favor – violates the

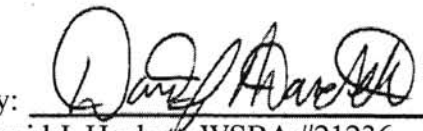
statute of limitations. Because Piris' action is untimely, this Court can affirm the trial court on this independent grounds.[2]

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's grant of summary judgment for the defendants..

DATED this 17th day of March 2013.

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: _____
David J. Hackett, WSBA #21236
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Attorneys for King County

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[2] This is not a case for application of the "continuous representation rule." *Cawdrey,* 129 Wn. App. at 819. There is no indication in the record, nor can any be alleged, that defendants were actively providing legal representation and advice to Piris on the resentencing during the 13 years following issuance of the Court of Appeals decision requiring the resentencing proceeding. Even under the continuous representation rule, the statute begins to run when "the attorney stops representing the client on the *particular matter in which the alleged malpractice occurred.*" *Id.* (emphasis in original).

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2014, I caused the foregoing King County's Response Brief to be filed with the WA Court of Appeals, Division I via U.S. First Class Mail, postage prepaid, and served the same via U.S. First Class Mail, postage prepaid, to the following:

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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 17th day of March, 2014, at Seattle, Washington

s/ Karen Richardson
Karen Richardson
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King County Prosecuting Attorney's Office