

FILED
SUPREME COURT
STATE OF WASHINGTON
4/29/2019 2:51 PM
BY SUSAN L. CARLSON
CLERK

NO. 96566-8

IN THE SUPREME COURT OF WASHINGTON

PHILLIP SCOTT NUMRICH,

Petitioner.

v.

STATE OF WASHINGTON,

Respondent.

PETITIONER'S REPLY IN SUPPORT OF MOTION FOR
DISCRETIONARY REVIEW

ALLEN, HANSEN, MAYBROWN
& OFFENBECHER, P.S.

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A. ARGUMENT IN REPLY

1. Two Different Judges Have Issued Certifications

The State argues that Mr. Numrich has not shown that discretionary review is warranted under RAP 2.3(b), including arguing, *inter alia*, that this matter does not involve a legal question as to which there is a substantial ground for a difference of opinion. State’s Answer to Motion for Discretionary Review (“SAMDR”) at 19. The State’s argument is unavailing.

Two different King County Superior Court judges have certified for interlocutory review the issues in these related Motions for Discretionary Review. First, on August 23, 2018, King County Superior Court Judge John Chun certified the original denial of Mr. Numrich’s motion to dismiss the manslaughter in the second degree charge, finding that its order “involves controlling questions of law as to which there are substantial grounds for a difference of opinion and that immediate review of the Order may materially advance the ultimate termination of the litigation.” Motion for Discretionary Review (“MDR”) Appendix 171-72.¹

Then, following the State’s untimely amendment to add manslaughter in the first degree, Judge James Rogers certified the Order on Motion to Amend: “The Order Granting the Amendment only is hereby certified for

¹ Judge Chun has since been appointed to the Washington State Court of Appeals.

appeal to join the discretionary appeal currently pending in the Washington Supreme Court.” MDR Appendix 2-3.²

Accordingly, while these two experienced judges disagreed with Mr. Numrich’s arguments regarding certain legal issues, they both recognized that these were novel matters that warranted interlocutory appellate review.

2. The State’s Recitation of Facts Obscures the Unique History of this Case

The superior court’s Order on Motion to amend relied on a factual finding that the prosecutor “did not consider the amendment until very late in the pending appellate process.” MDR Appendix 1. That finding is not only unsupported by the evidence, it is directly contradicted by the State’s admission that it knew of the amendment at the *beginning* of the litigation: “[a]t the time [of filing], the State had concluded that there was probable cause to charge Numrich with either first-or second-degree manslaughter.” SAMDR at 1. The State has conceded that “second-degree manslaughter was filed initially and the decision of whether to add first-degree manslaughter was reserved to a later time.” *Id.* If true, the State’s

² The State argues that “the trial court properly exercised its discretion in rejecting” Mr. Numrich’s argument that prosecuting him for first-degree manslaughter violates Washington’s general-specific rule. SAMDR at 17. However, the November 1, 2018 Order on Motion to Amend contained no mention of the general-specific rule. *See* MDR Appendix 1-3. It seems clear that the court desired that the appellate courts resolve that issue with regard to the first-degree manslaughter charge. *See, e.g., id.* at 2 (“these issues are obviously intertwined with the issues on discretionary appeal”).

intentional failure to provide notice of this extraordinary amendment warrants a sanction beyond attorney fees.

The charges were the result of a two-year investigation, which culminated in the filing of an Information on January 5, 2018 charging Mr. Numrich with two criminal offenses:

there is probable cause to believe that Phillip Numrich committed the crime of Manslaughter in the Second Degree within King County in the State of Washington. There is also probable cause to believe that Phillip Numrich committed the crime of Violation of Labor Safety Regulation with Death Resulting within King County in the State of Washington in violation of RCW 49.17.190.

MDR Appendix 108. The charging documents make no mention of manslaughter in the first degree or any potential amendments.

From the outset, this case was vigorously litigated, carefully managed by the superior court, and heavily staffed by a team of experienced prosecutors. At arraignment on January 16, 2018, the State was represented by the (then) chair of the Economic Crimes Unit of the King County Prosecutor's Office.³ Counsel for Mr. Numrich orally alerted the superior

³ Mr. Numrich notes the staffing and case management facts because they reflect the resources and attention that the Court and prosecutor's office invested in this case. This is not a case that sat dormant on the calendar for months. Nor is it a case that was handled by a "talking head"/calendar DPA or assigned to an "Early Plea Unit" prosecutor responsible for negotiating hundreds of cases. Rather, this case was staffed by a team of experienced, pre-assigned prosecutors. Because this case involved such immediate complex litigation, the superior court carefully managed the case based on the parties' representations. All of this attention makes the State's belated amendment more egregious.

court of the defendant's intent to move to dismiss under the general-specific rule. The State made no mention of any potential amendment.

Less than two weeks later, Mr. Numrich's counsel met with a team of prosecutors assigned to the Numrich case. Counsel discussed the merits of the case and the anticipated defense motion to dismiss. The State made no mention of any potential amendment.

Thereafter, numerous hearings occurred. In total, the parties appeared for *nine different hearings* in superior court between the filing of charges in January 2018 and when the State provided notice of its amendment on October 18, 2018. *See* Appendix 1-5. At many of these hearings the State was represented by a team of two prosecutors.⁴

The parties agreed in an order signed by the Criminal Presiding Judge that it was anticipated the losing party would seek discretionary review. MDR Appendix 232-36. The State made no mention of any potential amendment during scheduling or appeal discussions.

The parties had a lengthy argument on the merits of Mr. Numrich's motion to dismiss. The State was represented by its preassigned team of two prosecutors. The State made no mention of any potential amendment.

⁴ *See* Appendix 6-12 (selected Clerk's Minutes) (March 21, 2018 hearing - State represented by Senior DPA who is the new chair of the Economic Crimes Unit, in addition to a second prosecutor; July 19, 2018 - same two prosecutors; August 23, 2018 - same two prosecutors; October 1, 2018 hearing - same two prosecutors). At the April 30 and May 29, 2018 hearings the State was represented by the Senior DPA. *Id.*

The parties had a lengthy argument regarding certification of the superior court's order denying Mr. Numrich's motion to dismiss. The State was represented by the same team of two experienced prosecutors. The State made no mention of any potential amendment.

Two more months passed. Mr. Numrich filed his anticipated discretionary review pleadings in this Court. The parties appeared in superior court on the State's motion to amend conditions of release. The State was represented by the same team of two experienced prosecutors. Still, the State made no mention of any potential amendment.

3. The State's Inexplicable Delay Leads to at Least a Presumption of – if Not a Finding of Actual – Prosecutorial Vindictiveness

“Prosecutorial vindictiveness is [the] intentional filing of a more serious crime in retaliation for a defendant's lawful exercise of a procedural right.” *State v. McKenzie*, 31 Wn.App. 450, 452, 642 P.2d 760 (1981).

Here, the State intentionally filed “a more serious crime” at the precise time that Mr. Numrich was lawfully exercising a procedural right. The overwhelming evidence suggests it was an opportunistic tactic intended to disadvantage Mr. Numrich in the appellate proceedings and to penalize him for seeking interlocutory review.

The State argues that it “has provided a lengthy and detailed explanation of how and why the motion to amend came about when it did.”

SAMDR at 14. But the State has never provided a credible explanation for why it failed to notify the defense and the Court of the expected amendment throughout the many months of litigation. The State repeatedly asserts that Mr. Numrich never asked about any amendments and offers that the case had not yet been set for trial. SAMDR at 3. But these arguments are unavailing given the unique history of this case. There were dozens of opportunities between January 2018 and October 2018 for the State to provide notice of the expected amendment. If notice had been provided, Mr. Numrich and the court would have had a reasonable opportunity to reflect on how the amendment might impact the course of these proceedings. Instead, the State waited until the 11th hour to provide notice in its brief to this Court. The State's delay is objectively unreasonable and constitutes prosecutorial vindictiveness in the context of this case. *See Blackledge v. Perry*, 417 U.S. 21, 27 (1974) ("it was not constitutionally permissible for the State to respond to [defendant's] invocation of his statutory right to appeal by bringing a more serious charge against him").⁵

4. The Trial Court's Remedy Is Based on an Erroneous Factual Finding Regarding the Prosecutor's Intent

⁵ Notably, the State failed to respond to Mr. Numrich's extensive discussion regarding *Blackledge*, in which the United States Supreme Court rejected as vindictive remarkably similar conduct by the State. *See* MDR at 14-15; Statement of Grounds for Direct Review at 12-13.

As discussed *supra*, the Order on Motion to Amend relied on a factual finding that is contradicted by the record. *Compare* MDR Appendix 1 (Order on Motion to Amend finding the prosecutor “did not consider the amendment until very late in the pending appellate process”), *with* SAMDR Appendix 1 at ¶ 6-7 (Declaration of Patrick Hinds, conceding that the State believed at the time of charging there was probable cause to charge manslaughter in the first degree, and the State chose “to reserve the decision on whether to amend to Manslaughter in the First Degree”).

In actuality, the prosecutor made a conscious decision to *not* advise Mr. Numrich and the court of the possible amendment at the beginning of the litigation, and then sat silent as everyone else in the system – Mr. Numrich, his lawyers, the judges, and the court staff – labored under the false impression that the parties were litigating the dispositive legal issue regarding the felony manslaughter charge.

Because the trial court relied on an erroneous factual finding regarding such a critical issue – the prosecutor’s intent regarding the amendment during these months of litigation – the trial court failed to properly evaluate the other important punitive and deterrent purposes of sanctions. *See, e.g., Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993)(“[t]he purposes of sanctions orders are to deter, to punish, to compensate and to educate”);

id. at 355–56 (“[t]he sanction should insure that the wrongdoer does not profit from the wrong”). This Court has made clear that an important purpose of sanctions is to deter future misconduct:

Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.

Fisons Corp., 122 Wn.2d 299 at 355 (quoting Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181, 184 (1985)). “[S]anctions need to be severe enough to deter these attorneys and others from participating in this kind of conduct in the future.” *Id.* at 356.

The State of Washington has resources that dwarf those of any individual litigant who appears in its courts. Particularly in criminal cases, the disparity between the resources of the State and individuals accused of criminal offenses – many of whom are poor, mentally ill, and come from disadvantaged backgrounds or marginalized groups – is overwhelming. Minor financial sanctions, imposed sporadically to remedy the State’s misconduct in criminal cases, are insufficient to deter future misconduct. In criminal cases, true deterrence is achieved by depriving the State of its awesome criminal charging power.⁶

⁶ For example, one of the important purposes behind the rule excluding illegally obtained evidence is to deter future misconduct. *See, e.g., State v. Bonds*, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982) (noting one of the purposes of the exclusionary rule is to “deter the police from acting unlawfully in obtaining evidence”); *State v. Eserjose*, 171 Wn.2d 907, 918, 259 P.3d

Here, the State employed tactics that were incredibly disruptive to the judicial process and disregarded basic notions of notice and fair dealing. The State should not be able to buy its way out of the disorder that it created. A financial sanction is insufficient to punish and deter the State from engaging in such future misconduct. Accordingly, this Court should accept review and impose a sanction to include reversal of the superior court's order permitting the amendment.

5. Governmental Misconduct and the Law Relating to CrR 8.3(b) are Properly Before this Court

The State argues that Mr. Numrich's discussion of CrR 8.3(b) and mismanagement is not properly before this Court.⁷ It is impossible to evaluate delayed amendments without reviewing CrR 8.3(b).

Caselaw interchangeably addresses belated criminal amendments under both CrR 2.1(d) and CrR 8.3(b). *Compare State v. Lamb*, 175 Wn.2d 121, 130, 285 P.3d 27 (2012) (trial court did not abuse discretion in denying State's motion to amend under CrR 2.1(d)), *and State v. Rapozo*, 114 Wn.App. 321, 322-24, 58 P.3d 290 (2002) (court did not abuse its discretion

172 (2011) ("our state's exclusionary rule, like its federal counterpart, aims to deter unlawful police conduct").

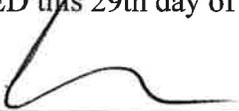
⁷ Issues pertaining to CrR 8.3(b) were briefed extensively and ruled on in the superior court. *See* MDR Appendix 211-18 (Defendant's Motion to Dismiss Pursuant CrR 8.3(b), or Alternatively to Reconsider Order on Motion to Amend); MDR Appendix 5 (characterizing and denying the defense motion as a "Motion to Reconsider").

in denying the motion to amend under CrR 2.1(d), noting “the State had ample opportunity to correct the charge before trial as almost two months had passed between charging and trial”), *with State v. Michielli*, 132 Wn.2d 22, 239–40, 937 P.2d 587 (1997)(dismissal under CrR 8.3(b) was appropriate where there was no “justification for the delay in amending the information” and “the State’s dealing with Defendant would appear unfair to any reasonable person”), *and State v. Sherman*, 59 Wn.App. 763, 770, 801 P.2d 274 (1990)(affirming dismissal under CrR 8.3(b) due to the State’s belated Amended Information and other discovery: a defendant may be prejudiced “if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process”). Accordingly, the record is more than sufficient to provide a basis to review the CrR 8.3(b) arguments, which are inextricably linked to the CrR 2.1 amendment issues.

II. CONCLUSION

For the foregoing reasons, Mr. Numrich respectfully requests this Court accept discretionary review.

RESPECTFULLY SUBMITTED this 29th day of April, 2019.


#40690
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Attorneys for Appellant

PROOF OF SERVICE

Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 29th day of April, 2019, I filed the above Reply in Support of Motion for Discretionary Review via the Appellate Court E-File Portal through which Respondent's counsel listed below will be served:

Patrick Hinds, Senior DPA
Eileen Alexander, DPA
King County Prosecutor's Office
King County Courthouse
516 Third Avenue, W554
Seattle, WA 98104

And e-mailed to Appellant Phillip Numrich.

DATED at Seattle, Washington this 29th day of April, 2019.


Sarah Conger, Legal Assistant

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Minute No: 17

CLERK'S MINUTES - Criminal Arraignment Calendar

SCOMIS ARRAIGN HCNTU MTHRG DSMHRG HSTKIC

Judge	O'DONNELL, SEAN	Date	1/16/2018
Clerk	SHAYLYNN NELSON	DR	E1201
DPA	Melinda Young	Start Time	08:37:16
Interpreter		Court Reporter	

King County Cause No: 181002555 SEA STATE vs NUMRICH, PHILLIP SCOTT

Reason		AKA	
DPA Unit		DOB	5/19/1977
ATD	TODD MAYBROWN	CCN	1795010
Defendant Present	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Custody Status	OUT CUSTDY
Charge(s)	1 Manslaughter In The	Commence Date	1/18/2018
Jail Location		60 Day Date	
Bail Amount	\$20,000.00	90 Day Date	05/14/2018
Bond Company		Current Bail Type	
		Bond Confirmed	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

- Defendant is arraigned and enters a plea of NOT GUILTY Objection Noted Yes No
- Case Setting Date 02/12/2018 No Contact Order entered
- Defendant's motion to reduce bond Denied Reserved Granted PR \$0.00
- On Basic CCAP Enhanced CCAP EHD Enhanced WER
- State's motion for bench warrant for Defendant Denied Granted \$0.00
- Order(s) Signed/Order(s) to be presented
- State's motion to dismiss this cause as to this Defendant Denied Granted
- State Defense motion for Stay of Proceedings, and Continuance to
- Order directing finger printing is signed

Agreed Findings of Fact Conclusions of Law and order are signed

Return Date is

Order Sealing document is signed

CLERK'S MINUTES

SCOMIS CODE: MTHRG

Judge: John Chun/Sean O'Donnell
 Bailiff: Jill Gerontis/Rianne Rubright
 Court Clerk: Shaylynn Nelson
 Digital Record: E-1201
 Start: 11:02:30 01:06:30
 Stop: 11:06:24 01:36:54

Dept. 16 & 29
 Date: 3/21/2018

KING COUNTY CAUSE NO.: 18-1-00255-5 SEA

State of Washington vs. Phillip S. Numrich

Appearances:

State appearing by DPA Patrick Hinds and Eileen Alexander
 Defendant is present and represented by counsel Todd Maybrown
 Department of Labor and Industries representative Eric Smith is present.

MINUTE ENTRY

- Defendant's motion to reduce bond is granted. Bail set at \$
- Defendant's motion to release to/transfer to/reinstate CCAP Basic is granted.
- Defendant's motion to continue trial date is granted.
- Omnibus date: Trial date: Expiration date:
- Case scheduling date: Expiration date:
- Defendant's motion to quash bench warrant is granted.
- Defense counsel's motion to withdraw is granted.
- State's motion to amend information is granted.
 Defendant is arraigned on the amended information and enters a plea of not guilty.
- Defendant failed to appear. Bench warrant issued. Bail set at \$
- Order Striking Trial Date signed.
- Confirmation of counsel.
- State's motion to amend conditions of release is granted.
-
- No Contact Order is entered.
- Order(s) signed.

**CLERK'S MINUTES
CASE SCHEDULING CALENDAR**

SCOMIS CODE: HCNTU

Judge: Sean O'Donnell
Bailiff: Rianne Rubright
Court Clerk: Shaylynn Nelson
Digital Record: E-1201
Start: 01:17:40
Stop: 01:21:08

Dept. 29
Date: 4/30/2018

KING COUNTY CAUSE NO.: 18-1-00255-5 SEA

State of Washington vs. Phillip S. Numrich

Appearances:

State appearing by DPA Patrick Hinds
Defendant present and represented by counsel Danielle Smith

MINUTE ENTRY

- Agreed continuance to: 05/29/2018 Expiration date: 08/27/2018
- Scheduling hearing is held.
Omnibus date: Trial date: Expiration date:
- State's motion for issuance of bench warrant is granted. Bail set at \$
- State's motion to dismiss is granted.
- State's motion to amend information is granted.
Defendant is arraigned on the amended information and enters a plea of not guilty.
- Defendant's motion to quash bench warrant is granted.
- Defense motion for pretrial competency evaluation is granted. Return date:
-
-

Order(s) signed.

**CLERK'S MINUTES
CASE SCHEDULING CALENDAR**

SCOMIS CODE: HCNTU

Judge: Sean O'Donnell
Bailiff: Rianne Rubright
Court Clerk: Shaylynn Nelson
Digital Record: E-1201
Start: 01:04:50
Stop: 01:06:17

Dept. 29
Date: 5/29/2018

KING COUNTY CAUSE NO.: 18-1-00255-5 SEA

State of Washington vs. Phillip S. Numrich

Appearances:

State appearing by DPA Patrick Hinds
Defendant present and represented by counsel Danielle Smith

MINUTE ENTRY

- Agreed continuance to: 06/26/2018 Expiration date: 09/24/2018
- Scheduling hearing is held.
Omnibus date: Trial date: Expiration date:
- State's motion for issuance of bench warrant is granted. Bail set at \$
- State's motion to dismiss is granted.
- State's motion to amend information is granted.
Defendant is arraigned on the amended information and enters a plea of not guilty.
- Defendant's motion to quash bench warrant is granted.
- Defense motion for pretrial competency evaluation is granted. Return date:
-
-

Order(s) signed.

CLERK'S MINUTES

SCOMIS CODE: MTHRG

Judge: John Chun
Bailliff: Jill Gerontis
Court Clerk: Dawn Tubbs

Dept. 16
Date: 7/19/2018

Digital Record: W 739
Start: 1:26:56
Stop: 2:32:04

KING COUNTY CAUSE NO.: 18-1-00255-5 SEA

State of Washington v Phillip Numrich

Appearances:

State appearing by DPA Patrick Hinds, Eileen Alexander
Defendant present, represented by counsel Todd Maybrow

MINUTE ENTRY

Defendant's motion to dismiss CT 1 - - Manslaughter 2

Defendant's motion to strike State's surresponse is denied

Respective counsel present oral argument

Court reserves ruling

Discussion re certification to Court of Appeals. Request is reserved, subject to the Court's ruling

Discussion re case setting

Case setting hearing 8-23-18 at 1:30 p.m.

Order to be presented

Rev: 10/24/12

Reply in Support of Motion for Discretionary Review

Page 1 of 1

Appendix - 10

CLERK'S MINUTES

SCOMIS CODE: MTHRG

Judge: John H. Chun
Bailiff: Teri Bush
Court Clerk: Andre' Jones
Digital Record: W 739
Start: 1:30:00
Stop: 1:52:10

Dept. 16
Date: 8/23/2018

KING COUNTY CAUSE NO.: 18-1-00255-5 SEA

State of Washington vs. Phillip Numrich

Appearances:

State appearing by DPA Patrick Hinds/Eileen Alexander

Defendant present and represented by counsel Cooper Offenbecher filling in for Todd Maybrown

MINUTE ENTRY

Respective counsel and defendant present

Defendant's motion to dismiss Ct. 1 Manslaughter 2

Counsel make oral arguments

Court's ruling: Defendant's motion is reserved

Orders to be presented

CLERK'S MINUTES

SCOMIS CODE: MTHRG

Judge: Marshall Ferguson
Bailiff: Kiese Wilburn
Court Clerk: Shaylynn Nelson
Digital Record: E-1201
Start: 11:06:15
Stop: 11:36:45

Dept. 31
Date: 10/1/2018

KING COUNTY CAUSE NO.: 18-1-00255-5 SEA

State of Washington vs. Phillip S. Numrich

Appearances:

State appearing by DPA Patrick Hinds and Eileen Alexander
Defendant is present and represented by counsel Cooper Offenbecher

MINUTE ENTRY

- Defendant's motion to reduce bond is granted. Bail set at \$
- Defendant's motion to release to/transfer to/reinstate EHD is granted.
- State's motion to continue trial date is granted.
- Omnibus date: Trial date: Expiration date:
- Case scheduling date: 12/05/2018 Expiration date: 03/03/2019
- Defendant's motion to quash bench warrant is granted.
- Defense counsel's motion to withdraw is granted.
- State's motion to amend information is granted.
Defendant is arraigned on the amended information and enters a plea of not guilty.
- Defendant failed to appear. Bench warrant issued. Bail set at \$
- Order Striking Trial Date signed.
- Confirmation of counsel.
- State's motion to revoke PR and impose bail is denied.
-
- No Contact Order is entered.
- Order(s) signed.

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

April 29, 2019 - 2:51 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96566-8
Appellate Court Case Title: State of Washington v. Phillip Scott Numrich
Superior Court Case Number: 18-1-00255-5

The following documents have been uploaded:

- 965668_Answer_Reply_20190429145026SC260067_8742.pdf
This File Contains:
Answer/Reply - Reply to Answer to Motion for Discretionary Review
The Original File Name was REPLY IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW.pdf

A copy of the uploaded files will be sent to:

- eileen.alexander@kingcounty.gov
- paoappellateunitmail@kingcounty.gov
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