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NO. 96566-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

PHILLIP NUMRICH,

Respondent.

**STATE'S REPLY IN SUPPORT OF
MOTION FOR DISCRETIONARY REVIEW AND
STATEMENT OF GROUNDS FOR DIRECT REVIEW**

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A. ARGUMENTS IN REPLY

1. NUMRICH’S ATTEMPT TO DISTINGUISH GASSMAN¹ IS UNPERSUASIVE

Under State v. Gassman, 175 Wn.2d 208, 263 P.3d 113 (2012), a trial court can only impose sanctions against the State for the “untimely” filing of a motion to amend if it finds that the State acted in “bad faith” or engaged in conduct “tantamount to bad faith.” 175 Wn.2d at 201-11. This Court’s holding in Gassman is straightforward and review here is appropriate because the trial court failed to follow it.

In his answer, Numrich cites to a portion of the Gassman opinion wherein this Court discussed various concessions made by the defense attorney in that case and asserts that these facts make Gassman distinguishable from this case. Answer at 8-9.² But this misreads the import of those facts. The concessions made by the defense attorney were relevant in Gassman given the procedural posture of the case and the lack of clarity in the record on appeal. 175 Wn.2d at 212-13. In addition, they were part of this Court’s analysis in reaching the conclusion that the record did not support a finding of conduct tantamount to bad faith in that

¹ State v. Gassman, 175 Wn.2d 208, 263 P.3d 113 (2012)

² Numrich’s “ANSWER TO MOTION FOR DISCRETIONARY REVIEW AND STATEMENT OF GROUNDS FOR DIRECT REVIEW” was filed on April 23, 2019 and will hereinafter be cited to as “Answer.”

case. Id. But these facts do not alter the basic rule of Gassman that sanctions are only appropriate for an untimely amendment if the State acted in bad faith or engaged in conduct tantamount to bad faith. Id.

When the actual rule from Gassman is applied to the facts of this case, it is apparent that sanctions were not appropriate. Here, the trial court imposed sanctions based on its conclusion that the State's motion to amend was untimely despite finding that the motion was not brought for any improper purpose. State MDR App. at 269-271.³ And, despite Numrich's arguments to the contrary, as discussed below the State did not act in bad faith or engage in conduct tantamount to bad faith. As a result, the trial court abused its discretion when it imposed sanctions based on its belief that the State could and should have brought the motion to amend earlier.

2. THE STATE DID NOT ENGAGE IN CONDUCT TANTAMOUNT TO BAD FAITH

The State has repeatedly explained how and why the motion to amend came about when it did. State MDR at 2-7; State MDR App. at 1-9, 133-135, 233-267. This includes the fact that the motion was not brought to retaliate against Numrich for seeking discretionary review, to gain advantage

³ The State's "MOTION FOR DISCRETIONARY REVIEW AND STATEMENT OF GROUNDS FOR DIRECT REVIEW" in this matter was filed on March 22, 2019 and will hereinafter be cited to as "State MDR." The appendices attached to that brief will hereinafter be cited to as "State MDR App."

in the appellate litigation, or for any other improper purpose. State MDR App. at 1, 135. In granting the motion to amend, the trial court essentially accepted the State's explanation, finding that State's counsel had been candid with the court and that there was no evidence that the State's actions were vindictive or otherwise improper. State MDR App. at 268-271. In his motion to dismiss and/or reconsider, Numrich accused the State of engaging in conduct tantamount to bad faith and/or of misleading the trial court. State MDR App. at 325-332. In denying Numrich's motions, the trial court implicitly rejected his accusations and did not disturb its earlier findings regarding the State's explanation of events. State MDR App. at 403-404.

In his answer to the State's motion for discretionary review, Numrich again argues that the record demonstrates that the State's conduct in moving to amend the Information was tantamount to bad faith. Answer at 10-14. However, Numrich's entire argument is fundamentally premised on two assertions that are not supported by the record. First, Numrich asserts that trial court's conclusion that counsel for the State was candid with the court during oral argument on the motion to amend is "at odds with the State's recent statement that the manslaughter first degree charge was always a "hold back" charge[.]" Answer at 10. Put another way, Numrich essentially asserts that the State has changed its explanation of events over time. Answer at 10-14. Numrich's argument on this point is virtually identical to

one he made in the trial court. Compare Answer at 10-14 with State MDR App. at 304-335. The trial court implicitly rejected these arguments when it denied his motions to dismiss and/or reconsider the amendment. State MDR App. at 403-404. And Numrich has not presented any compelling argument that the trial court erred in reaching that conclusion. Nor is there any basis in the record to support the assertion that the State has changed its explanation on this point. To the contrary, the State's explanation has remained the same throughout this matter. State MDR App. at 1-9, 25-57, 133-136, 233-268, 283-294, 379-396.

In particular, the State has indicated that it always believed that there was probable cause to charge Numrich with first-degree manslaughter, but decided not to file that charge initially and to reserve the decision on whether to add it later. State MDR App. at 2, 252-254. Numrich mischaracterizes this as being a statement that the State always intended to *actually* amend the charges and consciously withheld that information from the defense and the court. Answer at 10-14. But that is not what the State said, nor is it a reasonable interpretation of the State's explanation. Here, the State was not intentionally or consciously withholding information. Rather, the State itself simply did not think of or consider the potential amendment of charges between early 2018 (the time of the filing of the initial charges) and October of 2018 (the time that counsel for the State was drafting the response to

Numrich's briefing in this Court). State MDR App. at 4-6, 252-254. Nor was the decision to seek amendment a foregone conclusion. Rather, the reason that the State ultimately decided to bring the motion to amend at that time was out of concern that it could lose the option of amending due to the running of the Statute of Limitations if it did not. State MDR App. at 2, 6-7. Nor is this explanation anything new. The State made this same point in its briefing and argument on the motion to amend. State MDR at 233-267.

Second, Numrich accuses the State of having "misled" the court and the defense. Answer at 13-14. Numrich's argument on this point is also virtually identical to one he made in the trial court in support of his motion to dismiss and/or reconsider the granting of the amendment. Compare Answer at 10-14 with State MDR App. at 304-335. The trial court also implicitly rejected these arguments when it denied those motions. State MDR App. at 404-405. And Numrich has not presented any compelling argument that the trial court erred in reaching that conclusion.

More specifically, Numrich accuses the State of misleading the court and defense into believing that the decision on his motion to dismiss the count of second-degree manslaughter "would be the dispositive decision regarding the felony homicide charge under the general specific-rule [sic]." Answer at 13. But the State did no such thing. Here, Numrich brought a motion to dismiss one of the counts charged in the original Information. The

State opposed that motion and it was briefed and litigated. Nowhere in that process did the State offer any assurance that the court's ruling would be dispositive of any issues beyond those specifically raised by Numrich's motion or necessarily resolved by the court's decision.

Nor was Numrich ever "misled" as to the possibility of an amendment to the charges. Rather, his defense apparently simply failed to consider the possibility that the State would seek such an amendment. But the blame for this can hardly be laid at the State's feet. Here, the specific issue of possible amendments to the charges was never discussed by the parties one way or the other. State MDR App. at 1-9. However, the State certainly never did anything to indicate that it was foreclosing the possibility that it might—consistent with its long standing policy and practice—move to amend the charges at a later date. State MDR App. at 1-9. And the facts giving rise to the first-degree manslaughter charge added by the amendment are all readily apparent in the discovery that was provided to Numrich. (Indeed, the first-degree manslaughter charge arises from the same nexus of facts as the original charges and is essentially identical to the second-degree manslaughter charge except that it requires proof of a higher level of *mens rea*.) Against this backdrop, the defense apparently made an incorrect assumption about what the State might do and pursued a litigation strategy based on that assumption. In that context, the fact that the State did not act

as the defense expected does not mean that the State misled the defense.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THAT THE AMOUNT OF HOURS CLAIMED WAS REASONABLE

In the litigation before the trial court regarding the amount of attorneys' fees, the State raised significant questions about the adequacy of the billing records provided by Numrich and pointed to numerous specific billing entries that appeared problematic. State MDR App. at 419-435. In his answer, Numrich argues that he submitted detailed timesheets, that the trial court is not required to provide a detailed analysis of each expense claimed, and that the trial court's findings were sufficient to demonstrate that it had adequately considered these issues. Answer at 15-16. But this both ignores the caselaw and overstates the analysis conducted by the trial court.

While it may be true that, as Numrich argues, the "determination of the fee award should not be an unduly burdensome proceeding,"⁴ courts are still required to take an "active role" in assessing the reasonableness of the hours claimed. Mahler v. Szucs, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998). And that active role must be reflected in the trial court's findings and conclusions. Berryman v. Metcalf, 177 Wn. App. 644, 658, 312 P.3d 745 (2013). While a trial court "does not need to deduct hours here and

⁴ Answer at 15, quoting Steele v. Lundgren, 96 Wn. App. 773, 786, 982 P.2d 619 (1999).

there just to prove...that it has taken an active role,” it *is* required to enter findings that show how it resolved disputed issues and conclusions that explain its analysis. Id. Even where a trial court enters findings and conclusions, it still commits reversible error when they are so conclusory that they fail to do this. Id. at 658-59.

Here, despite Numrich’s claim to the contrary, there is no indication that the trial court adequately considered the State’s various objections to the hours billed. While the trial court entered findings that the hours claimed by Numrich’s attorneys were reasonable, these findings are conclusory in the extreme, do not show how the court resolved disputed issues of fact, and do not provide any of the court’s analysis in arriving at that decision. State MDR App. at 440-441. Rather, the trial court essentially adopted without question the hours claimed in the fee affidavits from Numrich’s counsel. Id.

4. THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THAT THE HOURLY RATE CLAIMED WAS REASONABLE

Numrich has never provided any evidence as to the reasonableness of his attorneys’ rates aside from the repeated—but unsupported—assertion of one of those attorneys that they were. State MDR App. at 296-300, 351-353, 405-418, 436-439. In its motion for discretionary review, the State pointed out that the trial court’s decision to accept that claimed hourly rate ignored controlling case law holding that the proof of the reasonableness

of the hourly rate must consist of something beyond the mere declaration of the counsel whose rate is in question. State MDR at 18-19. Numrich makes three arguments in response. None is persuasive.

First, Numrich asserts that the cases cited by the State do not establish that the proof of the reasonableness of the hourly rate must consist of something beyond the declaration of the counsel whose hourly rate is in question. Answer at 18-19. But this is incorrect. Clear case law holds that the party requesting fees bears the burden of establishing the reasonableness of the claimed hourly rate. Berryman, 177 Wn. App. at 657. And clear case law also holds that courts cannot rely solely on the attorney's fee petition in ruling on the reasonableness of a fee request. See, e.g., Mahler, 135 Wn.2d at 434-35 ("Courts should not simply accept unquestioningly fee affidavits from counsel."); SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 144, 331 P.3d 40 (2014) ("In determining an award of attorneys' fees, the trial court may not rely solely on counsel's fee affidavits."). Putting those holdings together, it is apparent that a trial court cannot rely solely on the attorney's fee petition to find that the hourly rate was reasonable.

Second, Numrich asserts that a trial court can find an attorney's hourly rates reasonable based on its own status as an "expert on the question of the value of legal services." Answer at 16-17. However, the only Washington case cited by Numrich in support of this proposition is a Court

of Appeals case⁵ that appears inconsistent (at least on this point) with this Court's subsequent decisions in Mahler and SentinelC3. Answer at 17. Moreover, even if a trial court could find that an attorneys' rates were reasonable based on its own "expertise" as to the value of legal services, there is no indication that that is what the trial court did in this case. The trial court's findings contain nothing to indicate that the trial court relied on its own familiarity with Numrich's attorneys or their general reputation within the legal community. State MDR App. at 404-405. Rather, the trial court appears to have simply adopted the cursory language proposed by Numrich and made a finding based only the unsupported affidavit of his attorney. Id.

Third, Numrich asserts that the "State has never submitted any evidence – or even argued – that [his attorneys'] hourly rates are unreasonable. Answer at 17. But this ignores the fact that it is Numrich who bears the burden of establishing that his attorneys' hourly rates were reasonable, not the State's burden to prove that they were unreasonable. Berryman, 177 Wn. App. at 661-64.

B. THERE IS NO BASIS FOR THIS COURT TO IMPOSE ADDITIONAL FEES ON APPEAL

In his answer, Nurmrich argues that this Court should award him attorneys' fees and costs for responding to this motion for discretionary

⁵ Brown v. State Farm Fire & Cas. Co., 66 Wn. App. 273, 831 P.2d 1122 (1992)

review. Answer at 19-20. This request should be denied.⁶

Under RAP 18.1(a), a party may request fees on appeal “if applicable law grants the party the right to recover reasonable attorney fees or expenses on review.” Thus, in order to receive an award of fees on appeal, “a party generally must prevail on appeal *and* qualify for an award under a contract, statute, or recognized ground in equity.” State Bar Association, Washington Appellate Practice Deskbook § 17.6 at 17-9 (4th ed. 2016) (emphasis added). Here, Numrich has not identified any contract, statute, or recognized ground in equity that grants him the right to recover attorneys’ fees on review in this case. Nor is the State aware of any. The two Washington cases cited by Numrich as supporting his request deal with the propriety of additional fees on appeal when the initial fees being reviewed were imposed pursuant to a fee shifting *statute* that explicitly or implicitly contemplate the awarding of appellate fees.⁷

Answer at 19-20; Costanich v. Washington State Dep’t of Soc. & Health

⁶ Where, as here, the Respondent’s request for fees on appeal is raised in its answer to a motion for discretionary review, it is unclear under RAP 18.1 whether the Petitioner should respond to the request in its reply or in a separate response filed later. Given this lack of clarity, the State will provide a summary response here so as to avoid waiving the issue. This has resulted in a brief slightly in excess of the page limit set forth in RAP 17.4(g)(1). A motion to allow filing of an overlength brief is being filed contemporaneously.

⁷ The third case cited by Numrich—United States v. \$60,201.00 U.S. Currency, 291 F.Supp.2d 1126, 1131 (C.D. Cal. 2003)—is a federal District Court case. Answer at 20. It is unclear how this decision from a federal trial level court sheds any light on the question of whether fees can or should be awarded in a Washington appellate court.

Servs., 164 Wn.2d 925, 933, 194 P.3d 988 (2008); Fisher Properties, Inc.,

Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 378, 798 P.2d 799 (1990).

But there is no such fee shifting statute that applies to this case. Nor is there an applicable contract or recognized ground in equity that grants a criminal defendant the right to be awarded appellate fees in this context.

As a result, even if he prevails, Numrich is not entitled to recover additional attorneys' fees or costs on review.

C. CONCLUSION

For the foregoing reasons, the State asks this Court to grant discretionary and direct review and to reverse the decisions of the trial court imposing sanctions against the State (in general) and setting the amount of sanctions at \$18,252.49 (in particular). The State also asks this Court to deny Numrich's request for appellate fees and costs.

DATED this 3rd day of May, 2019.

Respectfully submitted,

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