

Superior Court of the State of Washington
For the County of Spokane

Department No.

5

Michael P. Price

Judge



SPOKANE COUNTY COURT HOUSE

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May 12, 2009

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STATE OF WASHINGTON VS GASSMAN, TYLER WILLIAM
No. 2008-01-02444-1

MEMORANDUM DECISION

Dear Counsel:

This matter comes before the Court for hearing on May 1, 2009, on Mr. Gassman's motion for a new trial based upon newly discovered evidence. Mr. Tyler Gassman is represented by Mr. David Partovi of Partovi Law Office, P.S. The State of Washington is represented by Mr. Eugene Cruz, Deputy Prosecuting Attorney.

This is Mr. Gassman's second motion before the Court for a new trial and/or vacation of judgment – the Court having entered orders on April 6, 2009, denying Mr. Gassman's previous motion for arrest of judgment or in the alternative new trial.

The instant motion brought by Mr. Gassman focuses on a former co-defendant in this proceeding Mr. Anthony Kongchunji. Mr. Kongchunji pled guilty on January 26, 2009, to various crimes, including a robbery involving Mr. Eric Weskamp and drive by shootings involving Kyle Williams and Clifford Berger. Mr. Kongchunji did not testify before the Court in this trial, in which a jury found Mr. Gassman and co-defendants Mr. Larson and Mr. Statler guilty of one count of first degree robbery, two counts of first degree assault and two counts of drive by shooting on February 17, 2009. In that proceeding, Mr. Larson was represented by Ms. Anna Nordtvedt and Mr. Statler was represented by Mr. Timothy Note. Both Ms. Nordtvedt and Mr. Note prominently listed Mr. Kongchunji, who was also known by the nickname "Poncho", as a

potential witness in the Larson, Gassman, Statler trial and requested that a hold be placed on Mr. Kongchunji to secure his testimony in this proceeding, although neither counsel requested that Mr. Kongchunji actually be transported for trial. Mr. Partovi, representing Mr. Gassman, did not request a hold as to Mr. Kongchunji, nor did he place Mr. Kongchunji on any list of potential witnesses for trial.

The primary theory now advanced by Mr. Gassman by and through counsel Mr. Partovi in support of the current motion for a new trial is that Mr. Kongchunji is now “talking” and has disclosed to counsel and to the Court in an ancillary proceeding that Mr. Gassman did not commit crimes for which he was convicted on February 17, 2009, and that Mr. Matthew Dunham - a significant witness for the State in this case was essentially covering up at trial for his brother Larry Dunham and their friend Mr. Nicholas Smith. Mr. Partovi argues that he did not call Mr. Kongchunji as a witness during the Larson, Gassman, Statler trial because Mr. Kongchunji had advised counsel that he would exercise his right to remain silent and invoke his Fifth Amendment privilege against self incrimination should he be subpoenaed to testify in this matter.

Of particular interest to the Court here is the fact that Mr. Kongchunji apparently engaged in a “free talk” with Spokane County Sheriff Detectives William Francis and Doug Marske prior to the Larson, Gassman, Statler trial, at which point Mr. Kongchunji allegedly implicated all of the co-defendants referenced in the crimes of first degree robbery, first degree assault and drive by shooting. Whether defense counsel were universally aware of Mr. Kongchunji’s statements provided in the free talk is unclear to the Court. Regardless, all three defense counsel chose not to call Mr. Kongchunji as a witness in the Larson, Gassman, Statler trial.

LAW/ARGUMENT

CrR 7.5 provides that “the Court on motion of the defendant may grant a new trial when it affirmatively appears that a substantial right of the defendant was materially affected”. *Id.* “Newly discovered evidence material for the defendant which the defendant could not have discovered with reasonable diligence and produced at the time of trial is one of the reasons enumerated for which the Court can grant relief.” CrR 7.5(a)(3). Both counsel prominently cite Criminal Rule 7.5, as well as *State v. Williams*, 96 Wn.2d 215 (1981) and *State v. Castro*, 32 Wn.App. 559 (1982). Both *Williams* and *Castro* essentially stand for the following proposition:

A new trial will be granted on the grounds of newly discovered evidence only if the following five requirements are met: (1) the evidence must be such that the results will probably change if a new trial were granted; (2) the evidence must have been discovered since the trial; (3) the evidence could not have been discovered before the trial by exercising due diligence; (4) the evidence must be material and admissible; and (5) the evidence cannot be merely cumulative or impeaching. *See Castro* at 565 and *Williams* at 215.

Analyzing each of the five *Williams/Castro* factors clearly mandates that Mr. Gassman is not entitled to a new trial based upon newly discovered evidence. First, Mr. Gassman fails to cite any evidence such that the results from a fact finders determination would change if a new trial were to be granted. In this case, while Mr. Gassman provides correspondence written from Mr. Kongchunji to Mr. Gassman's father, as well as a transcript of an ancillary proceeding held in front of the Honorable Kathleen O'Connor wherein Mr. Kongchunji testifies regarding the same constellation of defendants, at no time does Mr. Kongchunji in either his correspondence or in his testimony before Spokane County Superior Court Department 4 ever vindicate Mr. Gassman or somehow suggest that Mr. Gassman did not commit the crimes for which he was convicted on February 17th under cause number 2008-01-02444-1. In fact, there is virtually no specificity provided by Mr. Kongchunji regarding events which were central to the first degree robbery, first degree assault and drive by shooting convictions here. There simply is no evidence presented by Mr. Gassman to support the notion that the jury verdict of February 17, 2009, would probably change if a new trial were granted.

Further, both *Williams* and *Castro* mandate that the evidence presented must have been discovered since trial. Here, as previously stated, both counsel for Mr. Statler and Mr. Larson prominently listed Mr. Kongchunji on their witness lists and asked that the Court hold him for potential trial testimony. Mr. Gassman's lawyer chose not to do so. Stated another way, all the lawyers in the Gassman, Larson, Statler trial were fully aware that Mr. Kongchunji had information about this case – an obvious fact which was demonstrated by defense counsel's listing of Mr. Kongchunji as a potential witness. The fact that Mr. Gassman's lawyer chose not to call Mr. Kongchunji at trial in this proceeding does not make Mr. Kongchunji's testimony, whatever it may have been, "newly discovered". *Castro* and *Williams* also reference the requirement that such evidence could not have been discovered before the trial by exercising due diligence. Again, there is simply nothing here to demonstrate that information Mr. Kongchunji may have had was not available to all the lawyers prior to trial by a simple exercise of due diligence. While counsel vehemently argued at the time of hearing that Mr. Kongchunji was "unavailable" as a result of his Fifth Amendment privilege, in fact no privilege existed as to Mr. Kongchunji at the time of the Larson, Gassman, Statler trial. Mr. Kongchunji had already pled guilty to the referenced charges on January 26, 2009, and therefore had no Fifth Amendment protection in place barring his testimony in this proceeding. Counsel's suggestion that Mr. Kongchunji was "unavailable" to testify in this trial is frankly self-serving and nonsensical. Mr. Gassman's counsel could easily have requested a subpoena as to Mr. Kongchunji, as was the case with counsel for Mr. Larson and Mr. Statler and the Court could have compelled Mr. Kongchunji's testimony at the time of trial should he have incorrectly attempted to cite a nonexistent Fifth Amendment privilege.

It is also notable that any testimony of Mr. Kongchunji at trial would have been, contrary to the *Williams* and *Castro* rulings, "cumulative or impeaching". That is, Mr. Kongchunji would likely have been offered as a rebuttal witness to impeach or rebut commentary provided to the jurors by Mr. Dunham – a factor which *Williams* and *Castro* directly bar. An additional factor would have been the necessity that Mr. Kongchunji's testimony would likely directly trigger a requirement by the State to call Detectives Francis and Marske to impeach Mr. Kongchunji's testimony

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regarding matters that he allegedly disclosed at the time of his “free talk”, at which time he allegedly implicated Mr.’s Gassman, Larson, and Statler in these crimes. Again, a factor which both *Williams* and *Castro* provide cannot be a basis for a new trial.

Counsel has failed to demonstrate any legitimate basis pursuant to CrR 7.5 or case law cited for a new trial in this matter and Mr. Gassman’s motion in that regard is forthwith denied. Counsel, for your convenience, the Court has enclosed an order denying Mr. Gassman’s motion.

As always, I appreciate counsel’s continued assistance and professionalism in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael P. Price", written over a horizontal line.

Michael P. Price
Superior Court Judge

Enclosure

pc: Timothy Note
Anna Nordtvedt