IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

J. S.,	)	No. 65843-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
	)	UNPUBLISHED OPINION
STATE OF WASHINGTON,	)	
	)	FILED: July 16, 2012
Petitioner.	)	

Spearman, A.C.J. — J.S. moved the King County District Court to expunge, delete, or redact court indices that connected his name to dismissed criminal charges from 1992. The district court denied the motion, but sealed the record. J.S appealed to the superior court, which remanded for the purpose of changing the caption to "State v. [Name Redacted]". We granted the State's petition for review. Because the record before us does not contain the district court order or any evidence as to whether the court applied the factors set forth in Seattle Times v. Ishikawa,[1] we reverse and remand for further proceedings.

FACTS

Background. According to J.S.'s briefing to this court,[2] when he was a teenager

[1] 97 Wn.2d 30, 640 P.2d 716 (1982).

[2] The record before this court is devoid of any evidence of the personal story relayed by J.S. in

in 1990, he pled guilty to an offense in Colorado and was placed on probation. On March 18, 1992, while attending college in Washington State, J.S. was arrested as a "fugitive from justice" for his Colorado offense. The State filed a probable cause document, and on March 24, 1992, the State filed a charging document. On June 22, 1992, the State dismissed the charge on its own motion.

It is further claimed that subsequently J.S. petitioned for and was granted a pardon by the governor of Colorado; that the underlying Colorado conviction and court records are gone and can no longer be located; and that the Washington State Patrol, the Seattle Police Department, and the FBI have all expunged the dismissed Washington arrest from their records. Thus, it is asserted that the only remaining criminal records in existence relating to J.S. are those still available through the Washington Judicial Information System (JIS), concerning his arrest for being a fugitive from justice and the State's subsequent dismissal of the charge.

J.S., is apparently now a successful businessman living in New York City and travels internationally for work. It is claimed that the information in JIS has twice caused J.S. delay at the United States-Canadian border and at the airport upon reentry into the United States.

King County District Court proceedings. J.S. filed a motion in King County District Court, seeking to limit access to the above-described data in JIS.[3] At oral argument, J.S. asked the district court to have all records of the Washington arrest and

his appellate briefing. It does not appear that J.S. or any other person has ever filed in district court any declaration, affidavit, or other sworn testimony regarding the alleged facts supporting J.S.'s claim for relief.

dismissed charge destroyed, redacted, or expunged from Washington state court records, such that his full name would not be accessible. Counsel for J.S. argued primarily that the district court was authorized to expunge or destroy the information under RCW 10.97.060. Counsel also argued that in the alternative to expunging or destroying, the court was authorized to change the name of the caption such that it would not be accessible via a public search.

On this issue, counsel called Cathy Grindle, the director of technology of the King County District Court. Ms. Grindle testified that the district court has the ability to change or redact a case name, while leaving the full court record intact and also leaving a copy of the full case name in a mirrored database accessible to court employees:

> [Ms. Grindle]: There – there is a command within the current JIS system that will expunge the record. But, the term, "expunge" is a little misleading in terms of – mostly with the GR 15 I think we think of expunge as deleting a record. It doesn't delete the record. It simply changes the name on – on a case, and it's on a case-by-case basis, changes the name on a case to the name, quote, unquote, "expunged." If you searched – you could still search the record on public access. You can go straight to it. You would see that the name is expunged. You would do – if you did a search on the person's real name, it wouldn't come up.
>
> [Mr. Saunders]: Okay.
>
> [Ms. Grindle]: No records would come up against it. But, that – that name would actually still exist in the case docket if you went that far back in time on the docket.
>
> . . .
>
> [Mr. Saunders]: So, you were mentioning yesterday and earlier this morning, too, that the difference between sealing the document and

[3] The motion was apparently titled "Amended Motion to Expunge Nonconviction Data[.]" However, because neither the State nor J.S. designated the motion for review, it is not in the record before us.

> doing this JIS button, this expunge button. Could you explain that difference to the Court?
>
> [Ms. Grindle]: When – when a case is sealed, the name of the case, the case number remain. And it'll come up, I think, on a public search as sealed, case sealed. But, the name is – remains in the system. If a case is expunged, the name is gone but the case still remains. So, I can look up, you know, 93083 and I can find that case. But, if I look under – under the name of the case, I'm not going to find it.
>
> [Mr. Saunders]: But, in your mirrored database, JIS warehouse, you would be able to find that information?
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> [Ms. Grindle]: We could find it in that. But, the warehouse is only avail – available to court employees. And this isn't deleting a case – the case – the expunged command, so to speak, doesn't delete the case out of JIS.
>
> [Mr. Saunders]: Right. So, expunge doesn't delete a file; it doesn't destroy a file. Instead it just changes it or alters it to take away a name.
>
> [Ms. Grindle]: Correct.

Verbatim Report of Proceedings (VRP) 10/27/2009 at 21-23.

The deputy prosecutor did not oppose the motion in district court, but instead argued any action taken should simply "be done correctly":

> Ms. Petregal: It's a little difficult in – in this situation because I hesitate to say the State doesn't have a position. But, it's not our record at issue. The criminal case – there's no criminal case before the Court. I argue sealing cases, I mean when – when the Defense asks to seal. And the State takes a position. This is a little different . . . given that it's non-conviction information. It – it's kind of our position that it should be done correctly, if at all.
>
> . . .
>
> And, so that – that's more what I think is the – the case here. It's the Court's record, and I don't know who exactly is – is representing that interest. Ms. Grindle can explain to the Court what they can and cannot do.

VRP at 1-2. The deputy prosecutor did, however, submit a memo which argued that expungement was prohibited to the extent it actually destroyed records.

The court disagreed with counsel for J.S. on the applicability of RCW 10.97.060,

indicating that "[t]he legislature has no authority to tell the courts it can or cannot destroy our records." Id. at 13. The court found that General Rule (GR) 15 was the only applicable authority: "I, frankly, don't see any other independent basis, aside from General Rule 15, that allows me to destroy court records or destroy the access." Id. at 14. The court thus declined J.S.'s request to have the records destroyed under RCW 10.97.060. Instead, the court treated J.S.'s motion as a motion to seal, a decision that was unopposed by the deputy prosecutor:

> The Court: [I]n this case, what I am going to do is to rename the motion to expunge a motion to seal. And I'll be granting a motion to seal. And I would ask if Counsel can get one of the general motions orders and draft up that order right now. We can go ahead and enter that while Mr. S. is still present, because I understand Mr. S. is going back to New York.
>
> Mr. Saunders: Yes, he is, Your Honor.
>
> The Court: Okay. So, if we could –
>
> Ms. Petregal: I don't – I don't have one sealing. And then – usually defense provides that. But, I mean, if he – I just think there needs to be something written according to the GR 15. But –
>
> The Court: Right.
>
> Ms. Petregal: We are agreeing to that . . . .
>
> . . .
>
> The Court: Okay. Well, let's just go ahead and indicate that we'll put it on on November 13th for an administrative review at noon. At that time I'll just take a look at it and make sure that I've received an agreed order from the parties. If I haven't, then we'll go ahead and set a – set an actual hearing to enter the order. And that would be an order sealing consistent with General Rule 15. And I am finding that the – that Mr. S.'s case – he does qualify for deletion of the data in all of the other databases under the statute.

Id. at 30-31.

RALJ[4] Appeal in King County Superior Court. J.S. filed a notice of appeal to the

superior court. In his designation of records to be transmitted to the superior court, J.S. named five documents: (1) Amended Motion to Expunge Nonconviction Data; (2) Agreed Order Changing Case Name; (3) (Proposed) Order Expunging Cases and Deleting Record; (4) Declaration of David M. Snyder; and (5) Order on Motion to Seal Court Records. On RALJ appeal, J.S. argued that the district court erroneously concluded it did not have authority to destroy the records under RCW 10.97.060 and that the district court erred by declining to remove his name from the court records.

In its RALJ response brief, the State argued that RCW 10.97.060 did not apply in this case, because under State v. Young, 152 Wn. App. 186, 189, 216 P.3d 449 (2009), court records, including nonconviction data, are not "criminal history record information" specified in the statute. The State thus argued the district court properly concluded it did not have the authority to destroy records under RCW 10.97.060. It also argued that the statute did not authorize the court to expunge J.S.'s name so the public could not find it. The RALJ response brief did not separately address the authority of the court to redact J.S.'s name under GR 15. The State did not cross-appeal the district court's decision to seal the records. Neither did it contend in its RALJ briefing that the district court failed to apply the Ishikawa factors before sealing nor did it dispute the existence of the district court's order sealing.

At oral argument on RALJ appeal, J.S. once again sought either destruction of the records under RCW 10.97.060 or redaction of his name. The superior court

[4] Appeals from district court are heard in the first instance in superior court under the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ).

focused on whether J.S.'s alternative request for relief, to have his name redacted, should simply be analyzed under GR 15(c) as a request to redact. The State admitted that the district court's order to seal was unopposed, but argued that redaction of J.S.'s name would amount to permanent destruction of records. The superior court affirmed the district court's order to seal, but remanded to the district court for the purpose of changing the caption to "State v. Name Redacted." Clerk's Papers (CP) at 126-27.

Discretionary Review with this Court. The State petitioned this court for review of the decision on RALJ appeal. The State argued in its petition only that the order directing the district court to redact J.S.'s name from court indices would amount to an impermissible "destruction" of records. The State did not allege a failure to apply Ishikawa factors in its motion. J.S. responded that GR 15 and this court's ruling in Indigo Real Estate Serv. v. Rousey, 151 Wn. App. 941, 215 P.3d 977 (2009) permits courts to redact names from court indices. In the event we accepted review, J.S. also cross-moved for discretionary review of that portion of the RALJ order declining to apply RCW 10.97.060. For the first time in its reply in support of the petition, the State claimed that neither the District Court nor the RALJ court addressed the Ishikawa factors. Also for the first time in the reply, the State argued that no signed district court order was ever filed or contained in the record on RALJ appeal. We granted the State's petition for review, but declined to grant cross-review.

The State filed a motion to strike portions of J.S.'s response brief on grounds that it was quoting findings from the district court's order sealing, when that order

cannot be located anywhere in the record. In response to the motion to strike, counsel for J.S. submitted a declaration. The declaration indicates that while he was preparing J.S.'s brief for this court, he attempted to locate the district court order, but could not find it. He exchanged email with Lori Holtzapple, the Court Clerk for King County District Court, who told him the order was not among the documents scanned into the electronic court records system. She also indicated a hard copy of the original file "no longer exists." Counsel included in the response to the motion to strike an unsigned version of the District Court order sealing. Counsel's declaration indicates that deputy prosecutor Petregal signed the proposed order "[w]ithout any modifications". Additionally, the district court made only two minor modifications to the findings in the proposed order, both of which were to replace "The Defendant" with "J.S." Counsel for J.S. did not ask to supplement the record with the proposed order, although he did ask that this court "consider the proposed order and deny the State's motion to strike[.]"

A commissioner of this court entered a ruling on the State's motion to strike, ordering counsel for J.S. to "provide confirmation by Judge Harper whether or not the proposed order, or some variation, was entered in District Court" or "to explain why Judge Harper is unable to confirm entry of the order." The ruling also ordered the State "to provide the recollection of deputy prosecutor Petregal of her approval of the proposed order and of any information she has regarding the entry of the proposed order" or "to explain why deputy prosecutor Petregal is unable to provide such information."

Ms. Petregal submitted a declaration indicating that she had no information about the order: "I cannot recall reviewing or signing the November 2009 order to seal submitted by defense. I cannot locate any discussion of the order nor [sic] a copy of it." Judge Harper responded as follows: "Defense submission was reviewed – an order sealing was entered after the 10/27/2010 hearing – the order was an agreed order which was presented ex parte – the case was not on the calendar – the order was not filed in the court file[.]" After receiving these responses, a commissioner passed the motion to strike to the panel.

DISCUSSION

The State sets forth two main arguments in its petition for review: first, that redaction of J.S.'s name from the caption violates the public's constitutional right to access court records; and second, that the RALJ court failed to incorporate "all of the Ishikawa factors into its analysis" before ordering redaction on remand. For the reasons described below, we remand for consideration of the Ishikawa factors.

The State argues that redaction or modification of a name in a case caption or title, such that a court file would not appear in a search by name of court records, amounts to permanent destruction and therefore violates the public's right of access to court records under the Washington Constitution. The State cites no authority indicating that redaction or modification of a caption or title, if carried out in compliance with GR 15 and Ishikawa, is unconstitutional. Generally, where an appellant fails to present argument or authority in support of their assignments of error, this court will not

consider the issue. Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a). But even if we considered the issue, it was already resolved in Rousey, 151 Wn. App. at 941. In that case, we held that courts have the authority under the state constitution to redact case titles or captions, so long as the court complies with both GR 15(c)(2) and Ishikawa. Rousey, 151 Wn. App. at 948-50 ("In sum, GR 15 authorizes courts to redact information in the [Superior Court Management Information System] SCOMIS, and GR 15 and the Ishikawa factors together provide the legal standard for evaluating [the appellant's] motion to redact her name from the SCOMIS index").[5]

The State contends that to the extent Rousey permits redaction of case captions or titles, we should "modify" Rousey because it "conflicts with several provisions of GR 15[.]" Brief of Petitioner at 15. We disagree. GR 15(d) reads:

> In cases where a criminal conviction has been vacated and an order to seal entered, the information in the public court indices shall be limited to the case number, case type with the notation "DV" if the case involved domestic violence, the adult or juvenile's name, and the notation "vacated."

This subsection simply limits what information is available when court records regarding a vacated conviction are sealed; it does not restrict the ability of a court to redact. Likewise, GR 15(c)(4) does not conflict with Rousey:

> When the clerk receives a court order to seal the entire court file, the

[5] In Hundtofte and Alexander v. Encarnaction and Farias, No. 66428-0-I (Wash. Ct. App. July (2012), we recently confirmed the holding of Roussey. But we also noted that the analysis of any request to redact information from SCOMIS must "start with the presumption of openness[,] (quoting Rufer v. Abbott Labs., 154 Wn.2d 530, 540, 114 P.3d 1182 (2005)) and that "[o]nly 'under the most unusual circumstances' may the public's constitutional right to the open administration of justice be infringed" (quoting State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995)). In light of our disposition of this case, we do not decide whether that strict test is met here.

> clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. The existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, names of the parties, the notation "case sealed,'" the case type and cause of action in civil cases and the cause of action or charge in criminal cases, except where the conviction in a criminal case has been vacated, section (d) shall apply. The order to seal and written findings supporting the order to seal shall also remain accessible to the public, unless protected by statute.

Again, nothing in this subsection restricts the ability of a court to redact. Rather, it simply describes procedures and limits to public information when an "entire court file" is ordered sealed.[6]

The State next argues the RALJ court failed to consider the Ishikawa factors before ordering redaction under GR 15(c). J.S. responds that the RALJ court did, in fact, include Ishikawa findings, and moreover, it affirmed the district court order, which also included such findings. The State moved to strike this argument because according to the State, there is no evidence in the record that this district court order exists. The State also responds that findings in the RALJ court order do not address the "compelling privacy" factor. On a related note, the State further argues that any such findings are not supported by the record, because the record contains no live or declaration testimony from J.S. about his circumstances. Additionally, the State points out that J.S. did not move to supplement the record with the proposed order he claims is similar or identical to the order approved by the district court.

As is described above, the State failed to raise any of these issues below.

[6] The State also suggests that at a minimum, "a publicly-accessible record reflecting the alteration must exist." Brief of Petitioner at 17. But here, the RALJ court ordered on remand the title to be changed to "State vs. [Name Redacted]". This clearly shows an alteration exists.

Generally, arguments raised for the first time in a reply brief will not be addressed. Cowiche Canyon, 118 Wn.2d at 809; RAP 10.3(c). But even so, the fact remains that deficiencies in the record before us make it impossible to ascertain what happened below. To the extent the RALJ court relied on the district court findings, the order is not in front of us, and we cannot review it. Moreover, to the extent the district court made factual findings, the record appears to be devoid of any sworn testimony upon which any such finding could be based. The State asks that the panel remand to the district court to apply GR 15 and the Ishikawa factors in the context of sealing and/or redacting the title of the case. The State's request for relief is well taken. We reverse the RALJ court and remand to the district court for consideration of J.S.'s motion in light of GR 15 and the Ishikawa factors.[7]

Reversed and remanded for further proceedings consistent with this opinion.

Spearman, A.C.J.

WE CONCUR:

Cox, J.

[7] The American Civil Liberties Union filed an amicus curiae brief generally arguing in favor of courts' ability to redact names from captions. At our invitation, the Allied Daily Newspapers and the Washington Coalition for Open Government have filed a response amicus brief. In light of the unusual procedural history of this particular case and our decision to remand for further proceedings, we decline to address the arguments raised by amici at this time. Additionally, in light of our disposition of this case, we deny the State's motion to strike.