IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 67437-4-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
CHRIS ANTHONY LINDHOLM,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: November 14, 2011
_____	)	

Becker, J. — In order to move for a new trial on grounds of newly discovered evidence under CrR 7.8, a defendant must show the information could not have been discovered at trial by due diligence. Appellant Chris Lindholm does not challenge the trial court's finding of fact that the evidence upon which he relies was readily available to counsel at the time of trial. We therefore conclude his motion for new trial under CrR 7.8 was properly denied.

Lindholm was tried and convicted before Judge John Hickman on charges of first degree kidnapping, second degree assault, felony harassment, and third degree assault. The first three charges involved domestic violence against his wife. On the second day of trial, during the State's case, Judge Hickman advised counsel that his clerk had discovered the judge had once represented

Lindholm's brother, Steve Lindholm, on an estate planning matter. Counsel did not inquire further into the previous representation and trial resumed. Lindholm was convicted by jury verdict on February 7, 2006.

Lindholm moved for a new trial on evidentiary grounds. The trial court granted the motion. The Court of Appeals affirmed. State v. Lindholm, noted at 137 Wn. App. 1063, 2007 WL 1054063 (2007). The Supreme Court granted the State's petition for review and remanded to the Court of Appeals for reconsideration in light of intervening case law. State v. Lindholm, 164 Wn.2d 1029, 196 P.3d 139 (2008). On remand, the Court of Appeals reversed its earlier decision, affirmed Lindholm's conviction, and remanded to the trial court for entry of judgment and sentence on the jury verdict of February 2006. State v. Lindholm, noted at 149 Wn. App. 1001, 2009 WL 1244845 (2009).

Back in the superior court, Lindholm moved for a new trial under CrR 7.8 on the ground of newly discovered evidence showing that Judge Hickman should have disqualified himself from presiding over the case. According to Lindholm, he had recently learned that Hickman had represented his brother not just once but on several occasions, including the preparation of a new will in 2003 that removed Lindholm as personal representative and excluded him and his wife as beneficiaries. Lindholm submitted a declaration by his brother that in the course of preparing the new will, Hickman learned of ill feelings the brother held towards Lindholm related to Lindholm's drug use and domestic discord. Lindholm argued that in view of Judge Hickman's knowledge about him gained

through representation of his brother, Judge Hickman should have recused himself.

The trial court heard argument on the motion on March 26, 2010, and denied the motion. On the merits, Judge Hickman concluded that because he did not have any recollection pertaining to his client's brother, there was no actual or potential bias by the court. He also concluded the motion was untimely because information about the extent of the judge's representation of the brother was readily available at the time of trial. The court entered judgment and sentenced Lindholm to 170 months. Lindholm appeals the denial of his motion for new trial.

A criminal defendant may move for a new trial up to one year after judgment is entered if there is "Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5." CrR 7.8(b)(2). CrR 7.5(b) allows a defendant to move for a new trial within 10 days after the verdict. A ruling under CrR 7.8 is reviewed for abuse of discretion. State v. Gassman, 160 Wn. App. 600, 608-09, 248 P.3d 155, review denied, 172 Wn.2d 1002 (2011).

The State contends that Lindholm could have discovered the full extent of Judge Hickman's representation of the brother in time to move for a new trial within 10 days after the 2006 verdict, and therefore the current motion was properly denied as untimely. We agree. Judge Hickman's findings and conclusions resolve the matter correctly:

I. That on August 5, 2005, the defendant was charged with

Kidnapping in the First Degree, Assault in the Second Degree, Felony Harassment, Assault 3 and Unlawful Use of Drug Paraphernalia. The first three counts were alleged to be domestic violence offenses wherein the defendant's wife Jill Lindholm was the victim.

II. The matter proceeded to trial on January 30, 2006 in front of the Honorable John R. Hickman, who had been assigned the case just that day. When the case first came before Judge Hickman, the judicial assistant indicated that the last name of the defendant sounded familiar. She then confirmed that the defendant's brother Steve Lindholm was a former client who Judge Hickman had represented prior to becoming a judge. Even though Judge Hickman had opened over 4,000 files during the course of his private practice, he remembered Mr. Lindholm and immediately disclosed his . . . former relationship to both counsel. This occurred before the jury was seated.

II. [sic] The most recent work that Judge Hickman had performed for Steve Lindholm occurred in 2003. Prior to that, Judge Hickman had performed estate planning work in 1993. Without reviewing past records, Judge Hickman disclosed the legal work that he recalled performing, which centered around estate planning, which was the last formal contact he had with Steve Lindholm. Judge Hickman did not see Steve Lindholm outside of his office, and Steve Lindholm was not a personal friend.

III. While the court does not dispute that there were additional professional contacts with Steve Lindholm prior to 2003, the only contact the court recalled at the time of trial was the estate planning work that was promptly disclosed. There was no intent by the court to deceive or minimize the prior contact with Steve Lindholm. Both counsel had ample opportunity to contact Steve Lindholm and confirm the court's representation. No further mention of the disclosure was raised any time by either counsel throughout the many months and years since the court's initial disclosure. Both counsel acknowledged the disclosure, waived it, and proceeded to trial. The court believed that if a request for recusal would have been made, it would have been from the State since the inference would be favorable toward the defense as the court had represented the defendant's brother. The total extent of the court's present recollection of Steve Lindholm's family was that he was married, lived in the Fife-Milton area, and worked for the City of Milton. The court was wrong, and the judicial assistant correctly indicated that Steve Lindholm worked for the City of Fife. Prior to this case being assigned, the court recalled nothing about Steve Lindholm's estate planning, including his immediate family and siblings, and the court certainly recalled nothing regarding

> whether Steve Lindholm had a brother, or any history with a brother. Over the course of 29 years of private practice, Judge Hickman drafted 200 to 300 estate planning documents. Judge Hickman's memory of any details of estate planning, outside of the court's immediate family, is nonexistent. If the court had any recollection of Steve Lindholm's brother, the court would have disclosed such information and would have recused itself. None of the additional information as to the court's prior contacts with Steve Lindholm was disclosed to the court until after the court of appeals ruled on this case and just before sentencing. If this information were a concern, it should have been brought to the court's attention in a timely manner. This information was readily available to the Lindholm Family, yet it was not communicated until after an unfavorable ruling by the Court of Appeals.
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> IV. This case does not present a probability of actual bias by the court that was so high as to violate the defendant's constitutional rights. The court had no knowledge that would have tempted the court to disregard neutrality. The actual rulings of the court demonstrate that the court was in fact a neutral fact finder. The court's knowledge of Steve Lindholm's brother (the defendant) was nonexistent prior to the trial. The court's conduct during the trial in this case in no way deprived the defendant of a fair hearing. There was no actual or potential bias by the court, nor was there a likelihood of such actual or potential bias, as the court had no knowledge of the defendant. The court therefore respectfully denies the defendant's motion for a new trial.

Lindholm assigns error to the findings, but fails to provide any argument showing that they are erroneous in any material respect.[1] In particular, he does not establish any basis for reversing the finding that the details of Judge Hickman's previous representation of the brother were "readily available." The assignment of error is therefore waived and the findings are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Because the evidence Lindholm relies on was not "newly discovered

[1] As the State concedes, the record shows that the court made the disclosure after the trial began, not before the jury was seated. That erroneous finding is not material to our analysis.

evidence" as that term is used in CrR 7.8, the trial court did not abuse its discretion by denying Lindholm's motion for new trial on the basis of its untimeliness.

The motion was also properly denied on the merits. Due process, the appearance of fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct require a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned. State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). There is no evidence here of actual or potential bias or reason to question Judge Hickman's impartiality during Lindholm's trial. Unchallenged findings state that Judge Hickman remembered very little concerning his representation of Lindholm's brother. In particular, he did not remember hearing anything about his client's brother or even that his client had a brother. Under these circumstances, the judge was not required to disqualify himself. The disclosure that he made to both counsel on the record was sufficient to satisfy his obligation as an impartial judge.

On appeal, Lindholm makes the additional argument that trial counsel was ineffective for failing to inform him of his constitutional right to a fair trial before an impartial court. The two prongs necessary to support a claim of ineffective assistance are deficient representation and prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Lindholm suggests that counsel should have consulted with the brother, should have discovered the full extent of Judge Hickman's previous activity as the

brother's lawyer, and then should have sought a thorough examination of Judge Hickman's files from private practice. We disagree. Passing up the opportunity to investigate was likely a tactical decision, not deficient performance, as Lindholm does not identify any other reason to regard Judge Hickman as lacking in fairness. And Lindholm fails to demonstrate that but for counsel's failure to investigate, the outcome of his trial would have been different.

In a statement of additional grounds filed under RAP 10.10, Lindholm claims that despite abundant grounds to doubt his competency to stand trial, the trial court failed to order him to undergo a psychological evaluation. It does not appear that Lindholm presented this issue to the trial court. The present record is wholly inadequate to support a review of this claim.

Affirmed.

Becker, J.

WE CONCUR:

Cox, J.