IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27535-3-III**
	)	
Respondent,	)	
	)	
v.	)	
	)	
MARIO GIL MENDEZ,	)	**Division Three**
	)	
Appellant,	)	
	)	
YAKIMA HERALD-REPUBLIC,	)	
	)	
Intervenor.	)	**UNPUBLISHED OPINION**

Korsmo, J. — This case was remanded for reconsideration in light of the decision in *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011). We hold that *Herald-Republic* does not change the result of our prior decision and again affirm.

FACTS

Mario Mendez and Jose Sanchez were each charged in Yakima County with two counts of aggravated murder. The State filed notice of intent to seek the death penalty. Because Mr. Mendez and Mr. Sanchez were each indigent, they were appointed attorneys. Due to the nature of the case, a "budget judge" was appointed to address costs and attorney fees incurred by appointed counsel. The budget judge was not the trial judge. Acting *ex parte*, counsel for both men sought and obtained orders sealing the billing records and related documents.

Mr. Mendez pleaded guilty to one count of first degree murder and one count of second degree assault in exchange for testifying against Mr. Sanchez, who was convicted and sentenced to life in prison.

After the trial, the *Yakima Herald-Republic* sought the billing records by filing a Public Records Act[1] request in both criminal cases. The trial court denied the requests, but noted that since Mr. Mendez's case was final, the newspaper could approach the budget judge to unseal the records under GR 15(e)(2).[2] Following this suggestion, the

[1] Chapter 42.56 RCW.

[2] The relevant portion reads: "A sealed court record in a criminal case shall be ordered unsealed only upon proof of compelling circumstances, unless otherwise provided by statute, and only upon motion and written notice to the persons entitled to notice under subsection (c)(1) of this rule."

paper filed a motion to intervene and unseal the records in Mr. Mendez's case while seeking direct review in the Supreme Court of the case relating to Mr. Sanchez. The trial court granted both motions in Mr. Mendez's case and permitted access to all but privileged communications or materials that constituted attorney work product. Mr. Mendez then appealed to this court.

We affirmed in a published opinion, *State v. Mendez*, 157 Wn. App. 565, 238 P.3d 517 (2010). The crux of our holding was that GR 15(e)(2) is an appropriate mechanism by which a nonparty may bring a post-trial motion to unseal. *Id.* at 577-579. In reviewing the trial court's decision to unseal, we applied those factors found in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982)[3] and concluded that the trial court had appropriately weighed Mr. Mendez's interests against those of the public to find a compelling circumstance. *Mendez*, 157 Wn. App. at 582-584. Our application of the *Ishikawa* factors was influenced in part by *Dreiling v. Jain*, 151 Wn.2d 900, 909-910, 93 P.3d 861 (2004), wherein the Supreme Court held that they may be applicable in the context of sealing or unsealing records. *Mendez*, 157 Wn. App. at 582.

[3] The factors are: (1) a proponent's showing of a compelling need for closure, (2) whether the public was given the right to be heard, (3) whether the court used the least restrictive means possible to protect the affected interests, (4) whether the trial court specifically weighed the competing interests of the defendant and the public, and (5) whether the order was properly limited in scope and duration to achieve its purpose. *Ishikawa*, 97 Wn.2d at 37-39.

After this court decided *Mendez*, the Supreme Court decided the action related to Mr. Sanchez's case. Mr. Mendez sought review after *Herald-Republic* was decided. His case was remanded to this court for reconsideration in light of that opinion. We directed the parties to file supplemental briefs addressing *Herald-Republic*.[4]

ANALYSIS

This remand requires us to apply *Herald-Republic* to our prior determination that GR 15(e) is an appropriate vehicle by which a nonparty may intervene to request that records be unsealed.

In *Herald-Republic*, the court held that a limited intervention to revisit a prior sealing decision under GR 15(e)(2) is a proper procedure for nonparties to use in a completed criminal case. 170 Wn.2d at 801. To the extent that its holding conflicted with *State v. Bianchi*,[5] that decision was overruled. 170 Wn.2d at 801. In making that determination, the Supreme Court cited with approval our prior decision in this case. *Id.* at 800-801. Contrary to Mr. Mendez's reading, the court also affirmed its recognition that the factors enunciated in *Ishikawa*, 97 Wn.2d 30, *may* have applicability in the context of sealing or unsealing records. *Herald-Republic*, 170 Wn.2d at 802 (citing

[4] Mr. Mendez also provided us with argument on other issues raised in his first appeal. We will not again address those issues and instead adhere to our prior decision regarding them since they are not impacted by *Herald-Republic*.

[5] 92 Wn.2d 91, 593 P.2d 1330 (1979).

Dreiling, 151 Wn.2d at 909-910). However, unlike our decision, the Supreme Court did not apply the *Ishikawa* factors to the case before it, choosing instead to distinguish *Ishikawa* and its progeny based upon the fact that, unlike the moving parties in those earlier cases, the *Yakima Herald-Republic* was seeking the unsealing of records *after* a trial. *Id*. at 802-803.

As part of its analysis, the court noted only that billing records are not at issue in a criminal case and that there are distinctions to be drawn depending upon the nature and use of court records. *Id.* at 803. In light of this, the parties on remand ask this court to provide guidance as to what factors to consider when contemplating the unsealing of records under GR 15(e)(2).

However, further guidance is not necessary here because we are not sending the case back to the trial court; further analysis would be dicta. Although this court applied the *Ishikawa* factors and the Supreme Court decided to distinguish *Ishikawa* rather than apply it, the difference in approaches does not change the outcome for Mr. Mendez.[6] That is because the *Ishikawa* factors impose a stringent standard designed to protect a

[6] Undoubtedly the difference in approaches was dictated by the procedural differences between the two cases. In *Mendez* we applied *Ishikawa* to a trial court's ruling on a motion to unseal. In *Herald-Republic*, the Washington Supreme Court was deciding only whether a hearing was justified, not whether an unsealing ruling was properly resolved.

defendant's right to a fair trial while simultaneously safeguarding the public's right of access before and during trial. *See Ishikawa*, 97 Wn.2d at 37-39; *Herald-Republic*, 170 Wn.2d at 802-803. Thus, even if our application of the *Ishikawa* factors was unnecessarily rigorous in a post-trial GR 15(e) context, such an application could only have favored Mr. Mendez. Since we held that the trial court properly disclosed the records pursuant to GR 15(e)(2), we cannot say that any distinction between *Herald-Republic* and our prior decision alters the result.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.