No. 30085-4-III

Korsmo, C.J. (dissenting) — The thoughtful majority opinion sets forth the proper legal standard, but this case turns on James Rogers' failure to prove his allegation. Given appellant's failure to provide any evidence from his trial counsel, the trial court had an ample reason to reject the claim. There was no abuse of discretion. I respectfully dissent.

Three different local attorneys represented Mr. Rogers. Mr. Steven L. Olsen represented Mr. Rogers through trial and the filing of the initial appeal. He was then replaced by current counsel, all of whom hail from outside Jefferson County. New counsel then pursued the motion to vacate the judgment based on an investigation initiated by Mr. Rogers, pro se. The evidence in support of the motion consisted of affidavits from Mr. Rogers, the private investigator, and new counsel. Noticeably missing are affidavits from any of the local attorneys who represented Mr. Rogers. The only evidence from any of them is some hearsay in new counsel's affidavit relating statements attributed to Mr. Olsen. Clerk's Papers (Sept. 9, 2010) (CP) at 178.

The affidavit of Mr. Rogers is also rather circumspect in addressing the historical questions, still relevant here, of "what did he know?" and "when did he know it?" The affidavit says that if he had known about the judge's past relationship with opposing

counsel (Peggy Ann Bierbaum) when Dr. Tatham "first filed suit against me" he would have sought a new judge. CP at 34, 35. Critically, he does not relate any information about what his various trial attorneys knew and may or may not have told him, nor does he directly identify when he first learned of the past relationship between opposing counsel and the judge.

This evidence, understandably, was not persuasive to Judge Craddock Verser. The judge stated that all three of the local attorneys who represented Mr. Rogers knew the same facts, with the exception of those related to the power of attorney.[1] "That's the way it is when you practice in a small town." Report of Proceedings (June 18, 2010) at 36. The judge also spoke at length of his three-decade long friendship with Mr. Olsen, the person who had helped him and his family get started when they moved to Jefferson County. *Id*. at 33-38.

The majority decries these comments, observing they are not proof that Mr. Rogers' local attorneys knew these facts. Majority at 22. While true, the majority's observation misses the point. It was Mr. Rogers' burden to establish what he knew and did not know, and when he knew. Due to the attorney-client privilege, he was the only one who could provide evidence from his attorneys. He made no effort to do so, even

[1] While this appointment certainly established that Ms. Bierbaum trusted Judge Verser, it does not establish the converse proposition that the judge trusted her. Instead, it simply showed his willingness to act on her behalf if necessary.

though new counsel clearly spoke with Mr. Olsen about the matters. He also provided no evidence about what information, if any, his attorneys provided him. Again, he was the only one in a position to do so.

The knowledge of an attorney is imputed to the client. *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279, 580 P.2d 636 (1978) (citing *Yakima Fin. Corp. v. Thompson*, 171 Wash. 309, 318, 17 P.2d 908 (1933); *Stubbe v. Stangler*, 157 Wash. 283, 288 P. 916 (1930)). Similarly, the court and other parties are justified in relying upon an attorney's authority to act in the client's best interests until the client had terminated the representation and advised the court and counsel. *E.g.*, *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978); *Russell v. Maas*, 166 Wn. App. 885, 889, 272 P.3d 273 (2012), *review denied*, No. 87245-7 (Wash. Jul. 11, 2012); *Engstrom v. Goodman*, 166 Wn. App. 905, 916, 271 P.3d 959 (2012), *petition for review filed*, No. 87386-1 (Wash. May 17, 2012). The attorney's actions are binding upon the client. *Haller*, 89 Wn.2d at 547-48; *Russell*, 166 Wn. App. at 889-90; *Engstrom*, 166 Wn. App. at 916. Attorney Olsen let the case proceed to trial before Judge Verser.[2] That action was binding upon Mr. Rogers.

[2] Although the statutory opportunity to change judges had been lost prior to attorney Olsen's entry into the case due to earlier discretionary rulings by Judge Verser, RCW 4.12.050(1), counsel was still able to file a motion to recuse if he believed one appropriate.

Therefore, if Mr. Rogers thought that a personal relationship rendered his trial unfair, he had to do more than show that he personally was unaware of the alleged relationship.[3] He also had to show that his attorney, who allowed the matter to go to trial before the judge, did not know. Mr. Rogers made no effort to do that. The trial court understandably rejected the motion.[4]

This case is in many respects similar to an allegation of ineffective assistance of counsel raised in a personal restraint petition. A person who contends his counsel did or did not tell him something bears the burden of proving that point. Mere allegations from the petitioner are insufficient. *E.g.*, *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886-87, 828 P.2d 1086 (1992). Similarly here, when a party complaining about an action taken by his counsel does not present evidence from the attorney, I would hold the evidence insufficient as a matter of law and affirm the trial court on that basis.[5]

Although not dispositive here, I do disagree with one other statement in the

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[3] Even if there was only need to show that the client was unaware, Mr. Rogers did not make that showing here. The carefully worded affidavit filed in this case never stated when he actually became aware of the alleged relationship and never indicated whether he and counsel discussed the topic.

[4] The trial court could have reached the same result by use of the missing witness inference. *E.g.*, *Wright v. Safeway Stores, Inc.*, 7 Wn.2d 341, 352, 109 P.2d 542 (1941).

[5] Indiana permits an inference that counsel would not have corroborated the habeas corpus petitioner's allegations when the petitioner fails to at least attempt to obtain evidence from the attorney. *Van Evey v. State*, 499 N.E.2d 245, 248 (Ind. 1986); *Lenoir v. State*, 267 Ind. 212, 214, 368 N.E.2d 1356 (1977).

majority's analysis. While discussing proof of prejudice, the majority states:

> The disproportionate distribution of the parties' community-like property to the younger, healthier party in this case raises further concerns of possible prejudice, although we need not and do not decide whether a party must demonstrate a facially anomalous result to show prejudice.

Majority at 33. I disagree that the unequal distribution of the community-like property raises any concerns in this case.[6]

The primary issue presented by the original appeal, but not decided in light of the majority's ruling on the CR 60(b) appeal, was whether a trial court can consider the separate property of the parties when making an equitable distribution of community-like property. Only the community-like property is before a court for distribution following the conclusion of a committed intimate relationship. *Connell v. Francisco*, 127 Wn.2d 339, 349, 898 P.2d 831 (1995). From this premise, Mr. Rogers argues that the trial court could not consider the existence of separate property in distributing the community-like property.

I disagree with that argument. It is difficult to discern how a trial court could make an equitable distribution of community-like property without knowing the resources of the parties, including their separate property. The extent of separate property is

[6] The statement should be read in the context of Mr. Rogers' bias argument and should not be read as an indication of the majority's view of this factor when equitably distributing community-like property.

considered when distributing community property in a marriage dissolution proceeding. RCW 26.09.080(2). It should be a factor considered when distributing community-like property as well.

Thus, there was no inference of prejudice to be drawn from the unequal distribution of the community-like property in this case. Not only was nearly the entire community-like property the result of Dr. Tatham's earnings during the relationship, but it would be completely unfair to ignore the fact that she had practically no separate property and Mr. Rogers had more than $1,300,000 in separate property. If not considering the separate estates, what factors could a trial court rely upon when distributing the community-like property? How could the court consider the needs of the parties without consideration of their economic resources? *Compare* RCW 26.09.080(4) (directing court in marriage dissolution to consider the economic circumstances of the parties).

Because the trial court had authority, if not an outright duty, to consider the separate property of the parties when distributing the community-like property, the majority errs in suggesting a disparate distribution of the latter could indicate prejudice against a party. If the family home is sought by both parties, does giving it to one of them suggest bias against the other? The answer is, emphatically, "No." One must look at the entire distribution scheme before discerning potential bias. The majority's focus on one

segment of the entire picture erroneously distorts the view of the whole. On its own, it does not suggest prejudice.

This appeal came about because a disgruntled litigant, unhappy with ending up with three times as much property as his former partner, decided to attack the decision-maker. Unable to find the "dirt" he assumed he would find, the litigant then focused on the judge's former relationship with opposing counsel and ignored his own counsel's relationship with the judge. Unless a judge in a small community was a hermit or a newcomer to the region (neither of which is a good foundation for the position) before assuming the bench, the judge will necessarily have had relationships—business or personal—with most of the attorneys in the community. That is not necessarily a bad thing. Those relationships will also be known to most members of the bar, either through direct experience or from disclosure in other cases. It is not inappropriate for a trial judge to consider those facts—whether raised by the litigant or not—when ruling on a motion to recuse.

The majority errs in finding persuasive that which the trial court found unpersuasive. It also errs by suggesting prejudice could result from a portion of a judge's broader property distribution ruling. For both reasons, I respectfully dissent.

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Korsmo, C.J.