IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent,	)	No. 30110-9-III
v.	)	UNPUBLISHED OPINION
LUCAS J. MERRILL, Appellant.	)	

Sweeney, J. — The trial judge has inherent authority to sanction a lawyer for conduct that interferes with the trial proceedings. The judge, however, must first find that the lawyer acted in bad faith. Here, the court sanctioned a lawyer for contacting the victims of a violent crime, despite the victims' written notice that they wanted an advocate present during any interview, pursuant to RCW 7.69.030(10). The lawyer was served with a copy of this notice. The court found that the lawyer disregarded the notice and contacted the victims. The lawyer admitted that he contacted the witnesses without a witness advocate present but claims he did so because he had to, given the exigencies of

the case. The court made no finding on whether the contact was justified under the statute or by the exigencies of the case, nor did the court enter a finding on whether or not the lawyer acted in bad faith. We then remand for further proceedings.

FACTS

Matthew Harget is a lawyer. He represented Lucus Merrill. Mr. Merrill was charged with assaulting members of the Gertlar family. The victims of Mr. Merrill's crimes elected to exercise rights granted by chapter 7.69 RCW ("Rights of victims, survivors and witnesses"). They signed a "Notice of Victim's Intent to Rely on RCW 7.69.030(10)." It provided, "Victim in the above case[] exercises the right to have an advocate present at any prosecution or defense interviews, in accordance with RCW 7.69.030(10), and demands contact, interview or correspondence be arranged through the Victim/Witness Office of the Spokane County Prosecutor's Office." Clerk's Papers (CP) at 10. A copy was served on Mr. Harget.

Mr. Harget and the prosecutor assigned to the case, Stephen Garvin, began negotiating a plea agreement. A pretrial hearing was scheduled for April 8 and trial was scheduled for April 18. As of April 7, the parties had not come to an agreement on a key provision. Mr. Harget did not know whether the Gertlars supported a plea agreement and he believed that no more continuances would be granted.

On April 7, Mr. Harget called Karen and Jay Gertlar to talk to them about the plea agreement. According to Mr. Harget, he introduced himself as Mr. Merrill's attorney and they discussed the plea agreement for several minutes.

Mr. Harget then reported the discussion to Mr. Garvin. Mr. Garvin responded that he would talk to his superiors about sanctions for Mr. Harget's contact. On May 13, 2011, Mr. Harget called the Gertlars again, this time to prepare to defend against the State's motion for sanctions. The State moved to sanction Mr. Harget for "willful discovery misconduct" and violating RCW 7.69.030(10) with the April 7, 2011, phone call. CP at 4.

Mr. Harget filed several declarations in response and explained that he did not believe that the notice filed by the Gertlars limited his ability to speak to victims because defense counsel has a right to speak to witnesses and that the witnesses do not "belong" to one side or another. He also said that he thought Mr. Garvin would speak to the Gertlars about the plea agreement, but did not know whether Mr. Garvin had actually spoken to them. And he did not know whether the Gertlars supported the plea agreement. He also said that, based on some e-mails from the State, he did not know whether the State intended to move forward with a plea agreement or go to trial.

The State filed the declaration of Lori Sheeley. Ms. Sheeley is a Victim/Witness

Advocate at the Spokane County Prosecutor's Office. She recounted several conversations she had with Ms. Gertlar about Ms. Gertlar's and her husband's phone calls with Mr. Harget. Ms. Gertlar told her that she did not know that Mr. Harget was Mr. Merrill's attorney, that she would not have spoken to him had she known who he was, and that Mr. Harget "pestere[d]" her until her husband finally hung up on him. CP at 53-54. Mr. Harget disputes this.

The court granted the motion for sanctions, relying on both its inherent authority to control litigation and chapter 7.69 RCW. It found:

- "Mr. Harget, in refusing to recognize [the Gertlars'] right, violated the purpose of the statute by engaging in the type of conduct the statute was designed to prohibit."
- "By his declaration filed in this matter, Mr. Harget admits that he disregarded the statute and the protections set forth therein."
- "Mr. Harget was aware that the victims desired the presence of an advocate for any interviews."
- "He made no attempt to seek court intervention prior to contact with the victims."
- "If he was unsure or unclear on their position after the first contact, it soon thereafter became crystal clear. Through no stretch of the imagination was he justified in contacting them a second time without the presence of the advocate."
- "Mr. Harget disregarded [the RCW 7.69.030(10)] right."

CP at 63. The judge concluded that "the state is mandated to protect victims' rights and to offer them the mechanism to invoke their right to have an advocate present" and

invoked her common law authority to impose sanctions. CP at 63. She ordered Mr. Harget to pay $100 to charity and participate in a one-hour ethics CLE about victims' rights within 60 days. CP at 63. Mr. Harget appeals the court's sanctions.

DISCUSSION

We review a trial court's decision to impose sanctions for abuse of discretion. *State v. Gassman*, 175 Wn.2d 208, 210, 283 P.3d 1113 (2012). A trial judge certainly has the inherent authority to sanction lawyers for improper conduct during the course of litigation, but that generally requires a showing of "bad faith." *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000). Trial courts are, however, encouraged to make an explicit finding of bad faith before imposing such sanctions. *Gassman*, 175 Wn.2d at 211. We will nonetheless uphold sanctions when the trial court made a finding equivalent to a finding of bad faith. *See S.H.*, 102 Wn. App. at 475-76 (citing *Wilson v. Henkle*, 45 Wn. App. 162, 175, 724 P.2d 1069 (1986) (holding that a finding of "inappropriate and improper" is tantamount to a finding of bad faith); *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 136 (2d Cir. 1998) (concluding that finding of acting in conscious disregard of discovery obligations amounted to finding of bad faith)). Bad faith is "[d]ishonesty of belief or purpose." Black's Law Dictionary 149 (8th ed. 2004).

The judge here imposed sanctions because defense counsel disregarded the Gertlars' RCW 7.69.030(10) right to have an advocate present at defense interviews. And she did so based on her "inherent authority" to control litigation. CP at 63. Mr. Harget readily admits that he contacted the victims, despite their notice, but he says his contact is sanctioned by what he calls the "safe harbor" provisions of RCW 7.69.030(10). It provides that "[t]his subsection applies if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case." RCW 7.69.030(10).

Mr. Harget argues that the presence of an advocate was impractical and might well have resulted in a delay. The State responds that there is no showing of any exigency that would have made the presence of a victim's advocate impractical. There are no findings here on appeal one way or the other on this question and it is a question that is unique to the particular circumstances of these trial proceedings.

And there is no finding that Mr. Harget acted in bad faith. The court's finding that "Mr. Harget disregarded [the Gertlars'] right" is arguably equivalent to a finding of bad faith. *See S.H.*, 102 Wn. App. at 475-76. But the court could not properly find that Mr. Harget "disregarded" the Gertlars' right without considering RCW 7.69.030(10)'s safe harbor. If the trial court concludes that the safe harbor did not apply, then it can consider

whether Mr. Harget acted in bad faith. That very fact specific conclusion would turn on the notices Mr. Harget received, the timing of his contacts, the trial and hearing dates, the purpose for Mr. Harget's contacts, and whether Mr. Harget relied in good faith on the safe harbor.

Mr. Harget also argues that the court should have considered whether his contact with the Gertlars amounted to an "interview." Br. of Appellant at 14-15. A crime victim has the right to have an advocate or support person present at "prosecutorial or defense *interviews*." RCW 7.69.030(10) (emphasis added). From this, Mr. Harget argues that the statute only applies to specific types of communication between victims and defense counsel. He says that an interview is investigatory and that his phone calls were not. He also says that the statute made no distinction between an interview and calling a victim to discuss a settlement and that the court should have explored whether any distinctions existed.

"Interview" means "a meeting face to face," "a private conversation," or "a formal meeting for consultation." Webster's Third New International Dictionary 1183-84 (1993). These definitions encompass both face-to-face interviews for investigatory purposes and private over-the-phone conversations. The court correctly concluded that Mr. Harget's contact was an interview. Mr. Harget's suggested distinction is at least

hypertechnical and would at most ignore the purpose of the statute to protect and support victims of violent crime. And Mr. Harget's second telephone visit with the Gertlars about the potential sanctions is still contact with victims who do not want to be contacted without a victim's advocate present. And it amounts to contact by the lawyer, Mr. Harget, who represents, and continues to represent, the defendant accused of assaulting these victims.

In sum, Mr. Harget raised the question of what he describes as "safe harbor" provisions of RCW 7.69.030(10) and the court should pass on whether he relied on that language in good faith. *See S.H.*, 102 Wn. App. at 475. And, of course, the court must make a finding that Mr. Harget did or did not act in bad faith before imposing a sanction.

We remand for further proceedings.

A majority of the panel has determined that 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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Sweeney, J.

WE CONCUR:

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Siddoway, A.C.J.

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Brown, J.