

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIM EYMAN, et al.,

Petitioners.

No. 9 8 7 4 3 - 2

CORRECTED RULING DENYING
DIRECT DISCRETIONARY REVIEW

Tim Eyman, and Tim Eyman Watchdog for Taxpayers, LLC (collectively Mr. Eyman) seek direct discretionary review of an order by the Thurston County Superior Court denying his motion to vacate a discovery sanctions order and a subsequent summary judgment order. As explained below, Mr. Eyman fails to show that the superior court committed obvious or probable error within the meaning of RAP 2.3(b); therefore, the motion for discretionary review is denied without deciding whether to retain this matter in this court or transfer it to the Court of Appeals.

Over 2,000 pages of records were submitted in this matter. The underlying facts will be related only briefly. Mr. Eyman is well-known as an organizer and promoter of voter initiatives, generally concerning tax issues. In 2002 the Public Disclosure Commission determined Mr. Eyman was using monetary donations to his political activities to support himself and his family in violation of the Fair Campaign Practices Act (FCPA), chapter 42.17A RCW. Mr. Eyman admitted diverting campaign

contributions for his personal use. A judgment was entered against Mr. Eyman, he paid a fine, and he agreed to never again serve as a committee treasurer or a signer on a political committee's accounts. Furthermore, the state Public Disclosure Commission (PDC) advised Mr. Eyman that political contributions were "not to pay you or your family's personal expenses, the payment of which will enable you to spend time assisting or promoting ballot measure campaigns and/or initiatives to the legislature[.]" App. 457, 464.

It appears Mr. Eyman resumed his remunerative activities by other means. The State alleges that in 2010 Mr. Eyman asked a signature gathering contractor, Citizen Solutions, to overcharge his political committee 50 cents per signature on initiative petitions as a kickback to him personally. Mr. Eyman allegedly collected \$150,000 for himself through this rubric.

Mr. Eyman apparently kept at it. During another initiative campaign in 2011, Citizen Solutions' principals paid Mr. Eyman a total of \$86,000, designated as "gifts" to Mr. Eyman's wife and children. Mr. Eyman's spouse was unaware of these payments and had no relation with Citizen Solutions' principals. Mr. Eyman may also have received another \$130,000 from Citizen Solutions denoted as "gifts." He also discussed setting up a "gift payment plan" with Citizen Solutions.

In 2012 Mr. Eyman's political committee contracted with Citizen Solutions again to gather signatures for Initiative 1185. Without consulting the other officers of the committee, Mr. Eyman negotiated the signature gathering contract, pricing it in such a way as to give himself another kickback. When the campaign closed, Mr. Eyman received through his company, Tim Eyman Watchdog for Taxpayers, LLC (Watchdog), \$308,185 from Citizen Solutions. Mr. Eyman did not disclose this payment to the relevant committee officers and did not disclose it to the PDC. As before, Mr. Eyman

used this money for personal and family living expenses and to fund another of his initiatives, I-517.

Mr. Eyman and Watchdog paid about \$200,000 to a Virginia company, Citizens in Charge, to fund signature gathering for I-517. Citizens in Charge spent \$182,000 on signature gathering firms in support of the initiative. Mr. Eyman instructed his committee members, including the treasurer, to designate the \$182,000 as in-kind contributions from Citizens in Charge, concealing his role as the source.

In 2017 the State filed a complaint against Mr. Eyman and Citizen Solutions for violating the FCPA by way of improper transfer of contributions between the I-1185 and I-517 campaigns. Mr. Eyman, initially represented by counsel, failed to respond to discovery, even when the superior court granted the State's motion to compel discovery. The superior court appointed a special discovery master. On the special master's recommendation, the court found Mr. Eyman in contempt, and ordered him to pay \$250 per day in contempt sanctions until he purged the contempt.

Represented by new counsel, Mr. Eyman still failed to fully comply with discovery, particularly with respect to contributions. The special master and the superior court denied multiple motions to purge the contempt. Instead, because Mr. Eyman still failed to comply with discovery, the court in September 2018 doubled the daily penalty to \$500 until Mr. Eyman purged the contempt. Mr. Eyman still failed to comply.

The State amended the complaint, adding additional FCPA violations arising from Mr. Eyman's failure to report political contributions paid to himself and his family. The State obtained some evidence of this money, but Mr. Eyman still would not cooperate in discovery.

In November 2018 the State propounded more discovery (its fifth set), asking for information concerning money Mr. Eyman or his family received in relation to his political work. Mr. Eyman again failed to respond. On July 10, 2019, following the

special master's recommendation, the superior court found Mr. Eyman in contempt again. The court denied the State's request to increase the daily penalty to \$1,000, reasoning that the monetary penalties were not an incentive for Mr. Eyman to comply with the court's orders.

Mr. Eyman still did not comply with discovery orders. He also started to proceed pro se.

On September 13, 2019, the superior court granted the State's motion for non-monetary sanctions pursuant to CR 37(b)(2)(A) (discovery sanctions order). In particular, the court found, for purposes of the present action, that \$766,447 in payments that Mr. Eyman received were contributions in support of ballot propositions as defined in RCW 42.17.005, and not gifts, requiring no further proof from the State as to that issue. In so ruling, the court found that (1) Mr. Eyman willfully and deliberately violated the discovery rules as well as the court's order compelling discovery, (2) that 21 months after the court initially compelled discovery, Mr. Eyman still failed to comply without reasonable explanation, and (3) he was still in contempt after eight failed motions to purge. The court further found that the State's ability to prepare for trial had been substantially and irreparably prejudiced by Mr. Eyman's failure to comply with discovery. In particular, the State was forced to conduct depositions and other discovery without the benefit of responsive discovery from Mr. Eyman. The court stated that it considered and imposed lesser sanctions, including more than \$200,000 in monetary sanctions to no avail. The court noted that its order did not resolve outstanding discovery issues, and that Mr. Eyman therefore remained in contempt and was still required to comply with the court's previous orders. The court granted the State's request for reasonable attorney fees and costs. The court denied reconsideration on October 2, 2019. Mr. Eyman did not seek discretionary review of either of these orders

within 30 days, as required by RAP 5.2(b). Mr. Eyman retained new counsel in mid-October 2019.

On February 21, 2020, the superior court granted the State's motion for partial summary judgment as to the following: (1) Mr. Eyman solicited contributions to compensate himself for promoting ballot propositions such as to require reporting under the FCPA; (2) Mr. Eyman is a continuing political committee as defined by RCW 42.17A.005; (3) Mr. Eyman failed to register as a political committee and was at least 2,706 days late doing so; (4) Mr. Eyman, as a political committee, failed to report \$766,447 in contributions he received for purposes of supporting ballot propositions, thus violating the FCPA; (5) Mr. Eyman was required to file one C-3 report and one C-4 report for each of 55 separate months from September 2012 through July, 2018, and the combined 110 reports were a combined total of 173,862 days late; and (6) Mr. Eyman concealed \$766,447 in contributions supporting his ballot propositions in violation of RCW 42.17A.435. Mr. Eyman filed a combined motion for reconsideration of the partial summary judgment order and a motion to revise the September 13, 2019, discovery sanctions order. The court denied that combined motion on March 13, 2020. Again, Mr. Eyman did not seek discretionary review of these orders.

On May 28, 2020, Mr. Eyman filed a motion to vacate the September 19, 2019, discovery sanctions order and the February 21, 2020, partial summary judgment order. The superior court denied the order on June 5, 2020.

On July 6, 2020, Mr. Eyman filed a notice for discretionary review of (1) the June 5, 2020, order denying the motion to vacate; (2) the March 13, 2020, order denying reconsideration of the partial summary judgment order and discovery sanctions order; (3) the February 21, 2020, order granting partial summary judgment; (4) the October 2, 2019, order denying reconsideration of the discovery sanctions order; and (5) the September 13, 2019, discovery sanctions order. Mr. Eyman also filed a statement of

grounds for direct review and a motion for discretionary review. RAP 2.3(b); RAP 4.2(b), (c). The State filed answers opposed to direct review and discretionary review. The State also filed two motions to supplement the record in this matter with more recent superior court records. Mr. Eyman objects to supplementation of the record. The parties argued their respective positions at a teleconference hearing on October 8, 2020. Meanwhile, Mr. Eyman filed a motion in the superior court to continue the trial, which is currently set to begin on November 16, 2020. The court denied that motion on October 9.¹ Now before me for determination is the motion for discretionary review, the statement of grounds for direct review, and the State's two motions to supplement the record.

Preliminarily, the State's motions to supplement the record are denied without prejudice. Judicial notice is taken of the recent superior records thus submitted, but they were not considered in making this ruling. The State may renew the motions if this court grants a motion to modify and retains this case for further review.

Turning to the motion for discretionary review, the only matter properly before me is the superior court's order denying Mr. Eyman's motion to vacate the partial summary judgment order and the order imposing discovery sanctions. The State is correct that Mr. Eyman's challenge to the other orders designated in the notice of discretionary review are time barred because Mr. Eyman did not seek discretionary review within 30 days of the entry of those orders and he did not move for an extension of time in which to seek discretionary review. RAP 5.2(b); RAP 18.8(b). Mr. Eyman contends he timely challenged these orders, citing the partial summary judgment rule, which allows the revision of a partial summary judgment order at "any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the

¹ At my request, Mr. Eyman submitted a copy of the order denying his motion for a continuance.

parties.” CR 54(b). But that rule does not apply to the discovery sanctions order. Mr. Eyman already moved for reconsideration of that order and the partial summary judgment order, and both were denied well outside the 30-day window for discretionary review. RAP 5.2(b). Thus Mr. Eyman’s motion for direct discretionary review of those orders is time-barred. His challenge to the order denying his motion to vacate is timely.

Moving on, Mr. Eyman contends the order denying the motion to vacate constitutes obvious error that renders further proceedings useless or probable error that substantially limits the status quo or that substantially limits a party’s freedom to act. RAP 2.3(b)(1)-(2). Neither of these criteria applies.

A superior court commits “obvious error” under RAP 2.3(b)(1) when its decision is clearly contrary to statutory or decisional authority with no discretion involved. *See* I WASHINGTON APPELLATE PRACTICE DESKBOOK, § 4.4(2)(a) at 4-34—4-35 (4th ed. 2016). The error also must render further proceedings “useless.” *See id.* at 4-36. Or stated more simply, the court “made a plain error of law that markedly affects the course of the proceedings.” II WASHINGTON APPELLATE PRACTICE DESKBOOK, § 18.3 at 18-14 (4th ed. 2016) (discussing the analogous rule under RAP 13.5(b)(1)).

Mr. Eyman in his motion for discretionary review fails to provide any meaningful argument on whether the superior court erred in denying his motion to vacate. Furthermore, the motion to vacate lacks any worthwhile analysis of an applicable rule, such as CR 60(b). To the extent CR 60(b) might apply, a superior court’s order denying a motion to vacate is generally reviewed for manifest abuse of discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). An alleged error in law is not a ground for vacating a judgment or order. *Id.* More generally, an abuse of discretion occurs when the superior court’s order is manifestly unreasonable or based on untenable grounds or entered for untenable reasons. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010). A decision is manifestly unreasonable if the court,

despite applying the correct legal standard to the facts of the case, adopts a position that no reasonable person would take. *Id.* at 459.

“Trial courts need not tolerate deliberate and willful discovery abuse.” *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 576, 220 P.3d 191 (2009). When a party fails to obey an order compelling discovery in a pending action, as Mr. Eyman consistently failed to do in this case, the superior court may issue a sanction in the form of an order establishing designated facts at issue “for the purposes of the action.” CR 37(b)(2)(A). Like an order on a motion to vacate, an order imposing discovery sanctions is reviewed for abuse of discretion. *Magaña*, 167 Wn.2d at 582; *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Before imposing a particularly harsh discovery sanction, such as the non-monetary sanction entered against Mr. Eyman, the superior court must consider on the record (1) whether the offending party’s violation was willful or deliberate, (2) whether the violation caused substantial prejudice to the adverse party, and (3) whether the court considered imposing a lesser sanction. *Magaña*, 167 Wn.2d at 584; *Mayer*, 156 Wn.2d at 688; *see also Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (explicating the three *Burnet* factors).

A party’s failure to comply with discovery orders is deemed willful when there is no reasonable excuse or justification for disregarding such orders. *Magaña*, 167 Wn.2d at 584. In this instance, the State propounded discovery concerning monies paid to Mr. Eyman that were attributed to contributions to his political campaigns. Mr. Eyman did not comply. The superior court found him in contempt and initially sanctioned him \$250 per day for his failure to comply with its orders to compel production. Mr. Eyman still would not comply. The court increased the daily monetary penalty to \$500. Mr. Eyman still would not comply to the court’s satisfaction. The court eventually denied eight motions to purge as Mr. Eyman’s noncompliance continued. Mr. Eyman has never articulated an objectively reasonable justification for repeatedly

disregarding the superior court's orders. His primary complaint—that the discovery requests touched upon a huge number of documents—is not compelling when the history of this matter is viewed in its entirety. Mr. Eyman's egregious history of noncompliance amply supported the superior court's explicit finding that Mr. Eyman's violation of the discovery rules and the court's orders was deliberate and willful.²

With respect to the prejudice prong of the *Burnet* factors, the key consideration is whether the nonoffending party was prejudiced in preparing for trial. *Magaña*, 167 Wn.2d at 589. Here, the court found that Mr. Eyman's failure to comply with discovery orders “substantially and irreparably” prejudiced the State's ability to prepare for trial. In particular, the superior court found that the State was forced to conduct depositions and other pretrial discovery without valuable information that Mr. Eyman could have provided had he complied. Again, the record provided supports this finding. Mr. Eyman complains that the State eventually gathered the information it needed. That is not the point. Mr. Eyman willfully thwarted the State's efforts to prepare for trial, causing significant delay and an obvious waste of resources.

Consistent with the final prong of the *Burnet* approach, the superior court also explained that it considered and imposed lesser sanctions, including a total of more than \$200,000 in monetary sanctions. Mr. Eyman still would not comply. A harsh non-monetary penalty was fully justified.

In light of the foregoing, the superior court did not abuse its discretion in denying the motion to vacate the order imposing discovery sanctions, and even if the order

² Mr. Eyman makes much of his pro se status during portions of his litigation in the superior court, arguing that he was forced into bankruptcy. He provides no controlling or persuasive authority carving out a safe harbor for pro se litigants subject to discovery requests in civil litigation. To the contrary, the superior court holds a pro se party to the same standards to which it holds an attorney. *Edwards v. Le Duc*, 157 Wn. App. 455, 238 P.3d 1187 (2010).

imposing discovery sanctions was properly before me (and it is not) the superior court did not abuse its discretion in imposing them.

Mr. Eyman barely mentions the order on partial summary judgment with respect to the order denying his motion to vacate. He does not allege that there were any disputed issues of material fact precluding summary judgment. CR 56(d). The motion to vacate merely proposes that if the order imposing discovery sanctions is vacated, the subsequent order on partial summary judgment must be vacated also.

Touching on the summary judgment issue, Mr. Eyman contends the FCPA is unconstitutional and that he is being targeted for his First Amendment activity. It is well-settled generally that FCPA disclosure requirements are not unconstitutionally vague and do not conflict with constitutional protections for political speech. *Voters Educ. Comm. v. Pub. Disclosure Comm'n*, 161 Wn.2d 470, 498, 166 P.3d 1174 (2007). Further reinforcing the constitutionality of the FCPA, after the superior court entered the partial summary judgment in this case, this court held that FCPA's registration and disclosure requirements did not violate the First Amendment as applied to the Grocery Manufacturer's Association (GMA). *State v. Grocery Mfrs. Ass'n*, 195 Wn.2d 442, 461-69, 461 P.3d 334 (2020). In particular, the court determined that the State had a sufficiently important interest in supporting the public's right to know the source of GMA's campaign funding and that that interest was not outweighed by the burdens on GMA's free speech and associational rights. *Id.* at 463-69. The superior court here did not have the benefit of *Grocery Manufacturers Association* when it imposed discovery sanctions and later decided the partial summary judgment motion, but the orders thus entered are not in conflict with that newly established precedent. This motion for discretionary review concerns a fairly straightforward discovery dispute, not a reviewable constitutional question. There is no showing of an abuse of discretion.

Since there is no showing of obvious error, there is no need to discuss whether further proceedings are useless. RAP 13.5(b)(1). There is no probable error either. RAP 13.5(b)(2). Even if there was probable error (and there was none), this criterion applies only when the claimed error alters the status quo or limits a party's freedom to act outside the confines of the instant litigation. *See* Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 WASH. L. REV., 1541, 1546 (1986) (interpreting meaning of "probable error" standard); *see also State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014) (interpreting probable error standard under RAP 2.3(b)(2)). There is no persuasive showing of such external effects in this case. Mr. Eyman worries about the consequences of an adverse judgment after trial, but he does not show immediate effects flowing from the order denying his motion to vacate that extend beyond the boundaries of this litigation.

In sum, Mr. Eyman fails to show that discretionary review is warranted under either RAP 2.3(b)(1) or (b)(2). Since discretionary review is not justified at all, there is no need to decide whether to transfer this matter to the Court of Appeals pursuant to RAP 4.2.

The motion for direct discretionary review is denied.


COMMISSIONER

October 15, 2020