SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

JEFFREY BEST, DANIEL CAMPOS and GARY DALE HUTT, on behalf of Themselves and all others similarly Situated and GREGG HANSEN,	)	
Plaintiffs,	)	No. 04 2 00189 0
vs.	)	**MEMORANDUM DECISION**
GRANT COUNTY, a Washington County,	)	
Defendant.	)	

PROCEEDINGS

This case is a proposed class action under CR 23 in which the plaintiffs asked the court to issue injunctive and declaratory relief against Grant County concerning its indigent defense services. The three named defendants Best, Campos and Hutt, were all charged with felonies in Grant County Superior Court and assigned attorneys to represent them. Each named defendant contends Grant County, through its Board of County Commissioners, has violated the constitutional rights of indigent persons accused of felonies in Grant County arising from the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 3, 12 and 22 of the Washington State Constitution.

The proposed representative plaintiffs (Best, Campos and Hutt) seek judicial enforcement of their right to effective assistance of counsel, due process and equal protection of the laws. They, together with Grant County taxpayer Gregg Hansen, seek injunctive and declaratory relief

in order to protect the constitutional rights of all present and future indigent criminal defendants. By their request for class certification under CR 23(b)(2) the representative plaintiffs seek to represent a class consisting of all indigent persons who have or will have criminal felony cases pending in Grant County Superior Court, who are appointed an attorney, and who have not entered into a plea agreement or been convicted.

The defendant opposes the representative plaintiffs' motion for class certification, contending class certification is not appropriate because the plaintiffs cannot establish a justicable controversy, the plaintiffs cannot establish actual harm and/or the imminent threat of future harm, because the plaintiffs cannot establish the necessary requirements under CR 23 and because the plaintiffs fail to state a claim upon which relief may be granted.

Plaintiffs have also moved the court to compel Grant County to produce documents responsive to plaintiffs' first request for production, to produce a witness in response to the plaintiffs' CR 30(b)(6) deposition who will be prepared to testify knowledgeably and completely regarding the matter set forth in the deposition notice, to answer questions concerning the qualifications of new public defenders contracted with the county and to provide the identity and responsibility of all persons who have participated on behalf of Grant County in the decision to seek reassignment of cases from one attorney to another since February 15, 2004.

Oral argument on the motions[1] was heard by the court on Wednesday, August 4, 2004. The court thereafter took the matter under advisement to review the extensive briefings by the parties and to consult the numerous cases cited by each side.[2] The court has now had the opportunity to review the positions of the parties.

DISCUSSION

1. Background. The plaintiffs' complaint contains numerous allegations pertinent to their motion for class certification. Paragraphs 27 through 31 outline Grant County's duty to

[1] The defendant also moved to strike plaintiffs' references to unpublished decisions in their reply in support of plaintiffs' motion for class certification and unauthenticated hearsay documents attached to the declarations of Nancy Talner and Don Scaramastra. While the parties did not argue the motion to strike orally, the court indicated it would consider the motion to strike and the opposition thereto in its decision-making process.

[2] The court also indicated to the parties that it was about to embark on a 10-day vacation which the court did take from August 5 to August 15. The court returned back on August 16 to preside over a 5½ day trial, Northwest Pipeline v. the State of Washington and 29 counties in which Northwest Pipeline protested its tax evaluations in the State of Washington.

provide effective assistance of counsel for indigent persons charged with felony crimes. Paragraphs 32 through 41 provide an overview of Grant County's public defense system. Paragraphs 42 through 49 provide reference to judicial findings of ineffective assistance of counsel and the disbarment recommendations for the public defenders Tom Earl and Guillermo Romero.[3] Paragraphs 50 through 56 outline the chaos created in the Grant County public defense system by suspension of Tom Earl. Paragraphs 57 through 94 outline how Grant County has failed to establish a public defense system that provides effective assistance of counsel to all indigent persons charged with felony crimes in that it has failed to assure that all public defenders meet professional qualifications, that defendant Grant County has failed to impose reasonable case load limits, has failed to monitor or oversee the public defense system, has failed to provide adequate funds for public defense, has failed to provide adequate funds to pay necessary costs of defense, has failed to provide representation at all critical stages of prosecution, and has undermined the independence of public defenders.

In paragraphs 95 through 100 of their complaint the plaintiffs outline how Grant County has failed to provide effective assistance of counsel for the class plaintiffs. Specifically, on January 29, 2004 Jeffrey Gregg Best was charged with burglary in the second degree, theft of anhydrous ammonia, unlawful storage of anhydrous ammonia, and theft in the second degree under cause number 04-1-00101-6. On February 10, 2004 Mr. Best was charged with burglary in the second degree and theft of anhydrous ammonia under cause number 04-1-00142-3. Mr. Best was assigned an attorney to represent him on the charges. Best contends and argues he was deprived of his rights of effective assistance of counsel because he wasn't represented at his initial appearance; he only met with his attorney on three occasions, none of the meetings of which lasted more than 10 minutes and one of which was by happenstance; and that Best did not have sufficient opportunity to discuss the facts relating to the charges against him or dismiss substantive legal issues or important litigation strategy. Moreover, Best asserts he was unable to contact his attorney even though he made several attempts to contact the attorney including filing kites with the jail and writing letters to his attorney. His court appointed counsel acknowledged receiving the kites and letters but did not respond in substance to them. Mr. Best further contends he was not advised of his rights with respect to important pretrial hearings, including suppression hearing under CrR 3.5 and CrR 3.6, nor was he fully advised of his sentencing range

[3] Both of whom have since been in fact disbarred by the Washington State Supreme Court.

if convicted. He asserts his attorney had an excessive case load because it had doubled since Tom Earl was suspended and because the attorney was also assigned a juvenile defendant charged in superior court with first degree murder. In fact, Best's attorney candidly admitted that he had not been able to do the things that should be done with regard to Best's case.

Daniel Campos was charged on August 22, 2003 with two counts of stalking and two counts of driving on suspended license under cause number 03-1-00750-4. On February 9, 2004 Mr. Campos was charged with malicious mischief second degree under cause number 04-1-00134-2. On March 29, 2004 the 2004 information was amended to include a second count of malicious mischief. Mr. Campos was appointed an attorney. Mr. Campos asserts he has been deprived of his rights to effective assistance of counsel because he was not represented by counsel at his initial appearance on the 2003 charge, that during representation of Campos on 2003 charge Campos' attorney only met with him immediately before court dates and that at these meetings Campos had an inadequate opportunity to discuss defending the charges against him. Mr. Campos further asserts that after having been represented by the assigned attorney on the 2003 charge for approximately five months he was given a newly assigned attorney, that when he asked for an explanation Campos was told he was provided a new lawyer because of an unidentified conflict of interest, and that his new attorney assumed responsibility of Campos' defense for both the 2003 and 2004 charges. Campos alleges that at the pretrial hearing regarding the 2003 charge Campos' previous attorney indicated that there were several witnesses that had not been identified or developed by the State and that although his previous attorney had indicated these witnesses would be needed to be interviewed no interviews took place. Campos additionally claims that although he provided his new attorney with contact information for potential exculpatory witnesses regarding the 2003 charge his attorney failed to advise Campos that the witnesses had been interviewed, that prior to receiving the names of potentially exculpatory witnesses from Campos, his attorney had already filed a list of witnesses for the 2003 charge and that the list only reserved the right to call Campos and two witnesses reserved by the State. Campos also contends his new attorney had him sign a stipulation to admissibility of defendant's statements made regarding the 2003 charge without fully advising Campos concerning the contents of those statements, the circumstances under which the statements were made, or the impact of the stipulation on his defense. Finally, Campos asserts his attorney did

not meet with him for a sufficient amount of time to discuss the facts relating to the charges against him, substantive legal issues and important litigation strategy.

Gary Dale Hutt was charged with conspiracy to deliver methamphetamine and attempted introduction of contraband in the second degree under cause number 04-1-00022-2 on January 12, 2004. On February 24, 2004 the information was amended to include charges of possession of methamphetamine with intent to deliver, possession of cocaine with intent to deliver, possession of marijuana with intent to deliver, conspiracy to deliver cocaine, conspiracy to deliver marijuana, and assault in the second degree. Mr. Hutt was assigned an attorney. He alleges his rights to effective assistance of counsel were violated because he wasn't represented by counsel at his initial appearance on the charges set forth above, that while detained during the pendency of the proceeding against him he had the opportunity to meet with his attorney only three times, none of which meetings lasted longer than 15 minutes, and that his attorney did not adequately discuss the facts relating to the charges against him or discuss substantive legal issues or important litigation strategy. He alleges his attorney did not accurately review the discovery with him or interview important witnesses in the case.

Finally, the plaintiffs allege that as a result of Grant County's acts and omissions including policies, practices and procedures maintained in countenance by Grant County, the indigent persons charged with felony crimes in Grant County have suffered or are at imminent and serious risk of suffering harm. The plaintiffs contend among other things that indigent persons are deprived of adequate consultation and communication with attorneys, that they must make decisions about their rights or contest issues without adequate factual or legal investigation by their attorneys, that they are deprived of meaningful opportunities to present defenses, that the rights of indigent persons are waived without proper consultation advice, that indigent persons are deprived of services of investigators and expert witnesses, that indigent persons' cases are not properly prepared for trial and that indigent persons do not receive meaningful benefits in exchange for guilty pleas.

On March 5, 2004 the Grant County Board of County Commissioners established a new contract to public defender program pursuant to Chapter 10.101 RCW which is evidently patterned after a similar system in Benton County. Grant County contends the new system comports to recommendations made by the ACLU in its March 2004 report entitled "The Unfulfilled Promise of Gideon-Washington's Flawed System of Defense for the Poor".

On April 20, 2004 Jeffrey Best entered a Statement of Defendant on Plea of Guilty to two counts of burglary in the second degree and theft in the second degree. Mr. Hutt's cases have all been resolved, he has been sentenced and is serving his time in Shelton Correctional Facility. Mr. Campos' cases are pending.

2. Law Regarding Class Action Certification. A primary function of a class action lawsuit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group. Smith v. Behr Process Corp., 113 Wn.App. 306, 319 quoting Brown v. Brown, 6 Wn.App. 249, 253 (1971). Washington courts favor a liberal interpretation of CR 23 as the rule avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits, and also frees the defendant from the harassment of identical future litigation. Smith, supra at 318. Interests of justice require that in a doubtful case any error, if there is to be any, should be committed in favor of allowing the class action. Smith, supra at 319 quoting Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968).

In a proposed action such as this one where the plaintiffs seek sweeping injunctive relief, questions relating to the named plaintiffs' standing and entitlement to equitable relief, the propriety of class certification, and the availability of system wide relief will often overlap. Stevens v. Harper, 213 F.R.D. 358, 366 (2002). Standing and entitlement to equitable relief are threshold jurisdictional requirements that must be satisfied prior to class certification. Any analysis of class certification must begin with the issue of standing. Only after the court determines the issue for which the named plaintiffs have standing should it address the question of whether the named plaintiffs have representative capacity. Stevens, supra. On a motion to dismiss for lack of standing, the trial court must accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party. Stevens, supra at 370.

When standing has been determined, plaintiffs moving for class certification bear the burden of demonstrating they meet the requirements of CR 23. Miller v. Farmer Brothers Company, 115 Wn.App. 815, 820 (2003). Where class certification is sought at the early stages of litigation, courts generally assume that the allegations in the pleadings are true and will not attempt to resolve material factual disputes or make any inquiry into the merits of the claim. Miller, supra; Smith, supra at 320. Courts may, however, go beyond the pleadings and examine the parties' evidence to the extent necessary to determine whether the requirements of CR 23

have been met. Miller, supra; Oda v. State, 111 Wn.App. 79, 94, review denied, 147 Wn.2d 1018 (2002). Because class actions are a specialized proceeding available in limited circumstances, the trial court must conduct a " rigorous analysis" of the CR 23 requirements to determine whether a class action is appropriate in a particular case. Miller, supra; Oda, supra at 93.

To certify a class action the court must determine four elements of CR 23(a) are present, that is (1) the class is so numerous that joinder of all members is impractical; (2) that there are questions of law in fact common to the class; (3) that the claims of the representative parties are typical of the claims of the class; and (4) that the representative parties will fairly and adequately protect the interests of the class. In addition to satisfying the four requirements of CR 23(a), the class action suit must fall within one of three categories of actions set forth in CR 23(b). Here, the representative plaintiffs contend CR 23(b)(2) applies because Grant County, it is contended, has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or a corresponding declaratory relief with respect to the class as a whole. See Sitton v. State Farm Mutual Auto Insurance Company, 116 Wn.App. 245, 251 (2003).

3. Decision.

a. Standing. To establish standing, a plaintiff must allege he has suffered an injury in fact, that the injury was causally connected to the defendant's actions, and that it is likely that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992). Here, each of the three plaintiffs, Best, Campos and Hutt, is or was represented by a public defender. They each allege they were denied effective assistance of counsel because the county failed to provide adequate indigent public defense services to them. Each has alleged specific facts related to the manner in which the county has provided and continues to provide indigent defender services and alleges specific facts which detail the manner in which each of the named plaintiffs has been deprived of those services.

Yet, Grant County contends Campos' claim is not ripe yet because his action is still pending and that Best's and Hutt's claims are moot because their cases have been resolved. Campos' allegation that he is facing criminal prosecution without an effective lawyer at his side certainly raises the prospect of serious and immediate injury or threatened injury. The right to

effective assistance of counsel extends to all persons accused of felonies not just those who are innocent. Harm is not limited to locking up innocent people. The accused is prejudiced if he or she is forced to plead guilty rather than run the risk of going to trial without competent counsel or if counsel doesn't bother to call witnesses who can support the accused, or when the accused must evaluate the pros and cons of a plea offer without competent counsel to explain the plea and its consequences or when counsel doesn't bother to move to suppress inadmissible evidence. Campos' claim is ripe.

The fact Best's and Hutt's claims have been resolved after this case was filed do not render their claims moot. As indicated by the United States Supreme Court in Sosna v. Iowa, 419 U.S. 393, 402 note 11, 95 S.Ct. 553, 42 L.Ed. 2d 532 (1975):

> "There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend on the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review."

Two classes of cases in which certification should "relate back" to the date of filing the complaint, preventing the case from being mooted by subsequent events involve cases where the allegedly illegal acts complained of are "capable of repetition yet evading review"[4] and cases including classes that are "inherently transitory".[5] As pointed out by the plaintiffs, Best's and Hutt's claims survive the mootness argument because their cases fall within both the classes allowing their cases to relate back to the date of filing even though their individual claims might be otherwise moot. See Burman v. State, 50 Wn.App. 433, 439 (1988). It is noted criminal proceedings are short in duration and inevitably terminate before a civil proceeding like this one is fully litigated. For this reason the length of any preadjudication status is unknown and no member of the class is likely to have a live claim throughout the litigation. As such the duration of the challenged action is short enough to evade review. Gerstein, supra. Moreover, that Best and Hutt have led guilty does not mean they may not act as class representatives. Putative class representatives are not required to forego or delay legal opportunities in order to avoid a mootness challenge. Perez-Funex v. District Director, INS, 611 F.Supp. 990, 1000, C.D. Cal.

[4] See Gerstein v. Pugh, 420 U.S. 103, 111, note 11, 95 S.Ct. 854, 483 L.Ed. 2d 54 (1975).
[5] See Wade v. Kirkland, 118 Fed. 3d 667, 670 (9th Cir. 1997).

(1984). Additionally, the changes in the plaintiffs' status do not moot their claims on behalf of the class because the class is inherently transitory. A class is inherently transitory when it consists of a "fluid population", such as pretrial detainees, prisoners or indigent persons, or where there is a constant, though revolving, class of persons suffering from the same deprivation. County of Riverside v. McLaughlin, 500 U.S. 44, 52, 114 L.Ed. 2d 49, 111 S.Ct. 1661 (1991). The class the plaintiffs seek to represent is fluid in that its membership shifts frequently.

Based on the foregoing, the court concludes the plaintiffs Best, Campos and Hutt have standing and that the court should proceed to its analysis under CR 23.

b. CR 23. CR 23(a)(1) requires the class to be so numerous that joinder of all members is impractical. A proposed class of at least 40 members creates a rebuttable presumption that joinder is impracticable. Miller, supra at 821. Here, while the numbers of the proposed class are by no means precise it has been demonstrated to the satisfaction of the court that the class consists of hundreds of persons with felony criminal cases currently pending in the Grant County Superior Court and several hundred if not thousands of whom will have criminal cases in the future.[6] And as has been pointed out above, the membership is inherently transitory so it is in a constant state of flux, making identification and joinder of members especially difficult and therefore impracticable. See Robinson v. Peterson, 87 Wn.2d 665, 667 (1976); see Johnson v. Moore, 80 Wn.2d 531, 533 (1972). These factors and others weigh in favor of certification.

CR 23(a)(2) requires that the proponents of the class demonstrate there are questions of law or fact common to the class. This threshold of "commonality" is low in the sense that it is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class. Smith v. Behr, supra at 320. Here, the plaintiffs' complaint sets forth in some detail the problems indigent defendants have experienced. They lack response from their attorneys, their attorneys failed to follow up with witnesses, their attorneys failed to assist with case strategy in evaluation of plea offers, their attorneys failed to file key motions and their attorneys failed to even appear on behalf of them in open court. The complaint also links the harmful practices it describes, contending the root causes of those practices are inadequate

[6] See declaration of J. Michael Spencer, paragraph 2, in which records from Grant County Superior Court indicate as of July 19, 2004 455 criminal cases had been filed.

funding of defense services, excessive case loads and prosecutorial interference with defense system. The plaintiffs have satisfied the requirement of commonality.

Next, the plaintiffs must establish under CR 23(a)(3) that the claims or defenses of the representative parties are typical of the claims or defenses of the class. "Typicality" is present if the representative plaintiffs' claims arise "from the same event or course of conduct which gives rise to claims of other class members and is based on the same legal theory." Rodriguez v. Carlson, 166 F.R.D. 465, 472 (1996). The representative plaintiffs' claims need not be identical to those of other class members. Hanlon v. Chrysler Corporation, 150 F.3d 1011, 1019 (9th Cir. 1998). Here, plaintiffs' claims are typical of those of other class members because their claims arise from the same course of conduct that gives rise to the claims of other class members, that is, all claims arise from Grant County's systematic deprivation of the constitutional right of effective assistance of counsel in its public defense system. All the claims are based on the same legal theory. All the claims arise from appointed counsels' failure to form such basic tasks as returning phone calls, appearing in court, giving legal advice, interviewing witnesses, filing motions, and preparing for trial. While the claims may vary in their precise details, they all arise from the same event or course of conduct. Plaintiffs have satisfied the typicality requirement.

Finally, CR 23(a)(4) requires the representative parties of the class to fairly and adequately protect the interests of the class. To be adequate class representatives, plaintiffs must not be involved in a collusive suit and they must not have interests antagonistic to those of the remainder of the class. Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978). The defendant Grant County does not contest this prong of the rule head on. Rather, it insists Best and Hutt are not adequate representatives because their cases are resolved and they do not belong to the class and that Campos' representation is inadequate because his case is not resolved. This court rejects those arguments as outlined above.[7] Here, the representative plaintiffs have the same interest as the class as a whole. They seek effective assistance of legal counsel for themselves and for all other indigent persons accused of felonies in Grant County. Moreover, each of the attorneys representing the plaintiffs is qualified, experienced and able to conduct the proposed litigation. They have the resources and expertise to handle this type of litigation.

[7] Under the discussion of standing, mootness and ripeness.

Based upon the foregoing the court concludes the requirements of CR 23(a) have been met.

Finally, in addition to satisfying the four requirements of CR 23(a), this action must fall into one of the three categories outlined in CR 23(b). The action does fall within the parameters of CR 23(b)(2) which provides that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or a corresponding declaratory relief with respect to the class a whole. Here, the case arises from Grant County's creation and maintenance of a public defense system that acts or fails to act in ways applicable to all class members. The case satisfied the "grounds generally applicable standard outlined in CR 23(b)(2)." Sitton, supra at 251.

Based on the foregoing, the court concludes from its analysis that the plaintiffs have met their burden under CR 23 and that the court should certify this a class action for declaratory and injunctive relief.

5. Motion to Compel. The court, as indicated above, also heard oral argument on the plaintiff's motion to compel. At oral argument there appeared to be some agreement with respect to two of the four areas of concern. The parties indicated that Grant County had finally complied with the request for production. To the extent that Grant County has not complied, it should be ordered to do so. Secondly, plaintiffs complained the Board of Commissioner Allison was not prepared for his CR 30(b)(6) deposition and they therefore have moved to compel that Grant County prepare the designee to respond to the questions outlined in the deposition notice. Grant County should be ordered to prepare the designee for the 30(b)(6) deposition so he can adequately respond to questions propounded, including responding to questions concerning identity and responsibility of all persons who have participated, on behalf of Grant County, in the decision to seek reassignment of cases from one attorney to another since February 15, 2004.

6. Motion to Strike. After reviewing the defendant's motion to strike references to unpublished opinions, exhibits appended to Nancy Talner's declaration and the newspaper article appended to Don Scaramastra's declaration, the court respectfully should deny Grant County's motion.

CONCLUSION

Based on the foregoing analysis, the court grants the plaintiffs' motion to certify the class, grants the plaintiffs' motion to compel and denies the defendant's motion to strike. Please prepare the appropriate orders and note them for presentation or otherwise present them by agreement.

DATED: August 26, 2004

JUDGE