

NO. 42599-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN JOSE RECINOS,

Appellant.

FILED APPEALS
COURT OF APPEALS
DIVISION II
2012 DEC 20 PM 1:10
STATE OF WASHINGTON
BY DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Ronald E. Culpepper

STATEMENT OF ADDITIONAL GROUNDS

JUAN JOSE RECINOS
DOC# 353340

Washington Corrections Center
PO Box 900
Shelton, WA 98584

PROSECUTORIAL MISCONDUCT

The prosecutor committed misconduct when he misled the jury in his rebuttal to closing arguments with the following;

"As a matter of fact, ladies and gentlemen, you should feel honored. You're the first people to hear about it, over a year later, after having time to think very carefully about what the charges against him and what the evidence was, exactly how he was going to explain this away. That's the first time the record, the evidence in this case, ever indicates anything about a kidnapping, was yesterday." 10RP 3/9/2011 P.867

This statement was misleading because he knew Recinos' story long before Recinos testified on March 8th 2011. How do we know that? Here are some examples;

a) Recinos stated, "I was given a psychological evaluation because he [Mr. Decosta / Defense Attorney] keeps making reference that it sounds too crazy that my wife was kidnapped and that is the reason why I committed all the actions."

While the prosecutor was present as you can read on page 6 of the same report the prosecutor said, "Your honor, only that this case involves actually four victims, interesting enough." 1RP 8/10/2010

b) In Washington State Patrol Detective Julie Gundermann's detailed report (found in the discovery) you will find notes where Mrs. Gundermann acknowledged Recinos'

side of the story. Mrs. Gundermann even asked some of the State's victims and witnesses if they knew anything about Tiffany Recinos possibly being kidnapped.

c) The prosecutor direct examined his own witness Mr. Hayes one day before Recinos testified as follows;

Q. I want to ask you just a couple other questions and then I think I'll be done. At any point did Juan tell you that he was trying to save his wife?

A. Not that I recall, no.

Q. At any point did he tell you that he believed that his wife had been kidnapped?

A. No.

Q. Did he tell you at any point that his wife had either called or motioned for help?

A. No.

8RP 3/7/2011

Not only were his misleading statements false but they were so ill intentioned with the purpose of using Recinos' silence as substantive evidence of his guilt.

These comments violated Recinos' 5th amendment right to remain silent.

Even the court advised Recinos not to discuss his case as can be observed in 4RP 2/24/2011 P.44

Thus, how is it possible that his silence was used against Recinos?

Prosecuting attorneys are quasi-judicial officers who have a duty to ensure that defendants receive a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct violates this duty and can constitute reversible error. Boehning, 127 Wn. App. at 518. We review allegedly improper statements by the state in the

context of the argument as a whole, the issues involved in the case, the evidence referenced in the statement, and the trial court's jury instructions. State v. Anderson, 153 Wn. App. 417, 427, 220 P. 3d 1273 (2009), review denied, 170 Wn. 2d 1002 (2010).

Because the Fifth Amendment of the United States Constitution grants suspects the right to silence, it is "fundamentally unfair and deprivation of due process to allow [the state to use] a suspect's silence... against him at trial." Hurd, 619 F.3d at 1089 (quoting Doyle, 426 U.S. at 618).

Court of Appeals Division II recently overturned Fuller's conviction because the State committed prejudicial prosecutorial misconduct by using Fuller's partial silence as substantive evidence of his guilt. See State of Washington v. Jaycee Fuller, 282 P.3d 126 (Wash.App.Div.2 08/08/2012)

Recinos did not object during trial but did write a post conviction motion to grant a new trial which the trial court denied. A similar case to Recinos' was brought before the Supreme court of the State of Washington in State v. Burke, 181 P.3d 1, 163 Wash. 2d 204 (Wash. 03/13/2008). Burke's silence was violated as well and even though he didn't object he was able to raise it as an issue on appeal because he filed a post conviction motion also denied by the trial court.

The prosecutor also committed prosecutorial misconduct when the prosecutor cross examined Recinos and commented on his silence. 9RP 3/8/2011

Please read all of the cross examination to see how much of it went on. 9RP 3/8/2011

The prosecutor specially violated Recinos' 5th Amendment right when he asked;

Q. "And yet you chose not to tell anyone about this until today?" RP 3/8/2011 P.784

The prosecutor used his rebuttal and final closing argument with ill intentions to discredit Recinos' exculpatory story which was clearly a violation to Recinos' constitutional 5th amendment right to remain silent. The Rebuttal and final closing found in 10RP 3/9/2011 will show the prosecutor's main focus to use Recinos' silence and discredit him to find him guilty. On page 865 the prosecutor says,

"He was acting to save his wife that night, that he was merely working to avert a kidnapping. Why didn't he tell anybody that?"

At page 865-866 he said,

"Why didn't he call 911?"

At page 866 the prosecutor says,

"When the police were there waiting at the Moreau residence, he didn't tell the police, whoa, there's been a big misunderstanding here, I was just trying to help, I thought she was kidnapped."

The prosecutor seals the deal right after commenting on Recinos' silence by saying,

"Ladies and gentlemen, the evidence in this case is

clear. The defendant is guilty with the crimes he has been charged and pursuant to the testimony and the forensic and physical evidence that has been produced in court, there should be no doubt reasonable or otherwise. The term, the only verdict that is consistent with your oath, as witness testimony you received as well as the evidence you received, is to find the defendant guilty. Thank you."
10RP 3/9/2011

Because the bell had already been rang and even if the Defense Attorney or Recinos would have objected it was too late. There would have been no curative instruction that could have erased the inflammatory comments made by the prosecutor. Thus, the defendant's constitutional 5th Amendment right which applies to the States through the 14th Amendment was violated.

SPEEDY TRIAL RIGHT VIOLATION

Recinos' right to a speedy trial protected by the Sixth Amendment of the United States Constitution, Article I, section 22 of the Washington Constitution and CrR 3.3 was violated five times. This violation occurred over a 1 year period Recinos was incarcerated while awaiting trial. These continuances took place as follow;

2RP 7/2/2010 On this date trial was extended from July 6th 2010 to October 6th 2010 (a 92 day extension which is 32 days more than the 60 day rule) because the defense said it needed more time to prepare for trial. Recinos objected but the Judge found good cause because Recinos' attorney needed to prepare.

2RP 10/1/2010 On this date trial was extended a third time from October 6th 2010 to November 16th 2010 over Recinos' objection (a 41 day extension) because the defense still needed to conduct interviews. There was also a concern about some new information (the jail informants) that had recently come forward. These informants came forward in May 2010 which was almost five months prior this court hearing. How is it possible that the prosecution, defense attorneys, and the court think this is a good reason to extend trial yet again? This clearly violates the defendant and prejudices Recinos by enabling the prosecutor to build up his case even more. This extension also enabled Recinos' witnesses to dwindle away as they were forgotten in the process.

October 15th 2010 (This court hearing verbatim was not listed in the appellate brief as an RP but is part of the transcripts. Please read) On this date defense attorneys, Mr. Purves and Mr. Decosta came to be dismissed as counsel due to conflict of interest. At this point Recinos was tired of the cat and mouse game and wished to proceed to trial because Recinos had raised this issue months prior to this date in which all parties said they were ready except for Recinos. As the trial court and prosecutor would like to point out, Recinos is who requested the substitution of counsel to take place. Thus, Recinos was getting what he wanted. But let's

remind the court that the original request for substitution was made in August 19th 2010 (see 1RP 8/19/10)

On this date of October 15th 2010 it was clear that Mr. Underwood had been preselected and assigned to Recinos over his objection despite Recinos' pleadings and objection to the court to continue to trial because Recinos was being coerced into taking a plea deal and to the extend of committing perjury by changing his story because it sounded crazy. Mr. Underwood (newly court appointed counsel stated on the record that he was busy with a big case (the Clemmons case where four police officers died in Lakewood WA) which shows that he had no intention in taking me to trial. New counsel was already tainted by Mr. Decosta which prejudiced Recinos. This 95 day extension was excessive and well over the limit to bring a defendant to trial.

2RP 1/18/2011 On this date, trial was extended a fifth time from January 18th 2011 to February 7th 2011 (a 20 day extension) over Recinos' objection. The reasons for the continuance were that the defense still needed to make interviews and by the record we can see that there really weren't any interviews done as there were no witnesses on Recinos' behalf other than one police officer, and the wife of the defense investigator

who showed up with a sticky note containing measurements of totally different vehicles than those involved in the accident; request which was done by Defense Attorney Mr. Underwood two days prior to her day of testifying.

2RP 2/7/2011 On this date trial was extended yet a sixth time from February 7th 2011 to February 22nd 2011 (a 15 day extension) over Recinos' objection. The prosecutor showed concern towards a Mr. Post who apparently was more important than Recinos even though Mr. Post was not in custody. The court agreed and granted the motion.

Under CrR 3.3 Recinos took all steps necessary to inform the trial court of the reasons not to extend the trial date to the best of his ability as a layman to the law. Despite it all, Recinos' constitutional right to a speedy trial right was violated. Recinos also filed motions on his own without the help of his assigned counsel but was denied and therefore the trial court abused it's discretion.

A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. CrR 3.3 (h) [last amend to this rule was in September 2003]

CrR 3.3 makes no allowance for the nature and complexity of the case. Whether an incarcerated defendant

is charged with one count of aggravated murder with more bodies being disinterred daily from his backyard, the rule requires that the trial commence within 60 days. State v. Saunders, 220 P.3d 1238, 153 Wash.App 209 (Wash.App.Div2 11/17/2009)

A defendant has a right to a speedy trial under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution.

INEFFECTIVE ASSISTANCE OF COUNSEL

Trial attorney was so ineffective that at sentencing the Court felt compelled to grant a new attorney after Trial attorney said,

"If I'm ineffective, then I think that Mr. Recinos may have to get new counsel to address some of these issues." 12RP 3/25/2011

Newly appointed counsel Mr. Robert Quillian said,

"I think certainly there are issues that need to be looked at in some depth." 13RP 4/8/2011

After six months of not performing Mr. Quillian says,

"I will simply say for the record that that communication has not been as much as it should be, and I apologize to him for that and I apologize to the court for that."

Further he says,

"In order to not further complicate the matter with further claims of ineffective assistance of counsel.." 13RP 8/19/2011

By the statement Mr. Quillian made he attempted to request to the court to grant him more time to compose the motion he was appointed for. Recinos had to file the motion on his own to raise all of the issues that were presented to the trial court which were denied. Now Recinos is raising these issues before the court of Appeals for a second time. Recinos reminds that the trial court abused it's discretion when it ruled against.

Ineffectiveness of counsel is as follows;

Defense Attorney failed to object to the prosecutor's misconduct when he commented on Recinos' silence during cross examination and closing arguments.

Defense Attorney failed to make sure Recinos received a copy of redacted discovery ordered by the court which impeded Recinos' ability to assist with all of the false testimony and wrongfully presented evidence to the jury.

Defense Attorney failed to conduct an Omnibus Hearing in violation to CrR 4.5 which states,

CrR 4.5 (a) "When required. When a plea of not guilty is entered, the court shall set a time for an Omnibus Hearing."

The court docket will show that this Omnibus Hearing was continued ten times and finally cancelled. This failure by the defense prejudiced Recinos tremendously because had it been held then;

- a) Recinos would have received a redacted copy of discovery
- b) Recinos would have known that defense counsel didn't have intentions on calling any material witnesses on Recinos' behalf
- c) Recinos would have been informed of Prosecutor's intent to lower charges from attempted murder first degree to second degree which took the element of proof from pre-meditation to intent. This change would have given Recinos a fully informed option to decide as to whether or not to take the 36 month plea deal offered by the prosecutor.
- d) During this hearing Recinos would have pleaded further about his actions on the day of his tragedy which could have set it in stone the fact that self defense existed.
- e) An order of full discovery would have been entered which would have prevented surprise evidence such as phone calls introduced during Recinos' cross examination which were edited and had omissions to aid prosecutor's false statements. The ineffective assistance of counsel violated Recinos' constitutional right to due process found in the Fourteen Amendment to the United States Constitution. All of the issues discussed above were presented to the trial court in a few pre and post trial motions. The trial court abused it's discretion by not

taking Recinos' rights seriously. Therefore, the court's abuse of discretion violated Mr. Recinos' constitutional right to a fair trial and due process mandated by the Fourteen Amendment of the United States Constitution.

In conclusion, based on Speedy Trial right's violation, Recinos asks the court of appeals to dismiss the charges with prejudice. In the alternative Recinos asks this court to review the issues above in addition to the Appellate Attorney's brief and grant a new trial based on the accumulative error stated on the brief, and or based on the prosecutor's misconduct for commenting on Recinos' silence which are protected by the 5th Amendment of the United States Constitution.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

This 19th day of December, 2012 in Shelton, WA

Respectfully,

A handwritten signature in black ink, appearing to read "Juan Jose Recinos", enclosed within a hand-drawn oval.

JUAN JOSE RECINOS

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DEPUTY

v.

DECLARATION OF SERVICE
BY MAIL

JUAN JOSE RECINOS,
Appellant

I, Juan Jose Recinos , the appellant in the above
entitled cause, do hereby declare that I have served
the following documents:

Statement of additional grounds

PARTIES SERVED:

Court of Appeals Division II
950 Broadway #300, M/S TB-06 Tacoma, WA 98402-4454

Valerie Marushige Attorney at Law
23619 55th Place South Kent, Washington 98032

I deposited the aforementioned documents in the
U.S. Postal Service by way of process as Legal Mail
through an officer station at WASHINGTON CORRECTIONS
CENTER, P.O. BOX 900, Shelton, WA 98584.

Dated this 19th day of December , 2012.

I declare under penalty of perjury under the laws
of the State of Washington that the foregoing is true
and correct.


