COA No. 44323-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHARLES LONGSHORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF MASON COUNTY

The Honorable Amber Finlay

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. REPLY ARGUMENT

1. THE ORDER REGARDING POSTING OF A GUARD BY THE WITNESS STAND AND JURY BOX REQUIRES A NEW TRIAL FOR VIOLATION OF MR. LONGSHORE'S RIGHT TO TESTIFY.

Mr. Longshore drove away from an apartment complex after a verbal altercation, and the vehicle then apparently fled from pursuing police officers. Mr. Longshore's defense was that he was not the person who drove the car at that time. His account was supported by his own independent witnesses from both inside the car and out. However, he was unable to testify himself, unencumbered, because the trial court ruled that if he chose to testify, a guard would be posted near the witness box and the jury.

The trial court has the authority to provide for the security of its courtroom, but before imposing a prejudicial security measure, it must consider the multiple factor test developed in the Washington cases, which the State concedes was not considered below. The trial court did not hold a hearing to address the Jaime / Hartzog factual issues, and thus did not find the required compelling individualized threat.

Instead, the court relied on the type of Mr. Longshore's current criminal case, where he was charged with Eluding, and his

charge with murder in another pending case, along with the jail guards' expressions of *desire* to impose the guard-posting measure. No evidence or facts were proffered or found that Mr. Longshore had been violent, disruptive, or even troublesome, either when in jail custody, or in the courtroom; these and the remaining bulk of the factors, required to be carefully considered under Due Process, were not.

1. The Supreme Court has clearly rejected the inadequate decisional framework suggested by the State. The prosecutor asks this Court to approve the trial court's order -- that a uniformed guard would be posted in between the witness box and the jury, 6 feet from the adjacent rear exit door, if Mr. Longshore testified, to prevent escape or hostage-taking by the defendant -- on the basis of the following argument:

> (1) because the trial prosecutor was *trying to prove* a charge of Eluding, a crime that itself involves escaping from law enforcement, and Mr. Longshore was also charged with murder in another case; and
> (2) because the courtroom guards *wanted* the security restriction, although they never offered any allegations of fact to support its imposition.

See Brief of Respondent, at pp. 12-16. The Respondent as part of this argument asks this Court to allow such guard-posting in prosecutions of this legal type, if requested by the guards, because

jurors will simply think that all such criminal defendants on trial, as part of the normal course of justice, are required to have a guard posted to protect them, if they take the stand.

Mr. Longshore asks this Court to reject all of these arguments. Due Process requires that prejudicial security restrictions must be based on facts found that establish an individualized security risk and actual danger – i.e., requiring the court to "make a record of a compelling individualized threat." State v. Gonzalez, 129 Wn. App. 895, 901-02, 120 P.3d 645 (2005) (citing State v. Hartzog, 96 Wn.2d 383, 397-98, 635 P.2d 694 (1981)); see also State v. Jaime, 168 Wn.2d 857, 862, 233 P.3d 554 (2010).

Placing a protective guard near a testifying defendant in particular types of criminal cases based on the crime(s) charged, without factual findings as to any existence of actual danger, is error under any conception of Washington and federal law. This must be true – unless all criminal defendants charged with certain ranges of crimes may have guards posted near them if they choose to testify, simply because the jail guards indicate that this is what they want.

The Supreme Court has already said that relying solely on the factual allegations of dangerousness made by jail guards, to support an order imposing security restrictions, is impermissible under Due Process. State v. Finch, 137 Wn.2d 792, 853, 975 P.2d 967 (1999). Here, it is not a "hearing" in the first place, to rely on the announced desires of the jail guards who do not recount any factual incidents to make out a basis to even consider prejudicial security measures.[1]

Mr. Longshore respectfully argues that the State's argument that the guard-posting can pass scrutiny because the guard would have been nearer the adjacent rear exit door, rather than directly in between the testifying defendant and the jury's line of sight, misses the point. The State makes much of its reading that the erroneously posted guard would be near an exit door of the courtroom (which, as can be seen from the Attachment A photographs, is between the witness box and the jury box), and not

[1] The Respondent contends that the trial court did hold the requisite "hearing" required by the Washington and federal decisions because it listened to the jail guards' expressions of desire to post a guard, and it considered on the record the fact that Mr. Longshore was charged with certain crimes, before it ordered that the security measure would be imposed. Brief of Respondent, at pp. 13. This is not a hearing to address the general test requiring a fact-specific inquiry regarding the particular defendant's danger, or the specific 11-factor test, of Jaime / Hartzog.

linearly between the witness box and the jury's view of the witness. See BOR, at pp. 14-15; see AOB, Appendix A.

The trial court stated that the guard would be "between" the witness box and the jury, and elsewhere stated that the guard would be posted 6 feet from the jury, seemingly nearer the door. 2RP 324-25, 330.

But the order *dissuaded* Mr. Longshore from testifying, so it cannot be said with inches-accurate precision exactly where the guard would have stood. Certainly, the court made clear to everyone in the courtroom that it was intending to fashion a posting location for the guard that would both prevent eluding through the door, and also be protective of the jury. See 2RP 329 (the court noting but dismissing the idea that the juror sitting at the number one position in the jury box, a retired policeman, should act if anything happened).

Betwixt or between, it matters not. Without the required factual findings, the applicable Due Process standards were squarely violated by the prospective order of posting a guard in the general area of the witness stand, jury box, and "escape" door, obvious to all as being for the special purposes of Mr. Longshore's

testimony only – not any of the other trial witnesses with specified criminal records and police history.

Additionally, even if the court had addressed and properly found a compelling individualized threat under Due Process, the court failed to consider the alternative requested by the defense of simply locking the door, as counsel suggested in the alternative without waiving his objection to the entire matter. 2RP 329. As a whole, even ignoring that counsel did request alternatives, the court should have, but did not, engage in the case-law required consideration of all reasonable options, also including physical but non-visible restraints. Mr. Longshore has made and continues to make this additional argument because the case law itself (regardless of request by counsel) requires the exploration of alternatives if there is such an individualized threat, but Mr. Longshore's position is that there was no such danger, and the trial court failed to follow the procedures requisite to finding, or to find, such danger. Appellant's Opening Brief, at Part D.1(d).

2. The violation of Mr. Longshore's right to testify was not abandoned by any proper waiver of that right in the trial court, and in any event, he may, post-trial, make the argument that any waiver was involuntary. Mr. Longshore moved for a

new trial below, including stating by affidavit that the court's guard-posting ruling precluded him from rightfully testifying in his defense. CP 39-40, 41-48, 50, 51-54.

The State argues that Mr. Longshore may not make these arguments on Appeal, because he did not previously, contemporaneously, or "at trial" place on the record his inability to exercise the right to testify because of the order. Brief of Respondent, at pp. 17-24.

First, the State's assertion that the issue was waived because Mr. Longshore's attorney stated he would not take the stand, is contrary to the waiver rules regarding the right to testify, which is protected by the state and federal constitutions. A colloquy with the defendant is not normally required; instead, in some instances, the rule that a waiver must be deemed knowing voluntary and intelligent before the trial court can accept it, can be satisfied when counsel tells the court the defendant will not take the stand. This is because counsel represents the defendant, can be presumed to have advised him of his rights, and can be presumed to be expressing his wishes. State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996); State v. Robinson, 138 Wn.2d 753, 760-

61, 982 P.2d 590 (1999); see State v. Woods, 143 Wn.2d 561, 608-09, 23 P.3d 1046 (2001).

Here, however, when defense counsel specifically asked the trial court to engage in its own colloquy with Mr. Longshore to ensure that Mr. Longshore himself was actually waiving the right to testify voluntarily, the trial court at that point could no longer satisfy the required voluntariness test by applying any such presumption, considering the high showing required before finding that a waiver of a constitutional right had validly occurred in its own courtroom.

Second, even if there had been an apparently rule-satisfying oral waiver of the right to testify, the Washington decisions allow a subsequent inquiry into the adequacy of that waiver, if the defendant can make credible allegations of a violation of the right to testify, including adequate detail to be tenable. Here, the entire context and the specific rulings below, along with Mr. Longshore's own detailed factual showing, renders that standard overwhelmingly satisfied. Because the order rendering Mr. Longshore unable to testify freely would be shown by this appeal, if the Court does conclude Due Process was violated under the Hartzog / Jaime standards, a new trial is required.

2. TRIAL COUNSEL WAS INEFFECTIVE.

Mr. Longshore's counsel assumed the factual task of showing the jury that Mr. Longshore did not know there was a controlled substance in the vehicle in which he was riding (it was hidden in a women's sock, etc.). 3RP 418, 426-28. His multiple arguments to this effect were based on evidence and inferences easily strong enough to be persuasive. However, because knowledge or lack thereof is simply immaterial to the elements of the crime of possessing a controlled substance as set out for the jury, the utility of these arguments was completely defeated by counsel's refusal of the unwitting possession instruction – an affirmative defense. RCW 69.50.4013(1); State v. Cleppe, 96 Wn.2d 373, 381, 635 P .2d 435 (1981), cert. denied, 456 U.S. 1006 (1982); 2RP 389; WPIC 52.01. Counsel then went on to make all of the foregoing specific arguments regarding lack of knowledge, as detailed in the Appellants Opening Brief. But the jury was not given a legal basis to acquit if it believed counsel's arguments. There are no circumstances under which counsel's refusal of the legal instruction was reasonably tactical or non-deficient. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). This

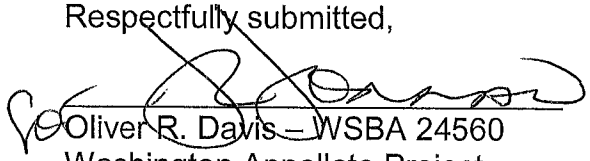
Court should reverse the possession count for a new trial. U.S. Const. amend. 6.

B. CONCLUSION.

Based on the foregoing and on his Appellant's Opening Brief, Mr. Longshore respectfully asks this Court to reverse the judgment and sentence of the Superior Court.

Dated this ___ day of October, 2013.

Respectfully submitted,



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