Supreme Court No. 96325-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

Brendan Taylor,

Appellant/Respondent

Kittitas County Cause No. 16-1-00323-0

The Honorable Judge Scott R. Sparks

ANSWER TO PETITION

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mr. Taylor adopts the statement of the facts in the Court of Appeals' decision. *See* Opinion, pp. 1-5.

ARGUMENT

THE ISSUE RAISED IN THE STATE'S PETITION DOES NOT MEET ANY OF THE CRITERIA FOR REVIEW AT RAP 13.4(B).

A. The issue raised in the state's Petition for Review does not meet any of the criteria for review at RAP 13.4(b).

The Court of Appeals' held in Mr. Taylor's case that, when an accused person offers to stipulate to all of the probative information in a no-contact order, a trial court must accept that stipulation in order to preclude the admission of additional, highly-prejudicial material contained in the order. Opinion, pp. 5-9.

The state argues that the Court of Appeals' decision in Mr. Taylor's case would undermine the effectiveness of no contact orders in domestic violence cases by depriving the state of the opportunity to submit those orders to the jury. Petition for Review, pp. 5-6. But the state does not cite to any authority or provide any logical explanation for the contention that a stipulation to all of the relevant facts contained in the order would undermine the prosecution's case in any way. *See* Petition for Review.

There is no issue of substantial public interest involved in Mr. Taylor's case. RAP 13.4(b)(4).

The Court of Appeals' decision in Mr. Taylor's case also does not conflict with any prior decision of this Court or of the Court of Appeals under RAP 13.4(b)(1). The state argues that the decision in Mr. Taylor's case conflicts with this Court's decisions in *Detention of Turay*, 139 Wn.2d 379, 402, 986 P.2d 790 (1999), and *State v. Finch*, 137 Wn.2d 792, 811, 975 P.2d 967 (1999). Petition for Review, p. 6. But the state is mistaken.

Turay is a case involving commitment as a sexually violent predator under RCW 71.09. *Turay*, 139 Wn.2d 379. This Court detailed the differences between a criminal trial and a proceeding under RCW 71.09 to hold that *Old Chief* does not apply in the 71.09 context. *Id.* at 401-02. *Turay* is inapposite to Mr. Taylor's case.

Likewise, *Finch* simply recites the general rule that the state is not required to accept an accused person's offer to stipulate to facts. *Finch*, 137 Wn.2d at 811. But that rule is not applicable where, as in the case of the existence of a valid no contact order, "the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." *State v. Johnson*, 90 Wn. App. 54, 62-63, 950 P.2d 981

(1998) (*quoting Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 654-55, 136 L.Ed.2d 574 (1997)). *Finch* is not in conflict with the Court of Appeal's holding in Mr. Taylor's case.

The Court of Appeals' decision in Mr. Taylor's case does not conflict with any prior decision of This Court or of the Court of Appeals. This Court should deny review. RAP 13.4(b)(1), (2).

B. The Court of Appeals correctly decided Mr. Taylor's appeal.

1. The logic of the United State's Supreme Court's decision in *Old Chief* applies equally to the admission of the no-contact order in Mr. Taylor's case.

Evidence must be excluded if its probative value is substantially outweighed by the risk of unfair prejudice. ER 403.

Evidence is unfairly prejudicial if it is "likely to provoke an emotional response rather than a rational decision." *Johnson*, 90 Wn. App. at 62.

Under ER 403, where the existence of a prior conviction is an element of an offense, the court must accept the accused's offer to stipulate to the prior conviction. *Old Chief*, 117 S.Ct. at 650; *Johnson*, 90 Wn. App. 54;[1] ER 403. Once that stipulation has been entered, the state

[1] *Old Chief* analyses the federal ER 403, but its reasoning and holding were explicitly adopted and applied to Washington State's ER 403 in *Johnson*.

may not introduce extrinsic evidence of that prior conviction or of the name of the crime of which the accused was convicted. *Id.*

While the courts in *Old Chief* and *Johnson* recognized the general rule that the prosecution may choose how to present the state's evidence in an attempt to prove guilt, they also noted that this rule has "virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." *Johnson*, 90 Wn. App. at 62-63 (*quoting Old Chief*, 519 U.S. at 190).

The *Old Chief* court further explained that:

> Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach.

Old Chief, 519 U.S. at 190.

As such, the prosecution does not suffer any prejudice when some extant legal status of the accused is proved by stipulation rather than by the admission of court documents. *Id.*

Indeed, the functional difference between the value of a stipulation to the existence of a prior conviction and of a court record naming the offense is "distinguishable only by the risk [of unfair prejudice] inherent

in one and wholly absent from the other." *Id.* (*quoting Old Chief*, 519 U.S. at 191).

Evidence containing the crime of a prior conviction is inherently prejudicial because of the risk that the jury will "generaliz[e] the defendant's earlier bad act into bad character" or "worse, … call[] for preventative conviction even if [the accused] should happen to be innocent momentarily." *Old Chief*, 519 U.S. at 180-81. This risk is particularly high when the prior conviction is for an offense similar to the one for which the accused is currently on trial. *Id.* at 185.

Accordingly, when the accused offers to stipulate to the existence of a prior conviction, evidence the name of the offense and of related court documents is inadmissible under ER 403 because it has no probative value and carries an inherent risk of unfair prejudice. *Johnson*, 90 Wn. App. 54, 62–63; *Old Chief,* 519 U.S. at 191.

The logic of *Old Chief* and *Johnson* applies equally to Violation of a No-Contact Order cases in which the accused offers to stipulate to the existence of a valid no-contact order.

First, like a prior conviction, the existence of a valid no-contact order is a simple "judgment rendered wholly independently of the concrete events of later criminal behavior charged against [the accused]." *Johnson*, 90 Wn. App. at 62-63 (*quoting Old Chief*, 519 U.S. at 190). Accordingly,

it is not subject to the general rule that the state may attempt prove its case in whatever way it sees fit. *Id.*

In Mr. Taylor's case, for example, the details of the no-contact order were inapposite to the prosecution's theory and narrative about the alleged assault.

Second, once an accused person has stipulated to the existence of a valid no-contact order, the order itself has virtually no additional probative value. Like a stipulation to a prior conviction versus the name and documentation of the prior offense, the difference between a stipulation to a valid no-contact order and admission of the order itself is "distinguishable only by the risk [of unfair prejudice] inherent in one and wholly absent from the other." *Id.* (*quoting Old Chief*, 519 U.S. at 191).

Finally, the admission of the actual no-contact order carries an inherent risk of unfair prejudice. Such orders generally allude to (or explicitly mention) prior charges, convictions, and/or allegations of violence against the accused. They also often include other language that makes the accused appear particularly dangerous or violent, such as the provision in Mr. Taylor's case prohibiting him from possessing firearms. This creates the same risk as that recognized in *Old Chief* that the jury will "generaliz[e] the defendant's earlier bad act into bad character" or "worse,

… call[] for preventative conviction even if [the accused] should happen to be innocent momentarily." *Old Chief,* 519 U.S. at 180-81.

Even so, the trial court in Mr. Taylor's case ruled that *Old Chief* did not apply to his offer to stipulate to the existence of a valid no-contact order because that case is limited to offers to stipulate to prior convictions. RP 48. The trial court's decision was based on untenable grounds and constituted an abuse of discretion. *City of Seattle v. Pearson*, 192 Wn. App. 802, 817, 369 P.3d 194 (2016).

Evidentiary error requires reversal if there is a reasonable probability that it materially affected the outcome of the trial. *State v. Hatch*, 165 Wn. App. 212, 219, 267 P.3d 473 (2011).

Here, Mr. Taylor was prejudiced by the court's improper refusal of his offer to stipulate and the admission of the no-contact order document. *Id.* The order specifies at the very top that it was entered "post-conviction" for "domestic violence." Ex. 35, p. 1. Accordingly, it informed the jury that Mr. Taylor had been previously convicted of a domestic violence offense against Kelly, which is the equivalent of the offense for which he was on trial. This is precisely the type of prejudice deemed unacceptable by the courts in *Old Chief* and *Johnson*. *See Old Chief,* 519 U.S. at 180-81.

Exacerbating the prejudicial effect, the order admitted in Mr. Taylor's clarifies that it was entered less than a week before the alleged assault. Ex. 35, p. 1. It also states that Mr. Taylor is no longer permitted to possess guns. Ex. 35, p. 1. These provisions serve to make Mr. Taylor appear particularly dangerous at the specific moment during which he was accused of assaulting [K.].

There is a reasonable probability that the court's error affected the outcome of Mr. Taylor's trial.

The trial court abused its discretion by refusing to permit Mr. Taylor stipulate to the existence of a valid no-contact order and by, instead, admitting the order itself. ER 403; *Old Chief*, 519 U.S. 172; *Johnson*, 90 Wn. App. 54. The Court of Appeals correctly decided this issue in Mr. Taylor's case.

2. Mr. Taylor offered to stipulate to every element that would have been proven by the admission of the No Contact Order. The state's argument to the contrary was dismissed by the Court of Appeals because it is in direct conflict with the facts of the case.

Mr. Taylor explicitly offered to stipulate to both of the elements of the crime of Violation of No-Contact Order, which would have been proved by admission of that order. The Court of Appeals quoted at length from the relevant colloquy:

THE COURT: . . . [S]ometimes . . . we'll have a case where there's a charge of felon in possession of a firearm,—

. . . .

THE COURT: One of the things the state would have to prove is the underlying felony conviction. Often-times the defense will stipulate to that in an effort to avoid the prejudice of having the specific named felony brought into the mix. And I think that's been approved pretty regularly as [an] appropriate thing to do.

. . . .

[THE DEFENSE]: Right.

[THE STATE]: And the law actually requires two [elements]. The state's—state's not willing to accept the stipulation; we'd like to use the order, both of them. But there's two elements the state has to prove; number one that there existed a no-contact order, number two that the defendant knew about it.

. . . .

[THE COURT]: . . . [Y]ou're saying that the defendant Mr. Taylor is willing to stipulate to both of those things.

[THE DEFENSE]: Yes.

Opinion, pp. 3-4 (citing RP 20-21).

Even so, the state argues that Mr. Taylor's proposed stipulation "could leave the false impression that Taylor was not present when the order was issued in open court and that Taylor never signed the order, acknowledging that he received a copy of the document." Petition for Review, p. 14. But the state does not explain how failure to prove those irrelevant facts would make any difference at trial in the face of a stipulation to Mr. Taylor's knowledge of the existence of a valid order. *See* Petition for Review. The state's argument regarding the content of Mr. Taylor's proposed stipulation is unavailing.

3. The state did not argue before the Court of Appeals that any error in admitting the no-contact order was harmless.

The state did not argue before the Court of Appeals that any error in admitting the no-contact order was harmless. *See* Opinion, p. 10. Even so, the state asks This Court to grant review on that basis now. Petition for Review, pp. 15-16. This Court should decline the invitation to grant review based on an argument which was never presented in the Court of Appeals.

CONCLUSION

For the foregoing reasons, this Court should deny review.

Respectfully submitted on October 10, 2018.

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_____
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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of this Answer to Petition postage pre-paid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, via email to:

Kittitas County Prosecuting Attorney
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I filed the Answer to Petition electronically with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 10, 2018.

_____
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LAW OFFICE OF SKYLAR BRETT

October 10, 2018 - 12:29 PM

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