70294-7 70294-7

NO. 70294-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSE SOCORRO BAUTISTA,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

On March 4, 2013, Mr. Socorro Bautista "consented" to have his change of plea hearing presided over by a judge pro tempore. Although he and his attorney signed a form consenting to the appointment of the pro tempore judge, there is not indication in the record that a translator was present to inform him of his right under Washington law to have hearing presided over by a popularly elected judge or that he would have waived that right by signing the form. Additionally, the record does not show how he could have knowingly assented for his attorney to agree to the appointment of a pro tempore judge on his behalf as it does not indicate a translator was present. Nevertheless, a pro tempore judge was appointed and presided over the hearing.

Prior to the hearing, Mr. Socorro Bautista and his attorney went through the plea statement with the assistance of a translator, but a written translation of the plea statement was not provided to Mr. Socorro Bautista. The record from the plea hearing clearly demonstrates that "go[ing] through" the record with his attorney did not adequately apprise Mr. Socorro Bautista of the consequences of pleading guilty. On multiple occasions, he indicated he did not understand the consequences of his plea and the rights he stood to

waive, and the trial court did not adequately clarify these rights and ensure Mr. Socorro Bautista grasped them.

Because the record does not demonstrate Mr. Socorro Bautista knowingly consented to the appointment of a judge tempore or understood the consequences of pleading guilty, this court should remand to the superior court for further proceedings as appropriate.

B. ARGUMENT

1. The judge pro tempore did not have jurisdiction because Mr. Socorro Bautista did not knowingly consent to his appointment or expressly authorize his attorney to consent to the appointment of a judge pro tempore.

Respondent does not contest that article IV, section 5 of the Washington Constitution bestows on defendants the right to have their case heard in a court presided over by an elected superior court judge. Washington Courts have repeatedly recognized the existence of such a right. State v. Sain, 34 Wn.App. 553, 557, 663 P.2d 493 (1983); State v. Robinson, 64 Wn.App. 201, 203, 825 P.2d 738 (1992). A judge pro tempore is only appointed if the parties consent and waive their right to a trial before a popularly elected judge. Mitchell v. Kitsap County, 59 Wn.App. 177, 181, 797 P.2d 516 (1990). If a party has not validly consented to the

appointment of a judge pro tempore, the appointed pro tempore judge lacks jurisdiction and the entire proceeding before the judge are void. Id. at 181-84.

a. Counsel can only consent to the appointment of a judge pro tempore with the defendant's express authorization.

The right to be tried before an elected judge is a substantial right. State v. Sain, 119 Wn.App. at 557. Consent by a defendant's attorney to the appointment of a judge pro tempore is only valid if the defendant explicitly authorizes his attorney to waive his right to a trial before an elected judge. State v. Belgarde, 119 Wn.2d 711, 721, 837 P.2d 599 (1992) (stating Sain, 34 Wn.App 553, "requires that an attorney must in fact be authorized by his or her client to consent to a trial presided over by a judge pro tempore").

Contrary to Respondent's claim, Mr. Socorro Bautista's attorney did not have the authority to consent to a judge pro tempore without his client's express authorization. Respondent's Brief at 6. In Graves v. P.J. Taggares Co., the Washington Supreme Court considered whether counsel has the authority to waive the right to a jury trial in a civil matter without her client's explicit authorization. Graves v. P.J. Taggares Co., 94 Wn.2d 298, 305, 616 P.2d.1223 (1980). Superior Court Civil Rule 39(a),

reflecting similar language to Article 4, section 7 of the Washington Constitution and RCW 2.08.180, states, in relevant part, that when a jury trial is demanded by a party, relevant issues will be tried before a jury unless "the parties or their attorneys of record . . . consent to trial by the court sitting without a jury." Id. (quoting SUP. CT. R. 39(a)); compare SUP. CT. R. 39(a) with Const. art. IV, § 7 ("A case in the superior court may be tried by a judge pro tempore [] with the agreement of the parties if the judge pro tempore . . . is agreed upon in writing by the parties litigant or their attorneys") and RCW 2.08.180. The Graves Court did not find, as respondent contends here, that when the language of a rule permits an attorney to consent on behalf of his client, the attorney may consent in court without first obtaining her client's explicit permission. Rather, the Court found:

> The effect of these rules is that the client must specifically consent to the withdrawal of a jury demand but that this consent may be communicated to the court by the client's attorney without the actual appearance of the party or the submission of a signed statement.

Graves, 94 Wn.2d at 305. The similarly phrased provisions of Article 4, section 7 of the Washington Constitution and RCW 2.08.180 likewise grant defense counsel the authority to

communicate the defendant's consent to a judge pro tempore, not to agree without the defendant's express permission to waive of his right to a trial presided over by a popularly elected judge.

The right to be tried before an elected judge is a substantial right a defendant's attorney cannot waive without the defendant's consent. Enshrining the right to a trial before an elected superior court judge in the Washington Constitution supports the contention that this right is a substantial right. The inclusion of language permitting counsel, with her client's express authorization to waive that right does not weigh in favor of the right being procedural, as respondent claims. Rather, as the Court found in Sain, the similar wording of Article 4, section 7 and Superior Court Rule 39(a), a rule the Washington Supreme Court found to bestow a substantial right on parties before the court, supports the contention that a defendant's right to have his case tried before a popularly elected judge is substantial. 34 Wn.App. at 556-57.[1]

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[1] Respondent incorrectly asserts that Sain is inapposite. While defense counsel in Sain did condition his assent to a judge pro tempore on his client personally consenting the following day, the court did not restrict its holding as claimed by respondent. 34 Wn.App. at 556. The Court did not hold a judge pro tempore is unauthorized to preside over a case only when defense counsel expressly conditions authorization on subsequently receiving his client's consent, and his client does not consent. Id. at 556-57. Rather, a judge pro tem is only authorized to preside over a case when a defendant personally consents or defense

Although this court has not addressed whether a defendant's right to be tried before an elected judge is a substantial right, failure to recognize this constitutionally based right as substantial would put this court at odds with other Court of Appeals' opinions. Although this court mentioned that "it is debatable whether a litigant's right to an elected judge is substantive rather than procedural" in a footnote in State v. Belgrade, 62 Wn.App. 684, 692 n.3, 815 P.2d 812 (1991), this statement mischaracterizes the law in Washington. While this court has not ruled on the issue, the debate is settled in two earlier opinions. Mitchell, 59 Wn.App. at 184 ("Certainly, consent to the appointment of a judge pro tempore is a substantial right. In our judgment, [defendants'] attorney was without authority to waive that right."); Sain, 34 Wn.App. at 557 ("We find the right under Const. Art. 4, § 5, to be tried in a court presided over by an elected superior court judge accountable to the electorate is a substantial right."). This Court should adopt the position established by Mitchell and Sain holding that the right to a trial before a popularly elected superior court judge is a substantial

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counsel, having received express authorization to waive his client's right to a trial before an elected judge, consents to the appointment of a judge pro tem. Id. (holding because right to trial before elected superior court judge is a substantial right, "the requirement of Mr. Sain's written consent could not be waived by [defense counsel's] unauthorized statements").

right.

b. Consent to the appointment of a judge pro tempore by a non-English speaking defendant is only valid if the record indicates a translator informed the defendant of this right and he knowingly waived it.

A defendant's waiver of his right to have his case tried before a popularly elected superior court judge, like any other substantial right, must be voluntary, knowing, intelligent, and on the record. See, e.g. Abad v. Cozza, 128 Wn.2d 575, 583, 911 P.2d 376 (1996); City of Bellevue v. Acrey, 103 Wn.2d 203, 207-08, 691 P.2d 957 (1984). A non-English speaking defendant cannot knowingly waive a right he has not been informed of in a language he understands. State v. Edwards, 93 Wn.2d 162, 168, 606 P.2d 1224 (1980) (defining waiver as "intentional relinquishment or abandonment of a known right or privilege"); U.S. ex rel. Negron v. New York, 434 F.2d 386, 390 (2d Cir. 1970) (holding non-English speaking defendant did not waive right to interpreter because he "may well not have had the slightest notion that he had any 'rights' or any 'privilege' to assert them"); see also Pate v. Robinson, 383 U.S. 375, 384, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) ("it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the court

determine his capacity to stand trial.")

Respondent, in essence, claims that waiver of a constitutional or other substantial right by a non-English speaking defendant without the assistance of an interpreter is valid as long as an interpreter is appointed after the right has been waived to assist the defendant throughout the remainder of his trial. Brief of Respondent at 9. Contrary to respondent's claim, a defendant in a criminal case does have the right to an interpreter under Washington law at all stages of a criminal proceeding. RCW 2.43.010; State v. Gonzales-Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999) ("In this state, the right of a defendant in a criminal case to have an interpreter . . . ."). The purpose of this right is to "secure the rights, constitutional or otherwise," of non-English speaking defendants. It can hardly be said that a defendant's rights are adequately protected if a non-English speaking defendant can be said to validly waive a constitutional right before an interpreter is appointed for the purpose of protecting those very rights during criminal proceedings. Additionally, this reading is contradicted by Washington law, which compels the court to appoint an interpreter to assist non-English speaking defendants "throughout the proceedings." RCW 2.43.030(1). The fact that an interpreter was

appointed to assist the defendant during his guilty plea hearing does not make the waiver of his right to a trial before an elected judge, which occurred prior to the hearing and before the record indicates an interpreter was appointed to assist Mr. Socorro Bautista, valid.

2. **Appellant's guilty plea was unknowing and involuntary because the record indicates he did not freely plead guilty or understand the consequences of pleading guilty.**

Respondent bears the burden of proving the validity of a guilty plea, including the defendant's understanding of the consequences of the plea. State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996); State v. Knotek, 136 Wn.App. 412, 423, 149 P.3d 676 (2006). Respondent does not demonstrate that Mr. Socorro Bautista's entered his plea of guilty knowingly, voluntarily, and intelligently, and his plea is thus invalid. In re Personal Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004).

When a defendant enters an Alford plea, the Court must exercise "extreme care" to ensure due process requirements are met. See In re Personal Restraint of Montoya, 109 Wn.2d 270, 277, 744 P.2d 340 (1987). In order to satisfy due process requirements, a guilty plea must be "freely, unequivocally, intelligently and

understandingly made" by a defendant who fully comprehends his legal and constitutional rights and the consequences of his plea. Woods v. Rhay, 68 Wn.2d 601, 605, 414 P.2d 601 (1966). A plea is invalid if the record of the plea hearing does not affirmatively show the plea was made intelligently, voluntarily, and with a full understanding of the consequences. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980).

a. Mr. Socorro Bautista 's guilty plea was invalid because he believed pleading guilty was the only course available to him.

An Alford plea is only valid if it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

The record indicates Mr. Socorro Bautista did not freely and voluntarily plead guilty because he believed pleading guilty to be the only course available to him. When the court asked Mr. Socorro Bautista if he wanted to plead guilty and surrender some of his constitutional rights, Mr. Socorro Bautista stated, "Yes, I have no other option." 1RP 5. Although the Court notified Mr. Socorro Bautista that he could go to trial instead of pleading guilty, the

record indicates this option did not register with Mr. Socorro Bautista. When again asked if he wished to plead guilty, Mr. Socorro Bautista reiterated his desire to plead guilty because he had not other option. 1RP 12. The trial court took no additional steps to ensure Mr. Socorro Bautista understood he had the right to a trial by jury and did not have to plead guilty. Because Mr. Socorro Bautista did not voluntarily choose to plead guilty, but rather did so thinking it was the only option available to him, his guilty plea is invalid.

b. Mr. Socorro Bautista's guilty plea was invalid because he did not understand the rights he waived by pleading guilty.

By pleading guilty, a defendant waives numerous constitutional rights, including the right to a trial by jury, to confront one's accusers, and the privilege against self-incrimination. Parke v. Raley, 506 U.S. 20, 29, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992). A guilty plea made without full awareness of the consequences constitutes an invalid waiver of a defendant's constitutional rights. Brady v. U.S., 397 U.S. 742, 748, 748 n.6, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). The record must show that the defendant fully understood the constitutional rights he waived by pleading guilty. Boykin, 395 U.S. at 242 (holding reversible "error, plain on the face

of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary"); State v. Elmore, 139 Wn.2d 250, 269, 985 P.2d 289 (1999) ("Such record must show that in pleading guilty, the defendant understood he was giving up . . . the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination.").

Contrary to respondent's contention, the record clearly illustrates that Mr. Socorro Bautista did not understand the rights he waived by pleading guilty. Although Mr. Socorro Bautista indicated he had "go[ne] through" the Statement of Defendant on Plea of Guilty with his attorney and a translator, subsequent testimony from the plea colloquy demonstrates this review did not adequately advise Mr. Socorro Bautista of the putative consequences of and rights he was waiving by pleading guilty. 1RP 3. During the course of the plea colloquy, Mr. Socorro Bautista indicated on seven separate occasions that he did not understand the terms of the plea agreement. 1RP 6-12. The issues Mr. Socorro Bautista indicated he did not understand included the constitutional rights waived by pleading guilty and the sentence to be recommended by the state under the terms of the plea. 1RP 6-7, 10. "Go[ing] through" the plea agreement with his attorney clearly did not adequately apprise

Mr. Socorro Bautista of the rights waived by pleading guilty and thus made his plea invalid.

Additionally, the trial court did not adequately elucidate the rights Mr. Socorro Bautista indicated he did not comprehend. When questioned, Mr. Socorro Bautista indicated he did not fully grasp the constitutional rights, enumerated in paragraph 5 of the Statement of Defendant on Plea of Guilty, waived by entering a plea of guilty. 1RP 6. Although the trial court reviewed some of these rights, the court did not review numerous fundamental rights Mr. Socorro Bautista stood to waive by pleading guilty. First, while the Court notified Mr. Socorro Bautista that pleading guilty waived his right to a trial, it did not notify him that this right entails the right to a trial by an impartial jury, a fundamental right that can only be waived if the record indicates the defendant was informed of his right and knowingly waived it. 1RP 5-6; Duncan v. Louisiana, 391 U.S. 145, 148-49, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); City of Seattle v. Williams, 101 Wn.2d 445, 451, 680 P.2d 1051 (1984) (holding waiver of trial by jury invalid because record did not indicate defendant informed of his right). Additionally, the trial court failed to ensure Mr. Socorro Bautista understood he was waiving his right to be presumed innocent until the charges against him are

proven beyond a reasonable doubt and his right to appeal a determination of guilt. The trial court did not review these rights with Mr. Socorro Bautista after he admitted he did not fully understand the rights he waived by pleading guilty. 1RP 6-7. Because the record indicates that Mr. Socorro Bautista was not adequately informed of some of the constitutional rights he waived by pleading guilty, the waiver is invalid. Woods, 68 Wn.2d at 605 (asserting "a failure on the part of the trial judge to fully determine the voluntariness of a plea . . . readily lends itself to" a claim of deprivation of due process of law).

Mr. Socorro Bautista's lack of comprehension of the consequences of his guilty plea illustrates the importance of providing non-English speaking defendants with a written copy of a plea statement translated into a language they understand. The record supports the contention that a defendant is not fully apprised of the rights he waives by pleading guilty unless provided with a list of those rights in writing. As exhibited by the trial court's review of Mr. Socorro Bautista's understanding of the plea statement, fundamental rights can be omitted or not adequately explained when the trial court or a defendant's attorney "go[es] through" the rights a defendant stands to waive by pleading guilty. Although, as

respondent notes, it is possible Mr. Socorro Bautista's attorney read each section of the plea statement word for word to his client, it is equally possible counsel omitted full or key aspects of the rights Mr. Socorro Bautista waived by pleading guilty, as the trial court did, when going through the plea deal with him. Respondent's Brief at 14; supra at 9-10. The only way to ensure that a plea by a non-English speaking defendant is made voluntary and with full understanding of the consequences is to provide him with a written copy of the plea statement in a language he is able to understand. See U.S. v. Mosquera, 816 F.Supp. 168, 175 (E.D.N.Y. 1993).[2] This guarantees the defendant understands all the consequences of pleading guilty, not only those counsel deems important enough to communicate to him. Id.

Providing non-English speaking defendants with a written translation of the plea statement is necessary to ensure they are fully informed of their constitutional rights as criminal defendants. It is likely that non-English speaking defendants who are recent

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[2] Respondent's claim that Mosquera is inapposite is without merit. Respondent's Brief at 15-16. The Mosquera court found that due process mandates that non-English speaking defendants be supplied with written translations of critical court documents, including plea bargains. 816 F.Supp. at 175, 178. The Court's reasoning did not hinge on the number of defendants in the case, but rather on the defendants' need to review the documents alone and consult others to fully understand their content. Id. at 175.

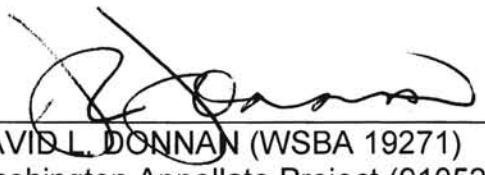
immigrants to the United States are not fully aware of their constitutional rights as criminal defendants. Id. at 171 (noting "the very concept of the American-style judicial system is completely foreign" to recent immigrant defendants) (quoting Katherine Long, Immigrants Pose Challenge for Courts—Critical Differences Cause Trouble, Seattle Times, Nov. 30, 1990, at C3). If such a defendant is not fully apprised of his constitutional rights before signing the plea statement, he cannot be said to knowingly waive those rights. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (defining waiver as "an intentional relinquishment or abandonment of a known right" (emphasis added)); U.S. ex rel. Negron, 434 F.2d at 390 (holding "indigent, poorly educated" Spanish speaking Puerto Rican defendant did not waive right to interpreter because he "may well not have had the slightest notion that he had any 'rights' or any 'privilege' to assert them"); see also Pate, 383 U.S. at 384 ("it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the court determine his capacity to stand trial.") Because the record does not affirmatively show Mr. Socorro Bautista was adequately informed of his rights as a criminal defendant when he "waived" these rights, his waiver was invalid.

C. CONCLUSION

For the reasons stated herein, Mr. Socorro Bautista requests this Court find the superior court was without jurisdiction in the absence of a knowing and intelligent waiver of the right to an elected judge at the change of plea hearing. Furthermore, that his change of plea and waiver of rights was not made knowingly and intelligently. The case should, therefore, be remanded to the superior court for further proceedings as appropriate.

DATED this 29th day of July, 2014.

Respectfully submitted:



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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] STEPHANIE GUTHRIE, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JULY, 2014.

X_____

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