

NO. 62717-1-I

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

REC'D

SEP 30 2009

KING COUNTY SUPERIOR COURT
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER BARNHILL,

Appellant.

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

The Honorable Deborah Fleck and Brian Gains, Judge

REPLY BRIEF OF APPELLANT

CHRISTOPHER GIBSON
KIRA FRANZ
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

1. BARNHILL WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL BY THE TRIAL COURT'S INADEQUATE COLLOQUY UPON THE MOTION TO PROCEED PRO SE.

Without actually saying so, the State in its response asks this Court to overrule prior caselaw on the subject of what constitutes a “voluntary, knowing, and intelligent” waiver of the right to counsel. The State asserts that because Barnhill’s waiver of counsel was repeated and unequivocal, no further colloquy was required. Brief of Respondent (BOR) at 8. This is far from Washington law.

A trial court must assume the responsibility for assuring decisions regarding self-representation are made with at least minimal knowledge of what is demanded in pro se representation;

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, *he should be made aware of the dangers and disadvantages of self-representation*, so that the record will establish that he knows what he is doing and his choice is made with eyes open.

City of Bellevue v. Acrey, 103 Wn.2d 203, 209-210, 691 P.2d 957 (1984) (emphasis the Court’s) (quoting Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)).

Normally, this is accomplished via a colloquy. Acrey, 103 Wn.2d at 211. Although there is no specific formula for the colloquy, courts agree it should, at minimum, inform the defendant of:

- 1) the nature and classification of charges,
- 2) the maximum penalty upon conviction, and
- 3) the existence of technical and procedural rules which would bind the defendant at trial.

Acrey, 103 Wn.2d at 211; State v. Silva, 108 Wn.App. 536, 541, 31 P.3d 729 (2001).¹ Without this critical information, a defendant cannot make a knowledgeable waiver of his constitutional right to counsel. Silva, 108 Wn.App. at 541.

The Silva case demonstrates how strictly courts will apply this rule. The Silva defendant, who had gone pro se in an Oregon case and a different Washington case before the trial at issue, requested to go pro se in the case reviewed. 108 Wn. App. at 538. The judge had performed the colloquy in a prior case, and so he did not review the charges in the instant case or their maximum penalties. Id. at 538, 540. Although the record

¹ This same test has been applied in many cases since Acrey. See e.g., State v. James, 138 Wn. App. 628, 636, 158 P.3d 102 (2007), review denied, 163 Wn.2d 1013 (2008); State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), affirmed, 164 Wn.2d 83, 186 P.3d 1062 (2008); State v. Lillard, 122 Wn. App. 422, 427-28, 93 P.3d 969 (2004), review denied, 154 Wn.2d 1002 (2005); City of Spokane v. Hamlett, 98 Wn. App. 841, 844, 991 P.2d 116 (2000); State v. Nordstrom, 89 Wn. App. 737, 742, 950 P.2d 946 (1997); State v. Buelna, 83 Wn. App. 658, 659-660, 922 P.2d 1371 (1996); and State v. Hahn, 106 Wn.2d 885, 896, 726 P.2d 25 (1986) (containing “textbook example” of a valid colloquy).

demonstrated the defendant understood the nature of the charges and Silva had been advised of their standard range; and although the defendant had twice represented himself at trial; and although, post trial, the defendant was actually sentenced within the standard range, this Court nonetheless reversed because the court below had not reviewed the maximum penalty upon conviction. Id. at 540-42.

The State implies that because Barnhill was arraigned and because he was given a copy of the charges at the commencement of trial, this fulfills the need of the colloquy. See BOR at 8, 13, 16. Not surprisingly, the State cites no legal precedent for such a rule. The law requires more – it requires the trial court to ensure for itself that the defendant understands “the dangers and disadvantages of self-representation.” Acrey, 103 Wn.2d at 209; Faretta v. California, 422 U.S. at 835.

All defendants are arraigned. Presumably, all defendants who represent themselves receive the charging documents at some point. If these were sufficient to prove that a defendant was informed of the dangers of self-representation, then virtually no case would be reversed for such a failing. Certainly, the Silva case would not have been.

In this case, the colloquy – which the State reviews so intricately that it covers some six pages of the State’s brief – was only about two pages of transcript on December 28, 2007, plus perhaps an additional two

pages of nearly identical questions and answers from December 21. 1RP 4-6; 2RP 6-8; BOR at 9-12, 16-18. A cursory review of these pages shows the minimal requirements of Acrey and Silva were not met – the elements and classification of the charges were not reviewed and the maximum penalties were not reviewed. On at least two bases, then, this colloquy was inadequate.

The State also contends that Barnhill “actually performed quite admirably.” BOR at 21. Appellate counsel believes the record reveals otherwise. The fact that Barnhill won a small number of pretrial motions does not mean that he was skilled; in this case, it means only that the trial court was following the law for an unrepresented party. In fact, at voir dire, during cross-examination, and during legal argument, Barnhill was woefully ineffective. See AOB at 15-20. The State’s assertion that his self-representation was competent does not make it so.

The effectiveness or ineffectiveness of Barnhill’s representation makes little difference to the legal issue of whether the colloquy was adequate. See State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991). (“the inadequacy of the [pro se] defense cannot provide a basis for a new trial...”) The only manner in which it matters is that a demonstrably skilled or sophisticated defendant – perhaps a lawyer or paralegal, for example – might not require so exacting a colloquy to prove a voluntary

waiver. Acrey, 103 Wn.2d at 211 (“A defendant’s background is certainly relevant to his ability to make a sensible, intelligent decision regarding self-representation....”). Barnhill’s failings are only relevant insofar as they prove he was not a defendant from such a category.

If a defendant seeks to represent himself, but the trial court fails to explain the consequences of such a decision to him, a resulting conviction must be reversed. United States v. Arit, 41 F.3d 516, 521 (9th Cir. 1994). No “harmless error” analysis can salvage the ensuing convictions. Silva, 108 Wn. App. at 542. Because the Court failed to review the charges or their maximum sentences, Barnhill’s convictions must be reversed. Silva, 108 Wn. App. at 542.

2. COUNT I, COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES, SHOULD BE DISMISSED FOR INSUFFICIENT EVIDENCE.

This Court should accept the State’s concession that there was insufficient evidence to sustain Count I, Communication with a Minor for Immoral Purposes (CMIP). BOR at 22-24. The State argues, however, that the conviction should merely be reduced to attempted CMIP, rather than dismissed. BOR at 24. The Court should not accept this argument.

According to the Supreme Court, retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the only remedy. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Although some decisions by the Court of Appeals have permitted entry of conviction on a lesser included offense when insufficient evidence supports the original charge,² counsel was unable to find a recent Supreme Court decision doing the same.³ In fact, in State v. Lee, a case involving second degree theft, the State failed to prove the necessary value element. 128 Wn.2d 151, 163-64, 904 P.2d 1143 (1995). The Supreme Court therefore reversed the theft conviction and remanded for dismissal of the information with prejudice. Id. at 164. See also State v. Greathouse, 113 Wn.App. 889, 913, 56 P.3d 569 (2002) (this Court agrees the Supreme Court's holding in Lee is "not that there was no theft....[but rather] that the prosecution failed to establish second degree theft because it presented no evidence that the defendant wrongfully obtained property from the...victim worth more than \$250"), review denied, 149 Wn.2d 1014 (2003). This Court should follow Supreme Court precedent and dismiss Count I, not remand for entry of conviction on a lesser crime.

² See, i.e., State v. Garcia, 146 Wn. App. 821, 193 P.3d 181 (2008), review denied, 166 Wn.2d 1009, 208 P.3d 1125 (2009); State v. Gilbert, 68 Wn. App. 379, 387-88, 842 P.2d 1029 (1993).

³ One Supreme Court decision permits such an action, but the case is significantly over a century old. State v. Freidrich, 4 Wash. 204, 29 P. 1055 (1892).

3. THE EVIDENCE IS INSUFFICIENT TO CONVICT BARNHILL OF WITNESS TAMPERING AS CHARGED IN COUNTS III, IV, V, VI, AND VII.

The State concedes that the evidence is so confused on counts IV, V, VI, and VII as to not support convictions for those counts. BOR at 24, 27. This Court should accept the State's concession.

The State also noted that there is an "alternative means" problem with those counts as well. BOR at 25, 27-28. This issue also applies to Count III, an additional witness tampering charge, which was not attacked by the evidentiary confusion issue. See BOA at 26 (acknowledging that both the CD track and transcript section are well-identified as to Count III). In order to permit the State to properly respond, a motion to file a supplemental brief and supplemental brief have been filed as to Count III's alternative means issue.

4. THE COURT SHOULD NOT HAVE FOUND BARNHILL'S TEXAS JUVENILE ADJUDICATIONS FOR "BURGLARY OF A HABITATION" COMPARABLE TO "RESIDENTIAL BURGLARIES" UNDER WASHINGTON LAW.

The State concedes that the four juvenile burglaries from Texas do not constitute "residential burglaries," as found by the trial court. BOR at 32. However, the State argues that such convictions still should count towards two points of Barnhill's offender score because they are comparable to Washington felony vehicle prowling offenses. BOR at 29,

32-33. This argument should be rejected, because it is unclear whether the burglaries would constitute a felony or misdemeanor vehicular prowling.

The parties agree the Texas statute defines burglary of a habitation in relevant part:

(a) A person commits an offense if, without the effective consent of the owner, the person:

(1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or

(3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

V.T.C.A. Penal Code §30.02. (Emphasis added). The Texas penal code further defines a “habitation” as:

[A] structure or vehicle that is adapted for the overnight accommodation of persons....

V.T.C.A. Penal Code §30.01(1).

Under Washington law, a vehicular prowling is classified as a class C felony only if it is of “a motor home or a vehicle with permanently installed sleeping quarters or cooking facilities.” RCW 9A.52.095; 9A.52.100 (emphasis added). The Texas law defining a habitation as a vehicle “adapted for the overnight accommodation of persons” is clearly broader than the more specific Washington law. V.T.C.A. Penal Code §30.01(1) (emphasis added). A futon in the back of a pickup truck with a bed cover might be sufficient under Texas law, whereas Washington law

requires significantly more – permanently installed sleeping quarters or cooking facilities. RCW 9A.52.095; V.T.C.A. Penal Code §30.01(1)

State v. McCorkle is distinguishable because the Georgia statute is even more restrictive than Washington’s. 88 Wn. App. 485, 496, 945 P.2d 736 (1997), affirmed, 137 Wn.2d 490, 973 P.2d 4651 (1999). In McCorkle, the Georgia statute defined burglary as when:

without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof.

GA Code Ann. §16-7-1 (1997) (emphasis added). “Designed for use as [a] dwelling” more resembles Washington’s requirement of “permanently installed sleeping quarters or cooking facilities” than the broader Texas wording: “adapted for the overnight accommodation of persons.”

Without proof that Barnhill’s Texas crimes would be felony vehicular prowls under Washington law, they cannot be included in his offender score. State v.. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). Because this issue may arise again upon retrial, this Court should find such out-of-state offenses should not be used to calculate the offender score.

B. CONCLUSION

Because Barnhill was unconstitutionally denied his right to counsel, this Court should reverse all of his convictions and remand for a new trial. Because insufficient evidence supported Count I, Count IV, Count V, Count VI, and Count VII, those counts should be reversed and dismissed without benefit of retrial. Because insufficient evidence supported one of the alternative means of Count III, and the Court cannot determine whether the verdict was unanimous, that count should also be dismissed. (See Appellant's Supplemental Brief). Finally, as the issue may arise again on retrial, this Court should find that Barnhill's juvenile Texas adjudications for "burglary of a habitation" should not be used to calculate his offender score.

DATED this 30th day of September, 2009.

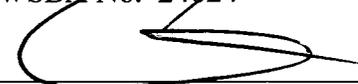
Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

B.A. 25097



KIRA T. FRANZ
WSBA No. 24824



CHRISTOPHER H. GIBSON,
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62717-1-I
)	
CHRISTOPHER BARNHILL,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF SEPTEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHRISTOPHER BARNHILL
DOC NO. 322338
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER, 2009.

x *Patrick Mayovsky*

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