

NO. 66442-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL PIATNITSKY,

Appellant.

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

REPLY BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

FILED
COURT OF APPEALS
STATE OF WASHINGTON
FOR
DIV 1
2011 NOV -8 PM 4:26

TABLE OF CONTENTS

A. ARGUMENT 4

 1. THE TRIAL COURT VIOLATED MR. PIATNITSKY'S
 FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE
 HIMSELF BY ADMITTING CUSTODIAL STATEMENTS
 HE MADE AFTER INVOKING HIS RIGHT TO SILENCE..... 4

 2. THE 'TO CONVICT' INSTRUCTION FOR FIRST-
 DEGREE ATTEMPTED MURDER OMITTED AN
 ESSENTIAL ELEMENT OF THE CRIME, VIOLATING
 MR. PIATNITSKY'S RIGHT TO DUE PROCESS..... 7

B. CONCLUSION..... 11

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995) 4

State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003) 5

State v. Dunbar, 117 Wn.2d 587, 817 P.2d 1360 (1991) 4

State v. Gore, 101 Wn.2d 481, 681 P.2d 227 (1984) 8

State v. Radcliffe, 164 Wn.2d 900, 194 P.3d 250 (2008) 1

State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997) 4, 8

State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995)... 6, 7, 8

Washington Court of Appeals Decisions

Becerra v. City of Warden, 117 Wn. App. 510, 71 P.3d 226 (2003) 7

Channel v. Channel by and through Marsh, 61 Wn. App. 295, 810
P.2d 67 (1991) 8

City of Kent v. Mann, 161 Wn. App. 126, 253 P.3d 409 (2011)..... 7

Dougherty v. Nationwide Insurance Co., 58 Wn. App. 843, 795 P.2d
166 (1991) 8

Park Hill Corp. v. Sharp, 60 Wn. App. 283, 803 P.2d 326 (1991).... 7

State v. Arthur, 126 Wn. App. 243, 108 P.3d 169 (2005) 7

State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008) 7

State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003) 7

State v. Chesley, 158 Wn. App. 36, 239 P.3d 1160 (2010)..... 7

State v. Gutierrez, 50 Wn. App. 583, 749 P.2d 213, rev. denied,
110 Wn.2d 1032 (1988) 1

<u>State v. Hogan</u> , 145 Wn. App. 210, 192 P.3d 915 (2008)	7
<u>State v. Molina</u> , 83 Wn. App. 144, 920 P.2d 1228 (1996)	7
<u>State v. Nicholson</u> , 119 Wn. App. 855, 84 P.3d 877 (2003)	8
<u>State v. Nuñez</u> , 160 Wn. App. 150, 248 P.3d 103 (2011)	7
<u>State v. Reed</u> , 150 Wn. App. 761, 208 P.3d 1274, <u>rev. denied</u> , 167 Wn.2d 1006 (2009).....	7
<u>State v. Ryan</u> , 160 Wn. App. 944, 252 P.3d 895 (2011)	7
<u>State v. Smith</u> , 34 Wn. App. 405, 661 P.2d 1001 (1983).....	1
<u>State v. Winings</u> , 126 Wn. App. 75, 107 P.3d 141 (2005).....	7
<u>State v. Wright</u> , 155 Wn.App. 537, 230 P.3d 1063 (2010)	7
<u>State v. Tvedt</u> , 116 Wn. App. 316, 65 P.3d 682 (2003)	7
<u>Thompson v. Hanson</u> , 142 Wn. App. 53, 174 P.3d 120 (2007).....	7

United States Supreme Court Decisions

<u>Edwards v. Arizona</u> , 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).....	3
<u>Michigan v. Mosley</u> , 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).....	2, 3
<u>Miranda v. Arizona</u> , 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).....	1, 2, 3

Statutes

RCW 9A.08.010	4
---------------------	---

Other Authorities

W. LaFave & A. Scott, <u>Criminal Law</u> (2d ed. 1986).....	5
--	---

A. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. PIATNITSKY'S FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF BY ADMITTING CUSTODIAL STATEMENTS HE MADE AFTER INVOKING HIS RIGHT TO SILENCE.

As explained in Mr. Piatnitsky's opening brief, the trial court violated his Fifth Amendment rights by admitting statements he made in response to police questioning after saying he didn't feel like talking. Appellant's Brief at 6-12 (citing, inter alia, Miranda v. Arizona, 384 U.S. 436, 444, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966); State v. Gutierrez, 50 Wn. App. 583, 749 P.2d 213, rev. denied, 110 Wn.2d 1032 (1988)).

This Court reviews the trial court's finding as to the content of the statement (i.e. what Mr. Piatnitsky actually said) for substantial evidence. State v. Radcliffe, 164 Wn.2d 900, 907-08, 194 P.3d 250 (2008). Contrary to the State's assertion, whether that statement, in turn, constitutes an unequivocal invocation of the right to silence is a question of law reviewed de novo. State v. Smith, 34 Wn. App. 405, 408, 661 P.2d 1001 (1983).

The State acts as if the transcript of the interview was accurate and that Mr. Piatnitsky said, "Yes, I don't know," when

asked if he'd like to give a written statement. Respondent's Brief at 18, 25. The trial court apparently also assumed the transcript was accurate, as it found Mr. Piatnitsky never stated a desire to remain silent. CP 313. Substantial evidence does not support this finding. The recording of Mr. Piatnitsky's actual statement, which was before the trial court during the suppression hearing, is clear that Mr. Piatnitsky did not say, "Yes, I don't know." Ex. 56 at 4:48-50. Indeed, Detective Keller acknowledged that Mr. Piatnitsky said, "I don't want to talk." 9/16/10 RP 41. The fact that the detective interpreted this statement to mean Mr. Piatnitsky wanted to write a statement rather than provide an oral statement is beside the point when determining whether substantial evidence supports the trial court's finding regarding the actual words spoken.

The State then implies that even if Mr. Piatnitsky invoked the right to silence by stating he didn't want to talk, he then waived this right by providing a written statement shortly after invoking his Fifth Amendment rights. Respondent's Brief at 23, 26-27. That is not the law. Once an individual invokes his Fifth Amendment right to silence, all questioning must cease. A police officer cannot ignore a defendant's invocation and thereby obtain a waiver of the right. Michigan v. Mosley, 423 U.S. 96, 101-04, 96 S.Ct. 321, 46 L.Ed.2d

313 (1975); Miranda, 384 U.S. at 473-74; see also Edwards v. Arizona, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (Miranda waiver obtained after suspect invoked right to counsel was invalid, even though suspect was warned again and gave statement; officers were required to “scrupulously honor” the invocation and cease questioning).

Finally, the State urges this Court to read Mr. Piatnitsky’s statements out of order, insisting that Mr. Piatnitsky “said he would rather not talk about it but would be willing to provide a written statement.” Respondent’s Brief at 28. Obviously, Mr. Piatnitsky did not argue that questioning had to cease at the point where Mr. Piatnitsky said “I just write it down, man.” It was after this portion of the interview that Mr. Piatnitsky invoked his right to silence, and at that point, the officers were required to cease the interrogation. Ex. 56 at 4:48-50; Mosley, 423 U.S. at 101 (citing Miranda, 384 U.S. at 473-74); Appellant’s Brief at 6-9. Furthermore, because Mr. Piatnitsky’s right to cut off questioning was not “scrupulously honored,” the trial court erred in denying the motion to suppress. Mosley, 423 U.S. at 104.

2. THE “TO CONVICT” INSTRUCTION FOR FIRST-DEGREE ATTEMPTED MURDER OMITTED AN ESSENTIAL ELEMENT OF THE CRIME, VIOLATING MR. PIATNITSKY’S RIGHT TO DUE PROCESS.

As explained in Mr. Piatnitsky’s opening brief, the “to convict” instruction for count two violated his right to due process because it omitted the essential element of premeditated intent. The instruction instead required only “intent,” which is the *mens rea* for second-degree attempted murder. Although other instructions explained that premeditation was an element of the completed crime of first-degree murder, this does not make up for its absence from the “to convict” instruction for first-degree attempted murder, because the omission relieved the State of the burden of proving the proper *mens rea*. Appellant’s Brief at 12-21 (citing, inter alia, State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995)).

The “intent” referred to in the “to convict” instruction given by the court is the intent “to accomplish a result which constitutes a crime.” State v. Dunbar, 117 Wn.2d 587, 591, 817 P.2d 1360 (1991) (citing RCW 9A.08.010(1)(a)) (emphasis in original). Premeditation is not a result; death is the result contemplated in a case of attempted murder. Id. at 590 (citing W. LaFave & A. Scott,

Criminal Law § 6.2(c) at 500-01 (2d ed. 1986)). Thus, the jury was instructed to find Mr. Piatnitsky guilty if he had the intent to accomplish the death of Mr. Manchester and took a substantial step toward causing his death. This is second-degree attempted murder.

In its response brief, the State fails to address the unique nature of the crime of first-degree attempted murder. It cites DeRyke for the proposition that the “to convict” instruction for an attempt need not include the elements of the crime allegedly attempted, so long as they include the elements of “intent” and “substantial step.” Respondent’s Brief at 30-35 (citing State v. DeRyke, 149 Wn.2d 906, 910-11, 73 P.3d 1000 (2003)). But as explained in Mr. Piatnitsky’s opening brief, this rule makes no sense in the context of first-degree attempted murder, because it is the one crime for which the *mens rea* is higher than intent.

DeRyke is inapposite because it involved an underlying crime (first-degree rape) for which there is no *mens rea* element. DeRyke, 149 Wn.2d at 913. Thus, the *mens rea* for attempted first-degree rape is intent. Id. The general attempt instruction is therefore appropriate for attempted rape. But it is not appropriate for first-degree attempted murder, which is *sui generis*. This Court

should address the unique due process issue inherent in a charge of first-degree attempted murder by holding that the “to convict” instruction must include the element of premeditated intent.

The Supreme Court’s decision in Vangerpen, not DeRyke, controls. State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995). In Vangerpen, the Court made clear that premeditated intent, not mere intent, is an “essential element” of the crime of first-degree attempted murder. Id. at 785. The charging document in that case alleged only “intent,” and the trial court granted the State’s motion to amend the information after resting its case to include the element of premeditation. Id. at 786. The Supreme Court agreed with the Court of Appeals that the conviction had to be reversed because of the bright-line rule prohibiting the State from amending the information after resting its case to add an essential element of the crime. Id. at 787. There was no dispute that the original information purported to charge first-degree attempted murder but “omitted an element of that crime.” Id. at 792. In a footnote, the court mentioned the well-settled proposition that all essential elements must be in both the information and the “to convict” instruction. Id. at 791 n.17.

Although the Supreme Court's decisions in Smith and Vangerpen control, the State claims this Court must instead follow Division Two's decision in State v. Reed, 150 Wn. App. 761, 208 P.3d 1274, rev. denied, 167 Wn.2d 1006 (2009). Respondent's Brief at 33-35. This contention is absurd. Division Two's decisions are not binding on this Court; indeed this Court frequently disagrees with the opinions of Divisions Two and Three. Compare, e.g., State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011) with State v. Nuñez, 160 Wn. App. 150, 248 P.3d 103 (2011); State v. Wright, 155 Wn. App. 537, 230 P.3d 1063 (2010) with State v. Chesley, 158 Wn. App. 36, 239 P.3d 1160 (2010); State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003) with State v. Arthur, 126 Wn. App. 243, 108 P.3d 169 (2005); City of Kent v. Mann, 161 Wn. App. 126, 253 P.3d 409 (2011) with Becerra v. City of Warden, 117 Wn. App. 510, 71 P.3d 226 (2003); State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008) with State v. Hogan, 145 Wn. App. 210, 192 P.3d 915 (2008); Thompson v. Hanson, 142 Wn. App. 53, 174 P.3d 120 (2007) with Park Hill Corp. v. Sharp, 60 Wn. App. 283, 803 P.2d 326 (1991); State v. Tvedt, 116 Wn. App. 316, 65 P.3d 682 (2003) with State v. Molina, 83 Wn. App. 144, 920 P.2d 1228 (1996); State v. Winings, 126 Wn. App. 75, 107 P.3d 141 (2005) with State v.

Nicholson, 119 Wn. App. 855, 84 P.3d 877 (2003); Channel v. Channel by and through Marsh, 61 Wn. App. 295, 810 P.2d 67 (1991) with Dougherty v. Nationwide Insurance Co., 58 Wn. App. 843, 795 P.2d 166 (1991). It is the Supreme Court's precedents that must be followed, not Division Two's. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

The Supreme Court has made clear that a "to convict" instruction which omits an essential element of the crime violates due process. Smith, 131 Wn.2d at 262-63. The Supreme Court has made equally clear that premeditation is an essential element of first-degree attempted murder. Vangerpen, 125 Wn.2d at 792. Because the "to convict" instruction on count two omitted the element of premeditation, it was constitutionally defective. Smith, 131 Wn.2d at 263. The State has not shown the error was harmless beyond a reasonable doubt. Respondent's Brief at 30-35. Accordingly, the conviction on count two should be reversed and the case remanded for a new trial. Smith, 131 Wn.2d at 266;

B. CONCLUSION

The convictions on counts 1, 2, and 4 should be reversed and the case remanded for a new trial because Mr. Piatnitsky's Fifth Amendment rights were violated by the admission of

statements he made to police after invoking his right to silence.
Alternatively, the conviction on count 2 should be reversed and the
case remanded for retrial on that count because the court omitted
the element of premeditated intent from the "to convict" instruction.

DATED this 8th day of November, 2011.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66442-5-I
v.)	
)	
SAMUEL PIATNITSKY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF NOVEMBER, 2011, 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:

FILED
COURT OF APPEALS
STATE OF WASHINGTON
NOV 8 2011
8 32:14 PM

- | | | |
|---|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> RANDI AUSTELL, DPA
KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
516 THIRD AVENUE, W-554
SEATTLE, WA 98104 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| <input checked="" type="checkbox"/> SAMUEL PIATNITSKY
346508
WASHINGTON STATE PENITENTIARY
1313 N 13 TH AVE
WALLA WALLA, WA 99362 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF NOVEMBER, 2011.

X _____ *Arne*

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710