

FILED
September 30, 2015
Court of Appeals
Division I
State of Washington

NO. 72840-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JESSE GRIENER-JACOBSEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA J. BENTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	4
1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING GRIENER- JACOBSEN'S MOTION FOR A NEW TRIAL.....	4
a. This Court Should Take This Opportunity To Provide Guidance To Trial Courts Regarding Whether The Restoration Of A Felon's Right To Vote Also Restores The Right To Serve On A Jury	5
b. Even If Juror Six Was Not Statutorily Qualified To Serve As A Juror, The Trial Court Properly Exercised Its Discretion In Denying The Motion For New Trial	7
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Fay v. New York, 332 U.S. 261,
67 S. Ct. 1613, 91 L. Ed. 2043 (1947)..... 12

Washington State:

In re Marriage of Rideout, 150 Wn.2d 337,
77 P.3d 1174 (2003)..... 7

Roche Fruit Co. v. Northern Pacific Railroad Co.,
18 Wn.2d 484, 139 P.2d 714 (1943)..... 12

State v. Berry, 129 Wn. App. 59,
117 P.3d 1162 (2005)..... 9

State v. Clark, 34 Wash. 485,
76 P. 98 (1904)..... 8

State v. Cleary, 166 Wn. App. 43,
269 P.3d 367 (2012)..... 3, 4, 8

State v. Emery, 174 Wn.2d 741,
278 P.3d 653 (2012)..... 9

State v. Persinger, 62 Wn.2d 362,
382 P.2d 497 (1963)..... 10

State v. Tingdale, 117 Wn.2d 595,
817 P.2d 850 (1991)..... 11, 12

State v. Williams, 96 Wn.2d 215,
634 P.2d 868 (1981)..... 9

Statutes

Washington State:

RCW 2.36.054.....	5, 6
RCW 2.36.070.....	1, 5, 6
RCW 9.94A.637	5, 6
RCW 29A.08.520	1, 5, 6, 7

Rules and Regulations

Washington State:

CrR 6.1.....	3
CrR 7.5.....	1, 3, 4, 8, 9, 11, 12

Other Authorities

13 Wash. Prac., Criminal Practice & Procedure § 4005 (3d ed.)...	12
Ritter, Gretchen, <u>Jury Service and Women's Citizenship Before and After the Nineteenth Amendment,</u> 20 Law & Hist. Rev. 479 (2002).....	5

A. ISSUES PRESENTED

1. Where a felon's right to vote has been automatically restored by RCW 29A.08.520(1) upon termination of supervision, have the felon's "civil rights" been restored for purposes of qualifying for jury service under RCW 2.36.070(5)?

2. Where the defendant failed to establish that any of the justifications for a new trial enumerated in CrR 7.5 applied in his case, did the trial court properly exercise its discretion in denying the defendant's motion for new trial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Jesse Aaron Griener-Jacobsen, with one count of felony harassment. CP 16. A jury found him guilty as charged. CP 45. Prior to sentencing, Griener-Jacobsen filed a motion for a new trial challenging the inclusion on his jury of a felon who, in Griener-Jacobsen's view, was not statutorily qualified to serve as a juror. CP 53-56. The trial court initially granted the motion, but then *sua sponte* reconsidered its ruling and denied the motion for new trial, sentencing Griener-

Jacobsen to time served. CP 72-73, 93-94; 11RP¹ 8. Griener-Jacobsen timely appealed. CP 85.

2. SUBSTANTIVE FACTS.²

During voir dire, Juror Six stated that he had been convicted of a felony approximately three and a half years earlier. 4RP 50-51. Juror Six had also disclosed the conviction on his written juror information sheet. 9RP 5. Neither the parties nor the court asked him whether his civil rights had been restored, and he did not volunteer that information. 4RP 50-126; 9RP 5. Juror Six was eventually seated on the jury that convicted Griener-Jacobsen. CP 54.

While speaking with jurors after the verdict, defense counsel learned that Juror Six had never received a certificate of discharge following his felony conviction. CP 54. Further investigation by defense counsel revealed that an order terminating Juror Six's supervision stated that Juror Six was "entitled to restoration of Civil Right or discharge from the sentence at this time," and while that

¹ The eleven volumes of the verbatim report of proceedings will be referred to as 1RP (June 16, 2014), 2RP (July 14, 2014), 3RP (October 6, 2014), 4RP (October 7, 2014), 5RP (duplicative partial transcript of October 7, 2014), 6RP (October 8, 2014), 7RP (October 9, 2014), 8RP (October 24, 2014), 9RP (November 7, 2014), 10RP (November 13, 2014), and 11RP (December 4, 2014).

² Because the issue on appeal relates only to the qualifications of one of the jurors, the testimony presented at trial regarding the facts of the crime will not be discussed.

should have automatically resulted in a certificate of discharge being provided to Juror Six, for unknown reasons that did not occur. CP 54-55.

Prior to sentencing, Griener-Jacobsen filed a CrR 7.5 motion for a new trial. CP 53-67. He argued that Juror Six was not qualified to serve on the jury, violating Griener-Jacobsen's right under CrR 6.1 to a jury of twelve persons, and that thus a new trial was required under CrR 7.5 because "a substantial right of the defendant was materially affected." CP 53, 55-56. The State opposed the motion, arguing that Griener-Jacobsen had failed to make the required showing of prejudice, that he was not allowed to challenge a juror's inclusion after accepting the jury without exercising available challenges, that the order releasing Juror Six from supervision and entitling him to restoration of his civil rights was sufficient to qualify him for jury service, that Juror Six's inclusion on the jury did not violate any of Griener-Jacobsen's constitutional rights,³ and that State v. Cleary⁴ had already decided the same issue in the State's favor. CP 69-70.

³ Griener-Jacobsen conceded that the right at issue was statutory rather than constitutional. 8RP 9.

⁴ State v. Cleary, 166 Wn. App. 43, 269 P.3d 367 (2012).

The trial court initially granted Griener-Jacobsen's motion, ruling that the presence of an ineligible juror on the jury rendered the verdict void. 8RP 11-12; CP 72. However, the trial court subsequently reconsidered that decision on its own motion and reversed it, denying the motion for new trial. 9RP 3-4; CP 93-94. The court stated that its initial ruling had been based on a misreading of Cleary and on the mistaken belief that inclusion of an ineligible juror was a constitutional violation. 9RP 3-4.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING GRIENER-JACOBSEN'S MOTION FOR A NEW TRIAL.

Griener-Jacobsen contends that Juror Six was not statutorily qualified for jury service, and that the seating of such a juror requires the reversal of his conviction. This claim should be rejected. Because Griener-Jacobsen failed to establish that his claim met any of the grounds for granting a new trial set out in CrR 7.5, the trial court properly exercised its discretion in denying the motion.

- a. This Court Should Take This Opportunity To Provide Guidance To Trial Courts Regarding Whether The Restoration Of A Felon's Right To Vote Also Restores The Right To Serve On A Jury.

A person is statutorily incompetent to serve as a juror in Washington if he or she has been convicted of a felony and has not had his or her "civil rights" restored. RCW 2.36.070(5). However, RCW 2.36 does not define "civil rights." RCW 2.36.070. Historically, the right to serve on a jury has been tied to the right to vote. Gretchen Ritter, Jury Service and Women's Citizenship Before and After the Nineteenth Amendment, 20 Law & Hist. Rev. 479, 481 (2002); see RCW 2.36.054(1) (directing that jury source lists be created by merging county's list of all registered voters with list of all licensed drivers).

By statute, a Washington felon's right to vote is automatically restored once he or she is no longer under the supervision of the Department of Corrections (DOC). RCW 29A.08.520(1). When a felon has completed all requirements of his or her sentence (including payment of financial obligations), the DOC is supposed to notify the sentencing court, which is supposed to then discharge the offender and provide him or her with a certificate of discharge. RCW 9.94A.637(1)(a). The entry of an order of discharge restores

to the felon all “civil rights” not already restored by RCW 29A.08.520. RCW 9.94A.637(5).

Currently, there is no clear guidance for trial courts regarding whether the restoration of the right to vote upon release from DOC supervision satisfies the restoration of “civil rights” requirement in the juror qualification statute.⁵ The historical link between jury service and the right to vote, and the legislature’s command that jury source lists be based in part on voter registration lists, suggests that when the legislature provided for automatic restoration of the right to vote upon release from DOC supervision, it intended that the right to jury service also be restored. See RCW 2.36.054(1). On the other hand, the juror qualification statute specifically refers to the restoration of “civil rights,” and the only statute that explicitly restores “civil rights” generally, as opposed to the right to vote specifically, is the discharge statute. RCW 9.94A.637(5).

If the restoration of voting rights satisfies the restoration of civil rights requirement in the juror qualification statute, then Juror Six was qualified to serve as a juror, and the trial court’s denial of the motion for new trial was proper on that basis. CP 67;

⁵ A Westlaw search reveals that no Washington court has ever issued an opinion addressing both RCW 2.36.070 and RCW 29A.08.520.

RCW 29A.08.520(1); see In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003) (appellate court may uphold trial court's ruling on any grounds supported by the record). Although the trial court's ruling was a proper exercise of discretion regardless of whether Juror Six was statutorily qualified, as explained below, it is critical that trial courts receive guidance on this issue.

Without guidance, it is inevitable that some trial courts will make costly mistakes, either by systematically excluding qualified felons from jury service under the mistaken belief that they are not qualified, or by refusing a defense request to remove an unqualified felon whom the court mistakenly believes is qualified. Such errors will result in reversals of convictions and remands for new trials, with all the attendant expenditure of judicial resources. Therefore, in the interest of judicial economy, this Court should take this opportunity to decide the question.

- b. **Even If Juror Six Was Not Statutorily Qualified To Serve As A Juror, The Trial Court Properly Exercised Its Discretion In Denying The Motion For New Trial.**

A defendant who fails to question a juror in voir dire regarding his or her statutory competency to serve as a juror has waived his right to disqualify him or her, and may not later

challenge his or her inclusion on the jury, on that basis. State v. Clark, 34 Wash. 485, 491-92, 76 P. 98 (1904); see also State v. Cleary, 166 Wn. App. 43, 47, 269 P.3d 367 (2012) (rejecting argument raised for first time on appeal that inclusion of juror whose civil rights may not have been restored constituted a material departure from statutory jury selection process and entitled defendant to a new trial).

Motions for new trial brought before sentencing are governed by Criminal Rule 7.5, which states:

The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

- (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;
- (2) Misconduct of the prosecution or jury;
- (3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;
- (4) Accident or surprise;
- (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;
- (6) Error of law occurring at the trial and objected to at the time by the defendant;
- (7) That the verdict or decision is contrary to law and the evidence;
- (8) That substantial justice has not been done.

A trial court's decision to grant or deny a motion for new trial will not be disturbed on appeal absent a mistake of law or manifest abuse of discretion. State v. Berry, 129 Wn. App. 59, 68, 117 P.3d 1162 (2005). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

CrR 7.5 creates a framework wherein a trial court has the discretion to grant a new trial only if two conditions are met: (1) one of the eight grounds listed in the rule has occurred, and (2) it affirmatively appears that a substantial right of the defendant was thereby materially affected. CrR 7.5; State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981). If none of the enumerated grounds exist, it would be an abuse of discretion for the trial court to grant a new trial. Williams, 96 Wn.2d at 222.

In his motion for a new trial, Griener-Jacobsen failed to identify a single one of the enumerated grounds that he believed was present in his case, and instead simply asserted that a substantial right had been materially affected by the presence of Juror Six on his jury, and that he was therefore entitled to a new trial. CP 53-56. On appeal, his argument drifts even further from the requirements of CrR 7.5, failing to discuss or even cite the rule.

Brief of Appellant at 3-6. A review of the enumerated grounds for a new trial reveals that not one of them was met in this case even if one assumes that Juror Six did not meet the statutory requirements for jury service.

As defense counsel told the trial court, Juror Six's failure to meet the statutory qualifications for jury service resulted merely from an administrative failure to mail Juror Six a certificate of discharge after he had met all the requirements to have his civil rights restored. CP 54-55. Furthermore, Griener-Jacobsen's failure to discover Juror Six's statutory ineligibility for jury service before the jury was empaneled was due to Griener-Jacobsen's own choice not to inquire further in voir dire after the juror disclosed his felony conviction, and was not due to any misconduct by Juror Six. 9RP 5.

There is no evidence that Griener-Jacobsen was actually prejudiced in any way by Juror Six's presence on the jury, nor does Griener-Jacobsen contend that he was. Brief of Appellant at 4-6 (arguing prejudice should be presumed); see also State v. Persinger, 62 Wn.2d 362, 366, 382 P.2d 497 (1963) ("The law presumes that each juror sworn in a case is impartial and above legal exception, otherwise he would have been challenged for

'cause.'"). Thus, the error of which Griener-Jacobsen complains was not an "[i]rregularity in the proceedings . . . by which the defendant was prevented from having a fair trial," nor does it satisfy any other basis enumerated in the rule. CrR 7.5(5).

Instead of addressing CrR 7.5, Griener-Jacobsen's argument on appeal relies entirely on State v. Tingdale's⁶ conclusion that prejudice should be presumed when there is a material departure from statutes requiring the impartial selection of jury panels. Brief of Appellant at 4. In Tingdale, the material departure was the trial court's dismissal of potential jurors from the panel prior to voir dire based solely on the clerk's personal belief that they were friends of the defendant. State v. Tingdale, 117 Wn.2d 595, 599-603, 817 P.2d 850 (1991). The supreme court held that there was no reason to dismiss the jurors for cause and the court's practice permitted the trial court or the clerk "to assemble a jury panel of their own choosing," violating the statutorily required element of chance and calling into doubt the impartiality of the jury. Id. at 600-01. The court thus concluded that the trial court's jury panel selection process was not in substantial

⁶ State v. Tingdale, 117 Wn.2d 595, 817 P.2d 850 (1991).

compliance with the jury panel selection statute, and was therefore an abuse of discretion. Id. at 600.

Tingdale is inapplicable here because it did not involve a motion for new trial and this case does not involve the selection of jury panels.⁷ Id. at 599-603. Furthermore, Tingdale's statement that prejudice will be presumed when there is a "material departure" from the jury panel statute was drawn from Roche Fruit Co. v. Northern Pacific Railroad Co., 18 Wn.2d 484, 139 P.2d 714 (1943). Tingdale, 117 Wn.2d at 600. Roche established that a departure from the methods set out in the jury panel statute was not a "material departure" if it was only "some slight irregularity [sic] that has had no effect upon the purpose" of providing a fair and impartial jury. 18 Wn.2d at 488. Because the inclusion of Juror Six had no effect upon the fairness or impartiality of his jury, Griener-Jacobsen has failed to establish that the error in his case was the kind of "material departure" justifying a presumption of prejudice even under Tingdale.

Because none of the bases enumerated in CrR 7.5 justified the granting of a new trial, and no other authority exists for such a

⁷ It is the composition of the jury list, and not of the jury itself, that is "considered basic to a fair and effective selection process." 13 Wash. Prac., Criminal Practice & Procedure § 4005 (3d ed.) (citing Fay v. New York, 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043 (1947)).

grant, the trial court properly exercised its discretion in denying Griener-Jacobsen's motion for new trial.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Griener-Jacobsen's conviction and the trial court's denial of his motion for a new trial.

DATED this 8th day of October, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
STEPHANIE FINN GUTHRIE, WSBA #43033
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Maureen Cyr, the attorney for the appellant, at Maureen@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in State v. Jesse Aaron Griener-Jacobsen, Cause No. 72840-7, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of October, 2015.

U Brame

Name:

Done in Seattle, Washington