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COURT OF APPEALS

06 MAR 14 PM 12:49

STATE OF WASHINGTON

No. 33833-5-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON


DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

Lloyd Higgins,

Appellant.

Lewis County Superior Court

Cause No. 05-1-0329-9

The Honorable Judge Nelson E. Hunt

Appellant's Opening Brief

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PM 3-13-06

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ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Higgins' motion to suppress.
2. The trial court erred by entering Conclusion of Law No. 2.5, which reads as follows:

“On the other hand, if the purpose of a search is to seize any property of a specified character, a particularized description is unnecessary and often impossible...(and) a general description as to character, place and circumstances is all that can be reasonably expected.” *State v. Withers*, 8 Wn.App. 123, 504P.2d 1151 (1972). This is such a case.

Supp. CP, Findings of Fact, Conclusion of Law, and Order.

3. The trial court erred by entering Conclusion of Law No. 2.6, which reads as follows:

The search warrant in this case sets forth the crime under investigation as “‘Assault 2nd DV’. RCW 9A.36.021.” As such, no specified subsection is required.

Supp. CP, Findings of Fact, Conclusion of Law, and Order.

4. The trial court erred by entering Conclusion of Law No. 2.8, which reads as follows:

The attached affidavit in support of search warrant refers to the underlying facts of the case, which account is based on Officer Gonzales' personal account, and lists items of evidence being sought as “a Glock pistol, unknown serial number or caliber; a spent casing, bullets, and an entry and possible exit point where the bullet struck.’

Supp. CP, Findings of Fact, Conclusion of Law, and Order.

5. The trial court erred by entering Conclusion of Law No. 2.9, which reads as follows:

Consequently, the search warrant in this case meets the particularity requirement as provided constitutionally and under court rule.

Supp. CP, Findings of Fact, Conclusion of Law, and Order.

6. The trial court erred by rejecting Mr. Higgins' proposed jury instruction on the inferior degree offense of Assault in the Fourth Degree.
7. The trial court erred by analyzing the propriety of an inferior degree jury instruction under the test for a lesser-included instruction.
8. The trial court erred by concluding that there was no basis in law for a lesser included instruction to the jury (when Mr. Higgins requested an inferior degree instruction.)
9. The trial court erred by concluding there was no evidence that Mr. Higgins committed only a simple assault.
10. The trial court erred by appointing standby counsel with a conflict of interest.
11. The trial court erred by failing to inquire into a conflict of interest between Mr. Higgins and standby counsel.
12. The trial court violated Mr. Higgins' constitutional right to counsel.
13. The trial court erred by accepting a waiver of counsel that was not voluntary.
14. Mr. Higgins was convicted under an unconstitutional statute.
15. Mr. Higgins was convicted of a crime defined by the judiciary in violation of the constitutional separation of powers.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Lloyd Higgins was charged with Assault in the Second Degree for allegedly shooting a handgun at his wife. Investigating officers sought a warrant to search his house for the gun and other evidence of the crime. In the affidavit in support of the warrant, the evidence was described as “a Glock pistol, unknown serial number or caliber; a spent casing, bullets, and an entry and possibly exit point where the bullet struck.” The affidavit was attached to the search warrant, but was not incorporated by any words of reference. The warrant made no mention of the items described in the affidavit, but instead permitted seizure of “evidence of a crime, to-wit: ‘Assault 2nd DV’ RCW 9A.36.021.”

1. Applying a *de novo* standard of review, did the search warrant violate the particularity requirement of the warrant clause? Assignments of Error Nos. 1, 2, 3, 4, and 5.

2. Applying a *de novo* standard of review, was the government able to describe the evidence sought with greater particularity than it did at the time the warrant was issued? Assignments of Error Nos. 1, 2, 3, 4, and 5.

3. Did the trial court err by concluding that the affidavit was incorporated into the search warrant when there was no language in the warrant referencing the affidavit? Assignments of Error Nos. 1, 4, and 5.

4. Did the trial court err by denying Mr. Higgins’ motion to suppress? Assignments of Error Nos. 1, 4, 5.

Although Ms. Higgins testified that Mr. Higgins fired the handgun, there was substantive evidence introduced that she had been the one to fire the gun. In addition, there was evidence that Mr. Higgins had pushed her against a wall. At trial, Mr. Higgins proposed an instruction on the inferior degree offense of Assault in the Fourth Degree. The trial court refused the instruction, and ruled that there was no basis in law or in fact for a lesser included instruction.

5. Taking the evidence in a light most favorable to Mr. Higgins, was there even the slightest evidence that the defendant may have committed only the lesser degree offense of Assault in the Fourth Degree? Assignments of Error Nos. 6, 7, 8, and 9.
6. Did the trial court violate Mr. Higgins' absolute and unqualified right to have the jury pass on the inferior degree offense of Assault in the Fourth Degree? Assignments of Error Nos. 6, 7, 8, and 9.
7. Did the trial court apply the wrong legal standard in analyzing the propriety of Mr. Higgins' proposed instruction on the inferior degree offense of Assault in the Fourth Degree? Assignments of Error Nos. 6, 7, 8, and 9.

At his initial appearance, Mr. Higgins requested the appointment of counsel and told the court that he did not wish to have Mr. Underwood appointed. At a later court appearance, his attorney (Mr. Meyer) withdrew after a complete breakdown in communication, which included accusations that Mr. Meyer had lied and had leaked confidential information to the victim, as well as incidents where Mr. Higgins hung up on Mr. Meyer or walked out of meetings in the jail. Mr. Higgins reiterated that he did not want Mr. Underwood appointed due to a conflict, and explained that Underwood "didn't do nothing" on a previous case. The court did not inquire further, but gave Mr. Higgins the choice of proceeding with Mr. Meyer or Mr. Underwood. Mr. Higgins then asked and was granted permission to represent himself. Subsequently, Mr. Underwood was appointed as standby counsel.

8. Did the trial court's failure to inquire into a conflict of interest between Mr. Higgins and standby counsel violate Mr. Higgins' constitutional right to conflict-free standby counsel? Assignments of Error Nos. 10, 11, and 12.
9. Did the trial court violate Mr. Higgins' constitutional right to counsel by forcing him to choose between two attorneys with conflicts of interest? Assignments of Error Nos. 10, 11, and 12.

10. Did the trial court violate Mr. Higgins' constitutional right to counsel by forcing him to choose between representation by counsel with a conflict of interest and proceeding *pro se*? Assignments of Error Nos. 10, 11, 12, and 13.

11. Did the trial court violate Mr. Higgins' constitutional right to counsel by accepting a waiver of that right that was not voluntary? Assignments of Error Nos. 11, 12, and 13.

The Washington legislature has criminalized assault, but has not defined the elements of that crime. In the absence of a legislative definition, the judiciary has, over the course of more than a century, defined the elements of the crime, and has expanded and refined that definition without input from the legislature.

12. Does the absence of a legislative definition of the crime of assault violate the separation of powers doctrine? Assignments of Error Nos. 14 and 15.

13. Does the judicially created definition of the crime of assault violate the separation of powers doctrine? Assignments of Error Nos. 14 and 15.

14. Was Mr. Higgins convicted under an unconstitutional statute? Assignments of Error Nos. 14 and 15.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

A. Prior Proceedings

Lloyd Higgins was charged in Superior Court in Lewis County with Assault in the Second Degree (domestic violence) and Unlawful Possession of a Firearm in the First Degree. CP 14-16. After the UPF charge was dismissed, he was convicted by a jury of the assault charge (with a finding of domestic violence) and sentenced to seven months in the Lewis County Jail. CP 4-13. This timely appeal followed. CP 3.

B. Statement of Facts

On April 24, 2005, Lloyd and Patricia Higgins came home separately from a bar and argued with each other. RP (9-7-05) 8-10. Ms. Higgins was intoxicated. RP (9-7-05) 9, 37, 52, 132, 166, 171. Ms. Higgins opened the door to confront Mr. Higgins, who was sitting on the front porch; he went inside and locked her outside. RP (9-7-05) 10.

Ms. Higgins went to the landlady's home (the other unit in the duplex) to see if she had a spare key. The landlady told her that she did not. RP (9-7-05) 11-12, RP (9-8-05) 196,199. The police were called, and an officer came to the house. RP (9-7-05) 36. He knocked on the front and back doors, and on a window through which he could see Mr. Higgins

reclining on the bed and watching television. Mr. Higgins did not respond. RP (9-7-05) 38.

The officer obtained a key from the landlady (who remained inside her unit), unlocked the back door of the Higgins home, and let Ms. Higgins back inside. She slammed the door behind her after telling the officer he might need to come back again that same night. RP (9-7-05) 39; (9-8-05) 200. While the officer was still in the back yard (explaining the situation to another officer who had come to the home), a shot was fired inside the home. RP (9-7-05) 40. Mr. Higgins was then observed through the window putting his pants on and walking out of the bedroom. RP (9-7-05) 41. Both officers went to the front door and ordered the occupants outside. Mr. Higgins came out with a cigarette and lighter in his hand; Ms. Higgins later came out as well. RP (9-7-05) 41, 42, 69-71.

After securing the residence, officers sought and obtained a warrant to search the home. The affidavit in support of the warrant request indicated that there had been an argument between Mr. and Mrs. Higgins, that Mr. Higgins had locked his wife out of the house, that officers standing outside the Higgins residence heard a gunshot, and Ms. Higgins told them that Mr. Higgins had "raised a Glock pistol and fired one shot..." Affidavit, p. 2; Supp. CP. It also indicated that Ms. Higgins later said that Mr. Higgins "had taken a Glock pistol off the nightstand and

shot it in her general direction...” Affidavit, p. 2; Supp. CP. The affiant sought permission to search the house for “evidence of the crime of Assault in the 2nd... [t]hat evidence being a Glock pistol, unknown serial number or caliber; a spent casing, bullets, and an entry and possibly exit point where the bullet struck.” Affidavit, p. 2, Supp. CP. The affidavit concluded with the following language: “...affiant believes that there is probable cause to believe that there is evidence of the crime of Assault Second Degree with a hand gun.” Affidavit, p. 3, Supp. CP.

The warrant authorized seizure of “certain evidence of a crime, to-wit: ‘Assault 2nd DV’ RCW 9A.36.021.” Search Warrant, Supp. CP.

Although the affidavit was apparently attached to the warrant, the warrant did not include any words of reference incorporating the affidavit. Search Warrant, Supp. CP.

Mr. Higgins was charged with Assault in the Second Degree, for allegedly assaulting Ms. Higgins with a deadly weapon. CP 14-16. An additional charge of Unlawful Possession of a Firearm in the First Degree was dismissed prior to the start of trial. RP (9-6-05) 21.

At his initial appearance, Mr. Higgins was found eligible for court-appointed counsel. He told the court at that time that “[Mr.] Underwood was my attorney, and I would not want him for my attorney again.” RP (4-25-05) 4. Mr. Meyer was appointed. RP (4-25-05) 5.

At a subsequent hearing, Mr. Meyer sought to withdraw, and told the court that there had been a “breakdown in communication,” which included accusations that Mr. Meyer had lied, had leaked information to the victim, (as well as “several different” unspecified other “things.”) RP (6-9-05) 13-14. Mr. Meyer also said that Mr. Higgins had ended every recent conversation by hanging up on Mr. Meyer or by walking out of the visiting booth in the jail. RP (6-9-05) 14.

After permitting Mr. Meyer to withdraw, the court sought to appoint Mr. Underwood. RP (6-9-05) 13-18. The following colloquy took place:

Mr. Higgins: I had him in Thurston County, and that’s a conflict of interest right there.

The Court: Why is it a conflict because he’s represented you before?

Mr. Higgins: Because he didn’t do nothing [sic] for me then.

The Court: Okay. So now you want to tell me who is going to represent you. It’s going to be Mr. Underwood or it’s going to be Mr. Meyer. Which is your choice?

Mr. Higgins: I’ll represent myself, sir.

RP (6-9-05) 16.

Mr. Higgins repeatedly stated that the only reason he felt he had to represent himself was because he was not willing to have Mr. Underwood represent him. RP (7-8-05) 7-8, 12, 18-19.

Prior to trial, Mr. Higgins moved to suppress evidence seized from his home, contending that the search warrant did not meet the particularity

requirement of the Fourth Amendment. Supp. CP. The court denied the motion, ruling that a specific description was not reasonable or required, and that the affidavit attached to the warrant provided sufficient detail. Findings of Fact and Conclusions of Law, page 2-3.

At trial, there was conflicting evidence as to who had fired the gun. When the police interviewed her, Ms. Higgins had initially claimed that Mr. Higgins had fired the gun, but then told the police that she had fired the gun. RP (9-7-05) 17. During trial she testified that Mr. Higgins had fired the gun, but admitted that she'd told the police that she had been the shooter. RP (9-7-05) 14, 17. This testimony (that Ms. Higgins told police that she'd fired the gun) was admitted without any objection or limitation. RP (9-7-05) 17.

When asked what happened after the gunshot, Ms. Higgins testified as follows:

I was grabbed from behind and actually pretty hard against the hallway wall. That's when my hip got shattered.
RP (9-7-05) 14.

Mr. Higgins proposed an instruction on the inferior degree offense of Assault in the Fourth Degree. The trial court rejected the proposed instruction, and the case was submitted to the jury without the inferior degree offense. RP (9-8-05) 254.

Mr. Higgins was convicted and sentenced, and he appealed. CP 3-13.

ARGUMENT

I. THE EVIDENCE SEIZED FROM MR. HIGGINS' RESIDENCE SHOULD HAVE BEEN SUPPRESSED BECAUSE THE SEARCH WARRANT VIOLATED THE PARTICULARITY REQUIREMENT OF THE WARRANT CLAUSE.

Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7.

The Fourth Amendment to the Federal Constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The Fourth Amendment requires that a warrant particularly describe both the place to be searched *and* the things to be seized. *U.S. v. Mann*, 389 F.3d 869 at 877 (9th Cir., 2004). The amendment's requirements of probable cause and particularity in describing places to be searched and things to be seized are inextricably interwoven. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992).

Compliance with the particularity requirement is reviewed *de novo*. *Perrone* at 549; *State v. Nordlund*, 113 Wn.App. 171 at 180, 53 P.3d 520 (2002). One aim of the particularity requirement is to prevent the issuance of warrants based on loose, vague or doubtful bases of fact. *Perrone*, at 545, 834 P.2d 611. The search warrant particularity requirement also serves to prevent general searches, in which law enforcement officials engage in a “general, exploratory rummaging in a person’s belongings...” *Perrone* at 545, *citations omitted*. Conformance with the rule “eliminates the danger of unlimited discretion in the executing officer’s determination of what to seize.” *Perrone*, at 546. The particularity requirement “makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.” *Stanford v. State of Tex.*, 379 U.S. 476 at 485-486, 85 S.Ct. 506 (1965), *quoting Marron v. United States*, 275 U.S. 192, at 196, 48 S.Ct. 74 (1927).

The description of the items to be seized must be specific enough to enable the person conducting the search to identify the objects sought with reasonable certainty. *U.S. v. Mann*, at 877; *Nordlund*, at 180. The degree of required specificity turns on the circumstances and the type of items involved. *Nordlund*, at 180. A description is valid if it is as specific

as the circumstances and the nature of the crime permits. *Nordlund*, at 180.

In determining whether a description is sufficiently precise, courts examine (1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued. *U.S. v. Mann*, at 878; *U.S. v. Wong*, 334 F.3d 831 at 836-837 (9th Cir., 2003); *U.S. v. Spilotro*, 800 F.2d 959 at 963-964 (9th Cir., 1986). “One of the crucial factors to be considered is the information available to the government. ‘(G)eneric classifications in a warrant are acceptable only when a more precise description is not possible.’” *U.S. v. Cardwell*, 680 F.2d 75 at 77 (9th Cir., 1982), quoting *United States v. Bright*, 630 F.2d 804 at 812 (5th Cir., 1980). The results of an officer’s investigation should be used to refine the scope of the warrant. *Cardwell*, at 77.

A warrant may be limited by referring to the crime under investigation *and* a generic classification of the evidence sought, but only if the nature of the underlying offense precludes a descriptive itemization. *State v. Riley*, 121 Wn.2d 22 at 28, 846 P.2d 1365 (1993). A warrant is

invalid of it could have described in greater detail “the criminal activities themselves rather than simply referring to the statute believed to have been violated.” *Spilotro*, at 963-964; *see also Cardwell* at 77 (a warrant authorizing seizure of evidence of a violation of 26 U.S.C. s. 7201 is not sufficiently specific; it is “not enough” to limit the search to “evidence of the violation of a certain statute”).

A defective warrant is not cured by the personal knowledge of the officer executing the warrant, or by remaining within constitutional limits when executing the warrant. *Riley*, at 28, 29; *U.S. v. McGrew*, 122 F.3d 847 at 849 (9th Cir., 1997). A defective warrant is not cured by an attached affidavit unless the warrant includes language specifically incorporating the terms of the affidavit by reference. *Riley*, at 29.

In this case, the warrant authorized seizure of “certain evidence of a crime, to-wit: ‘Assault 2nd DV’ RCW 9A.36.021.” Search Warrant, Supp. CP. The warrant did not limit the scope of the search, or specify with any greater particularity the evidence to be seized. However, as the warrant affidavit reveals, the officers knew a great deal more about the crime under investigation, including specific descriptions of the items to be seized. The search warrant language could have been much more explicit, and could have significantly limited the search, in order to comply with the Fourth Amendment particularity requirement.

Specifically, the affidavit indicates that there had been an argument between Mr. and Mrs. Higgins, and that Mr. Higgins had locked his wife out of the house. Officers standing outside the Higgins residence heard a gunshot, and Ms. Higgins told them that Mr. Higgins had “raised a Glock pistol and fired one shot...” Affidavit, p. 2; Supp. CP. She later said that Mr. Higgins “had taken a Glock pistol off the nightstand and shot it in her general direction...” Affidavit, p. 2; Supp. CP.

The affiant sought permission to search the house for “evidence of the crime of Assault in the 2nd ... [t]hat evidence being a Glock pistol, unknown serial number or caliber; a spent casing, bullets, and an entry and possibly exit point where the bullet struck.” Affidavit, p. 2, Supp. CP. The affidavit concluded with the following language: “...affiant believes that there is probable cause to believe that there is evidence of the crime of Assault Second Degree with a hand gun.” Affidavit, p. 3, Supp. CP.

Despite this, the warrant only uses the words “evidence of a crime, to-wit: ‘Assault 2nd DV’ RCW 9A.36.021.” It does not mention a shooting, a hand gun, a Glock, a casing, a bullet, or entry and exit points. The warrant suffers from the kind of problems described in *U.S. v. Mann*, *U.S. v. Wong*, *U.S. v. Spilotro*, and *U.S. v. Cardwell*, *supra*. The search was conducted in violation of the Fourth Amendment and Wash. Const.

Article I, Section 7, and the items seized from the residence should have been suppressed.

As noted above, the officers' knowledge of the underlying events and the specific evidence sought cannot cure defects in the warrant; nor can the fact that the officers (apparently) remained within constitutional bounds when executing the warrant. *Riley*, at 28, 29; *U.S. v. McGrew*, *supra*, at 849. Furthermore, although the affidavit was attached to the warrant, it was not incorporated by any words of reference, and thus cannot be examined to supply the missing information. *Riley*, at 29.

For these reasons, the items seized from Mr. Higgins' residence must be suppressed; the conviction must be reversed and the case remanded to the trial court:

II. THE TRIAL COURT VIOLATED MR. HIGGINS' UNQUALIFIED RIGHT TO HAVE THE JURY PASS ON THE INFERIOR DEGREE OFFENSE OF ASSAULT IN THE FOURTH DEGREE.

Under RCW 10.61.003 and 10.61.010, a criminal defendant may be found not guilty of a charged offense and convicted of a lesser degree offense. The statutes give the defendant the "unqualified right" to have the inferior degree passed upon by the jury if there is "even the slightest evidence" that the defendant may have committed only the lesser degree offense. *State v. Parker*, 102 Wn.2d 161 at 163-164, 683 P.2d 189 (1984), quoting *State v. Young*, 22 Wash. 273 at 276-277, 60 P. 650 (1900). The

appellate court views the supporting evidence in a light most favorable to the defendant. *State v. Fernandez-Medina*, 141 Wn.2d 448, at 456, 6 P.3d 1150 (2000) . The instruction should be given even if there is contradictory evidence, or if the defendant presents other defenses. *State v. Fernandez-Medina, supra*. The right to an appropriate lesser degree offense instruction is “absolute,” and failure to give such an instruction requires reversal. *Parker* at 164.

Mr. Higgins was charged with assault in the second degree under RCW 9A.36.021. The Information alleged that he assaulted Ms. Higgins with a deadly weapon, and the prosecution sought to prove at trial that he fired a handgun at Ms. Higgins.

There was some evidence that Ms. Higgins fired the handgun. Specifically, Ms. Higgins admitted that she’d told the police that she’d fired the gun. This evidence was admitted without objection and without limitation, and thus was available for the jury to consider as substantive evidence. RP (9-7-05) 17. Furthermore, Ms. Higgins testified that after the shot was fired, she “was grabbed from behind and actually pretty hard [sic] against the hallway wall. That’s when my hip got shattered.” RP (9-7-05) 14.

Taking this evidence in a light most favorable to Mr. Higgins, the jury could have concluded that Ms. Higgins fired the gun and that Mr.

Higgins grabbed her from behind and slammed her against the wall, committing only an Assault in the Fourth Degree.

Because of this the trial court should have submitted the instructions on Assault in the Fourth Degree to the jury. The failure to do so requires reversal. *Parker* at 164

III. THE CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INQUIRE INTO A CONFLICT OF INTEREST BETWEEN MR. HIGGINS AND STANDBY COUNSEL.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214 at 221-222 (3rd Cir., 1995).

A criminal defendant has a Sixth Amendment right to conflict-free standby counsel. *State v. McDonald*, 143 Wn.2d 506, 22 P.3d 791 (2001). When a trial court knows or should know of a conflict of interest between

the defendant and standby counsel, it must conduct an inquiry into the nature and extent of the conflict. *McDonald*, at 513. Failure to make an inquiry and take appropriate action constitutes reversible error and prejudice is presumed. *McDonald*, at 513.

In this case, the trial court should have been aware of the conflict between Mr. Higgins and Mr. Underwood. At his first appearance, after the court found him qualified for court-appointed counsel, Mr. Higgins told the judge “[Mr.] Underwood was my attorney, and I would not want him for my attorney again.” RP (4-25-05) 4. The court appointed another attorney, Mr. Meyer.¹ After Mr. Meyer was permitted to withdraw due to a conflict, the court attempted to appoint Mr. Underwood. Mr. Higgins then addressed the court (with permission) as follows:

Mr. Higgins: I had him in Thurston County, and that’s a conflict of interest right there.

The Court: Why is it a conflict because he’s represented you before?

Mr. Higgins: Because he didn’t do nothing [sic] for me then.

The Court: Okay. So now you want to tell me who is going to represent you. It’s going to be Mr. Underwood or it’s going to be Mr. Meyer. Which is your choice?

Mr. Higgins: I’ll represent myself, sir.

RP (6-9-05) 16.

¹ The court actually appointed another attorney in Mr. Meyer’s firm, but due to scheduling problems, Mr. Meyer handled the case with the court’s permission. RP (4-28-05) 7-10.

Later, after the court had appointed Mr. Underwood as standby counsel, Mr. Higgins raised problems with Mr. Underwood's performance, reaffirmed his lack of trust toward Mr. Underwood, and reiterated that the only reason he was representing himself was because he was not willing to have Mr. Underwood represent him. RP (7-8-05) 7-8, 12, 18-19. Despite the information provided by Mr. Higgins, the trial court failed to inquire into or make any findings regarding the potential conflict. With Mr. Higgins' unrebutted allegation that Mr. Underwood "didn't do nothing" for him in his last case, the court's failure to inquire gives rise to a presumption of prejudice under *McDonald*. The conviction must be reversed and the case remanded for a new trial. *McDonald, supra*.

IV. THE TRIAL COURT VIOLATED MR. HIGGINS' CONSTITUTIONAL RIGHT TO COUNSEL BY FORCING HIM TO CHOOSE BETWEEN REPRESENTATION BY AN ATTORNEY WITH A CONFLICT OF INTEREST OR PROCEEDING *PRO SE*.

The right to counsel guaranteed by the Sixth Amendment is fundamental and essential to a fair trial. *Gideon v. Wainwright*, at 342. Indeed, "the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Holloway v. Arkansas*, 435 U.S. 475 at 489, 98 S.Ct. 1173 (1978),

quoting Chapman v. California, 386 U.S. 18 at 23 n. 8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

A criminal defendant may waive his Sixth Amendment right to counsel, but only if the waiver is made knowingly, intelligently, and voluntarily. *State v. Nordstrom*, 89 Wn.App. 737 at 740, 950 P.2d 946 (1997); *City of Tacoma v. Bishop*, 82 Wn.App. 850 at 855, 920 P.2d 214 (1996). A reviewing court must indulge every reasonable presumption against waiver. *U.S. v. Taylor*, 113 F.3d 1136 at 1140 (10th Cir., 1997); *Johnson v. Zerbst*, 304 U.S. 458 at 464, 58 S.Ct. 1019 (1938).

A clear choice between alternatives does not always permit a voluntary decision; if the choice presented is constitutionally offensive, the choice cannot be voluntary. *Pazden v. Maurer*, 424 F.3d 303 at 313 (3rd Cir., 2005), *quoting from Wilks v. Israel*, 627 F.2d 32 at 35 (7th Cir., 1980). A waiver of the right to counsel will not be found where the defendant reluctantly agreed to proceed *pro se* under circumstances where it may have appeared that there was no choice. *Salemo* at 221. For example, a criminal defendant ““may not be forced to proceed with incompetent counsel; a choice between proceeding with incompetent counsel or no counsel is in essence no choice at all.”” *Pazden v. Maurer*, *supra*, at 313, *quoting Wilks v. Israel* at 35. For this reason, a reviewing court must be confident that the defendant was not forced to make a

choice between incompetent counsel and appearing *pro se*. *Taylor, supra*, at 1140. The court must decide whether the defendant waived the right to counsel voluntarily and affirmatively, or simply bowed to the inevitable. *Salemo, supra*, at 221-222.

The trial court bears the “weighty responsibility of conducting a sufficiently penetrating inquiry to satisfy itself that the defendant's waiver of counsel is knowing and understanding as well as voluntary. A judge can make certain that an accused’s professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which [the waiver is made].” *Pazden v. Maurer*, at 314, *quotation marks and citations omitted*.

The voluntariness of a defendant’s waiver of counsel turns on whether the defendant’s objections to his attorney are such that he has a right to new counsel. *Taylor*, at 1140. Good cause exists where there is “a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict with the attorney.” *U.S. v. Goldberg*, 67 F.3d 1092 at 1098 (3rd Cir.,1995). Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel. *Daniels v. Woodford*, 428 F.3d 1181 at 1198 (9th Cir., 2005). A trial court

must inquire if it knows or reasonably should know that a particular conflict exists. *State v. Jensen*, 125 Wn.App. 319 at 330, 104 P.3d 717 (2005).

In this case (as noted above), Mr. Higgins apprised the trial court of a potential problem with the appointment of Mr. Underwood at his very first hearing. RP (4-25-05) 4. He raised the issue again when the trial court sought to appoint Mr. Underwood as substitute counsel (after Mr. Meyer had been granted permission to withdraw). RP (6-9-05) 16. Despite this, the trial court did not inquire into the potential conflict, and instead forced Mr. Higgins to make the kind of constitutionally offensive decision described in *Pazden v. Maurer*, *supra*: “It’s going to be Mr. Underwood or it’s going to be Mr. Meyer. Which is your choice?” RP (6-9-05) 16.

This violated Mr. Higgins’ constitutional right to counsel.

First, Mr. Higgins’ complete lack of trust in Mr. Underwood was (apparently) justified by the fact that Mr. Underwood “didn’t do nothing” when he represented Mr. Higgins on his last case. RP (6-9-05) 16. Since the court failed to inquire further, this allegation is uncontradicted, and provides the “legitimate reason” for a loss of trust, precluding appointment of Mr. Underwood. *Daniels v. Woodford*, *supra*.

Second, Mr. Meyer himself told the court that there had been a “breakdown in communication,” which included accusations that Mr. Meyer had lied, had leaked information to the victim, (as well as “several different” unspecified other “things.”) RP (6-9-05) 13-14. Mr. Meyer also relayed that Mr. Higgins had ended every recent conversation by hanging up on Mr. Meyer or by walking out of the visiting booth in the jail. RP (6-9-05) 14. Such a breakdown in communication justifies appointing substitute counsel. *Goldberg, supra*, at 1098.

Because Mr. Higgins was faced with two unacceptable alternatives, his waiver of counsel was not voluntary. The conviction must be reversed and the case remanded to the trial court for the appointment of new counsel. *Holloway v. Arkansas, supra*.

V. THE CONVICTION MUST BE REVERSED AND THE CASE DISMISSED BECAUSE RCW 9A.36.021 VIOLATES THE SEPARATION OF POWERS AND IS UNCONSTITUTIONAL.

The State Constitution divides political power into legislative authority (Article II, Section 1), executive power (Article III, Section 2), and judicial power (Article IV, Section 1). *State v. Moreno*, 147 Wn.2d 500 at 505, 58 P.3d 265 (2002) . Each branch of government wields only the power it is given. *Moreno*, at 505; *State v. DiLuzio*, 121 Wn.App. 822 at 825, 90 P.3d 1141 (2004). The doctrine of separation of powers is

derived from this constitutional distribution of the government's authority. *Moreno*, at 505.

The purpose of the doctrine of separation of powers is to prevent one branch of government from aggrandizing itself or encroaching upon the “fundamental functions” of another. *Moreno*, at 505. A violation of separation of powers occurs whenever “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Moreno*, at 506, *citations omitted*. Judicial independence is threatened whenever the judicial branch is assigned or allowed tasks that are more properly accomplished by other branches. *Moreno* at 506, *citing Morrison v. Olson*, 487 U.S. 654 at 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

It is the function of the Legislature to define the elements of a crime. *State v. Wadsworth*, 139 Wash.2d 724 at 734, 991 P.2d 80 (2000). This is so “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community... This policy embodies ‘the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.’” *U.S. v. Bass*, 404 U.S. 336 at 348, 92 S.Ct. 515 (1971), *citations omitted*.

The legislature has criminalized assault. *See, generally*, RCW 9A.36. Instead of properly fulfilling its function and defining the crime,

however, the legislature has abdicated its responsibility and left the definition to the judiciary under RCW 9A.04.060.² The lack of a legislative definition has forced the judiciary to define the core meaning of the crime of assault, except in very limited circumstances not applicable here.³ This violates the separation of powers. *Moreno, supra*.

Through the actions of the judiciary, the definition of assault has expanded over a period of many years. At the turn of the last century, Washington's criminal code included a definition of assault. In 1906 the Supreme Court noted that "An assault is defined by the Code to be an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution." *State v. McFadden*, 42 Wash. 1 at 3, 84 P. 401 (1906). In 1909, the legislature adopted a new criminal code. The Supreme Court noted that the section defining assault (Rem. & Bal. Code SS 2746) "was repealed by the new criminal code, and so far as we are

² RCW 9A.04.060 fills legislative gaps in the criminal code with reference to the common law.

³ There are some sections of the statute in which the legislature *has* specifically defined the elements of specific kinds of assault. For example, *see*, RCW 9A.36.011(1)(b): "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: ...Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance."

able to discover, the term assault is not defined in the latter act.” *Howell v. Winters*, 58 Wash. 436 at 438, 108 Pac. 1077 (1910). In the absence of a statutory definition, the Supreme Court imported a definition from the common law, quoting from a treatise on torts:

“An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is within its range; the pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man's face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person; ‘A right to live in society without being put in fear of personal harm.’” Cooley, *Torts* (3d ed.), p. 278
Howell v. Winters, at 438.

This common law definition was broader in scope than the pre-1909 code section, because it required only an apparent (as opposed to an actual) ability to inflict bodily injury.

Howell v. Winters was a civil case. It was not until 1922 that the common law definition adopted by *Howell v. Winters* was approved by the Supreme Court for use in a criminal case. In *State v. Shaffer*, 120 Wash. 345 at 348-350, 207 P. 229 (1922), the Supreme Court, consistent with its holding in *Howell v. Winters*, expanded the criminal definition of assault

to cover situations where the defendant lacked the actual ability to inflict bodily injury. The same definition was endorsed again in two cases from 1942. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wash.2d 485, 125 P.2d 681 (1942) was a civil action for malicious prosecution which turned in part on the criminal law's definition of assault; *State v. Rush*, 14 Wn.2d 138, 127 P.2d 411 (1942) was a criminal case described by the court as being "indistinguishable" from *Shaffer, supra*. *State v. Rush*, at 140.

Thirty years later, the core definition of "assault" expanded further, again without any input from the legislature. This expansion appeared in *dicta* in the Supreme Court's opinion in *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073 (1972). In that case, the Court (in *dicta*) quoted from a federal case on assault:

There can in actuality be two concepts in criminal law of assault as noted in *United States v. Rizzo*, 409 F.2d 400, 403 (7th Cir. 1969), *cert. denied*, 396 U.S. 911, 90 S.Ct. 226, 24 L.Ed.2d 187 (1969).

One concept is that an assault is an attempt to commit a battery. There may be an attempt to commit a battery, and hence an assault, under circumstances where the intended victim is unaware of danger. Apprehension on the part of the victim is not an essential element of that type of assault. . . .

The second concept is that an assault is 'committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.' The concept is thought to have been assimilated into the criminal law from the law of torts. It is usually required that the apprehension of harm be a reasonable one.

State v. Frazier, at 630-631.

Following *Frazier*, Washington's judicially-created definition of assault was enlarged to include (1) actual battery (consisting of an unlawful touching with criminal intent, not necessarily injurious), (2) an attempt to commit a battery (whether or not injury was intended), and (3) placing another in apprehension of harm (whether or not injury was intended). See, e.g., *State v. Garcia*, 20 Wn.App. 401 at 403, 579 P.2d 1034 (1978); *State v. Strand*, 20 Wn.App. 768 at 780, 582 P.2d 874 (1978). These three definitions make up the core definition of the crime of assault today. See WPIC 35.50; see also *State v. Nicholson*, 119 Wn.App. 855 at 860, 84 P.3d 877 (2003).

Since the legislature removed the statutory definition of assault from the criminal code in 1909, the judiciary has stepped in to fill the vacuum and has undertaken to define the crime; the judicial definition has evolved and expanded over the last century. The lack of a legislative definition and the judicial creation of a definition violates the separation of powers doctrine. By not defining the crime, the legislature has abdicated its responsibility and invited the judiciary to encroach on a core legislative function. *Moreno, supra*; *Wadsworth, supra*.

The statutory and judicial scheme under which Mr. Higgins was convicted violates the separation of powers doctrine and is therefore unconstitutional. Because of this, his conviction must be reversed and the case dismissed with prejudice.

CONCLUSION

The search warrant in this case violated the particularity clause of the warrant requirement. The conviction must be reversed, the evidence that was seized from Mr. Higgins' house must be suppressed, and the case must be remanded to the trial court.

Furthermore, Mr. Higgins' had an absolute and unqualified right to have the jury pass on the inferior degree offense of Assault in the Fourth Degree. The trial court's refusal to instruct the jury on the inferior degree offense requires reversal of the conviction and remand for a new trial.

In addition, Mr. Higgins' constitutional right to counsel was violated when the court failed to inquire into a conflict of interest, forced Mr. Higgins to proceed *pro se* without a voluntary waiver of his right to counsel, and appointed as standby counsel an attorney with a conflict of interest. The conviction must be reversed and the case remanded to the trial court for the appointment of counsel and a new trial.

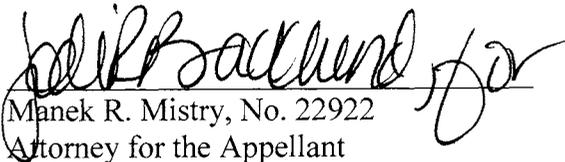
Finally, Mr. Higgins was convicted under an unconstitutional statute. The conviction for assault must be reversed and the case dismissed because the absence of a legislative definition of the crime of assault violates the separation of powers doctrine.

Respectfully submitted on March 13, 2006.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Lloyd Higgins
PO Box 1511
Centralia, WA 98531

And to the office of the Lewis County Prosecutor,

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 13, 2006.

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 March 13, 2006.



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