

Original

APPELLATE DIVISION
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
respondent

V

NO. 35628-7-II

DAVID LEE ERICKSON
Appellant

SUPPLEMENTAL ADDITIONAL GROUNDS STATEMENT
OF THE APPELLANT

From the Superior Court in the State of Washington
in Pierce County, the honorable Judge Thomas J. Felnagle

David L. Erickson 898481
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191 Constantine Way
Aberdeen, WA 89520

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ASSIGNMENT OF ERROR

- I. THE TRIAL COURT DID VIOLATE THE DEFENDANTS RIGHT TO A FAIR TRIAL, BY NOT PROPERLY VERIFYING THE CONTENTS OF A TRANSCRIPT USED AS A LISTENING AID.

- II. THE TRIAL COURT DID VIOLATE THE DEFENDANTS RIGHT TO DUE PROCESS BY ALLOWING UNVERIFIABLE NON-VERBAL RESPONSES TO BE PRESENTED TO THE JURY DURING TRIAL.

SUPPLEMENTAL ADDITIONAL GROUNDS

ARGUMENT

In my trial ther was a transcript used as a listening aid and my trial attorney did object to this. RP 108. The attorney mainly objected to the transcript because of the non-verbal responses that the transcript contained and the fact that there was no way to verify the accuracy of these entries because the interviewer had destroyed her notes.

The defense attorney did try to explain to the court that this was not proper when he stated " normally, when you have a tape and transcript, the jury is allowed to read the transcript while listening to the tape, with the theory that the transcript and the tape are verbatim. In other words, everything that is said on the tape is what's transcribed on the transcript. Ther aren't--I've never seen a police transcript on a tape that says, for example, although it can't be heard, ' individual nodded yes ' I mean thats just not done...a transcript is supposed to be a verbatim, word for word transcription of what is said on the tape. That is obviously not what this statement is. RP 109-110.

The defense counsel further argues that the non-verbal responses can not be verified due to the notes being destroyed " creates a due process discovery violation." RP 110. The court states that ER 403 covers the issue. PR 110. The court further states that " the 403 concern might be a problem if we were infront of the jury."

Later in the trial the defense renews his objection to the use of the transcript because there is no way to corroborete the non-verbal responses because the interviewer destroyed her notes. RP 745. The State quotes State v. Clapp, 67 Wn.App. 263 headnote 6, stating that a typewritten transcript may be used to illustrate the evidence contained on a tape so long as the party offering the transcript makes a foundation showing its accuracy. RP 748. However, the State fails to recognise that in Clapp the transcript is verified by several individuals and is not considered to be ' unduly prejudicial '. And also equally as important if not more so, it makes no mention of non-verbal responses that are unverifiable insertions on the transcript.

I would ask this court to review this issue under both State and Federal standards. " In People v. Caldwell, 39 Ill.2d 346, 236 N.E.2d 706, 37 A.L.R. 3d 226 (1968), the Illinois court noted that written confessions were very different from matters such as depositions or dying declarations when admitted as exhibits. Whereas the latter two types of evidence were said to be too susceptible of undue emphasis beyond the scope of ordinary testimony." Washington v. Frazier, 99 Wash.2d 180, 661 P.2d 126 (Wa.1983).

" We agree with the Court of Appeals that the trial court erred by failing to properly assure the accuracy of the transcripts." State v. Cunningham, 93 Wn.2d 823, 835, 613 P.2d 1139(1980). " Audio tapes. like other relevant evidence, are admissible at the discretion of the court, but should be excluded if they are unduly prejudicial." Washington v. Clapp, 67 Wash.App. 263, 834 P.2d 1101 (Wa.App. 1992).

" the transcripts may be used if the judge takes certain steps, such as reviewing the transcripts for accuracy and issuing a limiting instruction." United States v. Trenhaile, 38 F.3d 1219 (9th Cir. 1994), quoting United States v. Booker, 952 F.2d 247, 249 (9th Cir. 1991). And United States v. Turner, 528 F.2d 143 (9th Cir. 1975), " In the presence of defense counsel, methodically reviewed many of the tapes and corresponding transcripts to ensure their conformity. In doing so the court made appropriate corrections in the transcripts, including changes requested by defense counsel."

I also ask the court to consider strongly the non-verbal responses. I have been unable to locate any case law, neither State or Federal that addresses this issue. I believe the fact that it is difficult or may be impossible to locate this type of case gives great weight to the defenses statement at trial " that's just not done ". I hope the court will also assess the highly prejudicial nature of the transcript.

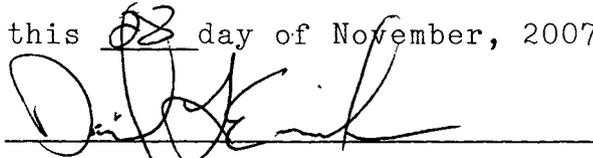
CONCLUSION

In this case not only should the court have confirmed the accuracy of the transcript by reviewing the tape and transcript, but also should have had the State redact the non-verbal responses on the transcript before allowing the jury to use it as a listening aid. There is also a strong chance that the audio tape should not have been allowed at all.

After the trial the trial lawyer told me that he had interviewed members of the jury and was told by an overwhelming percentage of them that the main piece of evidence considered for conviction was the audio taped interview, which I already stated in my original SAG, that I believe violated my Sixth Amendment right to confrontation. Because the court did not order that the non-verbal responses be removed I believe that my Constitutional right to a fair trial has been violated.

Due to this and other reasons previously stated I respectfully request that the court reverse the convictions.

Respectfully submitted this 08 day of November, 2007.



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

I, DAVID LEE ERICKSON, declare that, on the 28 day of November, 2007, I deposited the foregoing:

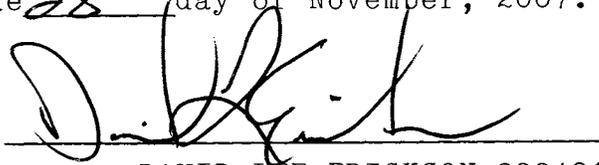
1. Motion for leave.
2. Supplemental additional grounds statement.
3. Notice of intent to file a personal restraint petition to be consolidated with the direct appeal.
4. letter to the Appeals Court.

or a copy thereof, in the internal legal mail system of Stafford Creek Correctional Center and made arrangements for postage, addressed to:

1. WASHINGTON STATE COURT OF APPEALS, DIVISION II
950 Broadway, Suite 300, Tacoma, WA 98402-4454
2. PIERCE COUNTY PROSECUTING ATTY Ofc
930 Tacoma Ave S Rm 946, Tacoma, WA 98402-2171
3. ANDREW P. ZINNER, ATTORNEY AT LAW
1908 E Madison ST, Seattle, WA 98122

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

DATED at Stafford Creek Correction Center, Aberdeen, Washington 98520, on the 28 day of November, 2007.



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