

NO. 35976-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

ADAM J. HOCKADAY

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]* DEPUTY

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

The Honorable James E. Warne

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT VIOLATED HOCKADAY'S CONSTITUTIONAL RIGHT TO DEMAND THE NATURE AND CAUSE OF THE ACCUSATIONS AGAINST HIM BY ALLOWING THE STATE TO AMEND THE INFORMATION AFTER IT RESTED AND DEFENSE COUNSEL DID NOT INVITE THE ERROR.

The state concedes that the trial court erred by allowing the amended information after the state rested, but argues that Hockaday is prohibited from complaining on appeal because the error was invited. Brief of Respondent (BOR) at 4-7. The state's argument fails because it disregards the purpose of the invited error doctrine.

"The invited error doctrine was originally founded on the principle of estoppel, and was designed to prevent a party from inducing reliance by the court and his or her adversary on one theory at trial and raising a new theory on appeal." In re Personal Restraint of Griffith, 102 Wn.2d 100, 105, 683 P.2d 194 (1984)(Utter, J., dissenting)(citing Elliott & Elliott, Appellate Procedure, 550-52 (1892)). The invited error doctrine discourages defendants from intentionally misleading trial courts. State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

The doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds, 126 Wn.2d 315, 893 P.2d

629 (1995). In Pam, the state set up a test case by asking the trial court to sustain Pam's objections, despite a favorable ruling by the court, in order for a particular issue to be resolved by a higher court. Id. at 511. Our Supreme Court held that this was exactly the type of conduct the invited error doctrine was meant to address:

The adversary system cannot countenance such maneuvers. Effective appellate review can be achieved only if both the defendant and the State maintain their adversary positions and vigorously litigate their respective claims. When counsel attempts to circumvent this system, the issues are not adequately presented for review and the system falters.

Id.

The state mistakenly relies on State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006) and In re Dependency of K.R., 128 Wn.2d 129, 904 P.2d 1132 (1995). BOR at 5-6. In Korum, a co-defendant who testified for the state, pled guilty to his involvement and a letter detailing his plea agreement explained that he would take a polygraph to verify his truthfulness. At a pretrial hearing, the court initially ruled that evidence of the letter was inadmissible. Defense counsel moved for reconsideration, expounding that the state could argue from the letter, "any doggone thing they want to argue. I'm satisfied with that. Just from the face of the document itself." Id. at 649. The state and defense eventually agreed to stipulate to the admissibility of the letter. At trial, the state asked the co-

defendant whether there was a provision in his plea agreement letter regarding how the state might verify his truthfulness and defense counsel objected. The trial court overruled the objection, noting that the parties had stipulated to the admissibility of the letter. On appeal, this Court held, and our Supreme Court agreed, that the invited error doctrine precluded Korum from complaining that the trial court erred by admitting evidence of the letter because he had solicited the ruling that the evidence was admissible. Id.

In In re Dependency of K.R., defense counsel made a motion to allow the testimony of polygraph experts for both sides, which the court granted. Later, defense counsel made a motion in limine and objected to the testimony of the state's polygraph examiner for lack of a written stipulation. On appeal, our Supreme Court held that the invited error doctrine precluded appellant from arguing that the trial court erred in admitting the polygraph testimony because defense counsel moved for the admission of polygraph testimony for both sides. 128 Wn.2d at 146-47.

Unlike in Korum and K.R., here, defense counsel did not make a motion or solicit the erroneous ruling by the trial court. 2RP 92-93. This case is more like In re Call, 144 Wn.2d 315, 328-29, 28 P.3d 709 (2001), where our Supreme Court held that the invited error doctrine requires that the defendant take affirmative, knowing, and voluntary action to set up the

error. In Call, the parties and the trial court were mistaken about Call's offender score, the proper standard sentence range, and the actual low-end sentence applicable to the agreed sentence, which the court imposed. On appeal, the state argued that the invited error doctrine applies because Call promptly filed a personal restraint petition which implies a strategy to set up the error and that he was aware of the error all along. Id. at 327-29. The Court, however, determined that neither Call, the state, nor the court was aware of the error in calculating Call's offender score and standard range. Accordingly, the Court concluded that because there was no affirmative action by Call which contributed to the error, the error was not invited. Id. at 329.

As in Call, the record substantiates that the state, defense counsel, and the trial court were not aware that an information cannot be amended after the state has rested unless the amendment is to a lesser degree of the crime or a lesser included offense. The record reflects that they "discussed" the amendment before the state moved to orally amend the information. 2RP 92-93. Contrary to the state's argument, defense counsel's mere acknowledgment that the amendment would not be a problem does not constitute affirmative, knowing, and voluntary action to set up the error.

Furthermore, this Court held in State v. Phelps, 113 Wn. App. 347, 354, 57 P.3d 624 (2002), that to the extent that an appellant can show that the trial court exceeded its statutory authority, the invited error doctrine will not preclude appellate review. Similarly, here, the trial court exceeded its authority by allowing the amended information in violation of the “bright line” rule that an information may not be amended after the state rests unless the amendment is to a lesser degree of the same crime or a lesser included offense. State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995). Moreover, the court’s error was not harmless because as our Supreme Court held in State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992), that allowing the state to amend an information after it has rested necessarily prejudices a defendant’s constitutional right to demand the nature and cause of accusation against him. (Emphasis added by the Court.)

Reversal is required because the trial court erred in allowing the state to amend the information and defense counsel did not invite the error.

B. CONCLUSION

For the reasons stated here, and in the opening brief, this Court should reverse Mr. Hockaday's convictions.

DATED this 22nd day of January 2008.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

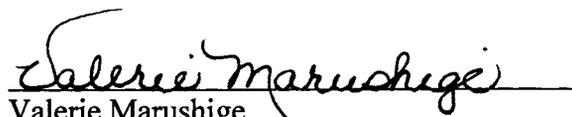
Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Jason Laurine, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626.

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

DATED this 22nd day of January, 2008 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

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