

COURT OF APPEALS, DIVISION II
IN AND FOR THE STATE OF WASHINGTON

TODD DWAYNE ROGERS

Appellant.

v.

STATE OF WASHINGTON

Respondent.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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JEREMY

On Appeal from the Pierce County Superior Court
The Honorable Frederick Fleming

SUPPLEMENTAL BRIEF TO THE STATEMENT OF ADDITIONAL GROUNDS

Todd Dwayne Rogers
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Washington State Penitentiary
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Walla Walla WA 99362-8817

A. IDENTITY

Now comes TODD DWAYNE ROGERS, Pro Se, before the Court of Appeals, and appealing tthe wrongful conviction before the Honorable Frederick W. Fleming, Superior Court of Pierce County, State of Washington. Appellant submits this SUPPLEMENTAL BRIEF to the STATEMENT OF ADDITIONAL GROUNDS according to the allowance permitted by this Court.

B. GROUND FOR RELIEF

Appellant should be given a new trial based on these facts:

- (1) Violations of the United States and Washington State Privacy Laws
- (2) Abuse of Authority
- (3) Police Misconduct
- (4) Prosecutorial Misconduct
- (5) Numerous violations satisfy the Cumulative Error Rule and void of the Harmless Error Doctrine
- (6) Insufficiency of the Evidence

C. ASSIGNMENT OF ERRORS

- (1) Were there wholesale violations of the Washington State statutes, RCW 9.73.030 and 9.73.050, and Federal Privacy Right Act, which resulted in gross prejudice to the Appellant's Due Process Rights under the United States and Washington State constitutions?
- (2) Did the Court abuse his discretion by allowing prior statements of Karisha Pierce be used for impeachment purposes, contravening Federal and State laws?
- (3) Did the detectives of the Lakewood Police Dept. commit Police Misconduct in the illegal acquisition of taped statements of Karisha Pierce?
- (4) Did the State knowingly present fabricated statements of Karisha Pierce?
- (5) Do thses gross erros fall within the Cumulative Error Rule, and were not subject to the Harmless Error Doctrine?

(6) Were there sufficient evidence to prove the crime charged?

D. ISSUES PERTAINING TO THE ERRORS

(1) Under current Federal and Washington State Laws, it is illegal to record private conversations and advertise its contents to the public in any manner.

RCW 9.73.030(3): Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication will be recorded.

RCW 9.73.050: Any information obtained in violation of RCW 9.73.030 or pursuant to any order under provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state.

Admission of prior statements by the State violated statutory law. The tape conversations of Karisha Pierce by Det. Brown on May 13, 2006, was used to impeach her testimony. (RP 5⁷⁹₇₉) The transcripts of the taped conversation is Exhibit 122 which was illegally obtained by the detectives, violating said RCW's and Federal Privacy laws.

State presented Exhibit 122 before Karisha Pierce and asked her if she recognized the document, her reply was "I don't know if it was recorded, but it seems like that's what I said, this is my first time ever seeing the document". (RP 5, 535) Defense asked Ms. Pierce if the detectives asked her permission to record her statements, she answered "no". (RP 5, 554)

Defense presented before the Court that the taped conversation was neither permissible nor authenticated for veracity. Defense enlightened the Court that Det. Brown never asked Ms. Pierce "Has what you told today the truth?" Also, it is noted that Det. Brown never once asked her "Do I have your permission to tape record this?" And lastly, Det. Brown never states on the tape "Is it okay to to turn off the recorder?" (RP 8, 1010, 1011) Judge Fleming responds: "It doesn't even say that they told

her they're taping her. It doesn't even say 'Is this true?' And she gives three statements tthat are all different, including this." (RP 8, 1021)

These statements of Ms. Pierce were obtained in violation of the Washington State and United States laws, and it's admissibility in trial proceedings is not only contrary to standing precedents, but a corruption of the very fabric of Due Process to a "fair trial".

Kardoranian by Peach v. Bellingham Police Dept., 119 Wn. 2d 178; 829 P.2d 1061 (1992): Remedy for unlawful electronic interception by police is generally suppression of evidence in criminal action.

State v. FaFord, 128 Wn.2d 476; 910 P.2d 447 (1996): Evidence obtained in violation of Privacy Act is inadmissible for any purpose including impeachment.

State v. Townsend, 105 Wn.App 622; 20 P.3d 1027; 144 Wn.2d 1016; 32 P.3d 283 (2001): Evidence in violation of the Washington Privacy Act, which bars the recordings of transmitted private communications without the consent of all participants, is inadmissible for any purpose.

State v. Porter, 98 Wn.App 631; 990 P.2d 460; 140 Wn.2d 1024; 10 P.3d 405 (1999): Defendant has automatic standing to object to evidence from intercepted conversations obtained in violation of the Privacy Act, including conversation between defendant's girlfriend and the informant, to which defendant was not a party.

Schonauer v. DCR Entertainment, Inc., 79 Wn.App 808; 905 P.2d 392; 129 Wn.2d 1014; 917 P.2d 575 (1995): When statute excluding illegally recorded evidence applies, it bars perceptions of those who made recording, as well as recording itself.

State v. Smith, 85 Wn.2d 840; 540 P.2d 424 (1975): A tape recording is authenticated for use as evidence upon a showing of how the tape was preserved, who the speakers are, that their statements were made freely and voluntarily, that the device used could take testimony, that the operator was competent, and that the recording is authentic, correct, and unchanged.

(2) The Court allowed the State to introduce Exhibits 122 and 192 for impeachment purposes, though knowing fully that it was the product

of Privacy Right infringements.

This was prejudicial to Appellant because it was the only means the State had to prove the "premeditation" purpose of the crime charged. Ms. Pierce testified that there was no communication between Appellant and Timothy Jackson before the gunshot. (RP 534) Again, the State was allowed to pursue this matter by trying to force Ms. Pierce to admit she made an earlier statement that the two men did engage in conversation. (RP 535-537) The State then attempts to admit Ms. Pierce statements to Det. Brown (Exhibit 192) as substantive evidence, but the court allowed it only for impeachment purposed after a lengthy argument. (RP 1003-1040)

Both Exhibits 122 and 192 were illegally obtained statements, and the Court abused its discretion by allowing such to be admitted into trial proceedings. This is not a harmless error, because it was the only means the State had to prove "premeditation". By trying to force previous fabricated statements made by Ms. Pierce as to the events of that night. The intent of the State was trying to paint the victim as an innocent bystander, a non-aggressor, that according to previous statements by Ms. Caulder the victim said "I have nothing to do with this" and "Why are you trippin?" before he was shot. The latter quote of Ms. Pierce.

Prior Washington law has allowed a party to impeach the party's own witness but only if the party was "taken by surprise by reason of affirmative testimony prejudicial to the interests of the party calling the witness". State v. Thomas, 1 Wn.2d 298, 303; 96 P.2d 1036 (1939). The two-part test required both the showing of surprise and testimony prejudicial to the party's interest. The requirement of prejudicial was not met when the witness merely failed to testify as favorably as expected. Cole v. McGhie, 59 Wn.2d 436; 361 P.2d 938; 361 P.2d 844 (1961). Cf. State v. Calhoun, 13 Wn.App 644; 536 P.2d 668 (1975).

Ms. Pierce testified to what she recollected actually happened that night, and the State knew of all her testimonies and previous statements, and there was thus no surprise for them since all her statements changed. And her trial testimony was not prejudicial she corroborated the shooting and the person who did the shooting. Her testimony didn't support the

"premeditation" part, and thus forced to a false testimony by impeaching her with an illegal transcript of an illegal taped statement. They were not "prejudiced" but only frustrated.

(3) All the officers and detectives involved in this case claim many years of experience as law enforcement personnels. Yet Det. Brown engaged in subterfuge to coerce Ms. Pierce into giving an unauthenticated statement that was illegally recorded. Det. Brown claimed the statement was given voluntarily (RP 958) and asserts Ms. Pierce was "lucid". (RP 959) In fact, there is not a single proof that the statements were recorded voluntarily and that she was coherent or lucid in the manner as proscribed by Det. Brown. Ms. Pierce herself claimed she was never asked or agreed to any tape recordings.

Ofc. Martin claims in his report "she was reluctant to provide information". (RP 1019) The police forced her to give three statements in a three-hour period. It is easy for anyone to discount it as "being nervous or afraid", but the other possibility is being coerced or scared into it. Looking at the conclusive records, Ms. Pierce readily denied agreeing to be tape recorded, and consistently disavowed those statements as true and accurate. (RP 1019-1020) Claims of voluntariness is a misconception of the actual events of that day, and their illegal taping justifies and substantiates "police misconduct".

(4) The State readily admits "And I agree, there's certainly issues regarding her credibility". (RP 1039) There were enough evidence presented by Defense that the testimonies of Ms. Pierce were one fabrication after another. The Court states "And she gives three statements that are all different". (RP 1021)

By allowing the admissibility of her prior statements, the State is trying to force Ms. Pierce to lie on the stand and claim what she said in previous statements were the truth, and not what she testified to "under oath", and remember, she never declared that those previous statements were truthfully told. Yet, all parties agreed that she is not

credible and a pathological liar. Her testimony should have been limited to what she recollects on the stand and introducing illegally obtained statements by the State to coerce her into producing more lies is a slap in the face of Due Process of a "fair trial", and is prosecutorial misconduct.

Mooney v. Holohan, 294 US 103 (1935): The Supreme Court has long disapproved of prosecution employing deceptive means to obtain convictions. By 1935, the Court recognized that a State's use of false evidence offended the due process clauses of the 5th and 14th Amendments. The Court held that the State's knowing use of false testimony was "inconsistent with the rudimentary demands of justice and hence unconstitutional". In Alcorta, (355 US 28, 32 -1957), the Supreme Court stated the Prosecutor has an independent duty to correct information they know to be false.

Three criteria's are set forth under Hayes, 399 F.3d 972, 989 (2005), are called the Hayes Standard of "materiality":

- (i) Nature of the false testimony.
- (ii) Importance of the witness to the prosecution's case.
- (iii) Whether evidence was cumulative.

The landmark case of Napue, 360 US 264, 270 (1959) and Brady, 373 US 83, 87 (1963), held that reversal required only if false testimony or non-disclosure of evidence affected the outcome of the trial.

Applying Hayes "material standard":

- (i) Karisha Pierce fabricated numerous statements making anything she says wholly unreliable.
- (ii) The statement was important in the State's cause to prove premeditation, and that the shooting victim's were just innocent bystanders. Where in-fact testimony by others describe the opposite of what Ms. Pierce claimed happened.
- (iii) There is no cumulative evidence supporting Appellant's guilt, except for the fabricated statement of Ms. Pierce, and her statement is not corroborated by other witnesses. Appellant acted in self-defense because two individuals attacked him first.

The State knowingly forced a witness to lie on the stand and present false testimony before the jury.

(5) All these errors combined under the Cumulative Error Rule justifies a new trial, and are not Harmless Errors. The Court's wrongful allowance of the submission of Ms. Pierce's illegally taped conversation, resulted in a miscarriage of justice. Without her statements, the State couldn't prove "intent" where there wasn't any, so they forced it. There is insufficient evidence to prove "premeditation", there is irrefutable evidence that Appellant was acting in self-defense by other witnesses, who did not lie or change their stories like Ms. Pierce.

The errors as noted in this brief individually affected Appellant's Constitutional Rights. Taken together, it was a manifest injustice, prejudicial to Appellant's ability to receive an honest and just trial in seeking the truth.

In re Pers. Restraint of Lord, 123 Wn. 2d 297; 868 P.2d 835; clarified in 123 Wn.2d 737; 870 P.2d 964, cert. denied 513 US 849 (1994): The defendant has the burden of proving an accumulation of error for sufficient magnitude that retrial is necessary.

(6) Sufficiency of the Evidence. Under the Green Standard, 94 Wn.2d 216, when challenging State's evidence, the evidence is weighted as more favorable to the State, to ensure it can be inferred to determine guilt "beyond a reasonable doubt".

In this case, it cannot meet the Green Standard. There is no evidence of premeditation or intent, only a statement of an unreliable and discreditable witness in Karisha Pierce.

E. NEWLY DISCOVERED EVIDENCE

I was able to receive a certified letter from LARRY BRUCE ROBINSON, the father of the children he shares with Karisha Pierce, that further supports the inference that Appellant was set-up and was first attacked by the victim's. I include as Exhibit A.

F. SUMMARY

Karisha Pierce had a motive to lie, to protect the friends of her boyfriend (Roger McCane). It was Mr. McCane that invited them to the party after knowing Ms. Pierce had already invited Appellant to the party days earlier.

Appellant was set-up and there were plans to rob and assault him for an earlier run-in at a barbecue. There were enormous and egregious abuses by the detectives, prosecution and the Court that prevented a fair trial. Appellant ask this court to grant this appeal, vacate the conviction and remand for a new trial, and whatever else the Court deems necessary.

Done this 5th day of August, 2008

Respectfully submitted,
TODD DWAYNE ROGERS

Todd Dwayne Rogers #820892

820892

Washington State Penitentiary

1313 N. 13th Ave.

Walla Walla WA 99362-8817

EXHIBIT A:
CERTIFIED STATEMENT OF LARRY BRUCE ROBINSON

This document was received but
SHOULD NOT be considered.

8/25/08 JW
Date Signature

AFFIDAVIT

STATE OF WASHINGTON)

) SS:

COUNTY OF WALLA WALLA

I, LARRY B. ROBINSON, declare under penalty of perjury that the following statements within this affidavit are true and correct to the best of my knowledge and has been executed on this 28 day of JULY, 2008, at WASHINGTON STATE PENITENTIARY 1313 NORTH 13th AVENUE

in the County of Walla Walla, Washington: ~~99302~~ **99362**: THAT,

(1). On or about May 16, 2006. I spoke to Ms. Karisha Pierce (who is the mother of affiant's children), after the shooting that took place in Ms. Pierce's apartment in Lakewood Washington.

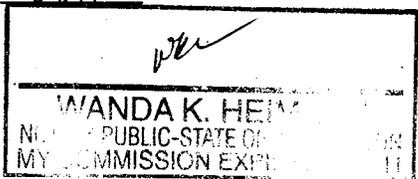
(2). Ms. Pierce, while crying hysterically, told me Roger McCane (a.k.a. "Dookey") talked her (Ms. Pierce) into setting up Mr. Rogers (a.k.a. Cuz-o) at her apartment and that two of Mr. McCane's friends got killed trying to "rob" Mr. Rogers.

(3). Ms. Pierce further told me Mr. McCane threatened to harm Ms. Pierce and our children if Ms. Pierce did not testify against Mr. Rogers.

(4). I then asked Ms. Pierce what else she witnessed, and Ms. Pierce stated she saw Mr. McCane take a gun from one of the dead guys pocket and hand it to another guy which Ms. Pierce had no idea if these men were going to hurt her or not. Then the men left. (continued on page 2)


(Affiant's Name) Larry Robinson
768049

Subscribed and Sworn to before me this 4th day of August, 2008.


WANDA K. HEIMAN
NOTARY PUBLIC-STATE OF WASHINGTON
MY COMMISSION EXPIRES 8/20/11

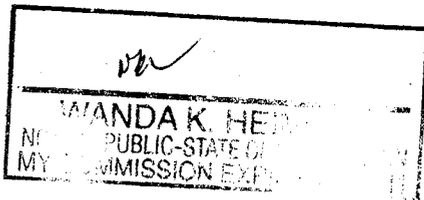
Wanda K. Heiman
Notary Public in and for the
State of Washington.
Residing in Walla Walla, WA
My commission expires 8/20/11

(5). Ms. Pierce also stated to me she was afraid she may get locked up and lose our kids if the police thought she was involved in setting up Mr. Rogers in her apartment.



LARRY B. ROBINSON # 768099

Subscribed and Sworn to before me this 4th day of August
2008.



Wanda K. Heiman

Notary Public in and
for the State of
Washington.

Residing in walla walla
Washington.

My commission expires 8/20/11

