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No. 38474-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Nicholas Howe,

Appellant.

Grays Harbor County Superior Court Cause No. 08-1-00289-9
The Honorable Judges F. Mark McCauley and David L. Edwards

Appellant's Reply Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 339-4870
FAX: (866) 499-7475

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ARGUMENT

I. THE WASHINGTON CONSTITUTION VESTS IN JURIES THE RIGHT TO DECIDE FELONY CASES.

Article I, Section 21 of the Washington Constitution provides that “[t]he right of trial by jury shall remain inviolate,” but authorizes the legislature to provide for “waiving of the jury in civil cases where the consent of the parties interested is given thereto.” Wash. Const. Article I, Section 21. It does not authorize the legislature (or the parties) to waive jury in criminal cases. By its plain terms, the state constitution mandates that juries decide criminal trials. A *Gunwall* analysis confirms this. See Appellant’s Opening Brief, pp. 4-16.

The framers of the state constitution placed the responsibility for adjudication of criminal cases on juries composed of citizens. Neither the legislature nor the judiciary can alter the balance of power prescribed by the framers (absent a constitutional amendment). Respondent argues that the Supreme Court has allowed waivers. Brief of Respondent, p. 1, citing *State v. Lane*, 40 Wn.2d 734, 246 P.2d 474 (1952).

Respondent’s reliance on *Lane* is misplaced for two reasons. First, the *Lane* court addressed conviction by a jury of eleven (rather than 12). The defendants in that case were found guilty following jury trials. Accordingly, language bearing on waiver of the constitutional requirement

that juries decide criminal cases is *dicta*.¹ *Pierson v. Hernandez*, 149 Wn.App. 297, 304-305, 202 P.3d 1014 (2009) (defining *dicta* as statements that do not relate to an issue before the court and are unnecessary to decide the case). Second, *Lane* predated *Gunwall* by more than 30 years, and thus did not go through the analysis required under that case. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Gunwall analysis is mandatory. The Supreme Court has declared that decisions that predate *Gunwall* are not binding (at least in the civil context):

[P]re-*Gunwall* decisions, or decisions *sans* a *Gunwall* analysis, are not binding. Absent a proper analysis on the *Gunwall* factors, a procedural hurdle we invariably impose upon parties who assert that greater protections exist under our state constitution, the question remains an open one.

Manufactured Housing Communities of Washington v. State, 142 Wn.2d 347, 356 n. 7, 13 P.3d 183 (2000).²

The Supreme Court has never undertaken the required *Gunwall* analysis. Indeed, *Forza* (which relied on the *dicta* in *Lane, supra*) spent

¹ Respondent should have cited a later Supreme Court case, which addressed waiver of the right to a jury trial. See *State v. Forza*, 70 Wn.2d 69, 422 P.2d 475 (1966).

² Note: although the quoted language is taken from the majority's opinion, the Westlaw version of the text uses the word "I" instead of "we." Other published versions use the word "we."

less than a page on the issue, and cited a 1930 federal case as authority for its conclusion. *Forza*, at 70-71.

Since *Forza* was decided without the benefit of *Gunwall*, it was implicitly overruled by *Gunwall* and is not binding authority. *Manufactured Housing Communities, supra*. As *Gunwall* analysis establishes, the waiver in this case was entered in violation of Wash. Const. Article I, Section 21. Accordingly, Mr. Howe's conviction must be reversed and the case remanded to the trial court for a jury trial.

II. MR. HOWE'S PURPORTED WAIVER OF HIS STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS INVALID.

Article I, Sections 21 and 22 of the Washington constitution provide greater protection to an accused person's jury trial right than does the Sixth Amendment to the federal constitution. *See, e.g., City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). Because of this, an accused person waiving her or his right to a jury trial in state court is giving up more than a similarly situated person in federal court.

Although the record supports a waiver of Mr. Howe's Sixth Amendment right, it does not show that he fully understood what he was giving up, as required under the state constitution. RP (9-15-08) 11-13; Waiver of Trial by Jury, CP 19. Accordingly, his waiver was not knowing, intelligent, and voluntary under Wash. Const. Article I, Section 21 and

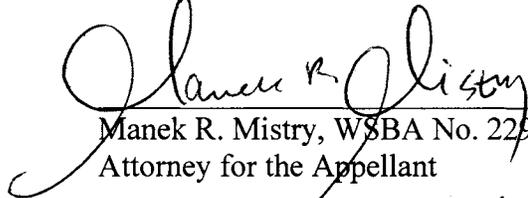
Section 22. His conviction must be reversed and the case remanded for a new trial.

CONCLUSION

Mr. Howe's conviction must be reversed and the case remanded to the trial court for a jury trial.

Respectfully submitted on August 20, 2009.

BACKLUND AND MISTRY



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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CERTIFICATE OF MAILING

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

Nicholas Howe, DOC #324148
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

and to:

Grays Harbor Prosecuting Attorney
102 West Broadway, #102
Montesano, WA 98563

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

All postage prepaid, on August 20, 2009.

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 August 20, 2009.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant