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DIVISION II

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STATE OF WASHINGTON
BY Kraig Newman
DEPUTY

No. 38474-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

NICHOLAS D. HOWE,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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ARGUMENT

The right to a trial by jury is a privilege that can be waived.

The first issue the appellant claims as error is his decision to waive trial by jury. Whether an accused can waive his or her right to jury trial in a criminal case has been decided in the affirmative by the Washington Supreme Court. *State v. Lane*, 40 Wash.2d 734, 246 P.2d 474 (1952). The appellant argues that the Washington Constitution offers broader protection than the United States Constitution with regard to the right to a jury trial. He seems to imply that prior decisions of the Washington Supreme Court, regarding this issue, were decided based on federal law. This is not the case. After a full reading of the holding and dissent in *State v. Lane* it is clear that the Supreme Court decided this case based on state law and was fully aware of the argument that Art. I Sec. 21 can be read to imply that the legislature was not empowered to authorize waiver of the right to jury trial.

In the majority opinion, in *State v. Lane*, Justice Olson, quoted the full text of Art. I Sec. 21 of the Washington State Constitution. The opinion held that the right to a jury trial was a privilege that could be

waived. The opinion specifically overruled a previous opinion that overturned a conviction based on a bench trial.

The dissenting opinion, written by Justice Hamley, argued that the language in Art. I Sec. 21 vesting the legislature with the ability provide a rule governing waiver in civil trials implicitly denied the legislature the power to provided for waiver in criminal cases. This is appellant's argument. The majority did not find this argument persuasive.

Based on state law and analysis of the Washington State Constitution the Supreme Court has ruled that a defendant can waive his or her right to a jury trial in the state of Washington. For this reason the Court should deny the appellant claim of error as to his waiver of his right to a jury trial.

The Appellant acted knowingly, intelligently, and voluntarily when he waived his right to a jury trial.

Washington State law requires that the defendant, in a criminal prosecution, act knowingly, intelligently, voluntarily and free from improper influence when he or she waiver the right to jury trial. *State v. Pierce*, 134 Wash.App. 763, 142 P.3d 610 (2006). A written waiver is not determinative but is strong evidence that the defendant validly waived the jury trial right. *Id.* An attorney's representation that his client knowingly, intelligently, and voluntarily relinquished his jury trial right is also

relevant. *Id.* A extended colloquy on the record is not required, only that the defendant personally expression of waiver. *Id.*

The appellant states that the record does not indicate that the court informed him, at the time of his waiver, that he would be allowed to participate in jury selection. For these reason he did not act knowingly when he waived his right to jury. The Court of Appeals addressed this concern, in *State v. Pierce*, and rejected that such advisement is required.

In this case the appellant was advised that he had a right to have his case heard by twelve citizens of Grays Harbor. He was informed that his attorney would be given the opportunity to question these people to determine whether they could decide the case fairly. The court asked the appellant if he had an opportunity to discuss the decision with his attorney, and the appellant responded that he did. The court asked the appellant if he had any additional question about his rights, and the appellant responded that he did not. The appellant affirmed that he believed that the waiver was in his best interest.

It is clear from the record that the appellant discussed this waiver with his attorney and was informed to his attorney's satisfaction, and the appellant's own satisfaction, as to the implication of the waiver. More importantly, it is clear form the record that it was the appellant's decision to waive his right to a jury. The requirement that he made this waiver knowingly, intelligently, and voluntarily has been satisfied.

CONCLUSION

For the reasons stated above, the respondent asks this court to deny the appellants claims of error.

Respectfully Submitted,

By: 

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DECLARATION OF MAILING

NICHOLAS D. HOWE,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 27th day of July, 2009, I mailed a copy of the Brief of Respondent to Jodi R. Backlund and Manek R. Mistry; Attorneys for Appellant; 203 Fourth Avenue East, Suite 404; Olympia, WA 98501, and Nicholas D. Howe 324148; Washington State Penitentiary; 1313 North 13th Avenue; Walla Walla, WA 99362, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 27th day of July, 2009, at Montesano, Washington.

Barbara Chapman