

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY *ks* DEPUTY

Court of Appeals No. 38564-3-II
Thurston County No. 08-1-01418-9

STATE OF WASHINGTON,

Respondent,

vs.

HOANG X. NGUYEN

Appellant.

BRIEF OF APPELLANT

ANNE CRUSER/WSBA #27944
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p/m 5/27/09

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A. ASSIGNMENT OF ERROR

I. MR. NGUYEN WAS DENIED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

I. THE STIPULATION THAT MR. NGUYEN HAD TWO PRIOR CONVICTIONS FOR VIOLATING A NO CONTACT ORDER DENIED HIM HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL ON THE CHARGE OF FELONY VIOLATION OF A NO CONTACT ORDER.

C. STATEMENT OF THE CASE

The Thurston County Prosecuting Attorney charged Hoang Nguyen with two counts of felony violation of a no contact order, based upon two prior convictions for violating a no contact order, alleged to have occurred on July 23, 2008. CP 3-4. The no contact order prevented Mr. Nguyen from having any contact with Hang Le Nguyen, his former wife. Exhibit 1, Trial RP I, p. 45. Prior to trial, defense counsel entered into a stipulation with the State whereby he stipulated that Mr. Nguyen had two prior convictions for violating a no contact order. Trial RP I, p. 5, Trial RP II, p. 89, Exhibit 8. Mr. Nguyen's signature does not appear on the stipulation, there is no record of the interpreter reading the stipulation to him prior to its entry into evidence, and no colloquy was conducted by the court to ascertain whether Mr. Nguyen was aware of the stipulation. Trial RP Vol. I. Mr. Nguyen speaks Vietnamese and required the

assistance of an interpreter. Trial RP I, p. 4. The stipulation was discussed in the Court's chambers outside the presence of Mr. Nguyen. Trial RP I, p. 5, 12. After the on-the-record discussion of the stipulation, the trial court asked defense counsel to confirm with Mr. Nguyen that he had no objection to the court conducting business in chambers without him there. Trial RP I, p. 12. After an un-recorded attorney-client conversation, defense counsel said that Mr. Nguyen had no objection to that. Trial RP I, p. 12. Mr. Nguyen himself never confirmed his acceptance of this procedure and never ratified this stipulation, either orally or in writing. Trial RP I, p. 12. The trial court read the stipulation to the jury as part of the closing instructions to the jury. CP 23. The stipulation was read as instruction number 12, and stipulated that Mr. Nguyen had been previously convicted of violating a no contact order on February 24, 2004, and January 21, 2003. CP 23.

The jury heard evidence that Mr. Nguyen borrowed a cell phone from a stranger named Ben Onosko while in the city of Las Vegas, and used it to call his former wife Hang Le Nguyen. Trial RP I, p. 33-48. Mr. Nguyen asked his former wife for the phone number of their adult daughter. Trial RP I, p. 48.

Mr. Nguyen was convicted of one count of violation of a no contact order, with a special verdict finding that he had two prior

convictions for violation of a no contact order. CP 5, 7. He was acquitted of the second count of violation of a no contact order. CP 6. The court imposed a standard range sentence of 26 months of confinement. CP 31. This timely appeal followed. CP 37.

D. ARGUMENT

I. THE STIPULATION THAT MR. NGUYEN HAD TWO PRIOR CONVICTIONS FOR VIOLATING A NO CONTACT ORDER DENIED HIM HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL ON THE CHARGE OF FELONY VIOLATION OF A NO CONTACT ORDER.

The stipulation that Mr. Nguyen had two prior convictions for violating a no contact order constituted a waiver of his right to a jury trial yet the record is devoid of proof that the waiver was lawfully obtained. Violation of a no contact order is a unique crime; the State is required to prove the base crime (e.g., whether the defendant knowingly violated a no contact order) and once that is accomplished, the crime will either be a gross misdemeanor or a felony based upon whether the State puts forth additional proof that the defendant has twice been previously convicted of violating a no contact order.

Here, the case was submitted to the jury in a bifurcated manner, wherein they were instructed to make a finding on the base crime and to answer a special interrogatory on the separate question of whether the crime would be elevated to a felony. It is constitutionally permissible for

the trial court to submit bifurcated “to convict” instructions for a base crime that will be elevated to a higher level upon a finding of certain facts. *State v. Oster*, 147 Wn.2d 141, 52 P.3d 26 (2002); *State v. Davis*, 154 Wn.2d 291, 306, 111 P.3d 844 (2005). For example, it is permissible in a prosecution for violation of a no-contact order to submit a “to convict” instruction on the base crime (which is a gross misdemeanor), and a special interrogatory on the question of whether any factors are present which would elevate the crime to a class “C” felony (e.g. two prior convictions for violation of a no contact order, an assault while in violation of the order, etc.).

Whether a defendant has two prior convictions for violation of a no contact order is *not* an element of violation of a no contact order. Violation of a no contact order requires proof that the defendant was restrained by a no contact order, knew of the existence of the order and willfully violated the terms of the order. If those elements are proven beyond a reasonable doubt, the defendant is deemed guilty of gross misdemeanor violation of a no contact order. If a defendant is charged with felony violation of a no contact order by having two prior convictions for violating a no contact order and the State fails to prove the two prior convictions, the defendant can still be found guilty of violation of a no contact order assuming the base elements are proven. Because Mr.

Nguyen was charged with felony violation of a no contact order, and his attorney waived Mr. Nguyen's right to contest the one fact that made his alleged crime a felony, the stipulation constituted a waiver of his right to a jury trial on the crime of felony violation of a no contact order.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a jury trial. Waiver of the right to a jury trial must be knowingly, intelligently and voluntarily made. *State v. Treat*, 109 Wn.App. 419, 427, 35 P.3d 1192 (2001); *State v. Bugai*, 30 Wn.App. 156, 157, 632 P.2d 917 (1981). The waiver must be either in writing or done orally on the record. *Treat* at 427; *State v. Wicke*, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979); *State v. Rangel*, 33 Wn.App. 774, 775-76, 657 P.2d 809 (1983). The State bears the burden of proving a valid waiver. *State v. Donahue*, 76 Wn.App. 695, 697, 887 P.2d 485 (1995). The right to a jury trial is one which an attorney "cannot waive without the fully informed and publicly acknowledged consent of the client..." *Taylor v. Illinois*, 484 U.S. 400, 418, n. 24, 108 S.Ct. 646 (1988). Where there is no waiver by the defendant on the record, the conviction must be reversed and the defendant granted a new trial. In *Treat*, the defendant was tried by a judge on stipulated facts, however no explicit waiver was made on the record or in writing. The Court of Appeals reversed his conviction and remanded his case for a new trial. *Treat* at 428.

In *United States v. Ferrebouf*, 632 F.2d 832 (1980), *cert. denied*, 450 U.S. 934 (1981), the Ninth Circuit held that when a defendant waives a jury determination on a single element of an offense by stipulating to it, such a waiver is not the same as a waiver of a jury trial in its entirety. Mr. Nguyen's case is distinguishable, however, because the stipulation in his case did waive, in its entirety, his right to have a jury determine whether he committed the crime of *felony* violation of a no contact order. As noted above, whether Mr. Nguyen had two prior convictions for violating a no contact order is *not* an element of whether he violated the current no contact order. It was the sole element determining whether he was guilty of felony violation of a no contact order.

Mr. Nguyen has a constitutional right to have a jury determine whether he has two prior convictions for violating a no contact order. He is free to waive his right to have a jury make that determination, but such a waiver must be made knowingly, intelligently and voluntarily, and must be made either in writing or orally on the record. That did not occur here. Of even greater concern is that Mr. Nguyen speaks Vietnamese and required the assistance of an interpreter. He was not present when this stipulation was proffered, did not sign the stipulation, and was not asked by the court whether he ratified its contents. There is no record that the interpreter read the stipulation to him, or that he learned of its contents

before it was read to the jury. Mr. Nguyen was denied his constitutional right to a jury trial and his conviction should be reversed and his case remanded for a new trial.

E. CONCLUSION

Mr. Nguyen's conviction should be reversed and his case remanded for a new trial.

RESPECTFULLY SUBMITTED this 27th day of May, 2009.



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DIVISION II

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STATE OF WASH. BY [Signature]
DEPUTY

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

STATE OF WASHINGTON,)	Court of Appeals No. 38564-3-II
)	Thurston County No. 08-1-01418-9
Respondent,)	
)	
vs.)	
)	AFFIDAVIT OF MAILING
HOANG X. NGUYEN,)	
)	
Appellant.)	
_____)	

ANNE M. CRUSER, being sworn on oath, states that on the 27th day of May 2009,
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AND

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