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

STATE OF WASHINGTON,
Respondent,

v.

CANDI LEE BANGE,
Appellant.

COURT OF APPEALS
DIVISION II
11 MAR 24 PM 12:06
STATE OF WASHINGTON
BY [Signature]
DEPUTY

APPELLANT'S BRIEF

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I. INTRODUCTION

This case involves the issue of whether the defendant-appellant, Candi Lee Bange, waived her constitutional right to a jury trial.

On January 15, 2009, Ms. Bange filed a waiver of her right to jury trial. Clerk's Papers on Appeal (CP) 20. The next month, the trial court dismissed the case against her with prejudice. CP 21-22. The State appealed and in May 2010, this Court reversed, remanding the case to the trial court. The mandate issued on July 2, 2010. CP 31-38.

In August 2010, a bench warrant issued for Ms. Bange and she was again appointed an attorney. CP 39 & 40. Then, in November, without Ms. Bange either discussing waiver of her right to jury trial on the record or filing another waiver, a bench trial was held on November 1, 2010. Verbatim Report of Proceedings for November 1, 2010 (RP).

On appeal, Ms. Bange argues that, although she initially waived her right to trial by jury, her right to a jury trial was revived when, during the 22 months

following the filing of her waiver, the trial court dismissed the case, the State appealed, this Court remanded the case, and a trial was held. Wilson v. Horsley, 137 Wn.2d 500, 511, 974 P.2d 316 (1999) (en banc) (in context of trial following mistrial, holding: "Parties who waive the right to a jury in one proceeding cannot be deemed to have given up the right for all subsequent proceedings.")

When Ms. Bange did not personally waive her right to jury trial after these events occurred, the trial court erred in conducting a bench trial in violation of her constitutional right.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

The superior court erred in denying Ms. Bange her constitutional right to trial by jury.

B. Issues Pertaining to Assignment of Error

1. When Ms. Bange filed a waiver of jury trial, did that right revive after the trial court dismissed the case, the State appealed, and this Court remanded

the case for trial, which occurred 22 months after the waiver was originally filed?

2. Did the trial court err by conducting a bench trial without Ms. Bange having filed a waiver of her right to a jury in the current trial or the court discussing Ms. Bange's right to a jury trial with her?

III. STATEMENT OF THE CASE

A. Procedural History

On October 28, 2008, the State filed an information charging Ms. Bange with delivery of a controlled substance, methamphetamine, in violation of RCW 69.50.401(1) and occurring on or about November 11, 2007. The information additionally charged the delivery occurred within 1000 feet of a school bus route stop in violation of RCW 69.50.435. CP at 1-2.

On January 15, 2009, Ms. Bange filed, pursuant to CrR 6.1(a), a waiver of her right to jury trial. The waiver stated, "I understand that I have a constitutional right to a jury trial. I do not want a jury trial. I want my case decided by a judge sitting without a jury." CP 20.

On January 22, 2009, the State filed an amended information. The new information deleted the school bus route stop enhancement. RP 3-4.

Two weeks later, on Ms. Bange's motion, the court dismissed the case against her, with prejudice. CP 21-22. The State appealed on February 9, 2009. CP 23-30. On May 20, 2010, this Court reversed the trial court's decision and remanded the case. CP 31-38. The mandate issued on July 2, 2010. Id.

On August 2, 2010, a bench warrant issued for Ms. Bange's arrest. CP 39. She was again appointed an attorney on August 11. CP 40.

Ms. Bange pleaded not guilty to the amended information on November 1, 2010. RP at 6. A bench trial, the Honorable James Lawler presiding, was held the same day, resulting in Ms. Bange's conviction. See RP. The court's "Findings of Fact and Conclusions of Law (Bench Trial)" was filed on November 17, 2010. CP 5-8.

On that day, the court sentenced Ms. Bange to twelve months and one day in custody followed by 12

months of community custody. Costs, fees and assessments were imposed. CP 9-18.

Appeal was timely filed the day of sentencing. CP at 9-18.

B. Evidence of Waiver at the November 2010 Trial

At the start of the trial in November 2010, the State asserted: "Matter is on for a bench trial." RP 3. Ms. Bange, represented by counsel, did not object. In his opening statement, Ms. Bange's attorney also noted that it was a bench trial: "This is a bench trial." RP 6. Ms. Bange, present in the courtroom, did not object.

Prior to trial, the judge admonished Ms. Bange of her trial rights, without mentioning her right to a jury trial:

First of all, you need to understand that you have the right to remain silent today. You also have the right to testify. You have the right to see and cross-examine the witnesses that are brought to testify against you. The decision of whether you testify or not is one for you to make after you consult with your attorney. If you do testify, you're going to be subject to cross-examination by the prosecutor. If you choose to remain silent, I won't hold that against you. Do you understand those rights?

RP at 3.

C. Facts Underlying the Conviction

The facts underlying the conviction are set forth in the court's "Findings of Fact and Conclusions of Law (Bench Trial)." CP at 5-8.

IV. ARGUMENT

The Trial Court Erred in Conducting a Bench Trial When Ms. Bange Did Not Waive Her Right to a Jury Trial Following the Trial Court's Dismissal of the Case, the State's Appeal and this Court's Reversal and Remand

Ms. Bange's conviction cannot stand when the trial court held a bench trial without obtaining Ms. Bange's waiver of her constitutional right to a jury trial. To be valid, the waiver of this right must be "voluntary, knowing, and intelligent." State v. Hos, 154 Wn. App. 238, 249, 225 P.3d 389 (2010), citing, City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984).

"The State bears the burden of establishing the validity" of such waiver, and appellate courts "indulge every reasonable presumption against such waiver, absent a sufficient record." Hos, 154 Wn. App. at 249-50, citing, State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). This issue is reviewed de novo. Hos, 154

Wn. App. at 250, citing, State v. Ramirez-Dominguez,
140 Wn. App. 233, 239, 165 P.3d 391 (2007).

A. Ms. Bange's right to a jury trial revived after her case was dismissed, the State appealed, this Court reversed and remanded and a new trial was scheduled.

While Ms. Bange waived her right to a jury trial twenty-two months before the bench trial, intervening events revived that right. The right to trial by jury is an inviolate right unequivocally guaranteed by this State's constitution. Wilson v. Horsley, 137 Wn.2d 500, 509, 974 P.2d 316 (1999) (en banc), quoting, Const. art. 1, § 21; see also U.S. Const. Amend. 6. An inviolate right "must not diminish over time and must be protected from all assaults to its essential guaranties." Horsley, 137 Wn.2d at 509 (quotation omitted). Under the law of Horsley, Ms. Bange's right to a jury trial was revived after the case against her was dismissed, appealed, and remanded.

To start, Ms. Bange's January 2009 written waiver did not waive her right to a jury at the November 2010 trial because a constitutional right cannot be waived if it is not known to exist. In Horsley, our Supreme

Court reasoned that the waiver of a right cannot be voluntary, knowing and intelligent if the person waiving the right does not contemplate the existence of that right. It held that since a defendant agreeing to a trial without a jury would not presume there would ever be a second trial, waiver of the right for one trial could not waive the right for the second trial. Moreover, the Court held the right could not be impliedly waived when it was not known to exist at the time of the waiver. Thus, the Court held that the right to trial by jury revives after a mistrial. Horsley, 137 Wn.2d at 510.

Similarly, in this case, when Ms. Bange waived her right to a jury trial, she could not have known that the case would be dismissed, appealed, remanded and tried nearly two years later. Accordingly, when she waived her right to a jury trial in January 2009, she did not also waive her right to a jury trial in November 2010. See 137 Wn.2d at 510.

Moreover, fairness compels revival of Ms. Bange's trial right. In Horsley the Supreme Court reasoned

that fairness compelled revival of the jury trial right following mistrial: "Limiting the waiver of a jury trial to the initial proceedings is also justified by the fact that conditions could be wholly different at the second trial from what they were at the first." Id. at 510 (quotation omitted). "It is hardly fair to presume," the Court continued, "that by waiving a jury for one trial the parties intended to waive a jury for any further trial that may be had." Id. For analytically identical reasons, it would be wholly unfair to Ms. Bange to hold that her waiver in January 2009 operated also to waive her right to a jury trial a year and ten months later, under completely different circumstances.

In Horsley, after reviewing law from other jurisdictions that supported its analysis and holding, the Court summed up its reasons for protecting this inviolate right. Simply put, a valuable constitutional right cannot be unintentionally waived prospectively:

As noted above, the right to a jury trial is a valuable constitutional right, and its waiver must be strictly construed. Allowing the waiver of a jury trial to remain valid

for subsequent trials of the same case would impermissibly allow the unintentional waiver of prospective rights. Parties who waive the right to a jury in one proceeding cannot be deemed to have given up the right for all subsequent proceedings.

Horsley, 137 Wn.2d at 511.

As can be seen from this excerpt, the Supreme Court so profoundly reveres the constitutional right to trial by jury that it holds it revives even for a trial following a mistrial -- when in that case, the second trial may be held within days of the first. Under these circumstances, Ms. Bange cannot be deemed to have waived her right to a jury when her original waiver was filed nearly two years prior to the trial at issue and after dismissal, appeal and remand of her case. Under the clear mandate of Horsley, the trial court erred in holding a bench trial when Ms. Bange did not waive her right to a jury at that particular trial.

B. Ms. Bange did not waive her right to a jury when she did not object to her attorney's statement that "This is a bench trial."

Further, Ms. Bange cannot be said to have waived her right to trial by jury when she did not object to her attorney's statement that the trial would be a bench trial. As an initial matter, counsel's statement in no way purported to be a waiver -- instead it was merely an observation of the type of proceeding occurring. Equally significantly, our Supreme Court has held that even if an attorney explicitly waives his client's right to a jury trial in open court, defendant's silent acquiescence in the matter does not constitute a valid waiver under constitutional standards. State v. Wicke, 91 Wn.2d 638, 644-45, 591 P.2d 452 (1979). When, in this case, Ms. Bange remained silent in the face of her attorney's observation about a bench trial, not her attorney's explicit waiver of the right to jury trial as occurred in Wicke, that decision requires the Court to reverse and remand this case.

Relying on Wicke, this Court recently found a defendant had not waived her right to a jury trial when she did not make a personal expression of waiver but her attorney stated in her presence that she sought a bench trial. State v. Hos, 154 Wn. App. 238, 225 P.3d 389 (2010). In Hos, the only discussion of waiver of jury trial on the record was the attorney telling the court, in the defendant's presence, that it was the defendant's "intent" to ask for a bench trial:

[It was the defendant's] intent to ask the Court to review . . . a couple of documents on stipulated facts for a bench trial. It's [the defendant's] intent to appeal a pre-trial suppression order denying her motion, and this is the most efficient way to get that up on appeal."

Id. at 244. The defendant had filed no written jury trial waiver and the trial court did not discuss waiver with her. Id. Citing Wicke, the Court held that a constitutional waiver requires the defendant's personal expression of waiver to be valid. Id. at 251-52. On the facts before it, the Court held the defendant had not waived her right to a jury trial and remanded the case. Id. at 252.

This Court's decision in Hos compels a similar result in this case. Here, the evidence of waiver is even weaker than in Hos. Instead of the attorney stating that it was the defendant's "intent to ask the Court" for "a bench trial" as "the most efficient way to get [the issue] up on appeal," here the attorney only stated, "This is a bench trial." RP at 6. In contrast to the facts in Hos, here the attorney provided no indication of Ms. Bange's intent to seek a bench trial or her understanding of the significance of a bench trial. Similar to that case, Ms. Bange did not file a written waiver and the court did not discuss the jury trial waiver option with her. Accordingly, for the reasons the court reversed and remanded in Hos, it should reverse and remand here.

Finally, although raised for the first time on appeal, this issue should be heard as it is a manifest error affecting Ms. Bange's constitutional rights. See RAP 2.5(a); Hos, 154 Wn. App. at 249-52 (reversing when defendant had not personally waived right to jury trial despite State's argument that issue should not be

heard on appeal because defendant had not raised it below).

V. CONCLUSION

For all of these reasons, Candi Lee Bange respectfully requests this Court to reverse her conviction.

Dated this 23rd day of March 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 23rd day of March 2011, I caused a true and correct copy of Appellant's Brief to be served by U.S. mail on:

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Carol Elewski