

filed COA II on
Wed 4/6/2011 1:56 PM

SR

NO. 41472-4-II

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

In Re Personal Restraint Petition of:

JOSEPH EDINGTON,

Petitioner.

PETITIONER'S REPLY BRIEF

**Clark County Superior Court No.
07-1-00616-8**

Steven Witchley
Law Offices of Holmes & Witchley, PLLC
705 Second Avenue, Suite 401
Seattle, WA 98104
(206) 262-0300
(206) 262-0335 (fax)
steve@ehwlawyers.com

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1 **I. ARGUMENT IN REPLY**

2 Introduction

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4 Joseph Edington has raised two claims for relief in this personal restraint
5 petition:

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7 Claim No. 1:

8 The trial court erred by instructing the jury that it must be unanimous to
9 answer “no” to the questions posed in the special verdict forms. This error
10 was not harmless beyond a reasonable doubt.

11 Claim No. 2:

12 Appellate counsel was constitutionally ineffective in failing to raise the issue
13 in Claim No. 1 on direct appeal.

14
15 In its terse response to Edington’s petition, the State appears to advance
16 three arguments.

17
18 First, the State contends—apparently in response to Edington’s claim that
19 appellate counsel was ineffective—that a *Bashaw* error is non-constitutional and
20 therefore cannot be raised for the first time on appeal. *Response*, at 2. Second, the
21 State claims—incredibly—that Jury Instruction No. 18 did not require that the jury
22 be unanimous in order to answer “no” on the special verdict forms. *Response*, at 6.
23 And lastly, the State appears to argue that because the jury reached a unanimous
24 verdict and was polled that any error in the instruction was harmless. *Response*, at
25 6-7.
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1 None of the State’s arguments are developed in other than the most
2 superficial manner; all are incorrect.
3

4 Instruction No. 18 Is Identical to the Instruction in *Bashaw* and Is Contrary
5 to Law.

6 The instruction disapproved by the Washington Supreme Court in *Bashaw*
7 stated in relevant part: “*Since this is a criminal case, all twelve of you must agree*
8 *on the answer to the special verdict.*” *State v. Bashaw*, 169 Wash.2d 133, 139,
9 234 P.3d 195 (2010) (emphasis supplied). Meanwhile, Edington’s Jury Instruction
10 No. 18 stated:
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13
14 If you find the defendant guilty of delivering a controlled substance as
15 charged in any of the Counts 1, 2, 3 or 4, it will then be your duty to
16 determine whether or not the defendant delivered the controlled substance in
17 that Count, within one thousand feet of a school bus route stop designated by
18 a school district. You will be furnished with a Special Verdict Form A on
19 each Count, for this purpose.

20 If you find the defendant not guilty of Delivery of a Controlled Substance—
21 Cocaine, as to any of Counts 1, 2, 3 or 4, do not use the Special Verdict
22 Form for that Count. If you find the defendant guilty in any Count, you will
23 complete the Special Verdict Form for that Count. ***Since this is a criminal***
24 ***case, all twelve of you must agree on the answer to a Special Verdict.***

25 If you find from the evidence that the State has proved beyond a reasonable
26 doubt that the defendant delivered the controlled substance within one
27 thousand feet of a school bus route stop designated by a school district, it
28 will be your duty to answer the Special Verdict “yes” as to that Count.

29 On the other hand, if, after weighing all of the evidence, you have a
30 reasonable doubt that the defendant delivered the controlled substance to a
person within one thousand feet of a school bus route stop designated by a

1 school district, it will be your duty to answer the Special Verdict “no” as to
2 that Count.

3 *See* PRP Exhibit C (emphasis supplied).
4

5 Put simply, the defect in Instruction No. 18 is identical to the defect in the
6 special verdict instruction in *Bashaw*. The State’s argument to the contrary is
7 patently frivolous.
8

9 *Bashaw* Error is of Constitutional Magnitude and Can Be Raised for the
10 First Time on Appeal. Appellate Counsel Was Ineffective in Failing to
11 Raise This Issue on Direct Appeal.

12 Relying on Division Three’s recent decision in *State v. Nunez*, ___ Wash.
13 App. ___, 248 P.3d 103, 2011 WL 536431 (2011), the State contends that *Bashaw*
14 error is non-constitutional and therefore cannot be raised for the first time on
15 appeal. *Response*, at 2. Although the State does not make the argument explicitly,
16 it appears to claim that because the error could not have been raised for the first
17 time on appeal, appellate counsel was not ineffective in failing to assign error to
18 Instruction No. 18. The State is incorrect.
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23 *Nunez* does hold that a *Bashaw* error cannot be raised for the first time on
24 appeal. *Nunez* is also wrongly decided, and in any event is not binding on this
25 Court.¹
26
27
28

29 ¹ A petition for review is pending in *Nunez*.
30

1 Edington's trial counsel did not object to Instruction No. 18. However,
2 "[t]he proposition is well-settled that an alleged instructional error in a jury
3 instruction is of sufficient constitutional magnitude to be raised for the first time on
4 appeal." *State v. Davis*, 141 Wash.2d 798, 866, 10 P.3d 977 (2000). Indeed, in the
5
6 *Bashaw* case itself trial counsel did not object to the defective instruction. *See*
7
8 *State v. Bashaw*, 144 Wash. App. 196, 198-99, 182 P.3d 451 (2008). Nevertheless,
9
10 the *Bashaw* Court reached the merits of the claimed error in both the Court of
11
12 Appeals and in the Supreme Court. That the Supreme Court considered the error
13
14 to be of constitutional magnitude is demonstrated by the Court's application of the
15
16 constitutional harmless error standard in its analysis. *See Bashaw*, 169 Wash.2d at
17
18 147-48.

19 Further, in a published opinion announced this week, Division One rejected
20
21 the *Nunez* Court's analysis and held that a *Bashaw* error is a manifest constitutional
22
23 error which can be raised for the first time on appeal:

24 We reach the opposite conclusion [as the *Nunez* court]. The *Bashaw* court
25 strongly suggests its decision is grounded in due process. The court
26 identified the error as "the procedure by which unanimity would be
27 inappropriately achieved," and referred to "the flawed deliberative process"
28 resulting from the erroneous instruction. The court then concluded the error
29 could not be deemed harmless beyond a reasonable doubt, which is the
30 constitutional harmless error standard. The court refused to find the error
harmless even where the jury expressed no confusion and returned a
unanimous verdict in the affirmative. We are constrained to conclude that

1 under *Bashaw*, the error must be treated as one of constitutional magnitude
2 and is not harmless.

3 *State v. Ryan*, ___ Wash.App. ___, ___ P.3d ___, 2011 WL 1239796 (April 4,
4 2011) (footnotes omitted).

6 As noted in Edington's *PRP and Opening Brief*, the Supreme Court accepted
7 review in *Bashaw* on December 2, 2008—while Edington's direct appeal was still
8 pending in this Court. See *State v. Bashaw*, 165 Wash.2d 1002 (2008). Because
9 the issue presented in *Bashaw* was identical to the instructional error which
10 occurred here, it was deficient performance for appellate counsel to fail to raise
11 this obviously non-frivolous issue on direct appeal. Moreover, given the outcome
12 in *Bashaw*, there is considerably more than a reasonable probability that, had
13 counsel raised this issue, Edington's sentence enhancements would have been
14 vacated on appeal. The Court should grant that relief now.

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20 The Instructional Error Was Not Harmless Beyond a Reasonable Doubt.

21 The State appears to argue that because the jury reached a unanimous verdict
22 and was polled that any error in Instruction No. 18 was harmless. *Response*, at 6-7.

23
24 But the Supreme Court rejected the *identical* argument in *Bashaw*:

25
26 The State argues, and the Court of Appeals agreed, that any error in the
27 instruction was harmless because the trial court polled the jury and the jurors
28 affirmed the verdict, demonstrating it was unanimous. ***This argument***
29 ***misses the point. The error here was the procedure by which unanimity***
30 ***would be inappropriately achieved.***

1
2 *Bashaw*, 169 Wash.2d at 147 (emphasis supplied).

3 As the *Bashaw* Court noted:

4
5 ***The result of the flawed deliberative process tells us little about what result***
6 ***the jury would have reached had it been given a correct instruction. . . We***
7 ***cannot say with any confidence what might have occurred had the jury***
8 ***been properly instructed. We therefore cannot conclude beyond a***
9 ***reasonable doubt that the jury instruction error was harmless.***

10 *Bashaw*, 169 Wash.2d at 147-48 (emphasis supplied).

11 Edington's case is indistinguishable from—indeed, identical to—*Bashaw*.

12 The error was not harmless beyond a reasonable doubt.

13
14 **II. CONCLUSION**

15 This Court should grant Mr. Edington's petition, vacate the school bus route
16 stop enhancements, and remand this case to the Clark County Superior Court for
17 re-sentencing.
18

19 DATED this 6th day of April, 2011.
20
21

22
23 _____
24 /s/
25 Steven Witchley, WSBA #20106
26 Law Offices of Holmes & Witchley, PLLC
27 705 Second Ave., Suite 401
28 Seattle, WA 98104
29 (206) 262-0300
30 (206) 262-0335 (fax)
steve@ehwlawyers.com

1
2 **CERTIFICATE OF SERVICE**

3
4 I, Steven Witchley, certify that on April 6, 2011, I served a copy of the
5 attached brief on counsel for the respondent by having it mailed, first-class postage
6 prepaid to:
7

8 Michael C. Kinnie
9 Clark County Prosecutor's Office
10 1013 Franklin St.
11 P.O. Box 5000
12 Vancouver, WA 98666-5000
13

14 4/6/11 Seattle, WA

15 Date and Place

14 /s/

15 Steven Witchley