

No. 48409-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Rory Mickens,

Appellant.

Cowlitz County Superior Court Cause No. 15-1-00851-7

The Honorable Judge *Pro Tempore* James Stonier

Appellant's Opening Brief

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ARGUMENT

I. THE CONSENT OF THE PARTIES LITIGANT IS NECESSARY BUT INSUFFICIENT TO CONFER JURISDICTION UPON A JUDGE *PRO TEMPORE*.

- A. Wash. Const. art. IV, §7 imposes three requirements for a judge *pro tempore* to have jurisdiction to try a case.

Under the Washington constitution, a judge *pro tempore* may try a case if three conditions are met. Wash. Const. art. IV, §7.¹ First, the judge *pro tempore* must be a member of the bar. Second, she or he must be “approved by the court and sworn to try *the case*.” Wash. Const. art. IV, §7 (emphasis added). Third, the parties or their attorneys must agree upon the judge *pro tempore* in writing. Wash. Const. art. IV, §7.²

When interpreting a constitutional provision, courts look to “the plain language of the text ‘and will accord it its reasonable interpretation.’” *State v. Barton*, 181 Wn.2d 148, 155, 331 P.3d 50 (2014). The words are given “their common and ordinary meaning, as determined at the time they were drafted.” *Washington Water Jet Workers Ass'n v.*

¹ Specifically, “A case in the superior court may be tried by a judge *pro tempore* either with the agreement of the parties if the judge *pro tempore* is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge *pro tempore* is a sitting elected judge and is acting as a judge *pro tempore* pursuant to supreme court rule.” Wash. Const. art. IV, §7.

² The provision also allows for judges *pro tempore* even absent agreement if certain other conditions are met. Wash. Const. art. IV, §7. Respondent does not seek to apply either alternative. *See* Brief of Respondent, pp. 12-14.

Yarbrough, 151 Wn.2d 470, 477, 90 P.3d 42 (2004), *as amended* (May 27, 2004). Courts may also examine the historical context for guidance. *Id.*

However, a court “need not look to legislative history if the provision is unambiguous.” *Washington Off Highway Vehicle All. v. State*, 176 Wn.2d 225, 234–35, 290 P.3d 954 (2012). Furthermore, “[t]he wisdom... of constitutional provisions is not subject to judicial review.” *City of Bothell v. Barnhart*, 172 Wn.2d 223, 229, 257 P.3d 648 (2011) (quoting *State ex rel. Anderson v. Chapman*, 86 Wash.2d 189, 191, 543 P.2d 229 (1975)). A court may not “engraft exceptions on the constitution, no matter how desirable or expedient such an exception might seem.” *Anderson*, 86 Wn.2d at 196 (internal quotation marks and citation omitted).

Here, the plain language of the constitutional text establishes that all three conditions must be met before a judge *pro tempore* has jurisdiction to hear a particular case. The drafters joined the three provisions using commas and the word “and.” Wash. Const. art. IV, §7. “And” is a coordinating conjunction which means (*inter alia*) “along or together with; as well as; in addition to; besides; also; moreover.” *Dictionary.com Unabridged*, Random House, Inc.³

³ Available at <http://www.dictionary.com/browse/and> (last accessed: October 10, 2016).

Courts “generally presume[] that use of the word ‘and’ ... indicates ... [an] intent that two provisions be applied conjunctively, while use of the word ‘or’ indicates an intent that the provisions be applied disjunctively.” *State v. Hodgins*, 190 Wn. App. 437, 443–45, 360 P.3d 850 (2015) (interpreting RCW 9.94A.030). The word “and” may only be interpreted as a disjunctive (or) “if it is clear from the plain language of the [text] that it is appropriate to do so.” *Bullseye Distrib. LLC v. State Gambling Comm'n*, 127 Wn. App. 231, 238–39, 110 P.3d 1162 (2005) (interpreting RCW 9.46.0241).

Here, the plain language of the constitutional text is unambiguous. The drafters of Wash. Const. art. IV, §7 used the word “and” to join the three prerequisites for jurisdiction. This unambiguous language establishes three requirements for a judge *pro tempore* to obtain jurisdiction to try a case.

Respondent fails to address the plain language of the constitution. Brief of Respondent, pp. 12-14. Respondent does not suggest that the word “and” had a different meaning in 1889 (when the constitution was adopted) than it does today. Brief of Respondent, pp. 12-14; *see Water Jet*, 151 Wn.2d at 477. Nor does Respondent claim that “the plain language of the [text]” makes clear that “and” should be interpreted to mean “or.” *Cf. Bullseye*, 127 Wn.App. at 238-239. Respondent does not

suggest that the constitutional language is ambiguous, or that the historical context and legislative history require a different result. *Id.*; *Off Highway Vehicle*, 176 Wn.2d at 234–35.

The state’s failure to argue these points may be treated as a concession. See *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). The plain language of the constitutional provision imposes three separate requirements allowing a judge *pro tempore* to try a particular case. Only two are met here. Because of this, the court lacked jurisdiction to try the case.

Respondent’s argument implies that a judge *pro tempore* need not meet all three requirements. Brief of Respondent, pp. 12-14. According to Respondent, the court’s jurisdiction may not be challenged if the parties have agreed to a judge *pro tempore*. Brief of Respondent, pp. 12-14 (citing *State v. Sachs*, 3 Wash. 691, 29 P. 446 (1892) and *State v. Belgarde*, 119 Wn.2d 711, 837 P.2d 599 (1992)).

This is incorrect. The constitution clearly imposes three requirements. Wash. Const. art. IV, §7. The authority cited by Respondent does not apply to Mr. Mickens’s case for several reasons.

First, the petitioners in both *Sachs* and *Belgarde* alleged lack of consent rather than a deficiency in the appointment and oath. *Sachs*, 3 Wash. at 693-94; *Belgarde*, 119 Wn.2d at 719. Furthermore, the *Sachs*

court dealt only with a statutory issue; the petitioner apparently did not allege a constitutional violation.⁴ *Sachs*, 3 Wash. at 693-94. The *Sachs* court decided only that a party who consented to a judge *pro tempore* could not later argue lack of consent. *Id.*

Second, the *Belgarde* court agreed that the petitioner *could* raise lack of jurisdiction for the first time on appeal, despite a failure to object in the trial court. *Belgarde*, 119 Wn.2d at 719. Indeed, the *Belgarde*, court found that the lower court’s decisions could not be sustained on the basis of the petitioner’s implied consent or failure to object. *Id.*, at 719-720. Instead, the court relied on the “retired judge” portion of Wash. Const. art. IV, §7 to affirm the trial court’s decisions. *Id.*, at 720-724. This provision does not apply to Mr. Mickens’s case.

The Rules of Appellate Procedure unequivocally allow lack of trial court jurisdiction to be raised for the first time on appeal. RAP 2.5(a)(1); *see also Nat’l Bank of Washington, Coffman-Dobson Branch v. McCrillis*, 15 Wn.2d 345, 360, 130 P.2d 901 (1942). Judge *Pro Tempore* Stonier was not appointed specifically to try Mr. Mickens’s case, and did not swear an oath that dealt specifically with Mr. Mickens’s case. Agreement to Judge Pro Tempore, Declaration of Clerk, Supp. CP. He therefore lacked

⁴ In addition, the *Sachs* petitioner did not have the benefit of RAP 2.5(a)(1), which allows a party to raise lack of trial court jurisdiction for the first time on appeal.

jurisdiction to try the case. *Id.*, at 357. Mr. Mickens’s convictions must be reversed and the case remanded for a new trial. *Id.*

B. Wash. Const. art. IV, §7 requires that a judge *pro tempore* be appointed and sworn to try “one particular case.”

The constitution requires that a judge *tempore* be “approved by the court and sworn to try *the* case.” Wash. Const. art. IV, §7 (emphasis added). Under the plain language of this provision, a judge must be appointed and sworn to try “one particular case.” *See McCrillis*, 15 Wn.2d at 357. This is so because the provision refers to “the case,” rather than “any case,” “all cases,” or simply “cases.” *See State v. Roberts*, 142 Wn.2d 471, 510, 14 P.3d 713 (2000), *as amended on denial of reconsideration* (Mar. 2, 2001) (holding that accomplice statute’s reference to “the crime” means “the charged offense,” rather than *any* crime perpetrated by the principal offender.)

This constitutional requisite is echoed in the statute governing appointment of judges *pro tempore*. *See* RCW 2.08.180. Under the statute, a judge *pro tempore* must be “approved by the court, and sworn to try *the* case.” RCW 2.08.180. The statute requires a judge *pro tempore* to swear or affirm that she or he “will faithfully discharge the duties of the office of judge pro tempore in the cause wherein is plaintiff and

..... defendant...” RCW 2.08.180. Thus, under the statute, the oath must make specific reference to the particular case to be tried.

Here, Judge *Pro Tempore* Stonier signed an oath to “faithfully discharge the duties of the office of Judge Pro Tempore,” but made no reference to Mr. Mickens’s case. Agreement to Judge Pro Tempore, Declaration of Clerk, Supp. CP. Because he was not specifically appointed to try this case, and because he did not swear an oath to try this case, Judge *Pro Tempore* Stonier lacked jurisdiction. *McCrillis*, 15 Wn.2d at 354-364; *State v. McNairy*, 20 Wn.App. 438, 440, 580 P.2d 650 (1978). His decisions are “absolutely void for lack of jurisdiction.” *McCrillis*, 15 Wn.2d at 363; *Matheson v. City of Hoquiam*, 170 Wn. App. 811, 818, 287 P.3d 619 (2012); *Mitchell v. Kitsap County*, 59 Wn.App. 177, 181, 797 P.2d 516 (1990).

Respondent does not explain how Judge *Pro Tempore* Stonier’s oath and the general order directing him to try cases satisfies either the constitution or the statute. Brief of Respondent, pp. 13-14 (citing CP 66-67). The state’s failure to offer an explanation can be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

The trial court lacked jurisdiction to hear and decide the case. *McCrillis*, 15 Wn.2d at 354-364; *McNairy*, 20 Wn.App. at 440. Because of this, Mr. Mickens’s convictions are “absolutely void.” *McCrillis*, 15 Wn.2d at 363. The convictions must be vacated and the case remanded for a new trial. *Id.*

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT PREJUDICED MR. MICKENS.

Mr. Mickens rests on the argument set forth in the Opening Brief.

III. MR. MICKENS WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Mickens rests on the argument set forth in the Opening Brief.

IV. THE COURT’S “REASONABLE DOUBT” INSTRUCTION IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR “THE TRUTH” IN VIOLATION OF MR. MICKENS’S RIGHT TO DUE PROCESS AND TO A JURY TRIAL.

Mr. Mickens rests on the argument set forth in the Opening Brief.

V. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

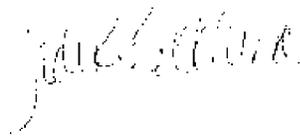
Mr. Mickens rests on the argument set forth in the Opening Brief.

CONCLUSION

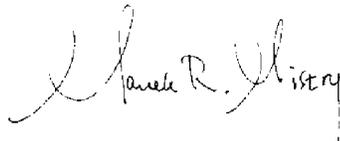
For the foregoing reasons, and those stated in the Opening Brief,
Mr. Mickens's convictions must be reversed.

Respectfully submitted on October 13, 2016,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Rory Mickens, DOC #927518
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

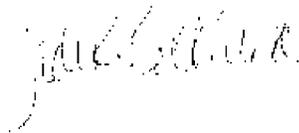
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 October 13, 2016.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

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