

NO. 290557-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
October 10, 2011
Court of Appeals
Division III
State of Washington

State of Washington,

Respondent,

v.

Lewis A. Lawrence,

Appellant.

Appeal From The Superior Court
Of Whitman County
Case No. 09-1-00041-1
The Honorable David Frazier and
The Honorable Bill Acey

SUPPLEMENTAL BRIEF OF RESPONDENT
--Applicability of PRP of Rhome

Denis P. Tracy, WSBA # 20383
Whitman County Prosecutor

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TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Dusky v. United States, 362 U.S. 402,
80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)..... 9

Faretta v. California, 422 U.S. 806,
95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)..... 5,11

Indiana v. Edwards, ___ U.S. ___,
128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008)..... 2,8

Washington State:

In re Personal Restraint of Rhome,
Washington State Supreme Court #83788- 1-4, 9, 10, 14, 15

State v. DeWeese, 117 Wn.2d 369,
816 P.2d 1 (1991)..... 14

State v. Gunwall, 106 Wn.2d 54,
720 P.2d 808 (1986)..... 12

State v. Hahn, 106 Wn.2d 885,
726 P.2d 25 (1986)..... 6-8, 13

State v. Kolocotronis, 73 Wn.2d 92,
436 P.2d 774 (1968)..... 4

State v. Rafay, 167 Wn.2d 644,
222 P.3d 86 (2009)..... 12

State v. Silva, 107 Wn. App. 605,
27 P.3d 663 (2001)..... 12

State v. Woodall, 5 Wn. App. 901,
491 P.2d 680 (1971), review denied,
80 Wn.2d 1005 (1972)..... 12

Constitutional Provisions

Federal:

U.S. Const. amend. VI 11

Washington State:

Const. art 1, § 22..... 11-12

A. ISSUES PRESENTED (in this Supplemental Brief)

1. Whether the trial court acted within its discretion in finding that defendant's waiver of the right to counsel was knowing, voluntary and intelligent, and effect of PRP of Rhome, Washington State Supreme Court #83788-1, on that question.

B. STATEMENT OF THE CASE

The Court of Appeals has asked for supplemental briefing regarding the applicability of PRP of Rhome, Washington State Supreme Court #83788-1. This new case, decided September 15, 2011, is relevant to the issue raised by the defendant in this appeal: whether the trial court abused its discretion in finding defendant's waiver of counsel to have been knowing and voluntary.

C. ARGUMENT

In this appeal, defendant seeks to take advantage of a recent decision of the United States Supreme Court that *permits* states to establish, if they so choose, a higher standard for competency to represent oneself at trial than for competency to

stand trial with the assistance of counsel. See Indiana v. Edwards, ___ U.S. ___, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008).

In PRP of Rhome, Washington State Supreme Court #83788-1, our State Supreme Court was asked to extend the decision in Edwards and establish in Washington the higher standard that the US Supreme Court found permissible.

In accordance with established principles of retroactivity, our State Supreme Court declined to announce and apply a new rule of criminal procedure such as the one Rhome sought, in a collateral attack. Our State Supreme Court noted that such a rule (as envisioned in Edwards) is NOT the law in this state. Moreover, the Washington Constitution's explicit protection of the right to self-representation at trial makes it unlikely that such a rule would ever be adopted in this state.

Defendant claims that he did not knowingly, voluntarily and intelligently waive his right to counsel. In light of the two trial judges' multiple, careful and detailed colloquies with defendant on this issue, defendant cannot demonstrate that the court abused its discretion in granting his wish to represent himself at his trial.

1. WASHINGTON REQUIRES A VOLUNTARY, KNOWING, AND INTELLIGENT WAIVER OF THE RIGHT TO COUNSEL, AND THAT IS ALL THAT WASHINGTON REQUIRES.

Defendant asks this Court to find that Washington law requires a separate inquiry into a defendant's competence to represent himself at trial, above and beyond the competence required to stand trial with the assistance of counsel, where there is some indication that a criminal defendant may suffer from a mental illness. This Court should reject such request, just as our State Supreme Court rejected such request. First, in PRP of Rhome, Washington State Supreme Court #83788-1, our State Supreme Court noted that this was NOT the law in Washington, and then noted that such a proposed new rule could not in any event be announced and applied in a collateral attack. Moreover, the Washington Constitution, which explicitly protects a defendant's right to represent himself at trial, would likely preclude defendant's proposed limitation of that right.

- a. The rule allowed by of Indiana v. Edwards is not currently the law in Washington.

The defendant implies that the rule he seeks to take advantage of, a higher standard of competence to represent oneself at trial than to stand trial with the assistance of an attorney,

has long been established in Washington. This is not correct. The court in PRP of Rhome, Washington State Supreme Court #83788-1, detailed the history of this issue in Washington.

For instance, defendant seeks to rely on language in State v. Kolocotronis, 73 Wn.2d 92, 436 P.2d 774 (1968). In that case, the trial court allowed a defendant with a history of serious mental illness to represent himself in part at trial, but required him to accept some assistance from counsel, and allowed counsel to put forth a defense of not guilty by reason of insanity over the defendant's objection. 73 Wn.2d at 95. The jury acquitted based on insanity at the time of the offense, but found the defendant not safe to be at large. Id. at 96. The defendant appealed, claiming that the trial court had improperly denied him the right to represent himself. Id. at 96-97.

In holding that the trial court had properly exercised its discretion, the Washington Supreme Court recognized that Kolocotronis was able to understand the nature of the proceedings against him, and to assist his counsel. Id. at 102. The court held, however, that "[t]hat condition is determinative only of his ability to stand trial, not of his ability to act as his own counsel, and to

exercise the skill and judgment necessary to secure to himself a fair trial." Id.

Kolocotronis preceded the United States Supreme Court's landmark decision in Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). In Faretta, the Court held that a state may not require a defendant to accept the assistance of counsel when that defendant wishes to represent himself. 422 U.S. at 807. The Court observed that, while the Sixth Amendment does not state the right to defend personally in a criminal action "in so many words," the right is "necessarily implied by the structure of the Amendment." Id. at 819.

The Court in Faretta cautioned that any waiver of the right to counsel must be knowing and intelligent: "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Id. at 835 (citation omitted). The Court explicitly recognized that a defendant's choice to represent himself may not always be a wise one: "And although he may conduct his own defense ultimately to

his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" Id. at 834 (citation omitted).

The Washington Supreme Court revisited this issue in a post-Faretta case, State v. Hahn, 106 Wn.2d 885, 726 P.2d 25 (1986). Hahn was diagnosed as a paranoid schizophrenic after his arrest. Id. at 886. After being found competent to stand trial, he waived a plea of not guilty by reason of insanity and chose to represent himself. Id. Hahn was convicted of second-degree murder, and he appealed. Id. The Court of Appeals reversed the conviction, finding that, while the standards for competency to stand trial and for waiver of an insanity plea were met, the standard for waiver of counsel was not. Id.

Explicitly recognizing that Faretta had proclaimed a criminal defendant's constitutional right to represent himself, the Washington Supreme Court set out the specific question raised by Hahn's situation:

The case before this court presents the difficult question of the standard for waiver of that right by a criminal defendant who is psychotic yet competent to stand trial. Hahn, a paranoid schizophrenic who was competent to stand trial, was granted his request to represent himself. We are asked to decide if Hahn's waiver of his right to counsel was valid.

Id. at 889.

The supreme court reversed the lower appellate court and reinstated Hahn's conviction. Id. at 901. The court held that "the Faretta standards must also be applied to waiver of counsel by a psychotic defendant." Id. at 894. The court then clarified the relevant standards:

The test for competency to stand trial is if the defendant has the capacity to understand the nature of the proceedings against him and to assist in his own defense. The standards for waiver of both an insanity plea and the right to counsel are (1) competency to stand trial and (2) a knowing and intelligent waiver with "eyes open", which includes an awareness of the dangers and disadvantages of the decision.

Id. at 895.

In reaching this conclusion, the court recognized that Faretta had limited the court's earlier holding in Kolocotronis:

While our holding in State v. Kolocotronis, 73 Wn.2d 92, 436 P.2d 774 (1968), that it is the responsibility of the trial court to determine a defendant's competency intelligently to waive the services of counsel and act as his own counsel, remained valid in the wake of Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975), *any consideration of a defendant's ability to "exercise the skill and judgment necessary to secure himself a fair trial" was rendered inappropriate by Faretta.*

Hahn, 106 Wn.2d at 890 n.2 (internal citations omitted, italics added).

There can thus be no uncertainty as to what the state of the law was in Washington after Faretta – trial courts were to ensure that a defendant was competent to stand trial and that any waiver of the right to counsel was knowing and intelligent. Once these standards were met, even a psychotic defendant's wish to represent himself must be honored.

The Supreme Court's decision in Edwards did not alter this law. The Indiana trial court had found Edwards, a schizophrenic who was suffering from delusions, competent to stand trial if represented by counsel, but not competent to represent himself. Edwards, 128 S. Ct. at 2381-83. On appeal, Edwards argued that, by refusing to allow him to represent himself, the trial court had violated his constitutional right under the Sixth Amendment to do just that. Id. at 2383.

The US Supreme Court framed the question as whether the Constitution "permits" a state to limit the self-representation right of a defendant who is competent to stand trial "by insisting upon representation by counsel at trial – on the ground that the defendant lacks the mental capacity to conduct his trial defense

unless represented." Id. at 2385-86. The Court concluded that such a limitation was permissible:

We consequently conclude that the Constitution *permits* judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution *permits* States to insist upon representation by counsel for those competent enough to stand trial under Dusky¹] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Id. at 2387-88 (italics added). Thus, Edwards did not *require* states to adopt the higher competency standard that the defendant now advocates, it simply *permitted* them to do so if they found such a standard appropriate under state law.

Our State Supreme Court reviewed all of these cases in its decision in PRP of Rhome, Washington State Supreme Court #83788-1. It summarized the state of the law in Washington at pages 9 and 10 of the slip opinion: "A defendant whose competency to stand trial has been questioned must knowingly and intelligently waive the right to counsel. Hahn, 106 Wn.2d at 893. In

¹ Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). This case defined the competency standard as including (1) whether the defendant has a rational as well as a factual understanding of the proceedings against him and (2) whether the defendant has sufficient present ability to consult

considering whether a defendant whose competency is in question is capable of making a knowing and intelligent waiver, a trial court considers the background, experience and conduct of the accused, which may include a history of mental illness. Kolocotronis, 73 Wn.2d at 99; Hahn, 106 Wn.2d at 900. The court may not, however, consider the defendant's "skill and judgment." Hahn, 106 Wn.2d at 890 n.2 [citation to Kolocotronis and Faretta omitted]."

The court summarizes the holdings at pages 11-12 of the slip opinion: "Read together, these three cases [Edwards, Hahn, and Kolocotronis] stand for the proposition that a defendant's mental health status is but one factor a trial court may consider in determining whether a defendant has knowingly and intelligently waived his right to counsel, but they do not require us to find that an independent determination of competency for self-representation is a constitutional mandate."

The court in Rhome leaves for another day the question of whether our State Supreme Court will modify the law in this state, and impose a heightened standard for waiver of counsel and pro se representation when there are mental health issues present.

with his lawyer with a reasonable degree of rational understanding. See Edwards, 128 S. Ct. at 2383.

Unless and until the State Supreme Court does so, this Court of Appeals is bound to follow the precedent detailed above.

- b. The New Rule That Defendant Seeks Would Run Afoul Of The High Level Of Protection For Personal Autonomy Found In Washington's Constitution.

Even if it were appropriate for this Court to announce a new rule of criminal procedure in this appeal, Washington law does not support the rule that defendant advocates. The respect for personal autonomy expressed in the Washington Constitution would likely prevent further limitation on the right to represent oneself at trial.

The Washington Constitution and the Federal Constitution differ in their approaches to the right of self-representation. The right to personally present one's defense at trial is not explicitly stated in the Sixth Amendment, but has been implied from the structure of the amendment.² Faretta, 422 U.S. at 819. By contrast, the Washington Constitution expressly guarantees the right of self-representation: "In criminal prosecutions the accused

² The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

shall have the right to appear and defend *in person, or by counsel* . . . " Const. art. 1, § 22 (italics added). See also State v. Silva, 107 Wn. App. 605, 27 P.3d 663 (2001) (undertaking Gunwall³ analysis and concluding that the Washington Constitution affords pro se defendants a greater right of access to the courts than does the Federal Constitution).

Long before Faretta, Washington courts affirmed a criminal defendant's state constitutional right to represent himself at trial. See State v. Hardung, 161 Wash. 379, 383, 297 P. 167 (1931) ("In this state, a defendant may conduct his entire defense without counsel if he so chooses . . . "); State v. Woodall, 5 Wn. App. 901, 903, 491 P.2d 680 (1971), review denied, 80 Wn.2d 1005 (1972) ("In this state, an accused has the right to appear and defend himself in person, or by counsel."). In addition, the Washington Supreme Court recently held, following a Gunwall analysis, that the Washington Constitution also guarantees a criminal defendant the right to represent himself on appeal. State v. Rafay, 167 Wn.2d 644, 222 P.3d 86 (2009).

compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

³ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Given the explicit protection of the right of self-representation in Washington's constitution, and the long history of recognition of this right by Washington's courts, it is unlikely that this state would countenance the limitation on this right that defendant seeks.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING THAT DEFENDANT'S WAIVER OF HIS RIGHT TO COUNSEL WAS KNOWING, VOLUNTARY AND INTELLIGENT.

Defendant contends that he did not knowingly, voluntarily and intelligently waive his right to be represented by an attorney. The record supports the conclusion that the trial court did not abuse its discretion in finding that he did.

A defendant who is competent to stand trial may waive the assistance of counsel if the waiver is made knowingly and intelligently. Hahn, 106 Wn.2d at 893. Whether there has been an intelligent waiver of counsel is an ad hoc determination that depends on the facts and circumstances of the case, including the background, experience and conduct of the accused. Id. at 900. This determination is within the discretion of the trial court. Id. The defendant bears the burden to show that his right to counsel was

not competently and intelligently waived. Id. at 901. See also PRP of Rhome, Washington State Supreme Court #83788-1.

A colloquy on the record is the preferred method for determining whether a waiver of counsel is valid. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). At a minimum, the record must reflect that the defendant understood the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of the defense. Id.

Both trial judges engaged in an appropriate and searching colloquy with defendant, and judge Frazier went so far as to have the defendant review an extensive written document as well. Just some of the warnings reviewed with the defendant included: t the court made sure that defendant understood the serious charge that he faced – Attempted Murder in the First Degree (three counts), as well as the maximum penalty upon conviction – life in prison. The court informed defendant that he could not expect help from the court, and that the trial would be conducted according to technical rules – the rules of evidence and the rules of criminal procedure. The court repeatedly and strongly advised Rhome that he would be better served by allowing an attorney to represent him at trial.

Knowing all this, defendant nevertheless assured the court that he wished to represent himself. The trial court did not abuse its discretion in allowing him to do so.⁴ This claim should accordingly be rejected.

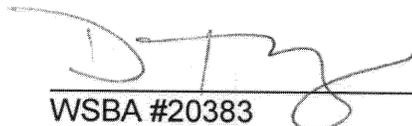
E. CONCLUSION

Under the case of PRP of Rhome, Washington State Supreme Court #83788-1, and the cases reviewed therein, this court should deny defendant's request to find that the trial court abused its discretion in finding a knowing and intelligent waiver of counsel.

DATED this 10 day of October, 2011.

Respectfully submitted,

Denis Tracy
Whitman County Prosecuting Attorney



WSBA #20383
Attorney for Respondent

⁴ Indeed, had the court not allowed defendant to exercise his constitutional right to represent himself under these circumstances, Rhome would have a colorable claim of reversible error. See State v. Breedlove, 79 Wn. App. 101, 110, 900 P.2d 586 (1995) (erroneous denial of defendant's motion to proceed pro se requires reversal without any showing of prejudice).

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7 IN THE COURT OF APPEALS, DIVISION III
8 IN AND FOR THE STATE OF WASHINGTON

9 STATE OF WASHINGTON,
10 Plaintiff,

Court of Appeals No. 290557-III
No. 09-1-00041-1

11 v.

AFFIDAVIT OF MAILING

12 LEWIS ADAM LAWRENCE,
13 Appellant,

14 STATE OF WASHINGTON)
15 COUNTY OF SPOKANE)

16
17 JENNIFER GRIFFIN, being first duly sworn, deposes and says as follows: That on **the 11th**
18 **day of October, 2011** I caused to be mailed in the United States Post Office at Colfax,
19 Washington, with postage fully prepaid thereon, a full, true and correct copy(ies) of the original
20 **SUPPLEMENTAL BRIEF OF RESPONDENT** on file herein to the following named person(s) at
21 the following address(es):

22
23 Lewis Lawrence
24 DOC # 340476
25 Washington State Penitentiary
26 1313 N 13th Ave
27 Walla, Walla, WA 99362

28 DATED this 10th day of October, 2011.

Jennifer Griffin

JENNIFER GRIFFIN

30 SIGNED before me this 10th day of October, 2011, by JENNIFER GRIFFIN.

31
32 *Kristina A Cooper*

NOTARY PUBLIC in and for the State of
Washington, residing at: Oakesdale
My Appointment Expires: 03-09-2015



AFFIDAVIT OF MAILING

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7 IN THE COURT OF APPEALS, DIVISION III
8 IN AND FOR THE STATE OF WASHINGTON

9 STATE OF WASHINGTON,
10 Plaintiff,

11 v.

12 LEWIS ADAM LAWRENCE,
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Court of Appeals No. 290557-III
No. 09-1-00041-1

AFFIDAVIT OF DELIVERY

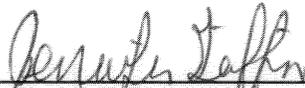
14 STATE OF WASHINGTON)
15 COUNTY OF SPOKANE)

16
17 JENNIFER GRIFFIN, being first duly sworn, deposes and says as follows: That on **10th day**
18 **of October, 2011**, I delivered, by way of electronic filing full, true and correct copy(ies) of the
19 original **SUPPLEMENTAL BRIEF OF RESPONDENT** on file herein to the following named
20 person(s):

21
22 Renee Townsley, Clerk/Administrator, Court of Appeals, Division III

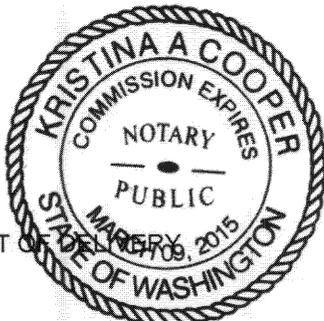
23
24 Marie Trombley at marietrombley@comcast.net.

25
26
27 DATED this 10th day of October, 2011.

28 
29 JENNIFER GRIFFIN

30 SIGNED before me on the 10th day of October, 2011, by JENNIFER GRIFFIN.

31
32 
33 NOTARY PUBLIC in and for the State
34 of Washington, residing at: Oakesdale
35 My Appointment Expires: 03-09-2015



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