

FILED

JUL 13 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29274-6-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

MARION SIMONE CLEARY

APPELLANT.

RESPONDENT'S BRIEF

**D. ANGUS LEE
PROSECUTING ATTORNEY
Carole L. Highland, WSBA #20504
Deputy Prosecuting Attorney
Attorney for Respondent**

**PO BOX 37
EPHRATA WA 98823
(509)754-2011**

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecuting Attorney, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asks that petitioner's motion for vacation of conviction and remand be denied as petitioner's claim of error is unsubstantiated and/or harmless.

III. ISSUE

Can petitioner establish that an unqualified juror sat on the jury that convicted her, and, if so, whether she received an unfair or biased trial?

IV. STATEMENT OF THE CASE

The appellant, Marion Cleary, was charged with five crimes arising out of an incident at the Wolf's Den Tavern in Grand Coulee, Washington on May 23, 2009 at approximately 3:20 a.m. Ms. Cleary was charged with the felony of unlawful imprisonment and the gross misdemeanor of assault in the fourth degree involving Ella Hale; the felony of intimidating a public servant involving Grand Coulee Police Officer Adam Hunt; the felony of assault in the third degree involving Grand Coulee Police Officer

Sean Cook; and the gross misdemeanor of obstructing a law enforcement officer for her conduct towards both officers. After trial and deliberations, Ms. Cleary was found guilty of only the latter two charges. CP 1-2, RP 4-8, 419-422.

Prior to *voir dire*, the State raised a concern that potential jurors numbers four, seven, and 28 had each indicated that they had been convicted of a prior felony, and asked that the court make some inquiry as to whether each man had had his rights restored to allow each of them to serve as jurors. RP 12.

Juror number four, Mr. Skinner, was brought in to the courtroom and asked whether he had been convicted of a felony, and whether he was still on DOC supervision. Mr. Skinner was surprised, and indicated that he had never been convicted of a felony. RP 15-17.

The Court then informed both counsel that juror number seven, Alan Butler, who was 68 years old, had checked off the box that he had been convicted of a felony, but then marked off “no” as to whether he was currently under Department of Corrections supervision. RP 18. The Court noted that juror number 28 had provided similar answers. *Id.*

The Court then asked both counsel whether it was necessary to bring either juror in to follow up with anything, and neither counsel made such a request. Both indicated that they were then ready to have the Court call in the jury as a whole. RP 19.

Juror number seven was chosen for the jury, while number 28 was not. RP 20.

V. ARGUMENT

A REVIEW OF THE TRANSCRIPT BELIES APPELLANT'S ASSERTION THAT MR. BUTLER WAS UNQUALIFIED TO SIT AS A JUROR, BUT ASSUMING *ARGUENDO* THAT HE WAS UNQUALIFIED, APPELLANT CAN MAKE NO SHOWING OF BIAS OR PREJUDICE.

RCW 2.36.070 sets out the requisite qualifications for a juror. In part, it states, (a) person shall be competent to serve as a juror in the state of Washington unless that person:

(5) Has been convicted of a felony and has not had his or her civil rights restored.

RCW 2.36.072 provides a mechanism by which the court may establish the qualifications of the potential pool, and allows each court to establish a process by which to make a preliminary determination of juror eligibility. In the instant case, the Court noted that the clerk's office had changed the follow up question to "have you ever been convicted of a

felony?” to “are you under DOC supervision?” from the previous follow up inquiry of “have your civil rights been restored?” RP 14. As noted earlier, juror number seven (who became juror number four when seated), answered in the affirmative to the conviction inquiry, and in the negative to the DOC supervision inquiry.

Our state constitution precludes felons from voting, but does not prevent felons from serving on juries. Const. art. VI, sec. 3. A person’s right to vote may be provisionally restored “as long as the person is not under the authority of the department of corrections.” RCW 29A.08.520. As there is no constitutional prohibition against felons serving on juries, the violation alleged by appellant is statutory in nature. The statutory provision of RCW 2.36.070 is declaratory in nature and may be waived by either party. *State v. Clark*, 34 Wash. 485, 76 P. 98 (1904). In *Clark*, the court held that neither party could take advantage of any disqualification of a juror unless that party had made a challenge for cause. As a statutory impediment, rather than a constitutional bar, any challenge to a possible felon sitting on Ms. Cleary’s jury had to have been affirmatively invoked by Ms. Cleary. That did not occur here. Counsel for Ms. Cleary was made aware of the potential issue and chose not to engage in further inquiry or to

raise a challenge for cause. His affirmative response to the court's inquiry was tantamount to an acceptance as to the qualifications of the chosen jury including Mr. Butler.

Appellant makes two unsupported assumptions in her challenge to the seating of Mr. Butler. First, she presents no indication or evidence that the court clerk, to whom the task was properly delegated under RCW 2.36.072, failed to accurately or properly vet the prospective pool. Secondly, she can present no indication or evidence that, if Mr. Butler were in fact a convicted felon, his answer that he was no longer on DOC supervision was incorrect or false. Since release from DOC supervision provisionally reinstates an individual's constitutional right to vote, it can be logically inferred that it would also reinstate an individual's statutory right to sit on a jury.

Due process clauses of both the United States Constitution and the Washington State Constitution guarantee every criminal the fundamental right to a fair trial. An impartial and unbiased jury is an essential right to a fair trial. This record lacks any indication that the presence of Mr. Butler on Ms. Cleary's jury led to any bias or prejudice to Ms. Cleary. The presiding juror was Mr. Sackmann, (juror number five in the box). RP 419.

Ms. Cleary was acquitted of three of the five counts with which she had been charged. RP 420-422. The fact that she was found guilty of some of the counts and acquitted of others is indicative of a thorough and thoughtful deliberation process on the part of the jury. Even if appellant's unsupported assumption that Mr. Butler were unqualified to serve were true, the courts have held that the presence of an unqualified felon on a jury where there is no showing of bias, is insufficient to overturn a jury's finding of guilt. *United States v. Bishop*, 264 F.3d 535 (5th Cir. 2001), *United States v. Humphreys*, 982 F.2d 254 (8th Cir. 1992). An allegation of bias harmful to the appellant based on the inclusion of a felon on appellant's jury must be more than speculative, it must be a "demonstrable reality." *United States v. Uribe*, 890 F.2d 554 (1st Cir. 1989). There is nothing in the record before this court which would support the inference that if a specific juror's qualifications were flawed, it affected either the verdict or prevented Ms. Cleary from receiving a fair trial. Having not raised the issue below when it could have been cured, it now comes too late after acceptance of the jury and the verdict and is analogous to invited error. In *Companiononi v. City of Tampa*, 958 So.2d 404 (Fla. App. 2007), a civil case, two of the jurors had failed to disclose prior felonies. The court

differentiated a situation in which the parties were aware of a potential fact which could disqualify a juror and chose not to exercise a timely challenge. In those instances, the court found that the absence of a timely challenge constituted a waiver of a later complaint. *Companioni*, at 409.

In *Bishop*, a juror, who was mistaken about her conviction status, had answered her questionnaire incorrectly. The court stated that “in order to obtain a new trial, the moving party must demonstrate that a juror failed to answer a voir dire question honestly, and that a correct response would have been a valid basis for a challenge for cause.” *Bishop* at 264 F.3d at 554 (internal citations omitted). If it can be inferred that Mr. Butler answered the first question correctly, i.e., have you ever been convicted of a felony?, it can also be inferred that Mr. Butler answered the second question regarding DOC supervision correctly. Furthermore, it is hard to imagine how a different response to either question would have been a basis for a challenge for cause.

VI. CONCLUSION

Based upon the foregoing, the State respectfully requests this Court deny Petitioner’s motion for vacation and remand and uphold the jury’s

guilty verdicts against Marion Cleary for the crimes of Assault in the Third Degree and Obstructing a Law Enforcement Officer.

DATED THIS 12th day of July, 2011.

Respectfully submitted:

D. ANGUS LEE, WSBA #36473
Grant County Prosecuting Attorney



Carole L. Highland, WSBA #20504
(Deputy) Prosecuting Attorney