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Jan 04, 2013
Court of Appeals
Division III
State of Washington

30220-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JONA R. ZEIGLER, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF GRANT COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

Citing State v. Fanger, 34 Wn. App. 635, 636, 663 P.2d 120 (1983), the State suggests that if counsel may waive a hearing under CrR 3.5, then it must follow that counsel may similarly waive her client's presence at such a hearing. Resp. Br. at 10-11. The State cites no authority for this assertion, but argues that if counsel may waive the hearing itself, then counsel may waive her client's right to be present.

But as the State recognizes, the hearing itself is a procedure, not itself a constitutional requirement, and thus the tactical decision to waive is appropriately provided to counsel. The defendant's right to be present at any evidentiary hearing is, however, a right protected by the constitution, and personal to the defendant. *United States v. Gordon*, 829 F.2d 119, 125 (D.C.Cir.1987). The State cites no authority for the proposition that counsel may waive this right on behalf of her client.

The State further argues that because issues of guilt or innocence are not before the court at a suppression hearing, it is not truly a hearing requiring the resolution of disputed facts. Resp. Br. 14-15. The State cites no cases in support of this assertion, one which ignores the reality that a judge, upon hearing the evidence presented at the hearing, must resolve disputed facts, and apply the law to the facts so found, in order to determine what evidence will be presented to the jury that will ultimately resolve the issue of guilt.

The defendant's right to be present is not limited to the trial of the evidence of guilt, but to every hearing at which her presence has some substantial relationship to the "opportunity to defend against the charge." *In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (quotations omitted), *clarified by* 123 Wn.2d 737, 870 P.2d 964 (1994); *accord State v. Corbin*, 79 Wn. App. 466, 449, 903 P.2d 999 (1995). *Lord* does not support the State's assertion that a defendant's ability to provide useful information to counsel during a suppression hearing is not reasonably related to the fairness of the hearing or her ability to defend herself.

Finally, the State contends that any error was harmless beyond a reasonable doubt because, based on the evidence presented at the hearing, at which Ms. Zeigler was not present, there was no basis for excluding the statements. Resp. Br. 17.

The defense theory of the case, based on Ms. Zeigler's testimony, was that she did not know she was being pursued. Her alleged statements to the officers, suggesting that she intended to run if the officer tried to detain her, was perhaps the strongest evidence undermining her defense. The court's ruling, finding those statements admissible, based on the uncontested statements of the officers at a hearing from which Ms. Zeigler was absent, prejudiced her defense. The State has not carried its burden of showing that the violation of her right to be present and to testify at the suppression hearing was harmless beyond a reasonable doubt.

B. CONCLUSION

This conviction should be reversed and the matter remanded for a suppression hearing at which Ms. Zeigler is afforded an opportunity to exercise her constitutional right to be present at a critical stage of the proceedings against her.

Dated this 4th day of January, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30220-2-III
)	
vs.)	CERTIFICATE
)	OF MAILING
JONA R. ZEIGLER,)	
)	
Appellant.)	

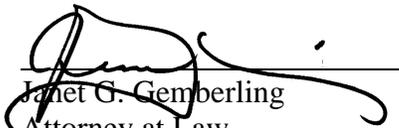
I certify under penalty of perjury under the laws of the State of Washington that on January 4, 2013, I served a copy of the Appellant's Reply Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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Signed at Spokane, Washington on January 4, 2013.


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