

NO. 34814-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

STEPHEN JACKSON,

Respondent / Cross-Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR ASOTIN COUNTY

The Honorable Ray Lutes, Judge  
The Honorable Scott Gallina, Judge

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REPLY BRIEF OF RESPONDENT / CROSS APPELLANT

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A. ARGUMENT IN REPLY

THE BOND ORDER, ENTERED AT A HEARING WHERE JACKSON WAS DENIED HIS STATUTORY AND RULE-BASED RIGHT TO COUNSEL, IS INVALID AND CANNOT BE USED TO CONVICT HIM OF BAIL JUMPING.

In his opening brief, Jackson established he has a statutory and rule-based right to counsel at the initial bail hearing, pointing to RCW 10.21.060(1) and CrR 3.1(b). Br. of Cross-Appellant, 10-11. In response, the State claims RCW 10.21.060 “applies only to detention hearings in capital cases and crimes punishable by the possibility of life in prison as authorized in Article I, Section 20 of the Washington Constitution.” Br. of Cross-Resp’t, 11. Even a cursory look at the constitutional and statutory provisions reveal the State is wrong.

Article I, section 20 guarantees the right to bail “by sufficient sureties” for “[a]ll persons charged with crime . . . except for capital offenses when the proof is evidence, or the presumption great.” The provision further specifies bail may be denied for those charged with offenses punishable by life imprisonment “upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons.” CONST. art. I, § 20. Thus, the constitutional provision applies broadly to all those charged with a crime, with explicitly

carved-out exceptions to bail in capital and life imprisonment cases. The provision is nowhere limited only to the latter.

RCW 10.21.060(1) then specifies a bail hearing must be held “in cases involving offenses prescribed in Article I, section 20, to determine whether any condition or combination of conditions will reasonably assure the safety of any other person and the community upon motion of the attorney for the government.” The offenses prescribed in article I, section 20 are all crimes except capital and life imprisonment offenses, to which a different standard applies. Neither the statute nor the constitutional provision are as limited as the State suggests.

In fact, RCW 10.21.060 would essentially be rendered superfluous under the State’s position, because the constitutional provision sets a higher standard for obtaining bail in capital and life imprisonment cases. See State v. Barton, 181 Wn.2d 148, 152-53, 331 P.3d 50 (2014) (noting article I, section 20 “make[s] bail more difficult to obtain for a person awaiting trial for a crime that would be punishable by life in prison.”). The logical conclusion is, then, that the statutory standard applies to all other offenses—the opposite of what the State argues.

Chapter 10.21 RCW was enacted by the legislature in 2010. The legislature’s express intent with the new enactment was “to require an individualized determination by a judicial officer of conditions of release for

persons in custody for felony,” consistent “with constitutional requirements and court rules.” Laws of 2010, ch. 254, § 1 (emphasis added). Jackson was held in custody on suspicion of felony offenses when the trial court held the initial bail hearing. Pursuant to the legislature’s intent, RCW 10.21.060(1) guarantees the right to counsel at that hearing “for persons in custody for felony,” like Jackson.

The State then faults Jackson for failing to object to the deprivation of his statutory right to counsel at the bail hearing: “He did not raise any concern regarding the deprivation of counsel at the bond hearing. His only objection lodged was to the amount and form of the bond which was addressed by the court at his arraignment.” Br. of Cross-Resp’t, 11. The State’s position puts unrepresented defendants in an impossible catch-22.

Under the State’s theory, a trial court could impermissibly deny a defendant his or her right to counsel, then that individual would be precluded from challenging the trial court’s clearly erroneous decision on appeal because he or she failed to object. Deprivation of the statutory right to counsel would be entirely insulated from appellate review.

Moreover, pro se litigants are held to the same standard as lawyers only *after* a knowing, intelligent, and voluntary waiver of their right to counsel. State v. Bebb, 108 Wn.2d 515, 524-26, 740 P.2d 829 (1987); see also State v. Vermillion, 112 Wn. App. 844, 852, 856-58, 51 P.3d 188

(2002) (holding defendant made a knowing and intelligent request to proceed pro se where, in part, he understood he would “be held to the same standard as a lawyer”).

The trial court and this Court have no way of knowing whether Jackson understood “the existence of technical procedural rules,” which is one of the minimum requirements for a knowing and intelligent waiver of the right to counsel. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). Without a valid waiver of his right to counsel, Jackson cannot be held to the same standard as an attorney, who would be expected to object to a clearly erroneous, harmful ruling. Jackson therefore cannot be faulted for failing to object to the denial of his right to counsel at the bail hearing.

Analogous case law further demonstrates Jackson’s failure to object does not preclude him from raising the issue on appeal. For instance, individuals subject to civil commitment under chapter 71.05 RCW have a statutory right to counsel at multiple stages of the commitment process. In re Det. of T.A.H.-L., 123 Wn. App. 172, 179, 97 P.3d 767 (2004). “The due process protection of the right to counsel articulated in chapter 71.05 RCW is meaningless unless it is read as the right to effective counsel.” Id. The same is true of the statutory right to counsel in sexually violent predator commitment proceedings, chapter 71.09 RCW: “The right to counsel is

meaningless unless it includes the right to effective counsel.” State v. Ransleben, 135 Wn. App. 535, 540, 144 P.3d 397 (2006).

In both contexts, involuntarily committed individuals can raise ineffective assistance of counsel claims for the first time on appeal, even though the right to counsel is only a statutory one. In re Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009) (applying Strickland standard in chapter 71.09 RCW case); T.A.H.-L., 123 Wn. App. at 179-81 (applying Strickland standard in chapter 71.05 RCW case); see also In re Dependency of A.J., 189 Wn. App. 381, 402-04, 357 P.3d 68 (2015) (holding reversal of a dependency order was justified based on violations of the mother’s statutory procedural rights, challenged for the first time on appeal).

Thus, due process of law requires a promised statutory right to be meaningful. In the contexts discussed above, the statutory right to counsel means the right to *effective* counsel, and so the constitutional standard applies. Due process likewise necessitates the constitutional standard apply to the denial of the statutory right to counsel. See Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) (“[A] party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.”). The statutorily guaranteed right to counsel at an initial bail hearing is meaningless if a defendant can waive that right without knowingly and voluntarily doing so.

The State next asks this Court to engage in harmless error analysis, arguing “[t]he only potential prejudice that could possibly be shown would be regarding the amount of surety, but this was not argued nor can it be shown to have had any impact on the outcome of the case.” Br. of Cross-Resp’t, 12. The State likewise, without citation, points to “the fallacy of Mr. Jackson’s claim that the bond order itself is somehow void.” Br. of Cross-Resp’t, 13. But the State fails to address or even acknowledge State v. Milton, 160 Wn. App. 656, 252 P.3d 380 (2011), which Jackson relied on to preemptively rebut this very point. Br. of Cross-Appellant, 18-19; In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) (“Indeed, by failing to argue this point, respondents appear to concede it.”).

Milton controls the outcome in this case. CrR 3.1(b)(2) guarantees criminal defendants the right to counsel “at every stage of the proceedings,” including restitution hearings. Milton, 160 Wn. App. at 659. In Milton, the trial court held a restitution hearing and entered restitution orders without Milton’s attorney present. Id. at 658. Milton had waived his right to be present and so did not object at the hearing, but challenged the deprivation of counsel on appeal. Id. The State argued the court of appeals should not reverse unless Milton demonstrated prejudice. Id. at 659. The court refused the State’s invitation to apply the harmless error standard. Id. Instead, the court vacated the restitution orders, without any consideration of prejudice,

because Milton was denied his rule-based right to counsel at the restitution hearing. Id.

Milton stands for multiple propositions. First, denial of the statutory or rule-based right to counsel is reviewable for the first time on appeal. Second, courts do not apply the harmless error standard when a defendant is denied the right to counsel. And, third, an order entered at a hearing where a defendant is denied his or her right to counsel is void. The State has not argued or demonstrated these principles do not apply with equal force in Jackson's case.

Finally, the State argues Jackson cannot now attack the validity of the bond order under the "collateral bar rule," because the trial court had jurisdiction to enter the order. Br. of Cross-Resp't, 19-20. The collateral bar rule applies in contempt proceedings: "a court order cannot be collaterally attacked in contempt proceedings arising from its violation, since a contempt judgment will normally stand even if the order violated was erroneous or was later ruled invalid." State v. Coe, 101 Wn.2d 364, 369-70, 679 P.2d 353 (1984). But this case does not involve a contempt proceeding. The State cites no authority holding that the collateral bar rule applies to criminal proceedings. See Br. of Cross-Resp't, 19-20.

The Washington Supreme Court has already refused to apply the collateral bar rule in other contexts. In City of Bremerton v. Widell,

defendants Widell and Blunt were convicted of second degree trespass for violating a notice of trespass issued by the Bremerton Housing Authority. 146 Wn.2d 561, 564, 51 P.3d 733 (2002). That notice prohibited the defendants from accessing a certain public housing development. Id. at 566. The City of Bremerton argued that, like a criminal contempt proceeding, the validity of the notice of trespass could not be raised at the criminal proceeding. Id. at 568-69. The court rejected the City's argument, holding that "[w]hether the antitrespass policy may serve to exclude the Petitioners is far from a collateral matter or procedural complaint." Id. at 569-70. The court went on to analyze whether the State had met its burden to disprove the defenses that the defendants' entrance was lawful. Id. at 570-74.

Violation of a court order cases provide a more apt analogy to Jackson's case. Similar to bail jumping, the State must prove a no-contact order applied to the defendant to convict the defendant of misdemeanor or felony violation of a court order. RCW 26.50.110(1)(a), (4), (5). In State v. Miller, the Washington Supreme Court has held the validity of the no-contact order is not an element of the crime. 156 Wn.2d 23, 31, 123 P.3d 827 (2005).

However, the Miller court also recognized "issues relating to the validity of a court order . . . are uniquely within the province of the court." Id. The court referred to these issues as relating to the "applicability" of the

order to the charged crime: “An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order.” Id. Thus, the trial court, as part of its gate-keeping function, should determine whether the order alleged to be violated is applicable and will support the charged crime. Id. “Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed.” Id.

In other words, “invalid or deficient orders are properly excluded” in criminal cases. Id. at 32. The November 30, 2015 bond order was entered followed a hearing at which Jackson was denied his right to counsel because the trial court did not ensure he made a knowing, intelligent waiver of that right. Under Milton, that bond order is invalid and should have been excluded at Jackson’s bail jumping trial.

Jackson maintains there is insufficient evidence to convict him of bail jumping because lack of counsel contaminated the entire bail hearing. Br. of Cross-Appellant, 19-20. Even if this Court disagrees, a new trial is necessary because the bond order was crucial evidence that Jackson had been released pursuant to a court order. RCW 9A.76.170(1). The jury may well have doubts about this essential element of the offense without the bond order in evidence.

B. CONCLUSION

For the reasons articulated here and in the brief of cross-appellant, this Court should dismiss Jackson's bail jumping conviction.

DATED this 16<sup>th</sup> day of August, 2017.

Respectfully submitted,

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