

FILED
Court of Appeals
Division III
State of Washington
1/23/2020 2:38 PM

No. 36552-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

LANCE THEOPOLIS SMITH,

Appellant

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

NO. 17-1-01370-0

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Terry J. Bloor, Deputy
Prosecuting Attorney
BAR NO. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. RESPONSE TO ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF FACTS1

III. ARGUMENT10

 A. The trial court did not abuse its discretion when it terminated the defendant’s right to represent himself.....10

 1. Standard on review10

 2. The trial court did not abuse its discretion in deciding that the defendant’s conduct forfeited or waived his right to self-represent.....12

 B. The trial court did not abuse its discretion by denying the defendant’s motions to reconsider the decision that he waived his right to self-representation by his conduct.....14

 1. Standard on review14

 2. The trial court did not abuse its discretion in reversing the decision to terminate the defendant’s pro se status15

IV. CONCLUSION.....17

TABLE OF AUTHORITIES

WASHINGTON CASES

City of Tacoma v. Bishop, 82 Wn. App. 850, 920 P.2d 214 (1996)11
State v. Afeworki, 189 Wn. App. 327, 358 P.3d 1186 (2015).....7, 11
State v. Condon, 72 Wn. App. 638, 865 P.2d 521 (1993).....13
State v. Englund, 186 Wn. App. 444, 345 P.3d 859 (2015)..... 14-15
State v. Kolocotronis, 73 Wn.2d 92, 436 P.2d 774 (1968)7, 12
State v. Lawrence, 166 Wn. App. 378, 271 P.3d 280 (2012)16
State v. Madsen, 168 Wn.2d 496, 229 P.3d 714 (2010)12, 16
State v. Thompson, 169 Wn. App. 436, 290 P.3d 996 (2012).....7, 11

FEDERAL CASES

United States v. Goldberg, 67 F.3d 1092, 1100 (3rd Cir. 1995).....11

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court appropriately withdrew the defendant's right to represent himself.

II. STATEMENT OF FACTS

Procedural History: The defendant was allowed to represent himself, which resulted in a mistrial on March 12, 2018 because the defendant infuriated the jury.

The defendant was arraigned on December 14, 2017 and requested an attorney. RP 12/14/2017 at 6. He soon started requesting the opportunity to represent himself. RP 01/04/2018 at 3; RP 01/12/2018 at 9. The Court ordered a competency examination under RCW 10.77 on January 25, 2018. RP 01/25/2018 at 2. That competency examination resulted in a finding that the defendant was competent to stand trial. RP 01/04/2018 at 13. The Court then allowed the defendant to proceed pro se with a standby attorney appointed. *Id.* at 16, 18. Trial was set for March 12, 2018. *Id.* at 18.

On March 12, 2018 the Court advised the defendant that he may lose his right of self-representation if he is disrupted the court or did not follow the court's instructions. RP¹ at 39. The Court again warned him

¹ Unless otherwise indicated, "RP" refers to the Verbatim Report of Proceedings for the Motion Hearings, Jury Trials, and Sentencing Hearing taking place on March 7, 2018, March 12, 2018, October 24, 2018, and January 7-10, 2019.

that he could lose his right of self-representation after he used a laptop computer to email Ms. Bonneru. *Id.* at 56, 80.

Problems arose when the defendant began voir dire.

The defendant began with a two-page monologue wherein he asked one question: “Does anybody kind of want to be here or is interested in this trial, raise your hand?” RP 03/12/2018 at 61. He also said, “Raise your hand if you like me. No one likes me. Okay. That felt really good. All right.” *Id.* at 61-62.

He again asked, “Who doesn’t want to be here really, really bad?” *Id.* at 62. A number of potential jurors raised their hands, including Juror No. 30. *Id.* The defendant again asked, “(Juror) 30, why don’t you want to be here?” *Id.* at 63. Juror 30 answered, “I think your conduct and decision to represent yourself has put you at a disadvantage to prove your own innocence” *Id.* Juror 30 stated that the defendant had made such a bad impact on him that he could not be fair. Juror 30 was excused. *Id.*

However, many jurors agreed with that sentiment. Juror 43 said, “My thoughts (are) exactly with 30. Your decision might have been a bad one.” He was excused. *Id.* at 64. The next juror to speak, Juror 45, said, “I echo 43.” He was excused. *Id.* at 65. The next juror to speak was Juror 15, who said, “I echo Juror 30 as well. I can’t believe that you are representing yourself.” *Id.* She was excused. *Id.* at 67.

The defendant seemed to try to regroup: “I am just kind of burning up 20 minutes. I am just kind of making this up as I go. . . . I am winging this. I am just trying to, you know, win the favor of my jury a little bit, you know, make you guys appreciate me a little bit. I mean, what can I tell you about myself? I have had a great life and a really rough life” *Id.*

At this point, the prosecutor objected and stated that the defendant should ask questions. *Id.* That objection was sustained. *Id.* at 68.

The defendant began asking questions that, if coming from a licensed attorney, would be considered bizarre. “[H]ow familiar are you with the courtroom? How many times have you come to court before?” *Id.* He used the answer to state, “I am a very honest person, a very good person.” *Id.*

He next asked, “Number 8, what is the most famous attorney that you have ever heard of?” *Id.* at 68-69. This caused Juror 33 to ask to address the Judge. Juror 33 said, “I am concerned whether the defendant is of a sound mind the way this is proceeding and I just wanted to bring that to your attention.” *Id.* at 69.

The following colloquy occurred:

Mr. Smith: Does that mean you are excited to be here or not excited to be here? Because a lot of people will look at this both ways.

This is—I am either really entertaining—I either come off as a genius and really entertaining or really irritating and completely mental.” *Id.*

Juror 33: Our time is really valuable and it feels like you are not taking that into account. *Id.* at 69-70.

Mr. Smith: No. I am 100 percent. And like I said, I have really great appreciation for life. And in every moment I am at I stick out wherever I am as having more fun than everybody else. I don’t do that on purpose. It’s just naturally who I am. I am a skater. *Id.* at 70.

Juror 33: If you don’t have important questions to ask the jury I would request that you move ahead so we can complete this session. *Id.*

Mr. Smith: I actually asked someone and they said they wanted to hear what I had to say. So I mean, I guess at this point I feel that you may not want to be on the jury. *Id.*

Juror 33: I am happy to serve. *Id.*

Mr. Smith: Okay. *Id.*

Juror 33: However, as long as we are moving ahead as rapidly as possible and not just talk about yourself but try to pick a jury that’s going to serve what you think is best for you. *Id.*

Mr. Smith: Well, what I am trying to do is make the jury like me, because if the jury likes you then at the end of the trial they will give you an innocent plea rather than a guilty one. *Id.*

Juror 33: I am more concerned about making a good judgment, not about liking you or not. *Id.*

The defendant moved on but did not heed Juror 33's advice because his next questions was, "(Juror) Number 9, are you excited for St. Patrick's Day?" *Id.* at 71. When the response was "Not really," the defendant replied that he hoped he would be out of jail because he liked corned beef. *Id.*

The defendant continued asking irrelevant questions when he next asked, "(Juror) Number 10, do you like the way our government is being ran right now?" *Id.* And, "(Juror) Number 1, do you think it's cool or not cool that the Bible is no longer in our courtroom?" *Id.* at 72. And, "(Juror) Number 2, is it springtime right now? I have been locked up for two months." *Id.* at 73.

He then asked three more jurors what they thought of the current government. *Id.* This prompted Juror 36 to state, "Mr. Smith, I am concerned about your ability to represent yourself. You are off topic. . . . [Y]ou don't seem to be aware of what time of year it is, and I don't think I can be fair because I don't think you have the capability to represent yourself." *Id.*

The trial judge then asked the bailiff to escort the jury pool from the courtroom. *Id.* at 74. The Judge noted that two jurors had expressed a

concern about the defendant's competency and ability to represent himself. The defendant told the jury that he was incarcerated and was asking repetitive questions. *Id.* The court could have also noted the reluctance of Juror No. 33 to participate, as well as Jurors 30, 43, 45, and 15 being excused because they felt they could not be fair to the defendant.

The Judge concluded that the defendant's behavior had created a situation where the jury would not be fair to him and declared a mistrial. *Id.* at 76. The Judge further concluded that there was no reason to believe that the defendant could successfully pick a jury. *Id.* The Judge continued the case two days, to March 14, 2018 to reset the trial date and to readdress whether the defendant should continue to represent himself. *Id.* at 77.

March 14, 2018: Trial Judge concludes that the defendant's right to self-representation should be withdrawn.

On March 14, 2018, the Judge reported that the jurors were dismayed at the defendant's behavior when he debriefed them after he declared the mistrial. RP 01/12/2018 at 38-39. The Judge also noted that the nonverbal conduct of the defendant, including gestures, resulted in the jury becoming unresolvedly tainted against him. *Id.* at 32-33.

The court noted the defendant's consistent pattern of being unable to keep from acting out, which made it impossible for the defendant to

represent himself. *Id.* at 40. That pattern was evident in the hearing on this date. He wanted the Judge to refer to him as “Attorney Smith.” *Id.* at 31. He tried to question the Judge about whether he made a mistake, gave contempt, or broke the law. *Id.* at 32. He challenged the Judge to “speak honestly” and “be honest and fair.” *Id.* at 33. He wanted the Judge to demonstrate the gestures the defendant made to the jury. *Id.* at 34. He claimed that his voir dire was “really genius.” *Id.* He accused the Judge of having a grudge against him and of perjury. *Id.* at 35, 38.

The Judge stated he reviewed several cases, including *State v. Afeworki*, 189 Wn. App. 327, (2015), *State v. Thompson*, 169 Wn. App. 436 (2012), and *State v. Kolocotronis*, 73 Wn.2d 92 (1968), and denied the defendant the right to continue to represent himself. RP 01/12/2018 at 29, 40, 44.

Trial on January 7, 2019: The defendant is removed to a media room where he could see and hear the proceedings.

The case was called for trial on January 7, 2019. RP at 96. The defendant was represented by Ms. Ajax. RP at 97. Nevertheless, the Court had lengthy colloquies with the defendant in which he stated that he was not ready for trial, *Id.*, requested that he be allowed to represent himself, RP at 99, accused the Judge of committing a crime and said the Judge would be in trouble with the United States Army and with Congress, RP at

101, 124, and called his attorney a fraud, RP at 122. The trial judge warned him that he could be removed from the courtroom if he continued to disrupt the proceedings. RP at 102.

The jury pool was brought in for voir dire shortly thereafter. RP at 125. During the voir dire, the defendant said, “For the record, Attorney Ajax, you are fired because you don’t listen to me and you are jeopardizing my innocence.” RP at 161. The court called a recess and as the jurors were being escorted out of the courtroom, the defendant said, “Keep that in mind jurors. . . . As you are leaving, she does not represent me.” *Id.*

As a result, the defendant was removed to a media room where he could see and hear the proceedings. RP at 169. There were no further interruptions or outbursts.

Substantive facts from trial: The defendant was a server at a restaurant in Richland in 2010. RP at 238. Jennifer Bonneru was a bartender at that restaurant. RP at 237. They never dated or had a romantic relationship. RP at 239.

For whatever reason, the defendant developed an obsession with Ms. Bonneru. The defendant began writing lengthy letters to her. RP at 243. She asked him to stop, but he continued. RP at 241, 243. One time her car broke down near Biggs, Oregon. She had so many incoming text

messages from the defendant that she could not call a tow truck. RP at 242.

He posted messages for her on Facebook. RP at 249. He sent letters to her place of employment. RP at 250. He threatened her ex-boyfriends. *Id.* He contacted her sister and mother. *Id.* She estimated that she had received hundreds of letters from the defendant. RP at 253. He would sometimes send 3-4 letters a day, some over 17 pages long. RP at 280. On one text he wrote, "I feel like hurting you and every living thing around you." *Id.* His constant efforts to contact Ms. Bonneru affected her and everyone around her. RP at 250-51. He sent a package to her apartment. RP at 255.

He continued to contact her regardless of Ms. Bonneru obtaining a No Contact Order. RP at 244. He was twice convicted of Violation of a No Contact Order. Ex. 1; RP at 246.

Count I involved a series of letters, packages, and Facebook messages the defendant sent to Ms. Bonneru from September 23, 2017 to December of 2017. See RP at 252, 254, 264. He wrote her a letter postmarked September 23, 2017 to her place of employment. Ex. 5; RP at 252. He wrote her two letters to her apartment. Ex. 6, 7; RP at 253-54. On October 25, 2017, he sent her a package to an old address. RP at 254-55. He sent her Facebook messages in December 2017. RP at 264.

Count II involved an in-person contact on January 10, 2018. Ms. Bonneru was out at a bar with friends, including Breanna Watts, celebrating Ms. Watts' birthday. RP at 265, 283. The police found the defendant about 50 yards from the bar. RP at 327. He told a police officer that he just happened to see Ms. Bonneru at the bar and waived at her. *Id.* The defendant repeats that version in his brief without mentioning the testimony from other witnesses. Br. of Appellant at 4.

Those other witnesses include Ms. Bonneru, who saw the defendant knocking on the glass window of the bar and waving frantically, trying to get her attention. RP at 266. Ms. Watts saw the same and told him to leave. RP at 285. The defendant did not leave, but circled around the building, and crossed the sidewalk. RP at 285-86. Ms. Watts called the police when the defendant kept pacing back and forth, staring at the bar. RP at 286.

III. ARGUMENT

A. **The trial court did not abuse its discretion when it terminated the defendant's right to represent himself.**

1. **Standard on review:**

The issue in this case is not whether the defendant properly requested in an unequivocal and timely manner that he represent himself. His request was both timely and unequivocal. The trial court used its discretion in granting his request for self-representation on February 15,

2018. The defendant's emphasis of his unequivocal and timely requests to represent himself are a red herring. The issue is, once the trial court granted the defendant's request for self-representation, did the trial court properly deem the defendant's conduct as being a forfeiture or waiver of that right?

A defendant may lose his or her right to counsel through forfeiture or waiver by conduct. *State v. Afeworki*, 189 Wn. App. 327, 345, 358 P.3d 1186 (2015). A court may find that a defendant has forfeited his right to counsel after having engaged in extremely dilatory conduct or extremely serious misconduct. *Id.* Further, there is a middle ground between forfeiture and waiver, waiver by conduct. *United States v. Goldberg*, 67 F.3d 1092, 1100 (3rd Cir. 1995). "Waiver by conduct" requires that the defendant be warned about the consequences of his actions, including the risks of proceeding pro se, and can be based upon conduct less severe than that constituting forfeiture. *City of Tacoma v. Bishop*, 82 Wn. App. 850, 859, 920 P.2d 214 (1996). It is insufficient to deny pro se status if the defendant is obnoxious or would cause difficulty in the administration of justice. *State v. Thompson*, 169 Wn. App. 436, 468, 290 P.3d 996 (2012).

Past mental illness is not determinative of a defendant's present mental competency to conduct his own defense; however, a past history of serious mental illness is a factor which must be given considerable weight

in determining a defendant's present condition. *State v. Kolocotronis*, 73 Wn.2d 92, 102, 436 P.2d 774 (1968).

On review, a trial court's decision with respect to issues of self-representation is reviewed for abuse of discretion. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

2. The trial court did not abuse its discretion in deciding that the defendant's conduct forfeited or waived his right to self-represent.

The defendant has not assigned error to the trial court's decision to declare a mistrial after the defendant's attempted voir dire on March 12, 2018. The trial court was correct that the defendant had infuriated the jury. Almost all of the jurors the defendant spoke to individually concluded that they could not sit on the jury.

For example, the first three jurors the defendant spoke to individually are numbers 30, 43 and 15. Juror 30 said he could not be fair to the defendant and was excused for cause. RP 03/12/2018 at 63. Juror 43 said the same and was excused. RP at 64. Juror 15 said she could not believe she was trying to represent himself, that she could not be fair and was excused. *Id.* at 65-66.

He asked inane questions of Jurors 7 and 8. ("How familiar are you with the courtroom," and "What is the most famous attorney that you have ever heard of?" *Id.* at 68-69). Juror 33 then told the Judge that he was

concerned about the defendant's mental state. *Id.* at 69. He went back to asking inane questions ("Are you excited for St. Patrick's Day?" *Id.* at 71. "Do you like the way our government is being ran right now?" *Id.*). Juror 36 then stated that he/she was concerned about the defendant's ability to represent himself. *Id.* at 73.

The trial court called a recess and noted the defendant had referred to being locked up and hoping to be released. This information would be kept from the jury for the defendant's benefit; a jury might conclude that the defendant is dangerous because a court found it necessary to incarcerate him pretrial. *State v. Condon*, 72 Wn. App. 638, 649-50, 865 P.2d 521 (1993).

More importantly, the salient things about the defendant's voir dire was how he infuriated most individuals he spoke to and how many jurors took the initiative to express their concerns to the Judge. The trial judge found it necessary to declare a mistrial in order to protect the defendant's right to a fair trial.

The necessity for a mistrial was confirmed when the trial judge had an exit interview with the jury panel. The Judge on March 14, 2018, stated that the jury was dismayed by the defendant's behavior. RP 01/12/2018 at 38-39. The court also noted the jury was upset by gestures the defendant made. *Id.* at 33.

The trial judge correctly analyzed the situation citing *Thompson*, *Kolocotronis*, and *Afeworki*. *Id.* at 29. The trial judge did not abuse his discretion in terminating the defendant's right to self-representation.

The defendant is incorrect in claiming that the "trial court's primary concern was the perceived inability to efficiently choose a jury and the 'orderly administration of justice.'" Br. of Appellant at 21. The trial court's stated reason for terminating the defendant's pro se status was a concern for the defendant's fair trial and the trial judge correctly analyzed the law. There is no reason to doubt the Judge's sincerity and no reason to doubt that the defendant was completely unable to select a jury without infuriating the entire panel.

The trial court did not abuse its discretion in terminating the defendant's right to self-representation.

B. The trial court did not abuse its discretion by denying the defendant's motions to reconsider the decision that he waived his right to self-representation by his conduct.

1. Standard on review:

A motion to reconsider the denial of a defendant's right to proceed pro se is reviewed for abuse of discretion. *State v. Englund*, 186 Wn. App. 444, 459, 345 P.3d 859 (2015). A trial court does not abuse its discretion by relying on its previous encounters with a defendant to deny the motion

to self-represent and by refusing to engage in a further colloquy on the subject. *Id.* at 459-60.

2. The trial court did not abuse its discretion in reversing the decision to terminate the defendant's pro se status.

The defendant had an opportunity to represent himself and infuriated the jury panel against himself. Under *Englund*, the trial court did not have to reconsider its decision. There was nothing the defendant did between the mistrial on March 12, 2018 to the verdict in his trial on January 8, 2019 to relieve the trial court's concerns.

The defendant wrote several letters to the court and they were received on November 19, 2018, November 29, 2018, November 28, 2018 and November 26, 2018². Those letters might answer any question about whether the defendant's mental status had improved from March 12, 2018.

The behavior of the defendant in court probably increased concerns that he would be unable to conduct voir dire without infuriating the potential jurors. On April 11, 2018, the defendant asked the Judge if he was familiar with "mutual combat," said the Judge "would be subpoenaed to mutual combat with me by the State of Washington." RP 01/12/2018 at 54. On November 5, 2018, the defendant was removed from the court after a series of interruptions. RP 07/25/2018 at 23. On December 19, 2018 the

² Clerk's subnumbers 108, 119, 114, and 113, designated on 01/23/2020.

defendant was again threatened with removal from the courtroom after he told the Judge, “you do not belong as a judge for the people.” RP 07/25/2018 at 51.

On the day of his trial on January 7, 2019, he again acted out in front of the jury, saying, “Attorney Ajax, you are fired because you don’t listen to me and you are jeopardizing my innocence. . . . Keep that in mind, jurors. . . . As you are leaving, she does not represent me.” RP at 161. The trial court had warned the defendant about such outbursts and ordered the defendant to attend the trial in the media room where he could see and hear the proceedings. RP at 169.

The cases cited by the defendant are not on point. In *State v. Lawrence*, 166 Wn. App. 378, 271 P.3d 280 (2012) the defendant first wanted to be pro se, then requested an attorney, then requested to be pro se. The issue on appeal was the propriety of the trial court’s ultimate decision to allow the defendant to represent himself. *Lawrence* did not hold that the trial court was required to consider additional motions for self-representation. In *State v. Madsen*, 168 Wn.2d 496, 229 P.3d 714 (2010) the trial court deferred the defendant’s requests to proceed pro se. *Madsen* did not involve a situation where the defendant requested reconsideration of a decision that he waived by conduct his right to self-representation.

The trial court did not abuse its discretion by denying the defendant's requests to reconsider allowing him to self-represent.

IV. CONCLUSION

The trial court is faced with a dilemma every time a defendant requests the right to proceed pro se. If the trial court grants the request, the defendant on appeal will claim that he or she was improperly warned or advised. If the trial court does not grant the request, the defendant on appeal will argue that his or her right of self-representation was improperly denied. That is why the reviewing court should defer to the trial court absent an abuse of discretion.

Here, the trial court granted the defendant's request for self-representation after a competency examination. This proved a disaster when the defendant infuriated the potential jurors. The trial court had no choice but to grant a mistrial on the court's own motion in order to protect the defendant's right to a fair trial.

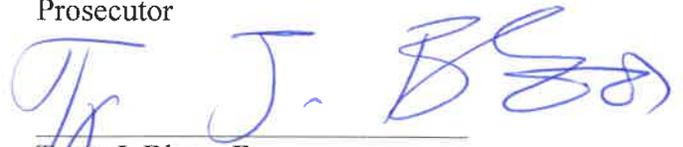
Having given the defendant the opportunity to proceed pro se, the trial court properly reviewed the caselaw and concluded that the defendant's conduct had waived or forfeited his right of self-representation. The trial court did not need to reconsider the decision to terminate the defendant's pro se status.

The convictions should be affirmed.

RESPECTFULLY SUBMITTED on January 23, 2020.

ANDY MILLER

Prosecutor

A handwritten signature in blue ink, appearing to read "T. J. Bloor", is written over a horizontal line. The signature is stylized and cursive.

Terry J. Bloor, Deputy

Prosecuting Attorney

Bar No. 9044

OFC ID NO. 91004

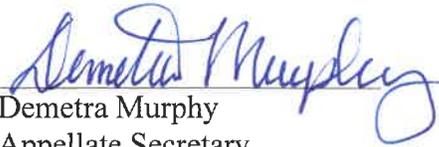
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Tiffnie B. Ma
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101

E-mail service by agreement
was made to the following
parties: tiffnie@washapp.org

Signed at Kennewick, Washington on January 23, 2020.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

January 23, 2020 - 2:38 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36552-2
Appellate Court Case Title: State of Washington v. Lance Theopolis Smith
Superior Court Case Number: 17-1-01370-0

The following documents have been uploaded:

- 365522_Briefs_20200123143317D3114226_8801.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 365522 Smith - Brief of Respondent.pdf
- 365522_Designation_of_Clerks_Papers_20200123143317D3114226_2881.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was 365522 Smith - Supp DCP.pdf

A copy of the uploaded files will be sent to:

- andy.miller@co.benton.wa.us
- greg@washapp.org
- tiffinie@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Demetra Murphy - Email: deme.murphy@co.benton.wa.us

Filing on Behalf of: Terry Jay Bloor - Email: terry.bloor@co.benton.wa.us (Alternate Email: prosecuting@co.benton.wa.us)

Address:
7122 W. Okanogan Place
Kennewick, WA, 99336
Phone: (509) 735-3591

Note: The Filing Id is 20200123143317D3114226