

77507-9
NO. 52824-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KIM MASON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. FOX

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. **ISSUES PRESENTED**

1. Under well-settled Washington law, an appellate court will not analyze a claim on independent state constitutional grounds unless one of two requirements has been satisfied: a) the Washington Supreme Court has previously ruled in a particular context that the state constitution provides greater protection than the federal constitution; or b) the appellant has briefed the issue according to the dictates of State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

In this case, for the first time in his reply brief, the defendant urges this court to undertake an independent state constitutional analysis of one of his claims. However, the Washington Supreme Court has never ruled that the state constitution provides greater protection in this context, and the defendant has not provided a Gunwall analysis. Should this court refuse to consider the defendant's claim?

2. Under the doctrine of forfeiture by wrongdoing, a defendant who has caused a witness's absence at trial by wrongful conduct with the intent of preventing the witness from testifying has forfeited his constitutional right to confront that witness. Thus, even if a defendant has broader confrontation rights under the state

constitution than under the federal constitution, the breadth of such rights is irrelevant if they have been forfeited by wrongdoing.

In this case, the defendant claims that the Washington constitution provides broader protection of his right to confront witnesses than the federal constitution, and that forfeiture by wrongdoing should not apply to him because of these broader protections. But the defendant has forfeited his rights by killing a witness to prevent him from testifying. Should this court reject the defendant's state constitutional claim?

B. STATEMENT OF THE CASE

The defendant, Kim Heichel Mason, was convicted by a jury of first-degree murder with aggravating circumstances for the February 19, 2001 killing of Hartanto Santoso. Mason received a life sentence as required by law. CP 565-67, 572-78. He timely appealed. CP 579-86.

Mason filed an opening brief on May 28, 2004, and the State filed its response on October 4, 2004. On December 9, 2004, Mason filed an overlength reply brief, and asked this court to allow him to raise a supplemental assignment of error regarding the right of confrontation under the Washington constitution. In an order

dated January 4, 2005, Commissioner William Ellis granted Mason's motion to file a supplemental assignment of error, and granted the State leave to file a supplemental response brief within 30 days of the order. This timely supplemental response follows.

The remaining procedural and substantive facts of this case are fully addressed in the Brief of Respondent, and need not be repeated here except as necessary for argument.

C. **ARGUMENT**

1. **THIS COURT SHOULD NOT ADDRESS A STATE CONSTITUTIONAL CLAIM WHEN IT ADDRESSES AN ISSUE OF FIRST IMPRESSION WITHOUT A GUNWALL ANALYSIS.**

Mason claims that in considering whether the doctrine of forfeiture by wrongdoing should apply in this case, this court must analyze the issue in light of a broader right of confrontation granted by the Washington constitution. He also asserts that he may raise this claim without performing an analysis of the Gunwall factors.¹ Appellant's Reply Brief, at 20. Mason is mistaken, and this court should refuse to consider his supplemental assignment of error.

¹ See State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Under well-settled Washington law, an independent state constitutional claim may be raised on appeal without a Gunwall analysis only when the Washington Supreme Court has already determined the appropriate state constitutional analysis in the particular context of that claim. State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). In such cases, the appellate court “will apply the already determined independent state constitutional analysis in deciding whether a state constitutional violation has occurred[.]” State v. Reichenbach, ___ Wn.2d ___, 101 P.3d 80, 84 n.1 (2004). On the other hand, in cases where the Washington Supreme Court has not previously considered a similar claim on independent state constitutional grounds, such claims will not be considered without a Gunwall analysis. State v. Dhaliwal, 150 Wn.2d 559, 575, 79 P.3d 432 (2003); State v. Smith, 148 Wn.2d 122, 131, 59 P.3d 74 (2002); State v. Reding, 119 Wn.2d 685, 696, 835 P.2d 1019 (1992).

In this case, Mason asserts that the doctrine of forfeiture by wrongdoing must be examined in light of a broader confrontation right under the Washington constitution, and that a Gunwall analysis is not necessary because the Washington Supreme Court has already determined that the state constitution offers broader

protection in this context. In support of this proposition, Mason cites State v. Smith, 148 Wn.2d 122, 59 P.3d 74 (2003), and State v. Foster, 135 Wn.2d 441, 473-74, 957 P.2d 712 (1998). Mason's reliance upon these authorities is misplaced.

In Foster, the issue was whether a child's testimony via closed-circuit television satisfied confrontation requirements under the federal and state constitutions. Foster, 135 Wn.2d at 450. Although the lead opinion concluded that the federal and state confrontation clauses are identical, a majority of the justices concluded that the state constitution provides broader confrontation rights than the federal constitution. See Foster, 135 Wn.2d at 473-74 (Alexander, J., concurring in part, dissenting in part); Id. at 481 (Johnson, J., dissenting).

In Smith, the issue was whether a child was "unavailable" for child hearsay purposes when the child refused to testify in the courtroom with the defendant present, but there were some indications that she might have been able to testify via closed-circuit television had such a system been available in Jefferson County. Smith, 148 Wn.2d at 126. The defendant attempted to raise a state confrontation clause claim without a Gunwall analysis. Id. at 131. The court acknowledged that a majority of the justices in

Foster had found that the state confrontation clause was broader than the federal confrontation clause. Id. Nonetheless, the court refused to consider the defendant's independent state constitutional claim due to his failure to perform a Gunwall analysis:

Because we have not yet decided whether article I, section 22 provides greater protection than the federal provision *in this situation* and because Smith did not brief the issue in accordance with State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), we will analyze his claim within the perimeters of the Sixth Amendment.

Smith, 148 Wn.2d at 131 (emphasis in original).

In Smith, the court refused to consider a state constitutional claim even though Smith's claim bore at least some resemblance to the claim raised in Foster. Even so, the court concluded that Smith's claim was not similar enough to Foster's claim to dispense with the Gunwall requirement. Therefore, it strains reason for Mason to raise a state constitutional claim that bears *no* resemblance to the claim in Foster, and to claim that a Gunwall analysis is not required based on Smith.

As the Washington Supreme Court has explained,

Parties raising constitutional issues must present considered arguments to this court. We reiterate our previous position: naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.

State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)

(citations and internal quotations omitted). This court should disregard Mason's naked castings, and affirm.

2. **EVEN IF A DEFENDANT HAS A BROADER CONFRONTATION RIGHTS UNDER THE WASHINGTON CONSTITUTION, SUCH BROADER RIGHTS ARE IRRELEVANT IF THEY HAVE BEEN FORFEITED.**

Mason argues that because the Washington constitution provides broader confrontation rights than the federal constitution, the doctrine of forfeiture by wrongdoing should not apply unless more stringent requirements are met. He does not specify what these requirements might be, nor does he explain how broader confrontation rights might translate into such requirements. Rather, he baldly asserts "that whatever the doctrine in Washington, it will be a stricter requirement than one adopted by federal evidentiary rules." Appellant's Reply Brief, at 20.

Even if this court chooses to review Mason's state constitutional claim, Mason's bald assertions should be rejected. The doctrine of forfeiture by wrongdoing does not concern the *exercise* of confrontation rights, but rather the *forfeiture* of such

rights. Therefore, once confrontation rights have been forfeited, it is irrelevant whether they are broad or narrow because they no longer apply. This court should reject Mason's state constitutional claim, and affirm.

In applying the doctrine of forfeiture by wrongdoing, the federal courts recognize that the right of confrontation "is a cornerstone of our adversary system of justice[.]" United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996). Nonetheless, the policy behind the forfeiture doctrine – that a wrongdoer may not use his confrontation rights as both a shield and a sword – is so powerful that it outweighs even a "cornerstone" right like confrontation:

By the same token, courts will not suffer a party to profit by his own wrongdoing. Thus, a defendant who wrongfully procures a witness's absence for the purpose of denying the government that witness's testimony waives his right under the Confrontation Clause to object to the admission of the absent witness's hearsay statements.

Id. As another court has observed,

It is hard to imagine a form of misconduct more extreme than the murder of a potential witness. Simple equity supports a forfeiture principle, as does a common sense attention to the need for fit incentives. The defendant who has removed an adverse witness is in a weak position to complain about losing the chance to cross-examine him. And

where a defendant has silenced a witness through the use of threats, violence or murder, admission of the victim's prior statements at least partially offsets the perpetrator's rewards for his misconduct. We have no hesitation in finding, in league with all circuits to have considered the matter, that a defendant who wrongfully procures the absence of a witness or potential witness may not assert confrontation rights as to that witness.

United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997).

Thus, in deciding whether forfeiture by wrongdoing applies in a given case, the relevant question is not the breadth of the defendant's confrontation rights. Rather, the relevant question is whether the defendant has engaged in wrongdoing such that public policy and common sense demand forfeiture of those rights, no matter how broad they may be.

Mason's supplemental assignment of error misses the mark. This court should reject his claims, and affirm.

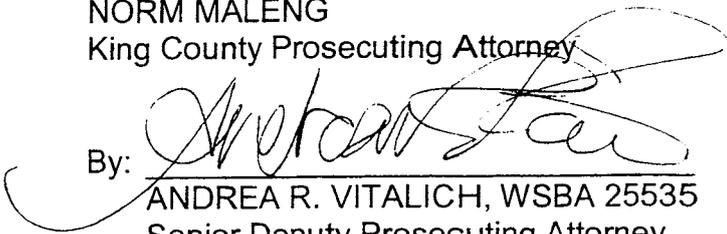
D. CONCLUSION

For the foregoing reasons, and for the reasons stated in the Brief of Respondent, Mason's conviction and sentence for aggravated first-degree murder should be affirmed.

DATED this 31st day of January, 2005.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. KIM MASON, Cause No. 52824-6-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Name
Done in Seattle, Washington

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