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SUPREME COURT
STATE OF WASHINGTON

2009 JUN 24 P 12:45

BY RONALD R. CARPENTER

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT)
PETITION OF DAYVA CROSS,)

No. 79761-7

STATEMENT OF ADDITIONAL
AUTHORITIES ON ALFORD
ISSUE

Petitioner,)
_____)

1) On the purpose and history of RCW 10.01.060:

State v. Karsunky, 197 Wash. 87, 84 P.2d 390 (1938) (once defendant has entered not guilty plea he cannot waive jury and proceed to a bench trial).

State v. McCaw, 198 Wash. 345, 88 P.2d 444 (1939) (same).

Laws of 1951, Ch. 52 § 1 (amending RCW 10.01.060 to add proviso that defendant may waive right to jury and have a bench trial, except in a capital case)

State v. Lane, 40 Wn.2d 734, 745, 246 P.2d 474 (1952) (Dissent -- "The legislature . . . responded to the decisions in the Karsunky and McCaw cases by enacting, in 1951, a statute providing that an

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accused could waive the entire jury and submit to the court the question of guilt or innocence.")

2) On the issue of when jury rights can be waived or whether jury trials are mandatory, even over defendant's express choice:

State v. Lane, 40 Wn.2d 734, 736-37, 246 P.2d 474 (1952)
(involving waiver of the right to a 12-person jury)

"It is not the legislative policy of this state that a jury trial is essential in every case to safeguard the interests of the accused and maintain confidence in the judicial system. The cited enactment is consistent with the idea that persons accused of crime have individual rights of election which must be secure. Granting a choice of privileges can in no way jeopardize their preservation. If an accused desires to waive a privilege, our concern should be to assure him that it can be done."

Brandon v. Webb, 23 Wn.2d 155, 159, 160 P.2d 529 (1945) (italics in original):

"It is undoubtedly true that under the constitutional provision referred to above the right of trial by jury may not, by legislative or judicial action, be annulled, nor be so impaired, obstructed, or restricted as to make of it a nullity. That does not mean, however, that a trial by jury is imperative and compulsory in every instance, regardless of whether or not the accused by his plea has raised *an issue of fact triable by a jury*. The purpose of the constitutional provision was to *preserve to the accused the right* to a trial by jury as it had theretofore existed; it was not the purpose of the fundamental enactment to render the intervention of a jury mandatory, in the face of the accused person's voluntary plea of guilty to the charge, where no issue of fact was left for submission to, or determination by, the jury."

Brandon v. Webb, 23 Wn.2d at 159-60:

"[A plea of guilty] is a confession of guilt and is equivalent to a conviction, leaving no issue for the jury, except in those instances where the extent of the punishment is to be imposed or found by the jury. By pleading guilty the defendant admits the acts well pleaded in the charge, waives all defenses other than that the indictment or information charges no offense, and waives the right to trial and the incidents thereof."

3) On whether the defendant may waive jury rights and then complain on appeal that the law forbids such a waiver:

State v. Lane, 40 Wn.2d 734, 738, 246 P.2d 474 (1952):

"Can these accused now be heard to say that, by waiving this privilege, they injected a fatal defect into their trial? We think not, for two reasons: (1) a voluntary waiver of a defensive, protective privilege, designed to assure the accused of a fair trial, should not and cannot convert it into an offensive right to have their trial declared invalid; (2) because the questioned action of the trial court does not pertain to its jurisdiction, it must and will be examined under the rules applicable to any other claimed trial error which can be waived. The record shows not only that the court's action was induced by the accused in this case but also that they did not urge it as error in the trial court, and, in either of these events, a claim of error will not be reviewed on appeal."

4) Regarding Cross' claim (Pet. Supp. Reply Br. at 16) that "...it does not appear[] that any of these jurisdictions have a statute comparable to RCW 9A.04.060":

Delaware: Del.C. Ann. Const., Sched. § 18 ("All the laws of this State existing at the time this Constitution shall take effect, and not

inconsistent with it shall remain in force, except so far as they shall be altered by future laws").

Steele v. State, 151 A.2d 127, 2 Storey 5, 52 Del. 5 (1959) ("Except as insofar as it has been found to be inconsistent with our statutory law, the common law of England is a part of the law of this state.")

Florida: F.S.A. § 775.01 ("The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject").

Kansas: K.S.A. § 21-3102 (2008) ("No conduct constitutes a crime against the state of Kansas unless it is made criminal in this code or in another statute of this state, but where a crime is denounced by any statute of this state, but not defined, the definition of such crime at common law shall be applied.")

Nebraska: Neb. Rev.St. § 49-101 (2008) ("So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska").

Oklahoma: 22 Okl.St.Ann. § 9 ("The procedure, practice and pleadings in the courts of record of this state, in criminal actions or in matters of criminal nature, not specifically provided for in this code, shall be in accordance with the procedure, practice and pleadings of the common law").

South Carolina: SC ST. § 14-1-50 ("All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section").

SC ST. § 17-1-30 ("The rule of the common law that statutes in derogation of that law are to be strictly construed has no application to this Title").

Virginia: VA. Code Ann. § 1-200 ("The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly").

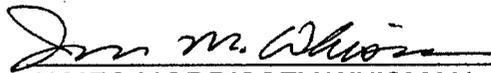
5) On the issue of whether stipulated trials and guilty pleas are comparable:

State v. Harper, 33 Wn. App. 507, 655 P.2d 1199 (1982)
(stipulated trials are distinct from guilty pleas).

State v. Davis, 29 Wn. App. 691, 630 P.2d 938 (1981)) (same).

Submitted this 24th day of June, 2009..

DANIEL T. SATTERBERG
Prosecuting Attorney



JAMES MORRISSEY WHISMAN,
WSBA # 19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

W554 King County Courthouse
Seattle, WA 98104
Telephone: 206-296-9650

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Certificate of Service by Mail

BY RONALD R. CARPENTER
CLERK

Today I sent by electronic mail directed to counsel for petitioner, ~~Todd~~
Maybrow at Allen, Hansen & Maybrow and James Lobsenz, at Carney
Bradley Spellman, and David Zuckerman, counsel for Amicus WACDL an
electronic copy of the STATEMENT OF ADDITIONAL AUTHORITIES,
in PRP OF DAYVA CROSS, Cause No. 79761-7, in the Supreme Court 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.



Name James Whisman
Done in Seattle, Washington

6/24/09
Date 6/24/09

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OFFICE RECEPTIONIST, CLERK

To: Whisman, Jim; Faulk, Camilla
Cc: Todd Maybrow; Lobsenz, Jim; Austell, Randi; Raz, Don; David@DavidZuckermanLaw.com
Subject: RE: Dayva Cross, No. 79761-7 (capital case)

Rec 6-24-09

From: Whisman, Jim [mailto:Jim.Whisman@kingcounty.gov]
Sent: Wednesday, June 24, 2009 12:43 PM
To: OFFICE RECEPTIONIST, CLERK; Faulk, Camilla
Cc: Todd Maybrow; Lobsenz, Jim; Austell, Randi; Raz, Don; David@DavidZuckermanLaw.com
Subject: Dayva Cross, No. 79761-7 (capital case)

Dear Supreme Court Clerk,

Attached is a Statement of Additional Authorities on the Alford plea issue in this case.

Oral argument is scheduled for tomorrow, June 25, 2009, as the 4th case.

Please let me know if there are any difficulties with this filing.

James M. Whisman
Senior Deputy Prosecuting Attorney
Appellate Unit Chair
King County Prosecuting Attorney's Office
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
206-296-9660