

NO. 80547-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOHNATHON D. ROSWELL,

Petitioner.

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BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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## I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, which have wide-ranging impact on the prosecution of numerous status or recidivist statutes.

## II. ISSUES PRESENTED

Whether a defendant charged with a status or recidivist offense is entitled to a hybrid jury/bench trial or to enter a partial guilty plea?

## III. ARGUMENT

In recent years, the Washington Legislature has enacted a number of status or recidivist crimes, in which the existence of one or more prior convictions for the same or a related offense elevates the offense to a felony. See, e.g., RCW 46.61.502(6) (driving while under the influence of intoxicants); RCW 46.61.504(6) (physical control); RCW 26.50.110(5) (violation of no contact order). The question before this Court is whether a defendant is entitled to remove one or more of the elements of these offenses from the jury by either entering a partial jury waiver or a partial guilty plea. Neither alternative is authorized by the Legislature or the Washington Constitution.

A. THE WASHINGTON CONSTITUTION DOES NOT  
AUTHORIZE HYBRID BENCH/JURY TRIALS

The state constitutional right to jury trial in criminal matters stems from Const. art. 1, §§ 21 and 22. Const. art. 1, § 22 is comparable to the Sixth Amendment to the United States Constitution, but article 1, section 21 has no federal counterpart. State v. Schaaf, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987). Const. art. 1, § 21 which provides that "[t]he right of trial by jury shall remain inviolate . . . ." preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. See, e.g., Sofie v. Fiberboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989); Schaaf, 109 Wn.2d at 14; State ex. rel. Mullen v. Doherty, 16 Wash. 382, 384-85, 47 P. 58 (1897).

One ascertains the scope of the right to jury in territorial days by reviewing statutes and judicial opinions from that era. The petitioner, Jonathan Roswell, has produced neither statute nor judicial opinion that authorized the hybrid bench/jury trial or partial guilty plea process that he seeks. This is not surprising as this Court has long held that the constitution does not confer a right upon a defendant to insist that he be tried by a judge rather than a jury or that he be allowed to plead guilty. State v. Martin, 94 Wn.2d 1, 4, 614 P.2d 164 (1980); State v. Frampton, 95 Wn.2d 469, 479, 627 P.2d 922 (1981).

Mr. Roswell's failure to locate any historical support for a hybrid jury is also consistent with Const. art. 4, § 16, which expressly prohibited judges from resolving factual issues once a jury is seated. This provision was enacted to clearly separate the functions of jury and judge. See B. Rosenow, The Journal of the Washington State Constitutional Convention 1889, at 622 (1962).

Finding no solace in the constitutional right to a jury, Mr. Roswell turns to "due process", claiming a right to prevent the jury from hearing "irrelevant and highly prejudicial evidence." Evidence that establishes the existence of an element of the crime can hardly be considered "irrelevant." See ER 401; ER 402. Mr. Roswell's prejudice claim was rejected by the United States Supreme Court more than 40 years ago in Spencer v. Texas, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967), and the federal due process clause is co-extensive with Wash. Constitution art. 1, §3. See, e.g., In re Pers. Restraint of Dyer, 143 Wn.2d 384, 394, 20 P.3d 907 (2001) ("Washington's due process clause does not afford a broader due process protection than the Fourteenth Amendment."); In re Pers. Restraint of Matteson, 142 Wn.2d 298, 310, 12 P.3d 585 (2000) (rejecting the claim that state due process rights are greater than federal due process rights because "there are no material differences between the ... federal and state [due process clauses]."); State v. Manussier, 129 Wn.2d 652, 679, 921 P.2d 473

(1996) (“The Gunwall factors do not favor an independent inquiry under article I, section 3 of the state constitution”).<sup>1</sup>

B. NO STATUTE AUTHORIZES HYBRID BENCH/JURY TRIALS OR PARTIAL GUILTY PLEAS

Only the legislature may create a procedure for hybrid bench/jury trials or partial guilty pleas. See, e.g., State v. Hughes, 154 Wn.2d 118, 149-152, 110 P.3d 192 (2005) (only the legislature could adopt a procedure for empaneling a jury to consider the existence of aggravating circumstances); Frampton, 95 Wn.2d at 479 (only the legislature can allow the State to require a jury in a capital case). For the Court to “create such [procedures] out of whole cloth would be to usurp the power of the legislature.” Hughes, 154 Wn.2d at 151. The question, therefore, is whether any statute currently authorizes these procedures.

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<sup>1</sup>While this Court held in State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984), that the state due process clause required that the rules of evidence must apply in a capital sentencing proceeding, Bartholomew predated State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), and contained no analysis in support of this independent state constitutional rule.

Needless to say, Mr. Roswell is not facing the death penalty. Pre-existing case law related to bifurcation, moreover, is populated with cases that uniformly refused to mandate such a requirement in capital cases. See State v. Boggs, 80 Wn.2d 427, 436, 495 P.2d 321 (1972); State v. Music, 79 Wn.2d 699, 489 P.2d 159 (1971), judgment vacated in part by 408 U.S. 940 (1972); State v. Cerny, 78 Wn.2d 845, 480 P.2d 199 (1971), judgment vacated in part by 408 U.S. 939 (1972); State v. Smith, 74 Wn.2d 744, 446 P.2d 571 (1968), judgment vacated in part by 408 U.S. 934 (1972). Bifurcation was rejected even though the State could introduce the defendant’s prior convictions and other potentially inflammatory information that was only relevant to the sentence. See Hawkins v. Rhay, 78 Wn.2d 389, 400-01, 474 P.2d 557 (1970)(relevant evidence related to “the defendant’s background and history, and any facts or circumstances in aggravation or mitigation of the crime and the penalty” was admissible in capital cases).

Mr. Roswell did not offer to plead guilty to the “prior conviction” portion of the charged offense. If he had, his offer would be rejected under binding precedent, as the statutory right to plead guilty is limited to a right to plead guilty to the entire charge. State v. Bowerman, 115 Wn.2d 794, 799-801, 802 P.2d 116 (1990).

Mr. Roswell’s briefs cite to no statute that expressly authorizes the hybrid bench/jury trial he sought. Mr. Roswell, therefore, turns to other statutes that he contends authorize the procedure he seeks in other settings.

Mr. Roswell contends that the newly adopted post-Blakely<sup>2</sup> statutory procedure for imposing an exceptional sentence supports his request. Supplemental Brief of Appellant, at 4-5. RCW 9.94A.537(4) authorizes a two stage proceeding for four aggravating circumstances if the evidence that supports those aggravating circumstances is not otherwise admissible with respect to guilt. With respect to the bifurcated procedure, the statute does not alter the identity of the fact-finder. To the contrary, RCW 9.94A.537(5) specifies that the jury that decided guilt is the body that is to determine the existence of the aggravating circumstance:

If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury

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<sup>2</sup>Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

is unable to continue, the court shall substitute an alternate juror.

Mr. Roswell next claims that a defendant in a capital case is allowed to waive his or her right to the second half of the trial. Brief of Appellant, at 18-19. It is true that the Legislature has expressly authorized a defendant to waive his right to a jury during the special sentencing proceeding. This waiver, however, is ineffectual if the prosecutor and the judge do not also waive a jury. See RCW 10.95.050(2) (“A jury shall decide the matters presented in the special sentencing proceeding unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.”). In addition, contrary to Mr. Roswell’s brief, the aggravating circumstances contained in RCW 10.95.020 are established during the first phase of the trial, and the legislature has not provided the defendant with a hybrid jury/bench trial or partial guilty plea option with respect to these elements. See generally State v. Kincaid, 103 Wn.2d 304, 692 P.2d 823 (1985) (authorizing bifurcated jury instructions, but not a bifurcated trial).

**C. THE FOLLOWING PROCEDURE SHOULD BE ADOPTED BY THIS COURT**

Numerous courts across the country have struggled with the procedure to utilize with recidivist or status offenses. See State v. Murray, 116 Haw. 3, 169 P.3d 955, 967-970 (2007) (surveying cases). Three basic approaches

have been adopted by the courts for dealing with prior convictions that are elements of a charged offense.

[T]rial courts could: (1) exclude all evidence of the prior convictions from the jury; (2) inform the jury that defendant has stipulated to the prior convictions with an instruction that the jury must consider the prior convictions as conclusively proven, but that the jury may not consider the prior convictions for any purpose other than as conclusive proof of the particular requisite element of the offense charged in the case; or (3) bifurcate the trial.

Murray, 169 P.3d at 972.

Option 1 must be rejected for the reasons stated in sections III. A. and III. B. of this brief. Option 3 must be rejected because while the Legislature has authorized bifurcated trials for certain Sentencing Reform Act aggravating circumstances and for capital cases, the Legislature has not authorized this procedure for the other myriad recidivist or status offenses.

Option 2 is consistent with Washington law. Under this approach, the defendant is allowed to stipulate to the fact of the required prior convictions. This stipulation serves the purpose of preventing the prejudice that would result from relating the details of the prior incidents to the jury. See generally Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); State v. Ortega, 134 Wn. App. 617, 142 P.2d 175 (2006), review denied, 160 Wn.2d 1016 (2007). While the stipulation must match the element, the trial court may utilize statutory citations instead of the name of the crime. For instance, a defendant who is charged with felony DUI under

RCW 46.61.502(6) would be entitled to select from among these alternative stipulations:

The defendant stipulates that he has previously been convicted of vehicular homicide while under the influence of intoxicating liquor or any drug.

OR

The defendant stipulates that he has previously been convicted of the crime defined in RCW 46.61.520(1)(a).

The defendant stipulates that within the last 10 years he has been convicted of driving while under the influence of intoxicating liquor or any drug four times.

OR

The defendant stipulates that within the last 10 years he has been convicted of at least four offenses listed in RCW 46.61.5055(13)(a).

Regardless of the specific wording, the stipulation must be preceded by an on-the-record colloquy with the defendant regarding the effect of the stipulation. Murray, 169 P.3d at 973.

When a stipulation is entered, the jury should be instructed that the defendant has stipulated to a specific element of the charged offense and that this element is considered proven beyond a reasonable doubt. The jury instruction would necessarily include the following six points:

1. Conviction under the charged statute requires the prosecution to prove beyond a reasonable doubt the element that the defendant has a certain number of prior offenses within the requisite time period;
2. The defendant has stipulated to the existence of at least the requisite number of prior offenses and that the prior offenses occurred within the requisite time period;

3. The stipulation is evidence only of the prior conviction element;
4. The prior conviction element of the charged offense must be taken as conclusively proven;
5. The jury is not to speculate as to the nature of the prior convictions; and
6. The jury must not consider defendant's stipulation for any other purpose.

Murray, 169 P.2d at 973.

The use of the above instruction would avoid the confusion that now exists under our pattern jury instructions when a prior conviction is admitted as impeachment and as an element of the offense. See Ortega, 134 Wn. App. at 621-23 (common limiting instruction, WPIC 5.05, can give rise to confusion when a prior offense is an element of the instant crime and also used for impeachment).

A defendant, whether he chooses to stipulate to his prior offenses or he elects to have the State prove the existence of the prior offenses, will have the option of requesting bifurcated jury instructions in which the "to convict" instruction omits any reference to the prior offense element. See generally, State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005); State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002).

IV. CONCLUSION

The rejection of Mr. Roswell's partial jury waiver was proper. His conviction should be affirmed.

Respectfully submitted this 15th day of August, 2008.



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