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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2001 MAR - 1 PM 12:40

No. 59457-5
THE COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

CITY OF TUKWILA
Petitioner,

v.

KELLAS GARRETT
Respondent.

MEMORANDUM IN OPPOSITION TO TUKWILA'S MOTION FOR
DISCRETIONARY REVIEW

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I. POSITION OF THE RESPONDENT

Kellas Garrett asks this Court to deny review of the decision in the Superior Court in this matter.

II. ISSUE PRESENTED

When the decision of the Superior Court was consistent with Supreme Court precedent, and when any issue of public interest already has been resolved by that Supreme Court precedent, the City has made no showing of a reason for this Court to accept discretionary review.

III. STATEMENT OF THE CASE

Kellas Garrett was charged in Tukwila Municipal Court with violating the provisions of a temporary protection order issued June 18, 2004, in King County Superior Court, for the protection of Trisha Clay, a violation of RCW 26.50.110(1). The alleged incident occurred on June 27, 2004. RP 13-14.

The matter went to trial September 1, 2005. Before the jury was sworn, counsel objected that the jury included jurors who do not live in Tukwila. (RP 6). Not a single juror who sat on the case lived in Tukwila. The court overruled the objection. Counsel later moved to dismiss the case based on that ground, and the court, while noting some concern that the jurors were not all from Tukwila, denied the motion and invited counsel to provide some authority. (Docket, page 9.) Prior to the verdict

being returned, counsel provided the Court with a copy of State v. Twyman, 143 Wn.2d 115, 121 (2001), noting its emphasis that a jury should come from the "population of the area served by the court". The Twyman court relied on RCW § 2.36.050, which states:

In courts of limited jurisdiction, juries shall be selected and impaneled in the same manner as in the superior courts, except that a court of limited jurisdiction shall use the master jury list developed by the superior court to select a jury panel. **Jurors for the jury panel may be selected at random from the population of the area served by the court.**

[Emphasis added.]

Defense counsel renewed the motion to dismiss based on the invalid jury at the end of the case and in post-trial motions. The court denied the motion.

A former Tukwila police officer, Mr. Mitchell, testified that he went to an address in Tukwila on June 27, 2006, found Mr. Garrett there, and arrested him because he was aware of a protection order. RP 12-14. Before he arrested him, Mr. Mitchell had not seen the actual protection order. RP 27. On June 28, he went there again and Trisha Clay showed him a copy of the protection order. RP 14-16. Defense objections to the admission of the protection order were overruled. RP 17-18.

The defense moved to dismiss at the end of the city's case, arguing the invalidity of the underlying protection order because there was no finding of a domestic relationship and the failure of the City to prove

knowledge. The motion was denied . RP 29-35.

The Court declined to give the defense jury instruction on validity of the protection order. RP 35-36. The Court also declined to give defense offered instructions on knowledge and service. RP 36-37. The defense objected to giving the special verdict on domestic violence because of the failure to prove a domestic family relationship. RP 43.

The jury returned a guilty verdict and a special verdict that Mr. Garrett and Ms. Clay were family or household members. RP 56-57. After the trial, the defense learned that the contract allowing King County Superior Court to summon jurors had expired. (See Appendix A.)

On January 19, 2006, Mr. Garrett appeared for post trial motions. He was in custody. Counsel moved to have the handcuffs removed for the hearing, and the court denied the motion. The city made no showing of a need for restraints. (Docket, page 11.) The court took the motions under advisement and said it would issue a written ruling. (Docket p. 13).

On February 6, 2006, Mr. Garrett appeared for sentencing, again in shackles. Counsel moved to have the shackles removed and the court again denied the motion.¹

¹This violated clear Washington Supreme Court holdings. "It is a well settled rule that absent some compelling reason for physical restraint, defendants may appear in court free of prison garb and shackles." [citations omitted] State v. Rodriguez, 146 Wn.2d 260, 263-264 (2002).

The court added: " As early as 1897 this court recognized the 'ancient right of one accused of crime ... to appear in court unfettered. State v. Williams, 18 Wash. 47, 50, 50 P. 580 (1897)." Rodriguez, at 268. Saying that the use of shackles is an affront to the dignity

The court orally denied all of the defense motions to dismiss and said it would issue a written ruling by February 7, 2006. [Note: As far as counsel is aware, no written ruling was issued.] The court sentenced Mr. Garrett to 345 days in jail, with 304 days suspended and 41 days credit for time served, suspended a \$5000 fine, and imposed costs of \$200. (Docket page 13). Mr. Garrett filed a notice of appeal. (Docket page 13-14.)

Superior Court Judge Douglass North reversed the conviction in an order December 15, 2006, ruling as follows:

There was a material departure from the jury selection procedure required by law; There was no agreement between Tukwila and King County; Tukwila had no authority to summon jurors from outside of Tukwila and its electoral district.

IV. The Decision of the Superior Court is Not in Conflict With a Decision of the Supreme Court.

The City of Tukwila misapprehends the holding of State v. Twyman, 143 Wn.2d 115, 121 (2001).

Not a single juror who served on the case lives in Tukwila. The defense filed a supplemental memorandum with juror invoices that demonstrate that of 40 potential jurors, only three gave a Tukwila residence address. One of the jury pool lived on Greenwood Avenue

of the court that the judge is obliged to uphold, the court cited Justice Brennan: "It offends not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law." Id., at 269, citation omitted.

And as the Williams court noted: "Besides, the condition of the prisoner in shackles may, to some extent, deprive him of the free and calm use of all his faculties." State v. Williams, 18 Wash. 47, 51.

North in Seattle, with a listed zip code of 98133, not one of the zip codes used to summon the jurors. The jurors who served on the jury live in Seattle and SeaTac.

The City violated statutory and constitutional protections and procedures and denied Mr. Garrett a fair jury trial.

The Twyman court, in deciding that the Shoreline District Court could choose jurors from its area and was not required to take them from the entire county, wrote that “in any one case the ‘population of the area served by the court’ n19 is that of the division in question.” The court also noted: “[i]t also is the policy of this state to minimize the burden on the prospective jurors, their families, and employers resulting from jury service.” RCW 2.36.080(2).” Id. It does not minimize the burden on prospective jurors to summon them to a court outside the city in which they live.

The court found that “a district court’s electoral district serves as the population area from which its juries should be drawn.” 143 Wn. 1d at 124-125. The electoral district of Tukwila does not include Seattle.

The Court, in allowing a *county* district court jury to be drawn from an area larger than the area in which the court sat, wrote: “Given all of this focus upon the localized nature of district courts, it would be quite incongruous if jurors were not also required to come from the district.” Noting that King County had been divided into districts, it found that the

jury need not be drawn from the entire county but from the division in question. The court emphasized that in Twyman the “venire selection occurred in an area closely paralleling a district court electoral district”. That is not what happened in Mr. Garrett's case. The venire came mostly from outside of the electoral district of Tukwila and none of the sitting jurors came from the electoral district of Tukwila.

It is clear that the City of Tukwila Court has jurisdiction over matters from its own City. “The municipal court shall have exclusive original jurisdiction over traffic infractions arising under city ordinances and exclusive original criminal jurisdiction of all violations of city ordinances duly adopted by the city in which the municipal court is located” Rev. Code Wash. § 3.50.020. A municipal court that has cases only based on city law enforced within city boundaries should have jurors only from that city.

The Court Violated Mr. Garrett’s Right to a Jury Selected in the Manner
Required by Law

Tukwila did not follow statutory requirements either to issue its own summonses for jurors or to have a contract with the County to do so. RCW 2.36.052 . When a jury is not selected substantially in the manner required by law, a litigant may claim error without showing prejudice.

[A] litigant is entitled to have his case submitted to a jury selected in the manner required by law; and further, that, if the selection is not

made substantially in the manner required by law, an error may be claimed without showing prejudice, which will be presumed. But it will only be presumed when there has been a material departure from the statute.

State v. Tingdale, 117 Wn.2d 595, 602 (1991) [citation omitted].

When, as here, the jurors are chosen from outside the population of the area served by the court, there has been a material departure from the statute. In addition, as outlined below, the Tukwila Court has violated the statute by not issuing the jury summons.

The Court Did Not Issue Its Own Jury Summons But Relied on an Expired Agreement with King County

The City of Tukwila does not maintain its own jury lists. It executed a memorandum agreement with King County to administer a pilot project to summon jurors to Tukwila Municipal Court. This is permitted by RCW 2.36.052:

Pursuant to an agreement between the judge or judges of each superior court and the judge or judges of each court of limited jurisdiction, jury management activities may be performed by the superior court for any county or judicial district as provided by statute.

RCW 2.36.095 requires a court to issue its own summons, and provides:

“2) In courts of limited jurisdiction summons shall be issued by the court.

Upon the agreement of the courts, the county clerk may summon jurors for any and all courts in the county or judicial district.”

Tukwila Municipal Court and King County Superior Court entered an agreement for Superior Court to issue summonses to jurors. (Copy in clerk's papers.) But the agreement expired April 30, 2005. No renewal was entered. (See email from King County jury manager Greg Wheeler attached to counsel's declaration, copy attached to this memorandum as Appendix A.) The agreement in question was for eighteen months and expired on April 30, 2005. As a result, Tukwila in Mr. Garrett's case violated the statutory requirement that the Municipal Court shall issue its own jury summonses. In the absence of a valid agreement, King County Superior Court had no authority to issue jury summons for people to come to Tukwila.

After the defense filed its brief in support of the motion to dismiss because the jurors were not from Tukwila and because the contract with the County had expired, the City offered a declaration from the court clerk asserting that the Tukwila judge had verbally renewed the contract with King County on an unspecified date. (Declaration of Amy Bell, p.2). But under the law, the written contract could not be modified because the contract had expired, and it could not be renewed by a verbal agreement because the contract was for eighteen months and must be in writing to satisfy the statute of frauds.

Generally, all parties to a contract are bound by its terms, and any contract that by its terms is not to be performed in one year from the

agreement must be in writing to satisfy the statute of frauds. See, Adler v. Fred Lind Manor, 153 Wn.2d 331, 344, 103 P.3d 773 (2004) (“it is black letter law of contracts that the parties to a contract shall be bound by its terms”). Because the agreement was for service that could not be completely performed in one year, the agreement falls within the statute of frauds and all material terms must be in writing to be enforced. See RCW 19.36.010(1); Alfred G. French v. Sabey, 134 Wn.2d 547, 552, 951 P.2d 260 (1998); Building Serv. Employees Int’l Union Lodge 6 v. Seattle Hosp. Council, 18 Wn.2d 186, 138 P.2d 891 (1943); Cope v. School Dist. 122, 149 Wash. 76, 270 P. 120 (1928); 49 Am. Jur. *Statute of Frauds* § 52, at 410 (1943); 3 Williston, *Contracts* § 495, at 585 (3d ed. 1960)).

Contracts that have been terminated or extinguished cannot be extended. See Pavey v. Collins, 31 Wn.2d 864, 870, 199 P.2d 571 (1948) (holding that the real estate “agreement had expired by virtue of its own terms and could not be revived”). Instead, the parties must enter into a new contract. *Id.*

The City of Tukwila and King County Superior Court agreed in writing to terms that allowed the County to summon jurors for eighteen months. The written agreement clearly stated that all modifications to the agreement must be in writing. Modifying a written agreement may include the extension of the terms beyond an approaching expiration date because

an extension of terms would constitute a “change or alteration” to the existing contract. *See* Black’s Law Dictionary (8th ed. 2004). However, renewing the original contract would “recreate a legal relationship or replace an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract.” *See* Black’s Law Dictionary (8th ed. 2004). The original written agreement could not be modified because it had expired. Because the contract was not renewed in writing, the jury summonses were invalid.

King County Issued Summonses to Jurors Who Do Not Live in Tukwila

King County issued summonses to citizens in three zip codes, 98168, 98178, and 98188, to come to Tukwila. These zip codes are not exclusive to Tukwila. In fact, they also include addresses in Seattle, Burien, SeaTac, Bryn Mawr, Skyway, Duwamish, McMicken Heights, and Riverton. [See U.S. Post Office web pages attached to counsel’s declaration.] These are distinct communities not part of Tukwila. (See USPS web page for Skyway Post Office and Washington tourism map for Riverton Heights attached to counsel’s declaration.) A number of the jurors in Mr. Garrett’s pool identified their homes as outside of Tukwila, including Seattle, SeaTac, Boulevard Park, and Skyway. (See declaration of counsel.)

The Failure to Follow Statutory Procedures is a Violation of Due Process

The failure of the Tukwila court to follow clearly defined procedures is a violation of state and federal due process protections as well. Article I, Section 3 of the Washington Constitution provides: "No person shall be deprived of life, liberty, or property without due process of law." Notice of the government's procedures is fundamental to due process. See, In re Personal Restraint of Cashaw, 68 Wn. App. 112, 124 (1992), affirmed on other grounds, 123 Wn.2d 138, 866 P.2d 8, (1994). Mr. Garrett had no notice that the City would summon jurors from outside of Tukwila.

The Failure to Provide Mr. Garrett a Jury from the Community Violated His Constitutional Right to a Fair Jury From The District In Which the Crime Allegedly Occurred

The right to jury trial is based in the constitution.

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases....

Wash. Const. Art. I, § 22.

The United States Constitution provides in the Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and **district wherein the crime shall have been committed**, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
[Emphasis added.]

The jury in Mr. Garrett's case was not from the "district wherein the crime shall have been committed."

The Jury Should Represent the Community

The U.S. Supreme Court repeatedly has emphasized the importance of the jury as representative of the community. "... the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." Taylor v. Louisiana, 419 U.S. 522, 527 (U.S. 1975). The Court added: "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." Id., at 428.

The value of a jury from the community was emphasized in a recent law review article.

If the purpose of a jury is to act as a check on the overzealous prosecutor or the corrupt judge, then it is imperative that the jury be local. The same people who (in some states) elect prosecutors and judges work alongside those officials when serving on juries, and thus have a direct role in keeping them honest. Given that local jurors have to live with the decisions that these prosecutors and judges make, these jurors have heightened incentives to fulfill their role vigorously.

Kalt, "Crossing Eight Mile: Juries of the Vicinage and County-Line," 80 Washington Law Review 271, 312 (2005) [footnotes omitted].

Tukwila's Practice Violated the Principle that a Jury Should Represent the Community

The principle that a jury is to reflect the values of its community is thwarted by bringing in jurors from other communities. Seattle Municipal Court should not have jurors from Tacoma; Bellevue Municipal Court should not have jurors from Seattle.

The U.S. Supreme Court has written: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." Smith v. Texas, 311 U.S. 128, 130 (U.S. 1940). The Congress has passed a law declaring the constitutional policy:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division **wherein the court convenes.**

28 USCS§ 1861 [Emphasis added.]

The issue here is more than a technicality. As the United States Supreme Court has written:

The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset.

Powers v. Ohio, 499 U.S. 400, 413 (U.S. 1991).

The jury in Mr. Garrett's case was chosen by unlawful means.

There is No Reason Tukwila Could Not Limit Its Summonses To Tukwila

Residents

It would not be difficult for either the superior court or the municipal court to summon only jurors who live in Tukwila. They simply should not send a summons unless the person has a Tukwila address. Alternatively, they should ask jurors to advise the court if they do not live in Tukwila and tell jurors that that would be an automatic excuse from service.

Tukwila Illegally Summoned Jurors Who Have No Obligation to Serve in Tukwila

In Powers, the Court held that the "congruence of interests" between defendant and juror "makes it necessary and appropriate for the defendant to raise the rights of the juror." 499 U.S. at 414. While in Powers the defendant was asserting rights of *excluded* jurors, Mr. Garrett can assert here, for the same reasons as in Powers, the right of citizens *not* to be called to jury service outside of their city to a court that has no jurisdiction over their home. As a person can be prosecuted and jailed for failing to appear for a jury summons, the right to resist a summons to a court in an area that does not serve a citizen's home is important. See, RCW 2.36.170: "A person summoned for jury service who intentionally

fails to appear as directed shall be guilty of a misdemeanor.” Tukwila should not be allowed to summon for jury service, at risk of jail for failure to appear, a person who does not live in Tukwila.

Tukwila violated the statutory requirements for summoning jurors. It materially departed from the statutory requirements for selecting a jury. The court neither summoned the jurors itself nor had a valid agreement with superior court to summon the jurors. The jury was not chosen from the area where the court convenes or from the population of the area served by the court. Mr. Garrett’s constitutional right to a fair jury was violated.

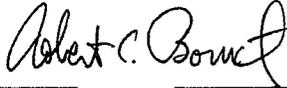
V. The Issue of Public Interest Involved in the Decision of the Superior Court Already Has Been Determined by an Appellate Court and This Court Need Not Accept This Case

The City incorrectly relies on the “public interest” provision of RAP 2.3 as a reason for this court to accept discretionary review. The question of whether jurors can be summoned from outside a court's electoral district and outside the population of the area served by the court has been resolved by Twyman, supra. Citizens who do not live in the court's electoral district or in the area served by the court are not lawfully summoned and may not sit on a jury in that court.

CONCLUSION

The City did not follow statutory and constitutional requirements in summoning jurors and the jury that sat on Mr. Garrett's case was not a legal jury. The Superior Court did not err in finding that Mr. Garrett was denied a fair trial. The ruling of the Superior Court is not in conflict with a ruling of the state Supreme Court. The issue of public policy that the City raises already has been resolved by the state Supreme Court. This Court should deny review.

Respectfully submitted,



Robert C. Boruchowitz WSBA # 4563
Attorney for Mr. Garrett

Dated: March 1, 2007

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CERTIFICATE OF SERVICE

I, Robert C. Boruchowitz, certify under penalty of perjury under the laws of the State of Washington that on March 1, 2007, I caused to be served on the person listed below the memorandum in opposition to discretionary review by placing it in the United States Mail, First Class.



Dated this ___ first day of _ March, 2007.

Ms. Kerri Ann Jorgensen
11 Front Street South
Issaquah, Washington 98027

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Appendix A for
MEMORANDUM IN OPPOSITION TO TUKWILA'S MOTION FOR
DISCRETIONARY REVIEW

Robert C. Boruchowitz WSBA # 4563

Subj: RE: FW: Tukwila
Date: 9/8/2005 11:13:36 AM Pacific Daylight Time
From: Greg Wheeler@METROK.COV
To: RCBORU@aol.com
Sent from the Internet (Details)

Not yet. We are trying to implement some changes that will allow more to be done on the internet and make this process less laborious. If it becomes significantly easier for us to provide the service, there might be some change in the cost to TMC. We're also working with Kent Municipal Court to provide a similar service and again, it hinges on being able to automate the process.

Greg Wheeler
Manager - Jury Services
206.298.9319
www.metrokc.gov/kcsc/juror.htm

From: RCBORU@aol.com [mailto:RCBORU@aol.com]
Sent: Thursday, September 08, 2005 11:09 AM
To: Wheeler, Greg
Subject: Re: FW: Tukwila

Thank you very much for faxing me the agreement (and the die notice).
I notice that the agreement expired in April. I take it there has been no renewal yet.
Thanks
Bob Boruchowitz

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