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No. 62279-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

IN RE THE PERSONAL RESTRAINT PETITION OF
BRADLEY PETERS

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

The Honorable George Mattson, Judge

REPLY BRIEF OF PETITIONER

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I. REPLY STATEMENT OF THE CASE

The petitioner will discuss the relevant facts in reply in the sections below.

II. REPLY ARGUMENT

1. MR. PETERS WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO BE PRESENT AT TRIAL

A defendant's right to be present during his trial is protected by the Confrontation Clause of the Sixth Amendment. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The right is also protected by the Due Process Clause, which safeguards the public' interest in a fair and orderly judicial system. *Bustamante v. Eyman*, 456 F.2d 269, 274-75 (9th Cir.1972), on appeal after remand sub nom. *Bustamante v. Cardwell*, 497 F.2d 556 (9th Cir.1974). See also *United States v. Gagnon*, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Thompson*, 123 Wash.2d 877, 880, 872 P.2d 1097 (1994).

The core of the constitutional right to be present is the right to be present when evidence is being presented. Beyond that, the defendant has a right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge[.]

In re Lord, 123 Wash.2d 296, 306, 868 P.2d 835, cert. denied, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994) (internal quotation marks and citations omitted).

CrR 3.4(a) provides that the defendant shall be present at arraignment, at every stage of the trial including the empaneling of a jury and the return of the verdict, and at the imposition of sentence, unless excused or excluded by the court for good cause. The rule is mandatory, and is not satisfied by the mere presence of counsel. *State v. Hammond*, 121 Wash.2d 787, 793, 854 P.2d 637 (1993).

The State does not dispute that Peters was not present at the deposition.

2. THE STATE MISSTATES THE HARMLESS ERROR STANDARD FOR VIOLATIONS OF THE STATE AND FEDERAL CONSTITUTIONAL RIGHT TO BE PRESENT AT TRIAL

The State argues that Peters must show “actual prejudice” from the denial of his right to be present at trial. State’s Response at 22. Although a violation of the right to be present is not structural error, the courts have not focused on whether the defendant’s presence would have changed the overall outcome of the trial, but at most on the effect on the specific hearing at issue. For example, in *State v. Davenport*, 140 Wn. App. 925, 167 P.3d 1221 (2007), *rev. denied*, 163 Wn.2d 1041, 187 P.3d 270 (2008), this Court found that the defendant had the right to be present at his resentencing hearing because the trial court’s role was not merely “ministerial” but rather involved the “exercise of discretion.” *Davenport*, 140 Wn. App. at 932-33. The Court reversed without any discussion of

how the defendant's presence could have affected the proceedings, and with no suggestion that the trial court's resolution of the issues was incorrect. *Id.* at 932.

Similarly, in *State v. Pruitt*, 145 Wn. App. 784, 187 P.3d 326 (2008), the defendant was not present when the trial court made a determination of guilt based on stipulated facts, after the defendant failed to comply with the conditions of his drug court diversion. *Pruitt*, 145 Wn. App. at 788-90. The Court found a violation of the right to presence and reversed even though the defendant had previously waived his right to confront witnesses or offer evidence. *Id.* at 800-01.

As this court's decision in *Davenport* makes clear, a hearing will be deemed critical for purposes of a defendant's presence whenever the court does more than perform a "ministerial act" or where it exercises discretion on matters of substantial concern to the defendant. *Davenport*, 140 Wn. App. at 932-33. Courts from other jurisdictions have applied a similar test to determine that a hearing on a motion to substitute counsel due to conflict of interest is a "critical stage" requiring the defendant's presence. See *People v. Ragusa*, 220 P.3d 1002, 1009 (Colo. App. 2009); *State v. Lopez*, 271 Conn. 724, 859 A.2d 898 (2004); *State v. Sam*, 98 Conn.App. 13, 17-31, 907 A.2d 99 (2006); *People v. Grigsby*, 47 Ill.App.3d 812, 365 N.E.2d 481 (1977). "(T)he trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views." *Grigsby*, 47

Ill.App.3d at 816, quoting *United States v. Alberti*, 470 F.2d 878, 882, *cert. denied*, 411 U.S. 919, 93 S.Ct. 1557, 36 L.Ed.2d 311 (1973).

Thus, it appears that the prejudice analysis is inextricably intertwined with the nature of the proceeding from which the defendant was absent. Here, Mr. Peters was absent from the actual presentation of critical evidence from one of the State's expert witnesses. This was not a ministerial hearing. And, as argued in his Personal Restraint Petition, Dr. Click's testimony was extremely prejudicial. Had Mr. Peters been present he could have reminded Mr. Meryhew of the various inconsistencies in the victim's statements that would have aided in directing the questions counsel asked of the doctor.¹

3. MR. PETERS DID NOT WAIVE HIS STATE AND FEDERAL
CONSTITUTIONAL RIGHT TO BE PRESENT AT THE
PRESENTATION OF THE EVIDENCE AGAINST HIM

In order for the State to show that Mr. Peters waived his right to be present, it would have to demonstrate that it gave Mr. Peters proper notice of the proceeding. CR 30(8)(a) provides that;

(a) Any party may videotape the deposition of any party or witness without leave of court provided that written notice is served on all parties not less than 20 days before the deposition date, and specifically states that the deposition will be recorded on videotape. Failure to so state shall

¹ It is not surprising that the Court's have not insisted on a showing that, but for the defendant's absence from a portion of trial, the jury would have acquitted him. It would be virtually impossible for a defendant to meet that standard. Thus, the State could routinely exclude defendants from important portions of the trial without fear of any consequences. If that were the case, the right to be present would become meaningless.

preclude the use of videotape equipment at the deposition, absent agreement of the parties or court order.

In this case, the State has presented no evidence either by declaration or citation to the trial record, demonstrating that it gave the defense 20 written notice that it intended to take a video taped deposition of the witness.

And, the evidence is that Mr. Peters was completely unaware that the deposition was intended to “preserve” the testimony of the witness for the jury. The only evidence of “notice” in the record is the following statement by the trial prosecutor:

The only witness we *may* have a problem with is Dr. Click who is finishing up her residency at Harborview and is leaving the state to go do the remainder of her work so I am going to speak with Mr. Meryhew about that. We may have to take her testimony by deposition. I believe Wednesday is her last *potential* day.

RP 9 (emphasis added).

Courts indulge every reasonable presumption against waiver’ of fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). There is simply no evidence that Mr. Peter’s knowingly, voluntarily and intelligently waived his right to be present. And no waiver can be inferred where the prosecutor did not give proper written or verbal notice of a deposition intended to perpetuate testimony.

4. MR. PETERS WAS DENIED HIS STATE AND FEDERAL
CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESS
AGAINST HIM

The State argues that there was no confrontation clause violation in this case because the witness was unavailable. The state suggests that reversal on the issue of unavailability is required only when the State makes “no effort” to secure the witnesses appearance. See Brief of Respondent at 15-17. That is not the test. The test is whether the state has made “reasonable efforts” to secure the witnesses attendance.

First the state asserts that it had properly subpoenaed Dr. Click. It had not. A subpoena is properly served only when it is:

served by any suitable person over 18 years of age by giving the person named therein a copy thereof, or by leaving a copy at such person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. When service is made by any person other than an officer authorized to serve process, proof of service shall be made by affidavit.

CR 45(c), see also CrR 4.8 (subpoenas shall issue in same manner as in civil cases). In *State v. Adamski*, 111 Wn.2d 574, 761 P.2d 621 (1988) the prosecution mailed subpoena to vocational home in accordance with the home's internal procedures for handling subpoenas to its residents. But the Supreme Court held that a subpoena that is not served in accordance with CR 45 is a nullity and its issuance cannot constitute due diligence to support a continuance.

In this case, the subpoena was not personally served. The subpoena stated that Dr. Click was served at “her abode with HMC SAC.” Clearly, “HMC SAC” is the Harborview Medical Center Sexual Assault

Unit. It is unlikely that “HMC SAC” is Dr. Click’s abode. It is certainly not a “person.”

Second, the state says:

While the hardship of returning for trial from a different state might not appear as extreme as in the case where a witness leaves the country, in Dr. Click's situation the hardship was nevertheless apparent. She was set to leave for Africa in a little over a month to work with an AIDS project; missing any part of the training program in Houston would thus negatively impact her preparation for this major next step in her career.

States Response at page 11, fn 5. There is no citation to the record to support this statement and there is no declaration from any competent person attached to the State’s Response. Therefore, the only statement this court can consider is the one made in the record. Even if this court could consider the footnoted statement, it is insufficient to establish any hardship. Attending a criminal trial and providing testimony is always inconvenient to the witnesses other commitments. If this court were to find that witnesses are “unavailable” simply because the summons interferes with their employment, most witnesses would be “unavailable.”

And this case is clearly distinguishable from *State v. Hacheney*, 158 Wash. 2nd 503, 158 P. 3rd 1152 (2007). In that case the witnesses appear to have been properly subpoenaed. The state properly asked the court for permission to take perpetuation depositions well in advance of trial. Hacheney was present at the depositions. And, the witnesses were all unavailable because, by the time of trial, they had left the United States.

5. MR. PETERS IS ENTITLED TO THE APPELLATE STANDARD OF REVIEW ON BOTH HIS RIGHT TO BE PRESENT AND HIS RIGHT TO CONFRONTATION

When the failure of appellate counsel to raise the constitutional issues on appeal was both deficient and prejudicial a personal restraint petitioner is entitled to rely on the appellate standard of review. *In Re Orange*, 152 Wash.2d 795, 814, 100 P.3d 291 (2004).

Here appellate counsel could have raised the confrontation clause issue on direct appeal. Although Mr. Peters has added information in this litigation, the issue was apparent from the trial court record as it stood during the first appeal.

As discussed above, there was nothing in the record to establish Dr. Click's unavailability. And, the videotaped deposition was entered as State's Exhibit 35. The trial transcript itself demonstrated that at the commencement of the deposition the only three people present were Dr. Click, and the prosecutor and defense counsel. And, there is no waiver of any rights by Mr. Peters on the record.

The issue would have been readily apparent to any competent appellate lawyer. The failure to raise the issue cannot be deemed tactical or the result of some carefully plotted overarching strategy.

6. MR. PETERS WAS PREJUDICED BY THE VIOLATION OF HIS RIGHTS.

Peters relies on his argument in his initial briefing to this court. If Peters had been afforded the effective assistance of counsel, Dr. Click's videotaped testimony would not have been admitted. Even the State

acknowledged that this was essentially a credibility battle between the victim, who had given inconsistent statements and Mr. Peters, who testified. RP 646-739. Therefore in closing the State used the admission of Dr. Click's testimony to bolster the credibility of the J.P. The prosecutor argued that "credibility" consisted of "four c's":

The next is consistency. Is this information changing over time? And think about what J.P. told the social worker about the history of abuse. What she told Dr. Click and what she saw on TV. What she told Dr. Sugar weeks later, and what she came in and told you the courtroom about what happened.

RP 804.

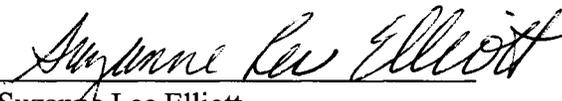
As argued above, had counsel objected to the introduction of Dr. Click's testimony, the State's consistency argument would have been significantly undermined.

III. CONCLUSION

This Court should grant Peter's Petition, reverse his convictions and remand for a new trial.

DATED this 14th day of May 2010.

Respectfully submitted,


Suzanne Lee Elliott
WSBA 12634

CERTIFICATE OF SERVICE

I certify that on May 14, 2010, I deposited this brief in the mail, postage prepaid, to the following:

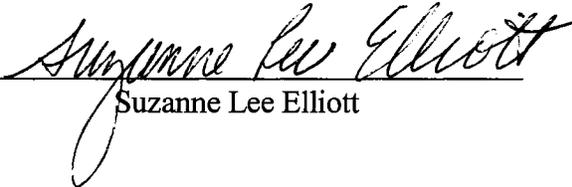
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