

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

STATE OF WASHINGTON,
Respondent.

v.

FELIX VINCENT SITHIVONG,
Petitioner.

Received
Washington State Supreme Court

JUL 03 2014

Ronald R. Carpenter
Clerk

90451-1

SUPERIOR COURT NO. 10-1-04298-5
COURT OF APPEALS NO. 68030-7-1
SUPREME COURT OF WASHINGTON NO. 89015-3

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUL 18 PM 1:08

PERSONAL RESTRAINT PETITION

FELIX VINCENT SITHIVONG
ACTING PRO SE
1830 Eagle Crest Way
Clallam Bay, WA. 98326

7-3-2014:
PAYMENT OF FILING
FEE WAIVED

Susan L. Carlson
Susan L. Carlson
Supreme Court Deputy Clerk

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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)
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) NO. _____
)
) PERSONAL RESTRAINT PETITION
)

Felix Vincent Sitthivong,
Petitioner's Full Name

A. STATUS OF PETITIONER

I, Felix Vincent Sitthivong, residing at CBCC; 1830 Eagle Crest Way, Clallam Bay, Washington 98326.

Apply for relief from confinement. I am now in custody serving a sentence upon conviction of a crime under Superior Court No. 10-1-04298-5.

The court in which I was sentenced was: King County Superior Court.

I was convicted of the crimes of: (count 2)-Assault in the First Degree; (counts 3 & 4)-Attempted Murder in the Second Degree; (count 5)-Murder in the First Degree; and (count 6)-Possession of a Firearm. I was sentenced to a total confinement period of 788.5 months.

I was sentenced after trial on December 2, 2011.

The Judge who imposed the sentence was the Honorable Jean Rietschel.

My lawyer at trial was, John R. Crowley; Attorney at Law, Smith Tower, 506 2nd Avenue, Suite 1015, Seattle, WA. 98104.

I did appeal the decision of the trial court to the Court of Appeals, Division I, CoA's No. 68030-7-1.

My lawyer for appeal was; Christopher H. Gibson, Attorney at Law, 1908 East Madison Street, Seattle, WA. 98122.

The decision of the Appellate Court was not published.

Since my conviction I have asked a court for some relief from my sentence other than I have already written above. The court I asked was The Supreme Court of the State of Washington; Supreme Court No. 89015-3. Review was denied on December 11th, 2013.

I filed my own Petition for Relief, pro se, while housed at Clallam Bay Correction Center, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

B. GROUNDS FOR RELIEF

I claim that I have (TWO) reasons for this court to grant me relief from my convictions and sentence described in Part A.

GROUND ONE

Charging Sitthivong With Two Separate Counts Of Alternative Charges - Premeditated and Extreme Indifference - Violated His State and Federal Constitutional Rights To: Due Process; Right To Present A Defense; Right To Notice Of Charges; and Right To A Fair Trial - U.S. CONST. AMENDS. 5, 6, and 14; WASH. CONST. Art. 1, Sections 3, 21, and 22.

ARGUMENT

Actual and substantial prejudice denied Sitthivong a fair trial where the trial court and prosecutor served the alternative charges of First Degree Murder and denied the lesser included offenses to one of the alternative charges. One crime of Murder should be charged as one count, and the commission of the crime by alternative acts. State v. Scott, 64 Wn.2d 992, 395 P.2d 377 (1964). Here, severance

of the alternative acts denied Sitthivong his constitutional rights to have the jury instructed on his theory of the case along with his proposed self-defense instructions. This denied Sitthivong a complete defense and violated his rights to notice, due process, proof beyond a reasonable doubt, and jury trial. Sitthivong's defense was self-defense and because the alternative acts of a single offense was separated as two counts, the trial court would not instruct on self-defense for both counts. (See RP). This was a complete denial of Sitthivong's right to have the jury instructed on his theory of the case. When self-defense negates an essential element of the crime, the State must prove the absence of self-defense beyond a reasonable doubt. State v. Dyson, 90 Wn.App. 433, 952 P.2d 1097 (1997). If the jury instructions have the effect of relieving the State of its burden of proof enunciated in; In re Winship, 397 U.S. 358 (1970), as to the mens rea, it deprives the petitioner of substantial due process rights and is structural error. Francis v. Franklin, 471 U.S. 307 (1985). When instructions switch the burden to prove lack of mens rea, this creates a mandatory presumption of guilt that is constitutionally deficient. Mullaney v. Wilbur, 421 U.S. 684 (1975). Not being allowed self-defense instructions on self-defense for the severed alternative charge created a mandatory presumption.

Due process protects criminal defendants from this type of danger by requiring the jury instructions to allow the defendant to argue his theory of the case, fully instruct the defense on their theory of the case, and inform the jury of the applicable law so that the jury can use their discretion to decide questions of fact. see State v. Koch, 157 Wn.App. 20, 237 P.3d 287 (2010). Here, Sitthivong was denied due process and a complete defense. This relieved the prosecutor of its burden of proof and caused a mandatory presumption of guilt. Had Sitthivong been charged in the alternative, according to the law, this error would not have occurred. However, because this did occur, Sitthivong's rights to a jury trial and fair trial was substantially prejudiced.

This case should be remanded for a new trial.

GROUND TWO

Did The State Violate Sitthivong's Rights Under The Sixth Amendment Of The United States By Not Allowing A "911 Tape Recording" Into Evidence, Which Supports His Self-Defense Claim, and Falls Under RAP 2.5(a), Thus, Denying Sitthivong Of His Sixth Amendment Right To Produce Evidence In Support Of His Self-Defense Claim Other Than His Own Testimony.

FACTS PERTINENT TO GROUND TWO

According to his own statements given on on October 17th, 2011, Kevin Lessig, who is a key witness for the State in this case, stated that he lives directly across the street from the "V-Bar" where the shooting took place. Lessig stated that he was in fact up and awake for the sole purpose of watching, recording, and reporting any illegal activity that may, or may not have occurred, the particular evening of June 5th, 2010, or in the early morning hours of June 6th, 2010.

ARGUMENT

While Sitthivong's attorney objected to the courts denial of his request to admit the "911 tape recording", for impeachment purposes, he did not base this objection on an alleged Sixth Amendment violation; Under RAP 2.5(a), Defendant Sitthivong has from the very beginning of this case claimed that it was a matter of self-defense. Clearly he has stated that he only pulled out his gun and fired after a man pulled out a gun and pointed it in his direction. That man then ran into the bar and Sitthivong fled the scene.

RCWA 9A.16.110(1) provides:

No person in the State shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means, himself or herself, his or her family, or his or her real personal property, or for coming to the aid of another who is in imminent danger of or the victim of assault, robbery, kidnaping, arson, burglary, rape, murder, or any other violent crime as defined in RCW 9.94A.030.

On October 17th, 2011, witness Lessig testifies that on June 6th, 2010, at around 0245 hours, he was up and awake to watch the V-Bar and take notes for the police if there had been a real problem and that this was something he had been planning for a while. He further states his apartment is directly across the street from the V-Bar. He also had a camera recording when he heard shooting and people running in the street. Lessig calls 911 and reported seeing a guy standing in the middle of everyone with his arm out and he looked liked he was shooting. Then he turned and ran into the bar. (note that this guy he reports turns out not to be the defendant, Sitthivong). He also testifies later that he was mistaken and the next day he realized the person he claimed was the shooter was in fact not. So the court rules the 911 recording as inadmissable. (see Lessig's testimony on October 17th, 2011). "A person need not be in actual imminent peril of his life or great bodily harm before he may defend himself. It is sufficient if in good faith he has

a reasonable belief from the facts, as they appear to him at the time, that he is in imminent danger; if he honestly believes such to be the case then he had a right to act in self-defense." see State v. Bradley, 141 Wn.2d 731, 737, 10 P.3d 58 (2000) - According to State v. LeFaber, 128 Wash.2d 896, 899-900, 913 P.2d 369 (1996). Thus, the general rule in Washington is that reasonable force in self-defense is justified if there is an appearance of imminent danger, not actual danger itself. Lessig testifies that he called 911 moments after the shooting to report what he saw. (see Lessig's testimony given on October 31st, 2011. "Store clerk statements during 911 call to inform police of a fist fight that was occurring outside store, including statements that a white person had fired a shot, were not "testimonial" in nature so as to be subject to requirements of confrontation clause, as admitted in prosecution on assault charges with firearm enhancements; Rather, statements were made in course of an ongoing emergency. State v. McWilliams, 311 P.3d 584 (2013). The facts in support of self-defense instruction, such as the defendants state of mind, can come from a number of sources, including state and defense witnesses and police testimony. State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997). Self-defense is a lawful act that absolves the actor of

culpability and, consequently the absence of self-defense is an element the State must prove. State v. James, 47 Wash.App. 605, 608, 736 P.2d 700 (1987). Here, it is important that the 911 recording, that was marked but not admitted, should have been admitted into evidence for the jury to hear and allow it to make its own determinations. By excluding this evidence, it clearly denies Sitthivong of his Sixth Amendment rights. By exclusion, it boisters the states case against him and blinds the trier of fact. At one point during the 911 call, Lessig is so sure of who the shooter is. He yells out the window to the police that the shooter went into the bar. (see Lessig's testimony given on October 31st, 2011). This account of the events is directly in synchronization with defendant Sitthivong's accounts and thus, supports his self-defense claim. Under Washington law, a defendant must produce some evidence demonstrating self-defense from "whatever source" and that the evidence does not need to be the defendant's own testimony. State v. Jordan, 158 Wash.App. 297, 241 P.3d 464 (2010) (citing State v. McMullum, 98 Wash.2d 484, 488, 656 P.2d 1064 (1983)). When questioned by defense counsel as to why Lessig did not change his accounts of the events in those early morning hours, he states: "That after he made his report to 911, he went down to the V-Bar to talk

to the people in the neighborhood and had discovered that the accounts of what all the other people said they saw was significantly different from what he said he had seen and reported to the 911 operator, so he changed his testimony. He further states that a number of statements he made to 911 are different than what he had testified to weeks ago. (see October 31st, 2011 testimony).

On a partial or incomplete record, the appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of, but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent. State v. Jasper, 271 P.3d 876 (2012). Here, we offer no statements that's not part of the record. We only argue that the ruling to not admit defense exhibit #83, the 911 tape recording, excluded any evidence in direct support of Sitthivong's claim of self-defense for the trier of fact to weigh in on, thus, upping the State's odds at conviction.

RAP 2.5(a)(3) provides:

(a) Errors raised for the first time on review - the appellate court may refuse to review any claim of error which was not raised in the trial

court. However, a party may raise the following claimed errors for the first time in the appellate court: (3) Manifest error affecting a constitutional right - A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been significantly developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

As prosecutor Castleton states to the jury on sentencing day December 2nd, 2011, Quote: "the only person who claims that he was somehow acting in self-defense came from the defendants own mouth." "There was nothing that he said on the stand that was corroborated by any of the evidence that supported a claim of self-defense." Unquote. Therefore, by not allowing a 911 recording taken seconds after a shooting is so far out of the scope of reality, the court was clearly prejudicial against defendant Sitthivong by not allowing him a proper defense. Thus, allowing the State to use this 911 exhibit that was not admitted, to claim there was no other evidence of self-defense other than the defendants own words. Clearly this is a Sixth Amendment violation.

C. STATEMENT OF FINANCES:

I do ask the court to file this without making me pay the \$250.00 filing fee because I am so poor and cannot pay the fee.

I have ~~\$66.24~~ ^{\$ 99.10} in my prison account.

I do ask the court to appoint a lawyer for me because I am so poor and cannot afford to pay a lawyer.

I am employed. My wages amount to \$16.00 a month. My employer is Washington State Prison, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

During the past 12 months I did not get any money from a business, profession or other form of self-employment.

During the past 12 months I did not:

- receive any payments.
- receive any interest.
- receive any dividends.
- receive any other money.

I do not have any cash except as stated as being in my prison account.

I do not have any savings or checking account.

I do not own stocks, bonds, or notes.

I have no real estate or other property or things of any value whatsoever.

I am separated from my wife and have not seen or heard from her in years.

There is no one who needs me to support them in any way.

The only bills I owe are my legal financial obligations and is estimated to be about \$28,000.00.

D. RELIEF REQUESTED:

I want this Court to vacate my conviction and give me a new trial.

E. OATH OF PETITIONER:

STATE OF WASHINGTON

COUNTY OF Clallam

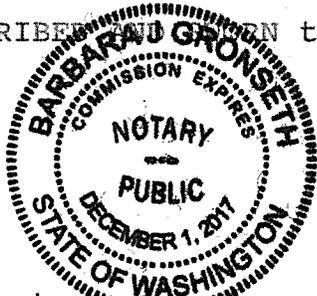
After being duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and believe the petition is true.

[Handwritten Signature]

Signature

Felix Sithivong #354579
Print Name & Number

SUBSCRIBER Felix Sithivong sworn to before me this 24th day of JUNE 2014.



Barbara Gronseth
Notary Public for Washington State
Residing at Clallam Bay
My commission expires Dec. 1, 2017

If a notary is not available, explain why none is available and indicate who can be contacted to help you find a Notary:

_____.

I declare that I have examined this petition and to the best of knowledge believe it is true and correct.

DATED this ___ day of _____, 2014.

Print Name & Number

DISPLAY TRUST ACCOUNTS - (OTIDTAC)

DOC#	Last Name	First Name	Middle Name	DOB	Age	Gender	Alerts	
0000354579	SITTHIVONG	FELIX	VINCENT	06/19/1985	29	MALE		
BKG#	Facility	Status	In/Out	Reason	Custody	Ind		
	B01 [019-AD04L]	ACTIVE-IN	In		Unclass	<input type="checkbox"/>		

Offender Sub Accounts

Account Code	Type	Description	Total Balance	Available Balance	Balance On Hold	Indigent Since	Days Remaining	Indigent
2101	REG	SPENDABLE	99.10	99.10				<input type="checkbox"/>
2102	SAV	SAVINGS	0.00	0.00				<input type="checkbox"/>
2103	WTRS	WORK TRAINING RELEASE	0.00	0.00				<input type="checkbox"/>
Totals			132.70	102.70	30.00			

Offender Payables

Type	Description	Created	Info Number	Original Amt	Total Paid	Write off Amt	Total Owing	Fix	Mth	Act
HYGA	INMATE STORE DEBT	AH1	12192011	3.06	3.06	0.00	0.00	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
MISCC	MISCELLANEOUS DE	AB1	12102012	1.69	1.69	0.00	0.00	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
TVD	TV CABLE FEE DEBT	AB1	12082012	0.50	0.50	0.00	0.00	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Payables Summary

Credit Obligations	Total	9.48	Paid	9.48	Write-offs	0.00	Owing	0.00	Next Page
Fixed Amount Obligations	Total	0.00	Paid	0.00			Owing	0.00	

 My Offenders	 My Work	 My Calendar	 Offender Updates	 Offender Detail
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