

FILED  
Dec 01, 2015  
Court of Appeals  
Division I  
State of Washington

No. 72639-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

EDWARD WARNER,

Appellant.

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

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REPLY BRIEF

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A. ARGUMENT

MR. WARNER’S RIGHT TO APPEAR AND DEFEND IN PERSON AND HIS RIGHT TO DUE PROCESS WERE NOT CONSTITUTIONALLY ACCOMMODATED, DUE TO THE INADEQUATE ACCOMMODATION.

- a. An accommodation must adequately protect the constitutional right to appear and be present.

“No defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.” In re Pers. Restraint of Khan, 2015 WL 7567017 (Nov. 25, 2015) (quoting United States v. Carrion, 488 F.2d 12, 14 (1973)). In Khan, the Washington Supreme Court recently reiterated that criminal defendants have both a constitutional and a statutory right to an interpreter in court, when needed. Id. at \*4 (citing Carrion, 488 F.2d at 14; State v. Gonzales–Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999)).

The right to a foreign language interpreter is frequently analogized to the right to accommodation for a hearing impairment.<sup>1</sup> In People v. Doe, the appellate court directly compared the hearing-disabled litigant before the court to one proceeding without a foreign language interpreter: “Clearly, a non-English speaking defendant could

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<sup>1</sup> The right to appear, to defend, and to be present are guaranteed under the Washington and the United States Constitutions. Article I, Section 22; U.S. Const. Amends. VI, XIV.

not meaningfully assist in his/her own defense without the aid of an interpreter.” 602 N.Y.S.2d 507, 510, 158 Misc.2d 863 (1993).

Because a hearing disability affects the ability of the accused to “sufficiently understand the proceedings against him such that he is able to assist in his own defense,” adequate accommodation is of paramount importance. Linton v. State, 275 S.W.3d 493, 503-04 (Tex., 2009); see also United States v. McMillan, 600 F.3d 434, 453-54 (5<sup>th</sup> Circ. 2010); State v. Barber, 617 So.2d 974, 976 (La., 1993).

Our Supreme Court has recognized the right to an interpreter as fundamental, reminding us that to proceed without an interpreter renders a trial “a meaningless ceremony, and the prisoner [would be] tried in violation of the laws and constitution of the land.” Khan, 2015 WL 7567017, at \*7 (Yu, J., concurring) (quoting Elick v. Wn. Territory, 1 Wn. Terr. 137, 140 (1861)).<sup>2</sup>

b. The lack of sufficient accommodation denied Mr. Warner his constitutional right to appear and be present.

In this case, Mr. Warner suffers from a hearing impediment that affected his ability to hear the trial proceedings; he alerted the court to this fact no less than five times during the trial. RP 3-4, 77, 80, 82,

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<sup>2</sup> Washington has protected the due process right of the accused to have an interpreter for court proceedings since before statehood. See Elick, supra.

142. Although the court assured Mr. Warner that the court would “do everything that we can to make sure that [he] can hear us,” the court did not adequately ensure that Mr. Warner could hear the proceedings. RP 82.

Although in the opening brief, Mr. Warner argued the court and his trial counsel had not accommodated his hearing loss in any manner, on October 21, 2015, a hearing was held to settle the record. 10/21/15 RP 3-10.<sup>3</sup> Although Mr. Warner’s trial counsel did not testify, the Honorable Charles R. Snyder – the same judge who presided at trial – conducted the hearing. Mr. Warner, by undersigned counsel, has agreed to the State’s motion to supplement the record under Rule of Appellate Procedure 9.10.

At the brief hearing on October 21, 2015, Judge Snyder stated that he recalled Mr. Warner’s trial, and “I do remember Mr. Warner expressing his difficulty.” 10/21/15 RP 7. The court’s recollection is that Mr. Warner was provided with an assistive device, but that “he at times didn’t use it and found it difficult to use, but I believe it was made available to him.” *Id.* at 8. The court further stated that Mr. Warner seemed to have access to the device throughout the trial,

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<sup>3</sup> The parties agree that no reference to a listening device appears in the original trial record.

“unless at some point he might have said this isn’t doing me any good. I don’t recall that, but I do recall he had it.” Id. The court also noted that Mr. Warner was adjusting the listening device during voir dire and “attempting to make it work better for him.” Id.

Following this hearing, it seems clear that the presence of the assistive device is not dispositive of the due process issue. The court specifically recalls that Mr. Warner had difficulty hearing the proceedings. 10/21/15 RP 7. The court also recalls that Mr. Warner found the listening device difficult to use and that consequently, he did not use it consistently during the trial. Id. at 8. The court-provided accommodation was therefore inadequate to ensure that Mr. Warner could hear “100% of the proceedings,” as due process demands. See Doe, 600 N.Y.S.2d at 510; see also Khan, 2015 7567015.

c. To the degree defense counsel neglected to ensure Mr. Warner’s disability was sufficiently accommodated, defense counsel was ineffective.

Likewise, Mr. Warner’s defense counsel failed to request sufficient accommodation. Despite the fact that Mr. Warner complained within the first moments of not being able to hear the judge, counsel never stated that the provided listening device was

inadequate or was not functioning properly for his client. RP 3-4, 77, 80, 82, 142.

Mr. Warner's early statement that "my hearing is very bad," RP 3, together with counsel's four additional reminders to the court that Mr. Warner could not hear the proceedings, indicate that counsel should have sought further accommodation from the court to assist Mr. Warner with his hearing disability.

To the degree that trial counsel failed to protect Mr. Warner's fundamental due process rights, counsel did not function as the effective advocate to which Mr. Warner was constitutionally entitled. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); In re Hubert, 138 Wn. App. 924, 929, 158 P.3d 1252 (2007).

## B. CONCLUSION

For the above reasons, as well as those raised in the opening brief, Mr. Warner's case should be reversed and dismissed for failure to prove an essential element. In the alternative, due to the violation of due process, the matter should be reversed and remanded for a new trial.

Respectfully submitted this 1<sup>st</sup> day of December, 2015.

*s/ Jan Trasen*

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
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v.	)	NO. 72639-1-I
	)	
EDWARD WARNER,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1<sup>ST</sup> DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 1<sup>ST</sup> DAY OF DECEMBER, 2015.

X \_\_\_\_\_ 