

73291-9

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Court of Appeals
Division I
State of Washington

73291-9

No. 73291-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARIO HUMPHRIES,

Appellant.

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

The Honorable Regina Cahan

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mario Humphries' right to Due Process, protected by the Fourteenth Amendment.

2. The trial court's comments at Mr. Humphries' re-sentencing violated the appearance of fairness.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The Fourteenth Amendment's guarantee of Due Process, and the appearance of fairness doctrine, protect a criminal defendant's right to a fair and impartial hearing. Where the trial court's remarks at Mario Humphries' re-sentencing hearing, to Mr. Humphries and a reasonable observer, seemed to demonstrate a lack of fairness toward the defendant by virtue of the court's repeated statements critiquing the Supreme Court's decision, did the court violate Mr. Humphries' right to Due Process, and the appearance of fairness doctrine?

2. Should this Court order reversal of Mr. Humphries' sentence and remand for re-sentencing before an impartial judge?

C. STATEMENT OF THE CASE

1. Original trial and appeal; Supreme Court decision.

Mario Humphries, age 19, was originally charged with second degree assault with a deadly weapon, following a Seattle police

officer's allegation that Mario shot a firearm at him, as the officer was driving in his patrol car. CP 6-8. The shooting charge was accompanied by a count of unlawful possession of a firearm (VUFA), with ineligibility based on Mr. Humphries' prior Washington robbery convictions, which were "serious offenses." CP 6-8.

During his 2010 trial, the trial court agreed with defense counsel that Mr. Humphries had no right to refuse to sign the stipulation drafted by his lawyer, which conceded guilt on an element of the VUFA charge. The stipulation stated that Mario did have a prior conviction for a firearm-disqualifying crime. Consistent with the court's ruling, after telling Mario that his consent or agreement with the stipulation was not needed, the stipulation was read to the jury just prior to the State resting its case, over Mr. Humphries' continued refusal to sign. See State v. Humphries, 181 Wn.2d 708, 712-13 and n. 2, 336 P.3d 1121 (2014).

Defense counsel did not seek an ER 404(b) limiting instruction telling the jury that it must not use the fact that Mr. Humphries had a prior firearm-disqualifying serious offense, as proof that he committed the alleged firearm assault alleged in the present case. Humphries, 181 Wn.2d at 713, 719.

The Court of Appeals affirmed the convictions. A dissenting judge analyzed that the right to demand jury proof of every element of the crime cannot be waived involuntarily, and opined that telling Mr. Humphries his signature was not relevant rendered any later waiver by placement of his signature on the document similarly unknowing. State v. Humphries, 170 Wn. App. 777, 806-08, 285 P.3d 917, 931 (2012), aff'd in part, rev'd in part, 181 Wn. 2d 708, 336 P.3d 1121 (2014).¹

On review, the Supreme Court determined that the criminal defendant's right to demand jury proof of each element of the crime required that the defendant could not be forced to stipulate to any element, over his timely, voiced objection. Humphries, 181 Wn.2d at 714-19. The Court ruled that the VUFA conviction must be reversed, and remanded to the trial court for re-sentencing.

2. Re-sentencing. The King County prosecutor did not pursue re-trial on the VUFA charge. CP 62. Subsequently, at his re-sentencing on the remaining assault, Mr. Humphries, through

¹ The trial court had denied Humphries' motion for a new trial based on ineffective assistance in failing to request an ER 404(b) limiting instruction precluding the jury from using the prior offense as propensity evidence; the Court of Appeals and then the Supreme Court ultimately rejected the defense argument regarding this aspect of the case. Humphries, 181 Wn.2d at 714-19.

counsel, argued for a sentence of 63 months at the lower end of the standard range, which had not changed from an offender score of 9. 3/12/15RP at 7-8. The defense filed a pre-sentence report. Supp. CP ____; 3/12/15RP at 6-8. The court ordered Mr. Humphries to serve 70 months on the assault (as requested by the State), plus the enhancement term. 3/12/15RP at 7-9; CP 53-61.

However, the trial court, at re-sentencing after issuing the new sentence, made comments and had discussions with the prosecutor that appeared to suggest its belief that Mr. Humphries had appealed a proper determination by the trial court. The court stated:

- that it did not understand the Supreme Court's decision;
- that the decision "puts people in a catch-22;"
- that the decision worried the court; and
- that the Supreme Court failed to perceive that the decision to stipulate to an element was, as the court said, "if that is not a strategic decision and a decision of counsel, what else is it?"

3/12/15RP at 9-11. Mr. Humphries appeals. CP 131-40.

D. ARGUMENT

THE TRIAL COURT'S COMMENTS AT SENTENCING EVIDENCED A BIAS AGAINST MR. HUMPHRIES THAT ABROGATED HIS RIGHT TO DUE PROCESS AND VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE

1. Mr. Humphries was constitutionally entitled to a fair sentencing hearing by a fair and impartial judge. The Fourteenth Amendment to the United States Constitution guarantees a defendant a fair trial. Of that right, our State Supreme Court has said:

A fair trial in a fair tribunal is a basic requirement of due process. . . . “[E]very procedure which would offer a possible temptation to the average man as a judge [to forget the burden of proof required to convict the defendant, or which might lead him] not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.” Tumey v. Ohio, 273 U.S. 510, 532[, 47 S. Ct. 437, 71 L. Ed. 749 (1927)].

State v. Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002).

A judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995) (quoting State v. Ladenburg, 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992)); see also Dimmel v. Campbell, 68 Wn.2d 697,

699, 414 P.2d 1022 (1966) (“It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties”).“ The appearance of fairness doctrine seeks to prevent the problem of a biased or potentially interested judge. State v. Carter, 77 Wn. App. 8, 12, 888 P.2d 1230 (1995). A violation of the appearance of fairness doctrine requires evidence of a judge's actual or potential bias. Carter, 77 Wn. App. at 11.

Mr. Humphries’ arguments on appeal from re-sentencing do not assert that the trial court possessed actual bias. However, as to this question of a *seeming* bias, “[t]he test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts.” In re Marriage of Davison, 112 Wn. App. 251, 257, 48 P.3d 358 (2002) (quoting Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355(1995)).

“Due process, the appearance of fairness, and canon 3(D)(1) of the Code of Judicial Conduct (CJC) require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned.” State v. Perala, 132 Wn. App. 98, 110-11, 130 P.3d 852, review denied, 158 Wn.2d 1018 (2006); State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d

141 (1996). The CJC provides guidance to judges and candidates for judicial office. Canon (D) of the CJC states that “[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.” State v. Chamberlin, 161 Wn.2d 30, 37, 162 P.3d 389 (2007) (quoting CJC Canon 3(D)(1)).

2. Mario Humphries may raise this issue initially on appeal. Generally, a defendant cannot appeal a sentence within the standard range; however, the prohibition is not absolute. RCW 9.94A.585(1); State v. Garcia-Martinez, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997). A defendant may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements. State v. Mail, 121 Wn.2d 707, 711-13, 854 P.2d 1042 (1993); State v. Onefrey, 119 Wn.2d 572, 574, 835 P.2d 213 (1992); State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); State v. McNeair, 88 Wn. App. 331, 336, 944 P.2d 1099 (1997).

Here, Mr. Humphries contends that his Due Process rights were infringed by the trial court’s potential or seeming bias against a dis-interested resolution of the issue of a low end or higher end sentence within the standard range, thus raising a claim the court

violated the United States constitutional provision guaranteeing Mario a fair hearing.

3. The trial court's comments after the sentencing of Mr. Humphries evidenced a seeming bias and rendered the hearing constitutionally unfair. In the case of State v. Ra, the Court of Appeals found the trial court's improper comments during sentencing (along with comments that had occurred at trial) violated the defendant's right to Due Process and the appearance of fairness. State v. Ra, 144 Wn. App. 688, 704-05, 175 P.3d 609 (2008), review denied, 164 Wn.2d 1016 (2008).

We agree with Ra that the trial court's comments suggesting that Ra was "some distorted character who breeds and lives violently," RP at 829, and scolding him for apparently nodding "as if you are agreeing with me," RP at 847, were inappropriate, "[did] not show proper restraint[,] and should not have been made." State v. Ingle, 64 Wn.2d 491, 499, 392 P.2d 442 (1964).

State v. Ra, 144 Wn. App. at 705.

Although the trial court in this case did not show bias in the form of an expressed opinion that the defendant was of lesser character, the court did appear to be more interested in assessing why the Supreme Court had condoned Mr. Humphries' exercise of his constitutional rights at his original trial.

To the defendant, who is the individual distinct from his trial lawyer, his appellate lawyer, and the trial court, and who obtained nothing of concrete benefit for litigating a significant constitutional issue to the highest court in the State, the sentencing court's remarks seemed to evidence a bias against him. It appeared that regardless of what arguments were made or evidence presented at the sentencing, the court was going to impose the punishment requested by the prosecutor. Mario Humphries' re-sentencing hearing was unfair under constitutional principles.

4. Mr. Humphries is entitled to reversal of his sentence before a different judge. Where the trial court has violated the defendant's right to a fair hearing and the appearance of fairness, the remedy is reversal of the sentence and remand for resentencing before a different judge. State v. Ra, 144 Wn. App. at 705. Here, in light of the Ra decision, there was evidence the trial court exhibited bias against Mr. Humphries, thus violating his right to Due Process and the appearance of fairness. Mr. Humphries argues that this Court must reverse his sentence, and remand for resentencing with instructions sentencing before a different judge.

E. CONCLUSION

Based on the foregoing, Mr. Humphries argues that this Court should reverse his sentence and remand for re-sentencing before a different Superior Court judge.

DATED this 10th day of August, 2015.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73291-9-I
v.)	
)	
MARIO HUMPHRIES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING 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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