

WASHINGTON STATE COURT OF APPEALS DIVISION THREE

CASE SUMMARIES FOR ORAL ARGUMENT

The following summaries are drawn from briefs and lower court judgments. The summaries have not been reviewed for accuracy by the judges and are intended to provide a general idea of facts and issues presented in the cases. The summaries should not be considered official court documents. Facts and issues presented in these summaries should be checked for accuracy against records and briefs, available from the Court, which provide more specific information.

Date of Hearing: Thursday, September 13, 2018

Location: Spokane, 500 North Cedar

Panel: Rebecca Pennell, Laurel Siddoway, George Fearing

9:00 a.m.

1) **No.: 347150**

Case Name: State of Washington v. Debra Jean Shoemaker

County: Chelan

Case Summary: Debra Shoemaker pleaded guilty to second degree burglary and third degree theft stemming from a break-in at a residence belonging to George Harmon. At the sentencing hearing, the court allowed a friend of Mr. Harmon, who was a licensed attorney in Oregon, to speak on Mr. Harmon's behalf. This friend presented information that was supplemental to that contained in the police report. Mr. Harmon's grandson also addressed the court. The sentencing court denied the State's recommendation for a residential drug offender sentencing alternative (DOSA) and imposed a high range sentence of 22 months in confinement for the burglary charge.

Ms. Shoemaker appeals, contending (1) the trial court violated her right to due process by allowing a family representative to present unproven, contested facts at the sentencing hearing, (2) the court violated the appearance of fairness doctrine, and (3) Ms. Shoemaker's counsel provided ineffective assistance by failing to object to the family representative's testimony.

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- 2) **No.: 353893**
Consolidated with: 353923, 353907, 353915
Case Name: In re the Termination of: B.M.
County: Pend Oreille

Case Summary: The Department of Social and Health Services (DSHS) took custody of B.M. and his three siblings in 2015. DSHS initiated dependency proceedings, and identified drug use and domestic violence as the main parental deficiencies. The children's father, L.M., was incarcerated at the time the dependency was initiated and for multiple periods of time throughout the dependency. DSHS made referrals for services, but never inquired what services, if any, L.M. could complete while incarcerated. The month before the termination trial, L.M. began to make positive progress with consistently visiting the children, but he was subsequently incarcerated and remained incarcerated at the time of trial. Following the dependency trial, the court terminated L.M.'s parental rights.

L.M. appeals, claiming the State did not adequately prove the facts of RCW 13.34.180 by clear, cogent, and convincing evidence.

- 3) **No.: 348164 (Linked with 347869)**
Case Name: State of Washington v. Carlos Hernandez, II
County: Grant

Case Summary: The State charged Carlos Hernandez, II, with possession of a controlled substance, driving with a revoked license in the first degree, and operation of a motor vehicle without an ignition interlock device. Mr. Hernandez was appointed a public defender, but retained private counsel. Due to a conflict in interest, private counsel moved ex parte to withdraw from representing Mr. Hernandez and requested to seal the motion and transcripts from the hearing. The court granted private counsel's motion, and subsequently reappointed Mr. Hernandez's initial public defender to represent him.

At the beginning of Mr. Hernandez's trial, the deputy bailiff turned away four spectators from observing voir dire because he mistakenly believed there was no space for them to sit in the courtroom. The four spectators, who were family members of the prosecutor in the case, contacted the prosecutor's office and another prosecutor interrupted the voir dire process to notify the court of the potential courtroom closure. Following a colloquy that determined the four spectators were the only people briefly denied access, Mr. Hernandez's counsel explicitly refused to move for mistrial due to the inadvertent courtroom closure. The jury found Mr. Hernandez guilty of all charges.

Mr. Hernandez appeals, contending (1) the courtroom closure violated Mr. Hernandez's right to a public trial since the court did not perform an analysis pursuant to *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and (2) the trial court erred by allowing private counsel to withdraw ex parte and under seal.

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- 4) **No.: 347869 (Linked with 348164)**
Case Name: State of Washington v. Carlos Hernandez, II
County: Grant

Case Summary: The State charged Carlos Hernandez, II, with third degree rape of a child, third degree child molestation, 12 firearm-related charges, distribution of a controlled substance to a minor with sexual motivation, and intimidating a witness. Prior to trial, Mr. Hernandez's private counsel withdrew ex parte and under seal, and following two continuances, the court reappointed a public defender for Mr. Hernandez. On the morning of trial, Mr. Hernandez elected to proceed pro se, which the court allowed following a colloquy on the record. The jury found Mr. Hernandez guilty of all charges except for the intimidating a witness charge, and the court sentenced Mr. Hernandez as a persistent offender to life without parole.

Mr. Hernandez appeals, arguing: (1) the trial court erred when it terminated his examination of the victim as a contempt sanction in violation of his confrontation rights, (2) the court erred in denying his motion to dismiss because it failed to appoint counsel at a critical stage, (3) the court erred in denying his motion to dismiss because the State failed to provide a witness's statements pursuant to CrR 4.7, (4) he was denied a fair trial because he was not provided access to resource materials and additional time to prepare for trial, and (5) he was denied a fair trial because the trial court took no action when a corrections officer intimidated Mr. Hernandez's witness from testifying by stripping him of his inmate trustee status.

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11:00 AM

- 5) **No.: 353052**
Case Name: State of Washington v. Ismael M. Tarango
County: Spokane

Case Summary: Carlos Matthews arrived at Bargain Giant grocery store on the afternoon of March 7, 2016. He pulled next to an SUV and saw Ismael Tarango sitting in the passenger seat. When Mr. Matthews looked inside the SUV, he saw Mr. Tarango holding a handgun in his right hand, resting on his thigh. Mr. Matthews called 911 to report what he had seen. Police officers arrived at the grocery store, began following the SUV, and initiated a traffic stop after confirming the SUV was the same one reported by Mr. Matthews. Mr. Tarango had an outstanding warrant for failing to report to the DOC, so he was arrested. DOC officers searched the vehicle and found two handguns behind the passenger seat. The State charged Mr. Tarango with two counts of unlawful

possession of a firearm and one count of escape from community custody. Prior to trial, Mr. Tarango moved to suppress the evidence found in the SUV. The court denied the motion and a jury found Mr. Tarango guilty on all counts.

Mr. Tarango appeals, arguing (1) the trial court erred when it denied his motion to suppress the evidence obtained as a result of the traffic stop, and (2) insufficient evidence existed to convict him of unlawful possession of a firearm in count 2.

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6) No.: 355586

Case Name: Aho Construction I, Inc. v. City of Moxee

County: Yakima

Case Summary: Aho Construction I, Inc. (“Aho”) sought to rezone and subdivide a plat into ninety-one residential home lots in Moxee. The City of Moxee (“City”) issued a Mitigated Determination of Non-Significance, which required Aho to extend Chelan Avenue, an existing roadway within the plat, across the entirety of the plat to create a continuous roadway through the planned subdivision. Aho appealed the City’s requirement by filing a land use petition with the superior court, which included a complaint for damages and inverse condemnation as well as allegations based on Washington’s Growth Management Act. The superior court granted the City’s motion to dismiss Aho’s action for failure to exhaust administrative remedies prior to filing suit. Aho appeals.

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PANEL CHANGE

Panel: Rebecca Pennell, Kevin Korsmo, George Fearing

1:30 PM

7) No.: 347168

Case Name: State of Washington v. Nathaniel E. Tilton

County: Grant

Case Summary: Michael Tilton agreed to permit his adult son, Nathaniel Tilton, to stay at his residence temporarily after Nathaniel was released from incarceration. Thirty-six hours after arriving at his father’s house, Nathaniel assaulted his father and Michael locked his son out of the home. When police arrived, Nathaniel had broken

down the door to the house and was demanding the keys to his father's vehicle. Following Nathaniel's arrest, police found drug paraphernalia in the yard that did not belong to Michael and had not been present prior to the assault. The State charged Mr. Tilton with residential burglary, fourth degree assault, second degree malicious mischief, and possession of a controlled substance.

Mr. Tilton spent 12 months in custody prior to trial, and refused to appear in his case on 10 occasions. A jury convicted Mr. Tilton of residential burglary, fourth degree assault, and second degree malicious mischief but acquitted him on the possession charge. The jury also entered special verdicts, finding Mr. Tilton committed these crimes shortly after his release from incarceration and that the victim was present during the burglary.

Mr. Tilton appeals, claiming: (1) insufficient evidence to support the burglary conviction because the State failed to prove he did not have permission to enter his father's home, (2) the trial court erred by failing to conduct an independent investigation into a perceived breakdown in communications between Mr. Tilton and his appointed counsel, (3) the prosecutor committed prejudicial misconduct during closing arguments, (4) the trial court erroneously imposed an exceptional sentence on the residential burglary conviction without proper findings of fact, and (5) the trial court erred in imposing legal financial obligations without investigating Mr. Tilton's mental health issues. Mr. Tilton also submitted a Statement of Additional Grounds asserting a number of claims, including that the court violated his speedy trial rights.

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8) No.: 353575

Case Name: State of Washington v. Duane Edward Gray

County: Ferry

Case Summary: In October 2016, Duane Gray purchased groceries with a food stamp EBT (electronic benefits transfer card) he was not authorized to use. The State charged Mr. Gray with four counts of unlawful redemption of food stamps. A jury convicted Mr. Gray of all four counts. Mr. Gray filed a motion to arrest judgment, arguing that the Washington statute did not create a crime, the information was inadequate, the evidence was insufficient to support a conviction, and the court provided erroneous jury instructions. The trial court granted the motion, arrested the judgment, and vacated the guilty verdicts. The State appeals that order.

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9) **No.: 355411**

Case Name: Brandon Bethay, et al v. Shawn Parker, et al

County: Kittitas

Case Summary: Shawn Parker and KBSM LLC own real property in Kittitas County, near Lake Cle Elum. Mr. Parker allowed Dan Stadler, the operator of Kids Rock, Inc., to conduct a youth camp on the subject property in July 2015. Mr. Parker did not request or receive compensation in exchange for allowing the camp use of the property. Eight year-old Christine Bethay attended the camp. During the camp, a group of campers including Christine exited Mr. Parker and KBSM's property and began playing in and near Morgan Creek Cove, an area of water in Lak Cle Elum. While Christine was playing in the water, camp counselors lost track of her and she drowned. Christine's parents and her estate brought a wrongful death action against Mr. Parker and KBSM. The superior court granted summary judgment in favor of the property owners and dismissed the case. Christine's parents and estate appeal.

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10) **No.: 352625**

Case Name: Maria Espindola v. Apple King, Inc.

County: Yakima

Case Summary: Apple King, Inc. employed Maria Espindola from August 2007 to April 20, 2012. In June or July 2011, Ms. Espindola notified her superiors that she was pregnant. In August 2011, she began developing kidney stones that resulted in a weeklong hospitalization and eventually required surgery to remove them. That same month, Ms. Espindola received and signed a copy of Apple King's attendance policy that assessed points against employees based on absences, and provided that an employee would be terminated in the event he or she accumulated 24 points during the designated 12-month time frame. Ms. Espindola missed or left work early several times due to her kidney stones, notifying her supervisor each time. On April 20, 2012, Apple King Terminated Ms. Espindola based on her accumulation of over 24 points under the attendance policy.

Ms. Espindola filed suit against Apple King, alleging that her termination violated the Americans with Disabilities Act (ADA), the federal Family and Medical Leave Act of 1993 (FMLA), Washington's Law Against Discrimination (WLAD), and Washington's Family Leave Act (WFLA). The district court granted summary judgment in favor of Apple King, and Ms. Espindola appealed her claims under the FMLA and the WFLA to the superior court. The superior court affirmed, and this Court granted Ms. Espindola's request for discretionary review.

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11) No.: 352960

Case Name: State of Washington v. Jeffrey Joseph Pool

County: Spokane

Case Summary: In 2015, a masked man brandishing a pistol entered the Cheney Dollar Tree store just before closing time and robbed approximately \$2,500. One year later, a man who concealed his face with a motorcycle helmet robbed the Dollar Tree store, against just before closing time. Tom Busby, an assistant manager at the Dollar Tree who was working the evening shift during both robberies, believed that the same individual committed both robberies. Following an investigation, the State charged Jeffrey Pool with two counts of first degree robbery, four counts of second degree assault, and four counts of first degree kidnapping. A jury convicted Mr. Pool on all counts.

Mr. Pool appeals, contending the trial court erred by: (1) not allowing defense to introduce evidence regarding the prior convictions of two “suspects” who were at the scene of the 2015 robbery, and (2) overruling defense objections regarding the State’s mischaracterization of DNA evidence during closing arguments.

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