

No. 46696-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jeremy Bakke,

Appellant.

Clark County Superior Court Cause No. 13-1-02265-6

The Honorable Judge Gregory Gonzales

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Bakke's convictions were entered in violation of his Wash Const. art. I, §§ 21 and 22 right to a jury trial.
2. Mr. Bakke did not knowingly, intelligently, and voluntarily waive his right to a jury trial.

ISSUE 1: An accused person must be tried by a jury absent a personal expression of waiver of the right to a jury trial. Here, the court found Mr. Bakke waived his right to a jury trial even though he signed and reviewed with his attorney the wrong form. Is the state unable to prove that Mr. Bakke knowingly, intelligently, and voluntarily waived his art. I, §§ 21 and 22 right to a jury trial?

3. The trial court erred by accepting Mr. Bakke's jury waiver without an affirmative showing that he understood all of his rights under art. I, §§ 21 and 22.

ISSUE 2: An accused person has the state constitutional right to a jury trial. Here, the record does not affirmatively demonstrate that Mr. Bakke understood his right to a fair and impartial jury, his right to participate in the selection of jurors, his right to a venire drawn from Clark County, and his right to have the jury instructed on the presumption of innocence. In the absence of an affirmative showing that Mr. Bakke fully understood his state constitutional right to a jury trial, was his jury waiver inadequate under art. I, §§ 21 and 22?

4. The trial court erred by failing to hold a hearing prior to requiring that Mr. Bakke be restrained during his trial.
5. The trial court erred by imposing restraints on Mr. Bakke without adequate cause.
6. The trial court erred by imposing restraints on Mr. Bakke without considering less restrictive alternatives.

ISSUE 3: Prior to requiring an accused person to attend trial in restraints, a trial judge must hold a hearing to determine the necessity of shackling the person during trial. Here, the judge did not hold a hearing to determine the need for restraints, and Mr. Bakke was required to attend trial in restraints. Was Mr.

Bakke's conviction entered in violation of his Fourteenth Amendment right to due process?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jeremy Bakke was given the wrong form to waive his fundamental right to a jury trial. He came to court the day before trial, and his attorney told the court they wished to waive jury. RP (7/17/14) 4.

She handed Mr. Bakke a form entitled “Waiver of Jury”. The document indicated:

2. I have been informed and fully understand that I have the following rights:
 - (a) The right to remain silent before and during trial, and the right to refuse to testify against myself;
 - (b) The right at trial to hear and question the witnesses who testify against me;
 - (c) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;
 - (d) The right to appeal the jury’s verdict.
3. I freely and voluntarily waive my right to a jury trial. No one has threatened harm of any kind to me or to any other person and no one has made promises of any kind to cause me to make this waiver.
4. The court without a jury will consider the factual basis of the charges listed in paragraph 1. The court will decide whether the facts provide substantial and compelling reasons to find me guilty of the charges listed in paragraph 1.

Waiver of Jury Trial filed 7/17/14, Supp. CP.

Where Mr. Bakke’s attorney signed, the form stated: “I have read and discussed this Waiver of Jury Trial on Aggravating Circumstances

with the defendant and believe that the defendant is competent and fully understands the waiver.”¹Waiver of Jury Trial filed 7/17/14, Supp. CP.

The form did not mention that a jury consisted of twelve people from the local community who must all be unanimous as to their verdicts. The form did not mention that the defense can participate in the jury selection and that the jury must be fair and impartial. The form did not mention that a bench trial would mean that a judge would decide the case alone. Waiver of Jury Trial filed 7/17/14, Supp. CP.

Then the judge engaged in brief colloquy that did not acknowledge or correct the content of the form:

THE COURT: And, Mr. Bakke, I have been presented here with a waiver of jury trial, and this form indicates what you're charged with in Paragraph 1. Do you understand the charges against you?

MR. BAKKE: Yes, ma'am.

THE COURT: And it also advises in Paragraph 2 that you have been informed and fully understand that you are entitled to a jury trial. And if you had a jury trial, you would have all of the rights that are explained in Paragraph 2. Have you gone through those rights with your attorney?

MR. BAKKE: Yes, ma'am.

THE COURT: And do you wish to waive those rights?

MR. BAKKE: Yes, ma'am.

THE COURT: And the -- you have a constitutional right to have a jury trial and that would be a jury of 12 persons who would be selected at random from the community and examined by the attorneys to determine that they would be fair and impartial. Do you understand your right to a jury trial?

¹ Jeremy Bakke faced no aggravating circumstance allegations. CP 1-2.

MR. BAKKE: Yes, ma'am.

THE COURT: And do you wish to waive that right and to proceed to a trial solely decided by the judge?

MR. BAKKE: Yes, ma'am.

RP (7/17/14) 4-5.

The court did not mention that the members of a jury must be unanimous as to their verdicts. The court did not mention that the defense can participate in the jury selection. The court did not mention that a bench trial would mean that a judge would decide the case alone. RP (7/17/14) 4-7.

The court signed the document. Waiver of Jury Trial filed 7/17/14, Supp. CP. On the next Monday, Jeremy Bakke's bench trial on charges of assault three, possession of methamphetamine and possession of stolen property began. CP 13-21.

When trial started, the court ordered that Mr. Bakke remain shackled and cuffed during trial. The court did not make a finding that he was an imminent escape risk, that he intended violence against anyone in the courtroom, or that he was disruptive. RP (7/21/14) 76-77.

To bring Mr. Bakke to court for his bench trial, jail staff put him in leg shackles and cuffs. The defense asked that both be removed. RP (7/21/14) 76. His attorney told the court that Mr. Bakke wanted to take notes to assist her. The state objected, reminding the court of Mr. Bakke's

charge. RP (7/21/14) 76. Without further information or argument, the court ruled:

At this point in time, I do believe it's an officer safety issue. Also, with respect to the fact that I know he's in custody, it doesn't affect me one way or the other. I'm as impartial as they come, so it's not an issue with me. He can take notes while he's restrained with the handcuffs.
RP 77.

At the trial, Mr. Bakke testified on his own behalf, and through his attorney he cross-examined witnesses against him. RP (7/21/14) 79-231; RP (7/22/14) 240-315. After hearing the testimony, the court entered a guilty finding. RP (7/22/14) 314-315; CP 58-67. Mr. Bakke was sentenced and timely appealed. CP 67.

ARGUMENT

I. MR. BAKKE'S CONVICTIONS WERE ENTERED IN VIOLATION OF HIS STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL.

Mr. Bakke's charges were tried to a judge without a jury waiver. Although he was presented with a waiver form to sign, he was given the wrong form. The form Mr. Bakke signed did not address waiver of a jury; it was instead a version of a form typically used for stipulated trials.² Mr. Bakke signed that he understood the rights to remain silent, to testify, to hear and challenge witnesses, to bring witnesses, and to appeal. Waiver of

² Though the reference to an aggravated sentence finding is just inexplicable.

Jury Trial filed 7/17/14, Supp. CP. But the form did not inform Mr. Bakke that he had the right to a jury of 12 fair and impartial jurors, that they must be unanimous to return a verdict, that he had the right to participate in jury selection, or that a judge would decide the case alone if he waived that right. Waiver of Jury Trial filed 7/17/14, Supp. CP.

A bench trial occurred even though Mr. Bakke was not informed of the nature of his jury right and what it would mean to waive it. A waiver of the state constitutional right to a jury trial must be knowing, intelligent, and voluntary. *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). There was no factual basis for the trial court's conclusion that Mr. Bakke's waiver was knowing, intelligent and voluntary; no such facts were presented.

The colloquy the judge had with Mr. Bakke did nothing to clarify or correct Mr. Bakke's understanding of the fundamental right he was purported to waive.

Nor are the failures of the waiver form and colloquy corrected by the defense attorney's signature indicating that she reviewed the waiver with Mr. Bakke. If she even cursorily discussed the form, it was still review of the wrong form. In any event, the right to a jury trial is a fundamental right that can only be given up personally, not through an attorney. *Stegall*, 124 Wn.2d 719.

Mr. Bakke did not effectively waive his fundamental right to a jury, because there is no information in the record that shows he understood the right he supposedly gave up. *State v. Hos*, 154 Wn. App. 238, 250, 225 P.3d 389 (2010). Courts must review constitutional issues de novo. *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014) *review denied*, 180 Wn.2d 1023, 328 P.3d 902 (2014). Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

Mr. Bakke had the state³ and federal constitutional right to a jury trial. Art. I, § 21; *see also* art. I, § 22 (guaranteeing accused persons the right to a trial by an impartial jury); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

The state bears the burden of demonstrating that an accused person validly waived the right to a jury trial. *Stegall*, 124 Wn.2d at 730; *Matter of James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). Here, the state cannot meet that burden.

Any waiver of a constitutional right must clearly consist of “an intentional relinquishment or abandonment of a known right or privilege.”

³The right to a jury trial under the Washington state constitution is broader than the federal right. *See, e.g., City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982).

Zerbst, 304 U.S. at 464. In order to sustain a waiver, a reviewing court must find in the record affirmative proof that the defendant fully understood the right under the state constitution—including the right to a local jury (from the county where the offense occurred), the right to participate in selecting jurors, the right to a jury of twelve, the right to a fair and impartial jury, the right to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt, and the right to a unanimous verdict.⁴

But here, Mr. Bakke was given the wrong form, and only evinced a cursory understanding of what he purportedly waived during the brief colloquy with the court. He was not informed that he had the right to have the case determined by a jury of twelve people who must be unanimous to return a verdict. Waiver of Jury Trial filed 7/17/14, Supp. CP; RP (7/17/14) 4-7. He demonstrated no understanding that he could participate in the selection of jurors or that the jury would be instructed on

⁴ The requirement of a record establishing a knowing, intelligent, and voluntary waiver is illustrated in other circumstances. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (waiver of the right to remain silent and the right to counsel in the context of custodial interrogation; *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)(waiver of the right to counsel at trial); *State v. Robinson*, 172 Wn.2d 783, 263 P.3d 1233 (2011) (waiver of trial rights attendant upon a plea of guilty).

the presumption of innocence.⁵ Waiver of Jury Trial filed 7/17/14, Supp. CP.

Understanding of these rights is critical to a knowing, intelligent, and voluntary waiver of the state constitutional right to a jury trial. In the absence of an affirmative showing that Mr. Bakke fully understood his state constitutional right to a jury trial, his waiver is invalid and his conviction was entered in violation of art. I, §§ 21 and 22.

This violation of Mr. Bakke's right to a jury trial is manifest on the record and may be raised for the first time on appeal. RAP 2.5(a)(3). Mr. Bakke's convictions must be reversed and his case remanded for a new trial. *Id.*

II. THE TRIAL COURT VIOLATED MR. BAKKE'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND WASH. CONST. ART. I, § 3 BY ALLOWING HIM TO BE RESTRAINED AT TRIAL IN THE ABSENCE OF AN "IMPELLING NECESSITY."

The judge tried Mr. Bakke while he was shackled, without holding a hearing and finding an impelling necessity. RP (7/21/14) 76-78.A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Damon*,

⁵ Although an accused person does not give up the right to a fair and impartial fact-finder or the right to the presumption of innocence by waiving jury, the decision to proceed with a bench trial can only be described as fully informed if the person knows these rights attach to a jury trial.

144 Wn.2d 686, 691, 25 P.3d 418 (2001); *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Restraints may not be used ““unless some *impelling necessity* demands the restraint of a prisoner to secure the safety of others and his own custody.”” *Finch*, 137 Wn.2d at 842 (quoting *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981) (emphasis in original)).

Mr. Bakke had the right to be brought before the court “with the appearance, dignity, and self-respect of a free and innocent man.” *Finch*, 137 Wn.2d at 844. Instead, he sat at counsel table with cuffs and shackles binding him for his trial. RP (7-21-14) 77-78.

Restraints are disfavored because they undermine the presumption of innocence, restrict the defendant’s ability to assist in the defense of his case, interfere with the right to testify, and offend the dignity of the judicial process. *Finch*, 137 Wn.2d at 845; *Hartzog*, 96 Wn.2d at 399. Close judicial scrutiny is required to ensure that the inherent prejudice of restraint is necessary to further an essential state interest. *Finch*, 137 Wn.2d at 846. Mr. Bakke’s attorney requested that Mr. Bakke be unshackled, but the judge, who was the factfinder as well, declined to take this action. RP (7/21/14) 78.

The trial court must base its decision to physically restrain an accused person on evidence that s/he poses an imminent risk of escape,

intends to injure someone in the courtroom, or cannot behave in an orderly manner while in the courtroom. *Finch*, 137 Wn.2d at 850. Concern that a person is “potentially dangerous” is not sufficient. *Finch*, 137 Wn.2d at 852. Restraints may only be imposed based on information specific to a particular person; a general concern or a blanket policy will not pass constitutional muster. *Hartzog*, 96 Wn.2d 383. Finally, restraints should be used only as a last resort, and the court *must* consider less restrictive alternatives before imposing physical restraints. *Finch*, 137 Wn.2d at 850.

Here, the trial judge did not hold a hearing to determine if any of the *Finch* factors applied. The court made no findings that Mr. Bakke posed an imminent risk of escape, that he intended to injure anyone in the courtroom or that he could not behave in an orderly manner while in the courtroom. RP (7/21/14) 76-78.

A trial court electing to impose restraints must make findings of fact and conclusions of law that are sufficient to justify the use of the restraints. *Damon*, 144 Wn.2d at 691-692. On direct appeal, improper use of restraints is presumed to be prejudicial. *In re Davis*, 152 Wn.2d 647, 698-699, 101 P.3d 1 (2004).

- A. The judge failed to hold a hearing or to consider less restrictive alternatives prior to requiring Mr. Bakke to appear in restraints with only one hand free.

Mr. Bakke appeared for his bench trial wearing restraints imposed by the jail. RP (7/21/14) 75. The court did not hold a hearing, hear evidence, or enter findings. Nothing in the record suggests that Mr. Bakke posed an imminent risk of escape, that he intended to injure someone in the courtroom, or that he could not behave in an orderly manner. *Finch*, 137 Wn.2d at 850. Nor is there any indication that the court considered less restrictive alternatives. *Finch*, 137 Wn.2d at 850.

The restraints were improper, and their imposition requires reversal. This is so even though Mr. Bakke's case was tried to the bench, because the improper imposition of restraints is presumed prejudicial. *Davis*, 152 Wn.2d at 698-699.

Although a major concern with the improper use of restraints involves the negative effect on a jury, the *Finch* court identified several other reasons why restraints may not be imposed absent compelling necessity. These include practical consequences, such as restriction of ability to assist in the defense and interference with the right to testify. In addition, imposition of restraints without adequate cause "offend[s] the dignity of the judicial process." *Finch*, 137 Wn.2d at 845. The illegal imposition of restraints violated Mr. Bakke's due process rights. *Id.*

Because the issue is raised on direct appeal, the court's improper use of restraints is presumed to be prejudicial. *Davis*, 152 Wn.2d at 698-699. The appellate court must review this constitutional issue de novo. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014). Mr. Bakke's convictions must be reversed⁶ and the case remanded with instructions to permit Mr. Bakke to appear in court without restraint, absent some impelling necessity. *Id.*

CONCLUSION

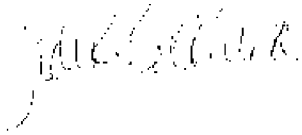
Jeremy Bakke was given the wrong form to waive his fundamental right to a jury. The trial judge accepted it as a jury waiver without any showing that Mr. Bakke understood the nature of the right and the consequences of its waiver. Since the case was not tried to a jury, this court must reverse the conviction and remand for trial.

Further, the court tried Mr. Bakke while he was cuffed and shackled, without holding a hearing or finding any impelling necessity. Because this court must presume prejudice, the court must reverse his convictions and remand for retrial.

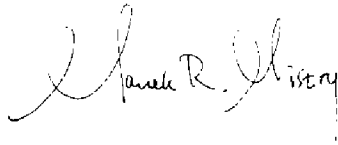
⁶ Even if the conviction is not reversed, the Clark County Superior Court should be reminded of the law regarding restraints. It appears from this record that restraints may be routinely imposed, at least during bench trials.

Respectfully submitted on February 19, 2015,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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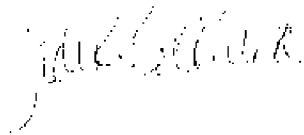
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 19, 2015.



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