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STATE OF WASHINGTON
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No. 63673-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS E. WRENN,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
THE HONORABLE JIM ROGERS, JUDGE

BRIEF OF APPELLANT

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I N D E X

TABLE OF CONTENTS

	<u>Page</u>
ASSIGNMENT OF ERROR	1
ISSUE PERTAINING TO ASSIGNMENT OF ERROR	2
STATEMENT OF THE CASE	3
ARGUMENT ON ASSIGNMENT OF ERROR.....	10
CONCLUSION	14

TABLE OF CASES

	<u>Page</u>
<u>Estate of Black</u> , 116 Wn. App. 492, 496, 66 P3d 678 (2003)	10
<u>State v. Dennison</u> , 115, Wn.2d 609, 619. P. 2d 193 (1990)	11
<u>State Ex.Rel. Floe. v. Studebaker</u> ., 17 Wn.2d 8, 17, 134 P. 2d 718 (1943)	12
<u>State v. Para</u> , 122 WN. 2d 590, 600, 859 P.2d 1231 (1993).....	13

OTHER AUTHORITIES

RCW 4.12.050.....	11
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ASSIGNMENT OF ERROR

1. The trial court erred in rejecting appellant's affidavit of prejudice.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the trial court had made a discretionary ruling prior to rejecting appellant's affidavit of prejudice

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

The appellant, Douglas E. Wrenn, was charged by Information (CP 1-7) with two counts of Assault in the Second Degree. Count I read as follows:

That the defendant DOUGLAS E. WRENN in King County, Washington, on or about March 19, 2008, did intentionally assault Yeska Quiroga with a deadly weapon, to-wit: a firearm;

Counts II utilized precisely the same language except that the named victim was one Ricky Brown.

To these charges Wrenn pled “Not Guilty” and, accordingly, was brought to trial in the Superior Court of King County on January 26, 2009, before the Honorable Jim Rogers, sitting with a jury (CP30).

The trial proceeded until February 4, 2009, on which date Wrenn was found “Guilty” on both counts (CP 28-29).

On June 12, 2009, Wrenn was sentenced, inter alia, to 12 months

and one day imprisonment on each count, to run concurrently (CP 64-71).

Notice of Appeal followed.

B. FACTUAL BACKGROUND

On March 19, 2008, at approximately 6:00 p.m. (RP 2/2/09 pg 76) in Bellevue, King County, Washington, Yeska Quiroga testified she was driving a motor vehicle accompanied by her former fiancée Ricky Brown (RP 2/2/09 pgs. 113-114).

As she was on a bridge attempting to enter Highway 405 she was forced to stop for a traffic light. At this point her car stuck in gear and would not move. The light turned green. The driver of the car right behind her began honking. Everyone else went around her in the far left lane. She thought she would have to turn left in order to proceed to 405 (RP 2/2/09 pgs 116-117).

After the light turned she got her car to go forward. She started to pull to the left, but then realized she had to be in the right hand lane to get to

the entrance to 405. She put on her right turn blinker and moved quickly into the right turn lane. By this maneuver she succeeded in cutting off the car that had been behind her that was then trying to pass her on her right (RP 2/2/09 pg.117).

The car behind then went around to her left and stopped right next to her, 2 to 3 feet away. The tinted windows on the black magnum car went down and she saw a gun pointed directly at her. The gun was being held by a black African-American male. There was nobody else in his car. He was moving his lips and his face was pointed at her. The gun stayed pointed for approximately 45 seconds (RP 2/2/09 pgs. 118-124).

The black car then got into the far left lane, made an illegal left turn on the red light and left. Quiroga was able to write down the license number of the car. She then got on the freeway, exited as soon as possible, parked and called the police (Ex 34, RP 2/2/09 pgs 125-129).

Quiroga's testimony was largely mirrored by that of Ricky Brown

(RP 2/3/09 pgs 20-56). There were some contradictions, but they are of no matter to the issues on appeal.

James Keene was one of the Bellevue Police Officers responding to the incident. The registered owner of the car was traced to unit 116 of an apartment-condo complex located at 118-107th Ave. N.E. in Bellevue. Keene and other officers went there and located the automobile parked in a secured part of the complex garage. He arrived at 6:29 p.m. when dusk had settled (RP 2/2/09 pgs 15-19). The apartment complex was approximately 3 blocks from the scene of the incident (RP 2/3/09 pg 7).

Prior to his arrival he had been advised there was probable cause to arrest the registered owner of the car. The suspect was described only as a black man in his mid 20s wearing a hat on backwards (RP 2/2/09 pgs 23).

Tyler Cormesser was another of the officers who went to the complex along with Officers Keene and Kevin Masseth. The car involved was a 2005 Dodge Magnum Station Wagon, license 436XGU and its

registered owner was Douglas Wrenn of 118-107th Ave N.E. #116 Bellevue WA (RP 2/2/09 pgs 165-168).

After locating the vehicle Cormesser went to a door of a stairwell leading from the garage. A person matching the description of the suspect emerged. As the suspect tried to walk around Cormesser, the officer grabbed his right arm, pushed him against the wall and yelled for assistance.

At that time the only description Cormesser had of the suspect was that he was a black male in his late 20s wearing a black hat (RP 2/2/09 pg. 176).

Keene and Masseth responded to Cormesser's yell. The suspect, who was indeed Wrenn, was brought under control and handcuffed (RP 2/2/09, pg 31).

Wrenn was then placed in the rear seat of Officer Demetrius Shaw's car (RP 2/3/09 pg 8) where he was held until alleged victims Quiroga and Brown were driven to the complex by Officer Gregory Neese (RP 2/2/09 pg 34).

Wrenn was identified at the complex as the assailant by Ricky Brown and Yeska Quiroga (RP 2/3/09 pg 30) at which point he was formally arrested (RP 2/2/09 pg 33) and given his Miranda rights (RP 1/26/09 pg 26).

Wrenn agreed to talk with the police and admitted that he had been involved in a traffic altercation earlier with a woman who had cut him off. He stated that he had pulled up next to her and had given her “the finger”. He denied the use of a weapon (RP 1/26/09 pgs 28-29).

Subsequently Wrenn gave his consent to search his car and the apartment he shared at the complex with a female roommate.

Wrenn told the officers that while he owned guns, they were all stored at his mother’s house (RP 1/27/09 pg 6). During a search of the apartment the officers found a loaded Beretta handgun, registered to Wrenn, concealed between the apartment’s washer-dryer and a wall (RP 2/3/09 pgs 69-71, 83-84). Wrenn then stated he had forgotten that he had placed the gun there several weeks before at the request of his roommate who was

having a party for friends (RP 1/27/09 pg 13).

Wrenn testified in his own defense at the trial and admitted the altercation, but maintained that he had not displayed a weapon. He insisted that the only thing he held in his hand during his verbal comments to the “victims” was his cell phone (RP 2/4/09 pgs 53, 59) on which he was talking at the same time.

As a practical matter the only factual issue for the jury to resolve was whether the State had proved beyond a reasonable doubt that Wrenn pointed a gun at the victims.

ARGUMENT ON ASSIGNMENT OF ERROR

1. The trial court erred in rejecting appellant's affidavit of prejudice.

The standard of review is de novo. Estate of Black 116 Wn. App. 492, 496, 66 P.3d. 678 (2003).

On January 26th, 2009, the parties were sent to the Honorable Jim Rogers for trial. At that time Wrenn attempted to exercise an affidavit of prejudice (RP 1/26/09 pgs 4-6).

In ruling on the matter Judge Rogers held:

THE COURT: Well, typically if I had only ruled on the OMNIBUS calendar I would agree with you, and I think there is a case on this, but I haven't been able to locate it. But in this case I was also asked to make a bail decision, which I think is a discretionary decision that would cause me to deny the motion for affidavit. So I'm going to - - I am going to deny the motion for affidavit, and we are going to go forward with trial this mornig. I was asked specifically to hear a bail hearing, and I actually refused Mr. Wrenn's bail to \$30,000 resulting in his release, and I think that sort of discussion is fundamentally different, and leads me to believe that I have exercised discretion sufficient, which was a

decision actually I think parties also made to have me hear that so the motion, unless the party - - unless you can show me a case that would cause me to believe a bail decision is not fundamentally different, I will respectfully deny your motion for an affidavit (RP 1/26/09 pgs 5-6).

(It is submitted that the language “actually refused Mr. Wrenn’s bail - - “ should read “actually reduced Mr. Wrenn’s bail - - “). Judge Roger’s order is found at CP 73.

State v. Dennison, 115 Wn.2d 609, 619, 801 P.2d 193 (1990)

ruled:

RCW 4.12.040 is a mandatory, nondiscretionary rule allowing a party in a superior court proceeding the right to one change of judge upon the timely filing of an affidavit of prejudice under RCW 4.12.050. *State v. Hansen*, 107 Wn.2d 331, 333, 728 P.2d 593 (1986); *Marine Power & Equip. Co. v. Department of Transp.*, 102 Wn.2d 457,461, 687 P.2d (1984); *State v. Guajardo*, 50 Wn. App. 16, 19, 746 P.2d 1231 (1987), *review denied*, 110 Wn.2d 1018 (1988). To be timely filed this affidavit of prejudice must be filed before the trial judge has been called upon to make a ruling involving the discretionary powers of the judge.

RCW 4.12.050 specifically provides, in part:

. . . the arraignment of the accused in a criminal action or

the fixing of bail, shall not be construed as a ruling or order involving discretion . . . “ (emphasis supplied).

Anticipating an argument that Judge Rogers had previously exercised his discretion at the omnibus hearing referred to, Wrenn invites the court’s attention to RP 12/12/09 pgs 1-4 and the omnibus order CP 74-76. It is clear from the documents that Judge Rogers was not called upon to exercise any discretion. The terms of the omnibus order and the two day trial continuance were agreed to and all Judge Rogers did was sign off on the mutually proposed order.

State Ex. Re. Floe v. Studebaker, 17 Wn. 2d 8, 17, 134 P.2d 718

(1942).held:

Neither do we think it can be said that the court was called upon by any of the attorneys connected with this case to make any ruling involving discretion, as contemplated by the statute. We do not believe it can be said that the court is required to exercise discretion when asked to make an order involving preliminary matters such as continuing a case, or for consolidation, where all the parties have stipulated that such order be made.

The writ will issue, permanently restraining respondent from

further proceeding in these cases.

State v. Para, 122 Wn. 2d 590, 600, 859 P.2d 1231 (1993) ruled;

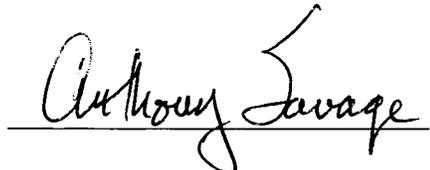
As *Floe* implicitly acknowledged, many issues may be resolved between the parties and presented to the court in the form of an agreed order. These matters will generally resolve pretrial disputes regarding such issues as admissibility of evidence, discovery, identity of witnesses, and anticipated defenses. If the parties have resolved such issues among themselves and have not invoked the discretion of the court for such resolution, then the parties will not have been alerted to any possible disposition that a judge may have toward their case.

In Para, supra, the rejection of a proposed affidavit was upheld because the parties had not resolved the issues among themselves.

CONCLUSION

Because the applicable statute specifically states that the fixing of bail is not an order involving discretion and because all other issues had been resolved among the parties, the affidavit of prejudice was timely and should have been granted. The matter should be reversed and remanded to the Superior Court for a new trial.

Respectfully submitted,

A handwritten signature in cursive script that reads "Anthony Savage". The signature is written in black ink and is positioned above a horizontal line.

ANTHONY SAVAGE, WSBA #2208