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No. 66977-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PAUL LEWIS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The trial court denied Mr. Lewis his Sixth Amendment right to be tried by a fair and impartial jury when the court refused to excuse a juror who candidly admitted he maintained a presumption of guilt.

- a. In light of Juror 31's admitted presumption of guilt, the trial court erred in denying Mr. Lewis's challenge for cause.

While a trial court is afforded a measure of deference in ruling on a challenge for cause, this Court has emphasized that “appellate deference to trial court determinations of the ability of potential jurors to be fair and impartial is not a rubber stamp” where a potential juror’s initial responses indicate actual bias. State v. Fire, 100 Wn.App. 722, 729, 998 P.2d 362 (2000), reversed on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001); State v. Gonzalez, 111 Wn.App. 276, 281, 45 P.3d 205 (2002).

Juror 31 responded to voir dire questions regarding the presumption of innocence saying “I don’t think that I really assume anybody is actually innocent, that they must have done something. That’s why they’re here.” 2/1/11 RP 85. When defense counsel attempted to clarify whether the juror could nonetheless follow the court’s instructions on the point, juror 31 candidly admitted “I would obviously try . . . but I don’t think I would ever start anyone like at zero.” Id. Nonetheless, the

trial court denied Mr. Lewis's challenge to Juror 31 for cause. 2/1/11 RP 69.

Juror 31's expressed belief in a presumption of guilt demonstrates he could not "try the issue impartially and without prejudice to the substantial rights" of a criminal defendant. That is actual bias. RCW 4.44.170(2). Here, like the jurors in both Fire and Gonzalez, in his initial response Juror 31 unequivocally admitted his actual bias, and reiterated his views even as the deputy prosecutor attempted to rehabilitate him. As in those cases, this Court applies a far-less deferential standard.

b. The State's waiver argument is contrary to controlling precedent of both the Washington and United States Supreme Courts

A claim that a trial court erroneously denied a challenge for cause of a juror who could not fairly decide a case is not waived by the failure to exercise a peremptory challenge. Indeed, the opposite is true. If a defendant exercises a peremptory, he cannot claim he has been denied his Sixth Amendment right to an unbiased jury. United States v. Martinez-Salazar, 528 U.S. 304, 315-16, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000); State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001).

As the Court [in Martinez-Salazar] indicated, if a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on

appeal if he can show that the trial court abused its discretion in denying the for-cause challenge

Fire, 145 Wn.2d at 158. Despite the clear holding of these cases, the State nonetheless claims, Mr. Lewis cannot raise this error on appeal because he did not exercise a peremptory challenge on Juror 31. Brief of Respondent at 9-11. The State's argument is contrary to the rule announced in Martinez-Salazar and Fire.

2. Defense counsel's presentation of expert testimony, which undermined Mr. Lewis's defense denied Mr. Lewis his Sixth Amendment right to the effective assistance of counsel.

Defense counsel presented a muddled defense that appears to have incorporated a claim of diminished capacity together with a claim of self defense. In support of that theory, defense counsel retained an expert who testified in a manner that completely undercut both claims and went further to open the door for the State to present additional evidence of past acts by Mr. Lewis. But the expert did not stop there, he went further suggesting to the jury that Mr. Lewis might be malingering.

The State attempts to defend the unreasonable choices of defense counsel saying counsel made the decision to present Dr. Kenneth Muscatel's testimony to support a claim of self-defense. Brief of Respondent at 23-24. Perhaps that may have been a reasonable tactical

decision had Dr. Muscatel's opinion actually supported self-defense. But that is not what Dr. Muscatel opined.

First, Dr. Muscatel testified that Mr. Lewis's mental state could not apply to a self-defense claim, erroneously summarizing a claim of self-defense as "saying I didn't do it." 2/7/11 RP 35. Self-defense is not a denial of acting at all. Rather, self-defense acknowledges the occurrence of the act, the use of force, but negates the unlawfulness of the act. RCW 9A.16.020.

Next, Dr. Muscatel told the jury that Mr. Lewis's mental illness was only relevant, and then only marginally so, if the jury believed Mr. Lewis's version of events. 2/7/11 RP 31. Having made Mr. Lewis's credibility the linchpin of relevance for any mental health evidence, Dr. Muscatel then emphasized that he had to rely on Mr. Lewis's word, 2/7/11 RP 16, and suggested Mr. Lewis may be malingering. 2/7/11 RP 45.

Only by ignoring that record can the State contend counsel made a reasoned decision to present Dr. Muscatel's testimony to support a claim of self-defense. Dr. Muscatel himself made every effort to discredit such a defense.

The Supreme Court has emphasized that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland v. Washington, 466 U.S. 668,

690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). “[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* at 690-91. In this case it is clear that defense counsel’s acts were not the product of reasonable investigation. Dr. Muscatel was not sprung on an unsuspecting attorney by his opponent. Rather, that counsel retained the expert and called him as a witness. And, then Dr Muscatel provided testimony that only hurt Mr. Lewis’ case. There are only two explanations for defense counsel’s action. First, it could be true that defense counsel failed to investigate and thus was unaware of the damning nature of Dr. Muscatel’s opinion. Second, defense counsel may have been aware of the testimony but chose to present it in any event. Under either scenario defense counsel’s actions are unreasonable. This Court must reverse Mr. Lewis’s convictions.

3. The compelled production of fingerprints to aid the State in its burden of proof is a plain violation of Article I, section 7.

Article I, section 7 of the Washington Constitution provides:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

a. A person’s fingerprints are a private affair.

Relying on recent caselaw from the Washington Supreme Court regarding the taking of physical evidence from the person of a defendant,

Mr. Lewis contends that the compelled production of fingerprints violates Article I, section 7 absent a judicially issued warrant or a recognized exception to the warrant requirement.

In its response, the State makes the bald claim “the State has found no case . . . that has held that fingerprints are protected under any state constitution or the United States Constitution.” Brief of Respondent at 35. But, the United States Supreme Court has held the taking of fingerprints triggers the Fourth Amendment, depending upon the reasonableness of the intrusion. See Hayes v. Florida, 470 U.S. 811, 813-18, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985); Davis v. Mississippi, 394 U.S. 721, 726-28, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969). The Fourth Amendment turns on the determination of whether a person’s reasonable expectation of privacy has been invaded. A reasonable expectation of privacy in one context or time may be unreasonable in another. Hayes itself illustrates this point. The Court concluded that while transporting a person to the police station for fingerprinting without a warrant was an unreasonable search, fingerprinting a person of interest in the field on less than probable cause might be reasonable. 470 U.S. at 816. While the reasonableness of the warrantless search might change depending upon the circumstances, at bottom it remains a search for purposes of the Fourth Amendment.

Washington Courts have concluded Article I, section 7 does not permit this “reasonable expectation of privacy” analysis, noting the “downward ratcheting” of expectations of privacy with advances in technology. State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984).

As we have so frequently explained, article I, section 7 is not grounded in notions of reasonableness. Rather, it prohibits any disturbance of an individual's private affairs without authority of law.”

State v. Snapp, __ P.3d __, 2012 WL 1134130, 8 (2012).

But even so, if something triggers the Fourth Amendment it necessarily triggers Article I, section 7; i.e. it is a private affair. State v. Parker, 139 Wnh.2d 486, 493–94, 987 P.2d 73 (1999) (Article I, section 7 “necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment.”) And while a warrantless search may be valid under the Fourth Amendment so long as it is reasonable, it still constitutes a private affair protected by Article I, section 7 and may only be intruded upon with authority of law. Thus, if the taking of fingerprints triggers the Fourth Amendment, i.e., requires a determination of reasonableness, it necessarily triggers Article I, section 7.

If a person’s fingerprints were not a private affair, then Article I, § 7 would not prohibit police from simply demanding passers-by provide

fingerprints in the absence of any suspicion that the person is or has been engaged in criminal activity. Yet that plainly violates the Fourth Amendment. See, Hayes, 470 U.S. at 813-18. Thus, by the State's logic, Article I, section 7 would actually afford less protection than the Fourth Amendment. That is inconsistent with the recognition that Article I, section 7 protects those interests protected by the Fourth Amendment. Parker, 139 Wnh.2d at 493-94; State v. Garcia-Salgado, 176 Wn.2d 176, 183, 240 P.3d 153 (2010).

A person's fingerprints are a private affair.

b. The taking of fingerprints can only occur by the authority of law.

The State contends that even if the taking of fingerprints constitutes a search, a person has a lessened expectation of privacy once convicted. Brief of Respondent at 37-38. First, while a jury had found Mr. Lewis guilty, the judgment had not yet been entered. Second, as Snapp recently reiterated "Article I, section 7 is not grounded in notions of reasonableness." Snapp, at 8. Thus, while a lessened expectation of privacy may permit a warrantless search under the Fourth Amendment, it does not constitute the authority of law under Article I, section 7.

Compelling Mr. Lewis to provide fingerprints violated Article I, section 7.

B. CONCLUSION

For the reasons above, this Court must reverse Mr. Lewis's convictions and sentence.

Respectfully submitted this 17th day of May, 2012.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66977-0-I
v.)	
)	
PAUL LEWIS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF MAY, 2012, 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:

[X] DENNIS MCCURDY, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF MAY, 2012.

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