

72376-6

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Cause No. 72376-6-1

COURT OF APPEALS, DIVISION ONE
IN AND FOR THE STATE OF WASHINGTON

FELIX SITTHIVONG

Petitioner

V.

STATE OF WASHINGTON

Respondent

PETITIONER'S ANSWER TO STATE'S PRP RESPONSE

Presented by:

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(I) STATEMENT OF FACTS

On June 5th, 2010, Petitioner accompanied his friends, Lee, Thomas, Battles, and Nam, to a bar called "Ohana." There, Lee and Petitioner encountered another group that became hostile towards them. (6 RP 207-09, 214, 219-222; 7 RP 103, 166-68; 8 RP 90-93; 10 RP 32-34; 12 RP 44) Threats were made towards Petitioner and Lee by Sok and Landon, culminating into an argument. (7 RP 109, 228; 8 RP 92-93, 168) Later that night, Petitioner and his friends decided to go to another bar called "The V-Bar", where they encountered the same hostile group earlier that night at Ohana. As Petitioner was walking towards the entrance to the V-Bar, Sok and Landon aggressively approached him and once again became hostile towards Petitioner. (7 RP 33-34; 10 RP 43, 45; 12 RP 63-64, 113-115) After the hostile encounter, Sok and Landon walked away because Petitioner's friends appeared on the scene, but after a short distance, they both turned and one of them pointed a gun at Petitioner. (12 RP 67, 69-70, 72, 135) Petitioner drew his gun and fired recklessly at the two men in self-defense, fearing for both his life and of his friends. (12 RP 69-70, 72, 135)

ADDITIONAL RELEVANT FACTS IGNORED BY THE STATE IN THEIR RESPONSE

After the shooting that same night, Landon ran away from the scene and was tackled by Ofc. Kallis several blocks from the V-Bar. Ofc. Zieger arrived shortly thereafter to assist, and testified that Landon gave him a false identification and name upon questioning (6 RP 21):

"He wasn't completely cooperative because he produced a fake ID at one point but gave up his real name."

Kallis also testified Landon wouldn't tell him who he was with that night (6 RP 67) :

Defense: You were asking him questions about who he was with, is that true?
Kallis: I believed I asked him, yes.
Defense: He would not tell you?
Kallis: That's correct, he did not tell me.

A witness named Debra Green was escorted to the scene and identified Landon as the shooter she witnessed. (6 RP 56) Kallis further testified they didn't find any gun on Landon, but admitted Landon could of disposed of it when he ran from the scene, and also testified neither he nor any other officers traced the path Landon ran in order to search for any weapons (6 RP 64):

Defense: Now, you indicated to the Prosecution that while Mr. Nguyen (Landon) was running you didn't see him throw anything.
Kallis: That's correct.
Defense: Did you happen to search though, did you search that path that Mr. Nguyen had run?
Kallis: I did not.
Defense: Did you see Ofc. Zieger search the path?
Kallis: No.

Note: Green's police statement was never admitted into trial because neither the State nor defendant's counsel was able to locate her. But her statement is valid under ER 804(a)(5) "missing witness rule.

The next day, April Francisco's (Petitioner's then girlfriend) home was the target of a drive-by shooting and received numerous threats. April and her family had to move to another residence for fear of their safety. Petitioner was told to leave the state because the other gang was looking for him, and he fled to California with several other people, where he was eventually arrested.

(II) ARGUMENT

(1) ARE PETITIONER'S CLAIMS OF ERRORS BARRED BECAUSE THEY ALREADY HAVE BEEN DECIDED ON DIRECT APPEAL?

Petitioner's PRP should not be dismissed because the claims were raised on direct appeal. A petitioner may renew an issue when the interest of justice require relitigation. In re Personal Restraint of Stenson, 142 Wn.2d 710, 719, 16 P.3d 1 (2001).

PETITIONER'S CLAIMS OF ERROR REQUIRE RELITIGATION TO CORRECT A MANIFEST INJUSTICE

The Washington State Supreme Court held that in the context of a manslaughter charge, "recklessly" means that a person knew of and disregarded a substantial risk that a homicide may occur. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005). The trial court denied Petitioner due process when it refused to grant a lesser-included offense of manslaughter, based on their erroneous reliance on older and invalid precedents in Pettus and Pastrana (89 Wn.App 688, 951 P.2d 284 (1998); 94 Wn.App 463, 972 P.2d 557 (1999) respectively). In 2005, the Washington Supreme Court invalidated Pettus and Pastrana and clarified that the definition of "recklessness" pertaining to manslaughter within their Gamble decision is the correct definition. Ten years later, another panel of the Washington State Supreme Court reaffirmed and upheld the Gamble interpretation with their decision in Henderson (182 Wn.2d 734, 344 P.3d 1207 (2015)).

The trial court abused its discretion by not following the Gamble decision, thereby disregarding the Washington State Supreme Court controlling opinion. Then again, in Petitioner's direct appeal (175 Wn.App 1021, No. 68030-7-1) the Court of Appeals erroneously affirmed the lower court relying on Pettus and Pastrana, with disregard to and absence of engagement to Gamble. The U.S. Supreme Court has held that "a new rule of the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final with no exception for cases in which the new rule constitutes a 'clear break' with the past." Griffith v. Kentucky, 479 314, 328, 107 S.Ct 708, 93 L.Ed.2d 649 (1987). The Washington State Supreme Court has cited the Griffith decision with approval in Gamble.

The Gamble decision was and still is the controlling opinion, thus law, in this state with regard to the definition of "recklessness." When Petitioner's trial commenced Gamble was effective law in Washington State. RCW 2.04.020 states, "The Supreme Court shall be a court of record, and shall be vested with all power and authority to carry into complete execution all it's judgment, decrees and determinations." (Washington state Constitution Article 4 ss. 11) The lower courts authority and decisions do not supercede precedent and laws setforth by the Washington State Supreme Court. Petitioner was denied this crucial benefit during trial and on direct, and in the interest of justice, this error needs to be relitigated anew.

(2) DID PETITIONER ESTABLISH THAT THE TRIAL COURT COMMITTED A BECK AND GAMBLE ERROR WHEN IT DENIED A MANSLAUGHTER INSTRUCTION TO COUNT 5?

The United States Supreme Court in Beck v. Alabama, 100 S.Ct 2382, 447 US 625, 65 L.Ed.2d 392 (1980) stated, "Providing the jury the 'third option' of convicting on a lesser-included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard." (Quoting Keeble v. US, 412 US 205, 93 S.Ct 1993, 36 L.Ed.2d 894 (1972)) The Washington State Supreme Court followed and approved both Beck and Keeble in their decisions within Gamble and Henderson. Petitioner's conviction for First Degree Murder by Extreme Indifference without the availability of a lesser-included offense violates his Due Process and Right to a Jury Trial. The Henderson court stated that in criminal trials, juries are given the option of convicting defendants of lesser-included offenses when warranted by the evidence. Giving jurors this option is crucial to the integrity of our criminal justice system, when no lesser-included offense is included, it forces jurors to convict of that crime or let them go – and this creates a grave risk jurors will convict even though they have reasonable doubts. To minimize that risk, we err on the side of instructing juries on a lesser-included offense. A jury must be allowed to consider a lesser-included offense if the evidence, when viewed in the light most favorable to the defendant, raises an inference that the defendant committed the lesser crime instead of the greater crime. (Paraphrased, Henderson and Gamble)

THE EVIDENCE IN PETITIONER'S CASE AFFIRMED A
LESSER-INCLUDED MANSLAUGHTER CHARGE TO COUNT 5

Under the Workman Test, 90 Wn.2d 443, 447-48, 585 P.2d 382 (1978), the Henderson court concluded that the legal prong has been satisfied because First Degree Murder by Extreme Indifference is an aggravated form of recklessness incorporating the same elements of First Degree Manslaughter. Therefore, Petitioner meets the legal prong.

The factual prong of Workman is concretely satisfied because there is overwhelming evidence Petitioner acted in self-defense when he recklessly fired his gun at a group of men in self-defense, and no jury would have convicted but for the lesser-included offense of Manslaughter if so presented to them.

1. Debra Green identified Landon as one of the shooters she witnessed. (As testified by Ofc. Kallis)
2. All the State's witnesses admitted to being drunk and not actually observing Petitioner's initial encounter with Landon and Sok that culminated before the gun fires. Ahmach admitted he was drunk and didn't witness the transactions between Petitioner and his aggressors. (5 RP 163, 174) Thomas admitted he was drunk and wasn't aware of the total situation. (7 RP 120) Philip Nguyen testified he was drunk, did not see gunshots nor knew where they came from. (5 RP 195 - 199)
3. Kevin Lessig testimony was tainted and unreliable. Lessig testified he reported to the 911 dispatcher that he saw a shooter run into the V-Bar. He also admitted he did not see the actual shooter nor who fired them, and that there could have been multiple guns. (5

RP 81-82) Lessig further testified he changed his story after talking with others and investigators. (12 RP 9)

4. There was evidence that threats were made towards Petitioner. Battles testified he heard threats made to Petitioner by the other men that they were going to kill Petitioner, and that Petitioner never threatened anyone. (7 RP 169, 239)
5. Petitioner closed his eyes when he fired his gun (as noted in the State's response), indicating he fired recklessly when he perceived he was in danger for his life, and not aiming specifically at any person.

The evidence purporting to support a request for a lesser offense must be viewed in the light most favorable to the requesting party. *Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

(III) CONCLUSION

The proper resolution is to vacate Petitioner's convictions on double jeopardy grounds and grant an entirely new trial, because it was unconstitutional for the State to charge and try Petitioner with two First Degree Murder charges based on the same victim (Counts 1 and 5). The Unit of Prosecution for the Murder statute is one charge per victim, retrying Petitioner for First Degree Murder by Extreme Indifference for Steven Sok (Count 5) would result in another double jeopardy issue, when Petitioner was already found guilty for Sok's death in Count 1. State's alternative to vacate Count 5 and resentence Petitioner to Count 1 is a plausible course. Though

the double jeopardy issue was not properly presented in this PRP, this Court should consider this issue henceforth.

Respectfully submitted this 17 day of March, 2016.