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COURT OF APPEALS
DIVISION II

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No. 33833-5-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BY JR
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STATE OF WASHINGTON,

Respondent,

vs.

Lloyd Higgins,

Appellant.

Lewis County Superior Court

Cause No. 05-1-0329-9

The Honorable Judge Nelson E. Hunt

Appellant's Reply Brief

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ARGUMENT

I. THE AFFIDAVIT WAS NOT SPECIFICALLY INCORPORATED INTO THE SEARCH WARRANT BY SUITABLE WORDS OF REFERENCE.

A search warrant affidavit can supplement a defective warrant and thereby satisfy the particularity requirement, but only if the affidavit is attached to the warrant and incorporated by suitable words of reference. *State v. Riley*, 121 Wn.2d 22 at 28, 846 P.2d 1365 (1993). Respondent asserts that the affidavit here functions in this way, and points out that the affidavit “was attached to the warrant itself.” Brief of Respondent, p. 10.

But Respondent does not suggest that the affidavit was incorporated into the warrant by suitable words of reference. Accordingly, the affidavit, whether attached or not, had no legal effect on the warrant. *Riley, supra*. Respondent does not address this aspect of *Riley*. Nor does Respondent assert that the warrant, standing on its own, was sufficiently particular to pass constitutional muster.

Because the search warrant in this case violated the particularity requirement, the items seized from Mr. Higgins’ residence must be suppressed. *Riley, supra*. The conviction must be reversed and the case remanded to the trial court. *Riley, supra*.

II. THERE WAS SUBSTANTIAL EVIDENCE THAT MR. HIGGINS COMMITTED ONLY THE INFERIOR CRIME OF ASSAULT IN THE FOURTH DEGREE.

Respondent contends that an inferior degree instruction was not warranted, yet acknowledges evidence of two simple assaults.¹ Brief of Respondent, p. 12-13. According to Respondent, these assaults were separate uncharged crimes, which Mr. Higgins cannot “substitute” for the charged crime.² Brief of Respondent, p. 13. Without citation to authority, Respondent asserts that “[a]ny evidence of separate assaults, whether they are of equal or lesser degree, cannot be used to support a lesser degree instruction.” Brief of Respondent, p. 13. This argument mischaracterizes the evidence introduced at trial.

The parties were involved in an altercation involving a handgun. Under one version of events, Ms. Higgins fired the gun and Mr. Higgins pushed her into the wall. RP (9-7-05) 17. In this scenario, Mr. Higgins committed only the inferior offense. Because the court was required to take the evidence in a light most favorable to Mr. Higgins, and to give the

¹ Respondent suggests that one of the assaults involved broken bones and therefore was an Assault in the Second Degree. Brief of Respondent, pp. 12-13. Taking the evidence in a light most favorable to Mr. Higgins, as required by *State v. Fernandez-Medina*, 141 Wn.2d 448, at 456, 6 P.3d 1150 (2000), the jury could have concluded that Ms. Higgins was exaggerating when she said that he had shattered her hip.

² Respondent does agree that these two allegedly separate crimes were part of the *res gestae* of the charged offense. Brief of Respondent at 12.

inferior degree instruction if there was even the slightest evidence that it was warranted, the refusal to give the instruction requires reversal of the conviction and remand for a new trial. *State v. Fernandez-Medina*, 141 Wn.2d 448, at 456, 6 P.3d 1150 (2000); *State v. Parker*, 102 Wn.2d 161 at 163-164, 683 P.2d 189 (1984).

III. THE RECORD ESTABLISHES MR. HIGGINS' LEGITIMATE LACK OF CONFIDENCE IN HIS COURT-APPOINTED ATTORNEY.

Respondent asserts that Mr. Higgins' lack of confidence in Mr. Underwood stemmed from a "disagreement" over how a prior representation was handled. Brief of Respondent, p. 16. This is inaccurate.

Because of the trial judge's failure to inquire, the record contains only Mr. Higgins' unrebutted statement that Mr. Underwood did "nothing" for him in the prior case. RP (6-9-05) 16. If Mr. Underwood truly did nothing, then Mr. Underwood undoubtedly violated RPC 1.1 (Competence) and RPC 1.3 (Diligence), and Mr. Higgins' lack of confidence was justified. Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel. *Daniels v. Woodford*, 428 F.3d 1181 at 1198 (9th Cir., 2005). A trial court must inquire if it knows or reasonably should know that a particular

conflict exists. *State v. Jensen*, 125 Wn.App. 319 at 330. 104 P.3d 717 (2005).

In this case, the trial judge should have inquired. *State v. McDonald*, 143 Wn.2d 506, 22 P.3d 791 (2001); U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The failure to do so requires reversal.

IV. THE TRIAL COURT VIOLATED MR. HIGGINS' CONSTITUTIONAL RIGHT TO COUNSEL.

Respondent does not dispute the legal analysis outlined in Mr. Higgins' opening brief. Instead, Respondent asserts that the record is "devoid of any evidence" that Mr. Underwood had a conflict. As noted above, this is incorrect; the record contains un rebutted evidence that Mr. Underwood did "nothing" when previously appointed to represent Mr. Higgins. RP (6-9-05) 16.

V. THE LEGISLATURE'S FAILURE TO DEFINE THE CRIME OF ASSAULT VIOLATES THE SEPARATION OF POWERS AND IS UNCONSTITUTIONAL.

The Legislature and not the judiciary is charged with defining the elements of a crime. *State v. Wadsworth*, 139 Wash.2d 724 at 734, 991 P.2d 80 (2000). The legislature has been given this responsibility "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the

community.” *U.S. v. Bass*, 404 U.S. 336 at 348, 92 S.Ct. 515 (1971).

People should not “ “[languish] in prison unless the lawmaker has clearly said they should.”” *U.S. v. Bass*, at 348, *citations omitted*.

It may be reasonable and constitutional to allow the judiciary to develop the common law tort of assault in the civil arena. It is unreasonable and unconstitutional to charge people and incarcerate them, when the crimes they are accused of committing lack a fixed core definition.

The legislature is capable of defining terms with great precision, and has done so even when the term being defined is not the core behavior that constitutes a crime. For example, to clarify what is meant by the Schedule II synthetic hallucinogen Dronabinol, the legislature noted that some other names for the drug include “[6aR-trans]-6a.7.8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo[b,d]pyran-i-ol, or (-)-delta-9-(trans)-tetrahydrocannabinol.” RCW 69.50.206(f)(1). Another fine example is contained in RCW 9A.49.010, which defines an “aircraft” as “any contrivance known or hereafter invented, used, or designed for navigation of or flight in air,” and a “laser” as “any device designed or used to amplify electromagnetic radiation by simulated emission which is visible to the human eye.” RCW 9A.49.010(1) and (2).

Given the ease with which it defines terms both simple and complex, the legislature can surely be called upon to spell out the core definition of a crime such as assault. Its failure to do so violates the constitutional separation of powers.

Respondent argues that the legislature properly fulfilled its duty by defining assault with reference to the common law, citing RCW 9A.04.060. Brief of Respondent, pp. 21-27. According to Respondent, the absence of a legislative definition of assault is analogous to the legislature's decision in RCW 9.41.300 to delegate to local judicial authorities the designation of specific areas of courthouse facilities as weapon-free zones. Brief of Respondent, p. 25-26. This delegation was found constitutional in *State v. Wadsworth*, 139 Wn.2d 724, 991 P.2d 80 (2000). In upholding that statute, the Supreme Court in *Wadsworth* noted a similarity between RCW 9.41.300 and cases involving bail jumping (where the court sets the dates upon which the defendant is expected to appear), violations of protection orders (where the court sets the parameters of the orders the defendant is expected to obey), and criminal contempt (where the court issues the orders which the defendant is expected to comply with). *Wadsworth*, at 736-737.

Contrary to Respondent's assertions, this is not a case where the legislature has defined the general terms and left it to the courts establish

specifics. Rather, the legislature has wholly failed to define the general term-- assault-- that constitutes the crime. The lack of this core definition has forced the judiciary to step in, not with specifics (such as the location of a weapons-free zone as in *Wadsworth*), but rather with a general definition of the crime itself. *Wadsworth* is distinguishable.

Finally, Respondent argues (without citation to authority) that the failure to define assault is not an unconstitutional delegation to the judiciary because of the “distinct difference” between the judiciary (as a branch of government) and the common law. Brief of Respondent, p. 26. This metaphysical distinction does not undermine Mr. Higgins’ separation of powers argument, since even Respondent concedes that the common law is developed through judicial decisions. Brief of Respondent, p. 26-27.

CONCLUSION

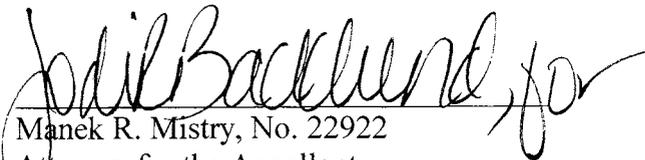
For the foregoing reasons, the conviction must be reversed and the case dismissed. In the alternative, if the case is not dismissed, Mr. Higgins must be granted a new trial.

Respectfully submitted on July 27, 2006.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:


DEPUTY

Lloyd Higgins
PO Box 1511
Centralia, WA 98531

And to the office of the Lewis County Prosecutor,

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 27, 2006.

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 July 27, 2006.


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