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COURT OF APPEALS

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No. 34439-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Ryan W. Allen,

Appellant.

Lewis County Superior Court

Cause No. 05-1-00436-8

The Honorable Judge Scott E. Blinks

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court should have suppressed the evidence.
2. The trial court erred by adopting Finding of Fact No. 1.6, which reads as follows:

Dispatch advised that Peggy Allen had a clear license but revealed her to be the protected party in a no contact order with a Ryan W. Allen, DOB 08-16-77, as the restrained party.

3. The trial court erred by adopting Conclusion of Law No. 2.5, which reads as follows:

Pursuant to the independent source doctrine, as articulated in *State v. O'Bremski*, 70 Wn.2d 425, 423 P.2d 530 (1967), *State v. Early*, 36 Wn.App. 215, 374 P.2d 179 (1983), *State v. Ludvik*, 40 Wn.App. 257, 698 P.2d 1064 (1985), and *State v. Hall*, 53 Wn.App. 296, 766 P.2d 512, *review denied*, 110 Wn.2d 1016 (1989), *inter alia*. Officer Lowrey's subsequent request of Peggy Allen for information regarding the male passenger's identity and her consequent identification of the Defendant was an independent source of such information that was not a derivative of or an exploitation of evidence gained as a result of the unlawful seizure of the Defendant.

4. The trial court erred by adopting Conclusion of Law No. 2.6, which reads as follows:

The defendant lacks standing to assert that Peggy Allen's identification of the Defendant was unconstitutionally obtained.

5. The trial court erred (in part) by adopting Conclusion of Law No. 2.7, which reads as follows:

Excepting the Defendant's unlawful seizure and all evidence obtained derivatively therefrom, Officer Lowrey had probable cause at the time of the Defendant's arrest to find that the Defendant was in violation of the no contact order. As such, the search of the ford was lawfully conducted incident to his arrest, and the evidence found in the Ford lawfully obtained.

6. Mr. Allen was denied his constitutional right to a jury trial.

7. Mr. Allen was denied his constitutional right to confront witnesses.
8. Mr. Allen was denied his constitutional right to testify.
9. Mr. Allen was denied his constitutional right to present a defense.
10. The trial court erred by accepting Mr. Allen's purported waiver of his right to a jury trial without ensuring that he was fully aware of the right being relinquished.
11. The trial court erred by convicting Mr. Allen following a bench trial based on documentary evidence without a valid waiver.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Ryan Allen was a passenger in a car driven by Peggy Allen. During a traffic stop, an officer determined that Peggy Allen had a protection order. Initially, the officer did not know the name, gender, or DOB of the restrained party, and did not know the terms of the order. The officer detained both Mr. Allen and Peggy Allen to determine if they were in violation of the no contact order. He asked Mr. Allen for identification, ran the information he received, determined the name and DOB of the restrained party, and then removed Peggy Allen from the car and interrogated her. Eventually, he arrested Mr. Allen, searched the car, and found methamphetamine. Mr. Allen's motion to suppress was denied.

1. Must the evidence be suppressed because it was discovered following a warrantless search that was performed incident to an unlawful arrest? Assignments of Error Nos. 1-5.
2. Was Mr. Allen's arrest illegal because probable cause was developed from an unlawful detention? Assignments of Error Nos. 1-5.
3. Was Mr. Allen's detention unlawful because it was not based on specific and articulable facts giving rise to a well-founded suspicion of criminal activity? Assignments of Error Nos. 1-5.
4. Since the trial court found the officer lacked a basis to detain Mr. Allen and Peggy Allen, should the evidence have been

suppressed as fruits of the unlawful detentions? Assignments of Error Nos. 1-5.

5. Does Mr. Allen have automatic standing to assert Peggy Allen's constitutional rights, given that he was charged with a possessory offense and found to be in actual possession? Assignments of Error Nos. 1-5.

Mr. Allen was charged Possession of a Controlled Substance and Violation of a Protection Order. He signed a handwritten waiver of his right to a jury trial. There is no record of any colloquy between Mr. Allen and the Judge, reviewing the waiver of trial rights. Mr. Allen was not advised that he had the right to participate in jury selection, 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.

6. Was Mr. Allen's waiver of his right to a jury trial invalid under the state constitution? Assignments of Error Nos. 6-11.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On June 9, 2005, Peggy Allen was pulled over by police for driving with faulty equipment. RP (11-18-05) 14. The officer took her license, ran her name, and found that her license was clear and that she had no warrants. In addition, the officer discovered that she was the petitioner in a no contact order. RP (11-18-05) 16. Initially, the officer did not know the name, gender, date of birth, or a description of the restrained party and did not have any information on the terms of the no contact order. RP (11-18-05) 22-23, 25.

The officer went back to the car “to determine whether the male passenger was the other part of the protection order.” RP (11-18-05) 16. He requested identification from the man, who did not have any. RP (11-18-05) 17. The officer then asked the passenger his name, and the passenger (and Peggy Allen) replied that it was Ben Haney. RP (11-18-05) 18.

The officer returned to his car, requested additional information from dispatch, and found out that the restrained person in the no contact order was named Ryan W. Allen, DOB 8/16/77; the officer did not get a description, or any other information about the restrained party or the

order. RP 19 (1-18-05) 18. While checking with dispatch, the officer saw the passenger moving, as though to put something under the passenger seat. RP (11-18-05) 19.

The officer returned to the car and asked Peggy Allen to step out. RP (11-18-06) 19. When she did, the officer confronted her and told her that he knew they had provided a false name for her passenger. She told him that the restraining order wasn't valid, and that the passenger was Ryan Allen. RP (11-18-05) 19, 20.

Mr. Allen was arrested and the car was searched. Supp. CP, Findings of Fact and Conclusions of Law on 3.6 Hearing. Methamphetamine was found under the mat in front of the passenger's seat, and Mr. Allen was charged with Possession of a Controlled Substance and Violation of a No Contact Order in Lewis County Superior Court. CP 15-16; Supp. CP, Findings of Fact and Conclusions of Law on 3.6 Hearing.

A suppression hearing was held. The court determined that the officer lacked a reasonable suspicion that the passenger (Mr. Allen) was the restrained party in Peggy Allen's no contact order. The court suppressed Mr. Allen's statements to the officer, but admitted the methamphetamine obtained from the search of the car. In support of its

decision, the court entered Findings of Fact and Conclusions of Law on the 3.6 hearing, which read (in part):

1.6 Dispatch advised that Peggy Allen had a clear license but revealed her to be the protected party in a no contact order with a Ryan W. Allen, DOB 08-16-77, as the restrained party.

...

2.3 Specifically, Officer Lowery lacked a reasonable, suspicion, pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 Led.2d 889 (1968), and its progeny, that the Defendant was the restrained party under the no contact order at the time of such request.

...

2.5 Pursuant to the independent source doctrine, as articulated in *State v. O'Bremski*, 70 Wn.2d 425, 423 P.2d 530 (1967), *State v. Early*, 36 Wn.App. 215, 374 P.2d 179 (1983), *State v. Ludvik*, 40 Wn.App. 257, 698 P.2d 1064 (1985), an d*State v. Hall*, 53 Wn. App. 296, 766 P.2d 512, *review denied*, 110 Wn.2d 1016 (1989), *inter alia*, Officer Lowrey's subsequent request of Peggy Allen for information regarding the male passenger's identity and her consequent identification of the Defendant was an independent source of such information that was not a derivative of or an exploitation of evidence gained as a result of the unlawful seizure of the Defendant.

...

2.7 Excepting the Defendant's unlawful seizure and all evidence obtained derivatively therefrom, Officer Lowrey had probable cause at the time of the Defendant's arrest to find that the Defendant was in violation of the no contact order. As such, the search of the Ford was lawfully conducted incident to his arrest, and the evidence found in the Ford lawfully obtained. Supp. CP, Findings of Fact and Conclusions of Law on 3.6 Hearing.

Mr. Allen signed a "Waiver of Jury Trial" that included the following language:

I Ryan Allen hereby waive my right to a trial by an impartial jury of 12 people. Supp. CP.

The court did not review the waiver with Mr. Allen on the record, although the judge indicated that they had reviewed it together. Mr. Allen told the court that he had reviewed the waiver with his attorney. Supp. CP; RP (2-17-06) 53-54.

The court accepted the waiver and found Mr. Allen guilty based on stipulated facts. Findings of Fact and Conclusions of Law were entered following the stipulated facts trial, and Mr. Allen was convicted as charged. He appealed.

ARGUMENT

I. THE EVIDENCE MUST BE SUPPRESSED BECAUSE IT WAS OBTAINED AS A RESULT OF AN UNLAWFUL WARRANTLESS SEARCH.

The Fourth Amendment to the Federal Constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

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." Wash. Const. Article I, Section 7. The Supreme Court has stated that "it is by now axiomatic that article I, section

7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment.” *State v. Parker*, 139 Wn.2d 486 at 493, 987 P.2d 73 (1999). Under Article I, Section 7, warrantless searches are unreasonable *per se*. *Parker*, at 494. Exceptions to the warrant requirement are limited and narrowly drawn. *Parker*, at 494. The State, therefore, bears a heavy burden to prove that a warrantless search falls within an exception. *Parker*, at 494.

One such exception is where the search is performed incident to a lawful custodial arrest. *Parker*, at 496. The exception is narrower under Article I, Section 7 than it is under the Fourth Amendment. *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). The legality of a search incident to arrest turns on the lawfulness of the arrest. Where the arrest is derived (directly or indirectly) from a violation of the Fourth Amendment or Article I, Section 7, the seized items must be suppressed as “fruits of the poisonous tree.” *Nardone v. United States*, 308 U.S. 338 at 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); *State v. Glossbrener*, 146 Wn.2d 670, 685, 49 P.3d 128 (2002).

The Fourth Amendment and Article I, Section 7 apply to brief detentions that fall short of formal arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d (1975), *State v. Crane*, 105 Wn. App. 301, 311, 19 P.3d 1100 (2001). A request for

identification from a passenger for investigatory purposes constitutes a seizure. *State v. Rankin*, 151 Wn.2d 689, 697, 92 P.3d 202 (2004). In order to justify a brief investigative detention, the police must have a well-founded suspicion of criminal activity based on specific and articulable facts; there must be a substantial possibility that criminal conduct has occurred or is about to occur. *State v. O'Cain*, 108 Wn. App. 542, 548, 31 P.3d 733 (2001).

- A. The evidence was the fruit of an illegal search, since Mr. Allen was detained even though the officer lacked a well-founded suspicion of criminal activity, based on specific articulable facts.

Here, the prosecution sought to justify the search as a lawful search incident to Mr. Allen's arrest for violating a no contact order. But the trial court concluded that the officer lacked a reasonable suspicion that Mr. Allen was the restrained party in the order, and thus did not have a basis to detain him for investigation. Conclusion of Law No. 2.3, Supp CP. The prosecution did not cross-appeal this conclusion; nor did the prosecution cross-appeal any of the findings of fact supporting this conclusion, thus they are verities on appeal.

When the officer detained Mr. Allen by asking him for identification, the officer knew only that Peggy Allen, the driver, had a

restraining order.¹ RP (11-18-05) 16. At that point, the officer did not even know the name, date of birth, or gender of the restrained party, and had no reasonable basis to suspect that the male in the passenger seat was the restrained party. RP (11-18-05) 22. Nor did the officer have any information on the terms of the no contact order, which could have included provisions for limited contact between the parties. RP(11-18-05) 20-25. Thus (as the trial court held) the detention, the request for identification, and the brief interrogation of Mr. Allen was unlawful, requiring suppression of any evidence derived (either directly or indirectly) from that detention. *Glossbrener, supra*.

Mr. Allen was further unlawfully detained when the police removed Peggy Allen from the car and interrogated her. At that point, the officer had a name and date of birth, but there was no additional information establishing that the passenger was the person named in the restraining order. Because of this, the continuing detention was also unlawful under the Fourth Amendment and Article I, Section 7 of the Washington Constitution. Any evidence derived from this further

¹ To the extent Finding of Fact No. 1.6 suggests that the officer learned the restrained party's name and DOB before contacting Mr. Allen, it is not supported by substantial evidence, and must be stricken.

detention must also be suppressed, whether discovered directly as a result of the detention or indirectly as fruits of the investigation. *Glossbrener*.

The trial court properly suppressed Mr. Allen's statements to the officer; however, it should have also suppressed Mr. Allen's furtive movements and the methamphetamine. First, if the police hadn't unlawfully detained Mr. Allen to ask his identity, they would never have developed probable cause to arrest him; instead, Peggy Allen would have been released as soon as she was ticketed for her faulty equipment, and the two would have been on their way.

Second, the police observation of Mr. Allen making furtive movements in the car occurred during the illegal detention, while the officer ran the name he had given (after demanding his identification). RP (11-18-05) 18-19. These observations were thus fruit of the poisonous tree, and should also have been suppressed. *Glossbrener*.

Third, the officer exploited the initial (illegal) interrogation with Mr. Allen by confronting Peggy Allen with the suspicion that Mr. Allen had given a false name; this resulted in her admission of Mr. Allen's true identity.² RP (11-18-05) 16-19. Because Peggy Allen's admission was

² To the extent Conclusion of Law No. 2.5 suggests that Peggy Allen's statement did not stem from the ongoing unlawful seizure of both of them it is not supported by the evidence and must be stricken.

based in part on the false name unlawfully obtained during the first illegal detention, her admission (which provided probable cause to arrest) is also fruit of the poisonous tree. *Glossbrener*. Without her admission, the police could not have arrested Mr. Allen, and could not have searched the vehicle. Accordingly, the arrest was invalid, the search was invalid, and the evidence should have been suppressed. *Glossbrener, supra*.

B. Peggy Allen was detained without a reasonable suspicion of criminal activity and Mr. Allen has automatic standing to assert a violation of her rights.

The doctrine of automatic standing permits a defendant to assert a third party's constitutional rights, where (1) the defendant is charged with a possessory offense, and (2) the defendant was in possession of the contraband item at the time of the search or seizure. *State v. Jones*, 146 Wn.2d 328, 332-333, 45 P.3d 1062 (2002).

In *Jones*, the defendant was charged with unlawfully possessing a handgun found in his passenger's purse. He was permitted to assert the passenger's rights under Article I, Section 7, because both conditions were met. The Supreme Court suppressed the handgun, and the case was dismissed.

In this case, Mr. Allen was charged with a possessory offense (possession of a controlled substance), and he was in possession of the contraband item-- the methamphetamine under the passenger side mat of

the car-- at the time of the arrest and search. CP 15-16; RP (11-18-05) 20-21. Accordingly, he had standing to assert a violation of Peggy Allen's rights. *Jones, supra*.

Peggy Allen's rights under Article I, Section 7 (and under the Fourth Amendment) were violated when she was unlawfully detained without a reasonable suspicion of criminal activity. *O'Cain, supra*. As the trial court found, the police had no basis to believe that Mr. Allen was the restrained party in the no contact order. Conclusion of Law No. 2.3, Supp. CP. All that was known initially, was that Peggy Allen was the Petitioner and that there was a no contact order.³ All that was known (at the time Peggy Allen was asked to step from her car) was that the restrained party was named Ryan Allen, with a DOB of 8/16/77; the officer had no description of the restrained person and no reason to suspect that the passenger was the restrained person. Furthermore, the officer was ignorant of the terms of the no contact order, which could have allowed contact in public, or for certain purposes, etc. Accordingly, when the officer detained Peggy Allen (first by questioning her passenger, then by requiring her to remain at the scene while they ran the passenger's

³ To the extent that Finding of Fact No. 1.6 suggests otherwise, it is not supported by substantial evidence and must be stricken.

information, and then by interrogating her), they violated her constitutional rights under the Fourth Amendment and Article 1, Section 7. *Crane, supra; Rankin, supra, O’Cain, supra.*

Since Mr. Allen has automatic standing to assert her rights as well as his own, all evidence derived from the unlawful detentions should be suppressed, and the case should be dismissed. *Jones, supra.*

II. MR. ALLEN DID NOT VALIDLY WAIVE HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER THE STATE CONSTITUTION.

The Sixth Amendment to the U.S. Constitution (applicable to the states through the Fourteenth Amendment) guarantees a criminal defendant the right to a jury trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Waiver of the federal jury trial right must be made knowingly, intelligently and voluntarily; the waiver must either be in writing, or done orally on the record. *State v. Treat*, 109 Wn.App. 419 at 427-428, 35 P.3d 1192 (2001). The federal constitutional right to a jury trial is one of the most fundamental of constitutional rights, one which an attorney “cannot waive without the fully informed and publicly acknowledged consent of the client...” *Taylor v. Illinois* 484 U.S. 400 at 418 n. 24, 108 S.Ct. 646 (1988). In the absence of a valid waiver of the

federal right, a criminal defendant's conviction following a bench trial must be reversed. *Treat, supra*.

Wash. Const. Article I, Section 21 provides that "[t]he right of trial by jury shall remain inviolate..." Wash. Const. Article I, Section 22 (amend. 10) provides that "[i]n criminal prosecutions the accused shall have the right to. . . a speedy public trial by an impartial jury..."

As with many other constitutional provisions, the 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 at 97, 653 P.2d 618 (1982). Because the right is broader and more highly valued under the state constitution, a waiver of the state constitutional right must be examined more carefully than a waiver of the corresponding federal right.

- A. A waiver of the state constitutional right to a jury trial is valid only if the record establishes that the accused was fully aware of the rights being waived.

The validity of a waiver under the state constitution is determined with respect to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Under a *Gunwall* analysis, waiver of the state constitutional right to a jury trial is valid only if the record shows that the defendant is fully aware of the meaning of the state constitutional right. This includes (among other things) an understanding of the right to participate in the selection of jurors, the right to a jury of twelve, 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.

The language of the State Constitution. The first *Gunwall* factor requires examination of the text of the State Constitutional provisions at issue. Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury *shall remain inviolate...*” *emphasis added*. The strong, simple, direct, and mandatory language (“shall remain inviolate”) implies a high level of protection, and, in fact, the Court has noted that the language of the provision requires strict attention to the rights of individuals. In *Sofie v. Fibreboard Corp.*, the Supreme Court clarified the meaning of the term “inviolate:”

The term “inviolate” connotes deserving of the highest protection. [Webster’s Dictionary] defines “inviolate” as “free from change or blemish: pure, unbroken . . . free from assault or trespass: untouched, intact . . .” Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989).

In addition, Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury...” Again, the direct and mandatory language (“shall have the right”) implies a high level of

protection. The existence of a separate section specifically referencing criminal prosecutions further emphasizes the importance of the right to a jury trial in criminal cases.

Thus, the language of Article I, Section 21 and Article I, Section 22 favors the independent application of the State Constitution advocated in this case, and suggests that any waiver must be stringently examined.

Significant differences in the texts of parallel provisions of the Federal and State Constitutions. The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and State Constitutions. The Federal Sixth Amendment and Wash. Const. Article I, Section 22 are similar in that both grant the “right to . . . an impartial jury.”

But Wash. Const. Article I, Section 21, which declares “[t]he right of trial by jury shall remain inviolate . . .” has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982) found the difference between the two constitutions significant, and determined that the State Constitution provides broader protection. The court held that under the Washington Constitution “no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime.” This is in contrast to the more limited protections available under the Federal Constitution. *Pasco v. Mace*, at 99-100.

Thus, differences in the language between the state and Federal Constitutions also favor an independent application of the State Constitution in this case. Waiver of the state constitutional right to a jury trial requires more than a waiver of the corresponding federal right.

State Constitutional history, state common law history, and pre-existing state law. Under the third and fourth *Gunwall* factors this Court must look to state common law history, State Constitutional history, and other pre-existing state law.

Prior to the adoption of the State Constitution in 1889, the U.S. Supreme Court had ruled that (even in a civil case) “every reasonable presumption should be indulged against [a] waiver” of the fundamental right to a jury trial. *Hodges v. Easton*, 106 U.S. 408 at 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882). Indeed, during the decade prior to the adoption of the State Constitution it was believed that a defendant *could not* waive the right to a jury trial: “This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner’s consent is erroneous.” *U.S. v. Taylor*, 11 F. 470 at 471 (C.C.Kan. 1882). *See also U.S. v. Smith*, 17 F. 510 (C.C.Mass. 1883): “The district judges in this district have thought that it goes even beyond the powers of congress in permitting the accused to waive a trial by jury, and have never consented to try the facts by the court...” *U.S. v. Smith at*

512. These authorities suggest that the drafters of the Constitution would have been loathe to permit a casual waiver of this important right. Even by 1900 there was still disagreement on whether or not a defendant could waive her or his right to a jury trial. *State v. Ellis*, 22 Wn. 129, 60 P. 136 (1900).

Gunwall factors 3 and 4 thus favor an independent application of Article I, Sections 21 and 22.

Differences in structure between the Federal and State Constitutions. In *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), the Supreme Court noted that “[t]he fifth *Gunwall* factor... will always point toward pursuing an independent State Constitutional analysis because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State's power.” *State v. Young*, at 180.

Matters of particular state interest or local concern. The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The protection afforded a criminal defendant contemplating a waiver of rights guaranteed by Wash. Const. Article I, Section 21 and 22 is a matter of State concern; there is no need for national uniformity on the issue. See *State v. Smith*, 150 Wash.2d 135 at 152, 75 P.3d 934 at 941 (2003). *Gunwall* factor number six thus also

points to an independent application of the State Constitutional provision in this case.

Conclusion. All six *Gunwall* factors favor an independent application of Article I, Section 21 and 22 of the Washington Constitution in this case. Each factor establishes that our state constitution provides greater protection to criminal defendants than does the Federal Constitution. To sustain a waiver, a reviewing court must find in the record proof that the defendant fully understood the right under the state constitution—including the right (along with counsel) to participate in selecting jurors, the right to a jury of twelve, 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.

B. Mr. Allen's waiver of his state constitutional right to a jury trial was invalid because the record does not establish that he was fully aware of the rights he was waiving.

In this case, Mr. Allen signed a written waiver; however, there is no record of any colloquy with the trial court judge prior to acceptance of the waiver (although the judge referred to a conversation about the waiver). RP (2-17-06) 53-54.

This record does not establish that Mr. Allen fully understood the state constitutional right to a jury trial; there is nothing to show that he was aware that he could participate in selection of the jury, that the jurors

would be required to presume him innocent unless proven guilty beyond a reasonable doubt, or that a guilty verdict required a unanimous jury. RP (2-17-06) 53-54.

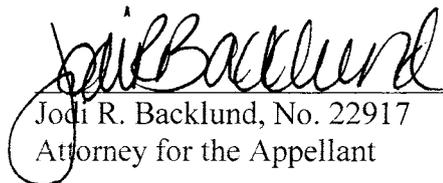
Since the record does not establish that Mr. Allen was fully aware of his right to a jury trial under the state constitution, the waiver cannot be sustained on appeal. The conviction must be reversed and the case remanded for a new trial.

CONCLUSION

For the foregoing reasons, the convictions must be reversed, the evidence suppressed, and the case dismissed.

Respectfully submitted on June 14, 2006.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

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

Ryan W. Allen
1117 "F" Street
Centralia, WA 98531

and to:

Lewis County Prosecuting Attorney
360 NW North Street MS:pro01
Chehalis, WA 98532-1925

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

All postage prepaid, on June 14, 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 June 14, 2006.


Jodi R. Backlund, No. 22917
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