

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JESS JAMES VARNELL,

Appellant.

APPELLANT'S OPENING BRIEF  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION TWO  
12/25/06

ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

The Honorable D. Gary Steiner, Judge

APPELLANT'S OPENING BRIEF

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pm 8/25/06

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A. ASSIGNMENT OF ERROR

Appellant's state and federal due process rights were violated when he was terminated from drug court without a termination hearing and there was insufficient proof that he knowingly, voluntarily and intelligently waived his rights to such a hearing.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. A defendant who is participating in a drug court program has waived important constitutional rights. As a result, due process under the state and federal constitutions provide that the defendant may not be terminated from the program without a hearing at which the prosecution is required to prove that the defendant did not comply with the terms of the drug court agreement, by the preponderance of the evidence.

Mr. Varnell was terminated from drug court without such a hearing and without such proof, based upon his statement that he wanted "out" and counsel's declaration that Mr. Varnell was willing to waive "any" rights he might have in order for termination to occur.

Should this Court reverse where there was no evidence that Mr. Varnell knowingly, voluntarily and intelligently waived his due process rights?

2. An attorney has no authority to waive the substantial constitutional rights of his client without clear evidence of a specific authorization to do so. Where there is no evidence of such an

authorization, was counsel's mere declaration that Mr. Varnell wanted to waive "any" rights he might have insufficient to effect a waiver of his client's substantial constitutional rights to due process?

A. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jess J. Varnell was charged by information filed in Pierce County on February 11, 2004, with unlawful possession of a controlled substance (methamphetamine) and third-degree driving while license suspended. CP 3-5; former RCW 69.50.401(d) (2004); RCW 46.20.342(1)(c). On March 18, 2004, an order was entered granting participation in drug court. CP 8. After a status hearing on April 12, 2006, before the Honorable D. Gary Steiner, drug court participation was terminated, and the court found Mr. Varnell guilty as charged. CP 45-47; RP 2-7.

Mr. Varnell appealed, and this pleading timely follows. See CP 73-86.

2. Overview of facts relating to the offense<sup>1</sup>

On February 10, 2004, an officer stopped the car Jess Varnell was driving, because a search of the registered owner of the vehicle "came up as suspended in DOL" and Mr. Varnell matched that person's description.

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<sup>1</sup>This statement of facts is taken from the Declaration for Determination of Probable Cause and is presented solely to acquaint the Court with the underlying facts. See CP 5.

CP 5. When he was searched incident to arrest, Mr. Varnell was found to have a pouch with syringes, a “snort” tube, and a powder that tested positive for methamphetamine. CP 5. When asked if the items were his, he admitted it, and said he had a drug problem but “it was not real bad.” CP 5.

3. Facts relating to the drug court termination

The drug court agreement was entered into court on March 18, 2004. CP 12. That “Petition, Waiver and Agreement” informed Mr. Varnell that he had certain trial rights that he was waiving and stated his agreement that, “should the Court or I terminate the Drug Court Program after 14 days from today either by the Court or me, I will proceed to a bench trial based solely upon the facts in the police report and laboratory reports, which I hereby stipulate to.” CP 12. The agreement also noted that the prosecution could seek termination of the agreement for “good cause,” and that Mr. Varnell agreed “that any failure on the treatment program may result in a violation hearing.” CP 13. The consequences of such a hearing were listed as “modification of the treatment program, revocation of. . . pretrial release, or termination from the program.” CP 13.

On January 10, 2005, the prosecution sought a warrant for Mr. Varnell’s arrest, indicating that he had failed to appear for drug court on that date. CP 15-17. On March 16, 2005, Mr. Varnell wrote the court a

letter, stating that he knew that he was an addict and needs help, and that he relapsed for a number of reasons, asking the court for another chance. CP 23-25. He was returned to drug court but then, on August 4, 2005, again apparently failed to appear for a drug court review, and another warrant was issued for his arrest. CP 36-38.

On August 15, 2005, Mr. Varnell sent the court a letter, informing the court that he was found not guilty on a new charge, and that he wanted to get back onto the drug court docket. CP 39-41. He also indicated that the prosecutor had indicated an intent to terminate him from drug court for “hanging around known drug users,” but said that he had simply been a bad judge of character and apologized for the trouble, asking to continue in drug court. CP 41.

Nothing further appears to have happened on the case until a status hearing, which was set for April 12, 2006. CP 42-43. On that date, the prosecution filed a “Motion and Order for Drug Court Termination,” stating that “the defendant has failed to comply with the conditions of Drug Court participation” but not identifying what specific acts the prosecution alleged had amounted to such violation. CP 54.55.

That same day, the parties appeared before Judge Steiner, and the prosecutor told the court that Mr. Varnell was in custody “from a district court warrant for possession of a dangerous weapon,” that he had “new charges that were processed in February,” and that the February charges

“led to some kind of disposition” but the prosecutor had not yet researched the details of that disposition. RP 2. The prosecutor stated that Mr. Varnell had “been missing” since his failure to appear for drug court in August, and that he was now facing a new charge, so that he did not deserve another chance at drug court and should be held pending a termination hearing. RP 2. She admitted that “treatment” had recommended that he be given such a chance “pending the outcome of the new charges” but disagreed with that recommendation. RP 2.

The court inquired of Mr. Varnell about the new charge and Mr. Varnell said it was “[p]ossession of a butterfly knife” which was apparently considered a “dangerous weapon.” RP 3. The court said Mr. Varnell would be held pending a termination hearing on May 9<sup>th</sup>, and defense counsel asked if the court would “hear from the defendant.” RP 3.

At that point, Mr. Varnell said that he had learned a lot in the drug court program but wanted “out” of it. RP 3. He wanted to tell everyone that they had “planted a seed” and he was planning to go back to his family in California because he was “alone up here.” RP 3-4.

At that point, the court stated that the termination hearing would be held on the 9<sup>th</sup>, and the prosecutor said she “heard Mr. Varnell say he wants out” so she had the paperwork ready. RP 4. At that point, counsel said, “[h]e would like to do it today, Your Honor. He would stipulate and otherwise waive any rights that he might have to a termination hearing in

order to accomplish that.” RP 4.

The parties then argued about whether he should get credit for time served while awaiting trial on a charge for which he was acquitted, and the court decided to give him that credit. RP 6. The court then asked if Mr. Varnell wanted to say anything before sentence was imposed, and Mr. Varnell said, “[y]ou guys saved my life. I want to go home to my family in Los Angeles.” RP 6. The court then imposed a standard range sentence of 18 months in custody, with credit for time served. RP 6; CP 60-72. It also entered findings and conclusions indicating that it had found him guilty of the drug offense for which he had participated in drug court, based upon the documentary evidence presented. CP 45-47.

D. ARGUMENT

APPELLANT’S DUE PROCESS RIGHTS WERE VIOLATED  
WHEN HE WAS TERMINATED FROM DRUG COURT  
WITHOUT PROOF HIS WAIVER OF THE RIGHT TO A  
HEARING WAS KNOWING, VOLUNTARY AND INTELLIGENT

Under RCW 2.28.170, counties have the opportunity to create drug courts. See, e.g., State v. Little, 116 Wn. App. 346, 351, 66 P.3d 1099, review denied, 150 Wn.2d 1019 (2003). Counties are not required to create such courts and defendants have no protected right to be prosecuted in a jurisdiction where such courts exist. See State v. Harner, 153 Wn.2d 228, 103 P.3d 738 (2004). However, when a defendant enters into a drug court agreement, they have waived important constitutional rights, such as trial by

jury and the rights to confrontation and cross-examination. See State v. Cassill-Skilton, 122 Wn. App. 652, 656, 94 P.3d 407 (2004). Thus, where a county has created a drug court and a person has been accepted into that program, termination from the program implicates the defendant's due process rights. 122 Wn. App. at 656.

Because due process rights are at issue, neither the language of the statute authorizing creation of drug courts nor the language of the specific drug court agreement the defendant signed controls the issue of whether termination was proper. 122 Wn. App. at 658. Instead, the reviewing court must ensure that the requirements of due process were met. 122 Wn. App. at 658. Those requirements include notice, the opportunity to present evidence, the opportunity to be heard by a neutral fact-finder on whether the agreement has been violated, and that the alleged noncompliance with the agreement be proven by the prosecution by a preponderance of the evidence. 122 Wn. App. at 656-58. Further, the termination court must indicate the evidence upon which it relied in finding noncompliance. 122 Wn. App. at 658.

In this case, the order terminating Mr. Varnell from drug court provided that he "has failed to comply with the conditions of Drug Court participation." CP 54-55. That order was entered, however, without the prosecution presenting proof by a preponderance of the evidence that Mr. Varnell had in fact failed to comply, and without a hearing on that issue. Further, despite counsel's declaration that Mr. Varnell would "stipulate" to

“waive any rights,” there was insufficient evidence that Mr. Varnell knowingly, voluntarily and intelligently waived his due process rights to a termination hearing.

A defendant may of course waive even fundamental rights like due process. See State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996); Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 2d 1461, 146 A.L.R. 357 (1938), overruled in part on other grounds by, Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). To be valid, however, “the waiver of a fundamental constitutional right must be ‘an intentional relinquishment or abandonment of a known right or privilege.’” Thomas, 128 Wn.2d at 558, quoting, Johnson, 304 U.S. at 464. A waiver of a fundamental constitutional right must also be made knowingly, voluntarily and intelligently. Thomas, 128 Wn.2d at 558. Further, courts indulge every reasonable presumption against such a waiver. See Little v. Rhay, 8 Wn. App. 725, 509 P.2d 92 (1973); Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

A waiver only meets such standards if it is clear that the defendant understands the right or rights he is waiving and the direct consequences of such a waiver, and is voluntarily choosing to give up those rights after having that knowledge. See, e.g., State v. Perkins, 108 Wn.2d 212, 214-15, 217-18, 737 P.2d 250 (1987) (waiver of fundamental right to appeal is valid if made with understanding of the consequences); State v. Tetzlaff, 75 Wn.2d 649, 453

P.2d 638 (1969) (“[o]ne cannot effectively waive . . . a constitutional right without knowledge of its existence”).

Here, there was no evidence that Mr. Varnell was aware of the due process rights he was giving up when he agreed to termination of the drug court program. He was not told anything about those rights on the record, nor did the court engage in any colloquy to ensure that he was made aware of what he was waiving.

Indeed, it appears that counsel did not even know which specific rights were involved, as he referred to Mr. Varnell waiving “*any* rights that he *might* have to a termination hearing,” not that Mr. Varnell was aware he had due process rights and had knowingly, voluntarily and intelligently chosen to waive those rights. RP 4 (emphasis added).

Further, it is questionable whether the alleged “waiver,” made by counsel, was even valid. While counsel is “impliedly authorized to stipulate to, and waive, procedural matters for hearing or trial,” nevertheless, “in his capacity as an attorney, he is without authority to waive any substantial right of his client unless specifically authorized to do so.” State v. Ford, 125 Wn.2d 919, 922, 891 P.2d 712 (1995), quoting, In re Adoption of Coggins, 13 Wn. App. 736, 739, 537 P.2d 287 (1975); see also, Mitchell v. Kitsap County, 59 Wn. App. 177, 184, 797 P.2d 516 (1990). The reason for the rule is to protect a client “from possibly serious consequences arising from a misunderstanding between the client and the attorney.” Graves v. P.J. Taggares Co., 94 Wn.2d

298, 303, 616 P.2d 1223 (1980). As a result of the rule, an attorney cannot “stipulate away” a substantial right of the defendant without “special authority” to do so. Wagner v. Peshastin Lumber Co., 149 Wash. 328, 337, 270 P. 1032 (1928).

Here, there was no evidence here that counsel had his client’s authority to stipulate away Mr. Varnell’s important due process rights to a hearing and proof by a preponderance of the evidence prior to termination of the drug court program. And while Mr. Varnell said he knew he was facing 18 months, it also appears that he may have believed that, with drug court termination, he would be free to go to his family in Los Angeles. RP 3-4.

Because there was insufficient evidence that Mr. Varnell knowingly, voluntarily and intelligently waived his fundamental due process rights to a termination hearing and all the attendant safeguards of such a hearing prior to termination from drug court, this Court should reverse.

E CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 25<sup>th</sup> day of August, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, Washington, 98402;

to Mr. Jess James Varnell, DOC # 720191, Larch Correction Center, 15314 NE Dole Valley Rd, Yacolt, Washington, 98675.

DATED this 28<sup>th</sup> day of August, 2006.



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