

FILED  
COURT OF APPEALS  
DIVISION II

09 FEB -2 AM 9:55

NO. 37937-6-II

STATE OF WASHINGTON  
BY *[Signature]*

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

---

STATE OF WASHINGTON,

Respondent,

v.

JEROMY WAYNE FREITAS,

Appellant.

---

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

The Honorable Linda CJ Lee

---

BRIEF OF APPELLANT

---

VALERIE MARUSHIGE  
Attorney for Appellant

23619 55<sup>th</sup> Place South  
Kent, Washington 98032  
(253) 520-2637

PM 1-30-09

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Procedural Facts</u> .....	1
2. <u>Substantive Facts</u> .....	2
C. <u>ARGUMENT</u> .....	6
THE TRIAL COURT ERRED IN ALLOWING A MATERIAL WITNESS TO INVOKE A BLANKET FIFTH AMENDMENT PRIVILEGE AGAINST SELF- INCRIMINATION BECAUSE A WITNESS DOES NOT HAVE AN ABSOLUTE RIGHT TO REMAIN SILENT AND BASED ON ITS KNOWLEDGE OF THE CASE AND EXPECTED TESTIMONY FROM THE WITNESS, THE COURT COULD NOT CONCLUDE THAT THE WITNESS COULD LEGITIMATELY REFUSE TO ANSWER ALL RELEVANT QUESTIONS .....	6
D. <u>CONCLUSION</u> .....	14

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>Eastham v. Arndt</u> , 28 Wn. App. 524, 624 P.2d 1159, <u>review denied</u> , 95 Wn.2d 1028 (1981) .....	8
<u>State v. Burri</u> , 87 Wn.2d 175, 550 P.2d 507 (1976) .....	7
<u>State v. Delgado</u> , 105 Wn. App. 839, 18 P.3d 1141 (2001) .....	9
<u>State v. Hobble</u> , 126 Wn.2d 283, 892 P.2d 85 (1995) .....	7, 8
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983) .....	7
<u>State v. Lougin</u> , 50 Wn. App. 376, 749 P.2d 173 (1988) .....	8, 9, 10, 12
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996) .....	7
<u>State v. Parker</u> , 79 Wn.2d 326, 485 P.2d 60 (1971) .....	8, 12
<u>State v. Smith</u> , 101 Wn.2d 36, 677 P.2d 100 (1984) .....	7

**TABLE OF AUTHORITIES** (CONT'D)

Page

**FEDERAL CASES**

Hoffman v. United States,  
341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951) . . . . . 12

Feguer v. United States,  
302 F.2d 214, 241 (8<sup>th</sup> Cir.), cert. denied,  
371 U.S. 872, 83 S. Ct. 123, 9 L. Ed. 2d 110 (1962) . . . . . 7

Kastigar v. United States,  
406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972) . . . . . 8

Thoresen v. Superior Court,  
11 Ariz. App. 62, 461 P.2d 706 (1969) . . . . . 8

United States v. Malnik,  
489 F.2d 682, (5<sup>th</sup> Cir. 1974) . . . . . 13

United States v. Moore,  
682 F.2d 853, (9<sup>th</sup> Cir. 1982) . . . . . 9

United States v. Pierce,  
561 F.2d 735 (9<sup>th</sup> Cir. 1977) . . . . . 13

Washington v. Texas,  
388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) . . . . . 7

**RULES, STATUTES, OTHERS**

U.S. Const. amend VI . . . . . 7

U.S. Const. amend V . . . . . 7

Wash. Const. art. 1, sect. 22 . . . . . 7

A. ASSIGNMENT OF ERROR

The trial court erred in allowing a material witness to invoke a blanket Fifth Amendment privilege against self-incrimination.

Issue Pertaining to Assignment of Error

Did the trial court err in allowing a material witness to invoke a blanket Fifth Amendment privilege against self-incrimination where the witness did not have an absolute right to remain silent, and based on its knowledge of the case and expected testimony from the witness, the court could not conclude that the witness could legitimately refuse to answer all relevant questions?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural Facts

On November 29, 2007, the State charged appellant, Jeromy Wayne Freitas, with one count of unlawful possession of a stolen vehicle, stating that Freitas “did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen.” CP 5. Following a CrR 3.5 hearing and trial before the Honorable Linda CJ Lee, a jury found Freitas guilty as charged on June 8, 2008. 6RP 284; CP 52, CP 53-56. On

---

<sup>1</sup> There are seven verbatim report of proceedings: 1RP - 11/29/07; 2RP - 6/2/08; 3RP - 6/3/08; 4RP - 6/4/08; 5RP - 6/5/08; 6RP - 6/9/08; 7RP - 6/27/08.

June 27, 2008, the court sentenced Freitas to 12 months in confinement. 7RP 12-14; CP 64. Frietas filed this timely appeal. CP 57.

2. Substantive Facts

a. Trial Testimony

Sergeant Chris Gard testified that on November 28, 2007, at around 9:45 p.m., he pulled Freitas over for speeding in Orting. 3RP 47-49. Freitas was driving a 1988 beige Toyota Camry. 3RP 49, 57. Gard conducted a records check on the car and discovered that it was stolen. 3RP 50. Gard and two back-up officers arrested Freitas and placed him in custody. 3RP 50-51. Gard advised Freitas of his *Miranda* rights and Freitas agreed to talk to him. 3RP 51. In answer to Gard's questions, Frietas said he did not know that the car was stolen. Freitas told him that he got the car from a friend in Roy, but he did not know the name of the friend or his phone number. 3RP 52. Gard inspected the car and found that the "ignition was punched" and the steering column was cracked and "kind of hanging down a little bit." 3RP 52-53. Gard suspected that the ignition had been forcefully punched with a screwdriver and hammer. 3RP 53. The lock to the trunk of the car was also damaged. 3RP 57. Gard learned that the registered owner of the car was Sarah Roberts, but he could not locate her so he had the car impounded. 3RP 54-56.

Sarah Roberts testified that on the morning of November 8, 2007, when she went to where her car had been parked to go to work, she realized that her car had been stolen and called the police. 4RP 69. She owned a beige 1988 Toyota Camry, which was parked in a parking lot in front of her apartment complex. 4RP 69-70. The car was locked and Roberts had all the keys to the car. 4RP 71-72. During the twenty days that her car was missing, Roberts walked to work and depended on her boyfriend for rides. 4RP 73-74. Her boyfriend retrieved the car from an impound lot and the estimated cost for repairing the damage was approximately twelve hundred dollars. 4RP 74-76. Roberts had not yet repaired the car and subsequently obtained another vehicle. 4RP 77.

Freitas' mother, Melissa Reeff, testified that Freitas lived near her home and visits her four or five times a week. 4RP 82-83. In November 2007, he came over once a week and was driving a smaller, "brownish-tan" car. 4RP 84. Reeff knew it was not Freitas' car and she saw Michael Wolfe drop Freitas off at her house once so she thought the car belonged to Wolfe. 4RP 85-86. She was not aware of any problem with the car or any indication that it was stolen. 4RP 86.

Freitas' grandmother, Carol Freitas, testified that she has known Freitas all his life and that he visits her six or seven times a month. 4RP 90. In November 2007, he was having trouble with his car so he borrowed

an older, "tannish-brown" car. 4RP 91. Freitas was driving the car when he came over for Thanksgiving and she saw Michael Wolfe drop him off once in the car. 4RP 92-93. She never had any reason to believe that there was a problem with the car or that it was stolen. 4RP 92-93.

Patricia Ann Iverson, Michael Wolfe's mother, testified that Freitas was her son's best friend and she had known Freitas all his life. 6RP 223. Iverson had two other children whose father was James Fink. 6RP 223. In October or November of 2007, Fink gave her a 1998 beige Toyota Camry as a gift because she did not have a car. 6RP 223-24. On the third day that Iverson had the car, she broke the key in the ignition while wiggling it back and forth to start the car. 6RP 225. She needed to get to work so she broke the ignition with a screwdriver and hammer "to put the wires together to start it." 6RP 226. Iverson explained that she had to pry the trunk open to get the tools out of the trunk. 6RP 233. Wolfe and Freitas helped her start the car and she drove to work. 6RP 227-28. Iverson let Wolfe and Freitas use the car a few times because they needed a car to look for jobs. 6RP 228. Iverson acknowledged that she did not change the registration or insure the car. 6RP 232. She trusted Fink and intended to get the title from him but failed to do so. 6RP 234-35.

b. Testimony of Michael Wolfe

When Michael Wolfe appeared in court to testify for the defense, the trial court advised him that his testimony could be incriminating and possibly result in criminal charges against him. 4RP 109-12. Wolfe sought the advice of his attorney and informed the court that he wanted to invoke his Fifth Amendment right against self-incrimination and not testify. 4RP 117-18. The court excused Wolfe and recessed the trial to allow the State and defense to research the scope of Wolfe's Fifth Amendment right against self-incrimination. 4RP 118, 131-33.

The next day, the court heard argument from defense counsel who contended that Wolfe was not entitled to a blanket Fifth Amendment right not to testify. Counsel argued that he had a right to call Wolfe as a witness and question him because "there's a number of questions that are very valuable to my client that I could ask." 5RP 141-42. Counsel assured the court that he would not ask any questions that would put Wolfe in danger of incriminating himself. 5RP 141. The State argued that because Melissa Reeff and Carol Freitas testified that they saw Wolfe driving the car, the "mere fact that [defense counsel] could ask that he knew about this car could place him in jeopardy of being charged with a crime." 5RP 143-44. The State asserted that Wolfe had a right to a blanket Fifth Amendment privilege, "Mr. Wolfe should not testify, should

be excluded, because he runs the real risk of incriminating himself on the record.” 5RP 145-46.

The trial court determined that Wolfe invoked his Fifth Amendment privilege and did not intend to answer any questions and that the defense’s anticipated line of questioning would expose Wolfe to probable criminal charges. 5RP 149-50. The court ruled that it would “allow Mr. Wolfe to invoke his blanket Fifth Amendment privilege and not require him to testify in this case.” 5RP 150.

C. ARGUMENT

THE TRIAL COURT ERRED IN ALLOWING A MATERIAL WITNESS TO INVOKE A BLANKET FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BECAUSE A WITNESS DOES NOT HAVE AN ABSOLUTE RIGHT TO REMAIN SILENT AND BASED ON ITS KNOWLEDGE OF THE CASE AND EXPECTED TESTIMONY FROM THE WITNESS, THE COURT COULD NOT CONCLUDE THAT THE WITNESS COULD LEGITIMATELY REFUSE TO ANSWER ALL RELEVANT QUESTIONS.

The trial court erred in allowing Wolfe to invoke a blanket Fifth Amendment privilege against self-incrimination because he did not have an absolute right to remain silent and based on its knowledge of the case and expected testimony from Wolfe, the court could not conclude that Wolfe could legitimately refuse to answer all relevant questions. The court’s error in violation of Freitas’ constitutional right to compulsory process requires reversal.

Both the Sixth Amendment of the Federal Constitution and art. I, section 22 (amend. 10) of the Washington Constitution guarantee an accused the right to compulsory process to compel the attendance of witnesses. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). The right guaranteed by the Sixth Amendment was recognized and applied to the states in Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), where the Court described the importance of the right:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19, cited with approval in State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). "The guaranty of compulsory process is a fundamental right and one which the courts should safeguard with meticulous care." State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)(citing Feguer v. United States, 302 F.2d 214, 241 (8<sup>th</sup> Cir.), cert. denied, 371 U.S. 872, 83 S. Ct. 123, 9 L. Ed. 2d 110 (1962)).

Under the Fifth Amendment, a witness has a right not to give incriminating answers in any proceeding. State v. Hobbie, 126 Wn.2d

283, 289-90, 892 P.2d 85 (1995)(citing Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972)). However, a witness does not have an absolute right to remain silent as does a defendant on trial. State v. Lougin, 50 Wn. App. 376, 381, 749 P.2d 173 (1988)(citing State v. Parker, 79 Wn.2d 326, 331, 485 P.2d 60 (1971). “There is no blanket Fifth Amendment right to refuse to answer questions based on an assertion that any and all questions might tend to be incriminatory. The privilege must be claimed as to each question and the matter submitted to the court for its determination as to the validity of each claim.” Eastham v. Arndt, 28 Wn. App. 524, 532, 624 P.2d 1159, review denied, 95 Wn.2d 1028 (1981)(citations omitted). A claim of privilege is not a “blanket foreclosure of testimony.” Lougin, 50 Wn. App. at 381.

Unless the question would obviously and clearly incriminate the witness, a claim of privilege against answering it must be supported by facts which aided by “use of ‘reasonable judicial imagination,’ ” show the risk of self-incrimination. Eastham, 28 Wn. App. at 532 (quoting Thoresen v. Superior Court, 11 Ariz. App. 62, 66, 461 P.2d 706 (1969)). The danger of incrimination must be substantial and real, not merely speculative, and the determination of whether silence is justified is vested in the sound discretion of the trial court under all the circumstances then present. Hobble, 126 Wn.2d at 290.

There is a narrow exception allowing a blanket privilege where “based on its knowledge of the case and of the testimony expected from the witness, [the trial court] can conclude that the witness could legitimately refuse to answer essentially all relevant questions.” State v. Delgado, 105 Wn. App. 839, 845, 18 P.3d 1141 (2001)(citing United States v. Moore, 682 F.2d 853, 856 (9<sup>th</sup> Cir. 1982)). For the exception to apply, the trial judge must have “some special or extensive knowledge of the case that allows evaluation of the claimed . . . privilege even in the absence of specific questions to the witness.” Id. (quoting Moore, 682 F.2d at 856).

In State v. Lougin, a codefendant, who had pled guilty but had not yet been sentenced, appeared to testify in Lougin’s trial pursuant to a bench warrant. The trial court ruled that if she testified, she would be subject to a complete cross-examination. Upon the advice of her attorney, the codefendant invoked her Fifth Amendment right against self-incrimination and the court did not require her to testify. Lougin, 50 Wn. App. at 378.

On appeal, the Court of Appeals, Division One, concluded that the trial court erred in not requiring the codefendant to take the stand and then claim the privilege as to specific questions. Id. at 382. The Court determined that she had a right to invoke the Fifth Amendment privilege

in response to specific questions but because she was not a defendant in Lougin's trial, she had no right to decline to testify altogether. Id. Noting that it was impossible to know how the codefendant would have responded to specific questions, the court reasoned that, "[c]onceivably if properly advised as to the scope of her privilege, she could have testified on Lougin's behalf and still have avoided incriminating herself." Id. However, the Court held that the trial court's error was harmless because the codefendant was not a willing witness and it was clear that once on the stand, she would immediately claim her privilege. Id. at 382-83.

As in Lougin, the trial court erred in allowing Wolfe to invoke a blanket Fifth Amendment privilege against self-incrimination and not testify, but the error was not harmless because Wolfe was a willing witness. Wolfe appeared in court intending to testify on behalf of the defense. 4RP 109. He had previously submitted an affidavit stating that he knew that Freitas was not aware that the car he was driving had been stolen. Ex. 5. When the court advised Wolfe that his testimony could be incriminating and possibly result in criminal charges against him, he asked to speak with his attorney. 4RP 111-12. After allowing Wolfe to consult his attorney, the court resumed its questioning:

THE COURT: Okay. My understanding, Mr. Wolfe, is that you had a chance to speak with Mr. Kim, who is a lawyer that represented you previously; is that correct?

MR. WOLFE: Yeah.

THE COURT: Okay. And my understanding, based on what Mr. Kim has represented to the Court, is that after your discussion with Mr. Kim, you wish to invoke your Fifth Amendment right and not testify in the State versus Freitas trial; is that correct?

MR. WOLFE: Yeah.

4RP 117-18.

The court excused Wolfe and asked for argument from the State and defense counsel regarding the scope of Wolfe's Fifth Amendment right against self-incrimination. 4RP 118, 131-33. Defense counsel argued that Wolfe had no right to a blanket Fifth Amendment privilege but could invoke his privilege to specific questions and assured the court that he would not ask Wolfe any questions that would put him in danger of incriminating himself. 5RP 141. Counsel argued that "there's a number of questions that are very valuable to my client that I could ask" without putting Wolfe at risk. 5RP 142.

Defense counsel asked the court to clarify whether Wolfe was invoking his Fifth Amendment privilege to not answer any questions at all but the court refused, ruling that it would "allow Mr. Wolfe to exercise his blanket privilege, because Mr. Wolfe's indication that he intends to invoke the privilege when asked any question or -- in this whole trial regarding --

especially with regard to any questions regarding the car, which is at issue, which would be all of the relevant questions in this case.” 5RP 147-50.

Contrary to the court’s conclusion, Wolfe never stated that he would assert his Fifth Amendment right to all questions. The record reflects that Wolfe only acknowledged that he did not want to testify and the court determined that “there’s nothing more I can do with Mr. Wolfe. He’s invoking his Fifth Amendment rights, and I cannot compel him to testify at this time.” 4RP 118. It is evident from the record that the court misapprehended the law because Wolfe had no blanket privilege. “The court, not the witness, is the final judge of the validity of the claim.” Parker, 79 Wn.2d at 332 (citing Hoffman v. United States, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951)). As the Court recognized in Lougin, “a claim of privilege may be raised only against specific questions, not as a blanket foreclosure of testimony.” Lougin, 50 Wn. App. at 381.

Furthermore, based on its knowledge of the case and testimony expected from Wolfe, the court could not conclude that Wolfe could legitimately refuse to answer essentially all relevant questions. Although Melissa Reeff and Carol Freitas testified that they saw Wolfe driving a tan car, defense counsel repeatedly gave the court his assurance that he would not ask Wolfe any questions that would place him in danger of incriminating himself. Defense counsel explained that he would ask

relevant questions helpful to his client without compromising Wolfe's privilege against self-incrimination. Consequently, the very narrow exception allowing a blanket privilege did not apply.

As the Ninth Circuit Court of Appeals emphasized in United States v. Pierce, 561 F.2d 735 (9<sup>th</sup> Cir.), a blanket refusal to answer any question is unacceptable:

It is simply impossible to anticipate every question that might be asked and conclude that each would present a distinct possibility of self-incrimination if answered by the witness. This is not to say that if [the witness] testifies and produces documents, he may not object to every question. It is just that we cannot speculate and say that any response to all possible questions would or would not tend to incriminate the witness.

Pierce, 561 F.2d at 741 (quoting United States v. Malnik, 489 F.2d 682, 686, (5<sup>th</sup> Cir.).

Reversal is required because the trial court misapprehended the law and consequently abused its discretion in allowing Wolfe to invoke a blanket Fifth Amendment right against self-incrimination.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Freitas' conviction for unlawful possession of a stolen vehicle because he was denied his constitutional right to compulsory process to compel the attendance of witnesses and consequently deprived of his right to a fair trial.

DATED this 30<sup>th</sup> day of January, 2009.

Respectfully submitted,

  
\_\_\_\_\_

VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Jeromy Wayne Freitas, Booking No. 2008161035, Pierce County Sheriff's Department, 910 Tacoma Avenue South, Tacoma, Washington 98402-2168.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30<sup>th</sup> day of January, 2009 in Kent, Washington.

  
Valerie Marushige  
Attorney at Law  
WSBA No. 25851

FILED  
COURT OF APPEALS  
DIVISION II  
09 FEB -2 AM 9:56  
STATE OF WASHINGTON  
BY  W. PURDY

37937-6-21

(Amended) **DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of appellant's opening brief to Jeromy Wayne Freitas at 6911 299<sup>th</sup> Street South, Roy, Washington 98580.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17<sup>th</sup> day of February, 2009 in Kent, Washington.

*Valerie Marushige*  
Valerie Marushige  
Attorney at Law  
WSBA No. 25851

FILED  
COURT OF APPEALS  
DIVISION II  
09 FEB 17 PM 12:04  
STATE OF WASHINGTON  
BY *W*  
DEPUTY