

NO. 37937-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEROMY WAYNE FREITAS,

Appellant.

COURT OF APPEALS
DIVISION II
09 JUN -1 11 09 AM
STATE OF WASHINGTON
BY 
VALERIE MARUSHIGE

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

The Honorable Linda CJ Lee

REPLY BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

23619 55th Place South
Kent, Washington 98032
(253) 520-2637

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN ALLOWING MICHAEL WOLFE TO INVOKE A BLANKET FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND THE ERROR WAS NOT HARMLESS.

The State argues that Wolfe would have faced a genuine risk of self-incrimination if he had answered any question relevant to the case and that any error by the trial court was harmless because Wolfe's testimony would have been cumulative. Brief of Respondent at 11-13. The State's bald assertions are unsubstantiated by the record. There is nothing in the record that supports the State's claim that Wolfe absolutely could not have answered any questions helpful to Frietas' defense. Consequently, as Division One of this Court concluded in State v. Lougin, 50 Wn. App. 376, 382, 749 P.2d 173 (1988), the trial court erred in not requiring Wolfe to take the stand and then claim the privilege as to specific questions. 50 Wn. App. at 382. The Court reasoned that, "It is impossible to know what the [witness] would have done if confronted with specific substantive questions. Conceivably, if properly advised as to the scope of her privilege, she could have testified on [the defendant's] behalf and still have avoided incriminating herself." Id. (Emphasis added).

The State argues further that the record is clear that Wolfe would have asserted his Fifth Amendment privilege to all relevant questions.

Brief of Respondent at 13-15. A careful review of the record belies the State's argument. Importantly, Freitas was Wolfe's best friend and had initially appeared in court to testify on Freitas' behalf but after being advised by the court, he decided to speak to his attorney. 4RP 109-112, 6RP 223. Thereafter, the court asked Wolfe if he wished to invoke his Fifth Amendment right and not testify and Wolfe replied, "Yeah." 4RP 118. Defense counsel urged the court to ascertain whether Wolfe meant that he was exercising his Fifth Amendment privilege to not answer any questions at all, but the court refused to ask Wolfe or his attorney for a clarification. 5RP 147-48. The record is therefore devoid of any support for the State's conclusory assertion that Wolfe intended not to answer any questions and would have immediately invoked his privilege if he took the stand.

The record substantiates that the court had no "special or extensive knowledge of the case" that allowed the court to permit Wolfe to invoke a blanket Fifth Amendment privilege. State v. Degado, 105 Wn. App. 839, 845, 18 P.3d 1141 (2001)(citing United States v. Moore, 682 F.2d 853, 856 (9th Cir. 1982)). Consequently, reversal is required because the trial court abused its discretion.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Freitas' conviction because he was denied his constitutional right to compulsory process to compel the attendance of witnesses.

DATED this 29th day of May, 2009.

Respectfully submitted,


VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Jeromy Wayne Freitas

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 Kimberley DeMarco, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 29th day of May, 2009 in Kent, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851

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DIVISION II
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