

No. 44184-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF CAMAS

Respondent

vs.

VLADIMIR V. GRUNTKOVSKIY

Petitioner

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY TO BRIEF OF RESPONDENT

I. RESPONDENT'S RECITATION OF IRRELEVANT FACTS

For some reason, Respondent felt it necessary to extol on how drunk Mr. Gruntkovskiy was at the time of his arrest. That gratuitous smear has nothing to do with the factual or legal issues in this case. Defendant's claim at trial, supported by his testimony, and another witness, was that Mr. Gruntkovskiy was not driving the vehicle when it hit the guy wire earlier. Even the City's only eye witness, Colby Jones, supported this claim, testifying at trial that he thought a different person, wearing an orange coat, was the driver. RP p. 107, l. 24-25. Respondent's seven page "Statement of Facts" is of no consequence in this matter.

II. RESPONDENT'S ARGUMENT THAT THE JURY WAS PROPERLY CONSTITUTED

Respondent argues that the jury panel in this case was properly constituted. In doing so, Respondent ignores the statute and case law controlling this matter, in favor of scenarios which have little or no bearing on this case. Respondent's muddled,

confused assessment of case law involving the constitutional right to a jury drawn from the entire county in District Court cases, has no applicability here, and deserves short response.

The Honorable Aurora Bearse, in granting Discretionary Review, properly recognized the jury issues, that is: 1) Whether, in a Municipal Court Prosecution, a defendant is entitled to have a jury drawn from the area served by the court, i.e. the Municipality, and if so, 2) whether the violation of that right is of constitutional magnitude, such that it may be raised for the first time on appeal. The blatant and obvious error in this case is that the jury selection process was completely erroneous, because, on the face of the undisputed facts, there was no compliance at all with RCW 2.36.050:

“ Juries in courts of limited jurisdiction.

In courts of limited jurisdiction,... Jurors for the jury panel may be selected at random from the population of the area served by the court.”

The Court Administrator had in place a mechanism to limit the jury pool to residents of the Municipality, but did not employ it, the result being that no member of the jury panel, and no member

of the ultimate six person jury itself qualified as Camas Municipal Court jurors under the statute.

This wholesale deviation from the procedure called for by the statute would appear inexplicable, except for the fact that the explanation is obvious: as argued before in Petitioner's Motion for Discretionary Review, the Clark County District Court, including the judge and the administrative arm of the court, failed to recognize the basis of the court's jurisdiction, and the Court mistakenly sat in its capacity and exercised its jurisdiction, as a District Court, rather than a Municipal Court.

Respondent represents to the court, with no citation to the record, that:

"In this case, the City of Camas used the master jury list developed by the Clark County Superior Court to select a jury pool. The jury pool was selected at random. The master list includes Camas citizens. The jury pool was not limited to just Camas citizens. Rather it was more expensive (sic) and included the entire county as permitted by the statutory scheme, allowing a greater opportunity for a diverse and random jury." Brief of Respondent at pages 16, 17,

The source of these factual allegations is not revealed. In the RALJ appeal to Superior Court, Petitioner appropriately sought and

was granted an opportunity to supplement the record with the Declaration of Silvia Reyes, CP 401, Exhibit 1, which establishes the blatant failure of the jury coordinator to assemble a “random” jury panel, and which failed to include any Camas jurors from the group available for counsel to select the jury. It appears that Respondent is attempting to object on appeal to Petitioner’s supplementation of the record, however, Respondent filed no cross appeal, and assigned no error in the Court of Appeals to the RALJ court’s decision allowing supplementation. If Respondent wished to supplement the record with some proof of the “master list,” Respondent should have done so in the RALJ appeal. Instead, Respondent merely throws his factual claims into the body of his brief. This portion of the Brief of Respondent should be disregarded.

Respondent spends inordinate time and paper discussing the difference between the words “may” and “shall,” attempting to convince the Appellate Court that the geographical limit for Municipal Court juries is merely advisory. The same statute, however, if read that way, would make the random aspect of the selection of jurors merely advisory, since the term “may” modifies

the random selection clause as well.

Under Respondent's theory, a jury panel may be drawn in Municipal Court cases with total disregard for any random selection process, such as by including only Democrats, teachers, college graduates, or any other arbitrary group, to the exclusion of all others, because the term "may" is advisory, rather than directive.

Respondent has presented no argument nor explanation for the fact that the jury panel is devoid of Camas jurors. The complete absence of any juror candidates from the Municipality of Camas, when the statutory preference is for inclusion of only such residents, and the existence of a procedure to accomplish that preference, does not support Respondent's claim that a random selection process was used in this case.

More significantly, however, is that the case most applicable, City of Tukwila v. Garrett, 165 Wn. 2d 152, 196 P.3d 681 (200) holds to the contrary of Respondent's "shall-may" argument. Garrett expressly holds that a jury summons process which includes some non-local jurors is permissible, unless there has been a material departure from the local jury requirement. A

process whereby no local jurors are included in the panel available for jury selection is without a doubt a material departure from the statutory requirement. If there has been a material departure from the statutes, prejudice will be presumed. See also State v. Marsh, 106 Wn. App. 801, 809, 24 P.3d 112 (2001). In accord is State v. Tingdale 117 Wn.2d 595, 817 P.2d 850 (1991), (material departure from the statutory jury selection process is presumed prejudicial).

It is impossible to imagine a clearer case of impropriety in selection of the jury panel than is shown in this case. In Garrett, there was rhyme and reason in the summons process: the summonses were sent to persons with Tukwila addresses and zip codes. As it turned out, the Postal Service address designations and the Tukwila city limits did not coincide. Close enough, concluded the Washington Supreme Court.

The process used by the Clark County District Court in the Gruntkovskiy case, on the other hand, is the poster child example of the situation discussed in Garrett, that is, a material departure from the statutory directive.

III. LACK OF PREJUDICE ARGUMENT

Respondent argues at length that the Petitioner, Mr. Gruntkovsky, has failed to show prejudice occasioned by the trial court's improper process. Given the nature of a jury trial and jury deliberations, which are confidential, it is impossible to imagine how prejudice could be demonstrated. Petitioner has no way of knowing what the jurors did in their secret deliberations, and no way to show that the verdict would have been different if a proper, local jury was used. Respondent's argument would be the same, one would think, if a criminal defendant demanded a jury trial, but, instead, the case was heard over his objections by the impartial court as a bench trial. The defendant would have no way to show that a jury, had one been impanelled, would have decided the case differently than a judge did. To place the burden on a defendant to show actual prejudice flowing from denial of the right to a jury trial would render the right to a jury meaningless.

Despite this practical problem, the courts in Garrett, State v. Twyman, 143 Wn.2d 115, 17 P.3d 1184 (2001), State v. Finlayson, 69 Wn.2d 155, 417 P.2d 624(1966) and State v. Tingdale, 117

Wn. 2d 595, 817 P.2d 850 (1991), make this inquiry unnecessary, by presuming prejudice (shifting the burden to the prosecutor to show lack of prejudice) where there has been a material departure from the mandates of the statute quoted above. Rather than arguing that Petitioner has failed to show prejudice, Respondent must prove the opposite.

IV. WAIVER ARGUMENT

Respondent takes the position that the Petitioner's trial attorney waived the error claimed here by failing to raise it at trial, citing the case of State v. Finlayson, 69 Wn.2d 155, 417 P.2d 624(1966).

In Finlayson, no constitutional claim was raised as to the method of selecting the jury panel. This language from Finlayson is pertinent:

“ There is no suggestion that there was any exclusion of any class of citizen or weighting of the jury list or that the jury list was not a representative cross section of the community.” 69 Wn. 2d at 156.

These issues, of course, are the basis of the Petitioner's constitutional claim in this case, as addressed in the Opening Brief of Petitioner. He was denied his constitutional right to a jury drawn from a fair cross section of the community, and further, jurors of the locality in which the crime was committed were excluded from the

jury panel and the jury.

The Finlayson decision is not persuasive on the issue of waiver. Finlayson cites as its authority the United States Supreme Court case of Shotwell Mfg. Co. v. United States, 371 U.S. 341, 9 L. Ed. 2d 357, 83 Sup. Ct. 448 (1963.) In that case, the defendants, after being convicted of tax evasion, challenged the selection process of the grand and petit juries, four years after the trial. The Federal Rules of Criminal Procedure expressly provided that such challenges must be made before trial:

Rule 12(b)(2):

"Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court, for cause shown, may grant relief from the waiver."

The United States Supreme court relied upon this rule in finding that the challenge to the makeup of the jury panel had been waived.

There is no equivalent rule of procedure in Washington's

courts of limited jurisdiction. The Finlayson court's determination that a challenge to the makeup of the jury is waived if not made at trial, in a case where no required jurors were excluded from the panel, and in a case where the jury panel represented a fair cross section of the community, done in reliance upon a federal rule of procedure, is distinguishable and not controlling in this matter.

Likewise, the cases cited by Respondent for the proposition that errors in jury selection *voir dire* are waived, if not raised at trial, have no applicability in this matter. Mr. Gruntkovskiy is not raising an objection to any of the questions and answers, and rulings on challenges to jurors, if any, in the *voir dire* jury selection process. That part of the trial was not even transcribed, because no error is predicated on the *voir dire* process. This appeal is based upon the undisputed fact that the jury panel, and of course, the jury itself was entirely bereft of any of the required jurors drawn from the area served by the court, and the locality where the crime was committed. This fact being uncontested and inescapable, there is no need to review the questions and answers during the jury selection process. No questions, answers, nor rulings by the court can change the fact that the entire panel was summoned in

violation of RCW 2.36.050.

Curiously, Respondent never even addresses the weight of national authority supporting Mr. Gruntkovskiy's position that his constitutional right to a jury trial was violated, and therefore can be raised for the first time on appellate review.

Exclusion of potential jurors from the locus of the commission of the crime deprives a defendant of his right to a jury drawn from a fair cross section of the community:

“(T)he traditional starting point for determining the community from which jurors are to be selected is the scene of the alleged offense. Hence, we feel that in determining whether the source from which a given jury is selected represents a fair cross section of the community, we must adhere to a notion of community which at least encompasses the location of the alleged offense. It is the community within which the crime was committed that the jury must represent.”
Alvarado v. State of Alaska, 486 P.2d 891, at 902 (1971.)

Likewise, Respondent ignores the overwhelming authority from the state of Montana, establishing that a failure to substantially comply with jury selection statutes (especially those which impact the selection of fair cross section of a community) is a constitutional

violation which is per se reversible error, with no showing by the defendant of prejudice.

“LaMere, like the defendant in Robbins, relies on a long line of Montana cases holding that a failure to substantially comply with the statutory procedures governing jury selection amounts to a denial of a defendant's fundamental constitutional right to trial by a fair and impartial jury, and is therefore *per se* reversible without any proof of individual prejudice. See generally Solberg v. County of Yellowstone, 203 Mont. 79, 659 P.2d 290 (1983); Dvorak v. Huntley Project Irrigation Dist. 196 Mont. 167, 639 P.2d 62; (1981), State v. Deeds 130 Mont. 503, 305 P.2d 321 (1957); State v. Porter 125 Mont. 503, 242 P.2d 984 (1952); State v. Hay 120 Mont. 573, 194 P.2d 232 (1948); State v. Diedtman, 58 Mont. 13, 190 P. 117(1920); State v. Miller, 49 Mont. 360, 141 P. 860 (1914); State v. Groom, 49 Mont. 354, 141 P. 858 (1914); State v. Landry, 29 Mont. 218, 74 P. 418 (1903); State v. Tighe 27 Mont. 327, 71 P. 3(1903); Kermon v. Gilmer, 4 Mont. 433, 2 P. 21 (1882).”

State v. LaMere 2 P.3d at 209.

V. CONCLUSION

The Honorable Court of Appeals should hold that Petitioner in this case was denied his right to a fair jury trial, or any trial at all, because the Clark County District Court and the Clark County Superior Court Administrator in charge of summoning jurors for Camas Municipal court cases failed to comply with the local jury requirement of RCW 2.36.050.

Further the Court should hold that the failure to do so, in a case where no Camas jurors were in the group of potential jurors present to hear the case, deprived Petitioner of his constitutional right to be tried by a jury drawn from a fair cross section of the community in which the crime occurred.

The Court of Appeals should reverse the Superior Court's decision on RALJ appeal, enter a cost bill in favor of Petitioner, and remand to the Camas Municipal Court for a new trial.

Dated the 31 day of July, 2013

Respectfully submitted

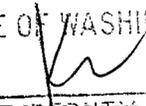
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BY 

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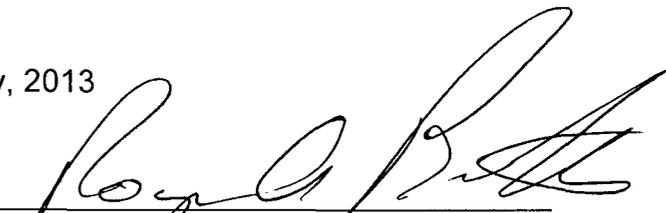
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BRIEF OF PETITIONER

I hereby certify, under penalty of perjury under the laws of the State of Washington, that on the date set out below, I caused a true and accurate copy of the REPLY BRIEF OF PETITIONER to be served on opposing counsel listed below, by United States mail directed to his place of business.

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DATED the 31st day of July, 2013



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