

No. 44643-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sandy Fehr,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-00719-2

The Honorable Judge Marilyn K. Haan

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ARGUMENT

I. THE TRIAL COURT INFRINGED MS. FEHR'S RIGHT TO BE PRESENT.

The federal constitution guarantees an accused person the right to be present for all critical stages of trial. U.S. Const. Amends. VI, XIV; *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). The state constitution guarantees the right to be present whenever the accused person's substantial rights are at issue. Wash. Const. art. I, § 22; *Irby*, 170 Wn.2d at 885. In this case, Ms. Fehr was excluded from a hearing held to decide whether to replay recordings during jury deliberations. RP 318-21.

An accused person's right to be present does not turn purely on whether the proceeding deals with legal or factual questions. Rather, due process protects the right to presence even when evidence is not being presented. *Irby*, 170 Wn.2d at 880-81. Respondent claims that Ms. Fehr did not have a right to be present a hearing because the issue of whether the recording should be replayed was a "question of law." Brief of Respondent, p. 5. The state also argues that the proceeding was not a "critical stage" of trial. Brief of Respondent, p. 5.

The state constitution right to appear and defend does not turn on whether the proceeding is a "critical stage." Nor does it matter whether or not the proceeding addresses a legal question. *Id.* at 885. Rather, art. I, §

22 protects the right to be present any stage of the trial where the accused person's "substantial rights may be affected." Ms. Fehr's substantial right to a fair and impartial jury was at issue during the hearing, because of the risk that the trial court's decision would place undue emphasis on a critical piece of prosecution evidence. *State v. Koontz*, 145 Wn.2d 650, 657-58, 41 P.3d 475 (2002).

Although not controlling, *Koontz* is helpful to the analysis. The *Koontz* court indicated that a hearing about replaying evidence affects the accused person's fundamental right to a fair and impartial jury. *Id.* at 653. The state points out that *Koontz* differentiated between replaying videotaped testimony and replaying an audio or video exhibit. Brief of Respondent, pp. 5-6. This is irrelevant. Ms. Fehr cites *Koontz* to establish that the decision to replay certain evidence is an important decision. *See* Appellant's Opening Brief, p. 8, 9. The *Koontz* court did not address the right to be present; its holding related to the precautions to be applied when a trial judge considers replaying videotaped testimony. *Koontz*, 145 Wn.2d 650.

Arguably, the accused person's presence in court rarely affects the outcome of a proceeding. Nonetheless, due process grants the accused a right to be present. This ensures an opportunity "to give advice or suggestions or even to supersede his lawyers altogether." *Irby*, 170 Wn.2d

at 883. Respondent argues that Ms. Fehr had no right to be present at the proceeding about replaying the audio recording because her “inclusion had no relation to the outcome.” Brief of Respondent, p. 6. The state does not cite any authority for that standard. Brief of Respondent, p. 6.

Ms. Fehr’s attorney did not object to the replaying of the recording of his client’s voice during deliberation. RP 319-21. Had Ms. Fehr been present, she could have encouraged counsel to object on her behalf.

Additionally, because Ms. Fehr’s fundamental right to an impartial jury was at issue at the proceeding, she had a right to be present under the state constitution regardless of whether her presence would have affected the outcome. *Id.* at 885. Art. I, § 22 prohibits a court from making decisions affecting the rights of an accused person during a proceeding from which s/he has been excluded. *Id.*

The state cannot show beyond a reasonable doubt that Ms. Fehr’s exclusion from the hearing was harmless.

Respondent points out that no disputed facts were at issue. Brief of Respondent, p. 7. But no disputed facts were at issue in *Irby* either. *Irby*, 170 Wn.2d 874. Nonetheless, the *Irby* court found that the violation of the right to be present was not harmless beyond a reasonable doubt. The court found that the state could not prove that the dismissed jurors

would have viewed the evidence the same as those who ultimately served on the jury. *Id.* at 886-87.

As Respondent notes, the question of whether to replay the evidence was within the court's discretion. *Koontz*, 145 Wn.2d at 658. Ms. Fehr does not claim that the court abused its discretion by replaying the tape when neither party objected at trial. Rather, the court could have exercised its discretion differently if Ms. Fehr had objected and argued against placing undue emphasis on the state's evidence.

The trial court's violation of Ms. Fehr's state and federal constitutional rights to be present require reversal. *Irby*, 170 Wn.2d at 880-81.

II. THE COURT PROHIBITED MS. FEHR FROM PARTICIPATING IN HER DEFENSE IN VIOLATION OF HER RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ART. I, § 22 WHEN IT FORBADE HER FROM RESPONDING TO TESTIMONY.

Ms. Fehr relies on the argument in her Opening Brief.

III. THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS REGARDING THE BUS STOP ENHANCEMENT VIOLATED MS. FEHR'S RIGHT TO DUE PROCESS AND HER RIGHT TO A JURY TRIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT RIGHTS AND WASH. CONST. ART. I, §§ 21 AND 22.

Ms. Fehr relies on the argument in her Opening Brief.

IV. DEFENSE COUNSEL DEMONSTRATED A MISUNDERSTANDING OF THE LAW, AND UNREASONABLY FAILED TO SEEK A MITIGATED SENTENCE BASED ON *SANCHEZ*.

In Washington, a sentencing judge may impose a prison term below the standard range when multiple delivery convictions result from a series of police-initiated controlled buys. *State v. Sanchez*, 69 Wn. App. 255, 263, 848 P.2d 208 (1993); *State v. Hortman*, 76 Wn. App. 454, 886 P.2d 234 (1994); RCW 9.94A.535(1)(g). Defense counsel's failure to seek an exceptional sentence on these grounds deprives the accused person of the effective assistance of counsel. *State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002).

Here, Ms. Fehr was convicted of three counts of delivery, based on three police-initiated controlled buys to the same confidential informant. RP 10-230. Nonetheless, defense counsel did not argue for an exceptional sentence. RP 333-35. Instead, Ms. Fehr's attorney told the court that the only options were a prison-based DOSA or a standard range sentence. RP 333.

Counsel's request for a prison-based DOSA in no way precluded him from seeking a mitigated sentence under *Sanchez*. Respondent argues that defense counsel's choice to forego the argument was tactical because he argued for a DOSA instead. Brief of Respondent, p. 11. The state does

not posit any reason why defense counsel could not have advocated for an exceptional sentence downward in the alternative to a DOSA.

In fact, counsel informed the judge on multiple occasions that the court was bound by the mandatory sentencing guidelines to a sentence within the standard range. RP 333, 334-35. The attorney misstated the law. *Sanchez*, 69 Wn. App. at 263. Rather than making a strategic choice, counsel appears to have been unaware of *Sanchez* and the court's ability to impose an exceptional sentence downward based on multiple controlled buys.

Hernandez-Hernandez does not foreclose Ms. Fehr's ineffective assistance claim. See Brief of Respondent, pp. 12-13 (citing *State v. Hernandez-Hernandez*, 104 Wn. App. 263, 15 P.3d 719 (2001)). In that case, defense counsel's failure to argue for an exceptional sentence did not prejudice the defendant. Counsel argued for a low-end standard range sentence based on many of the mitigating factors that would have applied under *Sanchez*. The sentencing court rejected counsel's request, and thus would necessarily also have refused to impose an exceptional sentence below the standard range. *Hernandez-Hernandez*, 104 Wn. App. at 266.

Here, on the other hand, counsel did not point to any mitigating factors other than evidence that Ms. Fehr was a low-level dealer. RP 333-37. In fact, counsel erroneously informed the court that it had no option

but to sentence Ms. Fehr within the standard range if it denied the DOSA.
RP 333-35. The state's reliance on *Hernandez-Hernandez* is misplaced.

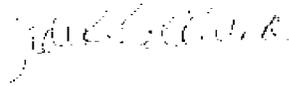
Ms. Fehr was denied the effective assistance of counsel at sentencing. *McGill*, 112 Wn. App. 95. Accordingly her sentence must be vacated and the case remanded to the trial court for a new sentencing hearing. *Id.*

CONCLUSION

Ms. Fehr's convictions must be reversed and the case remanded for a new trial. In the alternative, her sentence must be vacated and her case remanded for a new sentencing hearing.

Respectfully submitted on January 22, 2014,

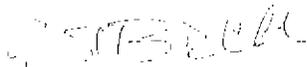
BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Sandy Fehr, DOC #843426
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

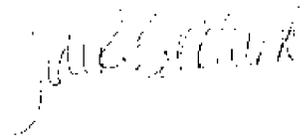
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
baurs@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 January 22, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

January 22, 2014 - 2:51 PM

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