

FILED

AUG 01 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

28671-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEIR WALLIN,

Appellant.

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

The Honorable John Antosz

RESPONDENT'S BRIEF

D. ANGUS LEE
Prosecuting Attorney

by: Tyson R. Hill—40685
Deputy Prosecuting Attorney

P.O. Box 37
Ephrata, Washington 98823
(509) 754-2011

FILED

AUG 01 2011

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____**

28671-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEIR WALLIN,

Appellant.

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

The Honorable John Antosz

RESPONDENT'S BRIEF

D. ANGUS LEE
Prosecuting Attorney

by: Tyson R. Hill—40685
Deputy Prosecuting Attorney

P.O. Box 37
Ephrata, Washington 98823
(509) 754-2011

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
I. IDENTITY OF RESPONDENT	1
II. RELIEF REQUESTED	1
III. ISSUES	1
IV. STATEMENT OF THE CASE	1-2
V. ARGUMENT	3-4
VI. CONCLUSION.....	4

TABLE OF AUTHORITIES

<i>Cases</i>	Page
<i>Portuando v. Agard</i> , 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000).....	3
<i>State v. Martin</i> , 171 Wn.2d 521, 252 P.3d 872 (2011).....	2, 3, 4
<i>State v. Martin</i> , 151 Wn. App. 98, 210 P.3d 345 (2009).....	3
 <i>Rules, Statutes and Other Authorities</i> 	
U.S. Const. Amend. VI.....	3
Wash. Const. Art. I, § 22	2, 3, 4

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

The State asserts no error worthy of reversal occurred in the trial and conviction of the Appellant.

III. ISSUE

A. Whether the Prosecutor's cross-examination of the Appellant violated his rights under Article I, section 22 of the Washington Constitution?

IV. STATEMENT OF THE CASE

On November 6, 2009, a jury convicted Keir Wallin of 5 separate drug related offenses. See 4RP.¹ Wallin now appeals his convictions, arguing that the initial questions asked by the Prosecutor of the Defendant during cross-examination were improper. The contested exchange was as follows:

¹ For the Court's convenience, the State will use the same format as the Appellant's Brief when referring to the verbatim report of proceedings: 1RP – 8/20/09; 2RP – 11/4/09; 3RP – 11/5/09; 4RP 11/6/09; and 5RP – 12/1/09.

Q: Mr. Wallin, you've had the advantage of being in the courtroom and hearing all the testimony so far, correct?
A: Yes I have, sir.
Q: You've had the chance to know ahead of time what people were going to say before you took the stand?
A: No, not really. Could you elaborate please?
Q: Before you took the stand, you had the opportunity to hear Sergeant Jones testify?
A: Yes.
Q: And to watch the video?
A: Yes.
Q: And to see the evidence that was admitted?
A: Yes. Today or yesterday.
Q: You have had the opportunity to see the police reports?
A: Yes, I have.

3RP at 177-78.

In Wallin's initial briefing, he argued this line of questioning violated his rights under Article I, Section 22 of the Washington State Constitution. However, after the Washington State Supreme Court decided *State v. Martin*, 171 Wn.2d 521, 252 P.3d 872 (2011), Wallin concedes that *Martin* is controlling precedent (though he disagrees with the Court's ruling) in its holding that questioning of this kind does not violate a defendant's rights under Article I, Section 22.

V. ARGUMENT

On appeal, Wallin argues that some of the prosecutor's questions (as outlined above) violated his rights under Article I, Section 22 of the Washington State Constitution. To support this claim, Wallin performed a *Gunwall* analysis in his original brief with this Court, arguing Article I, Section 22 provides more protection than the Sixth Amendment to the United States Constitution.

The arguments made by Wallin in his initial brief were argued before Division One of the Court of Appeals in *State v. Martin*, 151 Wn. App. 98, 210 P.3d 345 (2009). The *Martin* case was pending before the Supreme Court at the time Wallin appealed. The State filed a Motion to Stay pending the outcome of the *Martin* case and this Court granted the Stay.

On May 19, 2011, the Supreme Court issued its ruling in *State v. Martin*, 171 Wn.2d 521, 252 P.3d 872 (2011). In *Martin*, the Prosecutor asked the Defendant the same questions at issue in this appeal. *Id.* at 524-25. The United States Supreme Court had already upheld similar questioning in *Portuando v. Agard*, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). The *Martin* court was faced with the decision of whether to agree with the rationale in *Portuando*. The *Martin* court

conducted a *Gunwall* analysis and found that, on this issue, Article I, Section 22 was more expansive and therefore conducted an independent analysis. *Martin*, 171 Wn.2d at 533.

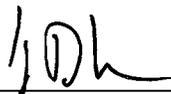
Relying on the same fact pattern as in Wallin's case, the Washington State Supreme Court concluded that the questions posed by the prosecutor did not rise to the level of a constitutional violation. *Martin*, 171 Wn.2d at 523. In Wallin's supplemental briefing to this Court, he concedes that the decision in *Martin* is controlling precedent (although he disagrees with the Court's ruling). Therefore, this Court should also conclude that the prosecutor's questions to Mr. Wallin on cross-examination did not violate Mr. Wallin's rights under Article I, Section 22 of the Washington State Constitution.

VI. CONCLUSION

Mr. Wallin concedes that the recently issued case of *State v. Martin* is controlling precedent. This Court should follow that precedent by holding that the prosecutor's questions to Mr. Wallin did not violate Mr. Wallin's constitutional rights.

Dated this 29th day of July, 2011.

D. ANGUS LEE
Prosecuting Attorney

By: 

Tyson R. Hill – WSBA # 40685
Deputy Prosecuting Attorney