

No. 294595

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
Oct 06, 2011
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, Respondent

v.

BOBBY RAY ZAPIEN, Appellant

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF FACTS

The facts presented in Mr. Zapien's opening brief are incorporated by reference.

II. ARGUMENT

Mr. Zapien's Sixth Amendment Right To Confront Witnesses Against Him Was Violated When He Was Precluded From Questioning Mr. Rhodes About The Use Immunity Agreement Resulting In An Unfair Trial.

In its response brief, the State argued that because the immunity the State offered to the prosecution witness, Mr. Rhodes, was a use/derivative use immunity, rather than a transaction immunity, Mr. Zapien's right to inquire and confront the witness about that agreement was not violated. (Br. of Respondent. at 6). The basis for the argument is unclear.

Here there is no doubt that immediately after Mr. Rhodes, an essential state witness, asserted a Fifth Amendment right to silence the prosecution extended use immunity to him.

Mr. Alford: [Mr. Rhodes' attorney]: Your Honor, my client has some concerns and if he was to make statements that were inconsistent to some statements that he made in relation to the conversation he may or may not have had with Mr. Zapien or law enforcement, he's subjecting himself to state and/or federal prosecution. That's what (inaudible) asserting (inaudible -- can't hear him).....

Mr. Guzman: [State's counsel]: Well, Your Honor, *if that's Mr. Rhodes' concern, the state would be willing to give him use or*

derivative use immunity for his testimony.” (4RP 411).
(Emphasis added).

The right to cross-examine and to test the credibility of a witness is a fundamental right guaranteed by both the federal and state constitutions. U.S. Const. Amend. VI; Const. art. 1 §22 (amend. 10). It is fundamental that a defendant charged with a crime should be given great latitude in the cross-examination of an essential prosecution witness to show motive, self-interest, bias, or credibility. *See State v. Tate*, 2 Wn.App. 241, 469 P.2d 999 (1970).

It was clear that Mr. Rhodes was afraid of some legal action being taken against him if he testified: he invoked a Fifth Amendment right to silence, and prior to the immunity offer he denied having any recollection of the conversation he allegedly had with Mr. Zapien. (4RP 410-411). Further, Mr. Rhodes was an essential state witness. It was only on the basis of his statements to law enforcement that a warrant was issued for Mr. Zapien. (4RP 348-349).

The prosecutor represented to the court that Mr. Rhodes was not given any “favorable treatment” for his testimony. (5RP 516). However, favorable treatment was not what the prosecutor offered on the record, but rather, use immunity.

The court's preclusion of Mr. Zapien's ability to fully cross-examine Mr. Rhodes on the issue of an immunity agreement denied him the opportunity to test the credibility of a witness. ER 611(b); *Davis v. Alaska*, 415 U.S. 308, 945 S.Ct. 1105, 39 L.Ed. 347 (1974); *State v. Ish*, 170 Wn.2d 189, 198, 241 P.3d (2010). This violated his Sixth Amendment right to confront the witnesses against him.

As noted in Mr. Zapien's opening brief, constitutional error is presumed to be prejudicial, and the State bears the burden of proving such error harmless. *State v. Jasper*, 158 Wn. App. 518, 534, 245 P.3d 228 (2010). The State has not proven such error harmless.

Mr. Zapien stands on the facts and authorities cited in appellant's opening brief for all remaining arguments.

III. CONCLUSION

Based on the facts and authorities, Mr. Zapien respectfully requests this court to dismiss his conviction with prejudice, or in the alternative, to grant him a new trial.

Dated: October 6, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Bobby Ray Zapien, do hereby certify under penalty of perjury under the laws of the State of Washington, that a true and correct copy of the Reply Brief of Appellant was sent by first class mail, postage prepaid on October 6, 2011, to Bobby Ray Zapien, DOC # 721778, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326; and by email per agreement between the parties, to Kevin Eilmes, Yakima County prosecutor at kevin.eilmes@co.yakima.wa.us.

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