FILED
AUGUST 29, 2012
Court of Appeals
Division III
State of Washington

30220-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JONA R. ZEIGLER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF GRANT COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

INDEX

A. ASSIGNMENTS OF ERROR 1

B. ISSUES 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 4

1. THE SUPPRESSION HEARING, CONDUCTED IN MS. ZEIGLER'S ABSENCE, VIOLATED HER CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL OF HER CONVICTION 4

E. CONCLUSION 7

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE LORD, 123 Wn.2d 296,
868 P.2d 835, *clarified by*
123 Wn.2d 737, 870 P.2d 964 (1994) 5

STATE V. CORBIN, 79 Wn. App. 466,
903 P.2d 999 (1995) 5

STATE V. IRBY, 170 Wn.2d 874,
246 P.3d 796 (2011) 6

STATE V. SARGENT, 111 Wn.2d 641,
762 P.2d 1127 (1988) 5

STATE V. THOMSON, 123 Wn.2d 877,
872 P.2d 1097 (1994) 5, 6

SUPREME COURT CASES

ILLINOIS V. ALLEN, 397 U.S. 337,
90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)..... 4

JOHNSON V. ZERBST, 304 U.S. 458,
58 S. Ct. 1019, 82 L. Ed. 1461 (1938)..... 5

UNITED STATES V. GAGNON, 470 U.S. 522,
105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)..... 5

FEDERAL CASES

CAMPBELL V. WOOD, 18 F.3d 662 (9th Cir.1994)..... 5

UNITED STATE V. GORDON, 829 F.2d 119 (D.C.Cir.1987) 5

A. ASSIGNMENTS OF ERROR

1. The court erred in taking testimony from the State's witnesses in the defendant's absence.
2. The court erred in finding the defendant's statements to police officers were admissible at trial.

B. ISSUES

1. When a defendant fails to appear for a suppression hearing and defense counsel agrees to proceed in her client's absence, does the court violate the defendant's due process right to be present at a critical stage of the proceedings in conducting the hearing?
2. When a defendant fails to appear for a suppression hearing and the court fails to require any information about the defendant's absence at the time of the hearing or at any time thereafter, does the court err in denying the defendant's suppression motion at the conclusion of the hearing and admitting the challenged evidence at trial?

C. STATEMENT OF THE CASE

Corporal Thomas Tufte approached Jona Zeigler while she was sitting in her truck in a parking lot near downtown Moses Lake. (RP 125,

135) Corporal Tufte told her there was a warrant for her arrest, and that she was not free to go. (RP 136) She told him she did not want to go to jail. (RP 136) After additional conversation, Ms. Zeigler told him she wasn't going, put her truck in reverse, backed up and drove out of the parking lot. (RP 139) Corporal Tufte got in his patrol car and began following her. (RP 140)

During the pursuit, he activated his siren. (RP 145) After turning onto a residential street, Ms. Zeigler attempted to get out of the moving truck, slipped, grabbed the steering wheel and was trying to get back into the truck when it began drifting to the left and hit the curb. (RP 153) The truck hit something near the curb, and as it bounced Ms. Zeigler lost her grip and fell. (RP 154) The truck continued to roll until it high centered on a fence and ended up pinning Ms. Zeigler under the rear wheel. (RP 154)

Nearby neighbors came to the officer's assistance in getting Ms. Zeigler out from under the truck. (RP 154-55) After he had moved her away from the truck, Corporal Tufte found Ms. Zeigler had a pulse but initially was not breathing. (RP 155) An ambulance came and took Ms. Zeigler to a nearby hospital, where Detective Kurt Adkinson interviewed her ten days later. (RP 171, 193)

The State charged Ms. Zeigler with eluding and reckless endangerment, and sought an exceptional sentence based on an allegation of endangerment by eluding. (CP 24) The State proposed to introduce statements Ms. Zeigler allegedly made to Detective Adkinson. (CP 4) The court conducted a suppression hearing at which Ms. Zeigler did not appear. (RP 8/3/2011) Defense counsel told the court she had asked Ms. Zeigler to be present but, "given the nature of the hearing," said she was prepared to proceed. (8/3/2011 RP 3) The court made no effort to ascertain the reason for Ms. Zeigler's absence and the hearing went forward. (8/3/2011 RP 3)

At the outset of the suppression hearing, the State indicated an intent to introduce Ms. Zeigler's statements to Corporal Tufte. (8/3/2011 RP 8) Defense counsel told the court that she was not challenging the admissibility of Ms. Zeigler's statements to Corporal Tufte because she did not believe her client was in custody at that time. (8/3/2011 RP 9-10) She offered to stipulate to the admissibility of the statements in her client's absence, but ultimately agreed to the admissibility of a transcript of the Corporal's previously recorded statement. (8/3/2011 RP 14-15)

The court found defense counsel had stipulated to the admissibility of Ms. Zeigler's statements to corporal Tufte, that her coherent and thoughtful responses to Detective Adkinson's questions demonstrated that

her waiver of rights was knowing and voluntary. (CP 25-26) The court ruled that her statements to law enforcement officers were admissible. (CP 26) Five days later, Ms. Zeigler appeared at a hearing on the State's motion to amend the information, but the court did not ask her anything about her failure to appear at the suppression hearing. (8/8/2011 RP 44-50)

During the State's case, Corporal Tufte told the jury that Ms. Zeigler initially lied about her identity, and that as she began to drive away she had said, "No, I'm not going." (RP 136, 139) Detective Kurt Adkinson testified, relating several of Ms. Zeigler's statements, including her admission that she told Corporal Tufte she "can't go to jail" and was "going to try to run." (RP 196-98) A jury found Ms. Zeigler guilty of eluding and answered "yes" on the special verdict form. (CP 42-44)

D. ARGUMENT

1. THE SUPPRESSION HEARING, CONDUCTED IN MS. ZEIGLER'S ABSENCE, VIOLATED HER CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL OF HER CONVICTION.

A criminal defendant has a constitutional right to be present at all critical stages of the proceedings. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The core of the constitutional right to be present is the right to be present when evidence is being presented. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482,

84 L. Ed. 2d 486 (1985) (per curiam). Critical stages include when evidence is being presented or whenever a defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (quotations omitted), *clarified by* 123 Wn.2d 737, 870 P.2d 964 (1994); *accord State v. Corbin*, 79 Wn. App. 466, 449, 903 P.2d 999 (1995).

A defendant may waive his rights under the Constitution, provided such waiver is "voluntary, knowing, and intelligent. " *Campbell v. Wood,* 18 F.3d 662, 671 (9th Cir.1994) (*citing Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)); *State v. Thomson*, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). But, in order to knowingly and intelligently waive a constitutional right, the defendant must be aware of the right at issue. *State v. Sargent,* 111 Wn.2d 641, 655, 762 P.2d 1127 (1988); *see also United States v. Gordon,* 829 F.2d 119, 125 (D.C.Cir.1987) (holding that if a defendant wants to waive his constitutional right to be present he must be advised of the right and then permitted to make an on-the-record waiver in open court). The record here is devoid of any showing that Ms. Zeigler made a voluntary, knowing, and intelligent waiver of her constitutional right to be present during this critical stage of the trial proceedings.

"A violation of the due process right to be present is subject to harmless error analysis." *State v. Irby*, 170 Wn.2d 874, 885, 246 P.3d 796 (2011). The State bears the burden of proving beyond a reasonable doubt that the error is harmless. *Id.* at 886.

The court made no effort to determine whether Ms. Zeigler's absence constituted a voluntary waiver of her right to be present. *See Thomson*, 123 Wn. 2d at 881. Thus the record is silent as to what testimony Ms. Zeigler might have offered at the hearing. Her attorney agreed to the admissibility of the Corporal's statement, then agreed to written findings according to which she had stipulated to the admissibility of her client's statements. Because Ms. Zeigler was not present at the hearing, she could not know that the findings misrepresented the defense stipulation. The State cannot carry the burden of showing her absence was harmless.

The State used the testimony of Corporal Tufte and Detective Kurt Adkinson to cast doubt on the defense theory of the case, that Ms. Zeigler did not know the officer was pursuing her. (RP 237-38, 248) Ms. Zeigler testified that she never heard sirens during the alleged pursuit, and did not see any emergency lights until shortly before she attempted to stop the truck. (RP 206)

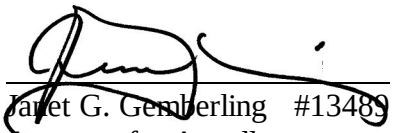
The State cannot prove that this constitutional error was harmless beyond a reasonable doubt.

E. CONCLUSION

The court erred in hearing the State's evidence at the suppression hearing in the absence of the defendant. Defense counsel's agreement to this proceeding constituted ineffective assistance of counsel. The conviction should be reversed and remanded for a hearing to determine the admissibility of this evidence in the presence of the defendant.

Dated this 29th day of August, 2012.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 30220-2-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
JONA R. ZEIGLER,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on August 29, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

D. Angus Lee
dlee@co.grant.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on August 29, 2012, I mailed a copy of the Appellant's Brief in this matter to:

Jona R. Zeigler
22220 Road 22 Northeast
Marlin, WA 98832

Signed at Spokane, Washington on August 29, 2012.

Janet G. Gemberling
Attorney at Law