

FILED
Feb 15, 2013
Court of Appeals
Division III
State of Washington

30439-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTEMIO ANGEL FREGOSO-GUERRERO, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF CHELAN COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF

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CONSTITUTIONAL PROVISIONS

CONST. ART. 1, § 21 2

A. ASSIGNMENT OF ERROR

The court erred in finding Mr. Fregoso-Guerrero guilty following a bench trial absent the defendant's knowing and voluntary waiver of his right to a jury trial.

B. ISSUE

In the absence of any evidence, written or oral, that the defendant was aware of his right to a jury trial or intended to waive that constitutional right, should his conviction following a bench trial be reversed?

C. STATEMENT OF THE CASE

The trial court conducted a hearing at which Mr. Fregoso-Guerrero's motion to suppress evidence was denied based on stipulated facts, trial counsel orally stipulated to the trial court's review of police reports as the basis for the court's determination of guilt, and the court found Mr. Fregoso-Guerrero guilty of second-degree theft. (RP 1-5) Written findings have not been entered. The record contains no evidence that Mr. Fregoso-Guerrero waived his right to have the charge tried to a jury. (RP 1-9)

D. ARGUMENT

Washington's constitution guarantees the right to trial by jury: "TRIAL BY JURY. The right of trial by jury shall remain inviolate" Const. art. 1, § 21; *see State v. Forza*, 70 Wn.2d 69, 70, 422 P.2d 475 (1966). Because the right to a jury trial is constitutional, any waiver of that right must be "knowingly, intelligently and voluntarily made." *State v. Bugai*, 30 Wn. App. 156, 157, 632 P.2d 917 (1981). Such a waiver must either be in writing, or done orally on the record. *State v. Wicke*, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979). In *Wicke*, even though defense counsel affirmatively waived Mr. Wicke's jury right, in open court, in Mr. Wicke's presence, and without objection, the court held this did not meet the constitutional requirement of a knowing and intelligent waiver.

To be sufficient, the record must contain the defendant's personal expression of waiver; counsel's waiver on the defendant's behalf is not sufficient. *Wicke*, 91 Wash.2d at 644, 591 P.2d 452. Our Supreme Court upheld the Court of Appeals' reversal of Wicke's conviction following a bench trial because, although Wicke's trial counsel had stated on the record that Wicke waived his right to a jury trial, the record did not contain Wicke's personal expression of such jury trial waiver. *Wicke*, 91 Wash.2d at 644, 591 P.2d 452. Wicke had stood beside his counsel, without objection, as counsel orally waived a jury trial. *Wicke*, 91 Wash.2d at 641, 591 P.2d 452. But the trial court did not question Wicke about whether he had discussed a jury waiver with defense counsel and whether he had agreed to the waiver;

nor did Wicke file a written jury trial waiver under CrR 6.1(a). *Wicke*, 91 Wash.2d at 641, 591 P.2d 452.

State v. Hos, 154 Wn. App. 238, 250-51, 225 P.3d 389 (2010).

There appears to be no written jury trial waiver in this case. At the bench trial, the court did not inquire as to Mr. Fregoso-Guerrero's desire to be tried by a jury or to waive his right to a jury. (RP 3-4) Counsel made no representation as to Mr. Fregoso-Guerrero's knowledge of his right to a jury trial or his desire to waive that right. The record here is even less adequate than the records in *Wicke* and *Hos* to demonstrate a knowing and voluntary waiver of the constitutional right to be tried by a jury.

E. CONCLUSION

This court should reverse Mr. Fregoso-Guerrero's conviction and remand the matter with instructions to the trial court to conduct further proceedings according to constitutional requirements.

Dated this 15th day of February, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)
)
Respondent,) No. 30439-6-III
)
vs.) CERTIFICATE
) OF MAILING
ANTEMIO FREGOSO-GUERRERO,)
)
Appellant.)

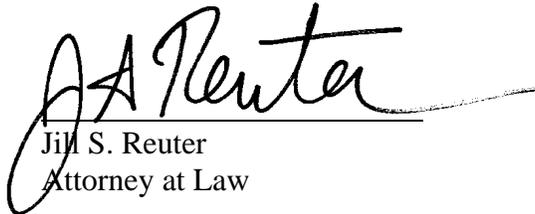
I certify under penalty of perjury under the laws of the State of Washington that on February 15, 2013, I served a copy of the Appellant's Supplemental Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on February 15, 2013, I mailed a copy of the Appellant's Supplemental Brief in this matter to:

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Signed at Spokane, Washington on February 15, 2013.


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