

FILED

JUL 31, 2012

Court of Appeals
Division III
State of Washington

COA No. 30651-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW GAROUTE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF GRANT COUNTY

The Honorable John Antosz

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court denied Mr. Garoute's constitutional right to an impartial jury by denying his challenge for cause to Juror 19.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Matthew Garoute was charged with possessing heroin and using drug paraphernalia after DOC probation officers found him sitting outside of a motel, where he volunteered that any urinalysis test would be dirty, and that he had just used illegal drugs which had been delivered to him by a friend. A search incident to arrest uncovered heroin in his pocket and paraphernalia including bags and syringes.

During *voir dire*, Juror 19 announced his significant frustration that law enforcement was doing too little to arrest persons (such as his own cousin) who blatantly exchanged, possessed and used drugs. The trial court denied the defendant's twice-raised challenge for cause to this juror, and defense counsel later exhausted all six of his peremptory challenges, but Juror 19 remained on the panel and sat in judgment in Mr. Garoute's trial.

Did the trial court err by denying Mr. Garoute's challenge for cause to Juror 19, where Juror 19 demonstrated actual bias?

C. STATEMENT OF THE CASE

Matthew Garoute was on community custody on August 17, 2011, and was sitting in a chair outside a motel where he was staying. Community corrections officers (CCO's) from the Department of Corrections (DOC) approached him with a request for a urinalysis (UA), at which point Mr. Garoute stated that a UA would be "dirty" since he had taken some narcotics a friend had given him. CP 5-6; 1/25/12RP at 122-24, 161-64. The officers obtained approval for an arrest from their superiors, and in a search incident to arrest, located heroin on Mr. Garoute's person, along with drug paraphernalia. CP 5-6; 1/25/12RP at 124, 163-66.

Mr. Garoute proceeded to jury trial at the conclusion of which the jury, including Juror 19 who his counsel had been unsuccessful in trying to remove from the panel, found him guilty on both counts as charged. CP 75-76. He was given a standard range sentence of 18 months incarceration on count 1, a felony conviction for possession of heroin, and was given a misdemeanor sentence on count 2, the paraphernalia conviction. CP 72.

Execution of sentence was stayed pending appeal. Supp. CP ____, Sub # 85. Mr. Garoute appeals. CP 90.

D. ARGUMENT

MR. GAROUTE WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY WHEN JUROR 19, WHO HAD EXPRESSED AN INABILITY TO APPLY THE PRESUMPTION OF INNOCENCE, WAS SEATED ON THE JURY PANEL

1. **Appealability.** After Mr. Garoute's two for-cause challenges to Juror 19 were denied by the trial court, the defense then employed all six of its peremptory challenges to remove other objectionable jurors. Juror 19 was not removed and sat on the jury during the trial, deliberating to conclusion. 1/25/12RP at 78, 90, 103-04; 1/26/12RP at 66-68 (juror polling); Supp. CP ___, Sub # 71.¹

Mr. Garoute may appeal the denial of his challenge for cause to Juror 19. See, e.g., City of Cheney v. Grunewald, 55 Wn. App. 807, 809, 780 P.2d 1332 (1989) (where trial court denied defendant's for-cause challenge and juror in question was seated on panel after defendant exhausted all peremptory challenges, denial of challenge for cause could be appealed); accord, State v. Hyder, 159 Wn. App. 234, 255, 244 P.3d 454 (2011); cf. State v. Gonzales, 111 Wn. App. 276,

¹ The designated document is the court clerk's record of potential jurors, those removed for cause, and those removed by peremptory challenge, which

282, 45 P.3d 205 (2002) (party need not exhaust all peremptory challenges in order to appeal denial of challenge for cause), review denied, 148 Wn.2d 1012 (2003) (citing State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001) and United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)).

2. Voir dire. *Voir dire* commenced with the deputy prosecutor's questioning of the prospective jurors regarding whether they knew people affected by drugs, or whether they had biases toward one side of the case or the other including towards DOC officers, that would prevent them from being fair and following the instructions of law in the case. 1/25/12RP at 71-74.

When Juror 19 stated he had a cousin involved in drug use, the prosecutor asked if this would cause him to be biased against the Department of Corrections side of the case. 1/25/12RP at 74. Juror 19 volunteered that the opposite was true, and then took the opportunity to expound at length about how the police normally don't do enough to arrest drug users like Mr. Garoute:

indicates that Mr. Garoute's counsel had at his disposal six peremptory challenges, in accord with CrR 16.4(e)(1), and employed all of them.

MR. OWENS: Okay. And the same question I've been asking. Do you think that you would hold any biases towards the Department of Corrections because of that relative?

JUROR NUMBER 19: Not toward the Department of Corrections so much. I would not . . .

MR. OWENS: Okay. With that answer I'm feeling that you're a little bit – you could be – have biases against somebody. So what would that be?

JUROR NUMBER 19: Oh, just what I've observed with – mostly my cousin's friends and a blatant – some of the things they do involving drugs, how little is done law enforcementwise about it. You know, you – you just sit there wondering, you know, just how much does it take to actually get these people arrested in the first place where I can go on-line on Facebook and see, you know, his friends offering him, you know, "Hey I can bring over a bag of whatever tonight" and nothing's done about it. That's frustrating.

MR. OWENS: Yes.

1/25/12RP at 74-75. Juror 19 stated frustration with the open and blatant use of drugs by people, and pronounced his judgment that law enforcement was not doing enough to arrest persons of this ilk. (The prosecutor then concluded his questioning by agreeing with Juror 19's sentiment).

Defense counsel's questioning of the potential jurors began with a general statement about the trial not being a "likability contest" and the importance of holding the State to its burden of proof beyond a reasonable doubt. 1/25/12RP at 75-77. Counsel then asked if jurors

who felt Mr. Garoute “looks guilty right here and right now think that it would be better if there was another juror sitting on the jury?”

1/25/12RP at 77.

Initially, counsel identified Juror 4 and Juror 3 as agreeing that it would be better if they were not on the jury. 1/25/12RP at 77. When more prospective jurors then raised their paddles, counsel remarked that the defendant seemed to be “standing behind the eight ball with you folks[.]” 1/25/12RP at 77. Counsel noted that biases are often based upon how people look, then asked the jurors again if it would be fair for those of them who felt “Matthew is starting behind the eight ball” to sit on the jury. 1/25/12RP at 77-78.

(i) Challenge to Juror 19. The record indicates that after a number of jurors raised their paddles in answer to this question, counsel therefore immediately raised challenges for cause to Jurors 3, 4, 18, 19, 20 and 22. This portion of *voir dire* proceeded as follows:

MR. KOZER: Matthew is standing behind the eight ball with you folks, correct? I mean, in all honesty. I mean that there's some bias.

Look, when we talk about biases it's a simple thing. I hate the Pittsburgh Steelers. I love the Green Bay Packers. And I have since I was a kid. But I don't like – I never liked Bill Powers. Maybe it's just the way he looks. I don't know, you know. Okay.

So those folks who raised their paddles that Matthew is starting behind the eight ball –

If I could see those paddles again, please.

-- do you think it would be fair if you sat on the jury for Matthew?

(Prospective jurors raising paddles.)

MR. KOZER: Your Honor, I'm going to move for cause –

Would those folks show me the paddles again, please?

(Prospective jurors raising paddles.)

MR. KOZER: -- on Jurors Number 3, 4, 18, 19, 20 and 22 in that in this situation they could not be fair to Mr. Garoute if they were on the panel.

1/25/12RP at 77-78. The trial court inquired of counsel as to which specific question these jurors had raised their paddles to, and counsel responded that these jurors were indicating they could not be fair to the defendant and follow the burden of proof and apply the principles of presumption of innocence. 1/25/12RP at 78.

The trial court, concerned that not all of the descriptive statements by defense counsel could be applied to each of the noted jurors, asked counsel to raise these challenges later after further *voir dire*, and denied the for-cause challenges provisionally. 1/25/12RP at 78-79.

Continuing questioning of the potential jurors regarding the presumption of innocence, counsel received statements from several jurors including some who counsel had not just challenged. 1/25/12RP

at 79-81. The State then resumed questioning of the jurors, and the prosecutor became enmeshed in questioning of Juror 20 in a manner that the court briefly felt might taint the jury pool, and also questioned Jurors 22 through 25, before ending his round of inquiry. 1/25/12RP at 89.

(ii) Challenge to Juror 19. When the trial court again invited challenges for cause, defense counsel challenged Jurors 3, 4, 18, and Juror 19. 1/25/12RP at 90. The court stated that it believed a different group -- Jurors 3, 4, 9 and 11 -- justified for-cause challenges, and after hearing counter-argument from the prosecutor, excused those jurors. 1/25/12RP at 90-92. The court stated, however, that it could not ascertain from the *voir dire* questioning that there was any basis to excuse any of the other jurors challenged for cause by the defense. 1/25/12RP at 92.

The court further stated that it desired additional questioning of Jurors 20 and 35. 1/25/12RP at 92. Defense counsel thus waived a further general round of questioning, and, following questioning of Jurors 20 and 35 by the court and counsel, the court excused these two jurors. 1/25/12RP at 92-101.

Following exercise of peremptory challenges, during which Mr. Garoute's counsel exhausted his six peremptory challenges, the petit jury was empanelled and sworn, including Juror 19. 1/25/12RP at 103-07; Supp. CP ___, Sub # 71.

3. Actual bias. Pursuant to Washington statute, a juror must be excused for either "actual" or "implied" bias. RCW 4.44.170; Kuhn v. Schnall, 155 Wn. App. 560, 228 P.3d 828 (2010). Actual bias is "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2).

Juror 19 demonstrated actual bias. The juror condemned those he suspected of drug use as breaking the law openly, and admitted he would accordingly tend to be unfair in assessing the guilt of alleged drug users such as the accused defendant. His agreement that it would not be fair to have him sit as a juror was based on a strong feeling that alleged drug users should be arrested more aggressively, and thus his bias went directly to his ability to sit fairly in this drug prosecution.

Juror 19's frustrations and bias strongly indicated he would also weigh in favor of crediting the DOC officers who (finally) arrested a

blatant drug user, as was plainly apparent from his statements. He was aware of his likely unfair treatment of Mr. Garoute and held to it.

As the Washington Supreme Court stated in State v. Davis, “[m]ore important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it.” State v. Davis, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000) (internal quotation marks omitted).

Accordingly, a defendant’s challenge for cause must be granted where there is a doubt about a juror’s ability to decide the case impartially and free from bias. Morgan v. Illinois, 504 U.S. 717, 723, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). A juror may not sit if he has an opinion or a state of mind that could prevent him from fairly trying the case. State v. Moser, 37 Wn.2d 911, 916–17, 226 P.2d 867 (1951); RCW 4.44.170, .190. Here, Juror 19’s strong opinions, including his belief that the legal system did “little” about blatant drug users like Mr. Garoute, related directly to an inability to sit fairly in this criminal drug case. But a defendant is entitled to a jury composed of persons who understand that a defendant is cloaked with a presumption that he is not guilty. State v. Gonzales, 111 Wn. App. at 281-82, 45

P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003); State v. Gosser, 33 Wn. App. 428, 434, 656 P.2d 514 (1982).

Juror 19 was not such a juror, as also shown by his later answer (after expressing his frustrations at police doing little to pursue illegal drug users) that he would not want a juror such as himself to sit in the case, if jurors are supposed to be fair. This was an admission and a clear indication to the court that Mr. Garoute's right to a fair and impartial jury required this juror be excused for cause, because his views or beliefs would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)).

For comparison, there was actual bias toward a party and an inability to fairly apply the law in Gonzales, where the challenged juror had expressed a belief that the police officer would count more than the defendant claiming innocence, and responded "I don't know" when the prosecutor asked, "So, in your mind, does [the defendant] still have a presumption of innocence regardless of the fact that it is an officer that has taken the stand to testify?" Gonzales, 111 Wn. App. at 279. The

Court of Appeals held that the juror had demonstrated actual bias.

Gonzales, at 282.

Here, the statement of Juror 19 demonstrated a bias that was based on his assessment of people who seemed to be using drugs, and his belief that they were guilty but escaped apprehension, likens the present case to that involving the juror in State v. Witherspoon, who stated that he was a “little bit prejudiced” against African Americans who dealt drugs. State v. Witherspoon, 82 Wn. App. 634, 637, 919 P.2d 99 (1996).

The Witherspoon Court pointed out that the juror in that case admitted life experience gaining judgment that would directly, factually tend to prejudice him against the party defendant and his position, to such a degree that the juror candidly admitted he could not be fair -

Juror No. 3 not only expressed concern about African Americans, he candidly admitted he was prejudiced: “When what you see in the newspaper, I have to admit I’m a little bit prejudiced. I see a lot of black people who are dealing drugs. When drugs are dealt, that’s who is involved unfortunately. I can’t help it. I’m sorry. I’m that way. I see it in the papers all the time, and I can’t help but be influenced.” The statement unequivocally concedes a prejudice against African Americans—a specific prejudice that they deal drugs. The very issue on which Juror No. 3 was being asked to pass was whether Mr. Witherspoon, an African American, possessed drugs. The prejudice, an actual prejudice, then goes to the very

heart of Mr. Witherspoon's case.

State v. Witherspoon, at 637-38. Although the present case does not involve racial bias, in this case Juror 19 had gathered strong sentiments about “blatant” drug users in society, in part through social media, to the same effect and degree. His “received bias” suggested he might be eager, not just predisposed like the juror in Witherspoon, to act on his frustrations and bias in this case, if he sat in judgment.

Additionally, just like in State v. Fire, Juror 19 here admitted a specific bias toward finding guilt as opposed to being able to apply the opposite presumption – that of innocence. In Fire, a child molestation case, the juror stated that he was “very opinionated” about child sex cases and that persons like the defendant should be “severely punished.” Fire, 145 Wn.2d at 155. The Court held that the juror had demonstrated actual bias, which showed an inability to apply the presumption of innocence. Id at 156–57.

The jurors in these cases, and Juror 19 here, were required to have been excused for cause.

4. Juror 19 was not rehabilitated, and his presence on the petit jury constituted error. In Fire, the Court of Appeals explained that one-word responses to leading questions were insufficient evidence

of “rehabilitation” for jurors who had demonstrated bias. State v. Fire, 100 Wn. App. 722, 728, 998 P.2d 362 (2000), rev'd on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001). The Court stated, “We find nothing in the potential juror’s one-word affirmative responses to the series of rehabilitative questions that indicates he had come to understand that he must lay his preconceived notions aside, in order to serve as a fair and impartial juror.” Fire, 11 Wn. App. at 729; see also Witherspoon, 82 Wn. App. at 638 (juror ultimately agreed that he would presume Mr. Witherspoon was innocent but “[t]hat, however, does not go far enough to mitigate a categorical statement by a juror[.]”).

In the present case, of course, there was no attempt at rehabilitation of Juror 19 by the deputy prosecutor. See Gonzales, 111 Wn. App. at 282 (juror gave no rehabilitative statements, thus there was no showing she could set aside her bias). The Juror’s bias stands. See Gonzales, at 282 (“Indeed, here no rehabilitation was attempted”).

The trial court, in the course of assessing its own list and the defense set of jurors it believed were biased, stated that Jurors 3, 4, 9 and 11 had indicated affirmatively when each was individually asked if they would judge Mr. Garoute by appearances, and therefore had to be

excused for cause. 1/25/12RP at 92. This was not rehabilitation of Juror 19's statements, however. The court had noted the specified jurors' statements to questions about whether they could be fair to the defendant as he sat before them right now. See 1/25/12RP at 79-82. This questioning occurred later, at a different juncture than when Juror 19 stated his frustration with inadequate arrests of drug users, and after the questioning by defense counsel who asked who believed they would not want themselves as jurors. 1/25/12RP at 74-75, 77-78. The fact that Juror 19 did not also later join in an answer to a different question about unfairness stemming from the defendant's appearance does not constitute rehabilitation of that juror.

Quite evidently, the deputy prosecutor in this case did not think rehabilitation of Juror 19 was even *possible*. See State v. Wilson, 141 Wn. App. 597, 606-07, 171 P.3d 501 (2007) (noting normal effort is to rehabilitate juror to see if he or she can put aside strong feelings and follow the judge's instructions). When the State resumed questioning of the jurors during a second round, the prosecutor stated he had "left off" by questioning Juror 19, but instead began questioning Juror 20. 1/25/12RP at 81. The prosecutor asked no questions attempting to elicit an answer from Juror 19 that he could apply the law, including the

presumption of innocence, as the court would instruct. In contrast, in State v. Latham, 100 Wn.2d 59, 66-67, 667 P.2d 56 (1983), the record showed that potential jurors who expressed strong feelings about drug use later indicated that they were "able and willing to put aside personal beliefs [and] [e]ach agreed to try the case on its merits. Here, Juror 19 was biased and was never rehabilitated.

5. Reversal is required. Both the Washington Constitution and the United States Constitution guarantee a defendant the right to a fair trial before an impartial jury. Const. art. 1 §§ 3, 21, 22; U.S. Const. amends. 6, 14.

Here, Juror 19 was seated. One can imagine that, after convicting Mr. Garoute, Juror 19 may well have returned home and warned his cousin that people who blatantly use drugs get convicted as criminals -- in fact he had just convicted a man for his cousin's very same sort of drug activity. Juror 19's announcement of actual bias during *voir dire* made this possibility real, and certainly raises grave concerns that he may have employed his actual bias to convict Mr. Garoute, simply in order to further his desire that drug users be prosecuted more aggressively.

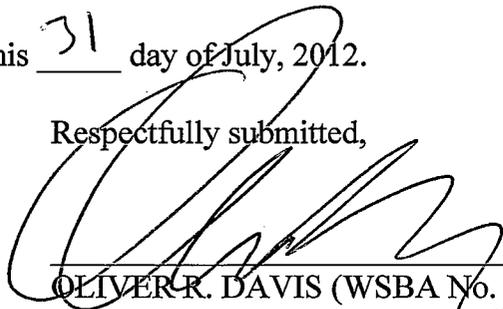
In any event, the error of denying a challenge for cause requires no showing of specific prejudice. Where a juror who should have been dismissed for cause was not, the defendant's conviction following jury trial where that juror sat in judgment upon him must be reversed. Fire, 145 Wn.2d at 158; Martinez-Salazar, 528 U.S. at 316. Mr. Garoute's convictions must be reversed.

E. CONCLUSION

For the foregoing reasons, Mr. Garoute respectfully requests that this Court reverse his convictions for possession of a controlled substance and use of drug paraphernalia.

DATED this 31 day of July, 2012.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 30651-8-III
v.)	
)	
MATTHEW GAROUTTE,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JULY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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EPHRATA, WA 98823-0037		
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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF JULY, 2012.

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