No. 31218-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

SCOTT MONTGOMERY NICHOLAS,

Appellant.

FILED
July 08, 2013
Court of Appeals
Division III
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF
KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00107-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A jury convicted Scott Montgomery Nicholas of one count of Violation of the Uniform Controlled Substances Act—Possession of a Controlled Substance With Intent to Deliver (Methamphetamine). Was the jury misled by a "to convict" instruction which informed the jury that it had a duty to return a verdict of guilty if it found all elements had been proven beyond a reasonable doubt, such that the defendant was deprived of his constitutional right to a jury trial? (Assignment of Error No. 1)

2. Does a sentencing court have the authority to impose a variable term of community custody contingent on the amount of early release under RCW 9.94A.701? (Assignment of Error No. 2)

B. STATEMENT OF THE CASE

The state accepts and adopts the procedural and substantive facts recited in the Brief of Appellant.

C. ARGUMENT

1. The Jury Was Not Misled by a "To Convict" Instruction Which Informed the Jury That it Had a Duty to Return a Verdict of Guilty if it Found All Elements Had Been Proven Beyond a Reasonable Doubt. The Defendant Was Not Deprived of His Constitutional Right to a Jury Trial.

A defendant's right to a jury trial under both state and federal constitutions is not violated by a "to convict" instruction which informs the jury it has a duty to return a verdict of guilty if it find all elements to have been proven beyond a reasonable doubt.

Nicholas argues that the language of the "to convict" jury instruction misstates the law and affirmatively misleads the jury about its power to acquit. Nicholas asserts that it is improper for the court to instruct jurors that it is their duty to find the defendant guilty if the jury finds all elements of the crime have been proven beyond a reasonable doubt. Specifically, Nicholas assigns error to the court's use of the word "duty" which he claims precludes a jury from acquitting if the elements have been established beyond a reasonable doubt. This, he argues, denies him his right to a jury trial under both state and federal constitutions.

Both Division One and Division Two have rejected Nicholas's arguments. *See State v. Meggyesy,* 90 Wn.App.693, 958 P.2d 319 (1998) and *State v. Bonisisio* 92 Wn.App.783, 964 P.2d 1222 (1998). *Meggyesy* and *Bonisisio* both held that altering the standard pattern instructions to tell the jury that it "may" convict is equivalent to notifying the jury of its power to acquit against the evidence. Additionally, in *State v. Owens,* 173 Wn.App. 1017 (2013), a Division Three case, the court upheld a "duty to convict" instruction relying on the same rationale used in *Meggeyesy* and *Bonisisio.*

Nicholas asserts that the language in *Meggeyesy* and *Bonisisio* are distinguishable because in those cases each defendant asked the court to instruct the jury that it "may" convict rather than "duty" to convict if the elements of the crime were established beyond a reasonable doubt. Here,

Nicholas argues that the language of the "to convict" instruction affirmatively misleads the jury about its power to acquit against the evidence. However, in *State v. Brown* 130 Wn.App. 767, 124 P.3d 663 (2005), another case involving this same challenge to the "to convict" instruction, Division Two found no meaningful difference between defendant's argument and the issues raised in *Bonisisio* and *Meggyesy* noting that the purpose of a jury instruction is to provide the jury with the applicable law to be applied in the case and the power of jury nullification is not an applicable law to be applied in a case involving possession with the intent to deliver methamphetamine, possession of marijuana and use of drug paraphernalia.

The law sets out the elements and possible defenses for each crime. If a person commits the acts specified in a statute and no defense is applicable, the person is guilty of the charged crime as a matter of law. A jury that found these acts proven could acquit the person only by ignoring the law. Nicholas is effectively seeking to have jurors instructed that they "may" disregard the laws defining crimes if they chose to do so.

From an early date, Washington law has been to the contrary. This issue was considered in *Hartigan v. Territory*, 1 Wn. Terr. 447 (1874). There, the trial judge had required the jurors to swear that they would try the case "according to the evidence and the law as given by the court." The Territorial Supreme Court upheld this oath:

> There is no appeal from the judge to the jury upon law propositions, and there ought not to be as a matter of principle; for every citizen of this territory has a right to the benefit and protection of the law.
>
> Whilst he is liable to its penalties, he has a right to be tried by law, and he is entitled to the authoritative declaration and application of the law to his case, as his best and highest protection. It is manifestly of the highest protection. It is manifestly of the highest importance in order to effect such protection of the rights of parties that the laws to which they are amenable shall be fixed and permanent, impartially applied to all persons and cases alike, and not fluctuating and variable. These provisions manifest an ardent desire and a wise determination to make the law paramount and supreme over all the powers and influences of will or passion, of interest or prejudice, whether of the few or the many; to render it stable, impartial, and equal in its operation over all who might fall under its animadversion or require its protection.

Id. at 450. Twenty years later, the United States Supreme Court reached a similar conclusion in *Sparf v. United States*, 156 U.S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1895). There, the trial court instructed the jury that "a jury is expected to be governed by law, and the law it should receive from the court." On appeal, the defendant claimed that this instruction violated the right to trial by jury. After a lengthy review of precedent, the Supreme Court concluded:

> We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. . . . Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of

> society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men.

Id. at 102-03.

The Supreme Court adhered to these principles in *United States v. Gaudin*, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310, 2315 (1995), when it reiterated that "[i]n criminal cases, as in civil, . . . the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions." The Court then clarified that the jury's role includes application of the law to the facts. *Id.*

The instructions in the present case fully complied with *Gaudin*: they stated the law and left application of that law to the jury. Under *Gaudin*, the judge was entitled to insist that the jury follow the legal principles set out in the instructions.

Far from condemning instructions that the jury has a duty to convict the defendant if they find the necessary facts, the Washington Supreme Court has upheld even stronger instructions. In an 1894 case, the trial court instructed the jurors that they "must" find the defendant guilty if they found specified facts. Although the Supreme Court did not consider this language ideal, it held that the instruction was not erroneous:

> [W]hile it would have been better that the word "may" should have been substituted, it clearly appears that all the court intended to say was that if they found from the evidence that all the acts necessary to constitute the crime had been committed by the defendant, the law made it their

duty to find him guilty.

State v. Wilson, 9 Wn. 16, 21, 36 P. 967 (1984).

In numerous subsequent cases, the Supreme Court has quoted, without criticism, instructions that it was the jurors' duty to find the defendant guilty, if the necessary facts had been proved. *E.g.*, *State v. Gray*, 98 Wn. 279, 285, 167 P. 951 (1917); *State v. Kallas*, 133 Wn. 23, 27, 233 P. 315 (1925); *State v. Baker*, 150 Wn. 82, 100, 272 P. 80 (1928). Courts in other jurisdictions have also approved similar instructions. *E.g. Farina v. United States*, 622 A.2d 50, 60-62 (D.C. App. 1993); *Kuenzel v. State*, 577 So. 2d 474, 517 (Ala. Cr. App. 1990), *aff'd per curiam*, 577 So. 2d 531 (1991), *cert. denied*, 502 U.S. 886 (1991); *Noggle v. State*, 256 Ga. 383, 349 S.E.2d 175, 176-77 (1986).

Washington Const. art. 4, § 16 provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, *but shall declare the law*" (emphasis added). Thus, in Washington determining the law is the duty of the court not the jury.

The instructions in this case delineate the functions of the court and the jury in a manner that is consistent with holdings of both the United States Supreme Court and the Washington Territorial Supreme Court. Nicholas nonetheless, contends that his position is supported by state constitutional analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986). Nicholas' argument lacks merit when

examined under the six nonexclusive *Gunwall* criteria.

a. Textual Language of the State Constitution

There are three provisions of the Washington Constitution, Const. art. 1, § 22, Const. art. 1, § 21, and Const. art. 4, § 16, that deal with the right to trial by jury and the roles of judge and jury. The first two of these provisions protect the right to trial by jury, but they do not delineate the functions of the judge and jury. That delineation is set out in Article 4, § 16, which expressly requires the judge to "declare the law." This language supports the conclusion that judges, not juries, are responsible for determining the law.

b. Significant Differences in the Texts of Parallel Provisions.

Article 1, § 22 is the only provision that deals exclusively with criminal cases. The relevant language is substantially identical to language in the Sixth Amendment. This similarity in language suggests that the two provisions are co-extensive.

Article 1, § 21 corresponds most closely to the Seventh Amendment. There are, however, significant differences between these two provisions, which can lead to different results. One difference is that Article 1, § 21 specifically refers to juries in courts not of record. The Supreme Court relied on this language in extending the right to jury trial to misdemeanors, which are often tried in courts not of record. *Pasco v.*

Mace, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). This distinction, however, sheds no light on the issue in the present case.

A second difference between the Seventh Amendment and Article 1, § 21 is that the federal provision covers only civil cases, while the state provision contains no such limitation. This difference does not support the creation of special attributes for juries in criminal cases. Logically, such special attributes would be placed in Article 1, § 22, which deals specifically with criminal cases, rather than § 21, which does not. As already pointed out, the jury trial provisions of § 22 are substantially identical with those of the Sixth Amendment. This supports the conclusion that the Washington Constitution was not intended to create jury trial rights that specifically apply in criminal cases beyond those created by the federal constitution.

Finally, Article 4, § 16 does not correspond to any provisions of the federal constitution. This difference does support a difference in interpretation. Again, as already pointed out, this provision supports the conclusion that juries have a duty to follow the law.

c. State Constitutional and Common Law History

Article 1, § 21 has been construed as preserving the right to trial by jury as it existed at common law in Washington Territory at the time the constitution was adopted. *Pasco v. Mace*, 98 Wn.2d at 96. *Hartigan* delineates the roles of juries and judges in Washington Territory.

According to that case, juries have a duty to follow the law declared by the court. *Hartigan*, 1 Wn. Terr. At 450-51. This decision is part of the Territorial conception of "trial by jury," which is preserved "inviolate" by Article 1, § 21.

This conclusion is reinforced by Article 4, § 16. That provision sets out the same division of responsibility as *Hartigan*: Judges may not interfere in jury determinations of facts, but they must "declare the law."

Nicholas claims that the practice in Washington Territory is represented by the instructions given by the trial court in *Leonard v. Territory*, 2 Wn. Terr. 381, 7 P. 872 (1885). Nicholas acknowledges that the Territorial Supreme Court's opinion in that case found the relevant instruction ***erroneous*** on other grounds. *Id.*, at 399-400. An erroneous instruction given in a single case does not establish Territorial practice. That practice is instead established by the decision of the Territorial Supreme Court in *Hartigan*, holding that juries have a duty to apply the law as declared by the court.

d. Pre-Existing State Law

Just five years after the constitution was adopted, the Washington Supreme Court found no error in an instruction that the jurors ***must*** find the defendant guilty, if the necessary facts had been proved. *Wilson*, 9 Wn. at 21. Since at least 1917, trial courts have been instructing jurors that it was their duty to find the defendant guilty if the elements of the

crime had been proved. *See, e.g.*, *Gray*, 98 Wn. at 285. Such instructions have been standard since at least 1977, when the first edition of the WPIC was published. This long-accepted practice is strong evidence that such instructions do not violate the Washington constitution.

e. Differences in Structure Between the Federal and State Constitutions.

While this factor "may support the notion that our constitution is more protective in a general sense", it does not shed any light on the analysis of a particular constitutional provision. *See State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

f. Matters of Particular State Interest or Local Concern.

Generally, law enforcement is a local matter. Again, however, this factor does not always aid the analysis of a particular issue. *See Ortiz*, 119 Wn.2d at 303. This state has no interest in allowing arbitrary acquittals of defendants whose guilt has been proven.

2. The Sentencing Court Did Not Have the Authority to Impose a Variable Term of Community Custody Contingent Under RCW 9.94A.701.

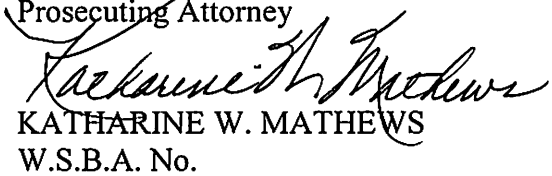
The State concedes this issue.

D. CONCLUSION

The Court should affirm Nicholas's conviction and remand for re-sentencing on community custody provisions.

Respectfully submitted this 8th day of July, 2013.

LORI LYNN HOCTOR
Prosecuting Attorney



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COURT OF APPEALS OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent v. SCOTT MONTGOMERY NICHOLAS, Petitioner/Defendant.	NO. 12-1-00107-5 COURT APPEALS NO. 31218-6-III DECLARATION OF MAILING

I, Shirley James, state that on July 8, 2013, I deposited in the United States mail by first class mail, proper postage affixed a copy of the Brief of Respondent to: DAVID N. GASCH, GASCH LAW OFFICE, P.O. BOX 30339, SPOKANE, WA 99223-3005, and to the defendant at Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8 day of July, 2013.

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