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SUPREME COURT
STATE OF WASHINGTON

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NO. 77767-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS D. HACHENEY,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

JOHN L. CROSS
WSBA No. 20142
Attorney for Petitioner
RONALD D. NESS & ASSOC.

420 Cline Avenue
Port Orchard, WA 98366
(360) 895-2042

ORIGINAL

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I. STATEMENT OF THE CASE

The facts and procedures in this matter have been adequately stated in previous brief. However, for the present purpose, Mr. Hachenev will highlight the following facts.

It is significant to the present argument that the trial court declined to find probable cause for the state's asserted concealment aggravator (RCW 10.95.020(9)). That ruling was cross appealed by the state but not addressed by the Court of Appeals. The trial court's ruling is at Clerk's Papers 349-350.

Similarly, with regard to the second issue on review, it is important to note that precise statement of prosecution with regard to the availability of the previously deposed witnesses. The prosecution stated:

“Now counsel needs - has suggested that the state has not made any effort to bring the witnesses back and it is time that the state has not gone about an effort to bring these witnesses back. Since the trial began, we have not been trying to make travel plans or contacting the witnesses to day ‘okay, we need you to come back. Will you come back? That's true!!.” RP 12/10/02 at 3811.

Thus, the record is clear that no effort was made to return these witnesses for trial.

Further, with regard to confrontation and availability, it should be noted that approximately 120 lines were redacted from the video depositions, and all objections were sanitized, before the tapes were played to the jury. See Court's Ruling on Perpetuation Deposition Objections, CP 1007-1013. Thus, any assertion that the videos presented resembled live testimony is simply incorrect.

II. ARGUMENT

1. Sufficiency of evidence supporting the aggravating factor of in the course of arson.

Further research indicates that it remains that there is no authority in Washington directly addressing this issue. Thus we are left with reasoning from the closely related felony murder cases previously briefed. Primarily, then, Mr. Hacheny's complaint with the Court of Appeals is the lack of authority for the rule allowing a finding that either an intimate connection or causation is sufficient.

However, other authority and arguments made in this case will assist the present analysis. First, the litigation below regarding the concealment aggravator (RCW 10.95.020(9)) helps inform the present inquiry.

In the Court of Appeals, the state cross appealed the trial court's ruling refusing to find probable cause for that aggravator. The Court of Appeals, by its affirmance, did not address that issue. Moreover, the trial court's Findings of Fact and Order Re: Probable Cause For First Amended Information (CP 348) does not analyze that issue. However, the failure to find probable cause alone is significant to the present issue.

It is clear that in refusing to find concealment, the trial court must have found that at the time of the killing that there was no "commission of a crime" to be concealed. RCW 10.95.020(9). In State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied 516 U.S. 1121 (1996), this court held that the aggravation is established if "the jury is presented with evidence which suggests that the killing was intended to postpone for a significant period of time the discovery of the commission of the crime." *Id.* at 167. Thus, based on the trial court's finding that "Dawn Hachenev was dead before her body was burned by a fire started in the bedroom," it is clear that the ruling is correct under Brett. That is, at the time of death, there was no other crime to conceal.

Equally clear, however, is that this analysis is completely at odds with the finding that the death occurred in the course of arson. If there was no crime to conceal at the time of death, how can one be in the course of that crime at the time of death. Once again we are confronted with logically inconsistent propositions being held to be true at the same time.

Further, another proposition from Brett also informs this analysis. In Brett, this court held that the assertion of a robbery aggravator (in the course of robbery) does not require proof of a completed robbery. Id. at 163. This court cited to authority from Illinois and Georgia to establish that proof of “in the course of” includes, at least, a death occurring in an attempted (generally, unconsummated) robbery. By implication, it appears that this proposition is broad enough to encompass any aspect of the crime, including preparation therefore, that can reasonably be said to be a substantial step toward consummation of the crime. Thus, we find that the trial court herein did not find that any aspect of arson obtained at the time of death.

Finally, another holding in Brett also seems to inform the present inquiry: that this court’s construal allowing the aggravator to apply to uncompleted felonies, of RCW 10.95.020(9) does not serve to expand the cause of death-eligible defendants. To the contrary, the ruling of the trial court and opinion of the Court of Appeals does expand the class. Now, that class would include any defendant who causes death in a time frame

close to the commission of a felony without regard as to whether that commission occurred before or after the death.

2. The admission into evidence of video deposition testimony violated the right to confrontation.

The United States Supreme Court has clarified confrontation analysis in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Though clearly requiring both the ability to cross examine and unavailability, Crawford does not analyze the unavailability prong.

First, it appears that the Court of Appeals applied the incorrect standard of review on this issue. Mr. Hacheney's confrontation argument is clearly of constitutional magnitude. And Constitutional challenges are questions of law and are reviewed de novo. See City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004).

The Court of Appeals decision does not note the de novo standard of review. The failure to apply the de novo standard is manifest in the Court of Appeals conclusion: "we conclude that the trial court did not abuse its discretion." Opinion at 14. Moreover, the Court of Appeals' misapplication of the standard allows it to affirm based on the fact that "the trial court seems to have inferred that the witnesses would not have returned for trial even if the State had offered to reimburse them for their travel expenses." Id.

The Court of Appeals, then, erroneously applied an abuse of discretion standard and, thereby, affirmed a seeming inference by the trial court. The error is palpable in light of the prosecution's own contrary statement "...the State has not gone about an effort to bring these witnesses back." RP 3811. As argued, this fact, directly from the prosecutor, is precisely the error recognized in State v. Aaron, 49 Wn. App 735, 745 P.2d 1316 (1987). The Aaron court reversed because there was "no effort" to return the witness at trial. Id. at 741. Yet, by using the abuse of discretion standard, the Court of Appeals allowed the trial court to infer that the witnesses would not return in any event.

Still further, the Court of Appeals relied on State v. Hobson, 61 Wn. App. 330, 810 P.2d 70, rev. denied, 117 Wn.2d 1029 (1991). In so doing, the Court of Appeals seems to ignore the rule asserted in that case: that the prosecution "must use all available means to compel the witnesses' presence at trial." Id. at 336 (emphasis added). Here, the prosecution states for the record that it made no effort. No effort must fall short of "all available means."

With regard to these depositions, then, we find a situation where testimony is taken well before trial (Olson 8/65/02 (CP191); Deloshmutts' 8/13/02; trial commenced October 16, 2002). In a closed forum¹

¹Petitioner here asserts again that this closed forum should warrant a reversal pursuant to In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) and State v. Easterling, slip. op. 76458-1 (2006), but this Court's order

Entails important evidence (at least with regard to Olsen, a fire investigator, when the cause and course of the fire were an issue of great importance in the case). And, finally, were presented in a sanitized fashion. See redactions of video tapes at CP 1007-13. All these considerations cut against the great weight of authority on this issue.

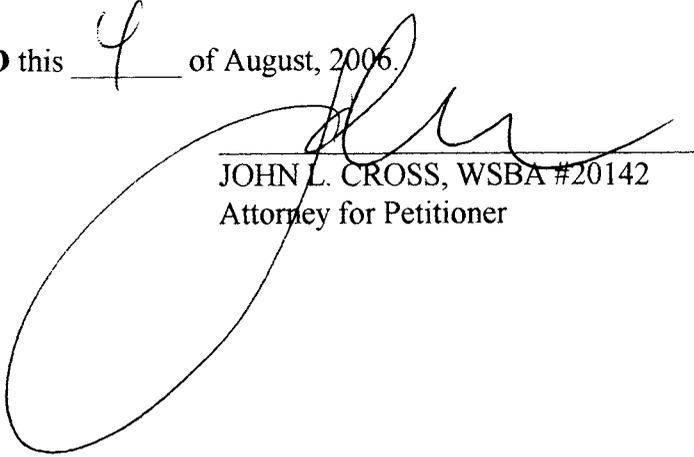
These circumstances are far from the paradigm of confrontation. Witnesses for the prosecution should appear in court, face-to-face with the accused, and be questioned (both direct and cross) under the “watchful eyes of the jury” State v. Rohrich, 132 W.2d 472, 477, 939 P.2d 697 (1997). Nonpublic, extensively edited testimony such as this is fully apprehended by the lawyers, reporters and judge only.

Finally, it is important to note that this procedure effectively froze the testimony in time. Proper testimony before the jury would, of course, include the ability of either party to recall the witness in light of other testimony received. This is particularly important with regard to Mr. Olsen because of the paramount importance in the case of the cause and course of the fire.

granting review referred to confrontation only.

The admission of these depositions was improper for the many reasons stated here and argued in the Court of Appeals. This error warrants reversal.

DATED this 4 of August, 2006.



JOHN L. CROSS, WSBA #20142
Attorney for Petitioner