

82736-2

NO. 60265-9-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MONDAY,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 AUG 15 PM 4:55

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT 1

 1. THE STATE’S DEFENSE OF ITS SEARCH WARRANT GREATLY OVERSTATES ITS EVIDENCE AND IGNORES THE CRITICAL OMISSIONS FROM THE SEARCH AND ARREST WARRANT APPLICATION 1

 2. THE PROSECUTION PROPERLY CONCEDES DEFENSE COUNSEL’S “DEFICIENT PERFORMANCE” BUT MISUNDERSTANDS THE CLEAR PREJUDICE STEMMING FROM THE LAWYER’S INADEQUATE REPRESENTATION..... 4

 3. THE PROSECUTOR’S MISCONDUCT DURING THE TRIAL WAS EGREGIOUS, ILL-INTENTIONED, AND INDELIBLY PREJUDICIAL 7

 4. THE PROSECUTION IGNORES THE IMPROPER FIREARM JURY INSTRUCTION..... 11

 5. THE COURT’S IMPOSITION OF INCREASED PUNISHMENT ABSENT A JURY’S VERDICT ON THE NECESSARY FACTUAL ELEMENTS REQUIRES REVERSAL..... 12

B. CONCLUSION..... 13

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Jackson, 102 Wn.2d 432, 688 P.2d 114 (1984) 2

Washington Court of Appeals

State v. Freeburg, 105 Wn.App. 492, 20 P.3d 984 (2001) 5, 6, 7

State v. Rodriguez, 53 Wn.App. 571, 769 P.2d 309 (1989)..... 2, 7

United States Supreme Court

Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117
(1999)..... 3

Federal Decisions

United States v. Splain, 545 F.3d 1131 (8th Cir. 1976) 10

Washington v. Hofbauer, 228 F.3d 689 (6th Cir., 2000) 10

Statutes

RCW 9.41.010..... 11

RCW 9.94A.533 11

Other Authorities

Oregon v. Ice, 170 P.3d 1079 (2007), cert. granted, 128 US. 1657,
170 L.Ed.2d 353 (2008) 12

A. ARGUMENT.

1. THE STATE'S DEFENSE OF ITS SEARCH WARRANT GREATLY OVERSTATES ITS EVIDENCE AND IGNORES THE CRITICAL OMISSIONS FROM THE SEARCH AND ARREST WARRANT APPLICATION

After Mr. Monday filed his Opening Brief, the prosecution submitted written findings of fact from the CrR 3.6 hearing.¹ In these brief written findings, the trial court acknowledges "some mistakes" by the police officer in writing the warrant affidavit. CP 290 ("Undisputed" Finding of Fact 1, line 8). But the court's findings do not identify the mistakes made. The findings also concede that the police could have been "more precise" in the affidavit describing the process of obtaining statements that Mr. Monday was the perpetrator. CP 291 (Conclusions of Law 4(a), line 15-16). In fact, as outlined in Appellant's Opening Brief, the search warrant affidavit contained significant, material mistakes and omissions that substantially mislead the judge who signed the warrant application.

The identification process was not simply "imprecisely" explained in the affidavit. CP 291. The police did not tell the court

¹ In his Opening Brief, Monday reserved the right to assign error to any findings of fact entered after he filed his brief. Because the belatedly entered findings of fact are cursory and contain little mention of the facts of the police investigation, Monday does not take issue with this findings of fact but maintains his challenges to the court's legal conclusions.

that its eyewitness had been held in jail for two weeks without prospect of release, having been arrested after he was identified as the shooter. CP 29 And his "identification" of Monday came only after his girlfriend submitted to a very contentious interview that culminated in a tenuous identification of Monday.

The Response Brief contends that the informants did not need to be identified in the affidavit or the court informed of the basis of their reliability because their identities were known to the police. Resp. Brf. at 24. Yet this analysis misses the issue, because a known informant is presumed credible only when that person is "uninvolved" in the offense or a victim of it. State v. Rodriguez, 53 Wn.App. 571, 574, 769 P.2d 309 (1989). The credibility of information upon which police rely is critical to establishing probable cause for a warrant, and the warrant application must establish the informant's credibility on its face. State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 114 (1984). A heightened showing of credibility is required when the informant is a criminal informant or has a significant penal interest in the case. See Rodriguez, 53 Wn.App. 571, 575-76. A cohort or accomplice's allegations against another suspect have long been recognized as inherently suspicious. See Lilly v. Virginia, 527 U.S. 116, 133, 119

S.Ct. 1887, 144 L.Ed.2d 117 (1999) (suspect's statements alleging other's involvement have "presumptive unreliability").

The informants, Saunders and his "baby" Sykes, had significant self-interest in naming someone other than Saunders as the perpetrator. But the court was never told of Saunders' self-interest, his in-custody status, his having been identified as the shooter by another known eyewitness to the shooting and identified as directly involved in the fight that preceded the shooting by a second eyewitness, his violent criminal history including convictions for firearm possession, or the circumstances under which he changed his story to the police. CP 56; 5/1/07RP 103-04, 139; 5/3/07RP 85-86; Pretrial Ex. 13, p. 4 (Saunders' criminal history).

Furthermore, Annie Sykes was not inherently reliable because she had an in-person conversation with the police. Before the police cornered her and escorted her to the police station for her interview, she steadfastly refused to speak with them for several weeks. 5/1/07RP 38-39. Throughout her day-long interview, conducted inside a holding cell, the police repeatedly and continually berated her for lying to them, until she offered her half-hearted and equivocal identification of Monday, whom she denied knowing before the incident. 5/3/07RP 22-23, 36, 94, 118. The

warrant application asserts Sykes knew shooter as Monday, even though Sykes was unsure of his name and said she had only met him on the day of the incident. 5/3/07RP 40-42.

The cursory written findings of fact, entered one year after the court's oral ruling, admit that the warrant affidavit contained inaccuracies and mistakes. Yet the written findings only summarily conclude that there was sufficient information before the court to find probable cause, without acknowledging the materiality of the omitted information and the recklessness with which the information was excluded from the affidavit in light of its critical nature. There can be no doubt that the police deliberately omitted the most prejudicial information undercutting the purported identification of Monday in an effort to obtain the search and arrest warrant for Monday.

2. THE PROSECUTION PROPERLY CONCEDES DEFENSE COUNSEL'S "DEFICIENT PERFORMANCE" BUT MISUNDERSTANDS THE CLEAR PREJUDICE STEMMING FROM THE LAWYER'S INADEQUATE REPRESENTATION

The prosecution correctly concedes that Mr. Monday's attorney was unquestionably deficient by asking for an incorrect jury instruction wrongly explaining the legal standard for Mr. Monday to have acted in self-defense. Resp. Brf. at 29. Yet the

prosecution misunderstands the prejudice resulting from this deficient performance.

Monday told police he shot Francisco Green because, after an extended fight with Francisco, Monday saw him approach a car and seek help; and Monday feared the help he sought was a gun.

5/29/07RP 33. Francisco can be heard on the videotape speaking to Chris Green, the passenger in the car, and saying, "Chris, get out of the car, get out of the car, they are trying to jump me."

5/16/07RP 149. Monday told the police, "I don't know" if Francisco had a gun when he fired rapid and haphazard shots in Francisco's direction. 5/29/07RP 35-36, 52. Monday's claim of self-defense rested on his perception that he faced an imminent injury, from a gun or from a retaliatory attack by Francisco and the passengers in the car, even if he was unsure whether the person whom he fired at had a gun. 5/29/07RP 52.

Monday's confusion over whether Francisco received a gun from the car after he asked the people in the car for help distinguishes this case from State v. Freeburg, 105 Wn.App. 492, 20 P.3d 984 (2001). In Freeburg, the court also gave the incorrect "act on appearances" instruction, improperly instructing the jury that a person may legally act in self-defense only when he or she fears

“great bodily harm” rather than the somewhat less serious requirement that the actor fear “great physical injury,” which does not require a fear of deadly force. 105 Wn.App. at 505. The Freeburg Court expressed grave concern over the instructional error and its likely prejudicial effect, and noted the harmful nature of such an instruction in any case where the assailant is unarmed. Id. at 507. But the court found that uncontested evidence showed Freeburg and the deceased struggled over a firearm in very close range before Freeburg fired the deadly shot. Id. Thus, the Freeburg Court found the clear instructional error harmless, because the only kind of injury Freeburg feared was that of being shot by a firearm at close range.

Unlike Freeburg, Monday had been involved in a physical altercation that stopped and started as the participants moved around the street. Then, the opponent in the fight sought help from people in a car, and obtained something that Monday thought might have been a firearm. However, Monday’s fear was not simply the fear of being shot, but also the fear of being assaulted by Francisco or his friends.

Numerous cases set forth the improper diminishment of the State’s burden of proof that follows from incorrectly instructing the

jury on the degree of injury the defendant must fear to prevail on a claim of self-defense. See Freeburg, 105 Wn.App. at 507; see also State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); State v. Woods, 138 Wn.App. 191, 156 P.3d 309 (2007); Rodriguez, 121 Wn.App. at 187. Defense counsel's patently deficient request that the jury receive incorrect, and more rigorous, instructions for Monday to have acted in self-defense establishes ineffective assistance of counsel and requires reversal.

3. THE PROSECUTOR'S MISCONDUCT DURING THE TRIAL WAS EGREGIOUS, ILL-INTENTIONED, AND INDELIBLY PREJUDICIAL

The prosecution's brief both downplays and ignores the blatantly improper conduct of the trial prosecutor.

The prosecutor prefaced his closing argument by assuring the jury that he had approximately 18 years of experience, 15 of those prosecuting murder cases, and based on this personal experience, he informed the jury that whatever any criminal defendant says, it is "inherently unreliable." 5/30/07RP 26-27. This "tenet" of all prosecutions was not because of the defendant's interest in the case, but rather a simple rule borne out by the prosecutor's long experience, which applied to all people who might be engaged in criminal acts. Its purpose was to assure the jury that

from the prosecutor's many years of experience, no juror should ever trust the "word of a criminal defendant." This appeal to extrajudicial experience, and inserting a systemic, proven bias against all persons accused of crimes, goes far beyond the pale of accepted argument. It undermines the presumption of innocence, in a case where Monday did not testify. Moreover, it was not said in passing, but rather as the self-proclaimed "theme" of the case. 5/30/07RP 59.

Additionally, the prosecutor's gratuitous reference to being hired by Norm Maleng, the long-time elected prosecutor who suddenly died a few days before the closing argument, was another ill-intentioned effort to secure juror sympathy on impermissible grounds. 5/30/07RP 26-27.

The prosecutor did not delicately refer to "African American" people as the Response Brief does, and did not cast his aspersions against "black folk" based on the facts of the case. See Resp. Brief at 33. No witness, and the prosecution's brief points to none, said that "black people" refused to cooperate with police. Some witnesses said that "on the street" people may be reluctant to talk to police, but never was it presented as a mechanism employed by "blacks" as a race. 5/22/07RP 19, 22-23. Yet the trial prosecutor

insisted that "black folk" had a code of not talking to police. 5/30/07RP 29, 37, 109-10. Casting the case in these unsupported and stark racial terms was flagrantly improper and the State's Response Brief finds no factual support for this race-based baiting of the jury. The prosecutor's efforts to secure a different standard for assessing the credibility of witnesses, and to be excused from presenting more forthright witnesses, based on their race was fundamentally improper.

The prosecution asserts that that trial prosecutor was somehow mimicking witness Annie Sykes when he repeatedly referred to the police as "poleese" when questioning her. Resp. Brf. at 34. The transcript shows otherwise. Repeatedly, the prosecutor questioned Sykes over and over about her interactions with "poleese" and Sykes is only quoted using such language on one occasion. The court reporter emphasized the prosecutor's surprising language, affecting an accent or a derogatory way of speaking to Sykes, without any apparent cause other than an effort to belittle Sykes.

The Response Brief does not address the well-established irregularity with which the prosecutor opened the case. During opening statements, the prosecutor assured the jury that the State

would not “falsely accuse[]” any person. 5/10/07RP(opening) 13; see e.g., Washington v. Hofbauer, 228 F.3d 689, 701-02 (6th Cir., 2000) (“always improper” to suggest defendant’s guilt predetermined prior to trial); United States v. Splain, 545 F.3d 1131, 1134-35 (8th Cir. 1976) (“serious transgression” to suggest would not prosecute unless believed defendant guilty). The objection to this remark was sustained, but the prosecutor repeatedly told the jury throughout the trial that it was his job to determine the truth, thereby making clear to the jury that it could trust his assessment of Monday’s guilt. See Opening Brief. P. 52-53 (detailing additional efforts by prosecutor to inject self into case person who determines truth and personal involvement in case).

Finally, the evidence in the case was far from overwhelming and the prosecutor’s misconduct was planned and purposeful. The police conceded the videotape was blurry, significant action takes place outside of the camera’s lens as the people come and go from the picture, and the nature of the argument leading to the shooting simply cannot be discerned. 5/3/07RP 24-25, 110. No witnesses affirmatively identified Monday or explained what occurred with reason, logic, and consistency. The State’s underhanded and

flagrantly improper efforts to secure a verdict on means that have been long-discredited require reversal.

4. THE PROSECUTION IGNORES THE IMPROPER FIREARM JURY INSTRUCTION

Under RCW 9.94A.533(3), a court may impose a five-year sentencing enhancement when the jury finds the offender “was armed with a firearm as defined in RCW 9.41.010.” RCW 9.41.010(1) defines a firearm as, “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” A weapon that appears to be a firearm does not satisfy the essential elements of the firearm sentencing enhancement.

Here, the prosecution does not address the instructional error. The jury was never instructed on the essential elements of a firearm sentencing enhancement. Instead, the prosecutor referred to the enhancement as a “deadly weapon enhancement,” and the court offered an instruction only on the definition of a deadly weapon, which does not include the critical language from RCW 9.41.010(1). CP 221 (Instruction 46).

By failing to ask the jury to find the essential elements of the firearm enhancement, this enhancement may not stand.²

5. THE COURT'S IMPOSITION OF INCREASED PUNISHMENT ABSENT A JURY'S VERDICT ON THE NECESSARY FACTUAL ELEMENTS REQUIRES REVERSAL.

The prosecution refuses to address the legality of Monday's enhanced punishment predicated on the trial court's factual determination that he committed separate and distinct serious violent offenses. However, the United States Supreme Court is presently considering whether a trial court may impose consecutive sentences based on a trial court's factual determinations. Oregon v. Ice, 170 P.3d 1079 (2007), cert. granted, 128 US. 1657, 170 L.Ed.2d 353 (2008) (oral argument set for October 15, 2008). For the reasons argued in Appellant's Opening Brief, this Court should find that the trial court's enhancement of Monday's sentence based on factual findings by the trial court violates the Sixth and Fourteenth Amendment's right to a fair trial by jury.

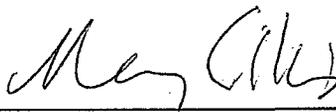
² The Washington Supreme Court has accepted review of three cases involving erroneous firearm enhancement instructions and whether the error is harmless. See http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=notyetset#P180_11106 (noting review accepted for: No. 78611-9 (consol. w/78876-6 & 79074-4) *State v. Williams-Walker*; *State v. Graham*; *State v. Ruth*).

F. CONCLUSION.

For the foregoing reasons and those discussed in Appellant's Opening Brief, Kevin Monday respectfully requests this Court reverse his convictions, suppress the evidence seized as a result of the invalid warrant, and order new trial and sentencing proceedings.

DATED this __ day of August 2008.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)

Respondent,)

v.)

KEVIN MONDAY,)

Appellant.)

NO. 60265-9-I

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 15TH DAY OF AUGUST, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] CATHERINE MCDOWALL (X) U.S. MAIL
KING COUNTY PROSECUTING ATTORNEY () HAND DELIVERY
APPELLATE UNIT () _____
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104

[X] KEVIN MONDAY (X) U.S. MAIL
875270 () HAND DELIVERY
WASHINGTON STATE PENITENTIARY () _____
1313 N 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF AUGUST, 2008.

X _____



FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 AUG 15 PM 4:55

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎ (206) 587-2711