

No. 83177-7
COA No. 61753-2-I

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2009 OCT -7 AM 8:14
ST. JIMMIE R. CARPENTER
CLERK

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Petitioner,

v.

S.J.W,

Defendant/Respondent.

FILED
OCT 7 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
CP

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

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 07-8-00180-4

SUPPLEMENTAL BRIEF OF PETITIONER

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY
WSBA # 22926
Law & Justice Center
P.O. Box 5000
Coupeville, WA 98239
(360) 679-7363

By: Colleen S. Kenimond
Deputy Prosecuting Attorney
WSBA # 24562
Attorney for Petitioner

TABLE OF CONTENTS

I. ARGUMENT1

 A. The Court of Appeals’ decision in this case contradicts the legislative purpose behind Senate Bill 4708, Laws of 1986, ch. 195.....1

 B. CrR 6.12(c)(2) conflicts with RCW 5.60.050(2).3

 C. RCW 5.60.050(2) and CrR 6.12(c)(2) cannot be harmonized...3

 D. RCW 5.60.020, RCW 5.60.050, and ER 601 are substantive law.....7

 E. Because the Court of Appeals’ Decision contravenes RCW 5.60.050(2), it must be reversed.....8

CONCLUSION.....9

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT DECISIONS

<i>City of Fircrest v. Jensen</i> , 158 Wn.2d 394, 143 P.3d 776 (2006).....	5
<i>Putman v. Wenatchee Valley Medical Center</i> , 2009 WL 2960977 (Wash.)5	
<i>State v. Fields</i> , 85 Wn.2d 126, 530 P.2d 284 (1975)	4, 6
<i>State v. Pavelich</i> , 53 Wash. 379, 279 P. 1102 (1929).....	4, 5, 7
<i>State v. Sears</i> , 4 Wn.2d 200, 103 P.2d 337 (1940)	4
<i>State v. Smith</i> , 84 Wn.2d 498, 527 P.2d 674 (1974).....	4, 8
<i>State v. Templeton</i> , 148 Wn.2d 193, 59 P.3d 632 (2002)	6

WASHINGTON COURT OF APPEALS DECISIONS

<i>State v. C.M.B.</i> , 130 Wn.App 841, 125 P.3d 211 (2005).....	8
---	---

WASHINGTON STATUTES

RCW 5.60.020	1, 7, 8
RCW 5.60.050	passim
RCW 7.70.150	5

COURT RULES

CrR 6.12(c)	3, 6, 7, 8
-------------------	------------

EVIDENCE RULES

ER 601	7
--------------	---

OTHER AUTHORITIES

Washington Session Laws

Laws of 2008, ch. 90.....	4
Laws of 1854, §289, §293.....	1
Laws of 1986, ch. 195.....	1

Washington Legislative Materials

Wa. Leg. 49 – SB4708, 2d Reg. Sess., at 209	2
---	---

OTHER CASES

Appeal of Dattilo, 136 Conn. 488, 72A.2d 50 (1950)..... 4
In re Florida Rules of Criminal Procedures, (Fla.) 272 So.2d 65 (1972).. 4
In re Sparrow, 338 Mo. 203, 90 S.W.2d 401 (1933)..... 4
R.E.W. Const. Co. v. District Court of Third Jud. Dist., 88 Idaho 426, 400
P.2d 390 (1965)..... 4
State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936) 4

I. ARGUMENT

A. The Court of Appeals' decision in this case contradicts the legislative purpose behind Senate Bill 4708, Laws of 1986, ch. 195.

In 1854, the Legislative Assembly of the Territory of Washington enacted the first versions of what later became RCW 5.60.020 and RCW 5.60.050. Laws of 1854, §289, §293. Those sections read as follows:

Sec. 289. Every person of sound mind, suitable age and discretion, except as hereinafter provided, may be a witness in any action or proceeding.

Sec. 293. The following persons shall not be competent to testify:

1st. Those who are of unsound mind, or intoxicated at the time of their production for examination.

2d. Children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

Those sections remained the law of the land until the State Legislature amended those sections by Senate Bill 4708 (Laws of 1986, ch. 195). That amendment changed Section 289 by removing "suitable age." It changed Section 293 by removing "Children under ten years of age" and replacing that phrase with the word, "Those."

Legislative history for SB 4708 is sparse. The Final Legislative Report for the 1986 Second Regular Session reads as follows:

Background:

Current law regarding the competency of children as witnesses provides that a witness must be of suitable age and that children under ten years of age who appear incapable of receiving just impressions of the facts or of relating them truly are incompetent. A hearing is automatically held to determine the competency of any witness under ten. One of the parties must request such a hearing to challenge the competency of all other witnesses.

It has been suggested that the words "suitable age" have no practical or legal effect in determining whether or not small children should be allowed to testify. Removing those words would eliminate any implication that age alone is the determining factor for assessing competency.

Summary:

All references to children in those acts governing the competency of witnesses are deleted. A competency hearing will no longer be automatic for all witnesses under ten, but any party will be able to request such a hearing.

SB 4708, 49th Leg., 2d Reg Sess., 209 (1986)

It seems clear that the Legislature intended to eliminate age as an automatic "disqualifier" to testifying. It seems equally clear that the Legislature found that hearings were automatically being held to determine the competency of any witness under the age of ten, and that the Legislature wanted to discontinue that practice. This implies that the practice in courts of having such hearings amounted to a de facto

presumption that those under ten years of age were incompetent to testify, because the hearings were “automatically held.”

In turn, this court practice explains the scholars’ beliefs that, somehow, the burden shifts to the prosecutor to show a child witness competent.

B. CrR 6.12(c)(2) conflicts with RCW 5.60.050(2).

There is an apparent conflict between RCW 5.60.050(2) and the related court rule, CrR 6.12(c), which reads, “The following persons are incompetent to testify: . . . (2) *children* who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly.” (Emphasis added.) When this Court adopted this rule in 1991, it changed “children under ten years of age” to simply “children.” By doing so, the Court overruled the Legislature’s 1986 amendment and, in fact, *expanded* the “de facto” presumption of incompetence of children, in direct opposition to the legislative intent as expressed in the Final Legislative Report on SB 4708.

C. RCW 5.60.050(2) and CrR 6.12(c)(2) cannot be harmonized.

According to the Legislature and, seemingly, this court,

In Washington, the legislature and the courts share the responsibility for enacting rules of evidence. The court’s authority for enacting rules of evidence arises from

a statutory delegation of that responsibility to the court and from Article IV, Section 1 of the state Constitution. *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975).

The legislature's authority for enacting rules of evidence arises from the Washington Supreme Court's prior classification of such rules as substantive law. See *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); *State v. Pavelich*, 53 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantive law").

Laws of 2008, ch. 90.

In *State v. Smith*, 84 Wn.2d 498, 527 P.2d 674 (1974), this Court was called upon to decide whether a rule concerning bail pending appeal was procedural, that is within the inherent powers of the court, or substantive, that is within the realm of the legislature. There, this court used the following analysis:

[C]ourts have certain limited inherent powers; among these is the power to prescribe rules for procedure and practice. See *R.E.W. Const. Co. v. District Court of Third Jud. Dist.*, 88 Idaho 426, 400 P.2d 390 (1965); *Appeal of Dattilo*, 136 Conn. 488, 72 A.2d 50 (1950); *State v. Roy*, 40 N.M. 397, 60 P.2d 646 (1936); *In re Sparrow*, 338 Mo. 203, 90 S.W.2d 401 (1933). Although a clear line of demarcation cannot always be delineated between what is substantive and what is procedural, the following general guidelines provide us with a framework for analysis. Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated. See *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929); *In re Florida Rules of Criminal*

Procedures, (Fla.) 272 So.2d 65 (1972). These guidelines, however, are expressive of the common law and should be applied in consonance therewith whenever possible.

This court has said, in *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929), that evidence rules, being substantive law, cannot be governed by court rules. *Id.* at 382.

This court has been called upon to employ this analysis in several different areas. In *Putman v. Wenatchee Valley Medical Center*, 2009 WL 2960977 (Wash.), this court ruled that RCW 7.70.150 invaded the court's procedural rulemaking authority concerning the instigation of lawsuits because that statute addresses how to file a claim to enforce a right provided by law. In doing so, this court said, "If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Id.* at 6, citing *City of Fircrest v. Jensen*, 158 Wn.2d 394, 143 P.3d 776 (2006).

In *Fircrest v. Jensen*, this court held that SHB 3055 was not in conflict with the court's inherent rulemaking powers. In that bill, the legislature made its intention clear, so that there was no reason not to follow that intention. "The statute is permissive, not mandatory, and can be harmonized with the rules of evidence." *Id.* at 399.

In *State v. Templeton*, 148 Wn.2d 193, 59 P.3d 632 (2002) this court ruled that preservation of evidence is a procedural matter such that this court could authorize a rule requiring advisement of right to counsel as soon as feasible after arrest in order to preserve possible exculpatory evidence. *Id.* at 217.

In *State v. Fields*, 85 Wn.2d 126, 530 P.2d 284 (1975), this court reviewed an apparent conflict with the statute authorizing search warrants in felony cases only and the court rule permitting search warrants for crimes including misdemeanors. The court decided that rules governing search warrants are procedural in nature such that the court rule would prevail over the statute. *Id.* at 130.

The State is asking this court to decide, first, whether RCW 5.60.050(2) can be harmonized with CrR 6.12(c)(2) and, if not, whether the statutes governing competency of witnesses are substantive or procedural.

As noted above, the statute and the court rule differ by one word. The statute refers to “those” and, as discussed, the legislature apparently chose that word to eliminate age as a factor in deciding competency. This statute now refers to persons of any age.

The court rule uses “children,” which expands the previous rule’s (and statute’s) limitation to “children under ten years of age.” “Children”

could, presumably, mean anyone in their minority, that is, under 18 years of age.

The state respectfully submits that RCW 5.60.050(2) and CrR 6.12(c)(2) cannot be harmonized because the statute eliminates age, and the court rule expands the age, contained in the previous statute and court rule, which had been identical.

D. RCW 5.60.020, RCW 5.60.050, and ER 601 are substantive law.

The next question, then, is whether the statutes governing competency, specifically RCW 5.60.020 and 5.60.050, are substantive law or procedural in nature. This court has not answered that specific question.

It has long been the case that evidence rules are considered by the Supreme Court to be substantive law. See *State v. Pavelich*, supra. It would seem, then, that the rules governing who can give evidence must also be substantive law.

Indeed, Evidence Rule 601 speaks to competency: “every person is competent to be a witness except as otherwise provided by statute or by court rule.” That being so, then this court has already included competency within the substantive law of evidence rules. It would follow,

then, that the exceptions to competency, as set out in RCW 5.60.050, are also matters of substantive law.

The state submits that, based on the foregoing arguments and precedent, CrR 6.12(c)(2) must fall to RCW 5.60.050(2).

E. Because the Court of Appeals' Decision contravenes RCW 5.60.050(2), it must be reversed.

These arguments also support the premise that the burden to show competence of a witness is on the party opposing the witness. For adult witnesses, the rule is clear, and succinctly put in *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982) “Where there has been no [adjudication of insanity], the burden is on the party opposing the witness to prove incompetence.”

RCW 5.60.020 “treat[s] all ‘persons’ the same for purposes of competency.” *State v. C.M.B.*, 130 Wn.App 841, 844, 125 P.3d 211 (2005).

There should be no distinction between how adult witnesses are treated for purposes of competency and how children are treated. There should be no difference between adults and children concerning who bears the burden of showing incompetence. There is no Washington case law precedent to support treating adults and children differently, and no logic to the proposition. And, most importantly, it seems clear that the

Legislature intended to remove the difference in procedure that crept into the system to create a de facto presumption of incompetency of children under age ten.

CONCLUSION

In the state of Washington, witnesses are witnesses, and age does not enter into the competency equation. The Court of Appeals' decision contravenes legislative intent and improperly places on the State the burden to show competency of witnesses under 18.

Respectfully submitted this 6 day of October, 2009.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: _____


COLLEEN S. KENIMOND
DEPUTY PROSECUTING ATTORNEY
WSBA # 24562