

X  
NO. 84907-2

IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

(Court of Appeals, Division I, Court Cause No. 63494-1-1)

**FILED**  
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STATE OF WASHINGTON  
*[Signature]*

CITY OF BOTHELL  
Petitioner,

v.

JAMES K. BARNHART,  
Respondent,

BRIEF OF AMICUS CURIAE, CITY OF AUBURN, WASHINGTON,  
IN SUPPORT OF PETITIONER, CITY OF BOTHELL, WASHINGTON

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A. IDENTITY OF AMICUS CURIAE

Amicus is the City of Auburn, a Washington municipal corporation, (hereinafter Amicus).

B. STATEMENT OF CASE

Amicus, City of Auburn, references and incorporates herein the Statements of the Case as set forth in the pleadings of the Petitioner, City of Bothell, Washington.

C. SUMMARY OF ARGUMENT

The City of Bothell, the Petitioner herein, very capably addressed the peremptory challenge issues and the issues relating to the constitutional arguments presented to this Court and the underlying courts.

It is Amicus's intention to address, however, the historical perspective in which the provisions of Article I § 22 of the Constitution of the State of Washington are set. The Washington Constitution, Article I § 22, adopted along with statehood in 1889, indicates an accused has the right to a speedy public trial by an "impartial jury of the county in which the offense is charged to have been committed." If this clause is read without historical context, it produces an absurd result – the invalidation of trials before juries formed from the members of a defendant's intimate community, the city in which the crime was committed. However, when this requirement is examined in light of other provisions of the

Constitution and the setting in which it was founded - a setting which is changed significantly over the last hundred years - its meaning becomes clearer. When understood in proper historical perspective, the "impartial jury of the county" means something quite different than that which the Respondent argues it does and the Court of Appeals held it to mean.

Two historical circumstances are revealing of the meaning of Article I § 22. First, historically, municipal courts (or their predecessors - police courts) were very limited in their scope and authority. They were not courts of record and their authority was much more limited in what they could do, when compared with the county courts - superior courts or justice courts. In this modest role, municipal courts did not hold jury trials, and appeals from the trials of municipal court were as trials de novo in the Superior Court. Second, when this state was admitted to the union and when its Constitution was developed and approved, there were no cities that had territory in more than one county.<sup>1</sup>

When Article I § 22 is viewed in light of these historical factors, as well as, the general purpose of both the state and federal Constitutions to

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<sup>1</sup> Even today, there are only six multi-county cities or towns. They include: 1) Auburn (King and Pierce counties), incorporated in 1891; 2) Bothell, (King and Snohomish counties), incorporated in 1909; 3) Coulee Dam (Douglas, Grant and Okanogan counties), incorporated in 1959; 4) Milton (King and Pierce counties), incorporated in 1907; 5) Pacific (King and Pierce counties), incorporated in 1909; and 6) Woodland (Clark and Cowlitz counties), incorporated in 1906.

preserve the right of an accused to be tried by jury members comprised of members of the community it is evident the Bothell Municipal Court jury did not abridge this constitutional requirement.

D. ARGUMENT

The Washington State Supreme Court, as well as the Supreme Court of the United States, has long held that there is no right to a representative petit jury. *Swain v. Alabama*, 380 U.S. 202, 208, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965); *Fay v. New York*, 332 U.S. 261, 284, 91 L.Ed.2043, 67 S.Ct. 1613 (1947); *State v. Hilliard*, 89 Wn.2d 430, 442, 573 P.2d 22 (1977). Instead, courts have held that there is [only] a constitutional right that the pool from which the petit jury is selected represents a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 526, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975). The fair cross-section requirement is violated when there is a showing that (1) a "distinctive" segment of the community (2) is substantially underrepresented in the jury pool (3) as a result of a "systematic exclusion" of the group. *Duren v. Missouri*, 439 U.S. 357, 364, 58 L.Ed.2d 579, 99 S.Ct. 664 (1979). See also *State v. Lanciloti*, 165 Wn.2d 661, 201 P.3d 323 (2009); *State v. Cienfuegos*, 144 Wn.2d 222, 232, 25 P.3d 1011 (2001).

In *Taylor*, the court held:

It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition; but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

*Taylor*, 419 U.S. at 538 (citations omitted).

In the case before this court there was no systematic exclusion of people from the community, and, in fact, the jury reflected a more complete representation of the community was involved. Since the crime occurred within the boundaries of the City of Bothell, it is the members of the City that most intimately reflect the Defendant's peers and members of the City, no matter where they live, would constitute a fair cross section of the community where a crime occurred.

The Respondent argues, and the Court of Appeals agreed, that the jurors for the Bothell offense should have come from Snohomish County since that was where the offense occurred. In support of that position, they rely upon Washington Constitution Article I § 22, at states in pertinent part as follows:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the

witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a *speedy public trial by an impartial jury of the county in which the offense is charged to have been committed* and the right to appeal in all cases . . . .

(Emphasis added.)

While the language of Article I § 22 seems to mandate single county juries even in the municipal course of two-county cities, interpreting it in such a way requires the Court to ignore other sections of the Constitution that must be considered in properly applying the Constitution to this issue. Article I § 21 states in part as follows:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in *courts not of record*, and for a verdict by nine or more jurors in civil cases . . . . (Emphasis added.)

This section, which immediately precedes Article I § 22, draws a distinction between whether or not a court is of record, a distinction which would have been more marked at the time of the Constitution's adoption. Although modern municipal courts are today the functional equivalent of district courts in terms of criminal prosecution, when the Constitution was adopted, that was not the case nor, as noted above, were there cities that had territory in more than one county. Looking at what the court said in the past about municipal courts, it is appropriate to note that in *Application of Eng*, 113 Wn.2d 178, 776 P.2d 1336 reconsideration denied (1989), this

court said municipal court judges were not “justices of the peace,” but instead municipal court was “inferior court”. *See also Seattle v. Filson*, 98 Wn.2d 66, 653 P.2d 608 (1982) (*overruled in part.*) That is significant because Washington. Constitution Article IV § 11<sup>2</sup> prohibits justices of the peace from becoming courts of record. Thus the Legislature had to have created “inferior courts” with the 1891 act, establishing a link between the municipal courts and “inferior courts” and setting the precedent for identifying future municipal courts as such. *See Eng.* at 188.

Municipal, or inferior, courts are created pursuant to the authority granted by Article IV § 12, which states that “[t]he legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this Constitution.” The legislature exercised this authority when it adopted RCW 2.36.050. Thus, it is RCW 2.36.050 that governs the composition of municipal court juries, which statute states as follows:

In courts of limited jurisdiction, juries shall be selected and impaneled in the same manner as in the superior courts, except that a court of limited jurisdiction shall use the master jury list developed by the superior court to select a jury panel. Jurors for the jury panel may be selected at random from the population of the area served by the court.

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<sup>2</sup> Article IV § 11 states as follows: “The supreme court and the superior courts shall be courts of record, and the legislature shall have power to provide that any of the courts of this state, excepting justices of the peace, shall be courts of record.”

Since the jurors in this case were selected at random from the City of Bothell, "the population of the area served by the court" the jury selection adhered to RCW 2.35.050 and was constitutional, even though some jurors resided in King County."

The Respondent suggests that this Court apply Article I § 22 in the context of municipal court trials so as to require these courts to look beyond their jurisdiction for composing juries. Yet this Court's prior holdings show that this constitutional provision was not promulgated with the intent to place such a requirement on inferior courts, which are not courts of record. Rather, the constitutional drafters left the composition of inferior court juries to the legislature to define and the establishment of de novo review of these courts' rulings supports the logic of this approach.

In *City of Seattle v. Hesler*, 98 Wn.2d 73, 78-79, 653 P.2d 631 (1982) this Court said that the superior court does not review the action of the justice (municipal) court because it is not a court of record. Thus, any appeal from a justice (municipal) invokes a trial de novo. *Hesler* also noted that the expression "court of record," as used in this context, appears to refer to the fact that the lower court did not keep a record of its proceedings, inasmuch as the lack of a record made it impossible to review the trial in the inferior court. *Id.* citing *State v. Young*, 83 Wn.2d 937, 523 P.2d 934 (1974).

In *State v. Buckman*, 51 Wn.2d 827, 322 P.2d 881 (1958), this Court held that the justice (municipal) court and the superior court had concurrent jurisdiction over certain offenses, citing *State v. Bringgold*, 40 Wash. 12, 82 P. 132 (1905). But in *Seattle v. Buerkman*, 67 Wn.2d 537, 408 P.2d 258 (1965), it was said that when the appellate jurisdiction of the superior court is invoked, the cause must be tried de novo, without reference to irregularities which may have occurred in the lower court's proceedings.

Accordingly, the distinction of a court being not of record was that appeals from its decisions were trials de novo in the superior court. But looking even further back to the environment that existed legally for "city courts" around the time the constitution was crafted, in *State v. Kennan*, 25 Wash. 621, 66 P. 62 (1901), this Court cited Ballinger's Ann. Codes & St. § 739, subd. 36, which declared:

municipalities shall have power to provide for the arrest, trial, and punishment of all persons charged with violating any of the ordinances of the city; but that such punishment shall not exceed the punishment provided by the state laws for misdemeanors. Section 4683 provides that justices of the peace shall have jurisdiction over all criminal cases coming under any city ordinance.

The Court in *State v. Kennan* also cited Sess.Laws 1899, p. 135, § 3, which provided that:

the justice of the peace designated as police justice shall have exclusive jurisdiction of all offenses defined by city ordinance, and full power to hear and determine all cases arising under such ordinance, and to pronounce judgment in accordance therewith, and that in the trials of actions brought for violation of any city ordinance no jury shall be allowed.

(Emphasis added.)

*State v. Kennan* thus held:

that the last statute was controlling in proceedings against a party charged with violating a city ordinance, and hence he was not entitled to a trial by jury, though under the General Statutes he may have had such right.

Added to that, Article XI § 11 of the State Constitution states as follows:

Article XI § 11. Police and Sanitary Regulations

Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

Accordingly, the authority that then existed (that existed when the State Constitution was promulgated) would have had police (municipal courts as inferior courts that could not have jury trials and that would have triggered the right of a defendant appealing a verdict from such courts to a trial de novo in the spirit court. Again, as noted *Hesler*, the constitutional objections [to cases being processed through inferior court cases] were met by the availability of a trial de novo in superior court on appeal. Only "county" courts were courts of record and no city courts had jury trials

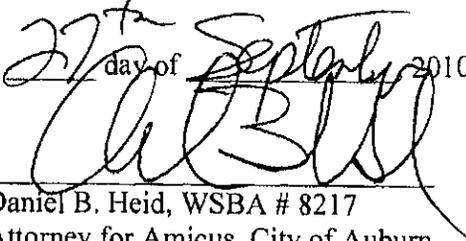
when the Constitution was promulgated, as jury trials – trials de novo – only came when (if) there was an appeal from such court to the Superior court. Later changes to the (now) municipal courts are consistent with the constitutional authorization for legislative creation of inferior courts.

It is axiomatic that “[c]onstitutional provisions should be construed so that no portion is rendered superfluous.” *State ex rel. Heavey v. Murphy*, 138 Wash.2d 800, 811, 982 P.2d 611, 617 (1999) With the backdrop for the constitutional language dealing with county courts and courts of record which required the availability of a jury trial, and with the authority granted to the legislature by the Constitution to create inferior courts, and with the practice of appeals from those inferior courts being heard by the superior court through de novo jury trials, the best way to reconcile Article I § 22 and Article IV § 12 so that neither provision is superfluous, is to construe the former as meaning that the limitation on jury residence refers to the communities served by the court, consistent with by RCW 2.36.050.

E. CONCLUSION.

For all of the reasons set forth above and as argued by the Petitioner, City of Bothell, it is respectfully requested that review be granted by this Court.

Respectfully submitted this 27<sup>th</sup> day of September 2010.

  
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Dear Clerk:

Please find the City of Auburn's Motion, Brief and cover letter submitted in connection with its request for leave to participate as Amicus, in support of the City of Bothell, in the above-referenced case. If you have any questions, please do not hesitate to contact me. Otherwise, thank you for your assistance. Dan

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