

NO. 84907-2

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

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

CITY OF BOTHELL
Petitioner,

V.

JAMES K. BARNHART,
Respondent,

SUPPLEMENTAL BRIEF OF PETITIONER, CITY OF BOTHELL,
WASHINGTON AND AMICUS CURIAE, CITY OF AUBURN,
WASHINGTON

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A. IDENTITY OF BRIEFING PARTIES

To assist the court in addressing the issues involved herein, the Petitioner and Amicus have joined together to supplement the existing briefing. The Petitioner is the City of Bothell, a Washington municipal corporation, (hereinafter Petitioner), and Amicus is the City of Auburn, a Washington municipal corporation, (hereinafter Amicus).

B. STATEMENT OF CASE

The Statements of the Case is as set forth in the pleadings of the Petitioner herein.

C. SUMMARY OF ARGUMENT

This case seeks review and reversal of the Court of Appeals decision in *City of Bothell v. Barnhart*, 156 Wn. App. 531, 234 P.3d 264 (2010), which held that under Washington State Constitution, Art. 1, § 22, the Respondent, James K. Barnhart (hereinafter Defendant), had a constitutional right to be tried by a jury of residents of the county in which the offense with which he was charged was alleged to have been committed (Snohomish County, in this case), and that the Bothell Municipal Court jury violated the Constitution by impaneling jurors who, although they resided in the City of Bothell where the offense occurred, did not reside in Snohomish County.

As noted by this Court in *State v. Lancillott*, 165 Wn.2d 661, 667, 201 P.3d 323 (2009), the common law principle for jury selection is that juries should be drawn from the area of the alleged crime (citing Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1674 (2000)). In the instant case, the area of the alleged crime is the City of Bothell, just as it is the City of Bothell that is prosecuting this case, doing so in its court, the Bothell Municipal Court.

This case should also be distinguished from *State v. Twyman*, 143 Wn.2d 115, 17 P.3d 1184 (2001), which dealt with a jury in a county district court. Different than municipal courts which have jurisdiction within their cities (which may include more than one county), district courts are specific to one county. While Article 1, § 22 of the Washington State Constitution *does* apply to (county) district courts, it *does not* apply to municipal courts.

At the time of the adoption and implementation of the State Constitution in 1889 there were no cities that were located in more than one county. The law then did not, and still does not, preclude cities from being located in more than one county. Since a city may be (and in six cases, are) located in more than one county, it would make no sense to limit municipal courts from having jury pools drawn from their whole corporate boundaries even if those corporate boundaries include more than

one county. More importantly, the constitutional provisions that would seem to require municipal court juries to be segregated by county do not apply to municipal courts. This is clear from a review of the history of Article I § 22 of the Constitution of the State of Washington. Article I § 22, adopted along with statehood in 1889, states that 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.” A plain language reading of this clause, read without historical context, 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 language is examined in light of other provisions of the Constitution and the setting in which it was created - a setting which has changed significantly over the last hundred years – its meaning becomes clearer. When understood in proper historical perspective, the “impartial jury of the county” reasonably, only applies to county courts, and is not applicable to municipal courts whose cities are located in more than one county.

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. Therefore, the constitutional limitation on jury selection did not apply to municipal courts. 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.¹

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 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; and, in fact, Article I § 22 does not apply to the Bothell Municipal Court.

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

¹ 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.

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 that 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. Therefore, regardless of side of the county line on which they reside, a jury made up of residents of the City of Bothell 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 that 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 courts of multiple-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 initially any cities that had territory in more than one county. Still, different than district courts that are limited in jurisdictional boundaries located within a single county, municipal courts have jurisdiction over the whole of the city, even if it includes 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 the municipal court was an "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 § 11² 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.

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

² 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.”

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) court invoked 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 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 superior court. Again, as noted in *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.

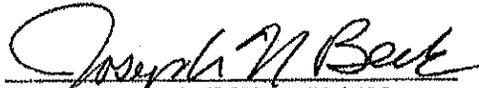
It is axiomatic that “[c]onstitutional provisions should be construed so that no portion is rendered superfluous.” *State ex rel. Heavey v. Murphy*, 138 Wash.2d 800, 811, 982 P.2d 611, 617 (1999) With the backdrop for the constitutional language dealing with county courts and courts of record which required 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 RCW 2.36.050. That also fits with the historical distinction of the courts and the provisions of Article IV § 11. If reconciled this way, a jury comprised of residents of the City of Bothell is not constitutionally deficient.

E. CONCLUSION.

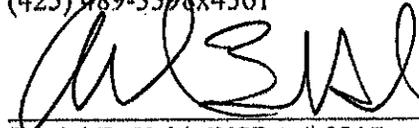
For all of the reasons set forth above and as argued by the Petitioner’ and Amicus’ briefing filed heretofore, it is respectfully requested that the decision of the Court of Appeals be reversed insofar as

it would preclude a municipal court from impaneling a jury of residents of the municipal court's city when the city is located within more than one county.

Respectfully submitted this 2nd day of December, 2010.



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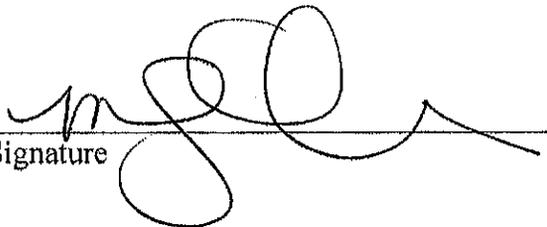
CERTIFICATE OF SERVICE
OF SUPPLEMENTAL BRIEF
OF CITY OF BOTHELL AND
AMICUS CURIAE

I, Melanie B Stockdale, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on the date below set forth, I sent, postage pre-paid, a true and correct copy of the Supplemental Brief of Petitioner City of Bothell, Washington, and Amicus Curiae, City of Auburn, Washington, concerning the above entitled matter to:

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at the above addresses and e-mail addresses, on the 2nd day of December, 2010.

SIGNED at Auburn, Washington, this 2nd day of December, 2010.


Signature