85996-5

FILED
JUN 02 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

NO. 26789-0-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

FREDERICK DAVID RUSSELL,

Defendant/Appellant.

REPLY BRIEF

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ARGUMENT

A. IDAHO ARREST

The State totally misconstrues Mr. Russell's argument concerning his arrest in the State of Idaho. Mr. Russell appropriately assigned error to the trial court's findings of fact. The findings of fact rely not only upon Idaho Code §§ 19-705 through 19-707; but also the Uniform Act on Fresh Pursuit. Chapter 10.89 RCW

The trial court, by basing its decision upon the respective code sections of two (2) states, indicates a reliance upon each provision to reach its decision that Mr. Russell's arrest was lawful.

Thus, by challenging all of the pertinent findings of fact Mr. Russell has preserved this issue on appeal.

It is the findings of fact and conclusions of law which are at issue. The State's position that it argued the respective authorities in its trial brief has no merit.

The State's argument that Mr. Russell cannot challenge the Interstate Mutual Aid Agreement (IMAA) is ludicrous. The trial court made a specific finding concerning the IMAA. As such, it relied upon the IMAA in making its determination concerning the lawfulness of Mr. Russell's arrest.

The question of the validity of the IMAA directly impacts whether or not it in fact exists. A document which does not comply with requisite statutory requirements has no validity.

As was correctly noted in *State v. Plaggemeier,* 93 Wn. 472, 478, 969 P.2d 519 (1999):

> A corollary of RCW 10.93.130 is that mutual law enforcement assistance agreements must comply with RCW 39.34 and obtain legislative ratification.

The State incorrectly asserts that Mr. Russell was required to prove that the IMAA was not filed or legislatively ratified. This constitutes an impermissible shifting of the burden of proof.

The State relied upon the IMAA at pre-trial hearings. It did not establish the preliminary foundational requirements to show that the agreement was a valid agreement.

The record is totally devoid of any legislative ratification of the IMAA.

The State's reading of the *Plaggemeier* case is erroneous. It is true that consent provisions and financial provisions of a mutual aid agreement are severable. Nevertheless, as the *Plaggemeier* Court stated at 479:

> **RCW 10.93.130**, a provision of very limited scope, merely gives notice of an agency's authority under RCW 39.34 to enter a mutual law enforcement assistance agreement. It **does not independently grant authority to enter such agreements**; **RCW 39.34 does**.

(Emphasis supplied.)

Chapter 10.93 RCW, the Washington Mutual Aid Peace Officers Powers Act is limited to extra jurisdictional arrests within the State of Washington. *See: Sheimo v. Bengston,* 64 Wn. App. 545, 549, 825 P.2d 343 (1992); *Vance v. Dep't of Licensing,* 116 Wn. App. 412, 415-16, 65 P.3d 668 (2003).

As argued in his original brief, the common law is the controlling factor in analyzing whether or not Mr. Russell's arrest in Idaho was a lawful arrest. It was not.

The State's claim that Mr. Russell concedes that the consent provisions are enforceable in the absence of filing a legislative ratification misconstrues the argument contained in his original brief.

If the IMAA is not enforceable, then, under the common law, Trooper Murphy's pursuit and arrest in Idaho was unlawful.

B. CONST. ART. I, § 10

Currently, considerable attention is being paid to a criminal defendant's right to a public trial.

The State takes the position that no constitutional violation occurred in Mr. Russell's case. It relies upon GR 28, RCW 2.36.100 and the cases of *State v. Collins,* 50 Wn.2d 740, 314 P.2d 660 (1957) and *State v. Lormor,* 154 Wn. App. 386 (2010).

In addition, the State references *State v. Momah,* 167 Wn.2d 140, 217 P.3d 321 (2009). The *Momah* case is distinguishable. Mr. Russell did

not request closure. The trial court, on its own initiative, conducted *voir dire* in chambers.

Const. art. I, § 10 states: "Justice in all cases shall be administered openly, and without unnecessary delay."

Const. art. I, § 22 provides, in part:

> In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed ....

The Sixth Amendment to the United States Constitution also provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State ... wherein the crime shall have been committed ....

State v. Collins, supra, is an outdated case. The recent outpouring of decisions on the right to a public trial have made the *Collins* case obsolete. Nevertheless, one (1) portion of *Collins* is pertinent under the facts and circumstances of Mr. Russell's case. The *Collins* Court held at 747:

> If an order of a trial court clearly deprives a defendant of his right to a public trial [Citation omitted.] it is unnecessary for the defendant to raise the question by objection at the time of trial. *State v. Marsh,* 126 Wash. 142, 145-46, 217 Pac. 705 (1923).

The trial court's adjournment to chambers to conduct *voir dire* on hardship issues is a clear violation of the constitutional right to a public trial.

The *Lormor* case references "trivial" closures. It ruled that the exclusion of the defendant's four (4) year-old daughter did not impact his constitutional right to a public trial. *State v. Lormor, supra,* 393-94.

Exclusion of a four (4) year-old is highly unlikely to impact a public trial right. There is little input that a four (4) year-old could provide concerning *voir dire* of jurors.

The recent case of *State v. Paumier, slip opinion* 36346-1 (04/27/10), adopts the analysis of the United States Supreme Court in *Presley v. Georgia,* ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed.2d ___ (2010).

The *Presley* Court began its analysis at 723:

> This Court's rulings with respect to the public trial right rest upon two different provisions of the Bill of Rights, both applicable to the States via the Due Process Clause of the Fourteenth Amendment. The Sixth Amendment directs, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...." The Court in *In re Oliver,* 33 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948), made it clear that this right extends to the States. The Sixth Amendment right, as the quoted language makes explicit, is the right of the accused.
>
> The Court has further held that the public trial right extends beyond the accused and

> can be invoked under the First Amendment. *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.,* 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed.2d 629 (1984) (*Press-Enterprise I*). This requirement, too, is binding on the States. *Ibid.*

The *Paumier* Court, in analyzing the decision in *Presley* held at 10:

> ... [W]here the trial court fails to *sua sponte* consider reasonable alternatives and fails to make the appropriate findings, the proper remedy is reversal of the defendant's conviction. *Presley,* 130 S. Ct. at 25.
>
> Thus *Presley*, **applying the federal constitution, resolves any question about what a trial court must do before excluding the public from trial proceedings, including *voir dire.***

(Emphasis supplied.)

The *Presley* Court concluded at 724:

> The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court's precedents but also from the premise that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." [Citation omitted.] **The public has a right to be present whether or not any party has asserted the right**.

(Emphasis supplied.)

In addition to outdated caselaw the State references GR 28 and RCW 2.36.100.

GR 28(a) states:

> This rule addresses the procedures for postponing and excusing jury service under RCW 2.36.100 and 2.36.110 and for disqualifying potential jurors under RCW 2.36.070 (basic statutory qualifications).

RCW 2.36.100(1) states:

> Except for a person who is not qualified for jury service under RCW 2.36.070, no person may be excused from jury service by the court except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary.

The State's argument is that the authority to excuse a juror under RCW 2.36.100(1) is ministerial and delegable to the court clerk.

GR 28(b)(1) states:

> The judges of a court may delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service.

RCW 2.36.100(2) provides, in part:

> At the discretion of the court's designee, after a request by a prospective juror to be excused, a prospective juror excused ... may be assigned to another jury term ....

There is no indication in the record that any juror made a request to the court clerk to be excused from jury duty. Rather, the trial court excused the jurors. Thus, the issue of delegation under either the statute or the rule has no bearing upon Mr. Russell's argument.

Mr. Russell has appropriately assigned error to the trial court's actions. Review is *de novo. See: State v. Brightman,* 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Two (2) recent cases support Mr. Russell's position that the trial court's actions violate his constitutional rights.

In *State v. Frawley,* 140 Wn. App. 713, 720, 167 P.3d 593 (2007), the Court determined that even though considerations of jury privacy and court rules were present, they did not trump a criminal defendant's constitutional right to a public trial.

The second case is *In re Detention of D.F.F.,* 144 Wn. App. 214, 226, 183 P.3d 302 (2008). The *D.F.F.* case considered MPR 1.3 relating to the closure of mental health proceedings.

The Court determined that the rule violated the constitutional right to a public trial.

The *D.F.F.* Court further determined that the constitutional right to a public trial is not subject to either a "triviality" or harmless error analysis. Mr. Russell asserts that this ruling, when viewed in light of the constitutional mandates of Const. art. I, §§ 10 and 22, neuters the State's argument as to GR 28 and RCW 2.36.100.

C. JUROR CHALLENGE

The State, in analyzing Mr. Russell's argument concerning challenges for cause, ignores the fact that two (2) challenges were denied. The

answers given by Jurors 8 and 16 have been addressed in Mr. Russell's original brief.

The State's reliance upon *State v. Fire,* 145 Wn.2d 152, 34 P.3d 1218 (2001), disregards the fact that Juror 16 remained on the panel after Mr. Russell exercised all of his peremptory challenges, including a peremptory challenge of Juror 8.

The *Fire* case relied upon *State v. Roberts,* 142 Wn.2d 471, 14 P.3d 713 (2000). The *Fire* Court concluded at 162:

> "'So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.'" [citing *Roberts* (quoting *Ross v. Oklahoma,* 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed.2d 80 (1988))]. This court concluded by holding that "because Roberts has not demonstrated that jurors who should have been removed for cause actually sat on the panel, his rights were not violated." [*Roberts* at 518].

Juror 16 should have been removed for cause. No peremptory challenge was used because Mr. Russell had exhausted his peremptory challenges. Thus, the presence of Juror 16 adversely impacted his constitutional right to a fair and impartial jury.

D. INVITED ERROR/FAILURE TO PRESERVE

"Under the invited error doctrine, a party may not set up error at trial and then complain about the error on appeal." *State v. Korum,* 157 Wn.2d 614, 646, 141 P.3d 13 (2006).

The State repeatedly asserts that the invited error doctrine precludes a number of issues raised by Mr. Russell in his original brief. Again, the State is wrong.

Any issue involving a failure to object, whether it be an evidentiary issue or one of instructional error, may still be considered if it is of constitutional magnitude. *See: State v. Bland,* 128 Wn. App. 511, 515-16, 116 P.3d 428 (2005); RAP 2.5(a)(3).

Insofar as the issue of the manufacturer's certificate is concerned, it arises to an issue of constitutional magnitude as recognized in *Melendez-Diaz v. Massachusetts,* 557 U.S. ___, 129 S. Ct. 2527, ___ L. Ed.2d ___ (2009).

Mr. Russell also asserts that the *Melendez-Diaz* case applies to chain of custody issues.

Mr. Russell's assignments of error as to Instructions 14 and 20 allow him to proceed on the issue of instructional error. The State's claim that he does not make a proper assignment of error is without merit.

Mr. Russell otherwise relies upon the argument contained in his original brief.

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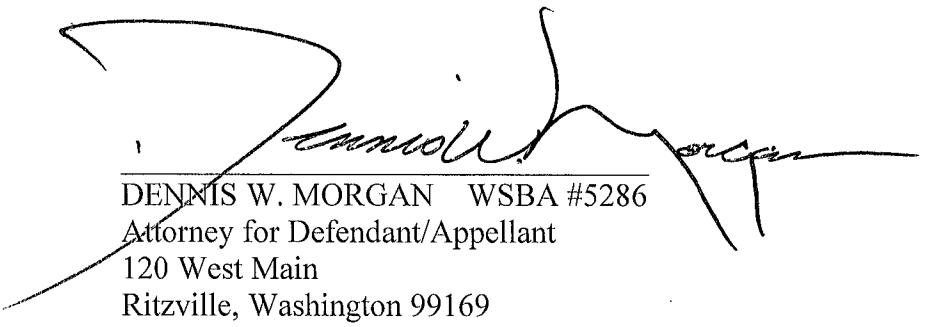
DATED this 1ST day of June, 2010.

Respectfully submitted,



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