

RECEIVED vsc
SUPREME COURT
STATE OF WASHINGTON
Jun 25, 2014, 2:35 pm
BY RONALD R. CARPENTER
CLERK

fb

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL

STATE OF WASHINGTON) No. 89881-2
Petitioner,)
vs.) RESPONDENTS'
JOSEPH T. McENROE and) STATEMENT OF ADDITIONAL
MICHELE ANDERSON,) AUTHORITIES
Respondents.) RAP 10.8
)
_____) Oral Argument June 26, 2014

1.

Respondents submit the following additional authorities in support of their argument:

"The Notice of Intention to Seek the Death Penalty is Not a Charging Document and Advising a Defendant What Sentence is Being Sought Does Not Allow a Defendant to Prepare a Defense," Amended Respondents' Brief, p. 26:

- a. RCW 10.37.015 Charge by Information or Indictment. (1) No person shall be held to answer in any court for an alleged crime or offense, unless upon an information filed by the prosecuting attorney, or upon an indictment by a grand jury, except in cases of misdemeanor or gross misdemeanor before a district or municipal judge, or before a court martial, ... (emphasis added)
- b. RCW 10.37.054 Information - Certainty. The indictment or information must be direct and certain as it regards: (1) The party charged; (2) The crime charged; and (3) The particular circumstances of the crime charged, when they are necessary to constitute a complete crime.

ORIGINAL

c. RCW 10.40.110 Demurrer to indictment or information. The defendant may demur to the indictment or information when it appears upon its face either –

(1) That it does not substantially conform to the requirements of this code;

(2) [That] more than one crime is charged;

(3) That the facts charged do not constitute a crime;

(4) That the indictment or information contains any matter which, if true, would constitute a defense or other legal bar to the action.

Emphasis added.

d. State v. Clark, 129 Wash.2d 805 (1996). "[T]he notice [of intention to seek the death penalty] simply informs the accused of the penalty that may be imposed upon conviction of the crime." Quoted and relied upon in State v. Yates, 161 Wash.2d 714, (2007). Emphasis added.

2. Respondents submit the following additional authorities in support of their arguments:

The Case Law of Other Jurisdictions Regarding Other Capital Sentencing Schemes is Not Relevant to the Application of *Alleyne* to RCW 10.95, Amended Respondents' Brief, p. 5, and,

Apprendi and Alleyne Both Instruct That to Tell Whether a Fact Is an Element of a Sentencing Factor You must Look at the Prescribed Sentence Range, Amended Respondents' Brief, p. 18.

a. Kolar v. State, 292 Ga.App. 623, 665 S.E.2d 719, Ga.App.,2008.

The question before us is whether the factors set forth in OCGA § 16–6–4(b)(2) are mitigating factors that decrease the felony punishment for the crime of child molestation to misdemeanor punishment, **or whether they are defining factors that describe the baseline crime of child molestation as a misdemeanor which can be increased to a felony only if the State shows that the factors are absent. If these are merely mitigating factors that decrease punishment, then there is no constitutional requirement that their presence or absence be found by the jury.** If they are defining factors that describe the baseline crime of

child molestation as a misdemeanor, then the State must prove their absence to a jury before seeking a felony conviction. [emphasis added]

b. State v. Hargrave, 225 ARIZ 1 (2010), the judge instructed the jury:

[T]he defendant had the opportunity to prove the existence of mitigating circumstances by a preponderance of the evidence. The burden of proving the existence of mitigation is on the defendant.

...

There was no error. The instructions given correctly state the law [of Arizona].

c. Idaho Homicide Statute 18-4004. Punishment for Murder. Subject to the provisions of sections 19-2515 and 19-2515A, Idaho Code, every person guilty of murder of the first degree shall be punished by death or by imprisonment for life

...

3. Respondents submit the following additional authorities in support of their arguments:

Under Washington Law Essential Elements of a Crime Must be Alleged in the Information, Amended Respondents' Brief, p. 19. and

Under Washington Law a Charging Document Must Allege Facts Supporting Each Element, Amended Respondents' Brief, p. 21.

a. State v. Goodman, 150 Wn2d 774 (2004)

A charging document is constitutionally sufficient under the Sixth Amendment to the United States Constitution and article I, section 22 of our constitution only if it includes all "essential elements" of the crime, regardless of whether they are statutory or nonstatutory.

...

Axiomatic in Washington law is the requirement that the charging document must "allege facts supporting every element of the offense" in order to be constitutionally sufficient. [citing] State v. Leach, 113 Wn2d 679 (1989).

...

Because the statutory maximum sentence increased depending on which controlled substance Goodman possessed, the identity of that controlled substance

was a “fact that increases the penalty for a crime beyond the prescribed statutory maximum ... Therefore, the prosecution was obligated to **allege and prove** the substance Goodman possessed was methamphetamine.

4. Respondents submit the following additional authorities in support of their argument:

State’s request for Reassignment of Trial Judge should be denied, Amended Respondents’ Brief, p. 29.

- a. State v. Kosewicz, 174 Wash.2d 683 (2012)

A defendant may bring a constitutional challenge to the information at any time before final judgment.

- b. Washington State Constitution, Article IV, Judiciary.

SECTION 28 OATH OF JUDGES. Every judge of the supreme court, and **every judge of a superior court shall**, before entering upon the duties of his office, **take and subscribe an oath that he will support the Constitution of the United States** and the Constitution of the State of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state. Emphasis added.

5. Respondents submit the following additional authorities in support of their argument:

Under Washington’s Death Penalty Statute the Sufficiency of Mitigating Circumstances is a Finding of Fact Which Must be Supported by Evidence, Amended Respondents’ Brief, p. 9.

- a. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 31.03 (3d Ed)
i. WPIC CHAPTER 31. Capital Cases—Death Penalty Instructions
ii. WPIC 31.03 Introductory Instruction (Capital Cases)

It is your duty to decide the facts in this case from the evidence produced in court. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. **You must apply the law from my instructions to the facts, and in this way decide the case.**

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses [, stipulations][, and the exhibits that I have admitted,][in the first phase of this trial and] during this special sentencing phase. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

...

As jurors, you are officers of the court. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict. You should bear in mind that your verdict must be based upon reason and not upon emotion. **You must reach your decision based on the facts proved to you and on the law given to you**, not on sympathy, prejudice, or personal preference. You may find mercy for the defendant to be a mitigating circumstance.

b. WPIC 1.02 Conclusion of Trial—Introductory Instruction [non-capital case]

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

...

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses [, stipulations][, and the exhibits that I have admitted,] during the trial.

Dated: June 25, 2014.

Respectfully submitted:

Kathryn Ross, WSBA 6894
Attorney for Respondent McEnroe
The Defender Association Division
King County Office of Public Defense
810 Third Avenue
Seattle, Washington 98104
(206) 447-3968

PROOF OF SERVICE

On June 25, 2014, I sent by electronic mail and by United States Postal Service, properly stamped and addressed, the above document, to counsel listed below:

James Whisman
Andrea Vitalich
Office of King County Prosecuting Attorney
W 554 King County Courthouse
516 3rd Avenue
Seattle, WA. 98104

Kathryn Ross
6/4/2014 at Seattle, Washington.

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, June 25, 2014 2:36 PM
To: 'Wdpac@aol.com'; Jim.Whisman@kingcounty.gov; bill.prestia@defender.org; Andrea.Vitalich@kingcounty.gov; Scott.Otoole@kingcounty.gov; David.Sorenson@kingcounty.gov; Colleen.O'Connor@kingcounty.gov; Lila@washapp.org; leo@defender.org; kerwriter@aol.com
Subject: RE: Respondents Additional Authorities - WSSC No. 89881-2

Rec'd 6-25-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Wdpac@aol.com [mailto:Wdpac@aol.com]
Sent: Wednesday, June 25, 2014 2:32 PM
To: OFFICE RECEPTIONIST, CLERK; Jim.Whisman@kingcounty.gov; bill.prestia@defender.org; Andrea.Vitalich@kingcounty.gov; Scott.Otoole@kingcounty.gov; David.Sorenson@kingcounty.gov; Colleen.O'Connor@kingcounty.gov; Lila@washapp.org; leo@defender.org; kerwriter@aol.com
Subject: Respondents Additional Authorities - WSSC No. 89881-2

Mr. Carpenter:

Attached please find Respondents' Statement of Additional Authorities. Oral argument is tomorrow, June 26.

Respectfully,

Katie Ross
Attorney for Respondent McEnroe
TDAD
810 Third Ave, Suite 800
Seattle, WA. 98104
(206) 447-3968
cell: (425) 232-6882
return of the documents.