

NO. 91220-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TAMMERA MICHELLE THURLBY,

Petitioner.

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STATE OF WASHINGTON  
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ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,  
DIVISION TWO

Court of Appeals No. 44774-6-II  
Cowlitz County No. 12-1-00966-7

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SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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A. SUPPLEMENTAL ARGUMENT

THE TRIAL COURT'S FAILURE TO EXPRESSLY CONSIDER THE PRESUMPTION AGAINST WAIVER OF THE RIGHT TO BE PRESENT AT TRIAL REQUIRES REMAND FOR A NEW TRIAL.

In its published opinion, the Court of Appeals held that a trial court need not expressly evaluate whether a defendant was voluntarily absent from trial in light of the presumption against waiver of constitutional rights. State v. Thurlby, 184 Wn. App. 918, 925-26, 339 P.3d 252 (2014). It rejected Division Three's holding to the contrary in State v. Cobarruvias, 179 Wn. App. 523, 318 P.3d 784 (2014).

A criminal defendant has a right to be present at trial, derived from the confrontation clause of the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments. State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994) (citing United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985)). The Washington constitution also guarantees a defendant the right to appear and defend in person. Wash. Const. art. 1, § 22 (amend. 10). A constitutional right may be waived only by a knowing and voluntary act of the defendant. Thomson, 123 Wn.2d at 880. Courts "must indulge every reasonable presumption against the loss of constitutional rights." Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L.Ed.2d 353 (1970).

This Court has established the procedure for determining whether a voluntary waiver of the right to be present at trial has occurred. The court must

- (1) [make] sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary,
- (2) [make] a preliminary finding of voluntariness (when justified), and
- (3) [afford] the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed.

Thomson, 123 Wn.2d at 881 (quoting State v. Washington, 34 Wn. App. 410, 414, 661 P.2d 605 (1983)).

In making this determination, the court must indulge every reasonable presumption against a waiver of the right to be present. State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003); Thomson, 123 Wn.2d at 881. The presumption against waiver applies to all three prongs of the test identified in Thompson. Even if the preliminary finding of voluntariness is reasonable and the court acts within its discretion in continuing the trial in the defendant's absence, if the defendant later appears and puts forth an explanation for his or her absence, the trial court must consider that explanation in light of the presumption against waiver. In fact, "[t]he presumption against waiver must be the overarching

principle throughout the inquiry. Otherwise, the right to be present is not safeguarded....” Garza, 150 Wn.2d at 368.

As this Court has recognized, the trial court cannot make a determination of voluntariness “without reference to the presumption against waiver.” Garza, 150 Wn.2d at 369. As Division Three recognized in Cobarruvias, the only way to adequately ensure that the right to be present at trial is safeguarded is to require the trial court to expressly consider the defendant’s explanation for not appearing at trial in light of the overarching presumption against waiver. 179 Wn. App. at 532; see also United States v. Watkins, 983 F.2d 1413, 1419 (7th Cir. 1993) (court’s determination whether to continue with trial in defendant’s absence must reflect a concern for the mandate of the Supreme Court that courts must indulge every presumption against waiver of constitutional rights).

In Cobarruvias, the defendant failed to appear on the final day of trial, and, after inquiry into the circumstances of his failure to appear, the court made a preliminary finding that the absence was voluntary. The defendant then provided an explanation for his absence prior to sentencing, moving for a new trial. The court denied the motion after careful consideration, concluding that the absence was voluntary. Division Three of the Court of Appeals reversed, finding “the trial court

erred in not expressly considering the defendant's showing in light of the 'overarching' presumption against waiver." Cobarruvias, 179 Wn. App. at 532. The court explained,

Here the court needed, but failed, to consider the presumption in its assessment. The presumption requires more than that the court simply listen to the defendant's explanation. It then must consider the absence question anew starting with the presumption against voluntary waiver.

Id. at 533. While the trial court considered the totality of the circumstances, the Court of Appeals could not determine whether it started that analysis with the presumption against voluntary waiver or with its original determination of voluntariness. Because it was unclear whether the trial court applied the appropriate test, it abused its discretion in denying the motion for a new trial. Id.

Here, as in Cobarruvias, the trial court failed to expressly consider Thurlby's explanation for her absence in light of the presumption against waiver of her right to be present at trial. In fact, the court started its analysis by noting that it made a preliminary finding of voluntary absence which was thoroughly documented in the record. RP 239. It then went on to discuss the evidence presented in explanation of Thurlby's absence without ever mentioning the presumption against waiver. RP 240-45.

Division Two held that the trial court need not expressly consider the defendant's explanation in light of the presumption against waiver of

the right to be present when ruling on a motion for new trial. Thurlby, 184 Wn. App. at 926. This holding is inconsistent with precedent from this Court applying the presumption against waiver of the right to be present at trial, and it fails to adequately safeguard that right. The Court of Appeals' decision should be reversed.

B. CONCLUSION

For the reasons addressed above, this Court should reverse the decision of the Court of Appeals and remand for a new trial.

DATED this 24<sup>th</sup> day of May, 2015.

Respectfully submitted,



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WSBA No. 20260  
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Supplemental Brief of  
Petitioner in *State v. Tammera Thurlby*, Cause No. 91220-3 to:

Tammera Thurlby, DOC#364978  
Washington Corrections Center for Women  
9601 Bujacich Rd. NW  
Gig Harbor, WA 98332-8300

I certify under penalty of perjury of the laws of the State of Washington  
that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Port Orchard, WA  
May 24, 2015

## OFFICE RECEPTIONIST, CLERK

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**To:** Glinski Law Firm PLLC; appeals@co.cowlitz.wa.us  
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Rec'd 5/26/2015

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The Supplemental Brief of Petitioner in the above case is attached for filing and service.

Catherine Glinski  
Attorney for Petitioner