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SUPREME COURT
STATE OF WASHINGTON
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No. 91220-3

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON** RECEIVED BY E-MAIL

STATE OF WASHINGTON,

Respondent,

v.

TAMMERA MICHELLE THURLBY,

Petitioner.

**SUPPLEMENTAL BRIEF OF
RESPONDENT**

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I. SUPPLEMENTAL ARGUMENT

Petitioner asks this court to depart from well-settled law and require trial courts to: 1) say aloud magic words upon the record, which in their utterance serve to somehow add additional protection to an otherwise protected right, and 2) having said those magic words, require the trial court to begin anew with answering the question about whether the Petitioner was voluntarily absent from their own jury trial. This request is made in spite of the well-settled three-part procedure established in *Thomson*, preserved in *Garza*, and followed by the trial court in this case. Petitioner's prayer would have this court vacate the conviction and the trial court's reasonable determination of voluntariness regarding the Petitioner's choice to attend to her mother rather than show up for the second day of her jury trial, a choice which left her absent from court proceedings for months until she was finally arrested on the outstanding bench warrant. The respondent, State of Washington, respectfully requests that this court deny the Petitioner's request and instead continue to follow this Court's established procedure for dealing with a defendant absent at trial.

The caselaw on this point is well-settled. This court adopted the three-part test initially laid out in *State v. Washington*, whereby a trial court must: (1) make an inquiry into the disappearance of the defendant to establish whether the absence of voluntary, (2) make a preliminary finding

of voluntariness, and then (3) give the defendant an adequate chance to explain his absence when they are returned to custody and sentenced. *State v. Thomson*, 123 Wn.2d 877, 881, 872 P.2d 1097 (1994), *citing State v. Washington*, 34 Wn.App. 410, 413, 661 P.2d 605, *remanded*, 100 Wn.2d 1016, 671 P.2d 230 (1983), *rev'd on other grounds on remand*, 36 Wn.App. 792, 677 P.2d 786, *review denied*, 101 Wn.2d 1015 (1984). Included in this three-part test is that the court presume against a waiver of the right to be present. *Id.*, *citing State v. Labelle*, 18 Wn.App. 380, 389, 568 P.2d 808 (1977). This is the procedure followed by the trial court and, as the Court of Appeals found in its examination, it complied with the mandate of this court in *Thomson*. *State v. Thurlby*, 184 Wn.App. 918, 925, 339 P.3d 252 (2014).

An invocation of magic words does not change the basic fact that the trial court indulged every presumption against waiver through all three stages of the three-part analysis. Initially, the trial court delayed the start of the trial to give the Petitioner time to arrive, or for the State to procure her presence. RP 104. The trial court even called the local hospital, the clerk's office, and the county jail to try and locate her. RP 110. Defense counsel even cites *Thomson* and the presumption against waiver in asking for a continuance into the afternoon. RP 112. That afternoon, the court noted it had tried the jail, the hospital and the clerk's office again and detectives were unable to locate the Petitioner by a physical search or through contact with the bail bondsman. RP 114. Defense counsel

reminded the trial court again of the presumption against waiver. RP 116. The court then examined the case file, looked at each of the previous appearances made by the Petitioner, and determined that she had been ordered to be present and was not, and ultimately made a preliminary finding that her absence was voluntary. RP 117-120. It is difficult to determine what the trial court could have done, other than utter the magic words “In light of the overarching presumption against a waiver...” that could have better preserved Petitioner’s right to appear at her own trial.

When Petitioner returned and was finally sentenced, months after absconding from her jury trial, the trial court listened to her allocution, addressed the “preliminary findings,” and then re-examined all of the circumstances point-by-point before ultimately concluding that the absence was voluntary. RP 239-241. The court framed the Petitioner’s predicament as a choice, noting that it was not “necessary” to be with her mother, although her desire to do so was “understandable.” RP 241-242. Again, it is unclear, aside from uttering the words, “in light of the overarching presumption against waiver,” that the trial court could have done in order to better safeguard the rights of the Petitioner.

The facts of the case show the trial court indulged every reasonable presumption against waiver, revisited the preliminary finding of voluntariness, and otherwise acted in every way to protect the right of the Petitioner to be present for her jury trial. This court need not extend

Thomson, which already adequately protects the right to be present and should affirm the conviction of the Petitioner.

II. REMEDY

Should this court conclude that the trial court erred by failing to explicitly state that the decision regarding the voluntariness of the absence of the petitioner was made in light of the overarching presumption against a waiver of the right to be present, the State's suggests that the appropriate remedy is not to vacate the conviction. Whether a defendant is voluntarily absent is decided based on an abuse of discretion standard. *Thomson*, 123 Wn.2d at 884, 872 P.2d 1097 (1994). The appropriate remedy would be to remand the case to the trial court for re-evaluation of the case in light of the newly articulated post-*Thomson* principles, which would govern all future cases.

III. CONCLUSION

The procedure for determining whether a defendant is voluntarily absent after the commencement of their jury trial is well-settled and this Court need not extend additional protection to adequately safeguard the right of defendants to be present at their trials. In this case, the trial court indulged every presumption against waiver and gave the Petitioner every opportunity to either appear for her jury trial, or to explain why her absence was involuntary. She offered no explanation, no reason why her absence was involuntary. The trial court considered each and everything

said by Petitioner, Petitioner's mother, and her defense counsel and still found, fully aware of the presumption against waiver, that the Petitioner had voluntarily waived her right to be present for the remainder of her jury trial. There are no facts in this case that suggest that Petitioner's right to be present was inadequately protected in any way and the State respectfully requests that this Court maintain the precedent established in *Thomson*.

Respectfully submitted this 6th day of August, 2015.

RYAN JURVAKAINEN
Prosecuting Attorney

By:



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Deputy Prosecuting Attorney
Representing Respondent

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CERTIFICATE OF SERVICE

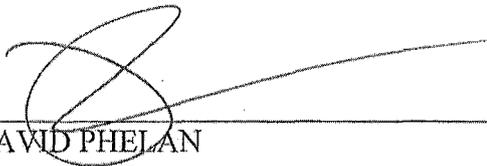
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DAVID PHELAN, certifies that opposing counsel was served by ~~mailing and~~
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE
OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 7, 2015.



DAVID PHELAN

OFFICE RECEPTIONIST, CLERK

To: Phelan, David L.
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Received August 7, 2015.

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Subject: 91220-3 - State v. Thurlby - Motion to allow filing of supplemental brief past deadline, Supplemental Brief, Affidavit of Service

Please find attached the State's supplemental reply brief, a motion to allow filing of the brief and an affidavit of service for said brief.

This is in regards to State of Washington v. Tammera Michelle Thurlby – 91220-3.

David Phelan
DPA – Cowlitz County Prosecuting Attorney's Office