

67341-6

67341-6

NO. 67341-6-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RODNEY SUMMERS

Appellant.

2012 JUN 12 PM 4:14  
COURT OF APPEALS  
DIVISION ONE  
WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

**1. The right to appear in a criminal case accords an accused person the right to physical presence, contrary to the prosecution's off-point reliance on civil procedure case law**

Article I, § 22 of the Washington Constitution ensures an accused person the right to “appear and defend in person, or by counsel.” The prosecution argues that, despite this language, a defendant does not have a right to appear in court and defend in person. It bases this assertion on an out-of-context remark in a civil divorce case, claiming that, at common law, “appearance” also meant “[a]ny action on the part of a defendant...which recognizes the case as in court.” Response Brief at 14 (citing Dlouhy v. Dlouhy, 55 Wn.2d 718, 349 P.2d 1073 (1960)).

The State urges this Court to adopt the Dlouhy court's distinct contextual use of the word “appear” on the ground that it was a usage “contemporaneous” with the adoption of the State constitution. But Dlouhy is not contemporaneous with the adoption of the Constitution -- it was decided in 1960, 70 years after the Washington Constitution was adopted. The other case the prosecution cites as support for this definition of “appear” was decided at a time even more removed from the Framers' drafting,

as it was written 110 years after the enactment of the constitution. Response Brief at 14 (citing In re Proceedings Before Special Inquiry Judge, 78 Wn.App. 13, 16, 899 P.2d 800 (1995)).

Second, the discussion in these two cases on which the prosecution relies is irrelevant to interpreting “appear” in article I, section 22 and do not support the State’s contention. In Dlouhy, a husband *physically* appeared at a hearing to contest a restraining order on the sale of property in a divorce case. The trial court did not treat that physical appearance as a general appearance and later issued substantive orders regarding the contested property without providing him notice. 55 Wn.2d at 720-21. The entire discussion of “appearance” was in the context of whether the husband’s act of physically appearing was sufficiently voluntary to constitute a general appearance and thereby triggered notice requirements that belong to a party. Dloughy is both inapposite as a legal precedent and it does not support the State’s position that physical presence is unimportant to whether a person has appeared in a case.

The Special Inquiry Judge case is further removed from the issue presented in the case at bar. It addressed whether an attorney representing a witness could file an affidavit of prejudice

based on that attorney's personal conflict with a judge. 78 Wn.App. at 15. The court reasoned that the attorney was not "appearing" in her personal capacity, and the witness who the attorney represented was not a party to the case, so neither the witness nor her attorney could file an affidavit of prejudice. Id. at 16. It was precisely because the witness was not a party to the case that she lacked the rights that would apply to an accused person. This case has no application to defining the rights of an accused person to appear in the course of a criminal trial.

The State cited one other case, McCoy v. Bell, 1 Wash. 504, 20 P. 595 (1889), that was contemporaneous with the State constitution, as it was decided the year of its adoption. Yet again, any discussion of "appearance" in this civil case is irrelevant and is misrepresented in the prosecution's brief. The prosecution implies that the statement it cites: "Physical presence was not even sufficient to constitute 'appearance,'" as if it described the common law definition of "appearance." McCoy was decided based on the statutory definition of "appearance" in Section 72 of the Justice Practice Act. 1 Wash. at 509-10. Indeed, shortly after citing the statute's definition requiring more than physical presence *before a justice of the peace*, a court of limited jurisdiction, the Court

reiterated how central the statutory definition was to its holding. Id. at 508 (“[T]he statute is imperative.”).<sup>1</sup>

The State suggests these discussions of “appearance” dictate how this Court should interpret article I, § 22. Far from being dispositive, the discussions are misleading and have no bearing on the relevant provision of our State constitution. The State’s creative reading offends the actual purpose of this provision: to ensure a defendant will have the right to appear in person. The State relies on irrelevant caselaw because it cannot escape the fact that Summers was denied this right.

The body of case law discussed in Appellant’s Opening Brief, pages 7-10, 21-28, accurately discusses and applies the right to “appear an defend in person” as it is applies to individuals accused of crimes. As our Supreme Court said and affirmed on several occasions,

It is the lawful right of a party to have his cause tried in open court, with opportunity to be present and heard in respect to everything transacted. It is his right to be present and attended by counsel whenever it is found necessary or desirable for the court to communicate with the jury . . . .

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<sup>1</sup> It is particularly odd the State cites a case interpreting an irrelevant statute from over a century ago to interpret the current State constitution while criticizing Summers for citing to the current, on-point rules of criminal procedure in support of his arguments. State’s Response, 8.

State v. Wroth, 15 Wash. 621, 623-24, 47 P. 106 (1896); State v. Beaudin, 76 Wash. 306, 309, 136 P. 137 (1913) affirming right to be physically present during trial, quoting Wroth); State v. Lloyd, 138 Wash. 8, 15, 244 P. 130 (1926) (affirming right to be physically present during trial, quoting Wroth); see also State v. Lee Doon, 7 Wash. 308, 310-11, 34 P. 1103 (1893) (affirming right to be present in courtroom “for any part of the trial”). Recent case law likewise cements the fundamental nature of the right to be personally present. State v. Garza, 150 Wn.2d 360, 367, 370, 77 P.3d 343 (2003) (“A defendant has a right, under the Washington and United States Constitutions, to be present at trial. This right is considered fundamental.”)

The prosecution’s failure to address this case law betrays the flimsiness of its efforts to claim Summers was not denied his right to be present.

**2. Conducting proceedings involving deliberating jurors when Summers was not physically present in the courtroom was not a “speculative” denial of his right to be physically present, but was rather a total denial of this constitutionally protected right for which prejudice is presumed.**

a. Summers was denied his right to be present

The State admits that the decision to exclude Summers from the entirety of the inquiry into and instructions about potential misconduct of deliberating jurors was not good practice, but faults the defendant for claiming “speculative” errors. Response Brief at 10.

According to the State, “the defendant cannot show that the alleged error had any actual effect on his rights. This is not a case in which the defendant was denied the ability to participate in a portion of the proceedings. Rather, he was connected to the courtroom by telephone...” Response Brief at 9. This statement evidences the State’s misunderstanding of the rights granted by the Washington constitution as well as its misrepresentation of Summers’s ability to understand and play any role in the courtroom proceedings.

A defendant is granted a right to be present “in person” to defend his claim under article I, section 22. The constitutional

mandate is not the right to “participate” in proceedings – it is presence. From this in-person presence many benefits flow to the accused person, including the ability to understand the proceedings, communicate with counsel, and ensure the proceedings are fair, but the right to be present is the right to a particular kind of procedure that is not subject to diminishment simply because the prosecution does not think in-person presence would affect the outcome. See e.g., Crawford v. Washington, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (“[the Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”); United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (Sixth Amendment right to counsel of choice “commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best.”).

Summers’s limited ability to hear and speak *to the courtroom* via telephone did not satisfy the right to appear and defend in person, or the right to due process of law. The State argues, “Since the defendant’s participation by telephone allowed him to

give advice or suggestions to his attorney, it satisfied due process....” Response, 11. But the State admits that Summers could not, in fact, give advice or suggestions *to his attorney* during the hearing. Response Brief at 6 (“the call was not confidential”). A corrections officer was standing with Summers from his position in the jail and he was listening on speaker phone. The only time the defendant could have conferred with his attorney was after the proceedings ceased and required a separate phone call. *Id.* When Summers was offered the chance to speak to his lawyer privately during a break, his attorney if his lawyer left the room and used a different telephone. 5/20/11RP 14. The situation was, therefore, fundamentally dissimilar to a defendant’s live participation during the course of a proceeding as events unfold before him with his attorney at his side.

The right to be present is fundamental in part because it is connected to the presumption of innocence. An indigent criminal defendant has the same right to the “unqualified presumption of innocent as one who can post bail.” State v. Gonzalez, 129 Wn.App. 895, 897, 120 P.3d 645 (2005). The accused person is entitled to the “physical indicia of innocence,” which include the right to be “brought before the court with the appearance, dignity,

and self-respect of a free and innocent man.” State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). There is substantial danger that the presumption of innocence will be destroyed when the accused person does not appear in court under means similar to that available to a free man. State v. Jaime, 168 Wn.2d 857, 862, 233 P.3d 554 (2010). Summers was held in jail during the proceedings, and not brought into court as a free person would be, thus indicating to the jury that Summers was no longer presumed innocent.

The prosecution’s analysis of the federal due process right is curiously stunted. For example, in the seminal case of Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975), the Supreme Court sua sponte reversed a conviction after it learned that the judge had communicated with the deliberating jury. The Court had taken review of the case to decide a different issue and this jury communication came to light only in the course of Supreme Court review. Id. at 36. Notwithstanding the lack of preservation of the issue, either at trial or on appeal, the Rogers Court held that the trial court’s brief conversation indicating it would accept the jury’s verdict was “so fraught with potential prejudice as

to require us to notice them notwithstanding petitioner's failure to raise the issue in the Court of Appeals or in this Court." Id. at 41.

The Rogers Court was enforcing the right to the orderly administration of justice, whereas the right to "appear and defend in person" under article I, section 22 requires the trial court to include the defendant in person when his rights may be substantially affected. State v. Irby, 170 Wn.2d 874, 883, 246 P.3d 796 (2011). When confronted with a juror who conducted independent legal research based on the jurors' debates of the meaning of critical legal terms, the question before the court rested on the credibility of the jurors. It needed to assess whether they were truthfully attesting that they were unaffected by outside legal research. Summers had no ability to evaluate their credibility or impress upon them the importance of honesty when he was not brought into the courtroom during these proceedings.

- b. The violation of Summers's right to be present during inquiry into the presumptively prejudicial misconduct of a deliberating juror constitutes as error for which reversal is required.

When a juror engages in some misconduct, such as consulting other sources for legal definitions, that misconduct is presumed prejudicial. United States v. Lawson, 677 F.3d 629, 643

(4<sup>th</sup> Cir. 2012) (collecting authorities). In *Lawson*, the court addressed whether to apply the presumption of prejudice that attaches when a juror has improper contact with an external source to a juror's consultation of an internet dictionary for further meaning about a term relevant to the case. *Id.* at 645-46. The court concluded that both consulting a dictionary and receiving information from a third-party raise the same cause for concern:

In both instances, a defendant's Sixth Amendment right to a fair trial is at issue, and the sanctity of the jury and its deliberations have been threatened. In both instances, an extrinsic influence has been injected into the trial, the content of which is beyond the trial court's ability to control. And, in both instances, the procedural and substantive protections that the law affords to the judicial process are limited.

*Id.* at 646.

The prosecution's claim that the juror's impropriety was so minimal as to carry no potential for prejudice is fundamentally mistaken. It overlooks the presumption of prejudice that should have attached. It ignores the role Summers could have played by his presence in both impressing upon the juror the importance to be candid when explaining the extra-record research he conducted and in ascertaining whether this juror and the remainder of the

jurors deliberating in the case could have been tainted by the information received.

To suggest these harms are speculative ignores long held jurisprudence establishing that physical presence is paramount to determining questions of credibility. See State v. Foster, 135 Wn.2d 441, 464, 957 P.2d 712, 724 (1998) (“[L]ive testimony, under oath, subject to cross examination, and under the watchful eyes of the jury maximizes the accuracy of the truth-seeking process in criminal trials.”).

By inexplicably and indefensibly conducting substantive hearings and re-instructing the jury without affording Summers his right to be present in person violated his rights under the due process clause of the Sixth and Fourteenth Amendments and article I, section 22 of the Washington Constitution. This error is presumed prejudicial and the necessary remedy is to order a new trial.

### **3. The sentencing errors must be stricken from the judgment**

The prosecution implicitly concedes that the \$100 penalty ordered under the domestic violence penalty statute, RCW 10.99.080, does not apply to Summers because the statute was not

in effect at the time of his conviction and therefore cannot be imposed under the authority of the statute cited in the judgment and sentence. Response Brief at 16; see Opening Brief at 30-21. Yet the prosecution urges this Court to treat the penalty as if the court intended to impose a fine on Summers. The judgment and sentence precludes this attempt to re-write the court's sentencing intent.

The judgment and sentence form contains a place in which the court may impose a fine under the authority of RCW 9A.20.021, which allows a judge to order a fine as part of the penalty in the case. CP 17. The court did not impose any fine under RCW 9A.20.021. Id.

The court ordered what it thought was a mandatory fine, under RCW 10.99.080. CP 17. RCW 10.99.080 does not apply to Summers' convictions because it did not exist at the time of the crimes of conviction. Laws 2004, ch.15. This penalty must be stricken because it was imposed without statutory authority.

Finally, the judgment and sentence mandates that Summers participate in highly invasive testing that may only be ordered if part and parcel of treatment, as requested by a treatment provider. The prosecution concedes the sentencing order does not limit the court-

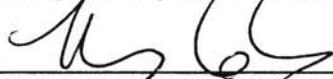
ordered obligation to treatment conditions. These conditions are improperly ordered and should be revised on remand.

B. CONCLUSION.

For the above-stated reasons and as set forth in Mr. Summer's Opening Brief, his constitutionally protected right to be present in court to defend himself in the proceedings against him was violated and his conviction must be reversed, and alternatively, the sentencing errors must be corrected.

DATED this 12<sup>th</sup> day of June 2012.

Respectfully submitted,



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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 ) NO. 67341-6-I  
 )  
 RODNEY SUMMERS, )  
 )  
 Appellant. )

2012 JUN 12 4:11 PM  
CLERK OF SUPERIOR COURT  
STATE OF WASHINGTON

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12<sup>TH</sup> DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |                                                                                                             |                                                 |
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| [X] | RODNEY SUMMERS<br>349585<br>CLALLAM BAY CORRECTIONS CENTER<br>1830 EAGLE CREST WAY<br>CLALLAM BAY, WA 98326 | (X) U.S. MAIL<br>( ) HAND DELIVERY<br>( ) _____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 12<sup>TH</sup> DAY OF JUNE, 2012.

X \_\_\_\_\_ 

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