

No. 68558-9-1

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

STATE OF WASHINGTON,
Respondent,
v.
MICHAEL RICH,
Appellant.

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

REPLY BRIEF OF APPELLANT

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A. REPLY ARGUMENT¹

1. Faretta *pro se* waiver – written form - 60 months incorrect.

The trial court failed to find a knowing, voluntary and intelligent waiver when granting Mr. Rich's motion to proceed pro se, where the court's written order affirmatively misadvised Mr. Rich as to the charges and stated the incorrect penalty faced.

The written Faretta waiver-of-counsel form that Mr. Rich and the trial court signed on August 24, 2011, stated Mr. Rich risked 60 months if he was convicted after choosing to represent himself; in fact he risked a maximum possible penalty of 72 months and a day. Respondent now argues that these facts should be disregarded by this Court for purposes of determining if Mr. Rich was properly advised, and had knowledge of the correct maximum penalty risked at trial, on that date. The critical time at which that knowledge must exist is August 24, 2011 – the date he waived counsel. BOR at pp. 3-11.

¹ Mr. Rich additionally relies on the arguments in his Appellant's Opening Brief for each issue to which error was assigned. Correction of a citation is required with regard to the issue of the scoring of Mr. Rich's juvenile offenses (Assignment of Error 8; AOB at pp. 42-43), in response to Respondent's notation at SRB p. 34, the correct Clerk's Papers citation to the Judgment and Sentence documents including the scoring of the convictions is CP 14-52, CP 153-204, and CP 153-204.

Respondent first asks this Court to rely on the charging document. That information listed the penalties for the offenses charged, but failed to indicate that the penalties would run consecutively. Respondent asks this Court to rely on prior-in-time hearings in which the charges were discussed but the maximum penalty for neither (much less the consecutive running) were ever stated. Finally, Respondent similarly asks this Court to rely on an “advice of rights” form which the defendant signed in December of 2010, which stated the charges and their classification, but did not state the penalties

The relevant knowledge is the knowledge at the time of the Faretta waiver, and nothing in Bellevue v. Acrey permits the reviewing court to search elsewhere in the record in order to correct an affirmative misadvisement given at the time of the *pro se* waiver, and Respondent does not cite authority that does so.

Even if Washington law permitted the State to refer back to advisements in the past and use those to satisfy and affirm the “knowledge” requirement by some theory of constructive knowledge rendering the incorrect advisement on the relevant date a nullity, the State’s statements of facts of the arraignment hearing, and

other events occurring many months prior to the August 2011 Faretta waiver hearing, are misleading.

At arraignment the previous year (December 22, 2010), after his then counsel had told the court she had reviewed what the “advice of rights” form stated about Mr. Rich’s charges and rights, Mr. Rich had said no when the court asked him if he had any questions about his “rights.” 12/2/11RP at 2. The advice of rights form lists the charges and their general classification, but states nothing, implicitly or explicitly, about the maximum penalty for each offense, much less the total incarceration faced. CP 276-77.

The charging information (filed a month earlier, on November 23, 2010) had listed the two charges and the penalties for each. But pursuant to the SRA, Mr. Rich’s maximum penalty would result from the *consecutive* running of the charges under RCW 9.92.080. The information, although it contains careful small-font listings of the incarceration and community custody period after each charge, was filed almost a year before Mr. Rich waived counsel, does not state the maximum penalty upon conviction if he was convicted for both charges, and does not establish that Mr. Rich knew the correct maximum penalty he faced at trial if he waived counsel on August 24, 2011.

At that Faretta hearing in August 2011, contrary to the Respondent State's description of it, Mr. Rich never "appeared well aware of his rights" prior to signing the written, waiver underneath its affirmatively erroneous statement of the charges and the maximum penalty. See BOR at 4.

Finally, the Respondent also relies on a February, 2012 hearing (after the Faretta waiver) at which Mr. Rich was told by the court that his language risked contempt, BOR at 9-10; 2/27/12RP at 8-9, and Mr. Rich replied by saying that people often are given 60 months in prison, and that he had paid many fines. 2/27/12RP at 8.

Mr. Rich appeared here to be suggesting that contempt before a judge is warranted if a person is facing a prison sentence. The remark does not support the State's theory that Mr. Rich's knowledge of the penalty at the time of his Faretta waiver is not demonstrated by the fact that he signed the waiver in express written reliance on its advisement that his maximum sentence was 60-month, but instead that knowledge is shown by this event, in the future, which also does not show knowledge of 72 months. Bellevue v. Acrey makes clear that the defendant must have knowledge at the time of the waiver via a colloquy advising of the maximum penalty. Bellevue v. Acrey, 103 Wn.2d 203, 210-11, 691

P.2d 957 (1984). Information about what the defendant was told or knew after the date he waived counsel is irrelevant to the question of knowledge on the relevant date unless the defendant expressly describes his knowledge at that prior time. United States v. Erskine, 355 F.3d 1161, 1169-71 and n. 11 (9th Cir.2004). The State's legal theory is not accepted. As noted, its factual claim of the events of that later hearing also fails, in any event. The evidence of Mr. Rich's knowledge being the written plea form signed at the relevant time (August 24, 2011), none of these or any other circumstances proffered by Respondent show the defendant somehow knew differently on that date of waiver that his maximum penalty, if convicted after choosing to represent himself, was actually 72 months and a day, contrary to the written form that both he and the judge signed.

Absent correct advisement of the maximum penalty at any time ever, and absent any showing, in any event, of that knowledge on the relevant date of counsel waiver, Respondent is effectively asking this Court to rely on its claim of Mr. Rich's admittedly significant previous criminal record, as a basis to affirm the Faretta waiver. Respondent asks this Court to conclude that the defendant knew his charges based on advisements prior in time (the written

waiver of counsel misstated them, listing only 1 count), and then to also conclude that he thus could and did smartly adduce or deduce his correct maximum consecutive number of months on his own, and that he made this calculation and had it in his mind consciously on August 24, 2011, even though he put *pen to paper* on that date signing a written form that stated the wrong set of charges and the wrong maximum penalty risked. But the Acrey Court said that in no case will “mere evidence” of a defendant’s

educational level, common sense, or prior experience with the criminal justice system be sufficient to show an awareness of these risks.

Bellevue v. Acrey, 103 Wn.2d at 211.

The Respondent’s cited case of Sinclair is also inapposite. It involves a defendant, faced with a single felony count, filed a successful written motion to represent himself below, and then argued on appeal that he had been coerced to either represent himself or remain with an inadequate lawyer, rendering his waiver equivocal. BOR at pp. 6-7; State v. Sinclair, 46 Wn. App. 433, 730 P.2d. 742, review denied, 108 Wn.2d 1006 (1987). The Court of Appeals affirmed because it determined that Sinclair did have knowledge of the maximum penalty at the time of the waiver, based on the “record that Sinclair was made aware of the ‘nature and

classification of the charge' against him." Sinclair, at 436-39 (citing Acrey, at 211). Mr. Sinclair had also been convicted of the same burglary felony charged, three individual times. Sinclair, at 438-39.

Of course, the Sinclair case, unlike Mr. Rich's, did not involve affirmative misadvisement of the maximum penalty at the time of the waiver; rather it involved no colloquy at all. Therefore, Sinclair's earlier knowledge of his penalty risked, based on previous advisement, could also apparently be considered to be the understanding he possessed at the later Faretta hearing. Sinclair, 46 Wn. App. at 46-40. The Sinclair Court was careful to add the caveat that its review of the record did show advisement throughout the proceedings, and emphasized that it was not hinging its knowledge ruling based solely on mere "prior experience with the criminal justice system," but only using that as experience as some evidence going to that fact. Sinclair, at 438 n. 1. The Respondent does not cite the Sinclair Court's caveat, or note that the case does not involve affirmative misadvisement, but indeed suggests that the existing law allows prior advisements to trump affirmative written misinformation at the hearing. BOR at 7-8 (arguing: "A defendant's waiver of the right to counsel is valid even if the trial court fails to

accurately advise the defendant”) (Emphasis added). There is no authority for any of this, including in Bellevue v. Acrey.

The defendant was affirmatively misadvised in writing, at the waiver hearing, with the wrong maximum sentence, and this was never corrected by a trial oral colloquy at the time. The record indicates that the conduct of the Faretta hearing by use of a written form was essentially instigated at the State’s behest, and subsequently, both counsel played a part in the creation of a written record that affirmatively shows that the defendant (1) had incorrect knowledge of the maximum penalty, and (2) he expressly stated his reliance on that knowledge, in waiving counsel. This procedure and these circumstances unfortunately resulted in supplanting the thorough, searching colloquy the Bellevue v. Acrey Court states must be conducted, including a simple correct statement of the maximum penalty risked. Reversal is required.²

² The Respondent cites no authority for its proposal that this Court need not reverse Mr. Rich’s felony DUI conviction under the theory that Rich was told he faced 60 months, and therefore the misadvisement was erroneous only ‘as to’ the misdemeanor charge. BOR, at pp. 10-1. This description of the facts even if accurate does not render knowing or voluntary the defendant’s affirmatively misadvised waiver and decision to represent himself at the unitary trial.

2. Alternative means – no evidence of “drug” impairment – no basis to ignore State v. Martin.

The defendant’s conviction for Felony DUI be reversed where the prosecutor in closing argued that the jury could convict for both drug and alcohol impaired driving, but there was not substantial evidence of the “drug” statutory alternative.

Initially, the Respondent’s response on this issue is to halfheartedly argue that there was indeed substantial evidence that Mr. Rich’s driving was impaired by *drugs* on the night in question, thus, Respondent argues, both alternatives of DUI were proved. This is despite the fact that Deputy Bearden testified that he detected, arrested, and tested for *alcohol* impairment.

The Respondent’s brief is misleading where it states that Deputy Bearden “is trained to detect [the] odor of marijuana,” because this is a phrase commonly associated with a police officer smelling marijuana smoke as evidence of current ongoing, or recent, marijuana smoking. See BOR, at p. 16; see. e.g., State v. Grande, 164 Wn.2d 135, 144, 187 P.3d 248 (2008) (discussing issue of probable cause to arrest occupants a car for possession “when a trained officer detects the odor of a controlled substance” emanating from a vehicle). In fact, Deputy Bearden merely testified that, when smelled, the pipe he located “smelled of burnt marijuana

in the bowl.” 2/28/12RP at 92. Deputy Bearden noted that the pipe was never tested, and he never stated he saw signs of anything in Mr. Rich other than alcohol use, or signs of alcohol impairment. 2/28/12RP at 111.

Respondent contends that Deputy Bearden, during his trial testimony, testified that he had “indicated in his report” that his opinion was that Mr. Rich was obviously impaired by “alcohol and drugs.” BOR, at p. 16. This is a misdescription of the record. The prosecutor and the deputy were referring to Deputy Bearden’s BAC testing form (referred to as “[p]age 32 of discovery”), which he filled out following the testing protocol for alcohol in the BAC room, which testing Mr. Rich refused. 2/28/12RP at 152-53, see 2/28/12RP at 97-99. The BAC testing that was offered to Mr. Rich was attempted in order to determine “alcohol concentration.” (Emphasis added.) 2/28/12RP at 98-99. At trial, Deputy Bearden merely noted that, after this procedure, he had filled out the required BAC form in the testing room, checked off that BAC testing was refused. At item number 8 of the form, entitled “Officer’s opinion of subject’s impairment due to use of alcohol and drugs,” the deputy had checked the box next to “obvious,” which he affirmed was the accurate assessment. 2/28/12RP at 152-53 (the other options

were “slight” and “extreme”). This was not evidence of drug impaired driving. AOB, at pp. 17-23; Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); U.S. Const. amend. 14. The Kitchen alternative means doctrine therefore requires reversal of the DUI conviction. State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

Primarily, the Respondent focuses its argument on the contention that substantial evidence is not required on any drug impairment statutory alternative, because the crime of DUI generally proscribes simply the “continuing” wrongful act of impairing one’s “driving abilities” by being “affected.” BOR at 13.

The Respondent, however, acknowledges State v. Martin, which held that the DUI prongs are alternative means. BOR, at p. 12. When the Respondent argues that DUI is simply a single crime of “affected” driving, such argument implicitly asks this Court to proceed under an assumption that Martin was erroneous, or perhaps that the Court should ignore the case. See BOR, at pp. 13-15. But the Respondent provides no argument directed at the Martin Court’s application of the analyses for determining whether a

statute establishes alternative means, or shows how that case was wrong. State v. Martin, 69 Wn. App. 686, 849 P.2d 1289 (1993).

Next, the Respondent references Petrich caselaw which holds that when a person engages in a “continuing course” of conduct, that is a single act or incident to which the Petrich rules for unanimity in multiple acts cases do not apply. BOR at 13-14; see State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). This appears to build on the Respondent’s prior argument that the defendant was affected, and that “common sense” dictates that it doesn’t matter what he was affected by. BOR, at p. 13. But the cited Petrich cases have nothing to do with the *alternative means* doctrine at issue in this assignment of error. There is no “continuing course” exception to the Kitchen alternative means rule, either legally, or logically.

Finally, the Respondent hints at the further suggestion that this Court could affirm the DUI conviction even in the absence of substantial evidence of drug impairment, under the theory that it can assume that the jury deliberated to verdict relying only on the alcohol prong. This is contrary to the record - the prosecutor in this case expressly argued for conviction based not only on impairment by alcohol, but also by drugs. The State had proffered both

alternative theories for guilt in the jury instructions, and then in closing contended albeit briefly that the pipe proved guilt on that prong. AOB, at pp. 17-20. There might theoretically be certain language a prosecutor could use in closing argument that could orally take one statutory alternative “off the table” by means of closing argument alone, and thereby effectively insulate against Kitchen reversal, but that is not Mr. Rich’s case, and indeed far from it. State v. Witherspoon, ___ Wn. App. ___, 286 P.3d 996, 1003 (October 16, 2012) (prosecutor’s confusing attempt to make clear in closing that only one of the means in the instructions was the prosecution theory did not satisfy this strictly applied exception to alternative means rule of reversal). The “substantial evidence” test fully applies, and reversal of Mr. Rich’s Felony DUI conviction is required.

3. Lack of proof of 4 prior DUI convictions – no local ordinances.

The State failed to establish four “prior offenses” per RCW 46.61.5055(14) to the court, or prove the same to the jury, where there was no evidence that four convictions satisfied the statutory definition, absent evidence of an equivalent local ordinance.

The court as a threshold matter and the jury pursuant to the express instructions and the law of the case were required to find 4

prior qualifying offenses for purposes of felony-level DUI. However, neither the court or the jury had before it *any* proof of an “equivalent local ordinance” which would show that the “DWI” judgments in Exhibits 7 and arguably 8, which are identified as such contrary to the Respondent’s contention, qualified as prior offenses under the state law of RCW 46.61.5055(14). For purposes of the court’s threshold ruling, and admission of the judgments, Mr. Rich objected repeatedly to these documents, and therefore the Respondent’s cited case of State v. Cochrane, 160 Wn. App. 18, 253 P.3d 95 (2011), does not apply. AOB, at p. 25.

7. The jury was required to agree on 4 prior DUI convictions, but since 5 were submitted as evidence, a Petrich instruction was required.

*Mr. Rich’s right to jury unanimity on the facts under Petrich was violated where the State offered multiple acts (five prior convictions) to prove the element of four prior DUI or Reckless Driving offenses, where there was no unanimity instruction, the prosecutor did not elect which four convictions the jury should base its verdict on, and the evidence as to one or more of the prior offenses was “**controverted**” – both regarding **equivalency** of the convictions, and regarding **identity** of the convictions as Mr. Rich’s.*

Respondent argues that Petrich does not apply where the State is trying to prove one event – ‘DUI elevated to a felony’ – and there is more than one set of facts that could constitute that crime.

BOR at 25. This is simply not the holding of, nor is it a caveat or exception to, the Petrich case and the rule established thereby.

Respondent mentions the “continuing course” exception to Petrich, but that also does not apply here – the multiple (five) sets of paper documents submitted to prove the “four priors” element of felony DUI do not constitute a continuing course of conduct, in any sense of the term.

The Simonson case cited by Respondent states that guilt as an accomplice and guilt as the principal are not alternative “means,” or multiple “acts” under Petrich, none of which has anything to do with the present case. State v. Simonson, 91 Wn. App. 874, 884, 960 P.2d 955 (1998). In fact, the Simonson decision notes the Kitchen rule in its entirety, which Respondent does not – that rule being: the jury need not be unanimous as to which statutory alternative was proved, “assum[ing] that each alternative means is supported by sufficient evidence.” (Emphasis added.) Simonson, at 884.

Finally, there is no case stating that the Petrich rule applies only to instances where there is evidence of multiple acts to establish the *actus reus*. BOR, at pp. 27-28. The cited case of State v. Norby, cited by Respondent, did not so state; rather, the

Norby Court held that the Seattle Municipal Code ordinance of driving under the influence contained three alternative means, and the decision followed the rule that no unanimity instruction is required in such instances, assuming sufficient evidence. City of Seattle v. Norby, 88 Wn. App. 545, 563-64, 945 P.2d 269 (1997).

Petrich applies --- if half of Mr. Rich's jurors believed that conviction documents 1, 2, 3 and **4** met the State's burden of proof of 4 qualifying offenses, but the other half of Mr. Rich's jurors believed that conviction documents 1, 2, 3, and **5** were the documents that satisfied those proof requirements, the verdict of guilty does not represent an agreement of all 12 jurors on proof of the facts establishing every element of the crime. The verdict, in the absence of an election in closing or a written unanimity instruction, bears inadequate assurances of unanimity, and constitutional error occurred.

This Petrich error results in a constitutional harmless error burden on the Respondent. Our courts follow the rule that affirmance in the face of a Petrich error is proper only if each, every and all of the facts (documents, or testimony regarding discrete "acts," etc.) were so *overwhelmingly* proved beyond a reasonable doubt at trial -- including by the complete *absence* of any

controverting evidence), that it really doesn't matter in the end which 4 of the 5 a particular juror picked versus another.

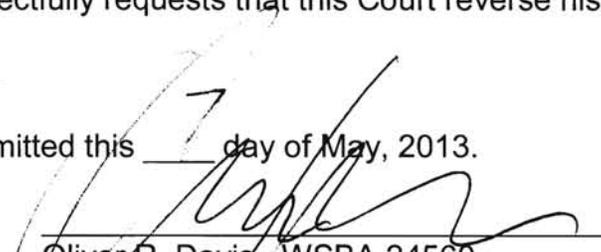
The evidence in this case was not overwhelming, and was controverted, as thoroughly argued in the Opening Brief. First, the judgment documents in Exhibit 7 fail in several ways to constitute proof of a "qualifying" offense, including but not limited to the reason that it does indeed on the face of the Exhibit reflect a conviction for "DWI," which is expressly not "DUI" as required by the offense element. Mr. Rich contends that these are fatalities which render that Exhibit insufficient as a matter of law – but at a minimum, there is certainly not "overwhelming" evidence that Exhibit 7 reflects a qualifying crime. Respondent has not addressed these problems with Exhibit 7 in any substance.

Second, Mr. Rich additionally controverted the State's claim that these documents proved he had 4 prior qualifying offenses. Mr. Rich (objecting repeatedly, contrary to the State's later argument herein) also denied that they showed they belonged to him, rendering the trial evidence of identity "controverted." The evidence of Felony DUI was controverted, and reversal is required under the constitutional reversible error test of Petrich.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Michael Rich respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this _____ day of May, 2013.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68558-9-I
v.)	
)	
MICHAEL RICH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF MAY, 2013, 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:

<input checked="" type="checkbox"/> ERIK PEDERSEN, DPA SKAGIT COUNTY PROSECUTOR'S OFFICE COURTHOUSE ANNEX 605 S THIRD ST. MOUNT VERNON, WA 98273	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF MAY, 2013.

X _____ 

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