

WASHINGTON STATE COURT OF APPEALS DIVISION THREE

CASE SUMMARIES FOR ORAL ARGUMENT

The following summaries are drawn from briefs and lower court judgments. The summaries have not been reviewed for accuracy by the judges and are intended to provide a general idea of facts and issues presented in the cases. The summaries should not be considered official court documents. Facts and issues presented in these summaries should be checked for accuracy against records and briefs, available from the Court, which provide more specific information.

Date of Hearing: Thursday, December 6, 2018

Location: Spokane, WA – 500 North Cedar

Panel: Robert Lawrence-Berrey, Kevin Korsmo, George Fearing

9:00 a.m.

1) **No.: 356531**

Case Name: In re the Guardianship of Anna May Black

County: Grant

Case Summary: In May 2013, Anna May Black and her husband Jack Black executed the Second Amendment and Restated Living Trust of Jack P. Black and Anna May Black (Trust). The Blacks placed nearly all of their assets into the trust, which appointed both of the Blacks as initial co-trustees. Prior to his death, Jack executed a Last Will and Testament leaving \$250,000 to the Black's daughter, Deborah, and directed Deborah to place Anna May, who had developed vascular dementia, in a specific care home. Following Jack's death in December 2013, Anna May was declared incompetent to manage the trust, leaving Deborah and the Blacks' son John as co-trustees. However, John was disqualified from serving as trustee. John objected to Deborah's petition to probate Jack's will and filed a motion to remove Deborah as co-trustee. During this time, John met with the law firm of Randall Danskin, which represented Anna May Black in the spring of 2014, to discuss the removal of Deborah as trustee.

In May 2015, the Grant County Superior Court appointed Lori Sorenson as the guardian of Anna May. The court specifically declined to also appoint Ms. Sorenson as the guardian of the estate. Following her appointment, Ms. Sorenson communicated with John regarding trust issues and met with attorneys to review trust documents. John subsequently initiated actions to stop the \$250,000 bequest from Jack to Deborah, demand an accounting from the co-trustees, and remove Deborah as co-trustee. Ms. Sorenson participated in the various litigation and hired Randall Danskin to assist her. The superior court ordered the various disputes to undergo mediation, denied Ms. Sorenson's motion to modify the guardianship so that she could act as guardian for the estate, and appointed a guardian ad litem to represent Anna May in the pending litigation.

Following mediation, Ms. Sorenson requested payment from the Trust of the Randall Danskin attorney fees she incurred, totaling approximately \$84,302.74. The court denied the request, finding that Randall Danskin's client was Anna May, rather than Ms. Sorenson, and that Ms. Sorenson acted outside the scope of her guardianship powers and lacked authority to incur the fees at issue on behalf of Anna May. Ms. Sorenson appeals, contending the trial court erred by: (i) finding that RCW 11.88.045(2) requires a guardian to obtain court approval of legal representation prior to the attorney providing legal services to the guardian; (2) finding that RCW 11.88.045(2) requires a guardian to obtain court approval of legal representation prior to awarding attorney fees for legal services provided to the guardian; and (3) finding that the due process rights of the trustee and the beneficiaries of the trust were violated by the guardian failing to give them notice before hiring attorneys to represent her in litigation when the guardian later sought payment of the fees from the trust.

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2) No.: 346706

Case Name: State of Washington v. Josephine Ellen Johnson

County: Grant

Case Summary: Josephine Johnson shot her husband in the abdomen on December 23, 2014. The day after the incident, she gave an interview to the police during which she indicated that she was attempting to leave the house but was afraid of her husband's abuse, and she only intended to point the gun at him so that he would let her leave, but he made a grab for the gun and it went off. Initially, Ms. Johnson's counsel intended to put forth defenses of self-defense and diminished capacity. However, as the case progressed, Ms. Johnson pursued a defense of accident. At trial, Ms. Johnson

testified that she was trying to hide the gun from her husband when he found her, he made a grab for the weapon, and it went off. The trial court excluded defense evidence supporting self-defense and diminished capacity, and refused to submit a self-defense instruction to the jury. Ms. Johnson was convicted of one count of assault in the first degree with a domestic violence special finding and a firearm enhancement. She appeals, arguing that the trial court erred by (1) denying the self-defense instruction, (2) refusing to admit evidence supporting self-defense and diminished capacity defenses, and (3) coercing the jury to enter verdicts on the special allegations.

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3) No.: 353168

Case Name: State of Washington v. Bryan Jack Ross Crow

County: Yakima

Case Summary: In June 2015, Officer Chris Taylor of the Yakima Police Department arrested Bryan Crow after witnessing him exit a parked vehicle. Officer Taylor, who recognized Mr. Crow from their many contacts while Officer Taylor worked in the gang unit and Mr. Crow's distinctive horn tattoos on his head, knew there was an outstanding warrant for Mr. Crow's arrest. Mr. Crow attempted to run, and was eventually arrested following a pursuit on foot. The State charged Mr. Crow with first degree unlawful possession of a firearm and possession of a stolen firearm.

During trial, two police officers testified about the various ways a person could illegally obtain a firearm and how someone might know if a gun was stolen or not. The jury convicted Mr. Crow as charged, and the court imposed a seventy-seven month sentence based on Mr. Crow's offender score of 4. Mr. Crow appeals, contending that the State violated his Sixth and Fourteenth Amendment rights to jury trial by presenting improper "profile" testimony from the police officers and that such error constitutes manifest constitutional error. He argues in the alternative that his trial counsel was ineffective for failing to object to the "profile" testimony, and claims the court erred in calculating his offender score.

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4) **No.: 347613**

Case Name: State of Washington v. Jose Abilio Aguilar Aguilar

County: Grant

Case Summary: Jose Abilio Aguilar Aguilar was charged with first degree murder with a firearm with the aggravating circumstances of deliberate cruelty and egregious lack of remorse, second degree assault with a firearm, intimidating a witness, and alien in possession of a firearm. The trial court dismissed the alien in possession of firearm charge after the State rested. The jury found Mr. Aguilar guilty of first degree murder with a firearm with both aggravating circumstances and the second degree assault, but the court dismissed the conviction for witness intimidation on double jeopardy grounds. The court concluded that sufficient evidence supported the egregious lack of remorse aggravator but not the deliberate cruelty aggravator, and imposed an exceptional sentence of 472 months.

Mr. Aguilar appeals, contending: (i) insufficient evidence supported a finding of premeditation, a necessary element of first degree murder; (ii) the State committed governmental misconduct by delaying discovery and amending the charges against Mr. Aguilar multiple times, improperly forcing Mr. Aguilar to choose between his constitutional speedy trial right and his right to effective counsel; (iii) the prosecutor committed misconduct; and (iv) cumulative error requires reversal of his convictions. Mr. Aguilar also submitted a Statement of Additional Grounds (SAG) in which he contends: (i) the trial court erred by failing to provide a *Petrich* instruction for the aggravating factors, and (ii) the trial court violated the real facts doctrine where it based its finding of egregious lack of remorse on facts the State only argued supported the deliberate cruelty aggravator.

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PANEL CHANGE

Panel: Robert Lawrence-Berrey, Kevin Korsmo, Rebecca Pennell

11:00 AM

5) No.: 353699

Case Name: State of Washington v. David E. Nickels

County: Grant

Case Summary: The State charged David Nickels with first degree murder in Grant County. Mr. Nickels' defense counsel who were based in Seattle sought assistance from Garth Dano, who at that time was a private criminal defense attorney in Grant County. According to Mr. Nickels' counsel, Mr. Dano consulted on a wide range of issues relating to Mr. Nickels' defense. In November 2014, while Mr. Nickels' appeal to this Court was pending, Mr. Dano was elected the Grant County Deputy Prosecutor and took office in January 2015. The Grant County Prosecutor's Office (GCPO) did not handle Mr. Nickels' appeal but contracted with Kitsap County to be a Special Deputy Prosecuting Attorney. This Court subsequently reversed Mr. Nickels' conviction and remanded for a new trial based on jury instruction error.

Mr. Nickels' defense counsel moved to disqualify the GCPO from prosecuting the case due to a conflict of interest. The superior court denied the motion and certified the issue pursuant to RAP 2.3(b)(4). This Court accepted discretionary review. Mr. Nickels contends the court erred by denying his motion to disqualify the entire GCPO, and only disqualifying Prosecutor Dano.

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PANEL CHANGE
Panel: Robert Lawrence-Berrey, George Fearing, Rebecca Pennell

12:00 PM

6) No.: 358640

Case Name: Joseph M. Thompson v. Progressive Direct Insurance Co.

County: Walla Walla

Case Summary: Joseph Thompson was seriously injured in a single-vehicle collision in which Stacy Haney was driving and Mr. Thompson was a passenger. Ms. Haney had an automobile insurance policy through Progressive Direct Insurance Company (Progressive), which agreed that Ms. Haney was solely responsible for the accident and tendered the liability limits of Ms. Haney's policy to Mr. Thompson for his bodily injury claim. Mr. Thompson also made a claim under Ms. Haney's policy for underinsured motorist (UIM) coverage which Progressive denied. After filing a complaint for declaratory judgment seeking a determination that he was entitled to UIM coverage under Ms. Haney's policy, Mr. Thompson moved for summary judgment and an award of attorney fees and costs. The trial court granted Mr. Thompson's motion for summary judgment and also awarded attorney fees to Mr. Thompson.

Progressive appeals, arguing that: (1) Mr. Thompson is excluded from UIM coverage because Ms. Haney's policy only covers policyholders and relatives of the policyholder; and (2) Mr. Thompson is not entitled to the trial court's award of attorney fees, and alternatively that the trial court erred in calculating the fee award.

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