

Supreme Court No. 91790-6
COA No. 45894-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL R. BROGAN,

Petitioner.

FILED

JUN 17 2015

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON **CRF**

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is Michael Brogan, the Defendant and Appellant in this case, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Brogan seeks review of Division Two's unpublished opinion in *State v. Brogan*, No. 45894-2-II (2015 WL 2027250) (Slip Op. filed April 28, 2015). No Motion for Reconsideration has been filed in the Court of Appeals. A copy of the opinion is attached.

C. ISSUE PRESENTED FOR REVIEW

1. Should review be granted where the trial court ordered jurors to return to the court the following Monday and continue deliberations, despite agreement by all jurors on Friday that they were deadlocked and that it was not possible to reach a verdict within a reasonable amount of time, in violation of Brogan's right to a fair and impartial jury.

D. STATEMENT OF THE CASE

Michael Brogan filed a brief and alleging, *inter alia*, that the trial court erred by requiring a deadlocked jury to return to the court after the weekend for further deliberation, which affected the outcome of the trial. The brief sets out facts and law relevant to this

petition and are incorporated herein by reference.

E. ARGUMENT

It is submitted that the issue raised by this Petition should be addressed by this Court because the decision of the Court of Appeals raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b).

**1. THIS COURT SHOULD GRANT REVIEW
BECAUSE THE TRIAL COURT VIOLATED
MR. BROGAN'S RIGHT TO DUE PROCESS
WHEN IT ORDERED THE JURY TO
RECONVENE THE FOLLOWING MONDAY,
AFTER THE JURY ANNOUNCED THAT IT
WAS DEADLOCKED THE PREVIOUS FRIDAY**

Following a trial of approximately four hours in duration, the jury notified a bailiff that it was deadlocked. A superior court judge filling in for the trial judge directed the jury to make a written statement regarding its position. RP(12/13/13) at 48. After the trial court judge returned to the courthouse that afternoon, the court called the jurors into the courtroom and called the jurors into open court and conducted the following inquiry:

THE COURT: I have called you back into the courtroom to find out whether you have a reasonable probability of reaching a verdict. First, a word of caution, because you are in the process of deliberating, it is essential that you give no indication about how the deliberations are

going. You must not make any remark here in the courtroom that may adversely affect the rights of either party or may, in any way, disclose your opinion of the case or the opinions of other members of the jury.

I'm going to ask you, as the Presiding Juror, if there is a reasonable probability of the jury reaching a verdict within a reasonable time. You must restrict your answer to yes or no when I ask you this question and you mustn't not say anything else.

So, with that, is a reasonable probability of the jury reaching a verdict within a reasonable time in this matter? . .

JUROR: No.

The jury was polled and all responded that they were in agreement that they were unable to reach a verdict. RP (12/13/13) at 50-51.

The court then stated:

THE COURT: All right. I'm going to go ahead and just excuse you at this time to go ahead and go back into the jury room.

RP (12/13/13) at 51.

The jury was brought into the courtroom a second time. The court directed the jury to return to court the following Monday, December 16, 2013. RP (12/13/13) at 57.

On the morning of December 16, 2013, the court announced that the jury had reached a verdict and the jury was brought into the courtroom at 9:44 a.m. RP (12/16/13) at 11. The jury was polled

and each juror indicated the verdict represented the verdict of the jury and his or her individual verdict. RP (12/16/13) at 15-18.

A criminal defendant has a right to a trial before an impartial jury. U.S. Const. amend. VI; Wash. Const. art. I §§ 21, 22. "The right to a jury trial includes the right to have each juror reach his or her own verdict 'uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel.'" *State v. Goldberg*, 149 Wn.2d 888, 892–93, 72 P.3d 1083 (2003) (quoting *State v. Booqaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978)), overruled on other grounds by *State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012). It follows that a trial court may not coerce a jury to reach a verdict. *State v. Jones*, 97 Wn. 2d 159, 163–65, 641 P.2d 708 (1982); *Booqaard*, 90 Wn.2d at 736–37.

Criminal Rule (CrR) 6.15 also provides guidance. CR 6.15 prohibits the trial court from instructing the jury, once deliberations have commenced, "in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." CrR 6.15(f)(2).

The jury deliberated a significant amount of time, more than five hours, relative to the length of the trial testimony, which was two and one-half hours of testimony. The jury was presented with only

one real issue: whether Mr. Brogan sold drugs to a police informant. The Court of Appeals, however, found that the facts of *Boogaard* differ significantly from the facts of the present case. *Brogan*, Slip Op. at 3. In *Boogaard*, the court found coercion when the trial court judge asked the presiding juror about the history of the jury's voting and asking the presiding juror whether the jury could reach a verdict in half an hour. *Brogan*, Slip Op. at 3, (citing *Boogaard*, 90 Wn.2d at 739-40. The Court of Appeals, however, essentially sidesteps the issue of the intrusiveness of the court's questions to the presiding juror by engaging in speculation regarding the length of time spent in deliberation. The Court states:

While the record indicates that the jury began its deliberations at 11:11 a.m. an informed Judge Haan of its deadlock at 4:23 p.m., it does not show how much of that time the jury was in deliberations. They may have adjourned for lunch. It may be that after informing the bailiff of their deadlock at approximately 2:30 p.m., and being instructed by Judge Warning to resume deliberations or write a statement regarding its deadlock, in may not have deliberated further.

Brogan, Slip Op. at 3-4.

Brogan argues that based on the foregoing, this Court should conclude that by ordering the jury to return on Monday, and by ignoring the jury's unequivocal announcement that it was deadlocked, the court improperly coerced a verdict and that review of the case

should be accepted.

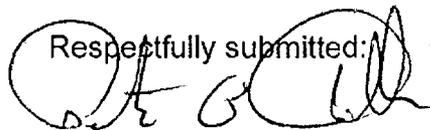
The jury was unequivocal that it was deadlocked on Friday afternoon. After being ordered to return on Monday morning, the jury almost immediately reached a verdict. Brogan submits that the record shows that the court improperly coerced the verdict. See *Boogaard*, 90 Wn.2d at 738.

The Court of Appeals' reliance on speculation that the jury may not have spent all of the five hours of deliberation actually deliberating was based on a cursory and unsupported assessment of the facts and merits review by this Court.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E of this petition.

DATED this 27th day of May, 2015.

Respectfully submitted:


PETER B. TILLER, WSBA #20835
Attorneys for Petitioner

CERTIFICATE OF SERVICE

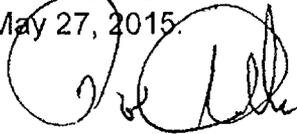
The undersigned certifies that on May 27, 2015, that this Petition for Review was by JIS link to (1) David Ponzoha, Clerk of the Court of Appeals, Division II, and was sent by first class mail, postage pre-paid to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 27, 2015.

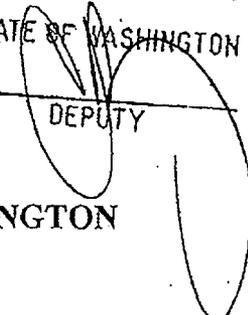


PETER B. TILLER

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL R. BROGAN,

Appellant.

No. 45894-2-II

UNPUBLISHED OPINION

BJORGEN, A.C.J.—Michael Brogan appeals from his conviction for an unlawful delivery of heroin conducted within 1,000 feet of a school bus route stop, arguing that the trial court erred in denying his motion for a mistrial after the jury had deadlocked.¹ We disagree and affirm.

The State charged Brogan with unlawful delivery arising out of a controlled buy of heroin. The State called its first witness, a detective involved in the controlled buy, at 1:49 p.m. on Thursday, December 12, 2013. It also called the remaining police officers involved in the controlled buy and the confidential informant. The trial recessed at 3:17 p.m. and reconvened at 3:33 p.m. The State then called a forensic scientist and two witnesses to establish the distance

¹ A commissioner of this court initially considered Brogan's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

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between the site of the buy and the school bus route stop. The State rested and the trial court discharged the jury for the evening at 4:02 p.m.

Trial resumed the next morning, Friday, December 13, at 10:17 a.m. Brogan rested without calling any witnesses. The trial court instructed the jury, the parties made their closing arguments, and the presiding judge, Judge Haan, excused the jury to deliberate at 11:11 a.m. At approximately 2:30 p.m., the jury informed the bailiff that it was hung. Judge Haan was out of the courthouse at the time. Judge Warning instructed the jury to resume deliberations or write a written statement about being hung. At 4:23 p.m., the jury again informs the bailiff that it was hung. Judge Haan, who had returned to the courthouse, had the jury brought into the courtroom. She asked the presiding juror if there was "reasonable probability of the jury reaching a verdict within a reasonable time in this matter?" Report of Proceedings (RP) (Dec. 13, 2013) at 49. The juror said no. All 11 other jurors said they agreed. Judge Haan excused the jury to the jury room at 4:34 p.m. She decided that rather than discharging the jury, she would have it return on Monday morning to see if it was still deadlocked. She released the jury for the weekend, instructing them to return at 8:50 a.m. on Monday, December 16 "to resume deliberations."

The jury returned on Monday at 9:43 a.m., and informed the bailiff that it had reached a verdict. The jury returned to the courtroom and delivered its verdict of guilty to unlawful delivery of heroin and its answer of yes to the question of whether the delivery occurred within 1,000 feet of a school bus route stop. The jury was polled, confirming the verdict. Brogan moved for a mistrial, arguing that the jury should have been discharged on Friday when it announced that it was deadlocked. Judge Haan denied his motion.

Brogan argues that by ordering the jury, after it had unanimously stated that it was deadlocked on Friday afternoon, to return on Monday morning to resume deliberations, the trial

court coerced the jury into reaching a verdict and denied him due process. *State v. Boogaard*, 90 Wn.2d 733, 736-37, 585 P.2d 789 (1978). But the court's limited inquiry into the jury's status and its instruction to the jury "to continue to deliberate" on Monday morning does not constitute coercion, in contrast to the judge's actions in *Boogaard* of asking the presiding juror about the history of the jury's voting and asking the presiding juror whether he thought the jury could reach a verdict in a half hour. *Boogaard*, 90 Wn.2d at 739-40. Thus, Brogan has not demonstrated that he was denied due process.

Brogan also argues that the trial court violated CrR 6.16(a)(3)² when it ordered the jury to return on Monday morning to resume deliberations. When a jury announces that it is deadlocked, the trial court may consider the complexity of the case, and the length of deliberations relative to the length of the trial, in determining whether to discharge the jury or order it to resume deliberations. *State v. Jones*, 97 Wn.2d 159, 165, 641 P.2d 708 (1982) (citing *Boogaard*, 90 Wn.2d at 739). We review a trial court's decision to order a jury to resume deliberations for an abuse of discretion. *State v. Dykstra*, 33 Wn. App. 648, 651, 656 P.2d 1137 (1983) (citing *Jones*, 97 Wn.2d at 165). Brogan contends that because the State's case was not complex, and that the trial took less than three hours but the jury deliberated for more than five hours before declaring it was deadlocked, the trial court abused its discretion in denying his motion for a mistrial. While the record indicates that the jury began its deliberations at 11:11 a.m. and informed Judge Haan of its deadlock at 4:23 p.m., it does not show how much of that time the jury was in deliberations. They may have adjourned for lunch. It may be that after

² CrR 6.16(a)(3) provides that if, during the poll of the jury, not all of the jurors concur with the verdict, "the jury may be directed to retire for further deliberations or may be discharged by the court."

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informing the bailiff of their deadlock at approximately 2:30 p.m., and being instructed by Judge Warning to resume deliberations or write a statement regarding its deadlock, it may not have deliberated further. Further, even if the jury deliberated for all five hours, that amount of time is not so disproportionate to the length of the trial to render Judge Haan's decision to order the jury to resume deliberations on Monday morning an abuse of discretion.

In his statement of additional grounds, Brogan asserts that when it resumed deliberations on Monday morning, the jury had already reached a verdict. There is, however, nothing in the record to support Brogan's assertion.

We affirm Brogan's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Brogan, A.C.J.
BROGAN, A.C.J.

We concur:

Maxa, J.
MAXA, J.

Melnick, J.
MELNICK, J.

TILLER LAW OFFICE

May 27, 2015 - 4:17 PM

Transmittal Letter

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No Comments were entered.

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