NO. 43444-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL D. COLLINS, II,

Appellant.

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

The Honorable Brian Altman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court deprived Mr. Collins an open trial by unilaterally sealing the jury questionnaire used during voir dire without consent of the parties or weighing the *Bone-Club* factors.

2. Mr. Collins's Skamania County conviction put him in jeopardy in violation of the Double Jeopardy Clause.

3. The trial court misapplied the law as to double jeopardy when it refused to grant Mr. Collins' pre-trial motion to dismiss for violating the Double Jeopardy Clause.

4. The trial court had no legal authority to enter a judgment against Mr. Collins for failure to register as a sex offender.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. During voir dire, the court used a jury questionnaire to determine whether the prospective jurors knew Mr. Collins and how they knew him. The day after the jury reached its verdict, the court entered an order sealing the jury questionnaire. The parties, including Mr. Collins, did not agree to seal the questionnaire and the court did not engage in a *Bone-Club* analysis before signing the order to seal. Is Mr. Collins's entitled to have his case remanded for a *Bone-Club* analysis?

2. The Double Jeopardy Clause protects against successive prosecutions for the same offense. Mr. Collins was convicted in 2009 for

failing to register as a sex offender in Clark County from January 1, 2009, to March 4, 2009. In 2011, he was convicted for failure to register as a sex offender in Skamania County from February 4-9, 2009. Was the Double Jeopardy Clause violated when the jury was permitted to find Mr. Collins guilty in Skamania County for an offense for which he had already been convicted in Clark County?

C. STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

1. Mr. Collins was convicted in Skamania County of attempted first degree murder and first degree robbery.

In 2009, Michael Collins was charged and convicted by a Skamania County jury of attempted murder in the first degree and robbery in the first degree. Post-sentencing, Mr. Collins filed a notice of appeal. CP 22-35.

From there, Mr. Collins was taken to Clark County to face charges of custodial interference and failure to register as a sex offender. CP 3. Later, the custodial interference was dismissed and Mr. Collins entered into a plea agreement on the failure to register charge. CP 3. Although the failure to register occurred between January 1 and March 4, 2009, the State agreed to amend the charge to reflect it having occurred in 2006. CP 13-15; RP1 at 3-6. Supplemental Statement of Arrangements Exhibits 4 and 5 filed December 15, 2011 and Exhibits 1, 2, and 3 filed January 5,

2012. The purpose of the amendment was to take advantage at sentencing of failure to register's former sentencing guideline classification as an unranked felony offense with a standard range of 0-12 months. RP1 at 17; RCW 9.94A.505(2)(b).

Mr. Collins entered an *In re Barr* plea, a legal fiction that allowed him to enter a guilty plea not otherwise supported by the facts. *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984); RP1 at 7-8.

2. Mr. Collins attempted first degree murder conviction was reversed on appeal.

In an unpublished opinion, this Court reversed Mr. Collins' attempted first degree murder conviction and affirmed the robbery conviction. *State v. Collins (unpublished opinion)*, 162 Wn.2d 1051, __ P.3d __, WL 2848819 (2011); CP 22-35. On remand, the attempted murder conviction was dismissed and Mr. Collins was resentenced on the first degree robbery. CP 3-4. Mr. Collins returned to the Department of Corrections to complete his sentence. CP 4.

3. Skamania County filed a new failure to register charge against Mr. Collins alleging incident dates for which Mr. Collins was already charged and convicted in Clark County.

However, within a few months, the State brought Mr. Collins back to Skamania County to face a new failure to register as a sex offender charge. CP 4. The alleged dates of the crime occurred within the January

1- March 4, 2009, dates charged in Clark County for the same crime. CP 13-15, 118-19; RP 2B at 283, 291, 318-21; Supplemental Statement of Arrangements, Exhibits 4 and 5 filed December 15, 2011 and Exhibits 1, 2, and 3 filed January 5, 2012. Specifically, Skamania County charged Mr. Collins with having failed to register in Skamania County between February 4-9, 2009. CP 118-19.

4. The court refused to dismiss Mr. Collins' new charges as violating double jeopardy.

Mr. Collins moved to dismiss the new failure to register charge on various grounds to include that it violated double jeopardy. CP 1-36; RP1 at 1-33. Mr. Collins argued he had already been convicted and sentencing by the State of Washington, specifically Clark County, for having failed to register as a sex offender for the February 2009 window of time Skamania County alleged in its new charge. RP1 at 1-24; CP 1-36.

At the dismissal motion, the court understood and accepted the legal fiction of the *In re Barr* plea which took the Clark County failure to register charges back to 2006. RP1 at 19. The court acknowledged the failure to register behavior in Clark County actually occurred between January 1 and March 4, 2009. RP1 at 19. But the court refused to grant the dismissal motion believing instead that Skamania County had an independent right to prosecute Mr. Collins for failure to register even

though Clark County convicted Mr. Collins for the same offense occurring during the same window of time. RP 20-22; Supplemental Statement of Arrangements, Exhibits 4 and 5 filed December 15, 2011 and Exhibits 1, 2, and 3 filed January 5, 2012.

5. The trial court sealed a jury questionnaire used in voir dire.

At the request of counsel, the court used a jury questionnaire in voir dire. RP1 at 107-119. The questionnaire was used to determine what each prospective juror knew, if anything, about Mr. Collins. The prospective jurors filled out the questionnaire prior to general voir dire questioning by the court and the attorneys. The attorneys used the filled out questionnaires during voir dire. Nothing in the record suggests that the public was excluded from the courtroom during voir dire. RP2A at 152-248.

The day after the jury returned its verdict, the court entered an order sealing the jury questionnaire. Supplemental Designation of Clerk Papers, Order Sealing Document (sub. nom. 76). The sealing order is a pre-printed form that allows the court to fill in certain information such as naming the item sealed, here "Juror Questionnaires." The stated purpose for having the form sealed is boilerplate: "[S]aid document contains specific and sensitive information that should remain confidential."

Supplemental Designation of Clerk Papers, Order Sealing Document (sub. nom. 76).

None of the parties, and certainly not Mr. Collins, signed the sealing order. No information in the record suggests that the court engaged in a *Bone-Club* analysis before sealing the jury questionnaire. Supplemental Designation of Clerk Papers, Order Sealing Document (sub. nom. 76).

6. Mr. Collins is found guilty of failure to register as a sex offender in Skamania County.

The evidence at trial established that Mr. Collins was required to register as a sex offender based on a Clark County sex offense conviction. RP3 at 433, 467. In 2008, Mr. Collins registered with the Clark County Sheriff's Office as having a fixed address in Vancouver, Washington. RP3 at 436. In late December 2008, Mr. Collins mother appeared at the Clark County Sheriff's Office with a note from Mr. Collins witnessed by her. The note explained that Mr. Collins was leaving the state. The note did not give any information about which state he was moving to or otherwise give an address where Mr. Collins could be contacted. Clark County Sheriff's Detective Kevin McVicker, who was charged with handling sex offender registration for Clark County, testified that the note was not a legal method to change a sex offender address. RP3 at 437-45.

On February 3 or 4, 2009, friends dropped Mr. Collins and his son, Teven Collins, at the Dougan Falls Campground in Skamania County. RP 2B at 317-18. The two planned to lay low at the campground for some time. RP 2B at 282-83, 319, 321. They brought some food, extra clothing, and a blanket with them. RP2B at 325, Over the next few days, they moved from campsite to campsite. RP2B at 300. They were last seen at the campground on February 9, 2009. RP 2B at 361.

During his stay at the campground, Mr. Collins never went to the Skamania County Sheriff's Office to report his presence at the campground. RP2B at 397-98.

The jury found Mr. Collins guilty of failing to register as a sex offender in Skamania County. CP 120. Post-conviction, the court again refused to dismiss Mr. Collins' conviction for violating double jeopardy. The court sentenced Mr. Collins to 57 months to run consecutive to his 2009 first degree robbery. CP 126. Mr. Collins now appeals his conviction. CP 141-62.

D. ARGUMENT

1. THE SEALING OF THE JURY QUESTIONNAIRE NECESSITATES REMAND OF MR. COLLINS CASE FOR A *BONE-CLUB* ANALYSIS.

Divisions One and Two of this Court have reached contrary results on this issue.

In Division One, in *State v. Beskurt*, as in Mr. Collins' case, the parties stipulated and the court agreed that the members of the venire would complete a confidential jury questionnaire. After the answers were made available to counsel, they questioned the members of the venire in open court. Thereafter, all parties selected and accepted the jury as constituted. Following the selection, acceptance, and swearing of the jury, the court entered an order sealing the completed jury questionnaires. *State v. Beskurt*, 159 Wn. App. 819, 824, 246 P.3d 580, *review granted*, 172 Wn.2d 1013 (2011).

The defendant appealed claiming the trial judge violated his right to an "open and public" trial by sealing the preliminary juror questionnaires without first conducting a *Bone–Club* analysis on the record. *Beskurt*, 159 Wn. App. at 824; *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). The court held there was no violation of his right to a public trial. But the trial court's failure to conduct a *Bone–Club* hearing before sealing the questionnaires is inconsistent with the public's

right of open access to court records. A *Bone-Club* analysis requires the court to weigh the following five factors.

> 1. The proponent of closure or sealing must make some showing of a compelling interest, and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose."

Bone-Club, 128 Wn.2d at 258-59.

As a remedy, the court ordered the case remanded for the trial court to conduct a *Bone–Club* hearing and to reconsider its closing order. *Beskurt*, 159 Wn.App. at 834. As noted above, the Supreme Court granted review of *Beskurt*. See Supreme Court No. 85737-3.[1]

This Court reached a contrary result. *State v. Chouap*, 170 Wn. App. 114, 129, 285 P.3d 138 (2012). In so doing, this Court reasoned,

> After the trial was over, the trial judge ordered the jury questionnaires sealed and both parties agreed to the order. There is no evidence that jury selection did not proceed in open court. Nor is there any evidence that the court denied either party, or any

[1] Oral argument was heard on February 16, 2012

> member of the public, access to the questionnaires. Chouap agreed to use and did use the juror questionnaires to question prospective jurors.

Chouap, 170 Wn. App. at 129.

A petition for review has been filed in *Chouap*. (See Supreme Court No. 87887-1.) Consideration on the Petition for Review is set for February 5, 2013.

Mr. Collins asks this Court to adopt the reasoning of *Beskurt* and remand his case to the trial court for *a Bone-Club* analysis.

2. MR. COLLINS WAS PUT IN JEOPARDY TWICE FOR FAILING TO REGISTER AS A SEX OFFENDER IN TWO COUNTIES ON OVERLAPPING DATES IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE.

In 2009, Mr. Collins pleaded guilty under *In re Barr* in Clark County to failure to register as a sex offender. RCW 9A.44.130 (2009). Two years later, the Skamania County prosecutor filled an information charging Mr. Collins with failure to register in Skamania County based on the same allegations Mr. Collins pleaded guilty two years earlier in Clark County. Despite Mr. Collins' well- reasoned argument that the Skamania County charge constituted double jeopardy, the trial court allowed a jury to consider the evidence. After the jury found Mr. Collins guilty as charged, the court entered a judgment of guilt. Mr. Collins was therefore

prosecuted twice for the Clark County incident in violation of the Double Jeopardy Clause. His conviction must be vacated.

a. The Double Jeopardy clause precluded the State from prosecuting Mr. Collins in Skamania County for the same incidents underlying the Clark County convictions.

The Double Jeopardy Clause of the Fifth Amendment "protects against a second prosecution for the same offense after conviction." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed. 2d 865 (1989); U.S. Const. Amend 5 ("Nor shall any person be subject for the same offense to be twice in jeopardy of life and limb.") The clause applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The state constitutional prohibition against double jeopardy offers the same scope of protection as its federal counterpart. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995); Const. Art. 1 § 9 ("No person shall...be twice out in jeopardy for the same offense.")

A double jeopardy violation is reviewed de novo. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). In reviewing an allegation of double jeopardy, the appellate court reviews the entire record. *State v. Noltie*, 116 Wn.2d 831, 848-49, 809 P.2d 190 (1991).

b. Mr. Collins was prosecuted twice for the continuing offense of failing to register as a sex offender between January 1, 2009, and March 4, 2009.

Failure to register as a sex offender is a not an alternative means offense. *State v. Peterson*, 168 Wn.2d 763, 770, 230 P.3d 588 (2010). The failure to register statute contemplates a single act that amounts to failure to register: the offender moves without alerting the appropriate authority. *Id.* The conduct is the same. The offender moves without notice or he does not. The fact that different statutory deadlines may apply, depending on the offender's residential status, does not change the nature of the criminal act: moving without registering. *Id.* The unit of prosecution for failure to register as a sex offender is the ongoing duty to report rather than each separate duty to report. *State v. Green*, 156 Wn. App. 96, 101, 230 P.3d 654 (2010); *State v. Durrett*, 150 Wn. App. 402, 410, 208 P.3d 1174 (2009).

And that is what Mr. Collins argued at the motion to dismiss. In 2011, Skamania County charged Mr. Collins with being an unregistered sex offender in their county for five days, from February 4-9, 2009. But Mr. Collins had already pled guilty and been sentenced in Clark County for failure to register for a time period encompassing January 1, 2009, to March 4, 2009. In denying Mr. Collins motion to dismiss, the court

wrongly accepted the prosecutor's argument that Skamania County, as its own political entity with its own prosecutor, had a right to prosecute and punish Mr. Collins separately from Clark County.

In reality, the jurisdiction for prosecution and punishment lies with the State of Washington. RCW 9A.04.030. The venue is not an element of the crime. *State v. Dent*, 123 Wn.2d 467, 479, 869 P.2d 392 (1994). Under CrR 5.1(a)(2), a criminal action may be commenced in any county where an element of the offense was committed or occurred.

Here, as instructed in the to-convict instruction, both elements (4) and (5) occurred in Clark Country.

> To convict the defendant of the crime of Failure to Register as a Sex Offender, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or between February 4, 2009 through February 9, 2009, the defendant knowingly failed to register with the Skamania County Sheriff not more then twenty-four hours after entering Skamania County;
>
> (2) That the defendant remained within Skamania County for twenty-four hours after entering Skamania County;
>
> (3) That the defendant lacked a fixed residence at the time;
>
> (4) That the defendant had previously registered with the Clark Count Sheriff;
>
> (5) That the defendant had previously been convicted of a sex offense that would be classified as a felony under the law of Washington and was required to register pursuant to RCW 9A.44.130; and

(6) That he acts occurred in the State of Washington.

Supplemental Statement of Arrangements, Court's Instructions to the Jury, Instruction 7 (sub. nom. 71).

To prove the Clark County specific elements, the prosecutor called Clark County Sheriff's Detective Kevin McVicker as a witness. Detective McVicker testified that Mr. Collins had to register as sex offender in Washington. Mr. Collins had done so with the Clark County Sheriff's Office in December 2008. Mr. Collins provided a residential address in Vancouver. Mr. Collins was given notice under RCW 9A.44.130 of his registration requirements. And on December 29, 2008, Mr. Collins mother came into the Sheriff's Office with a handwritten note from Mr. Collins saying he was moving out of state. RP3 at 433-38.

The trial court erred when it failed to recognize both the unit of prosecution for failure to register and the ability to prosecute a violation of state law in any county where at least one element occurred.

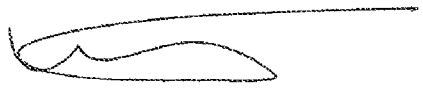
Mr. Collins' Skamania County conviction for failure to register as a sex offender should be reversed because it violates double jeopardy.

E. CONCLUSION

Mr. Collins' Skamania County conviction for failure to register as a sex offender violates double jeopardy and should be remanded with instructions to dismiss. Alternatively, Mr. Collins' case should be

remanded to the trial court to analyze sealing of the jury questioners under *State v. Bone-Club*.

Respectfully submitted this 12th day of December 2012.



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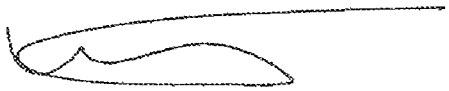
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Adam Kick, Skamania County Prosecutor's Office, at kick@co.skamania.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Michael D. Collins, II, DOC#805173, Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed December 12, 2012, in Longview, Washington.



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