93430-4

FILED
March 3, 2016
Court of Appeals
Division III
State of Washington

NO. 33109-1-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent –
Cross-Appellant,

v.

MARIA HERNANDEZ MARTINEZ,

Appellant –
Cross-Respondent.

RESPONDENT – CROSS-APPELLANT'S RESPONSE TO BRIEF OF CROSS-RESPONDENT

GARTH DANO
PROSECUTING ATTORNEY

Kevin J. McCrae – WSBA #43087
Deputy Prosecuting Attorney
Attorneys for Respondent – Cross-Appellant

PO BOX 37
EPHRATA WA 98823
(509)754-2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

State Cases

TABLE OF AUTHORITIES *(continued)*

Page

Federal Cases and Other Jurisdictions

Statutes and Other Authorities

I. STATEMENT OF THE CASE

Relevant facts have been previously laid out in prior briefing.

II. ARGUMENT

In order to make her argument against review of this issue Ms. Hernandez Martinez misconstrues both the double jeopardy clause and the 'likely to reoccur' prong of the exception to the mootness doctrine. She does not address the merits of the State's argument. While the State agrees that retrial of the perjury charges is barred by double jeopardy, the double jeopardy clause does not protect a judicial (as opposed to a finder of fact) acquittal, except by undesirable side effect, and whether an issue is likely to be repeated is not decided by focusing on the appellate court level. The crux of the defendant's argument is summarized as:

> Other than a blanket statement without any support, the State makes no attempt to show that this issue will reoccur or whether it is an issue at all. Anecdotally, counsel has been practicing for 21 years in all three divisions of the Court of Appeals and the Supreme Court of Washington and has never seen this issue arise. The reason this issue will not reoccur, and why it has not arisen before, is it is barred by the Double Jeopardy Clauses of the United States and Washington Constitutions. Once again, it matters not how the trial court, or a jury, comes to its conclusion regarding the acquittal of the charged offense, the fact of the acquittal is all that matters.

Brief of Cross-Respondent at 6. The State addressed many of the issues raised in its opening brief. It will address this argument here.

A. It does matter how an acquittal is obtained.

A judicial acquittal as a matter of law is not protected by the double jeopardy clause. If it were then the State could not appeal from a pre or post trial dismissal of the charges. Clearly it can, so the double jeopardy clause does not protect a judicial acquittal. Instead what the double jeopardy clause protects is the right of the defendant to only face one trier of fact. In a pretrial dismissal the defendant has not yet faced a trier of fact, so the State can appeal, and if successful, try the case. In a post-trial dismissal the trial court dismisses the jury's verdict, the state can appeal and the verdict will be reinstated if the State is successful. The defendant never faces a second trier of fact. In a midtrial acquittal, however, the right to have that particular trier of fact has vested. However, there is no decision from that trier of fact, therefore there is no verdict to reinstate on appeal, and because the jury would have been dismissed, there is no way to place the case back before the same trier of fact. An unreviewable judicial acquittal during trial is an undesirable side effect of the double jeopardy clause, not a feature. This is why the U.S. Supreme Court has said there is no constitutional requirement to permit them. *Evans v. Michigan*, 133 S. Ct. 1069, 1082, 185 L. Ed. 2d 124 (2013).

A jury is the conscious and voice of the people. A single judge, subject to no review, is not a legitimate system of justice. "[T]he defendant's interest is not the only one at stake. We must also consider 'the societal interest in punishing one whose guilt is clear after he has obtained a fair trial." *United States v. Stauffer*, 922 F.2d 508, 513 (9th Cir. 1990). The State Constitution recognizes that persons other than the defendants have rights and interests in criminal proceedings. *See* Wash. Const. Art 1 § 35. Appellate courts in this State reverse trial courts on sufficiency of evidence claims on a regular basis. There is no reason to conclude that trial courts are any better making the opposite rulings, that is incorrectly dismissing for sufficiency of evidence. There are reasons to believe the trial courts are worse at sufficiency rulings when they know there is no one able to review them. *See Association of Administrative Law Judges v. Colvin*, 777 F.3d 402 (7th Cir, 2015). Doubtless some judges are affected by the unavailability of review more than others, but it would be naive to think that the lack of review does not have an effect on some rulings.

B. Midtrial dismissal motions are not rare in the trial courts.

While this issue is rare in the appellate courts, it is certainly not unheard of, and it is common in the trial courts. Anecdotally the Deputy Prosecutor in this case has been practicing in the Grant County trial and Washington appellate courts for five and a half years, and has conducted

38 trials. At least 80 percent of those trials involved midtrial motions to dismiss. In one the State prevailed in a CrR 8.3(c) motion in front of one judge, but lost a midtrial motion on the same evidence in front of another. In another the State adopted a theory of the case from an unpublished case, meaning at least four judges (a trial court judge and three appellate court judges) approved of it, but had the charge dismissed by the trial court judge when he refused to adopt the legal theory. In another trial the trial court agreed to delay a midtrial ruling, and later stated he was convinced by closing arguments as to the issue of law. That case and issue are now subject to appellate review.

Numerous appellate decisions also revolve around, or at least involve, midtrial motions to dismiss. *See e.g.*, *Evans v. Michigan*, 133 S. Ct. 1069; *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946); *State v. Morton*, 83 Wn.2d 863, 870, 523 P.2d 199 (1974); *State v. Gallagher*, 15 Wn. App. 267, 549 P.2d 499 (1976); *State v. Olson*, 92 Wn.2d 134, 594 P.2d 1337 (1979); *State v. Matuszewski*, 30 Wn. App. 714, 715, 637 P.2d 994 (1981); *State v. Collins*, 112 Wn.2d 303, 771 P.2d 350 (1989); *City of Auburn v. Hedlund*, 137 Wn. App. 494, 506, 155 P.3d 149 (2007); *State v. McPhee*, 156 Wn. App. 44, 65-66, 230 P.3d 284 (2010). A Lexis search of Washington State cases using the search string 'dismiss w/s close w/s "state's evidence"' reveals 33 cases in which such a motion was discussed.

That search is grossly under inclusive, as it does not capture any of the named cases listed. To say that they are rare at the trial court level is just ignoring reality. Up until about 1980 the State could appeal midtrial motions to dismiss. In 1981, the Court of Appeals in *Matuszewski* applied federal double jeopardy law and held that the State could not appeal.

Apparently that was not the end of the issue. In *People v. Evans*, 491 Mich. 1, 4, 810 N.W.2d 535 (2012), the Michigan Supreme Court said that errors of law do not implicate the double jeopardy clause, just when the court weighs facts. This argument was rejected by *Matuszewski*, and was also rejected by the U.S. Supreme Court in *Evans*. However, not all Washington cases followed *Matuszewski*. In *McPhee* the court of appeals adopted the same logic as the Michigan Supreme Court and reversed the trial court's midtrial dismissal and allowed retrial. Thus there was considerable confusion and conflicting case law as to whether the State could appeal midtrial motions. This confusion has obviously been resolved by the U.S. Supreme Court decision in *Evans*, but it also explains the relative lack of State's appeals of midtrial dismissals. However, it was in *Evans* in 2013 that the Supreme Court suggested that jurisdictions did not have to allow midtrial motions to dismiss. *Evans*, 133 S. Ct. at 1082. "In this inquiry we keep in mind that where courts and practitioners have uniformly worked under the assumption that a certain principle is the law,

no occasion may have arisen for an appellate court to repudiate that principle for a long span of time." *State v. Miller*, 181 Wn. App. 201, 209-14, 324 P.3d 791 (2014).

Hernandez Martinez misidentified the relevant issue in mootness analysis. She argues the issue is unlikely to reoccur at the appellate court level, and offers an appellate court practitioner's experience of 21 years as evidence. The question is not the likelihood of repetition at a particular level of the court system. The exception to the mootness doctrine exists to enable review of issues that would not normally make it to the appellate court because they are usually moot by the time the appellate court is able to review them. According to Ms. Hernandez Martinez the appellate courts would never review moot issues, because their mootness would keep them from repeating in the appellate court. That would defeat the whole point of the exception. Because the State cannot appeal the merits of a midtrial motion to dismiss it is unlikely that the issue will repeat in appellate courts. However, it is likely to repeat in almost all trial cases at the trial court level. The relevant question is 'is the question likely to repeat itself in other cases' not 'is the question likely to repeat in other appeals?' Indeed if the procedural issue is actually resolved in this case, it is unlikely to reappear because it is resolved.

C. Mootness is not jurisdictional.

Ms. Hernandez Martinez contends "Mootness is jurisdictional," citing *State v. Deskins*, 180 Wn.2d 68, 80, 122 P.3d 780 (2014). Actually what *Desikins* says is that mootness is a jurisdictional concern and may be raised at any time. *Id.* Thus what *Desikins* is concerned with is when mootness may be raised, not the power of the court to hear the issue. Other cases recognize the imprecise use of the word "jurisdiction" in case law. "Generally speaking, jurisdiction is the power of a court to hear and determine a case. Beyond this basic definition, however, Washington courts have been inconsistent in their understanding and application of jurisdiction." *In re Marriage of Buecking*, 179 Wn.2d 438, 316 P.3d 999 (2013). "Subject matter jurisdiction refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case." *Id.* at 448. The legislature cannot restrict the court's jurisdiction where the constitution has specifically granted the court jurisdiction. *Id.* Mootness is prudential concern, not a constitutional one. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). This is apparent from the fact that the court can look at certain factors in order to decide a moot issue. If there was a constitutional jurisdictional bar to deciding a moot issue, rather than a prudential bar, there would be no exception to the doctrine.

D. An indefensible action should not forever hide behind the mootness doctrine.

The State is prohibited from appealing the dismissal of the perjury charge by double jeopardy and RAP 2.2(b). Therefore the State only appeals the procedure used. That issue is moot, but not barred by double jeopardy. It is also bound to reoccur in other trials, and possibly this one. Ms. Hernandez Martinez does not defend the trial court's actions on the merits, she only argues that the court's actions are shielded from review. *State v. Ward*, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005). (A lack of response concedes the issue.) The only defense to this practice appears to be 'we have always done it that way.' But the practice of midtrial motions evolved under different conditions, specifically the State could appeal from them. We have always done it that way is not precedent, because stare decisis requires a reasoned judicial opinion, and one does not exist on this procedure under current conditions. Even if RAP 2.2 is considered to bar this appeal, the court should exercise its discretion under RAP 1.2(c) and waive that rule in order to serve the ends of justice and decide this issue.

The need for this review can clearly be found in *State v. DeLeon*, 185 Wn. App. 171, 341 P.3d 315 (2014). In *Deleon* one appellate judge argued the courts need to more aggressively police prosecutor's charging

decisions and the legislator's power to define crimes and punishments. *Deleon*, 185 Wn. App. at 221-22 (Knodell, JPT. Concurring). The descent responds "These are age old debates that likely will last as long as our structure of government." *Id.* at 224 n. 5 (Korsmo, J. Dissenting). The problem with midtrial motions to dismiss is there is only one voice in that debate, the trial judge's. Our constitutional structure is set up to avoid one voice having the only say in any debate. Even the president or governor is not above the law, and even a Supreme Court Justice, who can declare what the law is in the final instance, must convince four of his or her colleges to go along with them.

Exceptions to the mootness rule exist to prevent situations such as this. An indefensible[1] action by the trial court should not be able to hide behind mootness rules, allowed to be repeated over and over again.

[1] The State does not mean to say dismissing the perjury charge was indefensible. Whether the perjury charge should have been dismissed is something that might be defended, although the State is not sure how. The indefensible act was taking the issue away from the debate that occurs in the appellate courts. This was indefensible, as evidenced by the fact that the cross respondent does not even try to defend it.

III. CONCLUSION

The court should review this issue and find that the trial court overstepped its bounds by refusing to delay its decision until after the jury returned.

Dated this 3rd day of March 2016.

Respectfully submitted,

GARTH DANO
Grant County Prosecuting Attorney

By: _____
Kevin J. McCrae – WSBA #43087
Deputy Prosecuting Attorney

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent- Cross-Appellant, vs. MARIA HERNANDEZ MARTINEZ, Appellant- Cross-Respondent.	)	No.33109-1-III DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Respondent – Cross-Appellant's Response to Brief of Cross-Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Thomas M. Kummerow
Washington Appellate Project
wapofficemail@washapp.org

Dated: March 3, 2016.

Kaye Burns