NO. 90575-4
COA NO. 71058-3-I
Cowlitz Co. Cause NO. 09-1-01275-7

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SCOTT E. COLLINS,

Appellant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the June 23, 2014 unpublished opinion of the Court of Appeals in *State v. Collins*, COA 71058-3-I. This decision affirmed the Cowlitz County Superior Court's convictions and sentence.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

1. The inadvertent testimony of a witness, even if the witness were grossly negligent, would not give rise to the level of misconduct to bar retrial. The petitioner's double jeopardy rights were not violated. Therefore, the decision of the Court of Appeals does not involve a significant question of law under the Constitution of the State of Washington or of the United States and does not involve an issue of substantial public interest that should be determined by the Supreme Court.

2. The trial court properly followed the plain and unambiguous language of RCW 9.41.040(6) when imposing six consecutive sentences for three counts of Unlawful Possession of a Firearm in the First Degree and three counts of Possession of a Stolen Firearm. Therefore, the decision of the Court of Appeals does not involve a significant question of law under the Constitution of the State of Washington or of the United States and does not involve an issue of substantial public interest that should be determined by the Supreme Court.

III. STATEMENT OF THE CASE

The State agrees with the petitioner's statement of facts.

IV. ARGUMENTS

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court only if one of four conditions are met: (1) If the

decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b).

A. RETRIAL, FOLLOWING THE TRIAL COURT'S GRANTING OF THE PETITIONER'S MOTION FOR A MISTRIAL, DID NOT VIOALTE THE PETITIONER'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

Generally, where a defendant requests a mistrial, double jeopardy does not bar retrial. *State v. Wright*, 131 Wn. App. 474, 484, 127 P.2d 742 (2006) (*citing United States v. Scott,* 437 U.S. 82, 99, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978)). However, where a prosecutor's intent is to goad the defendant into moving for a mistrial, retrial is barred by double jeopardy. *State v. Benn*, 161 Wn.2d 256, 270, 165 P.3d 1232 (2007), cert. denied 128 S.Ct. 2871 (2008); *see also Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). Under the federal test, the court

"must be able to find that the State was *intentionally* trying to provoke a mistrial." *State v. Lewis*, 78 Wn. App. 739, 743, 898 P.2d 874 (1995). The Oregon standard "bars reprosecution where 'improper official conduct is so prejudicial that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or *is indifferent* to the resulting mistrial or reversal.'" *Id.* (*quoting State v. Kennedy*, 295 Or. 260, 276, 666 P.2d 1316 (1983).

The Oregon standard has **not** been adopted by the State of Washington. *Lewis*, 78 Wn. App. at 746; *see also State v. Hopson,* 113 Wn.2d 273, 283, 778 P.2d 1014 (1989). Nevertheless, concluding that retrial was barred by double jeopardy concerns under either the federal or Oregon standard should only occur with a " 'rare and compelling' set of facts." *Hopson,* 113 Wn.2d at 283. "The inadvertent testimony of a witness, even if the witness were grossly negligent, would not give rise to the level of misconduct required for a bar." *Id.* at 282.

Under the federal standard, the record contains nothing in regards to intentional misconduct on part of the prosecution. In applying the federal standard and concluding that retrial was not barred, the *Hopson* court looked at other jurisdictions handling of cases involving almost identical issues. *Hopson*, 113 Wn.2d at 283; *see also State v. Maddox,* 185 Ga.App. 674, 365 S.E.2d 516 (1988) (police officer's testimony in

drunk driving trial was not attributable to prosecutorial misconduct where prosecutor did not actively aid or encourage the officer but rather had specifically instructed him not to refer to defendant's prior convictions); *State v. Fuller,* 374 N.W.2d 722 (Minn.1985) (the Minnesota Supreme Court reversed a Court of Appeals decision where the lower court had barred retrial based on a prosecutorial duty to properly instruct witnesses); *see also State v. Butler,* 528 So.2d 1344 (Fla.Dist.Ct.App.1988) (prosecutor's failure to warn a state detective serving as a witness not to mention a stolen car did not bar retrial).

In following this Court's conclusions in *Hopson,* the Court of Appeals properly concluded that the Oregon standard does not extend to witnesses. The petitioner asserts that we must surmise that "Deputy O'Neill deliberately violated the court's ruling in an effort to prejudice Collins" and "the intentional misconduct by this state official should bar retrial in this case." Petitioner's Brief at 13. The petitioner ignores the *Hopson* Court's conclusion that the Oregon standard does not apply to witnesses:

> Appellant would have this court extend Oregon application in two respects. First, he would have the double jeopardy bar apply to a stat state fire inspector who is a witness, not an officer of the court. Thus, he would extend the category of state officials subject to the rule beyond that clearly delineated in either *Rathbun* or *Kennedy II.* Applying this rule to a court official such as a bailiff, whose job involves

> contact with juries on a daily basis is far different from applying it to a state fire inspector.

Hopson, 113 Wn.2d at 28. The *Lewis* court expanded on this issue:

> The State is held "only to the consequence of what its official knew to be prejudicial misconduct.... Incompetence, thoughtlessness, or excitability of the state's officers may lead to a mistrial, but it does not reflect a willingness to risk placing the defendant repeatedly in jeopardy for the same offense."

Lewis, 78 Wn. App. at 745 (*quoting State v. Kennedy*, 666 P.2d at 1326-27).

Therefore, although Deputy O'Neill failed to follow the court's ruling, there is no showing of intentional prosecutorial misconduct or indifference. Despite the petitioner's numerous assertions, the Oregon standard is not applicable in this case. The petitioner's position would directly conflict with this Court's holding in *Hopson*. There are no conflicting decisions amongst the Court of Appeals divisions. Under the federal standard, retrial is not barred because the State did not intentionally cause the mistrial; thus, there is not a significant question of constitutional law at issue, nor is there a substantial public interest at issue. Therefore, the petitioner's argument is without merit.

B. THE TRIAL COURT DID NOT VIOLATE THE PETITIONER'S RIGHT AGAINST CRUEL PUNISHMENT WHEN ISSUING SIX CONSECUTIVE SENTENCES FOR THREE COUNTS OF UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE AND THREE COUNTS OF POSSESSION OF A STOLEN FIREARM.

To determine whether a sentence violates the prohibition against cruel and unusual punishment, the court will consider four factors: (1) the nature of the offense; (2) the legislative purpose behind the sentencing statute; (3) the punishment the defendant would have received for the same crime in other jurisdictions; and (4) the sentence the defendant would have received for other similar crimes in Washington. *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980). The finding of one factor will not be dispositive. *State v. Gimarelli*, 105 Wn. App. 370, 380-81, 20 P.3d 430 (2001). "Only on the very rare occasion when a consecutive sentence is shockingly long has a court held cumulative sentences cruel and unusual." *Wahleithner v. Thompson*, 134 Wn. App. 931, 937, 143 P.3d 321 (2006).

Each of the petitioner's convictions for unlawful possession of a firearm in the first degree and possession of a stolen firearm must run

consecutive to one another per RCW 9.41.040(6) and RCW 9.94A.589(1)(c).

> Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

RCW 9.41.040(6). This sentencing provision was enacted as part of the "Hard Time for Armed Crime Act," whose purpose was to provide greatly increased penalties for "those offenders committing crimes to acquire firearms,: and "to reduce the number of armed offenders by making the carrying and use of the deadly weapon not worth the sentenced received upon conviction." 1995 c 129 Section 21 (Initiative Measure No. 159). The legislature specifically intended to make sentences for armed felons extreme. Further, the imposition of consecutive sentences under this statutory provision is not subject to appeal under RCW 9.94A.535 because it is not a departure from the enumerated guidelines in RCW 9.94A.589(1).

Courts have specifically held that the statute requires multiple unlawful possession of firearm and possession of stolen firearm sentences to be run consecutive to one another. In *State v. Murphy*, 98 Wn. App. 42, 988 P.2d 1018 (Div. 2, 1999), the defendant was convicted of burglary in

the first degree, five counts of unlawful possession of a firearm in the second degree, and five counts of possession of a stolen firearm (the same firearms). The trial court sentenced the defendant to 14 months on each of the unlawful possession charges and ran them concurrent with one another, 3 months on each of the possession of stolen firearms charges and ran them concurrent with one another. The court then ran the stolen firearm charges consecutive to the unlawful possession charges, for a total of 17 months of prison. *Id.* at 45.

The State appealed, contending that the statute should be read as required each firearm offense to run consecutive, as opposed to each group of offenses. The Court of Appeals Division II held that the State's interpretation was correct. *Id.* at 49. RCW 9.41.060(6) deals with the question of consecutive sentences in a specific manner, thereby overriding the general requirement of the Sentencing Reform Act to run current offenses concurrently. *Id.* at 48. The court read the plain language of the statute to require the court to run each of the sentences imposed for firearm crimes consecutive to one another. *Id.* The court went on further to note that it is up to the legislature, not the appellate courts, to deal with any unintended harsh consequences from the sentences. *Id.*

The *Murphy* court's conclusion was followed by the Court of Appeals Division III in *State v. McReynolds*, 117 Wn. App. 309, 71 P.3d

663 (2003). In that case, the defendant was given consecutive sentences for multiple convictions for possession stolen firearms and unlawful possession of a firearm. In finding that RCW 9.41.040(6) required consecutive sentences, the court stated "[t]his provision clearly and unambiguously prohibits concurrent sentences for the listed firearm crimes." *McReynolds*, 117 Wn. App at 343.

The clear language of the Hard Time for Armed Crime Act required the trial court to run the sentence for each firearm crime consecutive to one another. The trial court followed exactly what the legislature intended. The petitioner wants this Court to ignore the unambiguous language of RCW 9.41.040(6), the previous holdings in *Murphy* and *McReynolds,* and the legislature's clear and unambiguous intentions. As noted by the Court of Appeals, the petitioner has conceded that several other jurisdictions have similar statutory schemes; thus, the petitioner cannot demonstrate that he would have received a less severe sentence outside of Washington.

Finally, at the time of sentencing, the Appellant had 27 previous felony convictions, 13 of which he was currently serving a sentence. CP 296-313. He had an offender score of 23. Even without the mandated consecutive sentences, the trial court would have been well within its discretion to impose an exceptional sentence.

The Court of Appeals decision does not conflict with a decision of this Court. In regards to previous holdings of the other divisions of the Court of Appeals, Division I's decision directly follows the rationale of Division II and III. The petitioner's 40 year sentence was a direct result of his past criminal conduct and his current offenses and was in direct accordance with the established sentencing scheme; thus, there is not a significant question of constitutional law at issue, nor is there a substantial public interest at issue. Therefore, the petitioner's argument is without merit.

V. CONCLUSION

For the reasons stated above, Petitioner's petition for discretionary review should be denied.

Respectfully submitted this 14th day of August, 2014.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petitioner for Review was served electronically via e-mail to the following:

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

Signed at Kelso, Washington on August 15th, 2014.

Michelle Sasser

Michelle Sasser

OFFICE RECEPTIONIST, CLERK

To: Sasser, Michelle
Subject: RE: PAs Office Scanned Item Scott E. Collins, 90575-4, Response to Petition for Review

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Attached, please find the Response to Petition for Review regarding the above-reference case.

If you have any questions, please contact this office.

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