

No. 70523-7-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON,  
Appellant, Cross Respondent.**

v.

**NICHOLAS LONGO,  
Respondent, Cross Petitioner.**

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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**ORIGINAL**

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in finding district court's suppression order in the civil forfeiture hearing was a full and final resolution of the issues regarding the validity of the search warrant.
2. The trial court erred in finding that the issues before district court in the civil forfeiture proceeding were the same issues before the superior court in the suppression hearing.
3. The trial court erred in finding that district court's decision in the forfeiture hearing was on the merits, after a full hearing, and that giving collateral estoppel effect to district court's decision in this criminal case is consistent with the State's public policy considerations.
4. The trial court erred concluding the superior court in this case was collaterally estopped from reviewing the issue regarding the validity of the search warrant due to district court's prior decision in the forfeiture proceeding.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether superior court erred concluding a district court's decision in a civil forfeiture hearing collaterally estopped superior court from considering the merits of a motion to suppress in this criminal case.
2. Whether superior court erred concluding district court previously fully and fairly litigated the validity of the search warrant in the forfeiture hearing, that the forfeiture hearing resulted in a final judgment or that the county prosecutor and City of Bellingham sit in privity with one another where forfeiture and criminal procedures are separate and distinct, the parties have different interests and the county prosecutor has no ability to ensure the district court forfeiture decision is fully litigated on appeal when the City of Bellingham may be encumbered by statutory financial constraints and concerns.
3. Whether superior court erred concluding its decision to preclude the State from litigating the merits of a motion to

suppress in a criminal case based on a decision in a forfeiture hearing is just and consistent with public policy considerations in the State of Washington.

**C. STATEMENT OF FACTS**

On September 13<sup>th</sup>, 2012 Nicholas Longo was charged with manufacturing of a controlled substance and possession of a controlled substance as proscribed by Wash. Rev. Code Ann. § 69.50.401(2)(c) (West). Supp CP \_\_\_(sub nom 6, Information). While making contact with residents at 2215 Electric Avenue, Bellingham police officers noticed the windows of the residence were covered and there was condensation on the basement windows even though it was 72 degrees, warm and dry outside. CP 4-5. While at the front door, officers detected a strong odor of marijuana emanating from the residence. Id.

When Bellingham Police Officer Medlen knocked on the door of the residence and the door opened, there was a strong odor of raw marijuana coming from inside this home. CP 154-327 (see, warrant transcript prepared by Longo). Based on Officer Medlen's training for the detection of marijuana and grow operations, he reasonably suspected a grow operation in the residence. Id., CP 4-5. A search warrant was

requested and granted. CP 4-5, see also CP 154-327<sup>1</sup>, search warrant transcript. Officers discovered 180 marijuana plants growing inside the residence in a sophisticated operation with glow lights, watering system, vents and timers. Several pounds of packaged marijuana along with packing materials and a digital scale were found in an upstairs bedroom closet. Id. Longo admitted he was responsible for the marijuana grow operation. Id.

Following charges, Nicholas Longo moved to suppress evidence in this criminal prosecution pursuant to Cr R 3.6 asserting that the doctrine of collateral estoppel precluded the State from litigating the validity of the search warrant executed in this case because the issue had previously been litigated in a civil forfeiture proceeding in district court. Longo had previously successfully moved to suppress the evidence obtained pursuant to the search of his home in a civil forfeiture proceeding against the City of Bellingham. CP 154-327.

Longo asserted in this case that superior court in his criminal case was bound by the district court decision in his forfeiture proceeding. Longo's attorney strategically sought to litigate the validity of the warrant

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<sup>1</sup> CP 154-327 refers to Declaration of Longo's Counsel as to record of Proceedings in the forfeiture case. The document contains three transcripts of the forfeiture hearing itself dated 11/2/12, 1/3/13 and 1/18/13 in reverse order. Reference to those transcripts will be by report of proceeding number and date of hearing. This document also contains the warrant transcript, the Forfeiture hearing Order and subsequent withdrawal by the City of Bellingham's appeal and various other documents filed in the civil forfeiture proceeding.



in the forfeiture proceeding first because the attorney fee provision of the forfeiture statute placed him in a better position to litigate the suppression issue he wished to raise. CP 154-327 (RP 9 (1/3/13, transcript of forfeiture proceedings.)) In his forfeiture proceeding Longo asserted the search warrant was not predicated on probable cause because officers did not investigate or advise the magistrate whether Longo was a medical marijuana provider pursuant to the analysis set forth in an unpublished decision of U.S. v. Kynatson et al, no.CR 12-0016 WFN. After hearing argument and consideration submissions, district court suppressed evidence found pursuant to the search warrant and dismissed the forfeiture proceeding. The City of Bellingham filed a notice of appeal of the forfeiture proceeding but soon after, withdrew its appeal. CP 154-327 (Order withdrawing appeal of forfeiture hearing suppression order).

On May 6<sup>th</sup>, 2013, Superior Court Judge Garrett granted Longo's request to suppress evidence determining the State was estopped and bound by the prior decision litigated in the civil forfeiture hearing. Following a Motion on Reconsideration, further briefing and argument, Judge Garrett supplemented the criminal case record with the transcript provided by Mr. Longo from the prior district court civil forfeiture hearing and denied reconsideration. See, CP 154-327. Judge Garrett determined, despite public policy considerations, that she was bound by district court's

decision in its civil forfeiture hearing where the same issue was fully and finally decided on the merits and therefore the State of Washington was collaterally estopped from re-litigating the validity of the search warrant in Longo's criminal case. CP 333-332. The State filed a timely Notice of Appeal and Longo cross appealed. Supp CP \_\_\_(sub nom 50).

Due to the language of the superior court order, this Court questioned the appealability as a matter of right of the Suppression Order. After requesting a response from the parties, the Court determined the suppression order was appealable as a matter of right because the decision effectively ended the State's ability to prosecute Mr. Longo. The State now appeals.

#### **D. ARGUMENT**

- 1. Superior court erred concluding it was bound pursuant to the collateral estoppel doctrine, in a criminal case by a prior decision litigated in a civil forfeiture hearing, essentially depriving the State of its ability to prosecute Mr. Longo for his crimes.**

Application of collateral estoppel doctrine to preclude the State of Washington from prosecuting Nicholas Longo for his criminal conduct based on a decision in a prior civil forfeiture hearing is unjust for policy reasons. Civil forfeiture hearings and criminal prosecutions are separate, often parallel proceedings that serve distinct and different purposes. The

fact that property may be subject to forfeiture requiring an expedited hearing determining legal issues that may be raised in a criminal prosecution should not have any bearing on the State of Washington's ability to file and hold an individual responsible for their criminal behavior in a separate and distinct criminal prosecution. State v. Dupard, 93 Wash. 2d 268, 609 P.2d 961 (1980). Superior court's decision in this case should therefore be reversed.

The collateral estoppel doctrine is founded on the Fifth Amendment's guarantee against double jeopardy. State v. Williams, 132 Wash. 2d 248, 253, 937 P.2d 1052 (1997)1997). Collateral estoppel or issue preclusion may bar relitigation of an issue of fact or mixed fact and law that was essential to the previous decision, as conclusive in a subsequent proceeding involving the same parties. 14A Karl B. Tegland, WASHINGTON PRACTICE, Civil Procedure sec.35.32, at 475 (1<sup>st</sup> ed.2003).

The doctrine of collateral estoppel requires a showing that (1) the issue decided in the earlier civil proceeding is identical to the issue raised in this criminal prosecution; (2) the prior civil proceeding must have ended in a final judgment on the merits; (3) the party against who the doctrine is asserted must have been a party or in privity with a party in the prior adjudication; and (4) the application of the doctrine does not work an

injustice against the party to whom the doctrine is applied. Williams, 132 Wash. 2d at 254. Whether collateral estoppel bars a claim is a question of law reviewed de novo. Lemond v. State, Dep't of Licensing, 143 Wash. App. 797, 803, 180 P.3d 829 (2008)2008).

***a. The legislature did not intend nor does our State constitution require that the State choose between bringing a remedial civil forfeiture hearing or a criminal prosecution.***

In State v. Barnes, 85 Wash. App. 638, 932 P.2d 669 (1997), the Court held that a prior summary judgment dismissing the State's forfeiture action against Barnes did not have double jeopardy or collateral effect on the subsequent criminal prosecution. On appeal, Barnes did not sufficiently demonstrate the issue he wished to preclude the State from litigating was identical or was previously fully litigated. Nonetheless, even if Barnes did meet this burden, the court concluded, "compelling public policy considerations supported the trial court's refusal to apply the doctrine" given that the "purpose of the criminal code is to protect the community from "conduct that inflicts or threatens substantial harm to individual or public interests." Id. at 640, *citing* RCW 9A.04.020, RCW 9.94A.010(4). Whereas, a civil forfeiture action satisfies a very different remedial purpose; in Barnes case, to forfeit financial gains traceable to criminal profiteering conduct pursuant to RCW9A.82.100(5)(c).

Predicated on these considerations, the court determined employing collateral estoppel under these circumstances would be unjust. Barnes is dispositive and demonstrates as a matter of law superior court erred and should be reversed.

On appeal, Barnes also asserted RCW 9A.82.100(13) precluded the State from bringing a criminal action based on the same acts relied upon in an earlier civil action. The Court found in contrast to Barnes argument, that the statute in fact permitted prosecution for both civil and criminal actions. Subsequent to the statute's enactment, there were several unsuccessful attempts to add language to require prosecutors to elect between bringing a civil or criminal action. Id. at 655, *citing*, 2 House Journal, State of Wash. 1858 (1985); 2 Senate Journal, State of Wash. 1677 (1985). The Court concluded the legislature's failure to amend this statute to require prosecutors to choose civil or criminal remedies demonstrated the legislature intended to provide prosecutors with the ability to bringing both civil and criminal actions based on the same conduct. Id.

Later the same year Barnes was decided, our Supreme Court determined in State v. Catlett, 133 Wash. 2d 355, 945 P.2d 700 (1997), consistent with Barnes, that the double jeopardy protections of the 5th Amendment of the United States Constitution and Art. 1 §9 of the

Washington Constitution were not implicated by forfeiture proceedings and would not bar subsequent criminal prosecution for drug offense where property used to facilitate, promote the drug offense is forfeited in a prior civil forfeiture hearing.

The Catlett court found the pursuant to WA. Const. Art I, §9 forfeiture proceedings under RCW 69.50.505 do not result in punishment to which jeopardy attaches because forfeiture proceedings are civil in rem proceedings that target the property, not the individual. The Court confirmed forfeiture hearings constitute a civil remedial process that targets property wherein an expedited hearing is held either administratively or if leave is properly sought, in a court of appropriate jurisdiction. Catlett concluded criminal prosecutions were distinguishable, serving a very different purpose to hold persons who commit crimes criminally responsible,

Whatcom County Superior Court essentially circumvented our state Supreme Court's decisions in Catlett to hold, even though double jeopardy principles are not implicated by a remedial forfeiture hearing, that the doctrine collateral estoppel may still preclude the State from litigating legal issues in a criminal prosecution if the same issues are allegedly fully litigated in a prior civil forfeiture proceeding.

Superior court placed too much emphasis on whether the same issue being raised in the criminal action was fully litigated in the prior civil forfeiture hearing wholly ignoring whether the issue was fairly litigated in the forfeiture hearing, truly resulted in a final judgment and the public policy considerations and dispositive state jurisprudence on this matter. Superior court erred and should be reversed.

***b. Longo's suppression issue was not fairly litigated, did not result in a final judgment on the merits, nor did the City of Bellingham and county prosecutor sit in privity with one another in the prior forfeiture proceeding. The State therefore should not be precluded from litigating the merits of Longo's suppression motion in this criminal case.***

Property at issue in a forfeiture hearing may be seized after a showing the forfeiture was lawful by a preponderance of the evidence for any number of reasons pursuant to the statute-including whether the property at issue was or is intended to be used for illegal drug activity or represents the proceeds of illegal drug sales, even without showing a connection between the property and a particular person. State v. Catlett, 133 Wn.2d at 312, RCW 69.50.505, *see also* United States v. Ursery, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996). The State drug forfeiture statute provides the exclusive mechanism for forfeiting property used in proscribed crime and sets for the exclusive manner for a claimant

to file a claim to return the property. State v. Alaway, 64 Wash. App. 796, 801, 828 P.2d 591 (1992)1992), RCW 69.50.505.

The statute requires the seizing agency to provide notice to interested parties within 15 days of the seizure. RCW 69.50.505(3). A person asserting a property interest then must file notice claiming an interest within 45 days or forfeit the property. RCW 69.50.405(3). Thereafter, a hearing and opportunity to be heard will be held. RCW 69.50.505(5). The expedited forfeiture hearing is an administrative action unless the claimant moves to have the proceeding heard in the court of appropriate jurisdiction pursuant to the rules of civil procedure. RCW 69.50.505(5).

Contrary to Longo's assertion, district court while seemingly fully considering the merits of the issue Longo presented, did not fairly consider whether the search warrant was predicated on probable cause under the abuse of discretion standard. Instead, district court overreached in the forfeiture proceeding at Longo's request, to review whether there was probable cause to issue the search warrant de novo. See, CP 154-327 (Declaration of Counsel as to record in Forfeiture Proceeding, RP 9 (1/3/13) Forfeiture hearing transcript).

Under Washington forfeiture law, "probable cause requires the existence of reasonable grounds for suspicion supported by circumstances



sufficiently strong to warrant a person of ordinary caution in the belief..” that the property was used or intended to be used in violation of the Uniform Controlled Substances Act. Barlindal v. City of Bonney Lake, 84 Wash. App. 135, 141, 925 P.2d 1289 (1996)1996). In a criminal case similarly, the issuance of a warrant is deemed proper when a reasonably prudent person would understand from the facts in the affidavit that a crime has been committed and the evidence of that crime would be found at the place to be searched. State v. Garcia, 63 Wash. App. 868, 871, 824 P.2d 1220 (1992)1992).

Information providing probable cause in support of a warrant need be gleaned entirely from its contents. State v. Neth, 165 Wash. 2d 177, 196 P.3d 658 (2008). A magistrate’s decision that a warrant should issue is an exercise of judicial discretion that is reviewed for abuse of discretion. State v. Jackson, 102 Wash. 2d 432, 688 P.2d 136 (1984). Great deference is given to the issuing magistrate’s determination of probable cause. Id. All doubts should be resolved in favor of the validity of the warrant. State v. Fisher, 96 Wash. 2d 962, 639 P.2d 743 (1982).

District court erred by reviewing the search warrant de novo in the context of the forfeiture proceeding to determine suppression of the property was warranted. By employing the wrong standard of review, district court’s determination in the forfeiture hearing, which is by statute

limited and narrow in focus, was overbroad and the probable cause issue while extensively litigated, was not fairly litigated such that it is appropriate to give collateral estoppel effect to district court's decision.

In circumstances where the Court's subject matter jurisdiction is limited, a judgment entered that contravenes that limitation will not have preclusive effect. Other Washington cases support this interpretation. *See, Mead v. Park Place Properties*, 37 Wn.App. 403, 681 P.2d 256 (1984) (superior court's authority in an unlawful detainer action is limited to determining the right to possession and issues incident to that right. Preclusive effect will not arise from an unlawful detainer action when the parties are involved in a subsequent litigation in a case under the broad general jurisdiction of the court). *See also, Kennedy v. City of Seattle*, 94 Wash. 2d 376, 617 P.2d 713 (1980) (a criminal misdemeanor case after finding the ordinance unconstitutional.) Similarly here, district court's authority was limited pursuant to RCW 69.50.505 to determining whether the property at issue was subject to forfeiture. RCW 69.50.505(5). To the extent district court exceeded those limits; its decision should not be given preclusive effect.

District court's decision was also not a final decision on the merits for purposes of applying the doctrine of collateral estoppel in this criminal case. While district court rendered a final decision suppressing evidence,

the City of Bellingham was likely hamstrung to fully litigate the issue on appeal in light of the attorney fee and cost provisions of the forfeiture statute explaining potentially why, despite the City's disagreement with the district court decision; it opted to withdraw its appeal. See, RCW 69.50.505(6), CP 154-327. Longo's attorney confirmed during the forfeiture hearing that he strategically sought to litigate the suppression issue in the forfeiture proceeding because the attorney fee provision placed him potentially in a better position. CP 154-327 ( RP 9, 1/3/13 forfeiture proceeding transcript). Given that forfeiture hearings are limited in scope, expedited and the forfeiting agency has limited recourse to appeal legal issues in light of costs and attorney fees it risks incurring pursuant to the forfeiture statute in pursuing an appeal, this court should not find the prior forfeiture hearing fairly litigated or resulted in a final decision on the merits.

Finally, this Court should determine the State of Washington and the City of Bellingham was not in privity with each other in contrast to the decision in Barlindal, 84 Wash. App. 135. Privity "denotes a mutual or successive relationship to the same right or property." Id. citing, Owens v. Kuro, 56 Wash. 2d 564, 354 P.2d 696, 696 (1960). In Barlindal, the Court determined Bonney Lake, who handled the forfeiture proceedings and Pierce County, who sought to criminally prosecute Barlindal, had a

mutual interest and shared common purpose in successfully prosecuting Barlindal and forfeiting his property. In contrast to Barlindal, the parties here did not share a mutual objective. The State seeks to hold Longo criminally responsible under our criminal statutes, while the City in a separate and distinct forum, sought forfeit properties related to Longo's crimes. The prosecutor had no financial interest in the forfeiture proceeding and importantly, no ability to force the City of Bellingham to fully litigate and appeal district court's decision in light of the potential statutory costs the City of Bellingham could face in pursuing an appeal. Given the separate interests and parallel but distinct proceedings, the county prosecutor and City of Bellingham do not sit in privity with each other for purposes of employing the collateral estoppel doctrine.

This Court should reverse superior court and remand this matter back to superior court to consider the merits of Longo's Motion to Suppress in the context of his criminal prosecution. Even if this Court determines Longo's suppression issue was previously fully and fairly litigated, resulted in a final judgment on the merits and that the county prosecutor sits in privity with the City of Bellingham, sound public policy considerations do not support this application of collateral estoppel; a doctrine founded on double jeopardy principles which our state Supreme

Court has already determined is not implicated by decisions made in forfeiture hearings.

***c. Precluding the State of Washington from litigating a CrR 3.6 motion to suppress based on a prior civil forfeiture hearing decision is unjust and contravenes public policy. Superior court should be reversed.***

Washington courts have consistently rejected employing collateral estoppel to preclude criminal prosecutions based on prior administrative or civil proceedings, even when, as is alleged here, the identical or related issue is litigated. Williams, 132 Wash. 2d 248 (Sound public policy precluded application of collateral estoppel to preclude criminal prosecution subsequent to DSHS hearing); State v. Cleveland, 58 Wash. App. 634, 794 P.2d 546 (1990) (subsequent criminal prosecution not precluded following adverse result in dependency proceeding on the same issue), State v. Vasquez, 148 Wash. 2d 303, 59 P.3d 648 (2002), Dupard, 93 Wash. 2d, 2731980) (determination of innocence by parole board not preclusive of subsequent criminal prosecution on same facts where one hearing was to determine parole violation and the other hearing to determine if Dupard committed a new crime.), Barnes, 85 Wash. App. 638 (prior summary judgment dismissing forfeiture proceeding against Barnes did not have collateral estoppel effect on subsequent prosecution

because public policy considerations demonstrate applicability of the doctrine would work an injustice against the State).

In Cleveland, 58 Wash. App. 634, the first three requirements of collateral estoppel were met. The issue in the dependency proceeding was identical to the issue presented in the subsequent criminal trial-whether there was sexual abuse, the State of Washington was the party in both proceedings and the dependency determination ended with a final judgment on the merits. The Court nonetheless found public policy considerations precluded estopping the State from criminally prosecuting Cleveland based on the prior dependency determination.

The Court found the expedited nature, narrow focus of dependency hearings and lack of resources in dependency proceedings demonstrate it would be unjust to hold the State to the decision made in the limited dependency proceeding. The Court also expressed concern that if collateral estoppel were applied in the criminal case based on a prior dependency determination, the State would be reluctant to conduct dependency proceedings where the issues could overlap in a subsequent criminal prosecution or would be forced to utilize resources to ensure the issues are fully litigated in the dependency hearing in a manner consistent with a criminal prosecution. This result would thwart the limited and important purposes dependency proceedings serve.

Consistent with Cleveland, our supreme court again determined in State v. Williams, that public policy reasons precluded applying collateral estoppel to bar a subsequent criminal prosecution for welfare fraud where the same conduct was at issue in a prior administrative proceeding where the State was seeking reimbursement for overpayment. In the administrative hearing, the State sought to recoup overpayment of financial assistance whereas, in the criminal proceeding the State sought to hold Williams criminally responsible for her behavior.

As in Cleveland, the Williams court found the purposes of the two proceedings were completely different and concluded permitting the use of the collateral estoppel doctrine to preclude criminally prosecuting Williams on the basis of a prior administrative determination would result in the State essentially having to choose between prosecuting an individual or foregoing an administrative hearing to recover financial losses for the State, or to re-allocate resources to fully litigate all the issues that could arise in the criminal case, in the administrative hearing. Id. at 258.

In Vasquez, 148 Wash. 2d 303, our supreme court again considered the applicability of collateral estoppel in a criminal case. There, for the first time, the Court examined whether a determination of probable cause in an administrative license suspension hearing should bar

re-litigation of that determination in a subsequent criminal prosecution. As in Cleveland and Williams, the Court in Vasquez focused not only on whether the issue was fairly litigated but also on the injustice prong and corresponding public policy of employing the doctrine of collateral estoppel in this scenario. The Court reflected, based on its previous decision in Thompson v. State, Dep't of Licensing, 138 Wash. 2d 783, 790, 982 P.2d 601 (1999), that the injustice element is “most firmly rooted in procedural fairness.” And consequently, in addition to determining whether the parties in the earlier proceeding received a full and fair hearing on the issue, Washington courts must also examine the important role of public policy considerations encompassed by the injustice prong. The Vasquez court concluded a court may reject or qualify application of collateral estoppel when collaterally estopping subsequent litigation would contravene public policy.

Ultimately, the Vasquez court held a determination in a litigated administrative hearing for purposes of suspension or revocation of a driver’s license will *not* preclude re-litigation of the same issue in a subsequent criminal prosecution. The Court predicated its decision on the fact that the nature of the two proceedings are distinct in purpose and procedure even when the same legal issue is raised and litigated, that applying collateral estoppel in these circumstances would force the State



to fully litigate matters at the administrative level causing delay and depletion of resources within prosecutors office. The Court concluded the purpose of a criminal prosecution was to determine whether the defendant should be punished for committing a crime. *Quoting Dupard*, 93 Wash. 2d, 275-761 (1980), the Court determined such purpose is “more appropriately addressed to the criminal justice system” unencumbered by any parallel proceedings. *Vasquez*, 148 Wash. 2d at 310, *citing Dupard*, 93 Wash. 2d at 277.

Consistent with these cases, our state supreme court has also rejected extending the collateral estoppel doctrine to allow non-mutual collateral estoppel applicable to subsequent or simultaneous criminal prosecution of co-defendants. *See, State v. Mullin-Coston*, 152 Wash. 2d 107, 95 P.3d 321 (2004) (2007) (the traditional policy reasons for applying collateral estoppel in civil cases are outweighed by various competing concerns and protections in the criminal context, thus an evidentiary decision on a CrR 3.6 hearing as to one co-defendant is not binding as to another).

Collateral estoppel is a judicially created doctrine that evolved to conserve judicial resources and provide finality to litigants. *Dupard*, 93 Wash. 2d at 272. Its application in the context of a criminal prosecution however, works and injustice by precluding the State from the opportunity

to enforce the criminal code. Beckett v. Dep't of Soc. & Health Servs., 87 Wash. 2d 184, 550 P.2d 529 (1976) *overruled by* Matter of McLaughlin, 100 Wash. 2d 832, 676 P.2d 444 (1984) (collateral estoppel is not appropriate where the scope/purpose of the hearings and the burden of proof is different).

Consideration of the “injustice prong” is a fundamental consideration of the collateral estoppel doctrine. Reninger v. State Dep't of Corr., 134 Wash. 2d 437, 451, 951 P.2d 782 (1998)1998). The record in this case demonstrates superior court overlooked the import of this consideration, focusing solely on Longo’s contention that he fully litigated his suppression issue in district court. As in Cleveland, Williams and Vasquez giving preclusive effect to a forfeiture hearing-that, by statute, is a separate civil proceeding expedited and limited in scope, is unjust and contravenes public policy because such a holding will require the state to ensure any related legal issue raised in the forfeiture proceeding is fully litigated with the resources of the prosecuting agency or opting to advise the forfeiting agency to forego forfeiture of the property to ensure the ability of the State to fully prosecute an individual in a criminal case. This contravenes the legislative intent, our state constitution and public policy.

***d. Superior court erred as a matter of law by erroneously extending the application of collateral estoppel to preclude the State from litigating legal issues in a criminal prosecution by determining it was bound by district court's prior decision in Longo's civil forfeiture hearing.***

Collateral estoppel has been employed, in contrast to the circumstances presented here, to preclude re-litigation of issues fully litigated first in a criminal prosecution in a subsequent civil forfeiture action where the party asserting collateral estoppel could demonstrate by competent evidence that the identical issue was previously fully litigated in a criminal case and the use of collateral estoppel would not result in an injustice. *See, Barlindal, 84 Wash. App. 135* (City's civil action for forfeiture of firearms was collaterally estopped by prior judicial determination in a criminal case that law enforcement did not have probable cause to search the residence where firearms were located), Thompson, 138 Wash. 2d 783. (Collateral estoppel precluded the department of licensing from re-litigating the admissibility of BAC in commercial driver's license hearing where the probable cause issue was previously raised and litigated in a criminal case).

One need only superficially compare the disparate standards of proof, the civil and criminal procedure distinction and the presumptions regarding search warrants to conclude that a suppression decision reached in a criminal matter in superior court is appropriately held to be binding

on a subsequent civil forfeiture proceeding. Applying collateral estoppel in the converse scenario, given these same considerations however, is unjust.

Whatcom County Superior Court erroneously extended Barlindal and Thompson in a manner that is unprecedented and ignored important procedural distinctions between these and Longo's case. In fact, the Court in Barlindal explained that the difference between the burden of proof in criminal and civil cases often precludes the application of collateral estoppel in a criminal case but in contrast, it could be applied where an issue in a prior criminal case is subsequently litigated in a civil matter. Barlindal, 84 Wash. App. at 140, *citing* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (U.S.S.C. 1984), 79 P.Ed.2d 361 (1984). And in Thompson, the Court held, notwithstanding its decision to preclude re-litigation of an issue based on a prior determination in a criminal case in a subsequent DOL hearing, that there were exceptions to its holding and that courts may still reject the application of collateral estoppel under circumstances where "there is an intervening change in the law, or the law applicable at the time of the first hearing was not well explained and required subsequent exposition." Id. at 796.

Longo's case is more analogous to Cleveland, Williams, Barnes and Vasquez, than to Barlindal and Thompson. Our state supreme court has previously determined that forfeiture proceedings are independent expedited, separate and distinct civil in rem proceedings that serve different interests and seek to obtain different results than criminal prosecution proceedings. Catlett, 133 Wash. 2d at 366-7-7, ("Seizure and forfeiture are civil processes and are independent of the outcome of any criminal charges that might be brought against the owner of the property." *quoting*, FINAL LEGISLATIVE REPORT, 2SHB 1973 (1989) at 119. )

Thus, as in Vasquez, application of collateral estoppel should not be applied in this case to preclude litigation of the merits of Longo's suppression motion in Longo's criminal case. Superior court should not be bound by district court's decision in a separate and distinct prior in rem civil forfeiture proceedings. Such a holding is unjust and contravenes public policy. Reversal of superior court's suppression order is warranted.

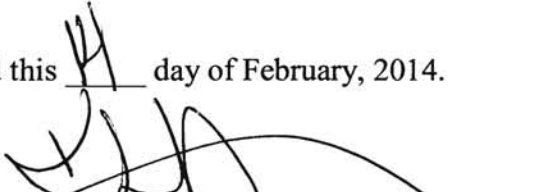
The State respectfully requests this Court reverse superior court's Order suppressing evidence, reject Longo's argument and analysis regarding the applicability of collateral estoppel and find that the issues decided in the civil forfeiture hearing in district court between the City of Bellingham and Longo pertaining to property not be given preclusive

effect on the State's ability to criminally prosecute Longo and litigate the merits of Longo's CrR 3.6 suppression motion.

**E. CONCLUSION**

The State requests this Court reverse superior court's suppression Order and remand this matter back to the trial court to allow the State to independently litigate the merits of Longo's motion to suppress evidence and criminal case.

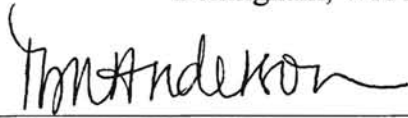
Respectfully submitted this 14 day of February, 2014.

  
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KIMBERLY THULIN, WSBA #21210  
Appellate Deputy Prosecuting Attorney  
Attorney for Appellant

**CERTIFICATE**

I CERTIFY that on this date I mailed, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's counsel, addressed as follows:

William Johnston  
401 Central Avenue  
PO Box 953  
Bellingham, WA 98225



LEGAL ASSISTANT



DATE