70523-7

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No. 70523-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Appellant, Cross Respondent.

v.

NICHOLAS LONGO, Respondent, Cross Petitioner.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

A. ARGUMENT IN REPLY

1. The Legislature did not intend that the State choose between seeking to forfeit property under its remedial forfeiture statute or criminally prosecuting and holding an individual responsible for engaging in criminal conduct.

Application of collateral estoppel doctrine to preclude the State of Washington from prosecuting Nicholas Longo for his criminal conduct based on a decision made in a prior expedited civil forfeiture hearing is unjust for policy reasons and contravenes Washington's legislative intent. Civil forfeiture hearings and criminal prosecutions are separate, often parallel proceedings that serve distinct and different purposes. An agency seeking to forfeit property under this state's remedial forfeiture laws wherein an expedited hearing is required should not preclude the state of Washington from its ability to file and hold an individual responsible for their criminal behavior in a separate and distinct forum of a criminal prosecution. State v. Dupard, 93 Wn.2d 268, 609 P.2d 961(1980). Superior Court's decision in this case should therefore be reversed.

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. State v. Williams, 132 Wn.2d at 254. The collateral estoppel doctrine is founded on the Fifth Amendment's guarantee against double jeopardy. State v. Williams, 132 Wn.2d 248, 253, 937 P.2d 1052 (1997).

In State v. Barnes, 85 Wn.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. While the decision was primarily predicated on the fact Barnes could not sufficiently demonstrate the issue he wished to preclude the State from re-litigating was identical, the appellate court nonetheless concluded that even if Barnes did meet this burden, "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 particular case, to forfeit financial gains traceable to criminal profiteering conduct pursuant to RCW9A.82.100(5)(c). Predicated on all of these considerations, the court determined employing collateral estoppel under

these circumstances would be unjust. The Court also noted that the forfeiture statute, RCW 9A.82.100(13) permits the forfeiting agency to separately bring a civil proceedings to forfeit property stemming from the same conduct as may be the subject of a separate criminal prosecution. Id. at 640.

Subsequent to Barnes, the court in State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997), in the wake of U.S. v. Usery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.ed. 549 (1996), held 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, which are civil in rem proceedings that target property and not persons 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. Catlett concluded in contrast to Deeter v. Smith, 106 Wn.2d 376, 721 P.2d 519 (1986) relied upon by Longo, that criminal prosecutions are distinguishable from forfeiture proceedings, 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 Barnes and Catlett to hold, even though double jeopardy principles are not implicated by remedial forfeiture

hearings, 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 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 or that public policy considerations and dispositive state jurisprudence on this matter precludes the application of collateral estoppel in these circumstances. Superior Court erred as a matter of law and should be reversed.

a. Longo's suppression issue was not fully and fairly litigated, even if district court de novo review of the warrant was appropriately because district court's subject matter jurisdiction was limited, the state did not have the option of fully litigating the issue by requesting the city fully prosecute an appeal of the district court decision and the City of Bellingham and state of Washington should not be considered to be sitting in privity of one another for purposes of applying issue preclusion.

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.2148, 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 Wn.App. 796, 801, 828 P.2d 591 (1992), RCW 69.50.505.

In the state's opening brief the state argued district court overreached its authority in the forfeiture hearing by reviewing the search warrant at issue de novo. See, Opening Br. at 12. The state asserted the standard of review is abuse of discretion whereas, Longo argued district court appropriately reviewed the search warrant in the context of the forfeiture proceeding, de novo. See, Opening br at 12, Response Br. at 7. The state concedes the while the issuing magistrates determination of probable cause is reviewed for an abuse of discretion and that great deference is given by the reviewing court, the trial court's review of the legal conclusion that probable cause exists, is reviewed de novo. See, State v. Chamberlin, 161 Wn.2d 30, 40, 162 P.3d 389 (2007) *but see*, State v. Maddox, 152 Wn.2d 499, 98 P.3d 1199(2004).

Even if district court appropriately reviewed the probable cause determination de novo, Superior Court nonetheless erred precluding the

state of Washington from litigating the merits of Longo's suppression motion based on district court's decision in the forfeiture hearing because the district court's subject matter jurisdiction was still limited, the proceedings expedited with no incentive for the City to fully pursue an appeal and the City of Bellingham does not sit in privity with the state of Washington because the property at issue prompts a forfeiture proceeding and a separate criminal prosecution. Therefore, while the issues Longo asserts on its face appear to have been seemingly fully litigated, a closer examination of the circumstances reveals the merits of whether the search warrant was supported by probable cause was not fully and fairly litigated in the forfeiture proceeding such that it would be appropriate to apply the doctrine of collateral estoppel to preclude the state of Washington from litigating the merits of a suppression motion in this criminal case.

District Court's authority in the prior forfeiture proceeding was limited pursuant to RCW 69.50.505 to determining whether the property at issue was subject to forfeiture. RCW 69.50.505(5). Pursuant to 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 sought to be forfeited was used or intended to be used in violation of the Uniform Controlled Substance Act. Barlindal v. City of

Bonney Lake, 84 Wn.App. 135, 141, 925 P.2d 1289 (1996). In circumstances where the Court's subject matter jurisdiction is limited, a judgment entered that contravenes that limitation will not have preclusive effect. *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 Wn.2d 376, 617 P.2d 713 (1980). (Supreme Court rejected assertion that Superior Court was estopped to relitigate the constitutionality of an ordinance based on a previous Municipal Court decision dismissing a criminal misdemeanor case after finding the ordinance unconstitutional.) To the extent district court exceeded its limited authority; its decision should not be given preclusive effect.

District Court's decision was also not a final decision fully litigated on the merits for purposes of applying the doctrine of collateral estoppel in this criminal case because the City of Bellingham did not fully pursue an appeal, even though it disagreed with district court's holding, likely in light of the attorney fee and cost provisions of the forfeiture statute See, RCW 69.50.505(6), CP 154-327 (RP 9, 1/3/13). Longo

confirmed he strategically sought to litigate the suppression issue in the forfeiture proceeding first because the forfeiture statute attorney fee provision placed him in a better position. CP 154-327 (RP 9, 1/3/13 forfeiture proceeding transcript). In other words, Longo could quickly have district court decide whether there was probable cause to support the warrant in the forfeiture hearing and if he lost, no harm no foul because he could re-litigate the issue in the criminal case and could fully prosecute an appeal without worrying about cost disincentives. The City, on the other hand, having lost, had to consider the cost benefit of prosecuting an appeal on the merits in light of Longo's right to fees and interest on property forfeited and held during the appeal. The State of Washington had no ability to force the City to appeal. Under these circumstances, Superior court erred determining district court fully and fairly litigated the merits raised by Longo in the forfeiture proceeding.

Longo also argues that probable cause was fully and fairly litigated because "the transcript of the testimony in support of the search warrant was the same before Whatcom County District Dourt and Superior Court." Br. of Respondent at 6. While the application to the search warrant was the same, the transcript of the forfeiture hearing itself –detailing the arguments made in the forfeiture hearing was supplemented ***after*** superior court determined the state was precluded from litigating the

merits of Longo's motion to suppress. Thus, the state was never provided an opportunity to litigate the merits of the suppression motion in this criminal case even where initially, superior court had no basis in fact to determine the identity of the issue litigated in the forfeiture proceeding.

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 conclude, in contrast to Superior Court's determination, that the prior forfeiture hearing was not fully and fairly litigated and did not result in a final decision on the merits.

Collateral estoppel should not preclude the State of Washington from criminally prosecuting Longo because the State of Washington did not sit in privity with the City of Bellingham, in contrast to the decision in Barlindal v. City of Bonney Lake, 84 Wn.App. 135, 925 P.2d 1289 (1996). Privity "denotes a mutual or successive relationship to the same right or property." Id *citing* Owens, v. Kuro, 56 Wn.2d 564, 543 P.2d 696 (1960). Privity does not arise from the fact that litigants are interested in the same question or in proving or disproving the same facts. Loveridge v. Fred Meyer, Inc, 125 Wn.2d 759, 887 P.2d 898 (1995). Privity is established in cases where a party is in actual control of the litigation or substantially participates even though not in actual control. Id.

In Barlindal, the Court determined the City of 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 notwithstanding Catlett. The court's conclusion in Barlindal is inconsistent with the legislature's determination that forfeiture matters and criminal prosecution are separate and distinct proceedings. Regardless, the facts in this case in contrast to Barlindal, reflect parties here did not share a mutual objective and that the state of Washington had no control with how the City handled the forfeiture proceeding or appeal. The State of Washington sought 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, Superior court erred concluding the County prosecutor and City of Bellingham sit in privity with each other for purposes of employing the collateral estoppel doctrine to preclude the

state of Washington from litigating the merits of a suppression motion in its criminal case.

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.

b. ***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.***

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. State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997)(Sound public policy precluded application of collateral estoppel to preclude criminal prosecution subsequent to DSHS hearing); State v. Cleveland, 58 Wn.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 Wn.2d 303, 59 P3d

648 (2002), State v. Dupard, 93 Wn.2d 268, 273, 609 P.2d 961 (1980) (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.), State v. Barnes, 85 Wn.App. 638, 932 P.2d 669 (1997). (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 State v. Cleveland, 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 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.

Similarly, in Williams, 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. 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 State v. Vasquez, 148 Wn.2d 303, 59 P.3d 648 (2002), 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. Department of Licensing, 138 Wn.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 concluded the purpose of a criminal prosecution was to determine whether the defendant should be

punished for committing a crime. Q*uoting* State v. Dupard, 93 Wn.2d 268, 275-76, 609 P.2d 961 (1980), the Court determined such purpose is "more appropriately addressed to the criminal justice system" unencumbered by any parallel proceedings. State v. Vasquez, 148 Wn.2d at 310, *citing,* State v. Dupard at 277.

Collateral estoppel is a judicially created doctrine that evolved to conserve judicial resources and provide finality to litigants. State v. Dupard, 93 Wn.2d at 272. Its application in the context of a criminal prosecution however, works an injustice by precluding the State from the opportunity to enforce the criminal code. Beckett v. Department of Social and Health Services, 87 Wn.2d 184, 550 P.2d 529 (1976), *overruled on other grounds*, Matter of McLaughlin, 100 Wn.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. Department of Corrections, 134 Wn.2d 437, 451, 951 P.2d 782 (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.

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 v. City of Bonney Lake, 84 Wn.App. at 140, *citing* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099, 79 P.Ed.2d 361 (1984). 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. State v. Catlett, 133 Wn.2d at 366-7, ("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 proceeding. 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.

B. 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 17th day of June, 2014.

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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:

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Therese E. Zamil
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6/17/2014
DATE