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No. 70523-7-I

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,
Appellant, Cross Respondent,

v.

NICHOLAS LONGO,
Respondent, Cross Petitioner.

Appeal and/or Petition for Discretionary Review
of an order of the Superior Court of Whatcom County
dismissing the criminal charge

THE HONORABLE DEBORAH GARRETT

Brief of Respondent,
Cross Petitioner
NICHOLAS LONGO

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying defendant's motion to suppress based upon the insufficiency of probable cause.
2. The trial court correctly granted defendant's motion to suppress based upon collateral estoppel because of the final ruling on the merits in Longo v. Ramsey, Chief of Police for the City of Bellingham, Whatcom County District Cause No. CV12-2036, Whatcom County Superior Court Cause No. 13-2-00526-0.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the rationale of United States v. Kynaston, No. CR-12-0016-WFN or the holding of the Court of Appeal for Division 3 in State v. Daniel K. Ellis, 178 Wash. App. 801, 315 P.3d 1170 (2014) and the holding of Court of Appeal for Division 1 in State v. Reis 2014 WL 1284863 (2014) which expressly rejected Kynaston and ruled that the search warrant testimony need not show the Washington Medical Marijuana Act exception's inapplicability, correctly interpreted the scope and meaning of the 2012 amendments to the Washington Medical Marijuana Act, i.e. whether probable cause to issue a search warrant based upon police detection of the odor of growing marijuana requires probable cause to believe that the grower is not authorized to grow marijuana under the Washington Medical Marijuana Act?

2. Whether the general principles of collateral estoppel apply from the Whatcom County District Court adjudication in Longo v. Ramsey, Chief of Police of Bellingham, CV12-2036, Whatcom County Superior Court Cause No. 13-2-00526-0 based upon the Whatcom County District Court's final ruling on the merits finding that the search warrant, which spawned the forfeiture action and the criminal prosecution, was unlawful as not supported by probable cause?

C. STATEMENT OF THE CASE

Respondent Longo does not take issue with the recitation of facts by the State. Longo agrees that the Superior Court gave collateral estoppel effect to the Whatcom County District Court order in Longo v. Ramsey, Chief of Police of Bellingham, CV12-2036 Whatcom County Superior Court Cause No. 13-2-00526-0 and that the effect of that order was to end the capacity of state to prosecute Longo.

The other matter worth noting is that in this case the Superior Court rejected the Kynaston rationale and opined that but for the application of collateral estoppel, the court

would have denied the motion to suppress. For this reason, this court may choose to stay consideration of this case given that the primary argument upon which the Whatcom County District Court order of suppression was based was the Whatcom County District Court's adoption of the rationale behind the decision of United States v. Kynaston, No. CR-12-0016-WFN. In Kynaston, a federal district judge sitting in Spokane interpreted state law to suppress a search warrant for marijuana based upon smell of the odor of growing marijuana. The federal district court ruled such cases require probable cause to conclude that the person growing marijuana is not a licensed medical marijuana grower under Washington law. The Washington Court of Appeals for Division 3 has ruled in State v. Daniel K. Ellis, 178 Wash. App. 801, 315 P.3d 1170 (2014) and the Washington Court of Appeal for Division 1 has ruled in State v. Reis 2014 WL 1284863 (2014) and expressly rejected Kynaston and ruled that the search warrant testimony need not show the Washington Medical Marijuana exception's inapplicability. Since the Washington Supreme Court is likely to review Ellis and Reis, this court might wish to stay consideration of this motion for discretionary review until either review is denied in Ellis and Reis or until the Washington Supreme Court resolves the issue in Ellis and Reis.

D. ARGUMENT

1. Longo cross-appealed the ruling of the trial court rejecting the Kynaston rationale argument. Since Divisions 3 and 1 in Ellis and Reis has now rejected the Kynaston's interpretation of the 2012 amendments to the Washington Medical Marijuana Act, Longo acknowledges his argument has been rejected but preserves here his position in the event the Washington Supreme Court overturns Ellis and Reis.

2. This court should decline the invitation to create an exemption from issue preclusion for judgments of the District Court in civil forfeitures cases brought pursuant to RCW 69.50.505 and affirm the decision of the Superior Court correctly applying the principles of collateral estoppel.

This case presents the issue of whether there should be an exemption under the norm rules for application of issue preclusion in criminal cases, at least where the charge in question is a felony offense. But this proposed exemption would primarily operate in the area of civil forfeitures under RCW 69.50.505 in cases where simultaneous with the initiation of the criminal prosecution, the state or one of its subdivisions, here the police department of the City of Bellingham, commences, at the same time that the criminal prosecution is commenced by the Prosecuting Attorney, an action to forfeit property. Distilled down to its base, the state is presenting the following exemption argument- the matter of the prosecution of drug offense felonies in the Superior Court is paramount and a special exemption, if you will, ought be created, to diminish the authority of the District Court, in the hierarchy of the courts, and make any final ruling on the merits not binding upon the Superior Court in the same factual incident. In effect, the norm rules of issue preclusion ought be stretched to create a new exception which would subordinate final rulings on the merits of a case properly before the District Court, to the interests of the executive branch of government as embodied in the power of the County Prosecuting Attorney to have unfettered discretion to prosecute crimes.[1]

[1] This may have been pointed out before the District Court, as here, the state in the prosecution of the criminal offense, and the City of Bellingham as the plaintiff in the forfeiture action can work together as they are on the same team. The seizing police department can decline to prosecute the forfeiture to avoid a collateral estoppel problem; the state can encourage the police department pursuing the forfeiture to appeal adverse rulings and agree to indemnify the agency for attorney fees should the appeal be unsuccessful. The proposed solution by the state is to make no accommodation and to just exempt the Superior Court from being bound by the District Court rulings.

In other words, the problem presented in this case is the result of the spawning of two simultaneous prosecutions against the citizen who is charged with a drug offense. The first is the criminal prosecution as here for growing marijuana. The second is a forfeiture action under RCW 69.50.505. That statute allows the police agency that makes the arrest and seizes property; as for example, finds a substantial sum of cash money at the site of an "illegal" marijuana grow operation or seizes a valuable car used to transport drugs, that agency has fifteen (15) days to initiate a forfeiture action against that property under RCW 69.50.505. Typically, the police agency that executes the search warrant possess the written form notice of the commencement of forfeiture proceedings and serve a copy on the owner of the property at the time the property is seized. This commences the forfeiture action. All police agencies aggressively pursue these forfeitures. RCW 69.50.505 (9) (a) provides that 90% of the value of the items forfeiture go directly to the police agency involved. The forfeiture action the Bellingham Police department commenced in this case was to forfeit currency found at the site of the growing operation.

There is no case taking such as extreme position and arguing that a particular court per se, here it is the Whatcom County District Court, rulings otherwise entitled to issue preclusive application, is not so entitled in a class of cases, here criminal cases, which are so important as to disqualify an entire court for the norm operation of the principles of collateral estoppel. The prosecuting authority is asking this court to diminish the District Court, arguing that for some reason the District Court is inadequate to resolve cases before it and have norm rules of application of its judgments be followed and recognized in the law. The application of the norm issue of issue preclusion should not be permitted to District Court judgments. It should be pointed out that the effect of

such a new startling precedent in effect finding that the District Court of Washington is not a court from which issue preclusion can come, has on the citizen litigant.

Where a criminal prosecution and a forfeiture action are commenced simultaneously, there will be twin judicial proceedings in which many of the issues will be identical- such as here – under the state proposed exemption or exception, the parties will litigate the same issue simultaneously with neither party getting any advantage until the Superior Court rules.

3. This court should stay consideration until the Washington Supreme Court resolves the Ellis and Reis cases. The court should adopt the rationale of the Superior Court and affirm its ruling of dismissal based upon collateral estoppel.

The Superior Court dismissed this case based upon collateral estoppel because it found that the Whatcom County District Court was a court of law, had jurisdiction of the subject matter and the parties and was competent to make the ruling it did, which was identical to the issue to be decided in the Superior Court and was thus entitled to collateral estoppel effect. This ruling is sound and should be adopted by this court. The state should be put to answering the question as to whether they can marshal one published decision from an American appellate court, which disqualifies another court from qualifying for issue preclusive effect to its judgments.

4. This court should affirm application of collateral estoppel because the issue was identical and the parties were in privity and each party had a full and fair opportunity to litigate the issue of probable cause before a competent court and jurist.

The state's argument is that the District Court resolution of the case was not a full and final resolution of the issues regarding the validity of search warrant. The court should understand that the transcript of the testimony in support of the search warrant was the same before the Whatcom County District Court and the Whatcom County Superior Court. In its brief, the state presents lengthy argument that the District Court erred in reviewing the search warrant testimony de novo, rather than on an abuse of discretion standard; see State's Appeal Brief at page 10. The state cites State v. Jackson, 432, 688 P.2d 136 (1984) as authority for this proposition. Appellate court review legal conclusions regarding evidence suppression de novo, State v. Mendez, 137 Wn2d 208, 214, 970 P.2d 722 (1999). Appellate courts also review de novo whether qualifying sworn information as a whole presents probable cause supporting a search warrant, In re Det of Petersen 145 Wn2d 789, 42 P.3d 952 (2002); see also State v. Garvin, 166 Wash.2d 242, 249, 207 P.3d 1266 (2009).

The state cites State v. Barnes 85 Wn2d 638, 932 P.2d 669 (1997). But Barnes is of no avail as Barnes is a case where the requirement of identity of issue was clearly not satisfied. That is not the case here.

The next case cited State v. Catlett 133 Wn2d 355, 945 P.2d 700 (1997). Catlett was the end of the double jeopardy argument made as a result of the United States Supreme Court's changing rules on double jeopardy in forfeiture cases and the ultimate ruling that the confiscation of property resulting from a civil forfeiture coupled with a criminal prosecution is not excessive punishment under 8th amendment. The issues resolved in Catlett are irrelevant to the facts of the instant case.

The state argues that the issue of probable cause is different in a civil forfeiture than in a criminal proceeding; see pages 11, 12 top, citing Barlindal v. City of Bonney Lake 84 Wa. App. 135, 141, 925 P.2d 1289 (1996) for probable cause to forfeit and State v. Garcia 63 Wa. App. 868, 871, 824 P.2d 1220 (1992), probable cause to search. This is a smoke screen as the issue of probable cause was the same before the issuing magistrate, the Whatcom County District Court Judge and the Whatcom County Superior Court Judge. There is obviously an identity of issue. In Deeter v. Smith, 106 Wn2d 376, 721 P.2d 519 (1986) the Washington Supreme Court held that the Fourth Amendment right against unreasonable searches and seizures applied in forfeiture proceedings, citing One 1958 Plymouth Sedan v. Pennsylvania 380 U.S. 693, 700-702, 85 S.Ct. 1246, 14 L.Ed2d 170 (1965). The Washington Supreme Court in Deeter also ruled that the drugs seized in the illegal search of Deeter's car could not be used in the forfeiture and that the forfeiture was appropriately dismissed, which is what happened in the instant case except that the District Court ruled first.

The state also cites other cases in support of its claim that a broad exemption against collateral estoppel be imposed upon the District Court. One is Mead v. Park Place Properties, 37 Wa. App. 403, 681 P.2d 256 (1984).

Mead v. Park Place Properties 37 Wa. App. 403, 681 P.2d 256 (1984) is a case where Mead was a grocery store in Park Place's Shopping Mall. Mead sued Park Place for breach of lease obligation and trespass and Park Place counterclaimed and asked for damages, principally ½ of expenses incurred by Park Place in paving the common parking lot, just under $83,000. Then in a separate action, Park Place brought an

unlawful detainer action against Mead. Mead tried to consolidate the actions but the Superior Court denied the request.

Mead prevailed in the unlawful detainer action before a jury, which was affirmed by the Court of Appeals. When that unlawful detainer action became final, Mead moved and succeeded in getting Park Place's counterclaim for damages dismissed because of collateral estoppel.

The Court of Appeals reversed. Collateral estoppel did not apply for a number of reasons; one was the impossibility of determining what was the basis for the jury's decision.

Longo's case is a simple repetitive circumstance involving application of collateral estoppel. Barlindal v. City of Bonney Lake 84 Wa. App. 135, 925 P.2d 1289 (1996) and Deeter v. Smith 106 Wn2d 376, 721 P.2d 519 (1986) find Superior Court resolution of probable cause in the criminal case in reviewing a search warrant identical to the probable cause issue presented in the forfeiture action when the judge rules on the property owner's motion to suppress the search warrant. The state cites Barlindahl to argue absence of priviity. Barlindahl is precedent for showing identity of issue.

Also cited is Kennedy v. City of Seattle 94 Wn2d 376, 617 P.2d 713 (1980). Kennedy owned two moorage sites in Seattle. One he rented to McGuire. Kennedy sued Seattle claiming its ordinance prevented him from evicting McGuire and was unconstitutional.

Prior to this suit, Kennedy had been cited for criminal violation of the same ordinance. Kennedy prevailed when the criminal prosecution brought by the City of

Seattle was dismissed on the ground that the ordinance was unconstitutional. The City of Seattle did not appeal and that judgment became final.

When the case of the constitutionality of the ordinance reached the Washington Supreme Court in his civil litigation, Kennedy claimed that Seattle Municipal Court adjudication that the ordinance was unconstitutional in the criminal prosecution was binding on this issue based upon collateral estoppel.

The Washington Supreme Court dispensed with this argument swiftly refusing to permit the Seattle Municipal Court adjudication affect the rights and positions of hundred of persons affected by this ordinance. There are no implications in this case beyond the particular facts and circumstances of Mr. Longo's case.

The state also cites Barlindal v. City of Bonney Lake 84 Wa. App. 135, 141, 925 P.2d 1289 (1996) for the principle of showing no privity between Bellingham, as subdivision of the State of Washington, and the State. But Barlindal is of no help. Barlindal is the flip side of the forfeiture conundrum. Barlindal moved quickly in his criminal prosecution in the Superior Court and obtained a ruling that the search warrant, which authorized entry into his home, was unlawful. This adjudication resulted in the dismissal of the criminal charges against Barlindal. As here, the police agency involved was a city police department, City of Bonney Lake. There, the Court of Appeals rejected the argument that the City of Bonney Lake and the State were not in privity, stating:

> Privity denotes a mutual or successive relationship to the same right or property.Owens v. Kuro, 56 Wash.2d 564, 354 P.2d 696 (1960). Our analysis leads us to hold that Pierce County and Bonney Lake were in privity under the facts of this case. The facts show that Pierce County and Bonney Lake had a mutual interest and shared a common purpose in a successful prosecution of Barlindahl as well as a successful forfeiture of his possessions:

> • Both Pierce County and Bonney Lake were acting on authority of state law;
> • Both participated in the acquisition of a search warrant and the subsequent search;
> • Both had a unity of purpose in securing Barlindal's conviction with lawfully obtained evidence;
> • Either Pierce County or Bonney Lake could have been the "seizing agency" entitled to bring the forfeiture action;
>
> These factors demonstrate that Bonney Lake and Pierce County were in privity from beginning to end. Their mutual objective was to work together to lawfully obtain evidence; they both sought to obtain a criminal conviction; and both could have benefited financially from either a successful prosecution or a successful civil forfeiture. Bonney Lake's argument that it was not in privity with Pierce County because it did not have an opportunity to present its arguments concerning the validity of the search is without merit. It is the obligation of a county prosecuting attorney to control a felony prosecution; the inability of a municipal attorney to control the prosecution does not diminish the common interests that both agencies have in the outcome of the prosecution, 84 Wa. App. at 143.

Lastly, the state argues that applying collateral estoppel from forfeitures to criminal cases is unjust and contravenes public policy. But the cases cited State v. Cleveland 58 Wash. App. 634, 794 P.2d 546 (1990), and State v. Vasquez 148 Wn2d 303, 59 P.3d 648 (2002) are cases where an estoppel is sought from an administrative ruling. The ruling from which the estoppel springs here is a ruling and adjudication of the District Court, which had jurisdiction over the parties and the subject matter.

The states also cites State v. Mullin-Coston 152 Wn2d 107, 95 P.3d 321 (2204). Mullin-Coston was a criminal case in which the Washington Supreme Court determined whether the doctrine of nonmutual collateral estoppel applied in criminal cases where the basis for asserting preclusion was a jury verdict in the case of another defendant. The Washington Supreme Court declined to apply the doctrine in such cases and held that

issues decided by one defendant's jury is not binding on a jury in the later trial of a different defendant.

Reninger v. State Department of Corrections 134 Wn2d 437, 951 P.2d 782 (1992) is cited by the state but in that case, collateral estoppel was applied to an agency action.

CONCLUSION

The exclusionary rule is applicable to forfeitures as well as to criminal cases; Deeter v. Smith 106 Wn2d 376, 721 P.2d 519 (1986). Where the execution of a search warrant results in the discovery of evidence which supports a criminal action for growing marijuana and, as well, a forfeiture action based upon the same incident and same search warrant, it is reasonable to expect that the defense bar will attack the integrity of the search warrant in both forums. The database for the search warrant is the testimony presented to secure that warrant. The decision called on by the District Court Judge or the Superior Judge in deciding the question of probable cause is identical. The result is also identical because the exclusionary rule deprives the prosecuting authority with the capacity to prosecute. Such is the case as is conceded by the state in its seeking discretionary ruling- that the effect of the Superior Court ruling was to eliminate totally the capacity of the state to marshal sufficient evidence to support its prosecution.

This case presents the logical extension of Barlindal v. City of Bonney Lake 84 Wa. App. 135, 141, 925 P.2d 1289 (1996) and applies the collateral estoppel from the decision of the District Court to the Superior Court, the reverse circumstance of Barlindahl v. City of Bonney Lake and Deeter v. Smith, saupra.

The Superior Court correctly applied the principle of collateral in this case and its judgment should be affirmed.

Dated this 9th day of May, 2014

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