Case # 316017

Statement of Additional Grounds for Review

State of Washington
v.
Frank Lazcano

NO. 31601-7-III

The Court of Appeals of the State of Washington
DIVISION THREE

STATE OF WASHINGTON
Respondent,

v.

FRANK LAZCANO
Appellant.

On Appeal from the Superior Court of the State of Washington for Whitman County

Statement of Additional Grounds for Review

FRANK G. LAZCANO
Appellant

Washington State Penitentiary
1313 N 13th Avenue
Walla Walla, WA 99362

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INTRODUCTION

I have reviewed 991 pages of jury trial verbatim report of proceedings, 61 pages of motion hearings on 2/8/2013 and 2/22/2013, and conducted legal research to the best of my ability. I have been unable to identify any issues that have not been raised in the Appellant Opening Brief. It is possible however, with my limited knowledge and access to materials, that I have missed something.

This court has been briefed on the double jeopardy issue and facts of this case. There are still some facts and law having to do with double jeopardy that have not been brought to this courts attention. I am going to touch on collateral estoppel, the same evidence test, and exceptions to the two doctrines.

As this court is familiar, I was charged with residential burglary and assault in the fourth degree based on the events that occurred at Mr. Backman's home on

December 27, 2011. CP 75-76. I took a plea bargain to criminal trespass in the first degree and was sentenced on March 9, 2012. CP 65, 67-73. Mr. Schur's body was discovered on March 25, 2012. 5RP 655. Soon after, I was charged with first degree murder by way of felony murder or premeditated murder. CP 16-17. The court denied my pretrial motion, claiming double jeopardy and collateral estoppel should preclude the State from pursuing a conviction of felony murder based on the same alleged burglary of Mr. Backman's home. 2/22/13RP 36-42; CP 19-23. In a special verdict form, a jury convicted me of only the felony murder. CP 229, 232-234.

COLLATERAL ESTOPPEL

The trial court should have precluded the State from relitigating the issue of burglary in a second criminal prosecution for felony murder based on the same facts.

"The doctrine of collateral estoppel is embodied in the Fifth Amendment guaranty against double jeopardy." State v. Williams, 132 Wn. 2d 248, 253, 937 P. 2d 1052 (1997). (citing) Ashe v. Swenson, 397 U.S. 436, 445-446, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970).

"'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principal in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties." Williams, 132 Wn. 2d at 253 (quoting) Ashe, 397 U.S. at 443, 90 S. Ct. at 1194.

"Before the doctrine of collateral estoppel may be applied, the party asserting the doctrine must prove: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party

against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice." Thompson v. State, Department of Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999) (citing) Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998) (see also) Williams, 132 Wn.2d at 254.

The State had all neciss ary evidence to litigate the issue of first degree burglary prior to the criminal trespass plea on March 9, 2012.

During arguement, against defendants motion in limine to exclude evidence of first degree burglary, the prosecutor for the State said "The State knew that this defendant had pushed his way through the house, assaulted two people therein, chased Marcus Schur out the back and that some-- a number of people reported hearing shots fired," 2/22/13 RP 30. There was also evidence of a hand gun. 2/22/13 RP 48; 3RP 274, 364. All of

this was known to the State prior to March 9th. The State, at that time, could have, but chose not to litigate fully the issue of first degree burglary. Instead, the State obtained a conviction of a less serious offense.

The issue of burglary was raised and resolved with a final judgment on the merits in the Whitman County Superior Court when I was convicted and sentenced on March 9, 2012. CP 65, 67-73, 75-76. Then the same issue of burglary, based on the same merits, was raised in a subsequent felony murder prosecution, by the same prosecuting attorney, in the same court. CP 6, 16-17. This meets all four elements of Washington's collateral estoppel doctrine.

The trial court agreed that the first three elements of collateral estoppel had been met, but ruled in favor of the State on the fourth "injustice" element. The trial court's ruling was grounded "with respect to the standard here that... the charge now would not have been sufficiently foreseeable

at the time of the plea agreement to the previous charges... I don't feel that the murder charge here resulting from the burglary thats being alleged here would have been sufficiently foreseeable." 2/22/13 RP 38-39

I have not been able to find any case law on this "sufficiently foreseeable" standard and what affect it may have on the collateral estoppel doctrine. Correctly or incorrectly, it is what the trial court grounded its ruling on, so I will address the "sufficiently foreseeable" standard under **EXCEPTIONS** to the best of my knowledge.

Thompson v. State, 138 Wn. 2d 783, 982 P. 2d 601, addresses what does constitute an injustice for collateral estoppel purposes in detail. The Thompson court explains that it may be unfair to allow a decision made in one type of proceeding to bar relitigation of the issue in a different type of proceeding. For example, allowing an informal administrative hearing to have preclusive effect on a later criminal prosecution; or the determination of innocence by a parole board to preclude a

subsequent criminal trial on same facts, because the two proceedings have different purposes. The court also talks about how an administrative decision may have a preclusive effect on a civil action. The court even looked at differences in burden of proof to determine if an injustice would occur. Thompson, 138 Wn. at 795-96.

"In summary the injustice prong of the collateral estoppel doctrine calls from an examination of primarily procedural regularity. This is not to rule out substantive analysis entirely, as when, for instance, 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." Thompson, 138 Wn. 2d at 799

There is nothing in the injustice language to suggest that an injustice may occur when a prosecuting attorney "excused [his] discretion in resolving Mr. Lazcano's case!" 2/22/13 RP 32. (parentheses by Frank Lazcano). In fact "the State had every incentive to litigate fully the issue ... in the criminal proceeding." Thompson at 799.

Further, the prosecutor suggests it would be extremely unfair to hold the State of Washington accountable for his mistakes. 2/22/13 RP32. On the contrary "In the [superior] court action, the prosecutor was the State of Washington in the person of a [Whitman] County [] prosecuting attorney." Thompson 138 Wn.2d at 793 (parentheses by Frank Lazcano, Appellant) It is perfectly fair to hold the State accountable for mistakes made by its representatives.

The State should have been precluded from relitigating the issue of the alleged burglary of Mr. Backman's home in a second prosecution of first degree felony murder after obtaining a conviction of criminal trespass, under the doctrine of collateral estoppel or issue preclusion.

SAME EVIDENCE

First degree criminal trespass and first degree felony murder, when predicated on first degree burglary are the same offense.

"Under the same evidence test, two statutory offenses are the same for double jeopardy purposes if the offences are identical in law and in fact. If each includes an element not included in the other, and each requires proof of a fact the other does not, then the offenses are not constitutionally the same under this test." State v. Hughes, 166 Wn.2d 675, 682, 212 P.3d 558, 561 (2009). (citing) State v. Jackman, 156 Wn.2d 736, 747, 132 P.3d 136 (2006).

The trial court, in my case, instructed the jury as follows: "Instruction No. 10: To convict the defendant of Felony Murder in the First Degree, based upon the predicate crime of Burglary in the First Degree, as set forth in Alternative B, Felony Murder, in Instruction No. 9, each of the following elements of the crime of Burglary in the First Degree must be proved beyond reasonable doubt. [Element No. 1] That on or about the 27th day of December 2011, the defendant entered or remained unlawfully in a building." 7RP 850-51. (parentheses added by Frank Lazcano)

Under RCW 9A.52.070. "A person is guilty of Criminal Trespass in the First Degree if he or she knowingly enters or remains unlawfully in a building."

So, of course felony murder has elements that criminal trespass does not, but there is no fact or element of criminal trespass that is not also a fact or element of felony murder, when predicated on burglary, as in my case.

"Just as the Valentine court concluded that "proof of attempted murder committed by assault will always establish an assault'" In re Personal Restraint of Orange, 152 Wn. 2d 795, 820, 100 P. 3d 291 (2004) (quoting with approval) State v. Valentine, 108 Wn. App. 24, 29, 29 P. 3d 42 (2001) Proof of felony murder when predicated on first degree burglary will always establish Criminal trespass.

The State violated double jeopardy under the same evidence test when I was twice convicted for the same offense. The latter conviction should be vacated.

EXCEPTIONS

The collateral estoppel doctrine and same evidence test are similar. Collateral estoppel exists to prevent a double jeopardy violation. The same evidence test exists to determine if double jeopardy has been violated. The exceptions are similar as well.

First there is this "sufficiently foreseeable" standard in which the trial court grounded its collateral estoppel ruling. 2/22/13 RP 39. Then there is the "Diaz exception" which the prosecution suggested "very clearly" applies to my case. 2/22/13 RP 30

As this court has been briefed, the Diez exception, as quoted from the footnote in Brown reads: "an exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence" Brown v. Ohio, 432 U.S. 161, 172 n. 7, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)

(citing) Diaz v. United States, 223 U.S. 442, 448-449, 32 S.Ct 250, 251, 56 L.Ed. 500 (1912).

The prosecution argued that other than Mr. Schur having been chased out the back of Mr. Backman's house and various reports of shots fired, there was "no indication that Marcus Schur had been killed." There were no signs of a struggle, no blood, no shell casings, no body and it happened very quickly. 2/22/13RP 30-31.

On the other hand, State's evidence shows that it was "very dark" and there was a large area to search. It was also raining, so any blood or signs of a struggle would have been washed away. 3RP328, 339, 345-47. There was also evidence of a hand gun that might not eject shell casings. 2/22/13RP 48; 3RP274, 362. Not that police diligently looked for shell casings before a body was discovered. 3RP358; 4RP396, 400.

One witness told police in a written statement, it was a few minuts from shots fired until he saw someone pick up an object

that he suspected was a gun, and put it in the white Ford car. 3RP314, 317-18. Another witness observed the white four door for a "while" and said she "thought some one got hit, and they were loading the person," in the car. 3RP332-33, 335-36. Both witnesses spoke with police on December 27, 2011. 3RP317, 339.

David Cramer, after following out the back door and hearing shots fired, had time to run back in the house, call his mother, run back out the front and down the hill to hide by the "foundation" and observe the white four door car until it left. 3RP269-273. Additionally, Mr. Cramer was specifically asked by the State: "Q. When you talked to the police that night, did you tell them that you thought Marcus had been shot, and was killed? A. Yes". 3RP271.

The State also had evidence that the little white Ford Escort had been burned prior to the plea bargain on March 9, 2012. 4RP512, 514, 516. Police searched for the little white car in Pine City, at my house and at Travis Carlons house on December 27, 2011, shortly after investigating in the town of Malden. On December

28, 2011, at "04:36 hours," in a recorded interview, I told police I drove the Escort car to Mr. Backmans on the 27th. I also told police the Escort was registered to Eli Lindsey and that it had been left at Tidyman's in Cheney. 3RP 361, 366-67.

At 12:30 AM on December 28, there was a 9-1-1 call about a fire near Burnett road in the nine mile falls area of Nortwest Spokane County. Fire Chief Ron Wood responded to the fire and found what he described as "a midsize Ford. Four door" on fire. Deputy Kevin Richey also responded to the fire at 1:50 AM and took photos of what he described as an "early model white sedan that had been burned". He then had the car towed to the police evidence lot. 4RP 498, 500-501, 507, 509; 5RP 541-46. The Escort was recovered by police before I turned myself in and was arrested for the initial burglary on December 28, 2011. 3RP 372.

On January 3, 2012, Trooper Bradley S. Osmonovich of the Washington State Patrol, identified Eli Lindsey's "badly burned" Ford Escort by its "C-VIN" at T&T Towing

who had impounded the vehicle. 4RP 512, 514, 516. (see also Eli Lindsey at 4RP 441-42, note Exhibit 17, vehicle registration).

The Diaz exception does not apply to this case because the State did not diligently pursue available information before resolving its initial charge as required by Brown, 432 U.S. 161, 169 n. 7. Also a charge of first degree felony murder predicated on first degree burglary was "sufficiently foreseeable" at the time of the criminal trespass conviction.

The State had evidence, prior to the first conviction on March 9, 2012, of a burglary, a shooting, a gun and a person being loaded into a vehicle that hours later was discovered burned. Also a witness at the scene told police he thought his brother had been killed.

The fact that the prosecutor "excused [his] discretion" in the first criminal prosecution, based on his personal knowledge that Mr. Schur was a methamphetamine addict (2/22/13 RP 31-32), is no exception to double jeopardy.

CONCLUSION

My first conviction of Criminal Trespass in the first degree was an essential element to prove Felony Murder in the first degree predicated on Burglary in the first degree. Double jeopardy has been violated and the second offense should be dismissed according to Brown, 432 U.S. at 169-70.

(Nothing herein should be construed in any way as an addmission of guilt on my part.)

I, Frank Lazcano, declare under the penalty of perjury under the laws of the State of Washington that the above is true and correct to the best of my knowledge.

DATED this 6th day of March 2014

Respectfully Submitted

FRANK G. LAZCANO
Appellant