

FILED
September 7, 2016
Court of Appeals
Division I
State of Washington
NO. 74256-6-1
COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEBEDE ABAWAJI,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN H. CHUN

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. The mandatory joinder rule, CrR 4.3.1, by its plain terms, applies to offenses “within the jurisdiction and venue of the same court.” Did the King County Superior Court properly deny Abawaji’s motion to dismiss a felony harassment charge, pursuant to the mandatory joinder rule, where he previously had been charged by the Seattle City Attorney in Seattle Municipal Court with misdemeanor violations of city ordinances committed at the same time as the felony harassment?

B. STATEMENT OF THE CASE

On November 1, 2014, Kebede Abawaji got angry at his estranged wife, so he pinned her down, choked her, told her, “I’m going to kill you,” and came at her with a kitchen knife. 6RP 506-29.¹ Abawaji was arrested by Seattle police, and the Seattle City Attorney’s Office charged Abawaji in Seattle Municipal Court with misdemeanor assault and unlawful use of a weapon to

¹ The verbatim report of proceedings is divided into 15 individually numbered volumes. The State has numbered them as follows: 1RP (April 14, 2015); 2RP (September 23, 2015); 3RP (September 24, 2015); 4RP (September 28, 2015); 5RP (September 29, 2015); 6RP (September 30, 2015); 7RP (October 1, 2015 — a.m.); 8RP (October 1, 2015 — p.m.); 9RP (October 5, 2015 — a.m.); 10RP (October 5, 2015 — p.m.); 11RP (October 6, 2015); 12RP (October 7, 2015); 13RP (October 8, 2015 — jury question); 14RP (October 8, 2015 — verdict); 15RP (November 6, 2015).

intimidate another,² both under Seattle Municipal Code.³ CP 25, 37.

The case was dismissed in January 2015 because the victim did not come to court to testify at trial. CP 26, 37. She had been pressured by members of Abawaji's Ethiopian community not to cooperate with the prosecution and to ask the city prosecutors to drop the charges. CP 26; 6RP 527.

On April 1, 2015, Abawaji surprised his now-ex-wife outside her apartment building and repeatedly hit her in the head with a hammer, disabling and disfiguring her, because he thought she was seeing another man and "she pissed me off." 5RP 366, 407-24, 429-49; 6RP 462-71, 533-45; 7RP 614; 11RP 89-90. The King County Prosecuting Attorney's Office, on behalf of the State of Washington, charged Abawaji by amended information in King County Superior Court with three counts: (1) attempted murder in the first degree – domestic violence, with a deadly weapon; (2) assault in the first degree – domestic violence, with a deadly weapon, for the April 1 attack; and (3) felony harassment –

² The Seattle Municipal Court records are not in the trial record below. The procedural facts of the municipal-court case are drawn from the trial-court briefings of the State and Abawaji. Those facts were not in dispute.

³ See Seattle Municipal Code 12A.06.010 and 12A.14.075.

domestic violence, for the threat made during the November 1 incident. CP 11-12.

Pretrial, Abawaji moved to dismiss the felony harassment charge as a violation of mandatory joinder under CrR 4.3.1. CP 37-39; 3RP 131-41. In essence, Abawaji argued that even though the “Municipal Court does not have jurisdiction over the felony matters,” a municipal prosecutor should have “refer[ed] this case for a felony charge” at the same time Abawaji was charged with city misdemeanors. 3RP 135-41. Abawaji further conflated the Seattle City Attorney’s Office and the King County Prosecuting Attorney’s Office in arguing that “the State had the same information all along from the first day of the filing of the municipal case.” 3RP 134.

The State replied that CrR 4.3.1 did not apply because the city charges were filed “in a different court by a different prosecuting entity.” 3RP 142. The State also argued that dismissal would defeat the ends of justice. 3RP 148-50.

The trial court denied Abawaji’s motion in part because the municipal court and the state court have “two separate prosecuting agencies.” 5RP 151. The court also found that the ends of justice would be defeated in that “this issue could never reach trial

because of pressure being placed on the alleged victim” during the municipal-court case. Id.

A jury convicted Abawaji of the lesser-included offense of attempted murder in the second degree, and as charged as to the other counts. CP 237-42. The jury also answered affirmatively the domestic-violence and deadly-weapon allegations. CP 243-46. The trial court vacated the first-degree assault conviction on double-jeopardy grounds. CP 299. The trial court imposed a standard-range sentence of 201 total months. CP 305-12. Abawaji timely appealed. CP 313.

C. ARGUMENT

1. THE MANDATORY JOINDER RULE DOES NOT APPLY BECAUSE KING COUNTY SUPERIOR COURT AND SEATTLE MUNICIPAL COURT HAVE DIFFERENT JURISDICTIONS AND PROSECUTORIAL AUTHORITIES.

Abawaji claims that his felony harassment conviction violated the mandatory joinder rule, CrR 4.3.1. It did not. Abawaji’s argument conflates and confuses the Seattle Municipal Court and the King County Superior and district courts and their separate prosecutorial authorities. By a plain reading of the rule, and by long-held case law, the mandatory joinder rule does not apply to

situations where charges are brought in different courts with different jurisdictions and different prosecutorial authorities.

Application of the mandatory joinder rule is a question of law, subject to de novo review. State v. Kindsvogel, 149 Wn.2d 477, 480, 69 P.3d 870 (2003). The appellate court may affirm the trial court on any basis that is supported by the record. State v. Henderson, 34 Wn. App. 865, 870-71, 664 P.2d 1291 (1983); see also RAP 2.5(a).

Under CrR 4.3.1(b)(3), “A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense.” Two offenses are related offenses “if they are within the jurisdiction and venue of the same court and are based on the same conduct.” CrR 4.3.1(b)(1).

Our municipal and superior courts have different and exclusive jurisdictions with separate prosecuting authorities. State v. Harris, 130 Wn.2d 35, 42, 921 P.2d 1052 (1996). The superior court has original jurisdiction in “all criminal cases amounting to a felony.” RCW 2.08.010. The superior court also has jurisdiction concurrent with the district court of all misdemeanors and gross misdemeanors under state law. RCW 3.66.060. The Seattle Municipal Court is a separate judicial entity with exclusive original

jurisdiction over violations of city ordinances. RCW 3.50.020. Our supreme court has long held that the rule of mandatory joinder “does not apply to situations where multiple charges are brought in different courts with exclusive jurisdictions, and the charges are prosecuted by different prosecutorial authorities.” Harris, 130 Wn.2d at 42 (citing State v. Fladebo, 113 Wn.2d 388, 392, 779 P.2d 707 (1989)).

Prior to enactment of CrR 4.3.1, our courts applied the “Peterson rule” to both mandatory joinder and related speedy-trial motions. See State v. Peterson, 90 Wn.2d 423, 431, 585 P.2d 66 (1978); Harris, 130 Wn.2d at 43-44 (Peterson rule and mandatory joinder are similar and serve the same purpose); State v. Lee, 132 Wn.2d 498, 502-03, 939 P.2d 1223 (1997) (relying on Harris to apply Peterson rule to mandatory joinder). The Peterson rule, in summary, required that “[w]here multiple charges stem from the same criminal conduct, the time for trial period begins on the date the defendant was held to answer on the first of these charges.” Kindsvogel, 149 Wn.2d at 482 (citing Peterson, 90 Wn.2d at 431). Our supreme court has still discussed CrR 4.3.1 as codification of the Peterson rule. See Kindsvogel, 149 Wn.2d at 482.

In Fladebo, the defendant was convicted of misdemeanor reckless driving in Mount Vernon Municipal Court, then charged by the Skagit County prosecutor in superior court with a state drug felony arising from the same arrest. 113 Wn.2d at 390-91. Our supreme court squarely held that the Peterson rule did not apply to such a situation, where the charges are in “different jurisdictions with separate prosecutorial responsibilities.” Id. at 392. In Harris, our supreme court heavily relied on Fladebo to emphasize the vital distinction between charges in municipal and superior courts by different prosecutors (rule does not apply) and charges in county district and superior courts by the same prosecutor (rule applies). 130 Wn.2d at 42-45.

Abawaji’s claim fails by a plain reading of CrR 4.3.1 and the controlling case law. His felony case in King County Superior Court, filed by a state prosecutor under state law, was not a “related offense” under the rule because it was not within the jurisdiction and venue of the Seattle Municipal Court. Abawaji’s argument that a city prosecutor somehow should have charged Abawaji with a state felony — a legal impossibility — or that when the city filed charges “the State had all the facts it needed” to

charge a felony,⁴ demonstrates his ongoing conflation of our state and municipal court systems.

Abawaji is incorrect that State v. Dixon⁵ “ends the discussion that municipal court and superior court cannot be the same jurisdiction.”⁶ In Dixon, the defendant “appeared in Seattle *District* Court on a misdemeanor charge of aiming or discharging a firearm” filed by the State, but the charge later was dismissed because Dixon’s wife did not appear to testify at trial. 42 Wn. App. at 316 (emphasis added). The same State prosecutor⁷ then charged Dixon with a felony firearm charge in King County Superior Court. Id. That violated the mandatory joinder rule because “[b]oth offenses are within the jurisdiction and venue of King County Superior Court” and were based on the same conduct, with the same prosecutorial authority.⁸ Id. at 317.

In erroneously comparing his case to Dixon, Abawaji is confusing “Seattle District Court,” an outdated name for King

⁴ Brief of Appellant at 8.

⁵ 42 Wn. App. 315, 711 P.2d 1046 (1985).

⁶ BOA at 11.

⁷ The King County Prosecuting Attorney. Id. at 315.

⁸ Whether the district and superior court were within the same jurisdiction was not in dispute in Dixon. 42 Wn. App. at 317. The issue was whether Dixon had been “tried” for the misdemeanor offense. Id. at 318.

County District Court, West Division, in the King County Courthouse in Seattle, with Seattle Municipal Court, an entirely different court.⁹ As our supreme court in Fladebo and Harris later made quite clear, the difference is distinct and important. While the mandatory joinder rule certainly applies to district and superior court cases with the same plaintiff, a county prosecutor, it simply does not apply and has never applied in a situation like Abawaji's. His claim is baseless.¹⁰

2. THIS COURT SHOULD PRESERVE THE STATE'S ABILITY TO SUBMIT A COST BILL.

Abawaji asks this Court to waive appellate costs because of his indigency. It is a defendant's future ability to pay costs, rather than his present ability, that is most relevant in determining whether it would be unconstitutional to require him to pay appellate costs. Because the record contains no information from which this Court could reasonably conclude that Abawaji has no likely future ability

⁹ See Avlonitis v. Seattle District Court, 97 Wn.2d 131, 132, 641 P.2d 169 (1982) (consolidated appeal in which Seattle District Court and Seattle Municipal Court are separate respondents).

¹⁰ Abawaji additionally argues that the Superior Court improperly denied his motion to dismiss under the "ends of justice" exception to the rule. See CrR 4.3.1(b)(3) (motion to dismiss a charge for a "related offense" must be granted unless ... for some other reason, the ends of justice would be defeated if the motion were granted"). Because the charges in superior court and municipal court were not "related offenses," the State is not addressing the "ends of justice" issue here.

to pay any amount of costs, this Court should not preclude the imposition of appellate costs. Alternatively, this Court could require Abawaji to meet the requirements of Division Three's recently published general order, which would provide at least some basis on which to decide Abawaji's ability to pay costs. See http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=021&div=III.

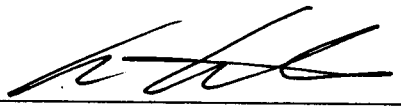
D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Abawaji's judgment and sentence.

DATED this 7th day of September, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Thomas Kummerow, the attorney for the appellant, at Tom@washapp.org, containing a copy of the BRIEF OF RESPONDENT in State v. Kebede B Abawaji, Cause No. 74256-6, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 7 day of September, 2016.

Name:
Done in Seattle, Washington