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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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STATE OF WASHINGTON
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STATE OF WASHINGTON,
Respondent,
v.
TONY COOPER,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE CHERYL B. CAREY
THE HONORABLE STEVEN C. GONZALEZ

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Double jeopardy precludes a person from being charged with the same crime twice. When a case has been dismissed without prejudice in Municipal Court it does not violate the defendant's double jeopardy right to re-file the case in Superior Court.

B. STATEMENT OF THE CASE

On October 4, 2007, Tony Cooper was arrested for shoplifting merchandise from Macy's Department Store located at the Northgate Mall in Seattle Washington. CP 2. Cooper had previously been trespassed from all Macy's locations for prior thefts. CP 2. The defendant entered the department store and proceeded to the "Young Mens" section of the store. CP 2. Cooper selected merchandise and entered the fitting room. CP 2. Cooper was observed by loss prevention officers for Macy's leaving the fitting room with articles of clothing he brought into the room and then exit the store not making any attempt to pay for the items. CP 2. Cooper was apprehended outside of the store and subsequently admitted to taking the items without paying for them. CP 2. Cooper was taken into custody and was initially booked for a

misdemeanor offense. CP 2. On October 5, 2007, a detective with the Seattle Police Department received the case for review and realized that this offense was a felony matter. CP 2. The detective referred the case into the King County Prosecutor's Office for Felony Theft and Burglary charges. CP 2. At Cooper's hearing in Municipal Court on October 8, 2007, the Court addressed the matter and dismissed the misdemeanor case without prejudice. CP 67 Municipal Court Order. Cooper was subsequently charged with Burglary in the Second Degree in King County Superior Court. CP 1.

Cooper set the matter for trial and the State moved to amend the information to add Malicious Mischief in the Second Degree and Bail Jumping charges. CP 18, 19. Cooper proceeded pro se through parts of the proceedings and was represented by counsel through other parts of the proceedings. The defense moved to dismiss the Felony charges against Cooper on the grounds of a Double Jeopardy violation. 5/23/08RP 4, 7/15/08RP 23, 8/4/08 RP 2, 8/13/08RP 20. The Honorable Judge Laura Inveen denied the defense motion to dismiss on May 5, 2008. CP 8. Cooper re-addressed the motion in front of the Honorable Judge Steven Gonzalez and he too denied the motion to dismiss stating that the

re-filing was not a Double Jeopardy violation. 8/13/08 RP 20.

When Judge Gonzalez denied the defendant's motion he indicated that he received a copy of the written order from Seattle Municipal Court and the order stated that the matter was dismissed without prejudice and a docket entry by the clerk was not controlling and was probably an error. 8/13/08RP 20. After pre-trial motions Cooper decided that to plead guilty to the Burglary in the Second Degree and Malicious Mischief and the State dismissed the Bail Jumping count against the defendant. 8/13/08RP 43, CP 18-19, 23-24. Cooper was sentenced by Judge Gonzalez within the standard range to 43 months for the Burglary in the Second Degree and 19 months for the Malicious Mischief in the Second Degree. CP 48-55. The sentences are to run concurrently with each other. CP 48-55.

C. ARGUMENT

Filing Burglary in the Second Degree and Malicious Mischief in the Second Degree in King County Superior Court arising out of the October 4, 2007 Theft from Macy's does not violate Double Jeopardy principals.

Cooper argues that because there was a docket entry made by a Municipal Court clerk that the case had been dismissed with prejudice that precluded the State from filing Felony charges in Superior Court. The defense's argument fails as the written order from Seattle Municipal Court dismissed the matter without prejudice and given the timing of the procedure jeopardy had not attached in Municipal Court.

Double Jeopardy Clause of Federal Constitution is coextensive with protections granted by state Constitution. U.S.C.A. Const.Amend. 5; State v. Corrado, 81 Wn. App. 640, 915 P.2d 1121 (1996). Accordingly, there is longstanding law in Washington State that acknowledges that a defendant may not be charged for the same crime twice. U.S.C.A. Const.Amend. 5; Wash. Const. art. 1, § 9. After the attachment of jeopardy, there must be a jeopardy terminating event, most commonly an acquittal or a final judgment of conviction, in order for double jeopardy protections to apply to subsequent proceedings. U.S.C.A. Const.Amend. 5; United States v. Jose, 425 F.3d 1237 (9th Cir. 2005). Jeopardy does not attach "merely because a charge is filed or pretrial proceedings are held." State v. George, 131 Wn. App. 239, 126 P.3d 93 (2006); State v. Higley, 78 Wn. App. 172, 179,

902 P.2d 659 (1995). Like the term “acquittal,” the phrase “dismissal with prejudice” has no talismanic quality for purposes of the Double Jeopardy Clause. U.S.C.A. Const.Amend. 5; Wash. Const. art. 1, § 9; State v. George, 160 Wn.2d 727, 158 P.3d 1169 (2007). The court even went on to hold that dismissal of charge “with prejudice” did not bar subsequent prosecution, under the Double Jeopardy Clause, where dismissal occurred in context of pretrial proceedings and defendant had not waived right to jury trial; jeopardy had not attached, because without waiver of jury trial, trial court was without power to find defendant guilty, and trial court could only rule on the motions before it, including State's motion to amend the information and defendant's suppression motion. Id. at 743; U.S.C.A. Const.Amend. 5; West's RCWA Const. art. 1, § 9. In this particular case, Cooper was not even arraigned on the misdemeanor charge prior to the dismissal without prejudice. Jeopardy had not attached to the proceeding in Municipal Court.

In this particular case, even if the court holds that jeopardy attached, there was no Double Jeopardy violation as the Municipal Court dismissed the matter without prejudice. When there is a discrepancy between an oral ruling and a written order, the written order controls. Grundy v. Brack Family Trust, 151 Wn. App. 557,

213 P.3d 619 (2009). In this case, there is not a discrepancy between an oral finding and the written finding signed by the court. The discrepancy is between the written order and a docket entry made by a clerk. The defense is asking this Court to deviate from the concept that written findings or orders are controlling and accept that a docket entry by a municipal clerk should be controlling. The defense does not cite any authority for that notion and that notion is incorrect.

D. CONCLUSION

For the foregoing reasons, this Court should affirm Cooper's convictions for one count of Burglary in the Second Degree and one count of Malicious Mischief in the Second Degree.

DATED this 14 day of October, 2009.

Respectfully submitted,

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