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Court of Appeals
Division I
State of Washington

NO. 72714-I-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH S. JOHNSON,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. The trial court suppressed evidence collected from a cell phone search, finding that the probable cause affidavit did not provide a sufficient nexus between the cell phone and the crime. Does collateral estoppel apply when, during the same litigation, she approves a warrant for the same phone based on a new warrant that contains information not previously considered?

2. The trial court denied a motion to dismiss under CrR 8.3 because the prosecutor, immediately after evidence was suppressed, sought a new search warrant, the results of which produced evidence that had been provided to defense well before trial. Does a prosecutor commit prejudicial misconduct when he immediately seeks a new warrant and provides duplicate discovery as soon as it is available?

II. STATEMENT OF THE CASE

A jury found the defendant guilty of the January 14, 2014, residential burglary of Joanne Sherman's house in the Fire Trial area of Stanwood. CP 27; 6RP 360; 4RP 67. Will Dixon had previously pleaded guilty to taking part in the same burglary. 5RP 185.

Dixon and the defendant had been good friends since junior high school. On the night of January 14, the night before the burglary, the defendant texted Dixon, "What's up should we hit this lick after work I got some plates to put on my jeep".¹ 6RP 318. Exhibit 63. The men spoke on the phone on January 14 at 3 am, 3:45 am, 8:10 am, 8:17 am, 8:21 am, and 8:30 am. Id. At 8:44 am, the defendant texted his brother Andy, "you got anyone that's needs to be robbed". 6RP 320; Supp. CP Id.

By noon, the men were in the Fire Trial neighborhood in Dixon's truck looking for houses to burglarize. 4RP 50; 5RP 188. Dixon knocked on Ashley Halligan's door and told her that he and someone else were looking for to buy a TV that was on craigslist. 4RP 48, 56. Halligan had a gut feeling that Dixon was casing her house for a burglary and told him to leave. 4RP 47-48. Dixon got back into the truck, drove a short distance, and stopped. 4RP 50, 51-52.

The defendant and Dixon looked for another house to burglarize. 5RP 189. They chose Joanne Sherman's nearby home when they saw a car pulling out of her driveway. 5RP 191. Dixon used a pry bar to break in through the back door. 5RP 192. He

¹ "Lick" is a slang term for a robbery or burglary. 6RP 328.

and the defendant worked together to remove several items including a large flat screen TV. 5RP 193. When they were done, they drove to Everett to sell one of the TVs and buy drugs. 5RP 195.

The defendant realized that he had left his keys at Sherman's during the break in so they drove back; the defendant took a backpack into Sherman's house and carried it back out. 5RP 196-97.

About an hour after Dixon had knocked on her door, Halligan saw Dixon's truck back in her neighborhood and called 911. 4RP 55, 57.

Deputy Eakin arrived and saw the defendant just getting into the passenger seat. 4RP 95, 98. When they saw Deputy Eakin, the defendant and Dixon discussed their cover story about purchasing a TV from "John". 5RP 199.

Deputy Eakin contacted the defendant and Dixon at around 1:30 pm. 4RP 101. The two told Deputy Eakin a story about a purchasing a TV involving the defendant's brother, Andy, and Andy's friend, John. 4RP 105, 109, 113. They said they had tried to find John but had gotten lost. Id. The defendant said he had

gotten out of the truck to get better cell phone reception. 4RP 110.
113.

The investigation was still going on at 2:30 which was when Joanne Sherman returned home. 4RP 67-68. She found the house had been burglarized, the back door forced open. 4RP 67-68, 73. Missing were four televisions including one large flat screen, a computer, jewelry, coins, two watches, a credit card, and her deceased husband's wallet. 4RP 68, 69, 89-90. Sherman called 911. 4RP 83.

Deputies picked up Sherman and brought her to the investigation scene. 4RP 83-84. Sherman recognized Dixon as someone who had knocked on her door a week earlier and asked for gas or money. 4RP 85.

As the investigation continued, the defendant was in the truck and on his cell phone. Exhibit 63. At 2:30, he called his brother Andy. Id. At 2:36, he texted Andy, "We're looking for my buddy John's house". Id. Andy texted back, "Alright" and "I'll find out how to get u here". Id. Later, the defendant told detectives that his cell phone would corroborate his story that he had been in the area to buy a TV. 4RP 139, 5RP 226. When he arrested the

defendant, a detective seized the cell phone as evidence. 5RP 227.

Dixon confessed orally and in writing and described both his and the defendant's involvement and said they had done the burglary because he needed money. 5RP 189, 190, 192, 193. Afterwards, he told officers he had ingested drugs and was sick. 5RP 143-44. He was dry-heaving, vomited, and said he was in pain. 5RP 143-44, 247. Aid was called to the scene and spoke to Dixon, after which he was transported to jail. 5RP 144.

Although he claimed he was drugged, Dixon showed no obvious signs of being impaired or unable to fully understand what was happening. 5RP 230, 247. He was lucid, coherent, cognizant, and had no difficulty answering questions responsively. 5RP 230. The detective dealing with him on-scene thought Dixon was shamming illness to avoid going to jail. 5RP 247.

Police served a warrant on the truck. Aside from the large flat screen TV and the laptop, they discovered virtually all of the items stolen from Sherman's home. 5RP 238-39. All of the smaller items were in the backpack the defendant carried into and out of Sherman's house. 5RP 213, 239, 250-51.

Both men were charged with residential burglary. Dixon pleaded guilty. 5RP 185. The defendant's case was eventually set for trial and motions on September 26, 2014. 1RP 2.

The defendant filed its motion to suppress the cell phone records on September 22. Supp. CP 76-91. The State filed its response three days later. CP 129-143.

The motion was heard the morning of September 26. 3RP. The court suppressed the cell phone records. 2RP 9-10. The court noted that there was information included in the State's brief that, had it been included in the probable cause affidavit, showed probable cause. 2RP 9-10. It was not included, though, so the affidavit was insufficient to show a nexus between the cell phone and the suspected criminal activity. Id. The court suppressed the evidence from the cell phone search. Id.

The State informed the court and counsel that it would seek another warrant for the phone based on additional information that would tie the phone to the burglary. Id. The defendant said there would not be enough time to conduct a new forensic examination of the results as it already had with the results from the first search. 2RP 11. The State said the second search was anticipated to produce exactly the same information and nothing more. Id.

That afternoon at trial call, the State moved to continue the trial for two weeks because a new cell phone warrant was being reviewed by a judge. 3RP 2-3. The State said the warrant would be served and processed by Tuesday afternoon when defense would receive the results. Id. The State said the search was anticipated to produce duplicates of the records already provided to defense. Id.

The defendant objected and insisted on going to trial the following Monday. Id. He acknowledged he had already received and investigated the cell phone discovery from the first warrant. 3RP 5.

The court cautioned the defendant that if the case went to trial “[l]ate disclosure is not a grounds [sic] for suppression of evidence... In civil cases discovery may close but it doesn’t close in criminal cases.” 3RP 8. That said, the court denied the State’s motion and the case was assigned to the judge who had granted the motion to suppress the first warrant. Id. 4RP.

On Monday, the State notified the court that it had been unsuccessful in having the cell phone warrant issued on Friday and asked the trial court to review it. 4RP 25. The defendant argued that a second search was prohibited by collateral estoppel. 4RP 3.

The court found no legal bar to the issuance of a second warrant for the cell phone. 4RP 5. It found no prejudice to the defendant's ability to prepare for trial because the evidence gathered would be identical to the evidence from the first search. 4RP 6. The court signed the second warrant at 10:15 a.m. 4RP 25.

The trial proceeded until Tuesday at 2 pm when the court sent the jury home until the next morning. 5RP 252-53. The defendant moved to dismiss the case for governmental mismanagement under CrR 8.3. 255-27.

The court clarified with counsel that the warrant was for the same phone; that the same phone had been in police custody since before the first search; that the same technology and the same machine were being used to search it; it was safe to assume the results would be the same. 5RP 254.

The defendant argued that he was prejudiced because court was going to recess until the next morning and he would have to come back. 5RP 255.

The court found no mismanagement. 5RP 257-58. The evidence from the warrant had been provided to the defendant well before trial. Id. At trial call on Friday, the defendant announced ready and objected to any continuance. Id. The issue of

suppression for late discovery was discussed at trial call. Id. The issue was discussed again at the start of trial and the defendant again said he was ready to go forward. Id. The defendant had been offered a continuance on Monday morning and declined. Id. The officer conducting the search was the last state witness and was not available until the next day. The court denied the motion. Id. Both counsel had told the court the trial would last three to four days. Even with a recess, the trial was well on track to end within that time period. 5RP 259-60.

The court found that this was not a “model of good management” but not legal mismanagement justifying a dismissal. 5RP 260. The court said, “I do not believe there is any prejudice whatsoever to Mr. Johnson at this point.” Id.

The court then conducted a lengthy discussion about the text messages and phone records and admitted a small number of them. 5RP 261-286. Exhibit 63. After reviewing jury instructions, the court went into recess at 3:43. 5RP 286-295.

The jury returned a verdict of guilty. 6RP 360. This appeal follows.

III. ARGUMENT

A. COLLATERAL ESTOPPEL DOES NOT APPLY IN A SINGLE ADJUDICATION WHEN THE COURT CONSIDERS A NEW ISSUE BASED ON NEW FACTS.

Collateral estoppel applies in criminal and civil cases to prevent the same parties from relitigating an issue that has already been resolved. State v. Harrison, 148 Wn.2d 550, 560-61, 61 P.3d 1104 (2003). The party against whom it is applied must already have had an opportunity to litigate the issue. State v. Longo, 185 Wn. App. 804, 808, 343 P.3d 378 (2015).

Collateral estoppel applies only when certain requirements exist:

(1) the issue in the prior adjudication must be identical to the issue currently presented for review; (2) the prior adjudication must be a final judgment on the merits; (3) the party against whom the doctrine is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) barring the relitigation of the issue will not work an injustice on the party against whom the doctrine is applied. (Citation omitted.)

Id. All four requirements must be met. State v. Williams, 132 Wn.2d 248, 254, 937 P.2d 1052. (1997). Failure to establish any one element is fatal to the claim. Lemond v. State Dept. of Licensing, 143 Wn. App. 797, 805, 180 P.3d 829 (2008). The party

asserting collateral estoppel carries the burden of proving each and every requirement. Williams, 132 Wn.2d at 253.

Collateral estoppel does not apply in the present case because the first element has not been met. There was no prior adjudication with a final judgment and the trial court never heard the same argument twice. Without successive cases and without an identical issue, collateral estoppel cannot apply.

First, there was no prior final judgment. Collateral estoppel applies only to issues that have already been resolved by a formal verdict and judgment. Harrison, 148 Wn.2d at 560-61; Williams, 132 Wn.2d at 253-54. It does not apply when a case is ongoing and no final judgment exists. Harrison at 562 (collateral estoppel does not apply when prior sentence was vacated and no longer exists as final judgment). The trial court's decision on the first search warrant did not constitute a final judgment.

The defendant's reliance on Cunningham v. State is misplaced. 61 Wn. App. 562, 811 P.2d 225 (1991). There, some of Cunningham had filed claims in federal court, some of which were dismissed in a partial summary judgment based on federal law. Cunningham, in another action, filed in state court raising some of the same claims. The state trial court applied collateral

estoppel on the issue previously decided in federal court using federal law. Cunningham appealed the decision and argued that a partial summary judgment was not a final judgment.

Division I disagreed. A final judgment "includes any prior adjudication of an issue *in another action* that is determined to be sufficiently firm to be accorded conclusive effect." Id. at 567, (quoting Restatement (Second) of Judgments, sec. 13 (1982) (emphasis added). The federal court's partial summary judgment was based on an issue of federal law so it commanded special deference. Id. at 569-70.

The present case is entirely different. Here, there was but one adjudication, the present case, with no other court having ruled on the issue.

Second, even if this were a new action, the defendant has not met the first prong. He has presented no evidence that the issue of the second warrant was identical to the issue of the warrant previously suppressed. Collateral estoppel applies only when moving party carries his burden to show that not just the issue but also the controlling facts are the same. Lemond, 143 Wn. App. 797, 805. This the defendant did not do.

In the present case, the defendant has not provided a copy of the second probable cause affidavit. Thus, he cannot show whether the facts were identical.

From the record, this court can infer that the second affidavit contained additional information supplementing the first affidavit. Even then, the defendant still has not met his burden. The controlling facts before the court on Monday were not those before the court on Friday. Without identical facts, collateral estoppel does not apply.

Nor can he show that the legal issue was identical. The issue before the court at the Friday motion hearing was whether the first affidavit supplied a sufficient nexus between the crime and the defendant's cell phone. The court said it did not. The issue before the court on Monday morning was whether the second affidavit supplied a sufficient nexus between the crime and the defendant's cell phone.

The defendant' claims that the factual issues were before the court at the motions hearing is unfounded. Although the facts were contained in the State's briefing, the trial court noted that they were not contained in the affidavit and did not weigh in the court's decision.

The Court of Appeals decision in State v. Longo 185 Wn. App. 804, 343 P.2d 378 (2015), calls for no other result. Longo was charged in two courts with related issues, a forfeiture action by a city in district court and marijuana-related felonies by the State in superior court. In both, he sought to suppress evidence gathered during a search of his home, arguing that officers unlawfully entered without any evidence his medical marijuana use was unlawful. The district court granted his motion and dismissed the City's forfeiture action. The superior court trial court agreed that the district court's decision applied by collateral estoppel, suppressed the evidence, and dismissed the case.

Division I reversed the trial court's dismissal. Id. at 806. Collateral estoppel did not apply. The issues were identical but the parties were not. Id. at 809.

In the present case, the parties are identical but the issues are not. As in Longo, when any requirement for collateral estoppel is missing, the doctrine does not apply.

The defendant has the burden of proving by that the facts before the court on both days were the same and were "necessarily adjudicated" in the prior hearing. Lemond, 143 Wn. App. at 805. Having failed to do this, his argument fails.

B. THE COURT CORRECTLY DENIED DEFENSE MOTION TO DISMISS BECAUSE THE DEFENDANT SHOWED NEITHER ARBITRARY GOVERNMENTAL CONDUCT NOR PREJUDICE.

Mid-trial, the defendant moved to dismiss the case under CrR 8.3(b) due to "governmental mismanagement." The trial court correctly denied his motion finding neither egregious mismanagement nor prejudice.

CrR 8.3(b) provides that "[t]he court, in the furtherance of justice... may dismiss any criminal prosecution due to arbitrary action or governmental misconduct where there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. CrR 8.3(b). The Washington State Supreme Court said:

We have repeatedly stressed that "dismissal of charges is an extraordinary remedy available only when there has been prejudice to the rights of the accused which materially affected his or her rights to a fair trial."

State v. Blackwell, 120 Wn.2d 822, 830-31, 845 P.2d 1017 (1993), quoting Spokane v. Kruger, 116 Wn.2d 135, 144, 803 P.2d 305 (1991) (quoting Seattle v. Orwick, 113 Wn.2d 823, 830, 784 P.2d 161 (1989)). Dismissal is appropriate only when there is truly egregious mismanagement. State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

A trial court's CrR 8.3(b) decision is discretionary and reviewable only for a manifest abuse of discretion. Blackwell, 120 Wn.2d at 830. An abuse occurs when the court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Id.

In the present case, the defendant has shown neither mismanagement nor prejudice. The trial court's decision was well within its discretion and should be affirmed.

The defendant has not shown intentional misconduct or even gross mismanagement. In Blackwell, the trial court had ordered the state to produce documents not in its possession. The state objected and then moved for reconsideration; the motion was denied but the court did add to its order that the defense could seek a subpoena duces tecum for the documents it sought. The state did not produce the documents and, on the day of trial, the court dismissed the charges, finding mismanagement. Id. at 825-26.

The Supreme Court disagreed and reversed. Id. at 832. The prosecutor had made efforts to obtain the ordered discovery and even suggested a subpoena duces tecum. Id. The court found no "game playing", mismanagement, or other governmental misconduct on the part of the State..." Id.

The same is true in the present case. Here, the State provided discovery and assumed its evidence was admissible until the court ruled that it was not. When that occurred, the State acted swiftly to correct the mistake and produced a new warrant which was served, processed, and delivered to defense. That is not mismanagement.

In Sherman, the court upheld the dismissal of charges after a prosecutor failed to produce certain documents. State v. Sherman, 59 Wn. App. 763, 771, 801 P.2d 274 (1990). The defense had emphasized how important the records were weeks prior to trial and the prosecutor had agreed to produce them. Id. at 771. The trial finding of mismanagement was based not only on the document problem but also on the prosecutor's late amendment of the information, failure to produce a witness list, and a motion to add an expert witness on the day of trial. Those actions as a whole demonstrated the State's mismanagement. Id. at 772.

Nothing of the sort occurred in the present case. Here, the same day the trial court suppressed evidence obtained from the first warrant, the prosecutor advised the defendant and the court that he was seeking a second warrant. Within hours, he began the process of having the warrant approved. Within one business day,

the warrant was signed. The "new" information was a duplicate of that already provided. There was no mismanagement.

The present case is similar to Wilson, a case that examined two instances of dismissals under CrR 8.3(b). Wilson, 149 Wn.2d 1. In one of the consolidated cases, the prosecutor had been given a court-imposed deadline of two days to set up a witness interview. He attempted to comply and continued his efforts for several days. Although unsuccessful, he did not engage in unfair gamesmanship or egregiously neglect his obligation. Id. at 11. In the other consolidated case, the prosecutor called a witness every day for several days and then asked a detective to continue calling while she was on vacation. When she returned, she tried again to contact the witness. The court found that there was no egregious mismanagement. Id. at 11. In both instances, the trial courts' dismissals were reversed. Id. at 13.

In the present case, the prosecutor complied with all discovery obligations and worked with alacrity to obtain duplicate evidence through a second warrant. In fact, the prosecutor was processing the second warrant the same day the first was invalidated and turned the results over to defense as soon as they were available. No mismanagement occurred, certainly not

“egregious” mismanagement. The court properly denied the motion to dismiss.

Nor has the defendant shown prejudice that materially affected his case. Dismissal is not required absent prejudice. Blackwell, 120 Wn.2d at 832. The trial court found there was absolutely no prejudice to the defendant since he had all of the discovery well before trial. The “new” discovery provided during trial was a duplicate of that already provided. And defendant said he had already done a thorough investigation of that information.

In the present case, the defendant knew duplicate evidence was coming. He was prepared to deal with the same information as he had received it from the first warrant. Any complaint that duplicate evidence impaired his ability to prepare for trial is unsupported by the evidence. The trial court’s ruling on the CrR 8.3 motion was well within its discretion.

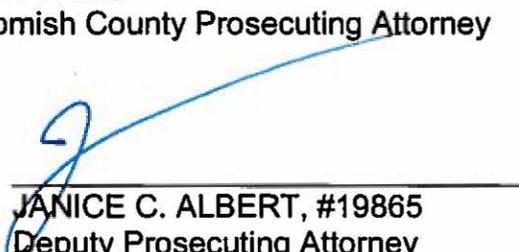
IV. CONCLUSION

For the foregoing reasons, the conviction should be affirmed.

Respectfully submitted on the 30th of June 2015.

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 30th day of June, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Nielsen, Broman & Koch, nielsene@nwattorney.net; swiftm@nwattorney.net; Sloanej@nwattorney.net; I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 30th day of June, 2015, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
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