

IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

COA 36262 7-II

STATE OF WASHINGTON)
Respondent)
v)
CORY LAMONT THOMAS)
Petitioner)

NO. 05-1-04377-8
ADDITIONAL SUPPLEMENT TO PLEA
OF FORMER JEOPARDY

RECEIVED
MAY 31 2007

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

COMES NOW CORY LAMONT THOMAS The Petitioner in support of my plea of former jeopardy, submits the following case propositions;

"Generally Jeopardy bars trial if three elements are met:
(a) Jeopardy previously attached. Serfass v US 420 US 377,388; State v Higley 78 Wn App 172 (b) Jeopardy previously terminated. Richardson v US 468 US 317,325; Higley(supra). and (c) The defendant is again in jeopardy 'for the same offense'. US v Dixon 509 US 688 Brown v Ohio 432 US 161,166; Blockburger v US 284 US 299,304; State v Corrado 81 Wn App 640."

The 1st two elements [a & b] determine 'former' jeopardy, which is a prerequisite to 'double' jeopardy. When 'former' jeopardy is assumed or established, the third element determines 'double' jeopardy. State v Corrado(supra)

Jeopardy 'attaches' when a jury is sworn. Crist v Bretz 437 US 28,28; Martin Linen Supply Co. 430 US at 569. In petitioners case a jury was sworn. Thus jeopardy did attach

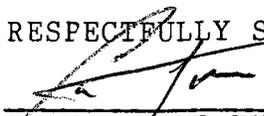
Jeopardy 'terminates' with a verdict of acquittal. Smalis 476 US at 145; Corrado(supra) Petitioner did receive a verdict of acquittal. Thus Jeopardy did terminate.

Further, jeopardy terminates with a conviction that becomes unconditionally final. Swisher v Brady 438 US 204,218; Corrado(supra) Thus petitioners verdict of acquittal has become and is unconditionally final.

This supplement to Plea of Former Jeopardy is being filed in support of petitioners Plea of Former jeopardy, and is to be decided upon when the issue of former jeopardy and double jeopardy are before the court for review of the asserted jeopardy's.

These authorities are also being filed to become a part of the official trial court record, in the event later review by appellate and or Supreme Court become necessary.

RESPECTFULLY SUBMITTED


CORY LAMONT THOMAS

DATED THIS _____ DAY OF _____ 2007

The verdict petitioner is content with accepting is the very first verdict rendered, which is the verdict in count one.

Petitioner was 'acquitted' and 'convicted' in count I. And that verdict of acquittal was final, and cannot be reviewed, on error or otherwise without putting the petitioner twice in jeopardy, and thereby violating the constitution. United States v Ball 163 US 662,671. 16 S. Ct. 1192.

Reduced to plain terms, the government contends that in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which defendant was lawfully convicted in the same count, and that conviction and acquittal in count I, not being involved in my appeal. Green v U.S. 355 US 184. 78 S. Ct. 221.

Petitioner asserts that is not so, I am asserting a plea of former jeopardy, and to force petitioner to a trial de novo to decide the issue of former jeopardy, would in essence force petitioner to nonetheless be twice put jeopardy. As the conviction in count one is not being appealed.

Count Two's conviction is the only conviction holding petitioner unlawfully, to allow petitioner to be continually held by affirmation of count II by this court, runs afoul of double jeopardy principals instituted by the founding forefathers of the United States Constitution, Amendment 5.

When a defendant is found guilty of a lesser offense under an indictment charging a more serious one, and he is content to accept this conviction. The state may not again prosecute him for the greater offense. Green(supra). As such not only is the conviction to affirm, the conviction in which former jeopardy has, but also in that petitioner has asserted a plea of former jeopardy, the state may not again re prosecute myself for any offense greater than the verdict of assault fourth degree. Green(supra)at 219.

The fact of the matter is that by finding petitioner guilty of [assault] under count I of the indictment, and of [assault 2nd] in count two

[arguably] the jury found [petitioner] guilty of all the elements necessary to convict [me] of [assault two] with which [I] was charged in [count II], but the judge's [and counsel's] erroneous instructions permitted the jury, for its own undisclosed reasons to render an irrational verdict. Green(supra)at 220.

In this case, the opinion of this court treats the question, not as one within this courts supervisory jurisdiction over state criminal proceedure, but a question answered by the fifth amendment itself, and therefore even congress cannot undertake to effect. Green(supra) at 220

A trial for one offense precludes retrial for all lesser- included offenses if at first trial the accused is acquitted of a charge that contains a lesser-included offense, in that event he may not be again tried for the lesser included offense, even if it was charged seperately at the first trial. Davis v Herring 800 F3d 513,518.

The jury had an opportunity to return a verdict for murder [Burglary First degree], however, [petitioner was forthrightly acquitted of Burglary first] petitioner is therefore protected from reprosecution for any lesser offense that was included in the murder [burglary] charge. Davis v Herring(supra)at 519.

A verdict of aquittal... amy not be reviewed...without putting the defendant twice in jeopardy, and thereby violating the constitution: has recently been described as the most fundamental rule in the history of double jeopardy jurisprudence. Davis v Herring(supra) at 522.

In regards to the assault fourth degree conviction and charge as a lesser and included crime, there is nothing we can do about that conviction it is not being appealed, and is a final judgment. U.S. v McLaurin 57 F3d 823 827 (9th Cir.)

The error that permitted two assault convictions in two different counts was thus effectively invited by the governments failure to properly instruct the jury. For that reason [alone] as well as constitutional grounds the government is foreclosed fro retrying on that count of count I and thereby

benefitting from the error, by getting a second bit at the apple. U.S. v McLaurin 57 F3d 822,823(9th Cir.)

The Primary purpose of the double jeopardy clause was to protect the integrity of a final judgment. Without respect for the finality, prosecutors with substantially greater resources than most individuals, would be permitted and encouraged to re prosecute defendants when the result was any sentence short of the maximum penalty. Adamson v Ricketts 789 F2d 772 (9th Cir.)(citing in part U.S. v Dinitz 424 US 600,606. 96 S. Ct. 1075.) U.S. v Stearns 702 F2d 291 (9th Cir) and see also Brown v Ohio 97 S. Ct 2221 holding (conviction for a lesser as a bar to greater).

Other than assault fourth degree, a re-trial on any offense resulting from the same allegations relied upon in the state's attempt to secure a Burglary First degree conviction, is barred by the prior trial and conviction of a lesser included offense based on the same transaction. Illinois v Vitale 100 S. Ct. 2260.

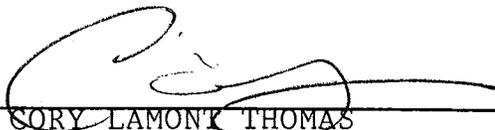
WHEREFORE

Petitioner MOVES this court to affirm Count I's lesser included conviction, and vacate Count II's seperate conviction based on the same facts relied upon in Count I.

RELIEF AND PRECATORY

Affirmation of Assault fourth degree based on Former Jeopardy. and a judgment reflecting a bar to a second prosecution.

Dated this _____ day of Apr. 2007


CORY LAMONT THOMAS

FURTHER AFFIANT SAYETH NAUGHT

Division Two Court of Appeals
Clerk, and a staff Attorneys

RECEIVED
MAY 31 2007
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

Cory Lament Thomas

RE: Multiple/Different filings.

Good Morning, can you please place the following into
the appropriate files

1) 34335-5, I just received this dept. of corr memo, that
I had addressed in my motion to reconsider denial of statement
of additional grounds as untimely. please forward to the
chief judge for her reviewing and subsequent filing.

2) 36262-7 PRP, I just ^{recently} received notice of my last Cr R 7-E's
transfer up as a prp. However in the packet "Cr R 7-E" that the
prosecutor / superior court transferred those two separate, subsequent
filings were not included. as such can you please file them
separately. [they have been filed in superior court but not
forwarded to the court of appeals]

* 36262-7 filing # 1 "supplement to plea of former
Jeopardy"

* 36262-7 filing # 2 "Additional supplement to plea of
former Jeopardy"

My copies do not reflect dates. nevertheless the copies sent to the court
do have dates they were mailed / signed in those copies. Thx.