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NO. 34967-1-II

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

STATE OF WASHINGTON,
Respondent,
v.
DELBERT BEATTY,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson E. Hunt

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. Appellant Delbert Beatty's convictions for both attempt and conspiracy to commit child molestation violated his right, under the Fifth Amendment of the United States Constitution and Article I, § 9 of the Washington Constitution, to be free from double jeopardy.

2. The requirement that Mr. Beatty submit a biological sample for DNA identification and analysis violates the Fourth Amendment of the United States Constitution and Article I, § 7 of the Washington Constitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Mr. Beatty was convicted of both attempt and conspiracy to commit first-degree child molestation. Both convictions were based on the same act, which was done in concert with Mr. Beatty's co-defendant. Where the evidence used to prove Mr. Beatty's intent, for purposes of the attempt charge, was the same evidence used to prove the conspiracy, was the double jeopardy clause violated? (Assignment of Error 1)

2. Both convictions were merged for purposes of sentencing and the sentences are running concurrently. Does the mere fact of

conviction, with its attached stigma and repercussions, implicate double jeopardy even where there is no impact on the sentence?

(Assignment of Error 1)

3. The Fourth Amendment's requirement that a person's expectations of privacy not be unreasonably disturbed prohibits suspicionless searches conducted primarily for normal crime control activities. RCW 43.43.754 requires suspicionless searches for the sole purpose of gathering evidence for future prosecution. Are such searches reasonable under the Fourth Amendment?

(Assignment of Error 2)

4. Article I, § 7 provides greater privacy protections than the Fourth Amendment. Does Article I, § 7 permit suspicionless searches under RCW 43.43.754 for the sole purpose of gathering evidence for future prosecution? (Assignment of Error 2)

C. STATEMENT OF FACTS.

1. Procedural Facts. On April 6, 2005, the Prosecuting Attorney for Lewis County charged Delbert Beatty with Conspiracy to Commit Rape of a Child in the First Degree and Attempted Rape of a Child in the First Degree. CP 52-54. The information was later amended to charge Conspiracy to Commit Child Molestation in the

First Degree and Attempted Rape of a Child in the First Degree. CP 27-28. Co-defendant W.E.C. was charged with the same offenses. CP 27-28.

Both defendants waived their right to a jury trial and the right to sever their trials. CP 34. A joint bench trial commenced before the Honorable Nelson E. Hunt on December 7, 2005. RP 1. Both defendants were convicted as charged and given identical concurrent sentences of 51 months on each count, and ordered to provide a biological sample for DNA analysis. CP 3-15; RP 329, 341. Judge Hunt merged the two convictions for purposes of determining the offender score. RP 340-41.

2. Testimony at Trial. Co-defendant W.E.C. was Mr. Beatty's girlfriend since approximately December, 2004. RP 263. W.E.C. testified that her eleven year-old daughter C.E.C. had begun seeing a counselor "a couple of years prior" for behavioral problems, including "defiance." RP 247. In December of 2004, C.E.C. was diagnosed with Attention Deficit Disorder and was having problems adjusting to changes at school and home, so W.E.C. began taking her to counseling again. RP 249-50.

On March 19, 2005, W.E.C. and Mr. Beatty purchased bras and thong underwear for C.E.C., at C.E.C.'s insistence. RP 245-46.

Later that night, C.E.C. was frightened by a storm, so W.E.C. invited her to come in the bedroom and watch television with Mr. Beatty and herself. RP 241. W.E.C. lay in bed between Mr. Beatty and C.E.C. while the three watched television. RP 242-43. Eventually Mr. Beatty felt uncomfortable and went to the living room, C.E.C. fell asleep, and W.E.C. joined Mr. Beatty in the living room. RP 242-43. Nothing inappropriate happened. RP 241-43.

W.E.C. believed C.E.C. had concocted the allegations of molestation because C.E.C. did not like Mr. Beatty's strict discipline. RP 282. Although C.E.C.'s relationship with Mr. Beatty was initially amiable, it soured as the family began spending more time at his house and he began to enforce rules about cleanliness, television viewing, and bedtime. RP 257-58, 261. C.E.C. was not accustomed to firm discipline, and with her biological father she had had the "run of the house." RP 257. C.E.C. was also unhappy about W.E.C.'s close relationship with Mr. Beatty, and angry with W.E.C. for refusing to help her biological father get out of jail. RP 257-58, 260, 282.

C.E.C. testified that in the previous year, she and her younger sister used to live with her mother and aunt, and would

sometimes spend the night at the home of her mother's boyfriend, Delbert Beatty. RP 50, 59.

C.E.C. testified that in March of 2005, W.E.C. and Mr. Beatty took C.E.C. to Wal-Mart, where Mr. Beatty purchased bras and thong underwear which C.E.C. had picked out. RP 73-74. Later that night, W.E.C. told C.E.C. to put on the thong underwear and a black nightgown. RP 72. Both W.E.C. and Mr. Beatty "poked" C.E.C.'s buttocks. RP 75. W.E.C. then asked C.E.C. to get in bed with Mr. Beatty and herself. RP 75-77. Mr. Beatty then "did something" to W.E.C. under the covers for several minutes. RP 78, 81. C.E.C. felt ill and went to the bathroom; W.E.C. followed her into the bathroom and asked, "Do you want Del to give you an orgasm?" RP 81-82. She also said, "I would rather have Del do this to you than some creep," and told C.E.C. that Mr. Beatty had saved W.E.C.'s life and that this was a way C.E.C. could pay him back. RP 82-84.

When C.E.C. returned from the bathroom, Mr. Beatty asked her to get back in bed. RP 84. W.E.C. went under the covers and did something to Mr. Beatty. RP 84. Mr. Beatty then asked C.E.C., "Do you want to see what your mom is doing?," "Do you want me to give you an orgasm?," "Do you want your mom to give you an

orgasm?," and "Do you want to give your mom an orgasm?" RP 84, 86-88. W.E.C. added she had "always wanted a lesbian experience." RP 88. When C.E.C. refused, Mr. Beatty said, "Just let me do it for one minute." RP 88. Mr. Beatty then said he would massage C.E.C.'s "sciatic nerve" and touched C.E.C.'s buttocks and legs.¹ RP 89. C.E.C. closed her legs and told him to stop, and he did not touch her any further. RP 89. C.E.C. then fell asleep and Mr. Beatty and W.E.C. left the room. RP 91.

C.E.C. reported the incident to her counselor, Renate Starroff, therapist Christine Allen, and Detective Jeffrey Todd Elder. RP 94, 96, 97.

¹ At trial, C.E.C. testified Mr. Beatty did touch her genitals. RP 89. However, in her statement to Detective Elder she stated he touched only her leg, near her knee. RP 218. It was also unclear whether this touching occurred over or under the nightgown. RP 90, 207-08.

D. ARGUMENT.

1. DOUBLE JEOPARDY PROHIBITS MULTIPLE
CONVICTIONS FOR THE SAME ACT

a. The Federal and State Constitutions prohibit multiple punishments for a single act. The Double Jeopardy provisions of the Fifth Amendment to the United States Constitution and Article I, § 9 of the Washington Constitution protect an individual from being held to answer multiple times for the same offense. *Whalen v. United States*, 445 U.S. 684, 688-89, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980); *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

Under the “same evidence” test, “if each offense, as charged, includes elements not included in the other, the offenses are different and multiple convictions cannot stand.” *Calle*, 125 Wn.2d at 777, citing *In Re Fletcher*, 113 Wn.2d 42, 49, 776 P.2d 114 (1989); *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983).

In *Dixon*, the defendant was arrested for second-degree murder and released on bond; as a condition of his release he was not to commit “any criminal offense.” 509 U.S. at 691. While on

release, Dixon was arrested and indicted for a drug violation. *Id.* He was convicted of criminal contempt and subsequently successfully moved to dismiss the drug violation indictment. *Id.* at 692. The United States Supreme Court found that “the ‘crime’ of violating a condition of release cannot be abstracted from the ‘element’ of the violated condition.” *Id.* at 698. Although Dixon could have violated the conditions of his release in a number of ways, in fact he violated it by possessing cocaine, and was subsequently indicted for the same act of cocaine possession. *Id.* The underlying offense was then a “species of lesser-included offense.” *Id.*, citing *Illinois v. Vitale*, 447 U.S. 410, 420, 100 S.Ct. 2260, 65 L.Ed.2d. 228 (1980), *accord. Whalen*, 445 U.S. 684. Thus, the “same evidence” test was met, and the Court held multiple convictions would have resulted in double jeopardy. *Id.* at 700.

In *State v. Valentine*, the Court of Appeals similarly held that convictions for attempted murder and first degree assault, where both charges were for the same stabbing incident, violated double jeopardy. 108 Wn.App. 24, 26, 28, 29 P.3d 42 (2001). Although the defendant could have taken a substantial step towards murder in a number of ways, he did so by stabbing the victim in the chest,

the same act giving rise to the assault charge. *Id.* at 26. The Court found that the offenses did not meet the “same evidence” test; however, that test is “not dispositive.” *Id.* at 28.

Two convictions may still constitute double jeopardy even though the offenses clearly involve different legal elements, if the court finds clear evidence that the Legislature intended to impose only a single punishment.

Id., citing *Calle*, 125 Wn.2d at 780. Determining the Legislature did not intend to punish the same act as both assault and attempted murder, the Court vacated the assault conviction. *Id.* at 29.

Similarly, the Court of Appeals has held that multiple convictions for third-degree rape and third-degree statutory rape violated double jeopardy. *State v. Bergen*, 33 Wn. App. 1, 14, 651 P.2d 240 (1982), *rev. denied*, 98 Wn.2d 1013 (1983). Although, again, the offenses did not meet the “same evidence” test, the Court found that the statutory scheme defined a single crime of rape, with punishment varying depending on the underlying circumstances. *Id.* Therefore the Legislature did not authorize multiple punishments for the same act. *Id.*

This Court has found that double jeopardy was violated where a defendant was convicted of reckless endangerment and reckless driving. *State v. Potter*, 31 Wn. App. 883, 885, 645 P.2d

60 (1982). The Court acknowledged that the elements are not the same; reckless endangerment can be committed in a number of ways and does not require operation of a vehicle. *Id.* at 887-88. “If, however, the statutory elements are compared in light of what did in fact occur, we observe that proof of reckless endangerment through use of an automobile will *always* establish reckless driving.” *Id.* at 888 (emphasis in the original). Expressing concerns about the efficacy of the “same evidence” test, the Court vacated the reckless driving judgment and sentence. *Id.* at 889.

Even if multiple convictions do not share the same elements, the Court must look to the actual facts of the case in addition to the legislative intent to determine whether double jeopardy has been violated.

b. Mr. Beatty’s multiple convictions for the same act violate double jeopardy. Here, Mr. Beatty was convicted of both Conspiracy to Commit Child Molestation in the First Degree and Attempted Child Molestation in the First Degree.

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RCW 9A.28.040.

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020.

Both statutes require a substantial step. In order to prove the attempt, the State was also required to prove Mr. Beatty's intent to commit Attempted Child Molestation in the First Degree. Just as in the cases discussed above, Mr. Beatty could have manifested that intent in a number of ways. However, the evidence used by the State to prove intent was the same as that used to prove the conspiracy.

For both the conspiracy and the attempt, Mr. Beatty's act of touching C.E.C.'s legs and/or buttocks satisfied the substantial step requirement. However, the evidence used to prove the intent required for the attempt conviction was inextricable from the evidence of conspiracy. In particular, Mr. Beatty's statements "Do you want me to give you an orgasm?" and "Just let me do it for one minute" showed his intent as a principal, while his statements "Do you want your mom to give you an orgasm?," and "Do you want to give your mom an orgasm?" showed his intent as an accomplice.

However, these statements must be taken in the context of W.E.C.'s statements and conduct: dressing C.E.C. in the nightgown, asking her "Do you want Del to give you an orgasm?," trying to convince her to have sex with Mr. Beatty, and saying she "always wanted a lesbian experience," as well as the conduct of both co-defendants in apparently engaging in sex acts in front of C.E.C. Taken together, these facts establish either the agreement for the conspiracy charge or the requisite intent for the attempt charge, but Mr. Beatty cannot be punished for both based on the same act.

In light of the facts as charged and argued at trial, the conspiracy was subsumed by the attempt. Just as "proof of reckless endangerment through use of an automobile will *always* establish reckless driving," so proof of attempt in concert with another will always establish conspiracy. *Potter*, 31 Wn. App. at 888.

c. Double jeopardy was violated even though the multiple convictions had no direct impact on Mr. Beatty's sentence.

The United States Supreme Court has observed that even when sentences are served concurrently, the mere fact of multiple convictions may still violate the rule against double jeopardy.

The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.

Ball v. United States, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

The Washington Supreme Court has similarly recognized double jeopardy may be violated even where sentences for the two offenses are served concurrently. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1071 (1998); *Calle*, 125 Wn.2d at 774-75 (Supreme Court rejecting concurrent sentence rule, holding "double jeopardy may be implicated when multiple convictions arise out of the same

act, even if concurrent sentences have been imposed").² Lastly, this Court has recognized it is not simply the imposition of dual punishments which violates double jeopardy principles, but also the fact of multiple convictions. *State v. Gohl*, 109 Wn.App. 817, 822, 37 P.3d 293 (2001), (citing *Ball*, 470 U.S. at 861 and *In re Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000))

The fact of multiple convictions, with the concomitant societal stigma and potential to increase sentence under recidivist statutes for any future offense violated double jeopardy even where, as here, the trial court imposed only one sentence for the two offenses.

Gohl, 109 Wn.App. at 822 (emphases added).

In *Gohl*, the defendant was convicted of two counts attempted first degree murder and two counts first degree assault for the same acts involving the same two victims. 109 Wn.App. at

² In *Calle*, the Washington Supreme Court noted both federal and state courts have cited *Ball* in concluding that double jeopardy concerns arise in the presence of multiple convictions, regardless of whether the resulting sentences are imposed consecutively or concurrently. 125 Wn.2d at 773-74, citing *United States v. Gomez-Pabon*, 911 F.2d 847, 861 (1st. Cir. 1990) (although defendants received concurrent rather than consecutive sentences for their dual convictions, adverse consequences still could result from the fact that two separate convictions issued), *cert. denied*, 498 U.S. 1074, 112 L. Ed. 2d 862, 111 S. Ct. 801 (1991); *United States v. Morehead*, 959 F.2d 1489, 1506 (10th Cir.) (a criminal conviction, in addition to imprisonment and a penalty assessment, presents potentially adverse consequences), *aff'd sub nom. United States v. Hill*, 971 F.2d 1461 (1992); *Chao v. State*, 604 A.2d 1351, 1360 (Del. 1992) ("The United States Supreme Court has held that, for purposes of double jeopardy, the term 'punishment' encompasses a criminal conviction and not simply the imposition of a sentence.").

819. At sentencing, the court found the assaults and attempted murder counts encompassed the "same criminal conduct," and imposed only one sentence. *Id.* at 822. The State argued that because the court imposed only one sentence, no double jeopardy violation occurred. *Id.* This Court disagreed, recognizing that it was the fact of multiple convictions which violated double jeopardy protections, despite the imposition of a single sentence. *Id.* Accordingly, despite a correct sentence, double jeopardy is violated when the judgment and sentence reflects multiple convictions.

d. The conspiracy conviction should be vacated.

Vacation of the lesser offense is the proper remedy for a double jeopardy violation. *Valentine*, 108 Wn. App. at 29; *State v. Portrey*, 102 Wn. App. 898, 106-07, 10 P.3d 481 (2000) .. Attempted Child Molestation in the First Degree is a Class A felony; Conspiracy to Commit Child Molestation in the First Degree is a Class B felony. RCW 9A.28.020; RCW 9A.28.040. The conspiracy conviction should therefore be vacated.

2. THE COLLECTION OF A DNA SAMPLE
PURSUANT TO RCW 43.43.754 VIOLATES THE
FOURTH AMENDMENT AND ARTICLE 1 § 7.³

a. Because it is conducted solely for a normal crime function, the DNA search and seizure is an unreasonable intrusion of privacy. The collection and subsequent analysis of biological samples from an individual constitutes a search for purposes of the Fourth Amendment. *Ferguson v. City of Charleston*, 532 U.S. 67, 76, 121 S.Ct. 1281, 149 L.Ed. 2d 205 (2001); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *State v. Olivas*, 122 Wn.2d 73, 83-84, 856 P.2d 1076 (1993).

A search is not reasonable unless it is pursuant to a judicial warrant based upon probable cause or falls within an exception to the warrant requirement. *Skinner*, 489 U.S. at 619, (citing *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980)). One recognized exception is the "special needs" doctrine, which provides that neither a warrant nor individualized suspicion is necessary where "special needs, beyond the normal

³ This court has ruled on this issue in *State v. Surge*, 122 Wn.App. 448, 94 P.3d 345 (2004). Since the Supreme Court has granted petition for review, 153 Wn.2d 10008, 111 P.3d 1190 (2005), Mr. Beatty preserves this issue pending the Supreme Court decision.

need for law enforcement, make the warrant and probable-cause requirement impracticable.” *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

RCW 43.43.754 does not serve a “special need” beyond normal crime control activities. Where evidence is gathered pursuant to a warrantless search which is used only to facilitate future prosecution, the special needs doctrine cannot apply. In *City of Indianapolis v. Edmond*, the Supreme Court held the special needs doctrine does not permit suspicionless highway checkpoints where the primary purpose was narcotics interdiction. 531 U.S. 32, 42-43, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000).⁴

The purpose of RCW 43.43.754 “is explicitly for future identification and prosecution.” *Olivas*, 122 Wn.2d at 91. Because an immediate objective of the search required by the statute is to facilitate normal law enforcement ends, the special needs doctrine cannot apply, and the search must be based on individualized suspicion. *Edmond*, 531 U.S. at 42-43; *Ferguson*, 532 U.S. at 83.

⁴ See also *Ferguson*, 532 U.S. at 76, (no special need existed to justify state hospital’s generalized policy of testing pregnant women for drug use); *Illinois v. Lidster*, 540 U.S. 419, 423, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004) (roadblock intended to identify potential witnesses of earlier crime, not to discover or prosecute new crimes, did serve special need).

When properly balanced, the warrantless and suspicionless intrusion of privacy occasioned by DNA analysis pursuant to RCW 43.43.754 is unreasonable.

b. The suspicionless compelled production of a convicted felon's genetic sequence violates the privacy protections of Article I, § 7. Article I, § 7 "unlike any provision in the federal constitution, explicitly protects the privacy rights of Washington citizens." *State v. Stroud*, 106 Wn.2d at 148, (citing *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). The warrant requirement is particularly important under the Washington Constitution "as it is the warrant which provides 'authority of law' referenced therein." *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing *Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)).

The Washington Supreme Court has never recognized a special needs exception to Article I, § 7 and Washington law does not permit suspicionless searches. "In the absence of individualized suspicion of wrongdoing the search is a general search. '[W]e never authorize general exploratory searches.'" *Kuehn v. Renton School District*, 103 Wn.2d 594, 599, 694 P.2d 1078 (1985) (quoting *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)).

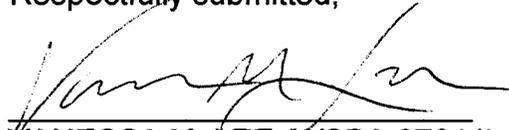
Because of the preexisting law in this State and the local interest in protecting the private affairs of those in Washington, the search mandated by RCW 43.43.754 violates Article I, § 7. The order to give a DNA sample should be reversed.

E. CONCLUSION.

Because the trial court violated Mr. Beatty's right under federal and state constitution to be free from double jeopardy, he respectfully requests that this court vacate his conspiracy conviction. Because the DNA searches mandated by RCW 43.43.754 violated both the Fourth Amendment and Article I, § 7, Mr. Beatty respectfully requests that the order to provide a biological sample be stricken.

DATED this 5th day of September, 2006.

Respectfully submitted,



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