

No. 36194-9-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V.

THOMAS CHAD O'MEARA

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BRIEF OF RESPONDENT

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**ORIGINAL**

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A. Counter-Statement of Issues Pertaining to Assignment of Errors

1. May the State, consistent with the double jeopardy clause and RAP 2.2(b), appeal the dismissal of the charge of Unlawful Use of Drug Paraphernalia after the trial judge, sitting as both judge and fact-finder in juvenile court, dismissed the charge?

2. Did the trial court correctly determine that the State does not have sufficient evidence to convict Mr. O'Meara of Unlawful Use of Drug Paraphernalia when there was no evidence that he used the items?

3. Would convicting Mr. O'Meara of both possession of marijuana and use of drug paraphernalia violate his right to be free from double jeopardy?

B. Statement of Facts

The Respondent accepts the Statement of Facts as set out in the Brief of Appellant.

C. Argument

**1. The State may not, consistent with the double jeopardy clause, appeal the dismissal of the charge of Unlawful Use of Drug**

**Paraphernalia after the trial judge, sitting as both judge and fact-finder in juvenile court, dismissed the charge.**

RAP 2.2 (b) governs when the State may appeal a dismissal by the trial court. It includes the caveat that no decision may be appealed which violates the double jeopardy clause. In this case, the State is appealing from a two count information. The defendant pled guilty without objection from the State to Count I, Unlawful Possession of Marijuana. The trial court dismissed Count II, Unlawful Use of Drug Paraphernalia. The court entered a written order dismissing the charge with prejudice.

The drug paraphernalia that is referenced in Count II is a pipe which smelled of burnt marijuana, a plastic baggie with marijuana, and a metal tin with marijuana. The Information simply charges Mr. O'Meara with possession of marijuana and does not distinguish between the marijuana in the pipe, the baggie, or the tin. This is not the type of case where the State should be allowed to appeal from a dismissal.

When a trial judge, acting as the fact finder in a juvenile proceeding, dismisses a case based upon an allegedly erroneous interpretation of the law, double jeopardy protects the juvenile from later being found guilty. State v. Dowling, 98 Wn.2d 542, 656 P.2d 497 (1983), overruled on other grounds by State v. Collins, 112 Wn.2d 303; 771 P.2d 350 (1989). In Dowling, the State presented evidence that the eleven year-

old juvenile was guilty of theft. At the end of the State's case, the defense moved to dismiss because the State had failed to prove capacity. The trial court agreed and dismissed the case. The State then presented supplemental briefing on the capacity issue. Upon reconsideration, the trial court concluded that capacity had been proved and convicted the juvenile. The Supreme Court reversed because the juvenile's double jeopardy rights had been violated.

The Dowling Court quoted the United States Supreme Court and said, "To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that even though innocent he may be found guilty." Dowling at 544, quoting United States v. Scott, 437 U.S. 82, 91, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978). When a trial judge makes a legal determination that the facts are insufficient to sustain a conviction, even if that determination is erroneous, retrial is prohibited. Dowling at 545; Accord State v. Lefever, 102 Wn.2d 777; 690 P.2d 574 (1984). The Court concluded its analysis by saying:

The constitution does not permit a jury to return a verdict acquitting a defendant, then 4 months later find the same defendant guilty. This same prohibition also applies to a trial judge when he performs the factfinding function of a jury.

Once a defendant is acquitted, all further proceedings must end.

Dowling at 547.

Nor may an appellate court review a trial court's determination that a case must be dismissed, even when the dismissal is based upon an allegedly erroneous interpretation of the law. Auburn v. Hedlund, 137 Wn. App. 494, 155 P.3d 149 (2007). In Hedlund, the District Court dismissed two charges, but granted a short stay to allow the City to appeal. The Superior Court reinstated the charges. The Court of Appeals held that the double jeopardy clause was violated.

The next question that must be addressed is whether jeopardy attached when the trial judge, after reviewing the facts in the light most favorable to the State, concluded that the evidence was insufficient as a matter of law to convict Mr. O'Meara. In order to answer that question, a careful review of State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986) is necessary. See also State v. Brown, 64 Wn. App. 606, 825 P.2d 350 (1992). In Knapstad the Supreme Court was trying to balance the right of the judicial system to process cases in an efficient and orderly manner and the right of the prosecution to have a jury determination of guilt. The State was insisting that it had the right to a trial by jury despite the fact that the trial court reviewed the charge and found it legally deficient, the

evidence was relatively simple, and the material facts were undisputed. Brown at 611. If the trial court makes a legal mistake in determining a Knapstad motion, the State may appeal to have its right to a jury determination reinstated and double jeopardy is not offended.

But there is a fundamental difference between adult court and juvenile court: the State does not have the right to a jury determination. When a trial judge reviews facts at a Knapstad motion in juvenile court, the judge is acting both as a judge and as a fact finder. If that judge erroneously determines that the evidence is insufficient, the State is in the same position it would be at the end of its case-in-chief. No one would contend that the State may appeal from a dismissal at the end of its case-in-chief. By the same token, the State should be prohibited from appealing a juvenile court dismissal pursuant to Knapstad.

This Court does not have jurisdiction to hear this appeal consistent with RAP 2.2 (b). The appeal should be dismissed.

**2. The trial court correctly determined that the State does not have sufficient evidence to convict Mr. O'Meara of Unlawful Use of Drug Paraphernalia.**

The State argues on appeal that the trial court erred by concluding that there is no evidence of use of drug paraphernalia. The state concedes

that there is no direct evidence of paraphernalia use, but argues that the court should have concluded that the use could be determined circumstantially. Brief of Appellant, 6. The State also argues that the presence of a baggie containing marijuana is evidence that Mr. O'Meara was using an object to "store" a controlled substance.

It is clear under Washington law that it is not illegal to possess drug paraphernalia. State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). As the O'Neill Court said in footnote 8:

Sergeant West could not have lawfully arrested O'Neill for possession of drug paraphernalia or use of drug paraphernalia in any event. Possession of drug paraphernalia is not a crime, and West could not have arrested for possession of the "cook spoon." See RCW 69.50.412; State v. McKenna, 91 Wn. App. 554, 563, 958 P.2d 1017 (1998). While use of drug paraphernalia is a misdemeanor, RCW 69.50.412(1), there is no evidence that the "cook spoon" was used in West's presence. Thus, the officer could not have arrested O'Neill for use of the drug paraphernalia because he could not arrest for this misdemeanor if it was not committed in his presence. See RCW 10.31.100.

Therefore, the fact that Mr. O'Meara was in possession of items that could be considered drug paraphernalia is insufficient as a matter of law to convict him of use of drug paraphernalia.

The problem with reviewing the case law interpreting this statute is that none of the cases address the sufficiency of the evidence to convict. They all address the quantum of evidence necessary to make a lawful

arrest. In every case cited by the State, the State argued that, because of an allegedly lawful arrest for use of drug paraphernalia, the officer was permitted to conduct a search incident to arrest. The criminal charge under review was not use of drug paraphernalia, but the fruit of the subsequent search, usually a controlled substance. Therefore, the cases cited by the State, while illustrative, are not controlling of this appeal.

In at least two cases, the appellate courts concluded that there was insufficient evidence to arrest the suspect for use of drug paraphernalia. The first case, State v. O'Neill, is quoted above. The second case is State v. McKenna, 91 Wn. App. 554, 958 P.2d 1017 (1998). In McKenna, the police officer searched a duffle bag and found a pipe, cigarette wrapping paper, and a small set of scales. The trial court held that the officer did not have probable cause to arrest for use of drug paraphernalia and the Court of Appeals agreed with only a cursory analysis.

Conversely, two cases held that the officer did have probable cause to arrest for use of drug paraphernalia. State v. Lowrimore, 67 Wn. App. 949, 841 P.2d 779 (1992); State v. Neeley, 113 Wn. App. 100; 52 P.3d 539 (2002). In Lowrimore, the officer lawfully searched a purse and discovered unspecified drug paraphernalia, marijuana pipes, and scales. The suspect was exhibiting “bizarre and emotionally unstable behavior.” While acknowledging that possession of drug paraphernalia is not a crime,

the Court held that the possession, coupled with the fact that she was exhibiting the effects of having used drugs recently, gave rise to probable cause to arrest.

Similarly, in Neeley, the approaching officer observed the suspect leaning over the passenger seat and bobbing her head up and down in a strange way as if ingesting or concealing something. When the officer arrived, he saw items he recognized as items used to ingest cocaine. The Court compared its facts to both McKenna and Lowrimore and determined that the suspect's odd behavior made it more like Lowrimore and sustained the arrest.

Mr. O'Meara's case is more similar to McKenna than to Lowrimore. Mr. O'Meara was not exhibiting the effects of having recently used controlled substances or otherwise acting suspicious. He was merely in possession of the items without more.

State v. Williams, 62 Wn.App. 748, 815 P.2d 825 (1991), review denied, 118 Wn.2d 1019 (1992), cited by the State, is inapposite. In Williams, the issue was whether the prosecutor abused his discretion by charging possession of cocaine rather than use of drug paraphernalia for a pipe with cocaine residue. The Court held that the two offenses are not concurrent and that the prosecutor has discretion to choose between the offenses. The Williams case is not helpful.

The State argues that the baggie containing the marijuana was evidence of drug paraphernalia use because it was used to “store” a controlled substance. The State cites no case law to support this novel argument and it should be rejected by this Court. The lack of cases supporting this position was also mentioned by the trial court in its oral decision. RP, 7. While dicta, the trial court opined that “nobody talks about saying the Ziploc bag is actually drug paraphernalia.” RP, 4.

Although not directly on point, one case is worth mentioning. State v. Hudson, 124 Wn.2d 107, 874 P.2d 160 (1994). In Hudson, the officer did a pat down search of the suspect and felt a baggie with a ragged-edge chunk which he immediately recognized as a controlled substance, probably cocaine. Analyzing the case under the plain touch doctrine, the Supreme Court held that the officer exceeded the proper scope of a Terry search. See Terry v. Ohio, 392 U.S. 1, 19-20, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

If the State is correct that possession of packaging materials is evidence of use of drug paraphernalia, then Hudson was decided incorrectly. Under the State’s theory, the officer in Hudson would have had probable cause to arrest for use of drug paraphernalia when he discovered the baggie containing cocaine. But this theory is so far afield that it was never even considered by the Court in its analysis. The trial

court correctly concluded that the evidence was insufficient to sustain a conviction for Use Of Drug Paraphernalia.

**3. Convicting Mr. O'Meara of both Possession of Marijuana and Use of Drug Paraphernalia would violate his right to be free from double jeopardy.**

If this Court is inclined to agree with the State's theory that a baggie or a small tin containing marijuana is evidence of the use of drug paraphernalia because the baggie or tin is storing the marijuana, this Court should still affirm the dismissal. Prosecuting a person both for possessing a container to store marijuana and for possessing the actual marijuana violates the double jeopardy clause. Although not argued in the trial court, this issue should be considered by this Court. This Court is free to affirm the trial court on any ground supported by the record. In addition, any double jeopardy violation is of constitutional magnitude and may be raised for the first time on appeal. State v. Adel, 136 Wn.2d 629; 965 P.2d 1072 (1998).

If a defendant's actions support charges under two statutes, the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Although Mr. O'Meara was charged with two separate offenses, it is difficult to imagine that the legislature intended

him to be convicted separately for possessing the marijuana and for storing the marijuana. Although RCW 69.50.412 was enacted in 1981, no appellate case even suggests that possession of the packing materials for storing a controlled substance can be charged in addition to and separately from possession of the controlled substance itself. The fact that no appellate case even discusses this possibility is circumstantial evidence of the lack of legislative intent.

State v. Williams, discussed above, is not contrary because in that case the Court of Appeals concluded that the prosecution may elect to prosecute *either* the drug paraphernalia charge *or* the drug possession charge. But there is no suggestion in the Williams decision that the prosecution may charge both.

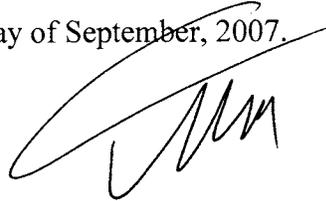
Under Washington's double jeopardy jurisprudence, two or more offenses may not be separately charged if they constitute the same unit of prosecution. State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998). In Adel, the defendant had marijuana butts in his case and a small amount in his cash register. The total weight was 0.3 grams. He was convicted of two counts of possession of marijuana but the Supreme Court reversed, holding that the two locations constituted the same unit of prosecution. Mr. O'Meara, who pled guilty to possessing marijuana, should not be

prosecuted separately for storing the marijuana. The dismissal should be affirmed.

D. Conclusion

This appeal should be dismissed. In the alternative, the trial court's dismissal of the offense of unlawful use of drug paraphernalia should be affirmed.

DATED this 28<sup>th</sup> day of September, 2007.

A handwritten signature in black ink, appearing to be 'T. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488  
Attorney for Defendant

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

STATE OF WASHINGTON,	)	Case No.: 07-8-00016-1
	)	Court of Appeals Cause No.: 36194-9-II
Plaintiff,	)	
	)	AFFIDAVIT OF SERVICE
vs.	)	
	)	
THOMAS CHAD O'MEARA,	)	
	)	
Respondent.	)	
STATE OF WASHINGTON )		
COUNTY OF KITSAP )		

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On September 28, 2007, I sent an original and a copy, postage prepaid, of the BRIEF OF RESPONDENT, to the Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

On September 28, 2007, I sent a copy, postage prepaid, of the BRIEF OF RESPONDENT, to the Jefferson County Prosecutor's Office, P.O. Box 1220, Port Townsend, WA 98368.

*ORIGINAL*

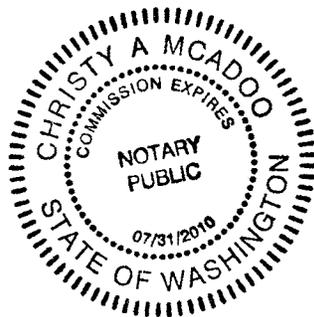
1 On September 28, 2007, I sent a copy, postage prepaid, of the BRIEF OF  
2 RESPONDENT, to Mr. Thomas Chad O'Meara, 3430 West Valley Road, Chimacum, WA  
3 98325.

4 Dated this 28<sup>th</sup> day of September, 2007.



5  
6  
7 Thomas E. Weaver  
8 WSBA #22488  
9 Attorney for Defendant

10 SUBSCRIBED AND SWORN to before me this 28<sup>th</sup> day of September, 2007.



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12  
13 Christy A. McAdoo  
14 NOTARY PUBLIC in and for  
15 the State of Washington.  
16 My commission expires: 7/31/2010