

FILED
COURT OF APPEALS
DIVISION II

NO. 38429-9-II

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STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES KOCH,

Appellant.

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

REPLY BRIEF OF APPELLANT

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WASHINGTON APPELLATE PROJECT
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A. ARGUMENT

1. IN THE ABSENCE OF ANY EVIDENCE THAT JAMES HAD LEGAL DUTY TO ACT, HIS FAILURE TO ACT CANNOT SUPPORT A CONVICTION OF SECOND DEGREE MANSLAUGHTER OR FIRST DEGREE CRIMINAL MISTREATMENT

To convict a person of first degree manslaughter the State must prove "He recklessly causes the death of another person." RCW 9A.32.060. To establish second degree manslaughter the State had to prove James acted with criminal negligence and thereby caused the death of another person. RCW 9A.32.070.

The State never contended James committed any act which caused his father's death. Instead, the premise of the State's case is that James had duty to act under the criminal mistreatment statute and his failure to do so established he negligently failed to meet a duty of care for his father. But, James did not have a statutory duty to his father.

RCW 9A.42.020(1), provides:

A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes

great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

The State contends James “assumed a duty to provide his father with the basic necessities of life under RCW 9A.42.020(1),” identifying for the first time that it is preceding under the third alternative of the statute. Brief of Respondent at 26. Having finally identified the alternative under which it prosecuted James, the State completely fails to address what that alternative requires in terms of proof. Instead, much as it did at trial, the State points to the tragic nature of Lloyd Koch’s death and the statute generally and says James Koch must be guilty.

As set forth in James’s initial’s briefing, Washington law has not recognized a duty of a child to care for a legally competent parent. The State does not offer a single contrary authority. Instead, the State argues that because James felt morally obligated to care for his father, he had a legal duty to act. Brief of Respondent at 26. Thus, rather than cite to a cases establishing a legal duty, the State’s brief cites only to James’s statements to police that he should have done something. See e.g. Brief of Respondent 26. But the State cannot provide a single authority that has equated a person’s sense of moral obligation with the legal

duty to act. Indeed there is none. Washington has not created a duty to care for an adult parent.

James did not and could not have a duty to force his father to accept unwanted medical care. James had not assumed responsibility for the care of his father. Nor did James have a legal duty to summon aid for his father. Thus, his failure to do so cannot support a conviction of manslaughter of any degree. In addition James is not guilty of criminal mistreatment.

Because the State failed to prove James committed either manslaughter in any degree or first degree criminal mistreatment the Court must reverse his convictions and dismiss the charges.

2. BECAUSE IT VIOLATES DOUBLE JEOPARDY PROVISIONS JAMES'S CONVICTION OF FIRST DEGREE CRIMINAL MISTREATMENT MUST BE VACATED

The double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple punishments for the same offense; offenses which are the same in law and fact. Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993); State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether *each provision requires proof of an additional fact which the other does not*.

Blockburger, 284 U.S. at 304 (emphasis added). It is ordinarily presumed that multiple punishments are not intended, and this presumption will only be overcome by an express statement of legislative intent. Whalen v. United States, 445 U.S. 684, 692-93, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).

To withstand a double jeopardy challenge, there must be an express statement of legislative intent for separate punishments. Whalen, 445 U.S. at 691-92. The Supreme Court has said the Blockburger test is simply “a rule of statutory construction” which seeks to determine the legislative intent. Albernez v. United States, 450 U.S. 333, 340, 102 S.Ct. 1137, 67 L.Ed.2d 275 (1981). If there is doubt as to the legislative intent for multiple punishments, principles of lenity require the interpretation most favorable to the defendant. Whalen, 445 U.S. at 694. Thus, where the Blockburger test reveals two offenses are the same in law and fact, convictions of both violates double jeopardy protections unless there is an express legislative intent to the contrary.

The State's brief provides "Under the 'same evidence' test, [sic] State concedes that manslaughter and criminal mistreatment are the same 'in fact.' Additionally the State concedes the two crimes are the same 'in law.'" Brief of Respondent at 17-18. Nonetheless, the State contends no double jeopardy violation exists because the State maintains "the independent statutory schemes and different purposes underlying each statute **suggests** the Legislature intended to allow separate punishments. . . ." Brief of Respondent at 19 (Emphasis added.)

The State's analysis completely ignores controlling caselaw and turns the analysis on its head. Despite the conceded outcome of the Blockburger analysis, the State maintains no double jeopardy violation exists. Despite the requirement of a clear statement of legislative intent for multiple punishments, the State contends the flimsiest of suggestions is sufficient to permit the multiple convictions. Despite having conceded below that the offenses merged, 10/6/08 RP 14, the State now maintains the offenses are separate.

James's offenses are the same in law and fact and there is no clear statement of legislative intent permitting multiple

punishments. Thus, this Court must reverse James's conviction of criminal mistreatment.

3. THE COURT DENIED JAMES OF HIS RIGHT TO A FAIR TRIAL AND HIS RIGHT TO PRESENT A DEFENSE WHEN IT REFUSED TO INSTRUCT THAT PROVIDING UNWANTED MEDICAL ASSISTANCE TO AN ADULT CONSTITUTES AN ASSAULT

Lloyd was not incompetent, he had no legal guardian. Lloyd had the ability and the constitutionally protected right to refuse medical aid. In re the Welfare of Colyer, 99 Wn.2d 114, 121-22, 660 P.2d 738 (1983), see also, McNabb v. Dep't of Corrections, 163 Wn.2d 393, 400-01, 180 P.3d 1257 (2008). Unwanted medical treatment has long been deemed an assault in Washington. Colyer, 99 Wn.2d at 121 (citing Physician's & Dentists' Business Bur. v. Dray, 8 Wash.2d 38, 111 P.2d 568 (1941)).

James proposed a jury instruction that provided:

It is unlawful to use physical force or [sic] upon another person absent that's person's consent, even if the actor's purpose is to provide the basic necessities of life.

CP 51 (citing Colyer, 99 Wn.2d 114).

The State contends the trial court properly refused the instruction because, the State contends, it is an incomplete statement of the law. Brief of Respondent at 46-47. Specifically,

the State faults the proposed instruction for failing to inform the jury that in some limited circumstance the State's interest in preserving life is sufficiently compelling to overcome the individual's right to refuse care. Id.

First, assuming for purposes of argument that State's statement of the law is correct, it does not render the proposed instruction incomplete. It might, however, provided a basis for the State to request an instruction qualifying at what point a legally competent person losses the right to refuse car. The State never sought such an instruction.

Second, whether or not the State had a sufficiently compelling interest to force medical care upon Lloyd is irrelevant to the question of whether James had a right or duty to force unwanted medical care upon his legally competent father. It simply does not follow that a State's interest in intervening creates a legal duty in a third party to intervene.

Third, assuming the State's interest in forcing unwanted medical care upon a legally competent adult creates a duty in third party such as James to force such care, that interest is limited to the providing lifesaving intervention and weakens substantially when the services are merely life sustaining. Colyer, 99 Wn.2d at

122. What the State accuses James of failing to provide was not lifesaving intervention but merely life sustaining intervention. Thus, James had no right or duty to act against Lloyd's wishes.

James's instruction properly stated Lloyd's right to refuse care. The instruction properly conveyed the established principle that unwanted medical care constitutes an assault. The failure to provide that instruction to the jury deprived James of his right to present a defense and requires this Court to reverse his convictions.

B. CONCLUSION

Because the State did not prove either of the two charges beyond a reasonable doubt, this Court must reverse both convictions. Alternatively the Court must reverse both convictions in light of the trial court's refusal to properly instruct the jury and due to the lack of jury unanimity on the criminal mistreatment conviction. Finally, James cannot be convicted of both manslaughter and criminal mistreatment.

Respectfully submitted this 11th day of August, 2009.



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

STATE OF WASHINGTON,)	
)	COA NO. 38324-1-II
Respondent,)	
)	
v.)	
)	
KEITH E. WOOD, JR.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 11TH DAY OF AUGUST, 2009, A COPY OF APPELLANT'S *REPLY BRIEF* WAS SERVED ON THE PARTIES BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

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STATE OF WASHINGTON
BY 
09 AUG 12 11:14 AM
COURT OF APPEALS
DIVISION II

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF AUGUST, 2009

X 