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COURT OF APPEALS
DIVISION II

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NO. 38472-8-II

STATE OF WASHINGTON
BY DM

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

STATE OF WASHINGTON,

Respondent,

v.

DARRIN LOUTHAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

The Grays Harbor Prosecuting Attorney charged Darrin Louthan with possession of methamphetamine following a stop and arrest by Montesano patrol officers for the alleged offense of possession of drug paraphernalia. Louthan moved to suppress the methamphetamine in Superior Court. When his motion was denied, he proceeded to a stipulated facts trial and was found guilty of the charge. Louthan filed the instant appeal in which he presented the issues raised in the CrR 3.6 hearing to this Court.

In a separate proceeding, the Montesano City Attorney prosecuted Louthan for possession of drug paraphernalia as well as a variety of infractions arising from the same incident. Louthan pleaded guilty to possessing drug paraphernalia in Montesano Municipal Court some time after his stipulated facts trial. Louthan's plea agreement did not reference or incorporate the methamphetamine charge in any fashion.

The State now makes the bizarre argument that Louthan is "estopped" from litigating the validity of his arrest in this Court because of his guilty plea to a different charge in another court. The State cites a number of decisions in support of its unusual claim but fails to recognize that these decisions either have no

application to this case or are decisions which applied a double jeopardy bar to a subsequent prosecution by the State. Louthan is neither “estopped” from litigating his CrR 3.6 issues in this Court, nor have these claims been waived by his municipal court guilty plea. The State’s arguments must be rejected.

1. TO THE EXTENT THE CIVIL DOCTRINE OF “COLLATERAL ESTOPPEL” MAY APPLY IN CRIMINAL CASES, IT DERIVES FROM THE FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY, AND SO CANNOT BE USED TO DENY A CRIMINAL DEFENDANT A FUNDAMENTAL RIGHT.

The double jeopardy clause of the Fifth Amendment provides: “no person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. 5. The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). The double jeopardy clause was designed to prevent the government, with all its resources and power, from repeatedly attempting to convict an individual for an offense,

thereby subjecting him to embarrassment, expense, and anxiety. State v. Roybal, 82 Wn.2d 577, 579, 512 P.2d 718 (1973) (citing Green v. United States, 355 U.S. 184, 190, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)).

The doctrine of collateral estoppel derives from civil law and “bars relitigation between the same parties of issues actually determined at a previous trial.” Ashe v. Swenson, 397 U.S. 436, 442, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Setting aside for the moment the question whether the issues presented in this appeal were “actually decided” when Louthan pleaded guilty to possession of drug paraphernalia in Montesano Municipal Court, collateral estoppel applies to criminal cases only as “a part of the Fifth Amendment’s guarantee against double jeopardy.” Id.

This axiomatic principle has animated the application of collateral estoppel in criminal prosecutions for at least a century: “It cannot be said that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.” United States v. Oppenheimer, 242 U.S. 85, 87, 37 S.Ct. 68, 61 L.Ed. 161 (1916); see also, Coffey v. United States, 116 U.S. 436, 442-43, 6 S.Ct. 437, 29 L.Ed. 684

(1886) (judgment of acquittal barred subsequent suit for forfeiture of same property).

Following the United States Supreme Court's decision in Benton v. Maryland, 395 U.S 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), which held that the double jeopardy clause applied to the states, Ashe made the constitutional dimensions of the rule explicit and consequently pertinent to state criminal prosecutions. State v. Cleveland, 58 Wn. App. 634, 638-39, 794 P.2d 546, rev. denied, 115 Wn.2d 1029 (1990).

In Ashe, the Court held that the defendant's acquittal in a robbery prosecution involving one of six poker players, where the sole question was identity, precluded his subsequent prosecution for robbery of a different player. 397 U.S. at 445. In its recent decision in Yeager v. United States, ___ U.S. ___, 129 S.Ct. 2360, ___ L.Ed.2d ___ (2009), the Court again held the issue preclusion component of the double jeopardy clause prevented the government from prosecuting the defendant for insider trading where a material element of this charge had been decided by his acquittal for fraud. Id. at 2366-67. In so holding, the Court substantially relied on Ashe. Id.

In Cleveland, cited in boilerplate by the State, Br. Resp. at 6, the Court held that collateral estoppel barred the State from criminally prosecuting the defendant for sexual abuse where, in a dependency proceeding, this issue had already been decided in the defendant's favor. 58 Wn. App. at 639-40. Conversely, in State v. Barnes, 85 Wn. App. 638, 932 P.2d 669 (1992), this Court held that a grant of summary judgment in a civil forfeiture action did not estop the State from prosecuting the defendant for criminal profiteering, as the defendant had failed to show (1) identity of issues in the civil and criminal matter or (2) a final judgment on the merits in the first action. 85 Wn. App. at 651-52.

The State has cited to no decisions where collateral estoppel has been applied against a criminal defendant in the unique fashion the State proposes here, as there are none. This is partly because a waiver of due process rights must be knowing, intelligent and voluntary. State v. Cabrera, 73 Wn. App. 165, 169-70, 868 P.2d 179 (1994) (neither defendant's failure to object to inclusion of out-of-state prior convictions in earlier proceedings nor his signature on the judgments collaterally estopped him from contesting their inclusion in the instant proceeding). Far from establishing a

constitutionally valid waiver, the State's "collateral estoppel" theory amounts to waiver by ambush.

The absurdity of the State's position is illustrated by a hypothetical scenario. Assume, for example, that Louthan had pleaded guilty to possession of drug paraphernalia in Municipal Court before litigating the legality of his stop in Superior Court. In that circumstance, the State's position essentially would compel a directed verdict on the felony charges. But the State can not so easily accomplish an end run around an accused person's due process rights. In short, there is no basis to apply "collateral estoppel" to preclude Louthan from litigating the merits of his motion to suppress evidence in this Court. The State's argument to the contrary should be rejected.

2. THE STATE HAS NOT MET THE STRINGENT REQUIREMENTS OF THE COLLATERAL ESTOPPEL RULE.

Even if collateral estoppel could apply, the State has not met the rigorous requirements of the rule. In order to invoke the doctrine, the court must find:

(1) the issue decided in the prior adjudication must be identical with the issue presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted must have been a party

or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

Cleveland, 58 Wn. App. at 639. Neither the first, third, nor fourth factors have been established; consequently, even if collateral estoppel could apply, the doctrine is not applicable here.

a. There is no identity of issues. Courts considering the application of collateral estoppel narrowly construe the issue preclusion component of the rule. For example, in Barnes, the Court rejected the claim that the State was collaterally estopped from prosecuting the defendant for criminal profiteering because of its earlier civil forfeiture proceeding. 85 Wn. App. at 651. The Court found there was no identity of issues because a civil forfeiture action requires affirmative proof that the defendant successfully profited from the criminal enterprise, whereas the crime of leading organized crime merely requires the State to show the defendant acted with the purpose of doing so. Id.

The only issue decided by Louthan's Montesano guilty plea is that Louthan possessed drug paraphernalia, which has never been contested. Specifically, Louthan admitted in his plea statement, "In Montesano, on 12/5/07, I possessed items used to ingest controlled substances into the human body." CP 86-87.

The State nonetheless avers, “The issues in Montesano Municipal Court cause number C16789 are identical (i.e. validity of conviction depends on the validity of the statute in question).” Br. Resp. at 7. The exceedingly narrow application of the issue preclusion component of the doctrine in Barnes shows the State’s assertion has no merit. 85 Wn. App. at 651. The first element of the collateral doctrine is not established.

b. There is no final judgment on the merits of the issues presented in this appeal. To satisfy element (2) of the collateral estoppel doctrine, the proponent – here, the State – must “show that in the earlier litigation there was a final judgment on the merits of the issue at hand.” Barnes, 85 Wn. App. at 651 (citations omitted, emphasis added). Additionally,

The proponent must provide the reviewing court with a sufficient record of the prior litigation to facilitate such analysis ... Where it is not clear whether an issue was actually litigated, or if the judgment is ambiguous or indefinite, application of collateral estoppel is not proper.

Id. (internal citation omitted).

In Barnes, the Court found that because Barnes had not provided a record of the summary judgment proceeding, the Court could not ‘say that the summary judgment court’s adjudication of

the issue of Barnes's role in leading organized crime was "sufficiently firm to be accorded conclusive effect." Id. at 652 (citation omitted). Here, the State's mere assertion that "the question of validity was resolved when the Defendant plead guilty," Br. Resp. at 7, does not make it so. The State has provided no record to show that this issue was "actually litigated" – presumably because none exists. Although the Montesano judgment and sentence is a final judgment, there is no basis to conclude the Montesano Municipal Court finally adjudicated the question whether MMC 8.22.040 is invalid.

c. Application of the doctrine would work an injustice.

Last, even if the first three predicates of the collateral estoppel doctrine are met, the State must show application of the doctrine does not work an injustice against Louthan – i.e., does not contravene public policy. Cleveland, 58 Wn. App. at 640. This the State cannot do.

In Washington, a criminal defendant has the unqualified constitutional right to appeal. Wash. Const. art. I, § 22. A defendant may only waive the right to appeal if he does so "intelligently and with a full understanding of the consequences." State v. Neff, 163 Wn.2d 453, 459, 181 P.3d 819 (2008).

The State has provided no record to show Louthan had any inkling that his guilty plea to the simple misdemeanor (and nonexistent crime) of “possession of drug paraphernalia” might preclude him from presenting all legitimate grounds on appeal of his class C felony conviction for possession of methamphetamine. The Municipal Court plea bargain does not reveal that any party to that plea even contemplated it might impact Louthan’s felony proceedings. CP 85. It is the State, not Louthan, who attempts a “back door” assault on Louthan’s constitutional rights. See Br. Resp. at 8; cf., also, State v. Larkins, 147 Wn. App. 858, 866-67, 199 P.3d 441 (2008) (State properly concedes that although identical issue was raised in a prior appeal, applying collateral estoppel would create an injustice should the Court reach a different result in the second proceeding). This Court should conclude that sound public policy militates against adopting the State’s argument, and find that the fourth element of the collateral estoppel doctrine has not been established.

3. LOUTHAN HAS NOT “WAIVED” HIS RIGHT TO LITIGATE THE SUPPRESSION ISSUES IN THIS COURT.

The State alternatively attempts the outlandish claim that Louthan has “waived” his right to challenge the validity of the

Montesano Municipal ordinance. But neither Louthan's stipulation to facts nor his Montesano guilty plea evidences a waiver of his right to raise all meritorious grounds on appeal in this matter. CP 22, 85. To the contrary, Louthan's waiver in the stipulation to facts specifically omits reference to the constitutional right to appeal. CP 22. Surely the State understood that by proceeding by way of a stipulated trial on the felony charge instead of a guilty plea, Louthan intended to appeal the adverse ruling on his motion to suppress evidence.

The State's argument appears to be based on the misplaced assumption that a guilty plea in a separate case and a separate court can collaterally impact another proceeding absent some agreement between the parties and a knowing and voluntary waiver by the defendant. This is not the case. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938).

But even assuming this faulty premise to be true, it is defeated by the authority cited in the State's own brief. Br. Resp. at 6. "[A] guilty plea forecloses appeal except for validity of the statute, sufficiency of the information, jurisdiction of the court, or circumstances surrounding the plea." State v. Cross, 156 Wn.2d 580, 620, 132 P.3d 80 (2006) (emphasis added, citation omitted).

Louthan may challenge the Montesano ordinance in this proceeding.

The State also contends that a defendant who pleads guilty ‘waives appeal “to errors committed prior to arraignment, including an illegal search or seizure.”’ Br. Resp. at 6 (quoting Cross, 156 Wn.2d at 618). But even if the proceedings were somehow linked (they are not), Louthan has never disputed that the so-called drug paraphernalia was in plain view. CP 13. He has always sought—and still seeks—suppression of the methamphetamine recovered in a search incident to his illegal arrest.

This Court should conclude that none of the State’s unusual theories may be used to bar Louthan from fully pursuing the issues presented in the instant appeal. He is neither collaterally estopped from challenging the validity of the ordinance that supplied the basis for his arrest, nor has he waived his right to do so. The State’s arguments must be rejected.

4. UNDER SETTLED LAW, MMC 8.22.040
CONFLICTS WITH RCW 69.50.412, AND
THEREFORE LOUTHAN’S ARREST FOR A
“VIOLATION” OF THIS PROVISION WAS
INVALID.

The Washington Legislature has decreed that state law fully occupies and preempts the field for penalties for violations of the

Controlled Substances Act. RCW 69.50.608. To the extent counties and local municipalities may enact laws relating to controlled substances, those laws must be consistent with the Controlled Substances Act. Id.

Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of the city, town, county, or municipality.

RCW 69.50.408.

The Washington Supreme Court and intermediate appellate courts have repeatedly affirmed that possession of drug paraphernalia is not a crime. See e.g. State v. O'Neill, 148 Wn.2d 564, 584 n. 8, 62 P.3d 489 (2003); State v. George, 146 Wn. App. 906, 193 P.3d 693, 696 (2008);¹ State v. Neeley, 113 Wn. App. 100, 107, 52 P.3d 439 (2002); State v. McKenna, 91 Wn. App. 554, 563, 958 P.2d 1017 (1998). Thus Montesano police officers could not have lawfully arrested Louthan for possession of drug paraphernalia. See O'Neill, 148 Wn.2d at 584 n. 8 (“Sergeant West could not have lawfully arrested O’Neill for possession of drug paraphernalia...”)

¹ Pin citations to the Washington Reporter of Decisions were not available for this case on Westlaw.

Yet the State, citing State v. Brockob, 159 Wn.2d 311, 342, 150 P.3d 59 (2006), claims that the Montesano police were entitled to rely on the “presumptive validity” of MMC 8.22.040. Br. Resp. at 8. The State both misreads Brockob and misrepresents the validity of the Montesano ordinance.

In Brockob, the Court held that “subsequent invalidation of a statute that provided probable cause for a police officer to make an arrest does not retroactively render the arrest unlawful.” 159 Wn.2d at 342. The dispositive circumstance was that the Court had “subsequently eliminated the basis for [the defendant’s] arrest” and he sought to have the “evidence derived from the arrest suppressed because the circumstances changed after the fact.” Id. at 342 n. 19 (Court’s emphasis).

Here, contrary to the State’s claim, the dispositive circumstance was that at the time of Louthan’s arrest, MMC 8.22.040 was presumptively invalid.

[P]olice officers may rely on the presumptive validity of statutes in determining whether there is probable cause to make an arrest unless the law is “so grossly and flagrantly unconstitutional’ by virtue of a prior dispositive judicial holding that it may not serve as the basis of a valid arrest.”

Brockob, 159 Wn.2d at 342 n. 19 (quoting State v. White, 97 Wn.2d 92, 103, 640 P.2d 1061 (1982) (emphasis added, internal citation omitted)).

Again, numerous courts have unequivocally stated that mere possession of drug paraphernalia is not a crime. ‘A reasonable person is deemed to know the law[;] ... “ignorance of the law is no excuse.”’ Retired Public Employees Council of Washington v. State, Dep’t of Retirement Systems, 104 Wn. App. 147, 152, 16 P.3d 65 (2001). Surely a police officer, “a person of reasonable prudence,” White, 97 Wn.2d at 103, should realize he stands on shaky ground when he effects an arrest for mere possession of drug paraphernalia.

Nor need Louthan file a “collateral attack” on his possession of paraphernalia conviction and obtain a judicial declaration that the statute is invalid in order for his arrest to be unlawful.² White, 97 Wn.2d at 103 (“Where substantially the same language in a different statute has been adjudicated unconstitutional ... a statute that has not been previously construed ... may not serve as the basis of a valid arrest.”). Further, “[l]ocal laws and ordinances that

² Although certainly, nothing prevents him from doing so at this time or in the future.

are inconsistent with the requirements of state law ... are preempted and repealed.” RCW 69.50.408.

In sum, Brockob does not help the State. Under settled precedent, the officers in this case should have known that Louthan’s arrest for possession of drug paraphernalia was unlawful. O’Neill, 148 Wn.2d at 584 n. 8; White, 97 Wn.2d at 103. The evidence must be suppressed.

5. PROBABLE CAUSE DID NOT EXIST TO
ARREST LOUTHAN FOR ANY OTHER CRIME,
NOR MAY THE SEARCH BE UPHELD ON THIS
BASIS.

The State creatively tries to suggest that the officers had probable cause to arrest Louthan for other offenses. Specifically, the State alleges, “Probable cause for use of drug paraphernalia, possession of controlled substances, and driving under the influence existed at the time of [Louthan’s] arrest.” Br. Resp. at 11.

The State does not bother to address or try to distinguish State v. Moore, 161 Wn.2d 880, 169 P.3d 469 (2007), even though this case was discussed extensively in Louthan’s opening brief and supports his argument that courts may not supply a hypothetical justification for an arrest where that crime was not investigated below. Br. App. at 2, 5-7. Instead, the State chooses to rely upon

a concurring opinion in a case decided before Moore. Br. Resp. at 9-10 (citing State v. Walker, 157 Wn.2d 307, 322-23, 138 P.3d 113 (2006) (Chambers, J., concurring)). Concurring opinions have no precedential value. Brother Intern. Corp. v. National Vacuum & Sewing Machine Stores, Inc., 9 Wn. App. 154, 158, 510 P.2d 1162 (1973); see also Roy Supply Inc., v. Wells Fargo Bank, 39 Cal. App. 4th 1051, 1067 (1995) (“It is well established that an opinion that expresses the views of less than a majority of the members of the court is not precedent.”).

Even if Moore were not controlling, the officers did not have probable cause to arrest Louthan for any of the other crimes listed by the State. Louthan did not use the drug paraphernalia in the officers’ presence, thus probable cause did not exist to arrest for this crime. RCW 10.31.100; O’Neill, 148 Wn.2d at 584 n. 8. At the time of Louthan’s arrest, the officers did not observe any controlled substances, thus probable cause did not exist to arrest for this crime either. Cf., CP 11-13 with Br. Resp. at 10 (misleadingly implying that the officers could have arrested Louthan for possessing a “smoking apparatus containing black tar” whereas in actuality the officers did not discover any so-called “black tar” until they conducted the search that is the subject of the present

appeal). And finally, probable cause did not exist to arrest Louthan for Driving Under the Influence of Drugs as the officers had little reason to conclude Louthan was under the influence of drugs until after they effected his arrest.

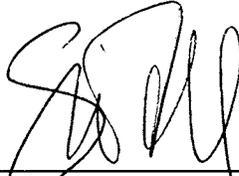
In sum, the officers lacked authority of law under article I, section 7 to arrest Louthan for mere possession of drug paraphernalia and lacked probable cause to arrest him for any other crime. The evidence recovered as a result of the illegal search should have been suppressed.

B. CONCLUSION

This Court should conclude that Louthan is not barred from litigating the validity of MMC 8.22.040 under either a collateral estoppel or waiver theory. This Court should further conclude that Moore precludes the court from supplying a post hoc justification for an otherwise unlawful arrest. This Court should last conclude that the trial court erred in finding probable cause existed to arrest Louthan for use of drug paraphernalia, and that probable cause did not exist to arrest him for any other offense.

DATED this 10th day of July, 2009.

Respectfully submitted:



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Washington Appellate Project (91052)
Attorneys for Appellant Darrin Louthan

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
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v.)	NO. 38472-8-II
)	
DARIN LOUTHAN,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JULY, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] EDGAR M KORZENIOWSKI, DPA GRAYS HARBOR CO. PROSECUTOR'S OFFICE 102 W. BROADWAY AVENUE, ROOM 102 MONTESANO, WA 98563-3621	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] DARIN LOUTHAN 110 MINKLER RD MONTESANO, WA 98563	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF JULY, 2009.

X _____ 

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BY _____
DEPUTY