

**FILED**

NOV 24 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 290000-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

THE STATE OF WASHINGTON, Respondent

v.

RONALD STEVEN LAW, Appellant

---

APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 08-1-01021-3

---

BRIEF OF RESPONDENT

---

ANDY MILLER  
Prosecuting Attorney  
for Benton County

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## STATEMENT OF FACTS

### Factual Background Regarding Double Jeopardy

#### Issue:

On October 3, 2008, the defendant was arrested for Possession of a Controlled Substance-Methamphetamine, and two misdemeanor offenses. (CP 145-147).

On October 20, 2008, the defendant had a hearing in the Benton County Jail with the Department of Corrections, with the following alleged violations:

1. Used a controlled substance Methamphetamine on or about 10/03/08. (Emphasis added).
2. Failure to obey all laws condition (sic) by possessing a controlled substance Methamphetamine on or about 10/03/08. (CP 28).

The defendant argues that his subsequent prosecution herein, Possession of a Controlled

Substance-Methamphetamine on 10-3-08, is barred as double jeopardy. (Appellant's Brief, 1).

**Factual Background Regarding Suppression Issues:**

On October 3, 2008, Trooper Thorson saw the defendant commit two traffic infractions, failure to yield and illegal turn. (CP 146-Findings 3, 4). He stopped the defendant who stated his name was Timothy R. Law. (CP 146-Finding 7). The defendant had pulled in next to another vehicle, and the woman standing nearby told Trooper Thorson that the defendant's name was "Ron." (CP 146-Finding 8). The defendant told Trooper Thorson his correct name and said his license was suspended. (CP 146-Finding 13). The defendant spun away from Thorson, dug into his pockets and tossed a tin container onto the ground. (CP 146, Findings 11, 12). The container held methamphetamine. (CP 143).

Other than stating his name, the defendant did not make any statements of evidentiary value

to the police. The State did not seek to introduce any such statements or request a hearing under CrR 3.5. The trial court did not consider any statement the defendant made to the police in determining his guilt. See Findings of Fact/Verdict. (CP 142).

**Factual Background Regarding Hybrid Representation Issue:**

The relevant time line is as follows:

October 7, 2010: Information is filed. (CP 1-2).

October 9, 2008: The defendant is arraigned and Daniel M. Arnold is appointed as his attorney. (CP 6).

March 19, 2009: The defendant filed a pro se motion to dismiss based on a double jeopardy argument very similar to that raised in the Appellant's Brief, Issue Number 1. (CP 30-36). The trial court allowed the defendant to argue that motion, although the defendant was represented by Mr. Arnold. (RP 03/19/09, 11).

March 26, 2009: The defendant orally argues his pro se motion. (RP 03/26/09, 14-27). The motion is denied. (RP 03/26/09, 27-28).

The defendant signs a waiver of time for trial, and the next hearing is set for May 7, 2009. (CP 45; RP 03/26/09, 31).

May 7, 2009: The defendant files a Motion for Discretionary Review with the trial court but which he intended for the Court of Appeals. (CP 46-47; RP 05/07/09, 5). The trial date is May 18, 2009, and the case is reset for May 14, 2009. (CP 45; RP 05/07/09, 7).

May 14, 2009: The jury trial remains on May 18, 2009. The Court notes that the defendant is ready for trial on that date. (RP 05/14/09, 37).

May 18, 2009: With a jury venire waiting, the defendant files a pro se "Objection to Trial Date." (CP 53-55). The defendant requests, pro se, a continuance "to retain new counsel." (RP 05/18/09, 31). The court granted the request, but told the defendant that it was untimely, that he

would be assessed the costs of bringing in a jury venire, and that he and his attorney needed to be ready for the next trial. (RP 05/18/09, 41).

June 22, 2009: Attorney, Nicholas Marchi, files a "Notice of Substitution of Attorney" for Mr. Arnold. (CP 69).

September 8, 2009: Defendant files a pro se "Notice of Motion for Motion to Dismiss and Memorandum in Support." (CP 83). He also files a pro se "Motion to Compel Response." (CP 79-81).

October 6, 2009: The defendant files a pro se Motion to Dismiss claiming a violation of his Right to Counsel. (CP 92).

Mr. Marchi also files a Memorandum in Support of Motion to Suppress Evidence. (CP 123-129).

January 29, 2010: A hearing on the defendant's motion to suppress is held. Regarding the defendant's "Motion to Compel" and "Motion to Dismiss," the court rules that it will

not entertain any additional pro se motions. (RP 01/29/10, 43).

The case is continued to February 4, 2010. (RP 01/29/10, 44).

February 4, 2010: The defendant is found guilty via a stipulated facts trial. (CP 142-143; RP 02/04/10, 6).

March 10, 2010: The defendant files a pro se Motion for Relief from Judgment or Order. (CP 148-155).

April 29, 2010: The defendant is sentenced. (CP 159-168).

#### **ISSUES**

- 1. Is the prohibition against double jeopardy violated if the defendant is prosecuted for Unlawful Possession of a Controlled Substance and he is also sanctioned for violation of the terms of community custody on a previous Judgment and Sentence based on his arrest on October 3, 2008?**

2. Did the trial court properly deny the defendant's motion to suppress?
  - A. Is the issue of whether the trooper was required to advise the defendant of *Miranda* prior to asking his name preserved for appeal?
  - B. Was *Miranda* rights necessary?
    - 1) Was the defendant "in custody"?
    - 2) Was the defendant subject to "interrogation" by the trooper asking his name?
3. Did the trial court properly deny a hybrid representation?
  - A. What is the standard on review?
  - B. When is a hybrid representation appropriate?
  - C. Did the trial court abuse its discretion in denying the defendant a hybrid representation?

#### ARGUMENT

1. Double Jeopardy was not violated by the prosecution of the defendant and his sanctions for violation of community custody on a 2006 Judgment and Sentence.

The defendant argues, "The legal fiction that an order of confinement imposed for a

sentencing condition violation is a consequence of the original conviction should not be applied when the crime charged is exactly the same as the alleged violation." (App. Brief, 7). However, the long established rule is the opposite: confinement imposed for a violation of the conditions of a previous conviction is a consequence of that conviction. *State v. Grant*, 83 Wn. App. 98, 110, 920 P.2d 609 (1996). The defendant's violations of the conditions of a previous judgment and sentence do not constitute charging a new crime. *State v. Prado*, 86 Wn. App. 573, 578, 937 P.2d 636 (1997).

The Department of Corrections should be allowed to sanction an offender for violating conditions of community custody, conditions which were imposed in this case in 2006. (CP 18). The State of Washington should also be allowed to prosecute the defendant for possessing drugs. Therefore, double jeopardy does not apply.

The defendant's argument that there is a distinction between a community custody violation based on "obey all laws" and a violation of possession of drugs, has not been recognized. The trial court in *Grant*, supra, put some significance on the language of the alleged community custody violations. However, the Court of Appeals in *Grant* did not. In any case, here the distinction does not matter: the violation alleges that the defendant used a controlled substance; the Information alleges that the defendant possessed a controlled substance. (CP 1, 28).

**2. The trial court properly denied the defendant's motion to suppress.**

**A. The issue regarding whether the trooper had to advise the defendant of *Miranda* before asking his name was not raised in the trial court.**

The defendant did not raise the issue in the trial court of whether Trooper Thorson was required to advise the defendant of *Miranda*

before asking his name. At trial, the defendant argued that Trooper Thorson's stop was pretextual and that the stop violated *Arizona v. Gant*. See page 6 of Memorandum in Support of Motion to Suppress Evidence. (CP 128, 6). This Court should decline to consider the argument pursuant to RAP 2.5 (a).

There was no hearing pursuant to CrR 3.5, "Confession Procedure." The defendant made no substantive statements regarding his knowledge of the drugs, and the State did not seek a CrR 3.5 hearing.

**B. Nevertheless, Trooper Thorson was not required to advise the defendant of his *Miranda* rights before asking his name. At that point, the defendant was not in "custody" and was not subject to "interrogation."**

**1) The defendant was not "in custody."**

A good summary of the law is in *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345, 349 (2004), which held:

In *Berkemer*, the United States Supreme Court held that a brief Fourth Amendment seizure of a suspect, either in the context of a routine, on-the-street *Terry* stop or a comparable traffic stop, does not rise to the level of "custody" for the purposes of *Miranda*. *Berkemer*, 468 U.S. at 439-40, 104 S.Ct. 3138. Because a routine traffic stop curtails the freedom of a motorist such that a reasonable person would not feel free to leave the scene, a routine traffic stop, like a *Terry* stop, is a seizure for the purposes of the Fourth Amendment. *Id.* at 436-37, 104 S.Ct. 3138. However, the court recognized that because both traffic stops and routine *Terry* stops are brief, and they occur in public, they are "substantially less 'police dominated' " than the police interrogations contemplated by *Miranda*. *Id.* at 439, 86 S.Ct. 1602. Thus, a detaining officer may ask a moderate number of questions during a *Terry* stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect "in custody" for the purposes of *Miranda*. *Id.* at 439-40, 86 S.Ct. 1602. Washington courts agree that a routine *Terry* stop is not custodial for the purposes of *Miranda*.

*Heritage*, 152 Wn.2d at 218.

**2) A request for the driver's name is not an "interrogation."**

"Interrogation" pursuant to *Miranda* means express questioning, as well as all words or actions on the part of the police, other than those attendant to arrest and custody, that are likely to elicit an incriminating response. *State v. Johnson*, 48 Wn. App. 681, 739 P.2d 1209 (1987). Simply asking a traffic offender his name is not likely to elicit an incriminating response.

Here, when Trooper Thorson asked the defendant his name, the defendant was not in custody or under interrogation. There was no requirement that he advise the defendant of the *Miranda* rights.

**3. The trial court properly denied a continued hybrid representation.**

**A. The defendant must show that the trial court abused its discretion in denying the hybrid representation.**

The issue on review is whether the trial court abused its discretion in deciding whether

or not to allow the hybrid representation. *U.S. v. Halbert*, 640 F.2d 1000 (9<sup>th</sup> Cir. 1981).

**B. A hybrid representation is not only disfavored, it should only be allowed where there is a special need.**

The case herein involves a defendant who wants to file and argue his own motions and be represented by an attorney. There is no right to hybrid representation under either the Sixth Amendment to the United States Constitution, *U.S. v. Halbert*, 640 F.2d 1000 (9<sup>th</sup> Cir. 1981), nor the Washington State Constitution, which provides, under article 1, section 22, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel..." (Emphasis added). As stated in *State v. Hightower*, 36 Wn. App. 536, 540-543, 676 P.2d 1016 (1984), "[T]here is clearly no constitutional right to hybrid representation in this state where the rights in question are granted in the disjunctive." *Id.* at 541.

Courts have allowed a hybrid representation only if there is a strong showing of a "special need." *Wilson v. State*, 44 Md. App. 318, 408 A.2d 1058, 1065 (1979), cert. denied, 287 Md. 758 (1980), or where there has been a "substantial showing" that "the cause of justice will thereby be served." *People v. Mattson*, 51 Cal.2d 777, 797, 336 P.2d 937 (1959). "Whether to allow hybrid representation remains within the sound discretion of the trial judge." *Halbert*, 640 F.2d at 1009.

In discussing the limitations to granting a right of hybrid representation, *Moore v. State*, 83 Wis.2d 285, 300, 265 N.W.2d 540 (1978) explains:

[T]he conflicting interests of the accused and society involved in a criminal trial can be served only in an orderly proceeding. The trial judge must therefore have discretion to control the conduct of a trial to maintain dignity, decorum and orderly procedures; to avoid unnecessary delays; and to prevent the disruption of the judicial process by the

accused's inept or disorderly self-representation. This approach reflects the fact that no right is more important to the accused and to society than the right to a fair, orderly trial.

*Moore*, 83 Wis.2d at 300.

**C. The trial court did not abuse its discretion by not allowing the hybrid representation.**

The defendant argues that the trial court had no basis to disallow the hybrid representation. However, the following support the trial court's decision on January 29, 2010 to disallow a hybrid representation:

- First, the case, which is an uncomplicated Unlawful Possession of a Controlled Substance matter, had by then taken over 16 months to date. If the trial court had an interest to avoid unnecessary delays and disruption of the judicial process, it properly allowed the defendant to speak through his attorney.

- Second, the defendant clearly stated his desire to be represented by an attorney on May 18, 2009, when the case was called for trial. The trial court rightly viewed the defendant's statements at that time to signal that he did not wish to continue with the hybrid representation.
- Third, the hybrid representation resulted in the inconvenience to a jury venire, who was called to court on May 18, 2009, and the disruption of judicial resources when the trial on that date was continued at the defendant's request.

The trial court could properly conclude that a hybrid representation in this case was a failure.

The defendant's argument is that once the hybrid representation is allowed, it must be allowed to continue. This argument fails because the trial court has the right to review the

effectiveness of the hybrid representation and make additional rulings. Just as the trial court has the discretion to allow a defendant to discharge his attorney and proceed pro se, or hire an attorney after proceeding pro se, the trial court has the authority to monitor the ongoing legal representation of the defendant.

In addition, the defendant's argument fails because he has failed to show there was any special need for the hybrid representation. Although there is no "garden variety drug possession charge," this case comes close.

Finally, the defendant has not explained how he was prejudiced by the trial court's denial of the hybrid representation. The defendant presented the motions he desired, either pro se (see above discussion regarding double jeopardy) or through his attorney (see above discussion regarding suppression of the evidence. When the hybrid representation was terminated, January 29, 2010, the defendant had already argued his motion

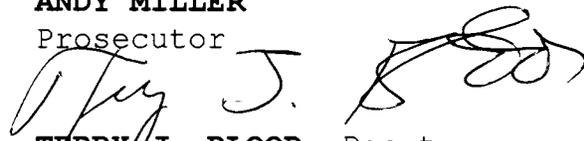
to dismiss based on double jeopardy. The defendant had two pro se motions, prepared months earlier which had not been resolved but which had no merit.

**CONCLUSION**

The conviction should be affirmed.

**RESPECTFULLY SUBMITTED** this 23rd day of  
November 2010.

**ANDY MILLER**  
Prosecutor

A handwritten signature in black ink, appearing to read "Terry J. Bloor", written over the typed name of Terry J. Bloor.

**TERRY J. BLOOR**, Deputy  
Prosecuting Attorney  
Bar No. 9044  
OFC ID NO. 91004

ORIGINAL

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

NO. 290000

Respondent,

vs.

DECLARATION OF SERVICE

RONALD STEVEN LAW,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on November 23, 2010.

Kenneth H. Kato  
Attorney at Law  
1020 N. Washington Street  
Spokane, WA 99201-2237

- U.S. Regular Mail, Postage Prepaid
- Legal Messenger
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7122 W. OKANOGAN PL, BLDG B  
KENNEWICK, WA 99336

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- Legal Messenger
- Facsimile

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on November 23, 2010.



PAMELA BRADSHAW