

FILED

JUL 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 298949

THE COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

JAMES L. COLBERT, Respondent.

BRIEF OF PETITIONER

Rea L. Culwell
Attorney for Plaintiff
WSBA #32080
Columbia County Prosecutor
116 N. 3rd Street
Dayton, WA 99328
509-382-1197

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I. IDENTITY OF PARTY FILING APPEAL

The Appellant, STATE OF WASHINGTON, by and through its attorney, REA L. CULWELL, Columbia County Prosecuting Attorney, respectfully requests that this court overturn the Columbia County superior court Honorable Judge William Acey's denial of the State's motion to dismiss the criminal action against Colbert based upon double jeopardy principles.

II. STATEMENT OF RELIEF SOUGHT

The State respectfully requests that the Court overturn the trial court's denial of the State's motion to dismiss the criminal action against Colbert as the criminal action places Colbert in double jeopardy, a constitutional violation.

III. STATEMENT OF ISSUE

Does a second trial on the charge of vehicular homicide violate the double jeopardy principles of the United States and Washington State Constitutions when the superior court, in the first trial declared a mistrial, over the parties' objections, to provide the defendant with an opportunity to evaluate and respond to evidence that was disclosed for the first time on the second day of trial?

IV. STATEMENT OF THE CASE

On January 3, 2011, the State charged, by amended information, James L. Colbert with Vehicular Homicide. CP 1. Colbert's trial by jury on the charge of vehicular homicide began on January 3, 2011. On the second day of trial, the parties learned that electronic scene measurements used to produce the physical scene map were in the possession of the State and had not been turned over to Colbert. RP-A at pgs. 5-7. The State utilized the physical scene map in its case in chief. Id. Upon learning of the existence of the electronic form of the measurements, Colbert moved for dismissal of the case claiming that, if he had had the data, his expert could prove that Colbert was not the driver. RP-A at pg. 23. Colbert claimed his constitutional rights to due process were violated, that he had not received a fair trial because he could not, without the measurements, adequately prepare his defense. RP-A at pgs. 7-9. The court, on its own motion and over the State and Colbert's objections, declared a mistrial. RP-B at pg. 55, ll 13-14.

The trial court concluded that the failure to turn over the evidence until the second day of trial resulted in manifest necessity for

a mistrial. CP 3, 4. The trial court found that a mistrial was necessary in the interest of the proper administration of public justice and the extraordinary and striking circumstance necessitated a mistrial. Id. The trial court found that a mistrial was necessary to allow the defense expert to analyze the electronic scene measurements. Id.

Colbert is now facing a second trial on the same charges.

After Colbert's motion to dismiss on double jeopardy grounds was denied, the State moved to dismiss on the same grounds. CP 8. The trial court denied the State's motion to dismiss on double jeopardy grounds, affirming the trial court's finding that the mistrial was manifestly necessary. CP 4.

V. ARGUMENT

A. DENIAL OF DISMISSAL SHOULD BE REVERSED AS CONSTITUTIONALLY VIOLATIVE OF PRINCIPLES OF DOUBLE JEOPARDY.

The superior court erred in denying dismissal and retrial of Colbert would violate double jeopardy protections of the United States and Washington Constitutions. The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be subject for the same offence to be

twice put in jeopardy of life or limb.” U.S. CONST. AMEND. 5.

Article I, section 9 of the Washington State Constitution provides that “[n]o person shall ... be twice put in jeopardy for the same offense.” WASH. CONST. ART. I § 9.

Retrial is not barred by double jeopardy principles when mistrial is justified by manifest necessity, when extraordinary and striking circumstances clearly indicate that substantial justice cannot be obtained without discontinuing the trial. State v. Juarez, 115 Wn. App. 881, 889, 64 P.3d 83 (2003), (citing, State v. Jones, 97 Wash.2d 159, 164, 641 P.2d 708 (1982)).

No manifest necessity requiring a mistrial existed here. The Court could and should have simply continued the trial allowing time for Colbert’s expert to examine the scene data. When evidence improperly surprises a defendant, the appropriate remedy is a reasonable continuance or recess to allow the investigation of and response to the evidence. See State v. Linden, 89 Wn. App. 184, 195-96, 947 P.2d 1284 (1997), review denied, 136 Wash.2d 1018, 966 P.2d 1277 (1998); State v. Beard, 39 Wn.

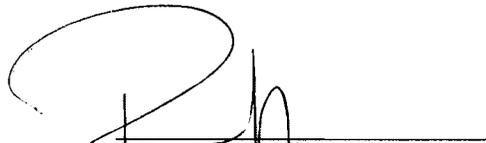
App. 601, 609, 694 P.2d 692, review denied, 103 Wash.2d 1032 (1985). Alternatively, the court could have allowed Colbert to proceed with the trial as he demanded.

In the interest of justice, to avoid placing Colbert in jeopardy of conviction for vehicular homicide for a second time, review should be accepted, the superior court's order denying dismissal should be reversed, and the matter dismissed.

VI. CONCLUSION

This court should reverse the trial court's denial of dismissal and dismiss the underlying criminal action with prejudice.

Respectfully submitted this 21 day of July, 2011.


REA L. CULWELL
WSBA NO. 32080
Prosecuting Attorney