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Court of Appeals
Division III
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NO. 35412-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DALLIN FORT,
Appellant.

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

Spokane County Cause No. 05-1-00950-1

The Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Fort's convictions were entered in violation of the Fifth and Fourteenth Amendment prohibition on double jeopardy.
2. Mr. Fort's convictions were entered in violation of the Wash. Const. art. I, § 9 prohibition on double jeopardy.
3. The trial court erred by ordering a mistrial following Mr. Fort's 2016 jury trial.
4. The order for a mistrial following Mr. Fort's 2016 jury trial was not based on manifest necessity.
5. The order for a mistrial following Mr. Fort's first jury trial was not based on "extraordinary and striking circumstances."
6. Double jeopardy barred Mr. Fort's re-trial following a mistrial order that was not based on manifest necessity.

ISSUE 1: Double jeopardy bars re-trial after a declaration of a mistrial based on an allegedly deadlocked jury unless the case poses "extraordinary and striking circumstances," and even then, based only a finding of "manifest necessity." Did double jeopardy bar retrial in Mr. Fort's case after the trial court ordered a mistrial based only on "good cause"?

7. The court exceeded its statutory authority under RCW 9.94A.703(3)(f) by imposing community custody condition (b)(21) because it included a prohibition that was not crime-related.
8. Community custody condition (b)(21) is not authorized by statute.

ISSUE 2: Unless otherwise authorized by statute, a sentencing court exceeds its authority by imposing a sentencing prohibition that is not crime-related. Did the court exceed its authority by prohibiting Mr. Fort from "go[ing] to places where alcohol is the chief commodity for sale" when there was no evidence of any alcohol use in his case?

9. The court exceeded its statutory authority under RCW 9.94A.607 by imposing community custody condition (b)(20), absent a finding that he had a chemical dependency that contributed to his offense.
10. Community custody condition (b)(20) is not authorized by statute.

ISSUE 3: A sentencing court may only order a chemical dependency evaluation and follow-up treatment if it finds that the offender has a chemical dependency that contributed to the offense. Did the sentencing court exceed its authority in Mr. Fort's case by requiring him to comply with any recommendations from his previous chemical dependency evaluation when there was no finding that he had a chemical dependency?

11. The court exceeded its statutory authority under RCW 9.94A.703(3)(d) by imposing community custody condition (b)(23).
12. Community custody condition (b)(23) is not authorized by statute.

ISSUE 4: A sentencing court may only order a affirmative conduct as a condition of community custody if it is conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." Did the court exceed its authority by requiring Mr. Fort to submit to random urinalysis and blood-alcohol testing when there was no evidence that he had ever used drugs or alcohol?

13. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 5: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Fort is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Dallin Fort's sister needed his help caring for her five children during the summer of 2003. RP 314. Mr. Fort came from Seattle to Cheney and cared for the children during that summer. RP 315.

Mr. Fort was a "fun uncle" to the children. RP 274. He took them fishing, played video games, let them eat junk food, and sometimes woke up early with them to watch the sunrise. RP 274-75.

The children's mother was a harsh disciplinarian. RP 306. She used corporal punishment that left bruises on the children, slapped the children in the face, and pulled their hair. RP 306. She did not agree with Mr. Fort's lax parenting philosophy. RP 328.

In early 2005, Mr. Fort made a report to Child Protective Services (CPS) about an injury that he had seen on one of the daughters, A.W. RP 335-36. Around that same time, Mr. Fort's sister called the police, saying that A.W. claimed to have been sexually abused by Mr. Fort. RP 319, 335-36.

Mr. Fort was charged with four counts of first-degree rape of a child. CP 2-3. One of the charges was dismissed and the jury acquitted on one more. CP 6. Mr. Fort was convicted of the two remaining charges. CP 15-63.

But, in 2015, the Court of Appeals granted Mr. Fort's Personal Restraint Petition and remanded his case for a new trial. CP 15-63.

Mr. Fort was retried for the first time in 2016. *See* RP 5-244.

At that trial, A.W. claimed for the first time that Mr. Fort had only penetrated her anally after claiming at the first trial that the penetration had all been vaginal. RP 49, 71, 162. She also said that she never performed oral sex on Mr. Fort despite claiming to have done so previously. RP 60, 65.

A.W. said that she saw Mr. Fort's erect penis, which had no deformity or discoloration. RP 62.

But Mr. Fort presented evidence that he suffered from Peyronie's Disease at the time of the allegations, which caused his penis to bend at a seventy- to seventy-five-degree angle when it was erect. RP 185, 189. Mr. Fort's doctor said that the bend in Mr. Fort's penis was "obvious." RP 194.

After beginning deliberations, the jury at the 2016 trial asked the court what would happen if they could not agree on a verdict. RP 239. The judge called the jury into the courtroom, where the presiding juror said that there was not a reasonable probability that the jury would be able to reach a unanimous verdict. RP 240.

Without asking for input from the parties or making any findings or legal conclusions, the trial court simply set a date for a new trial. RP 240-41.

The court signed a written order stating that the judge was declaring a mistrial because: “Good cause exists. Trial was had in the matter and the jury was unable to reach a verdict.” CP 66.

Mr. Fort’s case proceeded to a third trial, where he was convicted. RP 246-437.

As conditions of his community custody, the sentencing court ordered that Mr. Fort not possess alcohol or “go to places where alcohol is the chief commodity for sale.” CP 107. The sentencing court also required Mr. fort to submit to random urinalysis and blood-alcohol testing. CP 107. Finally, the court referred to Mr. Fort’s previous chemical dependency evaluation and ordered him to comply with any required follow-up treatment. CP 107.

The court did not find that Mr. Fort had a chemical dependency that contributed to his offense. CP 109.

This timely appeal follows. CP 122.

ARGUMENT

I. THE CONSTITUTIONAL PROHIBITION ON DOUBLE JEOPARDY BARRED MR. FORT’S RETRIAL BECAUSE THE COURT APPLIED THE WRONG LEGAL STANDARD WHEN IT DECLARED A MISTRIAL BASED ONLY ON “GOOD CAUSE,” WHEN THE CONSTITUTION PERMITTED A RETRIAL ONLY IN CASES OF “EXTRAORDINARY AND STRIKING CIRCUMSTANCES.”

Both the state and federal constitutions prohibit double jeopardy.

U.S. Const. Amends. V, XIV; art. I, § 9.¹ The proscription on double jeopardy protects the “valued right (of the defendant) to have his trial completed by a particular tribunal.” *State v. Jones*, 97 Wn.2d 159, 162, 641 P.2d 708 (1982) (quoting *Arizona v. Washington*, 434 U.S. 497, 503 n. 11, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)).

The U.S. Supreme Court has safeguards this “valued right”

because a second prosecution in a criminal case:

...increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona, 434 U.S. at 503–05.

¹ A claim that a conviction has been entered in violation of the proscription on double jeopardy is a constitutional issue, which is reviewed *de novo* and can be raised for the first time on appeal. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007); RAP 2.5(a)(3).

In order to protect the “valued right” to have a criminal case decided by a particular tribunal, jeopardy attaches when a jury is impanelled and sworn or when the first witness has answered a question. *Jones*, 97 Wn.2d at 162 (citing *State v. Morlock*, 87 Wn.2d 767, 770, 557 P.2d 1315 (1976)). Accordingly, an accused person is protected against a second prosecution if his/her trial is terminated at any point after those events have occurred. *Id.*

There is an exception, however, for cases in which a trial is terminated because “manifest necessity” warrants declaration of a mistrial. *Id.* at 162-63; *State v. Robinson*, 146 Wn. App. 471, 479, 191 P.3d 906 (2008). A mistrial that is declared in the absence of manifest necessity functions as an acquittal for double jeopardy purposes and the constitution does not permit a retrial. *Id.* at 484.

In cases of a jury’s alleged inability to reach a verdict, a mistrial is only manifestly necessary in cases posing “extraordinary and striking circumstances.” *Jones*, 97 Wn.2d at 164. The judge should consider “the length of time the jury has been deliberating in light of the length of the trial and the trial and the volume and complexity of the evidence.” *Id.* (citing *State v. Boogaard*, 90 Wn.2d 733, 739, 585 P.2d 789 (1978)).

The jury’s own assessment that it is deadlocked, by itself, is not sufficient grounds for declaring a mistrial. *State v. Taylor*, 109 Wn.2d

438, 443, 745 P.2d 510 (1987), *disapproved of on other grounds by State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991).

When “extraordinary and striking circumstances” are present, it is within a trial judge’s discretion to discharge a jury without terminating jeopardy. *Jones*, 97 Wn.2d at 163. But a court necessarily abuses its discretion by applying the incorrect legal standard.² *State v. Henderson*, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015).

In Mr. Fort’s case, the trial court did not find “manifest necessity” or “extraordinary and striking circumstances.” RP 239-44; CP 66. Rather, the court ordered a mistrial after finding only that: “good cause exists.” CP 66.

Because the mistrial following Mr. Fort’s second trial was not based on manifest necessity or “extraordinary and striking circumstances,” discharging the jury terminated jeopardy in this case and the constitutional prohibition on double jeopardy barred his retrial for the same offenses.

² The U.S. Supreme Court has ruled that the trial court need not make an explicit finding of manifest necessity if the record otherwise provides sufficient justification for the mistrial ruling. *Arizona*, 434 U.S. at 516-17. In that case, however, the trial court ordered the mistrial only after a lengthy colloquy with and argument by the parties on two different days. *Id.* at 500-01. The judge in that case also provided detailed reasons for his ruling on the record. *Id.*

In Mr. Fort’s case, however, the trial court did not solicit any feedback from the parties or discuss whether a mistrial would be declared at all. RP 239-44. Rather, the judge simply started the process of scheduling a new trial and then entered a written ruling finding simply that “good cause exists.” RP 239-44. The *Arizona* analysis is not applicable to Mr. Fort’s case.

Jones, 97 Wn.2d at 164; *Robinson*, 146 Wn. App. at 479. The trial court abused its discretion by applying the incorrect legal standard. *Id.*; *Henderson*, 182 Wn.2d at 743. Mr. Fort’s convictions must be reversed and the charges dismissed with prejudice. *Robinson*, 146 Wn. App. at 484.

II. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY ORDERING CONDITIONS OF MR. FORT’S COMMUNITY CUSTODY THAT WERE NEITHER CRIME-RELATED NOR OTHERWISE AUTHORIZED BY STATUTE.

The trial court does not have power to impose community custody conditions unless they are authorized by statute.³ *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013).

Statute permits a court to order a person on supervision to “comply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). A sentencing court may also require an offender to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(d).

“Crime-related prohibition” is defined as “an order of a court prohibiting conduct that directly relates to the circumstances for which the offender has been convicted.” RCW 9.94A.030(10). A condition is not

³ Whether a court has imposed a community custody condition beyond the bounds of its authority is reviewed de novo. *Warnock*, 174 Wn. App. at 611.

crime-related if there is no evidence linking the prohibited conduct to the offense. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

The philosophy behind the provision for crime-related sentencing conditions is that “persons may be punished for their crimes and they may be prohibited from doing things which are directly related to their crimes, but they may not be coerced into doing things which are believed to rehabilitate them.” *State v. Cordero*, 170 Wn. App. 351, 373–74, 284 P.3d 773 (2012) (*quoting State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993)).

Similarly, a sentencing court may only condition a community custody term upon completion of a chemical dependency evaluation and compliance with recommended treatment if it first finds that the offender has a chemical dependency that contributed to the offense. RCW 9.94A.607(1).

In Mr. Fort’s case, there was no evidence that alcohol use contributed to the offenses. In fact, there was no evidence that Mr. Fort had ever used alcohol in his life, much less that he suffered from an addiction. *See RP generally*. Accordingly, the trial court did not find that Mr. Fort had a chemical dependency that contributed to his offense. CP 109.

Even so, the court prohibited Mr. Fort from “go[ing] to places where alcohol is the chief commodity for sale” and required him to submit to random “UA/BA” (urinalysis and blood-alcohol) monitoring. CP 107. Because Mr. Fort was sentenced under RCW 9.94A.507, these conditions would be in place for the rest of his life. CP 114. The sentencing court also referred to Mr. Fort’s previous substance abuse evaluation and required him to comply with any recommended treatment. CP 114.

The prohibition on going to bars and other places where alcohol is primarily sold is not crime-related in Mr. Fort’s case. Likewise, the requirement that Mr. Fort engage in the affirmative conduct of submitting to random UA/BA testing for the rest of his life is not “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(d).

Finally, the requirement that Mr. Fort comply with any treatment recommended by his chemical dependency evaluation was impermissible because the sentencing court did not find that he had a chemical dependency that contributed to his offense. RCW 9.94A.607(1).

The sentencing court exceeded its statutory authority. *Warnock*, 174 Wn. App. at 611.

These conditions must be stricken from Mr. Fort’s Judgment and Sentence because they are neither crime-related, reasonably related to the

offense, or otherwise authorized by statute. *Cordero*, 170 Wn. App. 351; *O'Cain*, 144 Wn. App. at 775.

III. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE ANY REQUEST TO REQUIRE MR. FORT TO PAY APPELLATE COSTS BECAUSE HE IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016).⁴

Appellate costs are “indisputably” discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Fort indigent at both the beginning and the end of the proceedings in superior court. CP 64-65; 128-29. The sentencing court waived all discretionary LFOs as a result of that indigency. CP 11-12.

⁴ Division II’s commissioner has indicated that Division II will follow *Sinclair*.

That status is unlikely to change, especially with the imposition of a lengthy prison term. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

Additionally, the newly amended RAP 14.2 specifies that the trial court’s finding of indigency stands unless the state presents evidence that the accused’s financial circumstances have changed:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

RAP 14.2 (*as amended by 2017 WASHINGTON COURT ORDER 0001*).

The state is unable to provide any evidence that Mr. Fort’s financial situation has improved since he was found indigent by the trial court.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested. RAP 14.2; *Blazina*, 182 Wn.2d 827.

CONCLUSION

The trial court violated the constitutional prohibition on double jeopardy by retrying Mr. Fort after declaring a mistrial based on the

incorrect legal standard. The mistrial in Mr. Fort's 2016 trial terminated jeopardy in his case and functioned as an acquittal. Mr. Fort's convictions must be reversed and the charges dismissed with prejudice.

In the alternative, the sentencing court did not have the authority to order Mr. Court to refrain from entering any establishment that primarily sells alcohol, to submit to random UA/BA testing, and to comply with any recommendations from his previous chemical dependency evaluation. Those conditions must be stricken from Mr. Fort's Judgment and Sentence.

If the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Fort who is indigent.

Respectfully submitted on February 9, 2018,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on February 9, 2018.



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