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NO. 36497-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

HARRY LAMMON, JR.,
Appellant.

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

Ferry County Cause No. 18-1-00046-7

The Honorable Patrick A. Monasmith, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Lammon's Fifth and Fourteenth Amendment rights to be free from double jeopardy by entering three convictions in his case.
2. The trial court violated Mr. Lammon's Wash. Const. art. I, § 9 rights to be free from double jeopardy by entering three convictions in his case.
3. Double jeopardy permitted the entry of conviction for only one count of violation of a no-contact order in Mr. Lammon's case.

ISSUE 1: The constitutional prohibition on double jeopardy permits entry of only one conviction for each "unit of prosecution" of an offense committed. Did the trial court violate Mr. Lammon's constitutional rights by entering three convictions based on phone calls that he made within a span of ten minutes?

4. Ineffective Assistance deprived Mr. Lammon of his Sixth and Fourteenth Amendment right to counsel.
5. Ineffective Assistance deprived Mr. Lammon of his Wash. Const. art. I, § 22 right to counsel.
6. Mr. Lammon's predicate convictions for misdemeanor violation of a no-contact order were entered in violation of his Fifth and Fourteenth Amendment rights to be free from double jeopardy.
7. Mr. Lammon's predicate convictions for misdemeanor violation of a no-contact order were entered in violation of his art. I, § 9 right to be free from double jeopardy.
8. Mr. Lammon's defense attorney provided ineffective assistance of counsel by failing to challenge the constitutional validity of the predicate convictions, supporting the current felony charges.
9. Mr. Lammon was prejudiced by his attorney's ineffective assistance.

ISSUE 2: Defense counsel provides ineffective assistance by failing to research and raise a valid defense, absent tactical justification. Did Mr. Lammon's attorney provide ineffective assistance of counsel by failing to challenge the constitutional validity of the predicate offenses for his client's felony charges

(for violation of a no-contact order) based on the same grounds that counsel had raised regarding the instant charges when the same facts and law applied?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Harry Lammon, Jr. admitted to calling his (now ex-) wife three times on the same day even though he was barred from doing so by a no-contact order. CP 40-41. He called her once at 6:36pm, once at 6:40pm, and once at 6:46pm and left voicemail messages. CP 40. Mr. Lammon called back the second and third times because his wife's voicemail recorder cut him off before he was done discussing the personal items that he needed to retrieve from her in order to do his work. CP 6; RP 53-55. The total duration of the messages that Mr. Lammon left for his wife was 6 minutes and 33 seconds. CP 6.

Based on that conduct, the state charged Mr. Lammon with three counts of felony violation of a no-contact order (VNCO). CP 1-4.

Mr. Lammon's charges were elevated to felonies because he had previously been convicted of two counts of misdemeanor VNCO. *See* CP 29-39. Those two predicate convictions were based on voicemail messages that Mr. Lammon allegedly left, on the same day, at 1:33 and 1:39pm. CP 37.

Mr. Lammon's defense attorney argued that double jeopardy only permitted a single charge based on the current instance of three phone calls over the course of a few minutes. RP 4-6. But defense counsel never

raised a constitutional challenge to the predicate offenses on that same ground. *See RP generally; See CP generally.*

The trial court rejected Mr. Lammon's double jeopardy argument and the case proceeded to a stipulated facts trial. *See RP 24-28; CP 40-41.* The court entered three felony VNCO convictions based on the phone calls made over the span of ten minutes. CP 47-48, 91.

This timely appeal follows. CP 103.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY BY ENTERING THREE FELONY VNCO CONVICTIONS BASED ON PHONE CALLS THAT TOOK PLACE WITHIN TEN MINUTES OF EACH OTHER.

The trial court in Mr. Lammon's case entered convictions for three counts of felony violation of a no-contact order (VNCO) because Mr. Lammon had made three phone calls to the protected party on the same day: one at 6:36pm, one at 6:40pm, and one at 4:46pm. CP 40. Mr. Lammon made the second and third phone calls because the voicemail recorder cut him off before he was done leaving his message. RP 9. The total duration of the messages he left was 6 minutes and 33 second. CP 6.

If Mr. Lammon had showed up at his wife's home and talked to her for 6 minutes and 33 second, or ten minutes, or much longer, the state would only have been able to charge him with one count of VNCO based

on that interaction. The trial court violated the constitutional prohibition on double jeopardy by entering three convictions in Mr. Lammon’s case for significantly less-threatening conduct.

The constitutional prohibition against double jeopardy precludes multiple convictions for a single offense. *State v. Morales*, 174 Wn. App. 370, 384-85, 298 P.3d 791 (2013); U.S. Const. Amends. V, XIV; art. I, § 9.¹

When addressing multiple counts of the same charge, the double jeopardy analysis turns on the “unit of prosecution.” *Id.* To establish the unit of prosecution for an offense, the question is “what act or course of conduct the legislature has defined as the punishable act.” *Id.* (*quoting State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007)).

The unit of prosecution analysis looks first to the statute in question, then to the statutory history, and finally to the facts of a particular case. *Id.* If the statute is ambiguous regarding the unit of prosecution, the rule of lenity requires the ambiguity to be “resolved against turning a single transaction into multiple offenses.” *Id.* at 385.

No published opinion has determined whether communications occurring on a single day constitute more than one unit of prosecution for

¹ Constitutional issues are reviewed *de novo*. *State v. Karas*, 431 P.3d 1006, 431 P.3d 1066 (2018). Mr. Lammon properly raised this issue before the trial court by explicitly arguing that entry of three convictions would violate double jeopardy. *See* RP 4-6.

violation of a no contact order (VNCO). The rule of lenity requires that Mr. Lammon be liable, at most, for one count of VNCO for three phone calls, which were made within ten minutes of one another. *Morales*, 174 Wn. App. at 385.

By contrast, violations occurring on separate days each comprise a distinct unit of prosecution. *See State v. Brown*, 159 Wn. App. 1, 12, 248 P.3d 518 (2010);; *State v. Allen*, 150 Wn. App. 300, 314, 207 P.3d 483 (2009). In both *Brown* and *Allen* the prosecutor filed no more than one charge per day, even though there were hundreds of phone calls (and several personal contacts) in *Brown* and four separate emails in *Allen*. *Brown*, 159 Wn. App. at 6-7; *Allen*, 150 Wn. App. at 314.

The *Brown* and *Allen* courts held that double jeopardy permitted one conviction for each day on which the accused contacted the protected party. *Id.* Those decisions do not shed light on the circumstances of Mr. Lammon's case, in which three separate convictions were entered for conduct over the course of ten minutes.

Even so, Divisions I and II engaged in faulty logic during their statutory construction analysis in *Brown* and *Allen*. Both courts relied on the VNCO statute's use of the phrase "a violation" to hold that each distinct "violation" qualifies as a separate unit of prosecution. *Brown*, 159 Wn. App. at 10-11; *Allen*, 150 Wn. App. at 313-14. But the *Brown* and

Allen courts failed to conduct any analysis into the central question in the double jeopardy inquiry: what, exactly, *constitutes* “a violation.” *See Id.*

The Washington Supreme Court has held that use of the article “a” exhibits legislative intent for one unit of prosecution for each instance of possession of “a stolen access device.” *State v. Ose*, 156 Wn.2d 140, 146, 124 P.3d 635 (2005).

The *Ose* Court relied on prior caselaw construing criminal statutes to permit one unit of prosecution for each instance of “a fire,” “a minor,” “a firearm or a deadly weapon,” and “another person.” *Id.* at 147-48 (citing *State v. Westling*, 145 Wn.2d 607, 611–12, 40 P.3d 669 (2002); *State v. Root*, 141 Wn.2d 701, 9 P.3d 214 (2000); *State v. DeSantiago*, 149 Wn.2d 402, 68 P.3d 1065 (2003); *State v. Graham*, 153 Wn.2d 400, 406 n. 2, 103 P.3d 1238 (2005), *as amended* (Feb. 1, 2005)).

But the terms “a stolen access device,” “a fire,” “a minor,” “a firearm or a deadly weapon,” and “another person” are not ambiguous according to their plain language, in unit-of-prosecution terms.

The issue in Mr. Lammon’s case is whether the term “a violation” in the VNCO statute is ambiguous.

The courts in *Brown* and *Allen* held that it did not violate double jeopardy to quantify each *day on which the accused contacted the protected party* as a separate unit of prosecution, even though the words “a

day” to not appear in the VNCO statute. *See Brown*, 159 Wn. App. at 12; *Allen*, 150 Wn. App. at 314.

The trial court in Mr. Lammon’s case, on the other hand, held that *each phone call* constitutes a distinct unit of prosecution, even though the words “a phone call” do not appear in the VNCO statute. *See CP 43-44*.

These contrary interpretations demonstrate the very ambiguity of which Mr. Lammon complains. Because the VNCO statute does not clarify what constitutes “a violation,” *lenity* requires that it be construed in favor of only one unit of prosecution in Mr. Lammon’s case. *Morales*, 174 Wn. App. at 385.

The trial court’s choice to quantify the unit of prosecution as one phone call in Mr. Lammon’s case was arbitrary. Using the same reasoning, the trial court could just have easily concluded that each minute of Mr. Lammon’s voicemail messages constituted one unit of prosecution. Or each sentence. Or each word. Or each second.

Additionally, the trial court’s approach would incentivize in-person contact in violation of a court order over less-intrusive forms of communication. This is because a single occurrence of showing up at a protected party’s home or workplace would only constitute a single violation, regardless of the number of statements made or how long the defendant stayed there. If each individual phone call (even if made within

minutes of each other) constitutes a separate unit of prosecution, someone who avoided *in-person* contact with the protected party (by calling on the phone) would be punished more harshly than an offender who engaged in conduct more likely to be threatening to the protected party (by going his/her home or workplace).

The trial court's construction of the VNCO statute in Mr. Lammon's case produces the absurd result of encouraging a person who intends to violate a no-contact order to contact the protected party *in person*, in order to avoid multiple charges for a single instance of communication. Appellate courts must avoid statutory interpretations leading to absurd results. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

At best, the VNCO statute is ambiguous as to whether Mr. Lammon's three phone calls -- made within ten minutes of one another -- constitute more than one unit of prosecution. The rule of *lenity* requires construction in Mr. Lammon's favor. *Morales*, 174 Wn. App. at 385. Two of Mr. Lammon's convictions must be vacated. *Id.*

II. MR. LAMMON'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CHALLENGE THE CONSTITUTIONAL VALIDITY OF HIS PREDICATE CONVICTIONS ON DOUBLE JEOPARDY GROUNDS.

Mr. Lammon's current offenses were elevated to felonies because he had two prior convictions for misdemeanor VNCO. CP 1-4, 47-48. But those prior convictions were based on two voicemail messages that Mr. Lammon allegedly left for a protected party at 1:33 and 1:39pm on the same day. *See* CP 37; Ex. P3, Supplemental CP.

Under the same legal theory raised by Mr. Lammon's defense attorney in relation to the current felony offenses, Mr. Lammon's predicate misdemeanor convictions were also entered in violation of double jeopardy. Because the constitutional validity of those predicate convictions was an element of Mr. Lammon's felony VNCO charge, timely raising that argument below would have required the state to prove that validity beyond a reasonable doubt. *State v. Summers*, 120 Wn.2d 801, 812, 846 P.2d 490 (1993).

But Mr. Lammon's attorney did not make that argument below. *See RP generally*. He raised no challenge to the underlying convictions during the stipulated facts trial. *See* RP 24-28. It was only after that trial, in a sentencing memorandum, that defense counsel argued that the predicate convictions should not elevate the current offenses to felonies

because they constituted the same criminal conduct for sentencing purposes. *See* CP 24-39. Defense counsel did not challenge the *constitutional* validity of those prior convictions in his memorandum or during the hearing *See* CP 24-29; RP 40-63.

Mr. Lammon’s attorney provided ineffective assistance of counsel by waiving that argument.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).²

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Counsel’s performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel’s deficient performance if there is a reasonable probability³ that his/her attorney’s mistakes affected the outcome of the proceedings. *Id.*

² A claim of ineffective assistance of counsel is reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

³ A “reasonable probability” under the prejudice standard is lower than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, “it is a probability sufficient to undermine confidence in the outcome.” *Id.*; *see also Jones*, 183 Wn.2d at 339.

A defense attorney provides deficient performance by to “conduct appropriate investigations to determine what defenses were available.”

State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995).

In a prosecution for felony VNCO under RCW 26.50.110(5), proof of two valid predicate convictions for VNCO is an essential element of the crime. *State v. Robinson*, 76648-1-I, 2019 WL 1760670, at *2, --- Wn. App. ---, --- P.3d --- (Wash. Ct. App. Apr. 22, 2019). The state is required to prove the validity of those previous convictions beyond a reasonable doubt. *Id.* (citing *State v. Carmen*, 118 Wn. App. 655, 666, 77 P.3d 368 (2003)).

When an accused person challenges the constitutional validity of the alleged predicate offenses supporting a felony VNCO charge, the state must “prove beyond a reasonable doubt that the predicate conviction is constitutionally sound.” *Id.* (quoting *Summers*, 120 Wn.2d at 812). The defense must raise a “colorable, fact-specific argument supporting the claim of constitutional error” in order to trigger the state’s burden. *Id.*

The *Robinson* Court held that predicate convictions that were entered in violation of the constitutional prohibition on double jeopardy

cannot support a later conviction for felony VNCO. *See Robinson*, 76648-1-I, slip op. at *4-5.⁴

Here, Mr. Lammon’s predicate offenses – in which the trial court entered two convictions based on voicemails left within a few minutes of each other – were entered in violation of double jeopardy under the same theory advanced by trial defense counsel in relation to the current offenses (and outlined above, in Section I). *See CP 37; Ex. P3, Supplemental CP.*

If Mr. Lammon’s defense attorney had raised that argument below, the state would have been required to prove the constitutional validity of those predicate offenses beyond a reasonable doubt. *Robinson*, 76648-1-I, slip op. at *2; *Carmen*, 118 Wn. App. at 666. The state would have been unable to meet that burden, given the facts of the underlying convictions. *See CP 37; Ex. P3, Supplemental CP.*

Mr. Lammon’s attorney had no valid tactical reason for waiving challenge to the constitutional validity of the predicate offenses. A successful challenge would have downgraded his client’s felony offenses to misdemeanors. Though the trial court had already rejected the same double jeopardy argument as related to Mr. Lammon’s current charges, a

⁴ The *Robinson* Court also held that the defendant in that case had not waived the right to challenge the constitutional validity of the predicate convictions by pleading guilty to them. *Robinson*, 76648-1-I, slip op. at *5. This is because “the court ha[s] no power to enter the conviction or impose the sentence” when doing so violates double jeopardy. *Id.* (quoting *U.S. v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989)).

timely challenge would have preserved the issue for appeal. Mr. Lammon's counsel attorney provided deficient performance. *Jones*, 183 Wn.2d at 339.

Mr. Lammon was prejudiced by his attorney's deficient performance. As outlined above (in Section I), the constitutional prohibition on double jeopardy barred the entry of two convictions for two voicemails that occurred within minutes of each other. Timely raising that constitutional challenge to Mr. Lammon's predicate offenses would have downgraded his charges from felonies to misdemeanors. *See RCW 26.50.110*. There is a reasonable probability that counsel's error affected the outcome of Mr. Lammon's case. *Jones*, 183 Wn.2d at 339.

Mr. Lammon's defense attorney provided ineffective assistance of counsel by failing to challenge the constitutional validity of the predicate convictions on double jeopardy grounds. *Id.*; *Robinson*, 76648-1-I, slip op. at *2; *Carmen*, 118 Wn. App. at 666. Mr. Lammon's convictions must be reversed. *Id.*

CONCLUSION

Mr. Lammon's three VNCO convictions were entered in violation of the constitutional prohibition on double jeopardy. Additionally, Mr. Lammon's defense attorney provided ineffective assistance of counsel by

failing to argue below that his two prior predicate convictions were also entered in violation of the prohibition on double jeopardy and could not be used to raise the current offenses to felonies. Mr. Lammon's convictions must be reversed.

Respectfully submitted on May 7, 2019,



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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 May 7, 2019.



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