

FILED
FEB 28 2006
CLERK OF SUPREME COURT
STATE OF WASHINGTON

783624

No. _____
Court of Appeals No. 54805-1-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEITH G. GEORGE,

Petitioner.

FILED
COURT OF APPEALS
DIVISION ONE

FEB 16 2006

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

The Honorable Charles W. Mertel

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Keith G. George, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. George requests this Court grant review of the decision, published in part, of the Court of Appeals, 54805-1-I (January 17, 2006). A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The time for trial rule, Cr 3.3, requires dismissal of a charge when an in-custody defendant is not brought to trial within 60 days of arraignment or when an out-of-custody defendant is not brought to trial within 90 days of arraignment. In early 2004, Mr. George was detained in custody on charges pending against him simultaneously in Renton Municipal Court, Kent Municipal Court, and King County Superior Court. He was held variously at Renton City Jail, Kent City Jail, the Regional Justice Center, and King County Corrections Center. He was transported to Renton Municipal Court for five of seven pretrial hearings. When he was not transported, the court issued a bench warrant and, when he was next transported to

Renton, the court reset the commencement date of the time for trial. On June 15, 2004, one-hundred-thirty-two days after arraignment, the Renton Municipal Court dismissed the charge, which was later refiled and tried in King County Superior Court. Does the Court of Appeals holding that, under these circumstances, the State did not circumvent the time for trial rule involve an issue of substantial public interest that should be determined by this Court?

2. In United States v. DiFrancesco, 449 U.S. 117, 129-30, 101 S. Ct. 426, 66 L.Ed.2d 328 (1980), and Fong Foo v. United States, 396 U.S. 141, 82 S. Ct. 671, 7 L.Ed.2d 629 (1962), the United States Supreme Court held that the Double Jeopardy Clause prohibits retrial of an offense that is dismissed with prejudice, regardless of whether the reviewing court agrees with the reason for the dismissal. Mr. George was charged in Kent Municipal Court with misdemeanor violation of a court order on February 21, 2004. Three days later, Mr. George was charged in King County Superior Court with the same misdemeanor violation of a court order as already filed in Kent. The superior court charge was continued while he was in custody on the Kent charge, which was ultimately dismissed with prejudice for insufficient proof of personal service. Subsequently, Mr. George was tried and convicted of the misdemeanor in King

County Superior Court. Does the Court of Appeals holding that jeopardy had not attached and therefore, double jeopardy did not bar the superior court prosecution conflict with decisions of this Court of the United States Supreme Court, involve a significant question of law under the federal and state constitutions, and involve an issue of substantial public interest that should be determined by this Court?

D. STATEMENT OF THE CASE¹

Keith George was charged by a complaint filed in Renton Municipal Court, Case Number CR0033049, on January 6, 2004, violation of a court order on December 22, 2003, contrary to RCW 26.09.300(1). Br. of App., App. B at 1. He was arraigned on February 4, 2004, and an out-of-custody pretrial conference was scheduled for March 1, 2004. Br. of App., App. B at 9.

On February 24, 2004, Mr. George was charged by a complaint filed in Kent Municipal Court, Case Number K043924FV, with violation of a court order on February 21, 2004, contrary to RCW 26.50.110(1). Br. of App., App. A at 1. On February 27, 2004, Mr. George was charged by an information filed in King County Superior Court, Case No. 04-1099079 SEA, with felony harassment, contrary to RCW 9A.46.020(1), and violation of a court order on February 21,

¹A more complete recitation of facts is set forth in Mr. George's briefing to the Court of Appeals and is incorporated herein.

2004, contrary to RCW 26.50.110(1), the same violation as already pending in Kent. CP 1-5.

The superior court charges were continued while Mr. George was in custody in Kent City Jail pending trial on the Kent Municipal Court charge. CP 67, 68, 69. On March 12, 2004, Mr. George was transported from Kent City Jail to Renton City Jail and, later, to the Regional Justice Center Detention Facility where he was detained on the Renton Municipal Court charge. Br. of App., App. B at 2, 3, 9-11. Fifty-five days later, on May 6, 2004, he was released on the Renton charge. Br. of App., App. B at 4. In the meantime, on April 28, 2004, the Kent Municipal Court dismissed with prejudice the Kent charge, for insufficient evidence of personal service of the court order. Br. of App., App. A at 3-5.

On May 24, 2004, Mr. George was detained in King County Correctional Facility on the superior court charges and on the Renton charge. Br. of App., App. B at 5, 12-13. Twenty-one days later, on June 14, 2004, the Renton charge was dismissed without prejudice. Br. of App., App. B at 6, 7. Mr. George remained in custody on the superior court charge.

On July 13, 2004, the first day of trial on the superior court charges, the State amended the information to add a count of

violation of a court order on December 22, 2003, contrary to RCW 26.50.110(1), based on the incident previously dismissed in Renton. CP 6-7; 2RP 3. Mr. George was convicted as charged and timely appealed. CP 32, 33, 35A.

On appeal, Mr. George argued, *inter alia*, the conviction for violation of a court order on December 22, 2003, must be reversed for violation of the time for trial rule. He also argued the conviction for violation of a court order on February 21, 2004, must be reversed for violation of the prohibition against double jeopardy, when the charge previously had been dismissed with prejudice.

The Court of Appeals disagreed and affirmed Mr. George's misdemeanor convictions.² The court held there was no violation of the time for trial rule, finding the municipal court did not have authority to compel Mr. George's transport from other municipal or county jails and, therefore, Mr. George failed to appear and the commencement date was properly reset as the date of his next appearance. Opinion, p, 4-6. The court also held there was no violation of the prohibition against double jeopardy, finding jeopardy had not attached because trial had not begun and, even had trial

²The Court of Appeals reversed and remanded for retrial Mr. George's conviction on a felony harassment charge.

begun, jeopardy did not attach where the ground for dismissal was not an element of the offense. Opinion, p. 8.

E. ARGUMENT

1. THE DECISION OF THE COURT OF APPEALS THAT MR. GEORGE FAILED TO APPEAR FOR PURPOSES OF THE TIME FOR TRIAL RULE, WHEN HE WAS IN CUSTODY WITHIN THE COUNTY BUT NOT TRANSPORTED TO TWO COURT HEARINGS IN RENTON MUNICIPAL COURT, EVEN THOUGH HE WAS TRANSPORTED TO FIVE OTHER HEARINGS FOR THE SAME CASE INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Mr. George was not brought to trial on the Renton misdemeanor within the time limits prescribed by the time for trial rule. The time for trial rule requires dismissal of a charge when an in-custody defendant is not brought to trial within 60 days of arraignment or when an out-of-custody defendant is not brought to trial within 90 days of arraignment. CrR 3.3(b)(1), (2); CrRLJ 3.3(b)(1), (2).³ When a defendant fails to appear at a required proceeding, the commencement date for calculation of the time for trial is set as the date of the defendant's next appearance in court. CrR 3.3(c)(2)(ii); CrRLJ 3.3(c)(2)(ii).

³CrR 3.3, the time for trial rule for superior courts, governed Mr. George's motion for dismissal in King County Superior Court. CrRLJ 3.3, the time for trial rule for courts of limited jurisdiction, governed the proceedings in Renton Municipal Court.

Mr. George was arraigned in Renton Municipal Court on February 4, 2004. Br. of App., App. B at 9. Because he was out of custody, the expiration date was 90 days later, on May 4, 2004. CrRLJ 3.3(b)(2)(i). On February 23, 2004, he was booked into Kent City Jail on an unrelated charge. Br. of App., App. A at 1. On March 1, 2004, he was not transported for a pre-trial conference in Renton, and the court issued a bench warrant. Br. of App., App. B at 9. On March 12, 2004, Mr. George was transported from Kent to Renton, which date was adopted as the new commencement date with an expiration date of May 11, 2004. Br. of App., App. B at 9-10.

Mr. George remained in custody on the Renton charge until May 6, 2004, at which time he was released on his personal recognizance, a pre-trial conference was scheduled for May 17, 2004, and the expiration date was reset to June 10, 2004. Br. of App., App. B at 11. On May 7, 2004, the Renton Municipal Court noted he remained in custody on other charges and would need to be transported to the pre-trial conference. Br. of App., App. B at 11. On May 17, 2004, Mr. George was not transported and the court issued another bench warrant. Br. of App., App. B at 11-12. On May 24, 2004, the Renton Municipal Court was notified that Mr. George

had been transferred to King County Correctional Facility, regardless of the municipal court's warrant. Br. of App., App. B at 12.

On June 4, 2004, Mr. George was transported from King County Correctional Facility to Renton for a pre-trial conference, as which time the court again reset the commencement date. Br. of App., App. B at 12-13. On June 15, 2004, the Renton Municipal Court granted the prosecutor's motion to dismiss the charge. Br. of App., App. B at 13.

On July 13, 2004, the charge was refiled in King County Superior Court, defense counsel's speedy trial objection was denied, and the case proceeded to trial. 2RP 4-5. Significantly, at sentencing, the superior court gave Mr. George credit for 172 days served. CP 44.

Because Mr. George was in custody within King County at all pertinent times, he did not fail to appear for purposes of the time for trial rule. On March 1, 2004, he was in Kent City Jail and on May 17, 2004, he was in King County Correctional Facility. As this Court has noted, "A defendant has not duty to bring himself to trial[,] Barker v. Wingo, 407 U.S. 514, 527, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1982), rather, the defendant's appearance in court 'depends upon the efforts of the prosecutor and law enforcement officials.' State v.

Miffitt, 56 Wn. App. 786, 791, 785 P.2d 850 (1990).” City of Seattle v. Guay, 150 Wn.2d 288, 296, 76 P.3d 231 (2003).

Even assuming, *arguendo*, the municipal court did not know Mr. George’s whereabouts on March 1, 2004, and the commencement date was properly reset on March, 12, 2004, the docket clearly reflects all parties were aware of his location on May 17, 2004. In fact, on May 7, 2004, the day after he was released on his personal recognizance, a docket entry notes he needed to be transported to the next scheduled hearing. Br. of App., App. B at 11.

Accordingly, the municipal court erred when it reset the commencement date. To hold otherwise would be to condone abuse and circumvention of the time for trial rule; a defendant held on charges pending in more than one jurisdiction could be caught in a never-ending cycle of being detained held on a charge, not transported to a hearing, brought to court to reset the commencement date and reschedule the hearing, but later not being transported to the rescheduled hearing.

Nonetheless, the Court of Appeals ruled there was no time for trial violation, ruling Renton Municipal Court had no authority to compel Mr. George’s transport while he was held by other jurisdictions. Opinion, p. 5-6. In so ruling, the court relied on Guay,

supra, in which this Court considered whether a duty of due diligence and good faith inhered in former CrRLJ 3.3(g)(5),⁴ and whether courts of limited jurisdiction had authority to compel the transport of a defendant held outside the county. 150 Wn.2d at 294. This Court declined to read a duty of due diligence and good faith into CrRLJ 3.3(g)(5), as has been done with CrR 3.3, on the grounds that, unlike courts of limited jurisdiction, superior courts have statutory mechanisms with which to facilitate and compel the transfer of defendants detained out of state. Given the lack of statutory mechanisms, this Court found that courts of limited jurisdiction have no authority to compel the transport of misdemeanor defendants between county jails. *Id.* at 304.

Guay is distinguishable from the present case in several significant respects. First, as recognized by the Court of Appeals, Guay addresses a different rule than at issue here. Opinion, p. 5. Second, unlike the defendants in Guay who were held outside the

⁴Former CrRLJ 3.3(g)(5), currently codified as CrRLJ 3.3(e)(6), provided:
Excluded periods. The following periods shall be excluded in computing the time for arraignment and the time for trial:
(5) The time during which a defendant is detained in jail or prison outside the county in which the defendant is charged or in a federal jail or prison and time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

county in which they had pending misdemeanor charges, Mr. George was continually held in various municipal and county facilities, all of which were within King County. Finally, again unlike the defendants in Guay who were never transported for proceedings on their misdemeanor charges, Mr. George was in fact transported to Renton Municipal Court for five of the seven hearings in that court. The Court of Appeal's reliance on Guay is misplaced.

The Court of Appeals further ruled Mr. George waived the right to challenge the time for trial by failing to object to the jury trial scheduled for May 6, 2004, two days after the expiration date. Opinion, p. 6 n.15. On July 13, 2004, when the charge was refiled in King County Superior Court, Mr. George waived formal arraignment but maintained his objection to the time for trial on that charge. 2RP 4-5. The Court of Appeals finding that Mr. George waived his right to object is unsupported by the record.

Mr. George was not brought to trial until forty-two days after the proper expiration date of May 4, 2004, and five days after the latest possible expiration date of June 10, 2004, in violation of the time for trial rule. The Court of Appeals decision holding otherwise condones abuse and circumvention of CrRLJ 3.3 and CrR 3.3, is unsupported by the precedent from this Court upon which it relied,

and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(1) and (4), this Court should accept review.

2. THE DECISION OF COURT OF APPEALS DECLINING TO FIND A VIOLATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY, WHEN MR. GEORGE WAS PROSECUTED AND CONVICTED FOR AN OFFENSE THAT HAD BEEN PREVIOUSLY DISMISSED WITH PREJUDICE IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OF THE UNITED STATES SUPREME COURT, INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Mr. George was improperly prosecuted and convicted in King County Superior Court on the Kent misdemeanor when it had been previously dismissed with prejudice in Kent Municipal Court for insufficient evidence of personal service of the court order. See Br. of App., App. A at 3-5. The federal and state constitutional double jeopardy clauses prohibit successive prosecutions for the same offense. U.S. Const. Amend. V; Wash. Const. art. 1, § 9; United States v. Dixon, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L.Ed.2d 556 (1993); State v. Crediford, 130 Wn.2d 747, 760, 927 P.2d 1129 (1996). For purposes of a double jeopardy analysis, a dismissal for

insufficient evidence is equivalent to an acquittal. State v. Corrado, 81 Wn. App. 640, 647, 915 P.2d 1121 (1996) and cases cited therein. When a charge is dismissed with prejudice, a defendant is found not guilty, or a conviction is reversed due to insufficient evidence, the Double Jeopardy Clause unequivocally prohibits a successive prosecution for the same offense. United States v. DiFrancesco, 449 U.S. 117, 129-30, 101 S. Ct. 426, 66 L.Ed.2d 328 (1980); Burks v. United States, 437 U.S. 1, 9, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978); State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). Double jeopardy prohibits successive prosecutions regardless of whether the reviewing court agrees with the lower court's finding of insufficient evidence. Fong Foo v. United States, 369 U.S. 141, 143, 82 S. Ct. 671, 7 L.Ed.2d 629 (1962). Thus, the Kent Municipal Court order of dismissal barred the subsequent prosecution in King County Superior Court. See Br. of App., App. A at 2.

Nonetheless, the Court of Appeals ruled there was no violation of the prohibition against double jeopardy, finding jeopardy had not attached because trial had not begun. Opinion, p. 8. In so ruling, the court entirely ignored the undisputed fact that the municipal court dismissed the case "with prejudice." A dismissal

with prejudice is “[a] term meaning an adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause.” Black’s Law Dictionary 469 (6th ed. 1990).

The court also found that, even had trial begun, jeopardy did not attach because the ground for dismissal was not an element of the offense. Opinion, p. 8. In so finding, the court relied on City of Spokane v. Lewis, 16 Wn. App. 791, 559 P.2d 581 (1977), in which the defendant alleged double jeopardy prohibited a prosecution in superior court on charges that previously had been dismissed in district court after the city’s case in chief, for failure to establish jurisdiction. 16 Wn. App. at 792. Division Three held:

Since venue is not an element of the crime, the granting of such a motion [to dismiss] is not a determination on the merits but rather a recognition by the district court that as a matter of law the City has failed to prove a jurisdictional prerequisite, *i.e.*, the situs of the crime. Consequently, the ruling comes within the purview of [former] JCrR 4.11 and is properly reviewable.

Id. at 793.

The court’s reliance on Lewis is misplaced. Unlike the present case, there is no mention in Lewis whether the charge was dismissed with or without prejudice. More importantly, in the present case, the State never sought to review the municipal court order of

dismissal, but, rather, simply ignored the order altogether. Lewis is inapt.

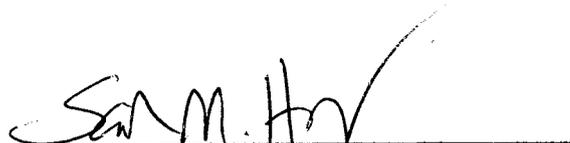
The Court of Appeals decision in the present case is in conflict with decisions of this Court and of the United States Supreme Court, involves a significant question of law under the federal and state constitutional double jeopardy clauses, and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(1), (3), and (4), this Court should accept review.

F. CONCLUSION

The decision of the Court of Appeals is in violation the time for trial rule, is unsupported by the decision by this Court upon which it relies, in violation of the constitutional prohibition against double jeopardy, is in conflict with decisions from the United States Supreme Court, involves a significant question of law under the federal and state constitutions, and involves issues of substantial public interest that should be decided by this Court. For the foregoing reasons, Mr. George respectfully requests this Court accept review of the Court of Appeals decision in this case.

DATED this 16th day of February, 2006.

Respectfully submitted,


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FILED
COURT OF APPEALS
DIVISION III
FEB 16 2006

Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

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

GML
Name

FEB 16 2006
Date

Done in Seattle, Washington

APPENDIX A

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE**

RECEIVED

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
KEITH GREGORY GEORGE,)
)
 Appellant.)
_____)

No. 54805-1-I JAN 17 2006
Washington Appellate Project

PUBLISHED IN PART

FILED: January 17, 2006

ELLINGTON, J. Keith George was convicted of two misdemeanor no-contact order violations, one occurring in Kent and the other in Renton, and one charge of felony harassment of his wife, Julianna. George did not attend two hearings on the Renton charge because he was in custody elsewhere on other charges; each time, the court reset the speedy trial clock to zero. We hold this did not violate George's right to a speedy trial.

In the unpublished portion of this opinion we also hold that George's conviction on the Kent charge did not violate double jeopardy principles, that sufficient evidence supported both misdemeanor convictions, and that juror bias did not taint the deliberations. We thus affirm the misdemeanor convictions. We accept the State's concession of error as to the felony harassment conviction, however, because a jury

instruction omitted an essential element of the crime. We therefore vacate that conviction and remand for retrial.

BACKGROUND

While Keith and Julianna George¹ were living together in California, George physically abused Julianna, and she obtained a restraining order against him. The order was issued on July 10, 2001 in San Joaquin County, and was valid for three years in all 50 states. George was served with the order on November 19, 2001.

Thereafter, George and Julianna reunited and relocated to Seattle. George's abusive behavior continued, and in July 2003, Julianna moved into a domestic violence shelter.

On December 22, 2003, George attempted to visit Julianna at her workplace. As a result of that visit, George was charged in Renton with violation of the California restraining order. George was arraigned in Renton Municipal Court on February 4, 2004.

Ten days later, George spoke to a friend, Carina Borjas, and made threats to kill Julianna. Borjas told Julianna of the threats.

On February 21, 2004, George appeared at Julianna's domestic violence shelter. As a result of that visit, George was charged in Kent Municipal Court with violation of the California restraining order. Three days later, George was charged in King County Superior Court with felony harassment by threats to kill, and with the misdemeanor charge already pending in Kent.

¹ Because the appellant and the victim share the same last name, we occasionally refer to Julianna by her first name for purposes of clarity.

On April 28, 2004, Kent Municipal Court dismissed the Kent charge with prejudice for insufficient evidence of personal service. The superior court charge on the same violation remained pending.

On June 14, 2004, Renton Municipal Court dismissed the Renton charge to allow it to be refiled in superior court with the felony. On July 13, 2004, the State amended the King County information to add the Renton misdemeanor charge. George made a speedy trial objection. The court informed George that briefing would be required to address the speedy trial objection, but none was ever submitted. Trial began that day on all three charges, and George was convicted on all three charges.

ANALYSIS

Time for Trial Violation. George contends his conviction on the Renton offense violated speedy trial rules. A defendant must be brought to trial within 60 days of his arraignment if he is in custody and within 90 days if he is not.² When the time for trial rule is violated, the remedy is dismissal with prejudice.³

We need not belabor the details of George's custody status at various times, or the various hearings and dates underlying George's argument. Simply stated, George was in custody elsewhere on other municipal court charges (first in the Kent jail, then in the Regional Justice Center) and so did not appear on two occasions when pretrial hearings were scheduled in Renton municipal court. Each time, the Renton court reset the speedy trial time clock to zero. Eventually, on June 15, the Renton court dismissed the charge to allow King County prosecutors to file it in superior court.

² CrRLJ 3.3(b)(1), (2).

³ CrRLJ 3.3(h).

George contends that because he was in custody, he did not fail to appear for purposes of the time for trial rule, and the trial court erred in resetting the commencement dates. We disagree.

The impact of a defendant's failure to appear at a hearing on the time for trial is governed by CrRLJ 3.3(c)(2)(ii), which since 2003⁴ has provided as follows:

(2) Resetting of commencement date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. . . .

. . . .

(ii) Failure to appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.^[5]

Under the plain language of this section, each failure to appear resets the speedy trial clock.⁶

⁴ The comments to the 2003 amendments to CrR 3.3 encourage us to avoid judicial gloss on these rules:

Task Force members are concerned over the degree to which the time-for-trial standards have become less governed by the express language of the rule and more governed by judicial opinions. To address this concern, the task force has tried to fashion a rule that is simpler, has fewer ambiguities, and covers more of the field of time-for-trial issues, with the hope that a reader of the rule will have a better understanding of the overall picture than currently exists.

TIME-FOR-TRIAL TASK FORCE FINAL REPORT, § 1(B) (Wash. Courts 2002), http://www.courts.wa.gov/programs_orgs/pos_tft.

⁵ (Emphasis added).

⁶ The rule makes some exceptions not relevant here. For example, CrRLJ 3.3(e)(6) provides that periods when the defendant is held outside the county or is in federal custody are excluded from the speedy trial calculation. A failure to appear during such a period thus extends, but does not reset, the time for trial under CrRLJ 3.3(c). Also excluded from the rule is a failure to appear resulting from unavoidable or unforeseen circumstances beyond the control of the court or parties. CrRLJ 3.3(e)(8).

Essentially George contends that because a defendant in custody must depend upon the efforts of the State for his or her appearance in court, we must interpret CrRLJ 3.3(c)(2)(ii) as imposing a duty of good faith and due diligence upon the municipality to ensure the defendant's presence, absent which a failure to appear cannot extend the speedy trial calculation. In the circumstances presented, we reject this argument.

State v. Guay⁷ addresses a different rule, but is nonetheless instructive. Interpreting former CrRLJ 3.3(g)(5),⁸ under which time spent incarcerated in another county was excluded from the speedy trial calculation, the court considered whether a municipality should have a duty like that imposed on the State in felony cases,⁹ such that if the location of the defendant is known and he or she is amenable to service of a warrant, the municipality must exercise due diligence to obtain his or her presence.¹⁰ The court refused to impose such a duty, holding that although courts of limited jurisdiction have inherent authority to issue transport orders, their authority does not extend to compelling the holding county to release the defendant.¹¹ The court noted that statutes exist to facilitate transfers of felony defendants, but the legislature has

⁷ 150 Wn.2d 288, 76 P.3d 231 (2003).

⁸ Former CrRLJ 3.3(g)(5) (amended effective 9/1/03) excluded "[t]he time during which a defendant is detained in jail or prison outside the county in which the defendant is charged or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington." This provision is identical to CrRLJ 3.3(e)(6).

⁹ See State v. Anderson, 121 Wn.2d 852, 865, 855 P.2d 671(1993) (State must exercise due diligence to bring a defendant to superior court where a mechanism exists to do so such as the interstate agreement on detainers).

¹⁰ Guay, 150 Wn.2d at 295.

¹¹ Id. at 304.

created no mechanism by which courts of limited jurisdiction may compel the transfer of a misdemeanor held by another jurisdiction.¹² Under these circumstances, the court held that time spent in jail in another county was properly excluded from the speedy trial calculation under CrRLJ 3.3(g)(5).¹³

As a court of limited jurisdiction, Renton Municipal Court had no power to require George's transport to Renton while he was held by other jurisdictions on other charges. In practice such transports are common, but they depend upon voluntary cooperation and uncertain resources, and are thus unreliable. The only way to ensure George could participate in his trial preparation was to reset the commencement date. Under the present rule, this is the required result even where a defendant fails to appear because he or she is held in custody by another jurisdiction.¹⁴ There was no speedy trial violation.¹⁵

George's conviction for the Renton no-contact order violation is affirmed.

The balance of this opinion having no precedential value, the panel has determined it should not be published in accordance with RCW 2.06.040.

¹² The court noted: "The absence of . . . a mechanism in the case of misdemeanors is . . . significant because it leaves no guidance as to the allocation of costs or burdens involved in the transport of misdemeanor defendants This type of allocation is legislative in nature and exceeds the authority of this court." Id. at 301.

¹³ Id.

¹⁴ We express no opinion as to whether a showing of due diligence is required where a defendant is held by the same jurisdiction in which the charges are pending.

¹⁵ We note that even if we adopted George's speedy trial calculation, George waived the issue by failing to object to the trial date. George was arraigned on February 4, 2004. Under George's calculation, his 90-day time for trial expired on May 4, 2004. On April 13, 2004, a jury trial was scheduled for May 6, 2004, two days after the 90-day time for trial expired. Contrary to the requirements of CrRLJ 3.3(d)(3), George did not object to the trial date, thus waiving any objection.

Double Jeopardy. Article I, section 9 of the Washington Constitution and the Fifth Amendment of the United States Constitution prohibit the State from twice putting a defendant on trial for the same offense.¹⁶ George argues that conviction on the Kent misdemeanor charge violated double jeopardy because Kent Municipal Court dismissed the charge with prejudice before he was convicted on the same charge in King County Superior Court. We disagree.

At a pretrial hearing on the Kent charge, the prosecutor offered an exhibit related to proof of service. The municipal judge ruled the exhibit insufficient and “dismiss[e]d [the] restraining order violations with prejudice”¹⁷ on grounds the city had not met its burden of proving personal service. George was thereafter tried and convicted of the same offense in King County Superior Court.

The prohibition against double jeopardy applies if jeopardy previously attached or previously terminated and the defendant is again in jeopardy for the same offense.¹⁸ Jeopardy does not attach until a defendant is “put to trial before the trier of the facts, whether the trier be a jury or a judge.”¹⁹ Thus jeopardy attaches when the jury is empanelled, or when the court begins to receive evidence.²⁰ Jeopardy does not attach “merely because a charge is filed or pretrial proceedings are held.”²¹

¹⁶ In re Percer, 150 Wn.2d 41, 49, 75 P.3d 488 (2003).

¹⁷ Br. of App., App. A at 4.

¹⁸ State v. Heaven, 127 Wn. App. 156, 160–61, 110 P.3d 835 (2005).

¹⁹ Serfass v. United States, 420 U.S. 377, 391, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975) (quoting United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971)).

²⁰ United States v. Martin Linen Supply Co., 430 U.S. 564, 569, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977).

²¹ State v. Higley, 78 Wn. App. 172, 179, 902 P.2d 659 (1995).

Here, trial had not begun. Jeopardy did not attach. Further, even where a trial has been conducted, jeopardy does not attach where the ground for dismissal is not an element of the offense.²² Proof of personal service is not an essential element of misdemeanor violation of a no-contact order.²³

George relies on United States v. DiFrancesco²⁴ for the proposition that double jeopardy prohibits retrial when a charge is dismissed with prejudice. But DiFrancesco is inapt. The question there was whether double jeopardy barred the imposition of an increased sentence.²⁵ George also relies on Burks v. United States²⁶ and State v. DeVries.²⁷ These cases are equally unavailing. In each, double jeopardy was implicated because the defendant was subjected to a trial where evidence of the elements of the offense was evaluated.²⁸ Whatever effect the with prejudice dismissal may have had on the Renton court's ability to reinstate the charge, it was not a bar to proceedings on the same offense in superior court.

Double jeopardy did not bar the superior court trial of the Kent restraining order violation.

²² See City of Spokane v. Lewis, 16 Wn. App. 791, 793, 559 P.2d 581 (1977) (double jeopardy does not bar retrial where trial court's grant of a motion to dismiss for lack of proof involved venue, a nonelement of the offense).

²³ City of Auburn v. Solis-Marcial, 119 Wn. App 398, 400, 79 P.3d 1574 (2003).

²⁴ 449 U.S. 117, 129, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980).

²⁵ Id. at 138–39.

²⁶ 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

²⁷ 149 Wn.2d 842, 72 P.3d 748 (2003).

²⁸ See Burks, 437 U.S. at 10 (court's decision represented a resolution of some or all of the factual elements of the offense charged); DeVries, 149 Wn.2d at 853 (insufficient evidence to establish essential elements of knowing delivery of a controlled substance).

Validity of the California Restraining Order. After she moved to the domestic violence shelter, Julianna obtained a temporary protection order in King County Superior Court. But the court later refused to enter a permanent order, because Julianna admitted she had initiated contact with George after the temporary order was entered. The order denying the permanent order provided that any previously entered temporary order expired immediately.

George argues²⁹ the California restraining order underlying his misdemeanor convictions was no longer valid because when the November 2004 King County order terminated any previously entered temporary order, it terminated the California order as well as the temporary King County order.

The validity of a restraining order is a legal question to be decided by the court.³⁰ Although validity is not an implied element of the crime of violating a no-contact order, the court must determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged.³¹

The California order was valid for three years in all 50 states, and expired on July 10, 2004, well after George committed his offenses. “Any protection order issued by the court of one State . . . shall be accorded full faith and credit by the court of another State . . . and enforced as if it were the order of the enforcing State.”³² George cites no authority for the proposition that a superior court in Washington can summarily

²⁹ Below, George argued only that there was no proof of service of the California order.

³⁰ We review questions of law de novo. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

³¹ State v. Miller, No. 76156-6, 2005 Wash. LEXIS 930 at *12–14 (Dec. 1, 2005).

³² 18 U.S.C. § 2265; People v. Perez, 734 N.Y.S.2d 398, 401 (N.Y. Misc. 2001).

terminate an unexpired California protection order.³³ Further, the California order was not a temporary order.³⁴ The Washington order denying Julianna's request for a permanent Washington order had no effect on the permanent California order. The trial court did not err in finding the California order applicable to George's offenses.

Juror Bias. A member of the jury in George's trial was employed as a correctional officer at the King County jail where George was incarcerated during trial. This fact was discussed at trial. The juror was examined individually, and reported that indeed George looked somewhat familiar and that the juror may have transported him to court at some point. The juror affirmed his ability to be impartial, and no party challenged him, although challenges were available.³⁵ In a statement of additional grounds for review, George appears to allege juror bias on grounds that the juror had access to his jail records. But George points to nothing in the record to support this allegation. It thus cannot be considered on direct review.³⁶

Felony Harassment. The State concedes that George's felony harassment conviction must be reversed because the jury instructions omitted an essential element

³³ State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after a diligent search, has found none.").

³⁴ The title of the California order is "Restraining Order After Hearing (Domestic Violence Prevention)." Ex. 3. Nowhere on the order does the word "temporary" appear.

³⁵ The juror also stated that he had "zero ability as a lie detector" and that words and gestures would, standing alone, not be evidence of guilt beyond a doubt in a threat case. Report of Proceedings (July 14, 2004) at 66-67.

³⁶ RAP 10.10(c).

