

**FILED**  
APR 28 2010  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

No. 37812-4-II

84452-6  
FILED  
COURT OF APPEALS  
DIVISION II  
10 APR 13 PM 12:38  
STATE OF WASHINGTON  
BY MM  
DEPUTY

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON

vs.

RICHARD TRACER

---

PETITION FOR REVIEW

---

Thomas E. Weaver  
WSBA #22488  
Attorney for Appellant

The Law Office of Thomas E. Weaver  
P.O. Box 1056  
Bremerton WA 98337  
(360) 792-9345

**ORIGINAL**

TABLE OF CONTENTS

A. Identity of Petitioner.....1

B. Court of Appeals Decision.....1

C. Issues Presented for Review.....1

D. Statement of the Case.....2

E. Argument Why Review Should Be Granted.....6

    1. The State may not appeal a facially valid judgment and sentence where the defendant has not contributed to the circumstances that led to the appeal.....8

    2. The Court of Appeals decision permitting the State to withdraw Mr. Tracer’s guilty plea places him twice in jeopardy for the same offense.....11

    3. Special Prosecutor Noah Harrison was acting as a de facto official for which his actions may not be collaterally attacked.....13

F. Conclusion.....16

TABLE OF AUTHORITIES

Cases

Anderson v. State of Indiana, 699 N.E.2d 257 (1998).....14

Blockburger v. United States, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932).....8

Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)...12

North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).....11

People v. Bartley, 60 A.D.2d 283, 401 N.Y.S.2d 71 (1973) .....12

State of Idaho v. Corcoran, 7 Idaho 220, 228, 61 P. 1034 (1900).....15

State of Indiana v. Waldon, 481 N.E.2d 1331 (1985) .....14

State of Louisiana v. Peyrefitte, 885 So.2d (2004).....12

State v. Bradfield, 29 Wn. App. 679, 630 P.2d 494 (1981).....9

State v. Cook, 84 Wn.2d 342, 349-50. 525 P.2d 761 (1974).....14

State v. Cook, 84 Wn.2d 342, 525 P.2d 761 (1974) .....14

State v. Dorsey, 40 Wn. App. 459, 698 P.2d 1109 (1985) .....9

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) .....10

State v. Hardesty, 78 Wn. App. 593, 599, 897 P.2d 1282 (1995), affirmed on other grounds, 129 Wn.2d 303, 915 P.2d 1080 (1996).....12

State v. LeRoy, 84 Wn.2d 48, 523 P.2d 1185 (1974).....10

State v. Smith, 52 Wn. App. 27, 756 P.2d 1335 (1988) .....15

State v. Whitney, 69 Wn.2d 256, 418 P.2d 143 (1966).....9

Texas v. Cobb, 532 U.S. 162, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001) .9

United States v. Medina, 709 F.2d 155 (2<sup>nd</sup> Cir. 1983) (footnote 3)  
(explaining Brown).....12

United States v. Patterson, 381 F.3d 859, 864 (9<sup>th</sup> Cir. 2004).....11

#### A. Identity of Petitioner

Richard Tracer asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of the petition.

#### B. Court of Appeals Decision

Mr. Tracer seeks review of the Opinion of the Court of Appeals, Division II, which remanded his case to the trial court to permit the special prosecutor to withdraw his guilty plea over his objection. A copy of the decision is in the Appendix at pages A-1 through A-17.

#### C. Issues Presented for Review

1. Consistent with RAP 2.2, may the State appeal a facially valid judgment and sentence where the defendant has not contributed to the circumstances that led to the appeal?

2. Does the Court of Appeals decision permitting the State to withdraw Mr. Tracer's guilty plea place him twice in jeopardy for the same offense in violation of the Fifth Amendment?

3. Was Special Prosecutor Noah Harrison acting as a de facto official for which his actions may not be collaterally attacked?

#### D. Statement of the Case

On May 25, 2007, Richard Tracer was driving a car while intoxicated. CP, 91. His blood alcohol content was .13. CP, 91. According to his trial counsel, while he was driving, his car was hit by a wayward meteor, causing him to get into an accident with another car and causing injury to another person. CP, 91.

Mr. Tracer was arrested for vehicular assault. CP, 1. He spent the next five days in jail. CP, 97. As a result, he missed out on a job opportunity with the Big Brother/Big Sister Program. CP, 97. Mr. Tracer is trained in the field of social work. CP, 97. Mr. Tracer was formally charged with vehicular assault on May 29, 2007. CP, 2.

For the next year, he attempted to get a job and get back on his feet. CP, 97. During that period, he obtained a drug and alcohol assessment and attended a mandatory drug and alcohol information school (ADIS). CP, 96. He also attended a DUI victim's panel to learn about the effects of drinking and driving accidents. CP, 96. While Mr. Tracer was attempting to improve himself, his attorney was investigating the accident. CP, 91. An accident reconstructionist hired by the defense determined that Mr. Tracer was not responsible for the accident. CP, 91.

The Jefferson County Prosecutor's Office recused itself from the case because of a conflict of interest. CP, 89. Mr. Tracer is the son of a

Jefferson County Sheriff's Office employee. CP, 14. Attorney Andrea Vingo was appointed special prosecutor for the case. CP, 4, 89.

On December 28, 2007, Mr. Tracer appeared for a court appearance. Ms. Vingo did not appear, however, and no explanation was offered. CP, 89. Over the next six months, the court held eight hearings. Ms. Vingo appeared in person for two of the hearings. CP, 146-47. On September 14, 2007 and November 2, 2007, Ms. Vingo failed to appear and the State was represented by the Jefferson County Prosecutor's Office with the defense assent. CO, 146. On June 8, 2007, Ms. Vingo appeared in person. CP, 146. On January 4 and 11, 2008, Ms. Vingo appeared by phone. CP, 146. On March 14, 2008, Ms. Vingo failed to appear and defense counsel requested a continuance on her behalf. CP, 146. On April 11, 2008, Ms. Vingo appeared in person. CP, 146.

On the eve of Mr. Tracer's next court appearance, May 9, 2008, he secured a job. CP, 89. The job was as a social worker with Friendship Diversion in Clallam County. CP, 89. The job was contingent, however, on him resolving the case on or before his May 9, 2008 court date. CP, 89. Mr. Tracer appeared in court on May 9 highly motivated to resolve the case and "get moving on." CP, 89.

When Mr. Tracer appeared for court on May 9, 2008, however, there was no one present to represent the State of Washington. CP, 89.

The trial was scheduled for May 19, 2008. CP, 14. Although Jefferson County Deputy Prosecuting Attorney Ted DeBray was present, he was unable to represent the State because of the conflict of interest. CP, 89. Once again, Ms. Vingo was absent from the proceedings without explanation. CP, 89. Ms. Vingo later explained that she woke up ill that morning, but this information was never relayed to the judge. CP, 134. Jefferson County Judge Crad Verser expressed frustration that Mr. Tracer had appeared “many, many times,” but Ms. Vingo kept missing court. CP, 89.

Mr. Davies represented to the court that the matter was set for a change of plea to an amended charge of DUI. CP, 89. The court’s first response was to try and get Ms. Vingo on the phone. CP, 89. The court also commented that if Ms. Vingo could not be located, it was willing to consider appointing a different special prosecutor, such as local attorney Noah Harrison. CP, 90. Attempts to contact Ms. Vingo failed, however. CP, 91. The court decided to appoint Mr. Harrison as the special prosecutor. CP, 91. The case was reset for later that afternoon. CP, 92.

When the parties appeared in the afternoon, Special Prosecutor Harrison moved to amend the charge to DUI. CP, 93, 96. He also stated that he was willing to recommend a deferred sentence. CP, 93. The court

stated that although it would permit the amendment, it would not consider a deferred sentence. CP, 93.

Mr. Tracer submitted a Statement of Defendant on Plea of Guilty. CP, 5, 94. In the Statement, he acknowledges that he is giving up his constitutional rights, including his right to proceed by trial by jury. CP, 5. The prosecutor agreed to recommend a standard first time sentence for DUI, including a mandatory minimum of one day in jail. CP, 6-7. The court reviewed the maximum penalties with him. CP, 94. The court also reviewed the consequences to his driver's license. CP, 95. Mr. Tracer signed the Statement, saying, "I make this plea freely and voluntarily. No one has threatened harm of any kind to me or to any other person to cause me to make this plea. No person has made any promises of any kind to cause me to enter this plea except as set forth in this statement." CP, 8. Judge Verser signed the Statement finding that the "defendant's plea of guilty [is] knowingly, intelligently and voluntarily made. . . . The defendant is guilty as charged." CP, 8.

The court sentenced Mr. Tracer to 365 days in jail with 360 days suspended with credit for five days served. CP, 9. The court also assessed fines and costs totaling \$3757. CP, 9. The court also placed Mr. Tracer on probation and set conditions of probation. CP, 9-10.

For reasons that are not entirely clear from the record, Jefferson County Prosecutor Juelanne Dalzell was upset by the events of May 9 and filed a motion to vacate the judgment. CP, 13. Ms. Dalzell objected to the appointment of Special Prosecutor Harrison by the court. CP, 13. The prosecutor's office appointed a new special prosecutor, Pamela Loginsky. Mr. Tracer objected to the motion, citing his interest in the "finality of his plea." CP, 148. The court denied the motion, as well as the motion to reconsider. CP, 178. The State appealed.

The Court of Appeals held that the appointment of Mr. Harrison as Special Prosecutor was inappropriate, although the Court also concluded that "the record contains no suggestion that Tracer contributed to the circumstances that form the basis of this appeal." Opinion, 17. The Court remanded the case to be reviewed by a duly appointed special prosecutor. That special prosecutor will have the authority to withdraw the guilty plea if he or she wishes. Mr. Tracer petitions for review.

#### E. Argument Why Review Should Be Granted

Despite the fact that "the record contains no suggestion that Tracer contributed to the circumstances that form the basis of this appeal," the Court of Appeals remanded his case to allow the special prosecutor to withdraw his guilty plea over his objection. Opinion, 17. In doing so, the

Court of Appeals permitted the State to appeal from a judgment under circumstances not permitted by court rule and in violation of his double jeopardy rights. The Court also permitted the State to collaterally attack a de facto public official in violation of public policy. This Court should grant review.

This Court should grant review of important issues of constitutional law and issues of substantial public interest. RAP 13.4(b). Mr. Tracer's case presents a "host of novel legal issues" that justifies further review. Opinion, 2.

Preliminarily, Mr. Tracer acknowledges that the circumstances that led to the amendment of his information from vehicular assault to DUI are unusual. He is also willing to accept the conclusion of the Court of Appeals that the appointment of Mr. Harrison as special prosecutor was improper. But even acknowledging these facts does not alter the fact that Mr. Tracer's judgment and sentence is facially valid. Absent evidence that Mr. Tracer contributed to the anomalies, this appeal should have been dismissed without reaching its merits.<sup>1</sup>

---

<sup>1</sup> Mr. Tracer offers no opinion on the propriety of other remedies, including judicial conduct complaints, attorney ethics complaints, or even civil lawsuits.

**1. The State may not appeal a facially valid judgment and sentence where the defendant has not contributed to the circumstances that led to the appeal.**

The first issue is whether a facially valid judgment and sentence in a criminal case may be lawfully appealed by the State. The Court of Appeals relied on RAP 2.2(b)(1) to hold that this case was appealable by the State. The rule reads: “A decision that in effect abates, discontinues, or determines the *case* other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information.” (Emphasis added.) The Court of Appeals properly quoted the rule, but then misapplied the rule by concluding that the trial court’s action “discontinued prosecution of the vehicular assault *charge*.” Opinion, 7 (emphasis added). The rule permits the State to appeal from an action discontinuing the “case,” not the “charge.” The trial court’s actions did not discontinue case number 07-1-00090-0, given that Mr. Tracer entered a facially valid guilty plea to that case number.

Even if the Court of Appeals is correct and RAP 2.2(b)(1) contemplates appeals from the discontinuation of a specific charge, vehicular assault and DUI are legally the same charge. Blockburger v. United States, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932).

The vehicular assault charge alleged that, while under the influence of alcohol, Mr. Tracer was involved in an accident that resulted in injury to another person. The DUI charge was, therefore, a lesser-included offense and the same offense for purpose of double jeopardy. See, also, Texas v. Cobb, 532 U.S. 162, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001) (Blockburger test not limited to Double Jeopardy Clause but applies to other situations where the Court must determine whether two offenses are the same).

Finally, the Court of Appeals fails to cite any case for the proposition that the State may appeal from a facially valid judgment and sentence. The one case cited by the Court, State v. Whitney, 69 Wn.2d 256, 418 P.2d 143 (1966), is clearly distinguishable. In Whitney, this Court was interpreting Rule on Appeal 14(8), not RAP 2.2. Second, although this Court discussed at some length the advantages and disadvantages of permitting liberal state appeals, the Court ultimately decided that it did not need to decide the issue, because the remedy sought by the State was a pre-judgment writ of certiorari. The cases which cite to Whitney have all involved interlocutory appeals. See State v. Bradfield, 29 Wn. App. 679, 630 P.2d 494 (1981); State v. Dorsey, 40 Wn. App. 459, 698 P.2d 1109 (1985) (footnote 3) (suggesting that Whitney's discussion applies to interlocutory orders, not final judgments).

This Court distinguished the Whitney case in State v. LeRoy, 84 Wn.2d 48, 523 P.2d 1185 (1974). In LeRoy, the trial court suppressed critical evidence and the State sought an extraordinary writ and stay. The Court of Appeals denied the writ. The trial court dismissed the case and the State filed a notice of appeal. This Court dismissed the appeal. Read together, Whitney and LeRoy stand for the proposition that the State may seek interlocutory review of a pre-trial ruling, but may not appeal from a final judgment.

In footnote 2 of its decision in Tracer, the Court of Appeals states that there is nothing about RAP 2.2(b)(1) that precludes the State from appealing from a guilty judgment, although the Court acknowledges that the situations in which the State would want to will be very rare. To suggest that the State may appeal from a guilty judgment that is otherwise valid is an unprecedented statement. The fact that the Court of Appeals failed to cite any supporting cases where the State appealed from a guilty plea indicates how extraordinary this position is.

By making the argument that guilty pleas may not be appealed consistent with RAP 2.2, Mr. Tracer does not contend that a defendant has an expectation of finality in a judgment where he has contributed to the fraudulent circumstances of the judgment. See State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) (State may appeal a judgment and

sentence upon proof of fraud by the defendant). But absent fraud by the defendant, there should be an absolute bar on appeals by the State of a facially valid guilty plea. The issue of whether the State may appeal a facially valid judgment and sentence where the defendant has not contributed to the circumstance that led to the appeal is an issue of public interest that should be reviewed by this Court.

**2. The Court of Appeals decision permitting the State to withdraw Mr. Tracer's guilty plea places him twice in jeopardy for the same offense.**

The Double Jeopardy Clause of the Fifth Amendment applies in three situations: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). In Mr. Tracer's situation, it is the second scenario that is at issue: jeopardy after the acceptance of a guilty plea.

Once a court accepts a guilty plea and determines that the plea is knowing and voluntary, jeopardy has attached. United States v. Patterson, 381 F.3d 859, 864 (9<sup>th</sup> Cir. 2004), rehearing denied. A court may not set aside a guilty plea on the government's motion once jeopardy has attached. Patterson at 864. Under normal circumstances, a defendant has

a reasonable expectation of finality in a facially valid judgment. State v. Hardesty, 78 Wn. App. 593, 599, 897 P.2d 1282 (1995), affirmed on other grounds, 129 Wn.2d 303, 915 P.2d 1080 (1996).

The Supreme Court of Louisiana reinstated the defendant's guilty plea after the trial court erroneously vacated it on the motion of the government. State of Louisiana v. Peyrefitte, 885 So.2d (2004). Although the defendant had breached the plea agreement by testifying falsely at a co-defendant's trial, the proper remedy was to charge him with perjury, not vacating the guilty plea.

The State may not prosecute a lesser offense after a valid guilty plea results in a conviction to the greater offense. Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). This is so because jeopardy attaches upon the acceptance of the guilty plea. United States v. Medina, 709 F.2d 155 (2<sup>nd</sup> Cir. 1983) (footnote 3) (explaining Brown). Where a plea has been validly accepted and the court has itself agreed on the sentence to be imposed, in the absence of fraud the court has no inherent power to set the plea aside without defendant's consent. People v. Bartley, 60 A.D.2d 283, 401 N.Y.S.2d 71 (1973).

In this case, Mr. Tracer entered a knowing and voluntary plea to a criminal charge. The trial court reviewed the written guilty plea with him, ascertained that he understood the maximum penalty and the prosecutor's

recommendation. The trial court then entered an order finding that the plea was knowing and voluntary and finding Mr. Tracer guilty of DUI. At that moment, jeopardy attached and remand is inappropriate.

The Court of Appeals' analysis on this point is not on point. The Court said, "The prosecutor and the defendant are the only parties to a plea agreement. The judge's role is not that of a party to the negotiation but rather as an examiner to assure that the plea procedure is characterized by fairness and candor." Opinion, 15-16 (citations omitted). While Mr. Tracer does not disagree with this analysis, it does nothing to resolve the double jeopardy issue. Regardless of whatever anomalies in the plea bargaining process may have occurred, the acceptance of the guilty plea resulted in a conviction, for which jeopardy attached. Jeopardy having attached, the State may not retry Mr. Tracer for the same offense. This is an issue with significant constitutional ramifications and further review is merited.

**3. Special Prosecutor Noah Harrison was acting as a de facto official for which his actions may not be collaterally attacked.**

The final issue for this Court is whether Special Prosecutor Harrison was acting as a de facto official when he amended the information. Mr. Tracer, having conceded for purposes of this appeal that Mr. Harrison's appointment was irregular, is not in a position to argue that

Mr. Harrison was properly appointed as special prosecutor. But Mr. Tracer had nothing to do with the irregularities that resulted in Mr. Harrison's appointment. As such, he was entitled to rely on the apparent authority of the special prosecutor and the actual authority of the judge to accept his guilty plea. An appointment, or other grant of authority, gives the appointee at least colorable title to office and makes the appointee a de facto official. Anderson v. State of Indiana, 699 N.E.2d 257 (1998).

The Court of Appeals permitted the State to collaterally attack the acts of a de factor prosecutor. It is well established that the acts of a de facto public official may not be collaterally attacked. State v. Cook, 84 Wn.2d 342, 525 P.2d 761 (1974). In Cook, the trial court dismissed a criminal prosecution because the case was prosecuted by a limited practice legal intern. The Court said,

The legal intern was authorized to engage in a limited practice of law under license issued by this court, and he was acting under color of his appointment by the prosecuting attorney. His status, therefore, was, at the minimum, that of a de facto officer or appointee. The defendant's motion to dismiss thereby became an impermissible collateral attack upon his authority. This conclusion is mandated, by analogy, by those cases refusing to permit a collateral attack upon the authority of a de facto public official to act, whether the latter be a private attorney, a judge, a prosecuting attorney, or other de facto officer.

State v. Cook, 84 Wn.2d 342, 349-50. 525 P.2d 761 (1974). Accord

State of Indiana v. Waldon, 481 N.E.2d 1331 (1985).

In a turn-of-the-century Idaho case, after the elected prosecutor advised the court of his desire to recuse himself on a murder case, the court appointed an out-of-county attorney to represent the State. The defense objected because he lived out-of-county and had once acted as the attorney for the victim. The Court rejected these contentions saying, "We think that the trial court was justified in appointing Mr. Forney to act temporarily as the prosecuting officer of Shoshone county. But, even if we be mistaken in this, he acted as such, and his acts were those of an officer de facto, and entitled to recognition as such." State of Idaho v. Corcoran, 7 Idaho 220, 228, 61 P. 1034 (1900).

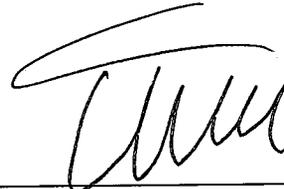
In State v. Smith, 52 Wn. App. 27, 756 P.2d 1335 (1988), an unqualified Court Commissioner signed a search warrant. The Court of Appeals found that although the Commissioner was without actual legal authority to sign the warrant, the Commissioner was acting as a de facto judge and, as such, the defendant's argument constituted an unauthorized collateral attack on the warrant. The search was sustained.

Regardless of the State's statutory arguments concerning Special Prosecutor Harrison's appointment, he was clearly acting as a de facto prosecutor and the State is now precluded from raising a collateral attack on his qualifications. This is an issue of substantial public interest and this Court should grant review.

F. Conclusion

This Court should grant review and affirm Mr. Tracer's conviction for DUI.

Dated this 12th day of April, 2010.



---

Thomas E. Weaver  
WSBA #22488  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Appellant,

v.

RICHARD CHARLES TRACER,

Respondent.

No. 37812-4-II

(Consolidated with 37939-2-II and 37892-2-II)

PUBLISHED OPINION

Quinn-Brintnall, J. — According to his defense attorney, on May 25, 2007, Richard Charles Tracer collided with another vehicle after the car he was driving was hit by a meteor. Tracer's counsel told the Jefferson County Superior Court that because it was the meteor and not Tracer's .13 blood alcohol level that caused the collision, the special deputy prosecutor appointed to handle the case had agreed to allow Tracer to plead guilty to driving while under the influence (DUI). When the special prosecutor<sup>1</sup> appointed to handle the case did not appear, Superior Court Judge Craddock Verser appointed a local defense counsel special deputy prosecutor for the case directing that he make the motions necessary to accept Tracer's proffered guilty plea. Jefferson County Prosecutor Juelanne Dalzell appeals from the judgment and sentence entered on Tracer's

---

<sup>1</sup> Because Tracer is the son of a Jefferson County Sheriff's office employee, the Jefferson County Prosecutor, Juleanne Dalzell appointed a special prosecutor.

guilty plea to DUI with a blood alcohol content (BAC) of less than .15.

The parties present a host of novel legal issues, including (1) the State's right to appeal; (2) limits on the judicial appointment of special prosecutors, and the qualifications, authority, and compensation of judicially appointed special prosecutors; and (3) whether principles of due process and double jeopardy prohibit remand for further proceedings in this case. We hold that (1) the State has a right to appellate review of the removal without notice of a duly appointed special deputy prosecuting attorney as well as the substitution of a defense attorney to perform special prosecuting attorney duties in accord with the trial court's directions; (2) the trial court lacked authority to appoint the substitute special prosecuting attorney in this case and to award him compensation; and (3) because the actions of the improperly appointed special prosecutor were conducted without lawful authority, neither due process nor double jeopardy prohibit a remand for further proceedings before a different trial judge. Accordingly, we reverse and remand.

#### FACTS

According to Tracer's defense counsel, an accident reconstructionist determined that on May 25, 2007, Tracer collided with another vehicle after the car he was driving was hit by a meteor. Defense counsel acknowledged that Tracer's BAC level measured .13; nevertheless, she told Judge Verser that because it was the meteor and not the alcohol that caused the collision, the State's special deputy prosecutor had agreed to reduce Tracer's charges from vehicular assault to DUI in exchange for Tracer's plea of guilty.

Tracer, who is the son of a Jefferson County Sheriff's office employee, and his defense counsel appeared in Jefferson County Superior Court to enter a guilty plea to a reduced charge of

DUI under BAC level .15 on May 9, 2008; but the special prosecutor, Andrea Vingo, did not appear that day. Instead, Ted DeBray, a duly authorized deputy for the elected prosecuting attorney Dalzell, appeared and requested that the matter be set over for one week to allow Vingo to continue to represent the State in the matter. Tracer objected to the continuance, arguing that he had a job offer that was contingent on his resolving the matter that day and that he was “prepared to plead guilty to a DUI with a breath test/blood test below [BAC level] .15.” Clerk’s Papers (CP) at 89.

The trial court denied the State’s motion for a one-week continuance. It appointed Noah Harrison, a criminal defense attorney who happened to be in the courtroom representing defendants in three other matters, as a special deputy prosecuting attorney to represent the State at a hearing, to be held that afternoon, at which Tracer would enter a guilty plea to the reduced DUI charge. At that hearing, the trial court directed Harrison as follows:

[COURT]: Mr. Harrison[,] is the state orally moving to amend the information to charge driving while under the influence with a breathalyzer of less than [BAC level] .15.

HARRISON: I do, your honor, I make that motion.

CP at 96.

In his statement to the trial court in support of the plea, Harrison did not indicate that he had been in contact with the victim, *see* RCW 9.94A.421, nor did he recommend that mandatory restitution be set at a later date. He requested \$314.08 in restitution to law enforcement. He expressly declined to recommend that Tracer be placed on probation and suggested that “the court might consider a deferred sentence in this matter to give Mr. Tracer the opportunity to keep this off his record and show the court that this was an anomaly.”<sup>2</sup> CP at 93.

---

<sup>2</sup> We note that as a serious traffic offense, the trial court was required to report Tracer’s

The trial court initially seemed to decline Harrison's suggestion that it impose a suspended sentence, but it then sentenced Tracer to 5 days plus a suspended sentence of 360 days if he did not pay his financial obligations within 24 months, stating, "if you get this paid off that's all the court care[s] about." CP at 98. It set a review hearing 10 months later to determine whether Tracer's driver's license would be administratively suspended; according to the trial court, "if the legal financial obligations are fairly close, *if they are close to being paid I'll suspend.*" CP at 97 (emphasis added). The trial court then said to Tracer, "Well good luck to you. I think this . . . I'm glad it worked out this way. I'm glad this wasn't your fault but it certainly could have been." CP at 98.

A week later, the State filed an emergency motion to reconsider the trial court's removal of Vingo, appointment of Harrison, and all subsequent actions in the case, including its acceptance of Tracer's guilty plea. Specifically, the State argued that the trial court had exceeded its statutory authority to appoint special prosecutors under former RCW 36.27.030 (1963) and it had, therefore, violated the separation of powers doctrine. The State further argued that Harrison was not qualified to serve as a prosecutor because his representation of other criminal defendants in the jurisdiction created a conflict of interest with the State.

Finally, the State submitted a declaration from Vingo stating that, while she had "had no problem with" amending the charges to DUI the night before the plea hearing, she "was noncommittal as to all the details of the proposed resolution." CP at 134. According to Vingo, she was ill when she awoke the next morning so did not attend the May 9 hearing; nonetheless,

---

conviction to the Department of Licensing within 10 days of entry of the judgment and sentence. See former RCW 46.20.270 (2006).

she would not have been able to reduce the charges that day because she had not been able to communicate with the victim, as RCW 9.94A.421 required. Tracer's attorney filed his own declaration disputing Vingo's account. He indicated that he did not request an amendment to the charges; rather, after months of negotiations, Vingo voluntarily offered to amend the charge to DUI. He further declared that on May 8, Vingo agreed to standard DUI first time offense penalties and indicated that she would complete the paperwork before the hearing scheduled for the following day. Additionally, Tracer's attorney stated that Vingo did not inform him of any "formalities" that prevented her from amending the DUI charge.

The trial court set the hearing on the State's emergency motion after the 30-day appeal deadline for the judgment and sentence. To avoid missing the appeal deadline, the State filed its notice of appeal before the hearing on the emergency motion.

In the meantime, Harrison filed a motion for compensation under former RCW 36.27.030. His request for \$1,000 (five hours at \$200 per hour) included time spent several days after the plea hearing calling the Washington State Bar Association (WSBA) ethics hotline. The State objected to Harrison's fee request, arguing that Harrison's performance as a prosecutor had been deficient and that, because any compensation would come out of Dalzell's salary, former RCW 36.27.030 provided she had a due process right to actual notice and an opportunity to be heard regarding the amount of the fee. The State offered a "certification" by a senior deputy prosecutor in King County that described prosecutorial standards of practice and concluded that Harrison had failed to meet them. The State also offered Dalzell's declaration stating that her hourly salary with benefits was only \$56.61 and argued that Harrison's compensation should at least be limited to that amount.

The trial court denied the State's emergency motion, ruling that its appointment of Harrison fell within the scope of former RCW 36.27.030 because Vingo was "any prosecuting attorney" and she had failed to attend a court session. Report of Proceedings (RP) (June 13, 2008) at 19. It explicitly declined to conclude that the entire Jefferson County Prosecuting Attorney's Office was unable to perform its duties because of a conflict of interest. The State appealed from this ruling.

The trial court subsequently granted Harrison's fee request as well, albeit at a lower hourly rate. It used the hourly rate given by "conflict counsel," or \$65, for a total of \$325. RP (June 27, 2008) at 7. The trial court also ruled that the county would pay rather than taking the funds out of Dalzell's salary. The State filed a notice of appeal from this ruling, which we consolidated with the other two appeals from the judgment and denial of the motion to vacate judgment.

## ANALYSIS

### Appealability

As a preliminary matter, Tracer argues that the trial court's denial of the State's motion to vacate the judgment is not appealable under RAP 2.2(b). There are two requirements for a superior court decision to be appealable by the State in a criminal case: (1) the decision must fall within a category enumerated in RAP 2.2(b)(1) through (6), and (2) the appeal must not place the defendant in double jeopardy. RAP 2.2(b).

Under the plain language of RAP 2.2(b)(1), the State may appeal from

[a] decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).

Here, the State's appeal from the judgment arising from Tracer's guilty plea falls within the scope of RAP 2.2(b)(1). The trial court's actions discontinued prosecution of the vehicular assault charge and determined the resolution of that charge by a means other than a judgment or verdict of not guilty.

Moreover, the non-exclusive language in RAP 2.2(b)(1) allows the State to appeal in extraordinary circumstances. *See, e.g., State v. Whitney*, 69 Wn.2d 256, 260-61, 418 P.2d 143 (1966) (interlocutory review granted to correct patently erroneous construction of statute likely to recur, which deprived the State of a long-accepted, highly useful and reliable means of establishing responsibility for a crime). In cases where the public has an important and justified interest in the proper administration of criminal justice and there is a serious question as to whether the appealed conduct interfered with the legitimate prosecution of criminal cases, RAP 2.2(b)(1) does not preclude the State's appeal.<sup>3</sup> *See also* RAP 1.2(a) ("These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.").

Here, the State appeals the trial court's appointment of an attorney to follow the trial court's express direction that the appointed attorney amend the information to facilitate the court's acceptance of Tracer's guilty plea to a reduced charge. Under these unique circumstances, the State has amply demonstrated cause to believe that the trial court so far departed from the accepted and usual course of judicial proceedings as to call for our review. *See* RAP 2.3(d)(4). *See, e.g., State v. Meacham*, No. 38548-1-II, 2010 WL 436459 (Wash. Ct. App. Feb. 9, 2010) (the trial court lacks authority to dismiss a special allegation over the State's

---

<sup>3</sup> We note that RAP 2.2(b)(1) does not preclude appeals from guilty judgments—although the cases in which the State would *want* to appeal from a guilty judgment will be very rare.

objection).

### Separation of Powers

The State's arguments hinge on the premise that a trial court's conduct in this case impinged on the constitutional principle of separation of powers. We agree.

In *State v. Ramos*, 149 Wn. App. 266, 270 n.2, 202 P.3d 383 (2009), we noted that an appellant may raise a separation of powers violation for the first time on appeal. This is not only because the separation of powers is a constitutional principle, *State v. David*, 134 Wn. App. 470, 478-79, 141 P.3d 646 (2006), *review denied*, 160 Wn.2d 1012 (2007), but also because an entity that acts in violation of the separation of powers doctrine acts without authority. *See Ramos*, 149 Wn. App. at 271.

Under separation of powers principles, the decision to determine and file appropriate charges is vested in the prosecuting attorney as a member of the executive branch. *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990); *see also State v. Walsh*, 143 Wn.2d 1, 10, 17 P.3d 591 (2001) (Alexander, C.J., concurring). Although, in the proper circumstances, trial courts have authority to dismiss charges with prejudice for prosecutorial mismanagement or misconduct under CrR 8.3(b) or without prejudice under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), trial courts do not have the authority to substitute their judgment for that of the prosecutor's. *State v. Starrish*, 86 Wn.2d 200, 205, 544 P.2d 1 (1975); *see also State v. Korum*, 157 Wn.2d 614, 655, 141 P.3d 13 (2006) (Johnson, J., concurring) (prosecutor's discretion to file charges is an executive function).

Thus, the trial court lacked authority to amend the information, sua sponte, to dismiss the vehicular assault charge and to accept Tracer's proffered guilty plea to the reduced charge of DUI

under BAC level.15. By appointing and then directing the special deputy prosecutor to perform his duties in a manner predetermined by the court, Judge Verser exceeded his authority and effectively moved to amend the information sua sponte. It is axiomatic in law that one may not do indirectly what he may not do directly. *Pierce County v. State*, 159 Wn.2d 16, 48, 148 P.3d 1002 (2006) (“All the powers of the states, as sovereign states, must always be subject to the limitations expressed in the United States Constitution . . . . What is forbidden to them, and which they cannot do directly, they should not be permitted to do by color, pretence, or oblique indirection.”) (quoting *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 516, 12 L. Ed. 535 (1848)). The trial court lacked the authority to amend the information on its own motion and was not authorized to direct the special prosecutor to do so. The motion to amend the information was invalid and Tracer remains charged with vehicular assault.

We briefly address the remaining issues.

A. Appointment of Special Prosecutor

The State argues that former RCW 36.27.030 did not provide statutory authority for appointment of a special prosecutor because (1) it was not the *elected* prosecuting attorney who had failed to appear and (2) Harrison was not “qualified” to serve as a prosecuting attorney.

The statute at issue is former RCW 36.27.030, which provides in relevant part:<sup>4</sup>

When any prosecuting attorney fails, from sickness or other cause, to attend a session of the superior court of his county, or is unable to perform his duties at such session, the court or judge may appoint some qualified person to discharge the duties of such session, and the appointee shall receive a compensation to be fixed by the court, to be deducted from the stated salary of the prosecuting attorney.

The State raises two issues with regard to the applicability of this statute to this case: (1) whether Vingo was “any prosecuting attorney” or whether that term refers only to the elected prosecuting attorney of the county, and (2) whether Harrison was “qualified” to serve as a prosecutor.

Our goal in construing a statute is to carry out the legislature’s intent. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). If a statute is unambiguous, we apply it according to its plain language. *Watson*, 146 Wn.2d at 954. But if the statute’s language is susceptible to more than one reasonable interpretation, it is ambiguous, which allows this court to look to principles of statutory construction and legislative history to discern the legislature’s intent. *Watson*, 146 Wn.2d at 955.

1. “Any Prosecuting Attorney”

The State contends that under former RCW 36.27.030, “any prosecuting attorney” means that a trial court judge may appoint a special prosecutor only if the *elected* prosecuting attorney

---

<sup>4</sup> The preceding paragraph to this section provides:

When from illness or other cause the prosecuting attorney is temporarily unable to perform his duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

Former RCW 36.27.030. Parts of the parties’ briefing suggest that the trial court appointed Harrison under this paragraph because the elected prosecuting attorney had a conflict of interest arising from Tracer’s relationship with the Jefferson County Sheriff’s Office. But the trial court explicitly stated that that was not the reason for its appointment.

fails to be available for a hearing. We disagree.

The State argues that “any prosecuting attorney” only includes the elected prosecutor because other provisions of chapter 36.27 RCW distinguish between the phrases “prosecuting attorney,” “deputy prosecuting attorney,” and “special prosecuting attorney.”

Generally, when different words are used within the same statute, courts recognize that the legislature intended separate meanings. *See State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002). Yet, in at least one other context, the Washington Supreme Court has held that a deputy prosecutor can be included in the phrase “the prosecuting attorney.” *See State v. Blake*, 71 Wn.2d 356, 359, 428 P.2d 555 (1967) (interpreting provisions of Rules for Courts of Limited Jurisdictions (CrRLJ) (former CrRLJ 2.01 and former CrRLJ 2.02 referring to “the prosecuting attorney.”) (citing RCW 36.27.040, which states, “[t]he prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal”). And the qualifying term “any” suggests that the provision applies to more than one possible prosecuting attorney.

Furthermore, to the extent that the language may be ambiguous, it is extremely unlikely that the legislature contemplated that only the elected prosecuting attorney would be responsible for “attend[ing] session[s] of the superior court.” Former RCW 36.27.030. Although we share the State’s concern that the truancy of any deputy prosecutor would justify a trial court bypassing sanctions and more conventional courtroom control procedures altogether to appoint a special prosecutor to conduct the proceeding, we conclude that the statute’s reference to “any” prosecuting attorney is not limited to the elected prosecuting attorney.

2. Harrison's Qualifications

The State argues that Harrison was not "qualified" to serve as a special prosecutor because, as an attorney for criminal defendants in concurrent litigation against the State in Jefferson County, he had a conflict of interest. We agree.

An attorney who represents criminal defendants may not contemporaneously represent the government in criminal cases. WSBA Informal Opinions 1766 (1997); A.B.A. Prosecution Function Standard 3.13(b); A.B.A. Defense Function Standard 4-3.5(g); A.B.A. Committee on Prof. Ethics & Grievances, Formal Op. 142 (1935); Utah St. Bar Ethics Advisory Opinion Committee: Opinion No. 1998-04 (1998); Wis. St. Bar Standing Committee on Prof. Ethics, Formal Opinion E-81-5, 54 Wis. Bar Bull. No. 8, at 68 (Aug. 1981); J. Burkoff, Criminal Defense Ethics 2d: Law & Liability § 6:11, at 304-07 (2005 ed.) (surveying cases); J. Hall, Professional Responsibility in Criminal Defense Practice § 13.8 at 536 (3rd ed. 2005).

The trial court here did not investigate Harrison's qualifications before conscripting him to act as a special prosecutor at the trial court's direction. We appreciate the difficult position in which the trial court's purported special prosecutor appointment placed Harrison. When Judge Verser first jokingly suggested the appointment, Harrison immediately stated, "It's a conflict." CP at 90.

Numerous courts have recognized that "[t]he interference of the Courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief." *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516, 10 L. Ed. 559 (1840); *see also Perkins v. Lukens Steel Co.*, 310 U.S. 113, 131-32, 60 S. Ct. 869, 84 L. Ed. 1108 (1940); *United States v. Bliss*, 430 F.3d 640, 650 (2d Cir. 2005); *Skwira v. United States*,

344 F.3d 64, 72 (1st Cir. 2003); *cert. denied*, 542 U.S. 903 (2004); *Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, LLC*, 176 P.3d 737, 745 (Colo. 2007); *Kolp v. Bd. of Trustees of Butte County Joint Sch. Dist. No. 111*, 102 Idaho 320, 330, 629 P.2d 1153 (1981). The functions vested solely in the executive branch prosecuting attorney include whether to initially file charges, what charges to file, and when to file them. *State v. Finch*, 137 Wn.2d 792, 809, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999); see *United States v. Nixon*, 418 U.S. 683, 693, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (“the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case”) (citing *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 19 L. Ed. 196 (1869)). Another function delegated entirely to the executive branch is deciding whether to plea bargain with a criminal defendant. *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); *State v. Crawford*, 159 Wn.2d 86, 102, 147 P.3d 1288 (2006); *State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003). See also *People v. Municipal Court*, 27 Cal. App. 3d 193, 207, 103 Cal. Rptr. 645 (1972) (when the “so-called ‘special prosecutor’ became the deputy of the judge in attempting to press forward with [a] prosecution,” this was “in clear violation of the doctrine of the separation of powers”). Because the trial court not only appointed an attorney who was not qualified to serve as a special prosecuting attorney, but also controlled and directed the special prosecutor’s representation during the case, the appointment was ineffective and the motion to amend the information invalid.

Because he was not serving as a properly appointed special prosecuting attorney, Harrison’s motion to dismiss the vehicular assault charge was invalid. Judge Verser did not appoint Harrison to use his best professional judgment and represent the State as a special deputy prosecuting attorney; he appointed Harrison and directed him to assist the court in amending the

information and accepting Tracer's proffered guilty plea to a reduced charge. As such, the trial court lacked authority to amend the information to remove the vehicular assault charge and had no authority to accept Tracer's guilty plea to a different charge. *See State v. Bowerman*, 115 Wn.2d 794, 799, 802 P.2d 116 (1990) (the defendant's right to plead guilty is limited to the crime as charged); *see also* CrR 4.2(a) (At arraignment, a defendant may plead not guilty, not guilty by reason of insanity, or guilty.).

B. De Jure / De Facto Public Official Doctrine

Tracer argues that, even if the trial court's appointment of Harrison was improper, the State may not collaterally attack the acts of a de facto prosecutor.

The de facto public official doctrine bars collateral attacks on the authority of a de facto public official to act. *State v. Cook*, 84 Wn.2d 342, 350, 525 P.2d 761 (1974). To constitute a person as an officer de facto, he must be in actual possession of the office, exercising its functions and discharging its duties under color of title. *State v. Smith*, 52 Wn. App. 27, 29, 756 P.2d 1335 (1988). Tracer argues that because the trial court appointed Harrison, he acted with "at least colorable title to office." Br. of Resp't at 18. But the prosecuting attorney's undisputed role is to select his prosecutor for any given case unless there is a valid appointment under former RCW 36.27.030. *See* former RCW 36.27.040 (2000).

We agree with the State that Harrison's motion to amend the information was void because former RCW 36.27.030 did not authorize the appointment or allow his conduct in the case to be directed by the trial court. *See* RCW 2.44.020 (if attorney appears for party without authority, court may relieve the party from the consequences of attorney's act); *see also People v. Stackpoole*, 144 Mich. App. 291, 375 N.W.2d 419 (1985) (unauthorized prosecutor's dismissal of

case was not binding on real prosecutor's office); *Smith v. State*, 42 Okla. Crim. 308, 275 P. 1071 (1929); *Brunty v. Smith*, 22 Va. App. 191, 196, 468 S.E.2d 161 (1996).

C. Compensation

The State maintains that the trial court improperly awarded Harrison's special prosecuting attorney fees. Harrison did not file a response brief on this subject and he has relinquished his right to be heard.

Under former RCW 36.27.030, a special prosecuting attorney is entitled to "compensation to be fixed by the court, to be deducted from the stated salary of the prosecuting attorney." Generally, if appointment of a special prosecutor was improper, the unauthorized attorney is not entitled to fees under former RCW 36.27.030. *See Osborn v. Grant County*, 130 Wn.2d 615, 628, 926 P.2d 911 (1996). Accordingly, we vacate the trial court's award of fees to Harrison.

Authority to remand

A. Double Jeopardy

Tracer contends that once the trial court accepted his guilty plea, the double jeopardy clause barred the State's requested relief. Double jeopardy is implicated in appeals where the government seeks to subject the defendant to a second trial for the same offense. *See United States v. Scott*, 437 U.S. 82, 87, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978). Tracer argues that remanding for trial on the original vehicular assault charge would violate his right against double jeopardy for the same offense because jeopardy attached when the trial court accepted his guilty plea. We disagree.

The prosecutor and the defendant are the only parties to a plea agreement. *State v. Pouncey*, 29 Wn. App. 629, 935-36, 630 P.2d 932, review denied, 96 Wn.2d 1009 (1981). "The

judge's role is not that of a party to the negotiation but rather as an examiner to assure that the plea procedure is characterized by fairness and candor." *State v. Tourtellotte*, 88 Wn.2d 579, 583, 564 P.2d 799 (1977). Although the superior court has some latitude in conducting the proceedings before it, that latitude does not extend to engaging in plea negotiations, appointing special prosecutors and directing them in the manner in which to conduct their duties so as to affect the outcome of those negotiations, or using that special prosecutor to alter the charging documents duly filed before it to effectuate the agreement.

Accordingly here, the trial court accepted Tracer's guilty plea to an invalid amended information. Because Harrison's motion to amend the information was done without lawful authority, it is void and because Tracer cannot bargain with the court to accept a guilty plea to a portion of the charges filed in the information, Tracer remains charged with vehicular assault. *Bowerman*, 115 Wn.2d at 800-01.

B. Due Process

Tracer argues that he has a due process right to the benefit of his plea agreement. A defendant does not have a constitutional right to plea bargain, *see Weatherford*, 429 U.S. at 561, and, thus, the failure to enforce an alleged plea *proposal* cannot violate substantive due process. *State v. Yates*, 161 Wn.2d 714, 741, 168 P.3d 359 (2007), *cert. denied*, 128 S. Ct. 2964 (2008). Absent some detrimental reliance by the defendant, the State may withdraw from any plea agreement before the actual entry of a guilty plea, which constitutes acceptance by both parties. *Yates*, 161 Wn.2d at 741. The trial court lacked authority to amend the information or to accept Tracer's guilty plea to a lesser charge and the judgment and sentence based thereon is void. Tracer has not demonstrated any detrimental reliance either before or after the hearing at issue in

this case that would bind this court to perpetuate the error that the trial court committed below.

C. Remand

Assuming a plea agreement between Vingo and Tracer existed, the State, through a duly appointed special prosecuting attorney, is technically free to withdraw it. We note, however, that the record contains no suggestion that Tracer contributed to the circumstances that form the basis of this appeal. It is tempting to resolve the matter on equitable grounds and allow Tracer's plea to stand. But such a decision would contribute to the further misuse of judicial authority in violation of the separation of powers doctrine and ignore the law. We leave the decision of the proper disposition of this case to the sound independent exercise of the judgment and duties of a properly appointed qualified special deputy prosecuting attorney and remand for further proceedings consistent with this opinion before a different trial judge.

---

QUINN-BRINTNALL, J.

I concur:

---

HOUGHTON, J.

Consol. Nos. 37812-4-II / 37939-2-II / 37892-2-II

Penoyar, A.C.J. (concurrency) -- I concur in the majority's result. I agree that the trial court improperly directed Special Deputy Prosecutor Noah Harrison's exercise of discretion.

Penoyar, A.C.J.