

SUPREME COURT NO. 85789-0
(consolidated with 85947-7)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner

v.

GEORGE RYAN

Respondent.

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

The Honorable Richard Eadie, Judge

SECOND SUPPLEMENTAL BRIEF OF RESPONDENT

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A. INTRODUCTION

The Court heard argument in this matter January 12, 2012. At argument the Honorable Steven C. González directed supplemental briefing on whether double jeopardy precludes retrial on sentence enhancements.¹ This brief is intended to comply with that directive.

B. ISSUE PRESENTED

Do double jeopardy principles preclude retrial on sentence enhancements?

C. ARGUMENT

1. DOUBLE JEOPARDY PRINCIPLES PRECLUDES RETRIAL ON SENTENCE ENHANCEMENTS.

Jury unanimity is not required to answer "no" to a special verdict concerning a sentence enhancement. State v. Bashaw, 169 Wn.2d 133, 145, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 893-95, 72 P.3d 1083 (2003). Special verdicts are final even if they are not unanimous. Goldberg, 149 Wn.2d at 895.

When an ultimate factual issue has been decided by a valid final verdict, that same issue may not be litigated again in a future lawsuit between the same parties. Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Known by the "awkward phrase"

¹ www.tvw.org/index.php?option=com_tvwplayer&eventID=2012010008B at 31:28-31:37 and 37:14-37:17.

collateral estoppel, this rule nonetheless embodies a vitally important constitutional protection against double jeopardy. Id. at 443, 445. Simply put, collateral estoppel precludes one jury from reaching a conclusion directly contrary to that of a previous jury. Dowling v. United States, 493 U.S. 342, 348, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). A second prosecution violates double jeopardy when the ultimate issue in the second trial was already decided by a previous jury. Id.

Washington's double jeopardy clause, article I, section 9 of the Washington Constitution is coextensive with the federal double jeopardy protection found in the Fifth Amendment and is given the same interpretation by the courts. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Application of collateral estoppel is a question of law subject to de novo review on appeal. State v. Eggleston, 164 Wn.2d 61, 70, 187 P.3d 233 (2008) (citing State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007)).

Washington case law states the test: Collateral estoppel precludes relitigation of an issue if these four questions are answered affirmatively:

- (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?
- (2) Was there a final judgment on the merits?
- (3) Was the party against whom the plea of collateral estoppel is asserted a party or in privity with the party to the prior adjudication?
- (4) Will the application of the doctrine work not an

injustice on the party against whom the doctrine is to be applied?

State v. Tili, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003). With scant Washington case law on the collateral estoppel prong of double jeopardy, Washington courts look to federal decisions for guidance. State v. Eggleston, 129 Wn. App. 418, 118 P.3d 959 (2005), aff'd in part, rev'd in part, 164 Wn.2d 61 (2008).

The seminal case is Ashe v. Swenson. In that case, six men were robbed at gunpoint during a poker game. Ashe, 397 U.S. at 437. Ashe was first tried for robbery of one of the poker players. Id. at 438. Four witnesses testified they were robbed and their assailants were armed, but their identification of Ashe as one of the robbers was weak. Id. Defense cross-examination was limited to exposing the weaknesses in the witnesses' identification. Id. Ashe was acquitted. Id. at 439. Six weeks later, Ashe was tried for robbery of a second poker player. Id. at 439-40. The evidence was largely the same but the identification testimony was stronger. Id. at 440. This time, Ashe was convicted. Id.

The court held that "straightforward application of the federal rule [of collateral estoppel] to the present case can lead to but one conclusion," namely, that the second prosecution was "wholly impermissible." Id. at 445. The court reasoned that the record was devoid of any indication from

which the first jury could have found there was no robbery. The “single rationally conceivable issue in dispute” was whether Ashe was one of the robbers. Id. “[T]he State could not present the same or different identification evidence in a second prosecution for the robbery . . . in the hope that a different jury might find that evidence more convincing.” Id. at 446.

In the context of whether the factual predicate necessary for a sentence enhancement exists, the only rationally conceivable disputed issue is whether the State met its burden to prove its existence beyond a reasonable doubt. See e.g., CP 79 (Instruction 18 informing Ryan's jury "you must unanimously be satisfied beyond a reasonable doubt" to answer "yes" on the special verdict forms). Once that issue is resolved against the State by entry of a verdict rejecting it, the State cannot drag the defendant into court again in hopes that a new jury will decide the issue differently. Double jeopardy principles preclude it.

2. RYAN ADOPTS BY REFERENCE ARGUMENTS PRESENTED IN PETITIONER NUNEZ'S SECOND SUPPLEMENTAL BRIEF.

In accordance with RAP 10.1(g), Ryan adopts the arguments presented in the second supplemental brief filed by Petitioner Nunez.

D. CONCLUSION

For the reasons stated, this Court should conclude double jeopardy principles preclude retrial on sentence enhancement once there is a valid verdict rejecting it.

DATED this 31st day of January 2012.

Respectfully submitted,

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)	
v.)	NO. 85789-0
)	CONSOLIDATED WITH 85947-7
GEORGE RYAN,)	
)	
Respondent.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JANUARY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE SECOND SUPPLEMENTAL BRIEF OF RESPONDENT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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x Patrick Mayovsky