

No. 63810-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Personal Restraint Petition of

WAYNE NEWLUN,

Petitioner.

PETITIONER'S REPLY BRIEF AND ANSWER TO
SNOHOMISH COUNTY'S MOTION TO STRIKE

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TABLE OF CONTENTS

A. **ARGUMENT IN REPLY** 1

THE RECORD ON REVIEW ESTABLISHES THE DOUBLE
JEOPARDY VIOLATION WITHOUT THE NEED FOR
FURTHER PROCEEDINGS 1

1. Reply to Snohomish County 2

a. The record on review is sufficient to establish the double
jeopardy violation 2

b. This Court should deny Snohomish County's motion to
strike 5

2. Reply to King County 6

B. **CONCLUSION** 10

TABLE OF AUTHORITIES

United States Supreme Court

Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195
(1975) (per curiam) 7

United States v. Broce, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d
927 (1989) 6, 7, 8, 9

Washington Supreme Court

State v. Knight, 162 Wn.2d 806, 174 P.3d 1167 (2008) 4

Washington Court of Appeals

State v. Knight, 134 Wn. App. 103, 138 P.3d 1114 (2006), aff'd, 174
P.3d 1167 (2008) 3, 5

Other Authorities

United States v. Makres, 937 F.2d 1282 (7th Cir. 1991) 8

United States v. Montilla, 870 F.2d 549 (9th Cir. 1989)..... 8, 9

A. ARGUMENT IN REPLY

THE RECORD ON REVIEW ESTABLISHES THE DOUBLE
JEOPARDY VIOLATION WITHOUT THE NEED FOR
FURTHER PROCEEDINGS

Neither Snohomish County nor King County contests that Mr. Newlun was punished multiple times for the same offense in violation of the Double Jeopardy Clause. Instead, both counties argue that Mr. Newlun waived his right to raise the double jeopardy challenge by pleading guilty to the crimes. But a defendant may challenge his convictions on double jeopardy grounds even if he pled guilty to the crimes, as long as the record on review is sufficient to establish the violations without the need for further proceedings. Here, the double jeopardy violations are plain from the record on review and no further proceedings are necessary to establish the necessary facts. Therefore, Mr. Newlun may raise the double jeopardy claim and is entitled to relief.

In addition, this Court should deny Snohomish County's motion to strike the documents contained in Appendix A and B of Petitioner's Reply to Respondent's Reply Brief. As discussed in Petitioner's Supplemental Brief and more fully below, the facts alleged in those documents were expressly incorporated into the

guilty plea in Snohomish County cause number 06-1-00241-0.

Therefore, they are part of the record on review.

1. Reply to Snohomish County.

a. The record on review is sufficient to establish the double jeopardy violation. Snohomish County acknowledges that the record in cause number 06-1-00648-2 identifies the piece of identification possessed by Mr. Newlun as Guy Randal's driver's license. But Snohomish County argues that the record before the trial court in cause number 06-1-00241-0 is insufficient because it is not specific as to what kind of identification Mr. Newlun possessed. Snohomish County Supplemental Brief at 8. Therefore, according to Snohomish County, Mr. Newlun cannot establish a double jeopardy violation from the record on review.

This argument must be rejected. The record in cause number 06-1-00241-0 establishes that Mr. Newlun was convicted in that case, as in cause number 06-1-00648-2, for possessing and using Guy Randal's driver's license. As argued in Petitioner's Supplemental Brief, the guilty plea statement in number 06-1-00241-0 expressly incorporated the allegations contained in the affidavit of probable cause. Snohomish County Response to PRP, Exhibit 7 at 10, 12. The affidavit of probable cause alleged that

Newlun presented "Guy Randall's ID," with Newlun's picture on it, at a Lowe's Home Improvement store in Bellevue for the purpose of renting a car. Snohomish County Response to PRP, Exhibit 6 at 2. The allegations in the affidavit of probable cause were "taken from police reports and witness statements provided by the Everett and Bothell Police Departments." Id. at 1. One of those witness statements, provided by Jonathan Graham, a loss prevention employee of the Bellevue Lowe's, established that the piece of identification used by the theft suspect was a "WA State driver's license" in the name of "Guy Randal." Petitioner's Reply to Snohomish County's Response to PRP, Appendix B. The police report also included a photocopy of "Guy Randal's" driver's license used by the suspect. Petitioner's Reply to Snohomish County's Response to PRP, Appendix A.

In State v. Knight, 134 Wn. App. 103, 110, 138 P.3d 1114 (2006), aff'd, 174 P.3d 1167 (2008), this Court addressed a similar claim and held the record on review included police reports referenced in the defendant's guilty plea. Knight pled guilty to one count of second degree murder, one count of conspiracy to commit first degree burglary, and one count of conspiracy to commit second degree robbery. Id. at 105. On appeal, she claimed the

record supported only one conspiracy conviction—conspiracy to commit second degree robbery. Id. This Court agreed, explaining that

[t]he police reports that were referenced in Ms. Knight's guilty plea describe an earlier plan to enter Mr. Cole's hotel room with the intent to rob (the basis for the count of conspiracy to commit first degree burglary), but this plan was subsumed in the overall scheme that comprised the single criminal conspiracy.

Id. at 110. In other words, the "record" on review included the police reports referenced in the guilty plea.

In State v. Knight, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008), the Washington Supreme Court affirmed, explaining, "[a]lthough a guilty plea can waive double jeopardy protections where the violation is not apparent from the appellate record, the Court of Appeals found a double jeopardy violation here, and the court must provide a remedy."

As in Knight, the "record" on review in Mr. Newlun's case includes the police reports and witness statements referenced in the affidavit of probable cause. Snohomish County Response to PRP, Exhibit 6 at 1. Those documents plainly show Mr. Newlun was prosecuted and convicted twice in Snohomish County of identity theft for using Guy Randal's driver's license. He is therefore entitled to relief from the double jeopardy violation.

b. This Court should deny Snohomish County's motion to strike. Snohomish County filed a motion requesting that this Court strike the documents contained in Appendix A and B to Petitioner's Reply to Respondent's Reply Brief filed on October 21, 2009. In the motion, Snohomish County argues that those documents were not made a part of the record at the time of the plea or sentence and are therefore not part of the record on review. But as stated, the allegations contained in the police reports and witness statements were expressly referenced in the affidavit of probable cause. Snohomish County Response to PRP, Exhibit 6 at 1 ("The following information is taken from police reports and witness statements provided by the Everett and Bothell Police Departments."). The affidavit of probable cause, in turn, was expressly incorporated into the guilty plea statement. Snohomish County Response to PRP, Exhibit 7 at 10, 12. In Knight, 134 Wn. App. at 110, this Court affirmed that documents such as police reports, when referenced in the guilty plea, are part of the "record" on review.

In sum, the "record" on review includes Appendix A and B of Petitioner's Reply to Respondent's Reply Brief. This Court should therefore deny the State's motion to strike.

2. Reply to King County. King County argues that the "record" on review is insufficient to establish a double jeopardy violation, because the violation is not apparent from the documents that the King County trial judge possessed at the time of the plea. King County notes that the judge was provided with documents showing that Mr. Newlun was found guilty of multiple counts of identity theft in three Snohomish County cases. King County also does not dispute that the record in the Snohomish County cases was sufficient at the time of the King County plea to demonstrate a double jeopardy violation. But King County argues that because the King County trial judge was not aware of the necessary facts, the double jeopardy claim fails.

This argument must be rejected. The question is whether the double jeopardy claim is apparent from the record as it existed at the time of the plea without the need for further proceedings to establish the necessary facts. See United States v. Broce, 488 U.S. 563, 575-76, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). Here, the double jeopardy violation is apparent from the record as it existed at the time of the King County plea. As discussed, the record in the Snohomish County cases shows that Mr. Newlun was prosecuted and convicted in that county of identity theft for

possessing Guy Randal's driver's license. Once those convictions were entered, King County was "precluded by the United States Constitution from haling [Mr. Newlun] into court" on a charge of identity theft for possessing the same piece of identification.

Menna v. New York, 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam). The record as it existed at the time of the King County plea is sufficient to establish the double jeopardy violation; no further proceedings are necessary to establish the necessary facts. Therefore, Mr. Newlun did not waive his right to bring the double jeopardy claim by pleading guilty to the charge.

This case is therefore distinguishable from Broce, 488 U.S. 563. In Broce, respondents pled guilty and were convicted of two separate counts of conspiracy but contended in a collateral attack that only one conspiracy existed and the multiple convictions violated the Double Jeopardy Clause. 488 U.S. at 565. The indictment alleged two distinct agreements, and thus, "[w]hen respondents pleaded guilty to two charges of conspiracy on the explicit premise of two agreements which started at different times and embraced separate objectives, they conceded guilt to two separate offenses." Id. at 571. The only way respondents could establish the existence of a single agreement was to seek further

proceedings at which to expand the record with new evidence. Id. at 575. Therefore, because the claim could not be established on the existing record, it was waived by the guilty plea. Id. at 575-76.

In contrast to Broce, in this case, no further proceedings are necessary, because the necessary facts are apparent from the existing record.

The two federal cases on which King County relies support Mr. Newlun's position. See United States v. Makres, 937 F.2d 1282 (7th Cir. 1991); United States v. Montilla, 870 F.2d 549 (9th Cir. 1989). In Makres, defendant pled guilty to five counts of forging endorsements on and cashing five checks that he had stolen from his employer, which were transported in interstate commerce as a result of the normal check clearing process. Makres, 937 F.2d at 1283. He then filed a collateral attack, arguing the unit of prosecution was the number of transportations involved, not the number of securities involved. Id. at 1284. He therefore requested an evidentiary hearing to establish whether there had been only one interstate transportation involving all three checks. Id. The Seventh Circuit held Makres' "attempt to seek an evidentiary hearing to determine if his 1982 convictions violated the double jeopardy clause [wa]s precluded by the express holding of the

Supreme Court in [Broce]." Id. at 1285. By arguing that the claim could be established only through an evidentiary hearing, Makres "concede[d] that no *facial* double jeopardy violation exist[ed]." Id. at 1286.

Similarly, in Montilla, defendant pled guilty but appealed her conviction, arguing outrageous government conduct deprived her of her constitutional rights. United States v. Montilla, 870 F.2d 549 (9th Cir. 1989). Citing Broce, the Ninth Circuit explained the question in determining whether Montilla waived her right to raise the claim was whether "the judge could determine at the time of accepting the plea, from the face of the indictment or from the record that the government lacked the power to bring the indictment." Id. at 552. Because Montilla could not prove her allegations without an evidentiary hearing, she waived her right to make the claim. Id. at 553.

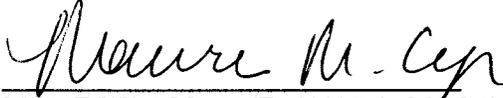
Thus, the cited cases uniformly draw a distinction between whether a claim can be determined from the record on review, or whether further proceedings are necessary to establish the necessary facts. Here, no further proceedings are necessary because all of the necessary facts are contained in the record and are properly before this Court. Therefore, Mr. Newlun did not waive

his right to raise the double jeopardy challenge by pleading guilty to the crimes.

B. CONCLUSION

For the reasons stated above and in his supplemental brief, Mr. Newlun requests this Court vacate his convictions entered in violation of the Double Jeopardy Clause.

Respectfully submitted this 11th day of May, 2010.


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DIVISION ONE**

IN RE THE PERSONAL RESTRAINT PETITION OF)		
)	
WAYNE NEWLUN,)	NO. 63810-6-I
)	
Petitioner.)	

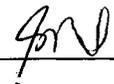
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF MAY, 2010, I CAUSED THE ORIGINAL **PETITIONER'S REPLY BRIEF AND ANSWER TO SNOHOMISH COUNTY'S MOTION TO STRIKE** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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