

64.174-3

64174-3

NO. 64174-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,

v.

DEXTER MELVIN NANCE JR.,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JUDGE RICHARD D. EADIE

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

This Court has requested supplemental briefing "addressing the impact of the Washington Supreme Court's decision in State v. Hall."¹

B. SUMMARY OF IMPACT

In Hall, the Supreme Court did not rule as Nance hoped, i.e., the Court did not definitively hold that the unit of prosecution for witness tampering is per witness, per proceeding--regardless of the number of attempts to tamper that are made. Instead, the Court indicated that when a perpetrator attempts to tamper with a particular witness, it may well constitute a new or separate unit of prosecution if the perpetrator changes strategies, means of contacting the witness, uses intermediaries to attempt to tamper with the witness, or if the perpetrator has been stopped from tampering after discovery and then resumes his tampering activity--even if the intent to tamper involves the same proceeding and same witness.

Here, Nance pled guilty to four counts of tampering with a witness. In order to raise a claim of double jeopardy after pleading

¹ ___ P.3d ___, 2010 WL 1610966 (Apr. 22, 2010).

guilty, the double jeopardy violation must be clear from the record present on appeal, or else the issue is waived. The record here does not clearly show a double jeopardy violation because Nance used many different manners, modes, intermediaries and strategies in his attempts to tamper with the witness. His claim of double jeopardy is far from clear, and thus the issue is waived.

C. ARGUMENT

In Hall, the defendant made repeated phone calls from jail to a single witness and attempted to tamper with this witness regarding his upcoming trial. A jury convicted Hall of three counts of tampering with a witness. Hall, like Nance here, argued that the unit of prosecution for witness tampering was per witness, per proceeding, regardless of the number of attempts to tamper with the same witness. The State argued the unit of prosecution was per attempt to tamper with a witness.

While the Supreme Court held that all of Hall's similar attempts to tamper with the witness constituted but one unit of prosecution, the Court did not adopt the defendant's argument. Instead, the Court articulated that it may well be a new unit of prosecution if a perpetrator "changed his strategy by, for example,

sending letters in addition to phone calls or sending intermediaries, or if he had been stopped by the State briefly and found a way to resume his witness tampering campaign"... "or other facts that may demonstrate a different course of conduct." Hall, 2010 WL 1610966 at 6. As a result of this decision, Nance's attempt to challenge his conviction, the result of a plea, is foreclosed.

A guilty plea generally insulates a defendant's conviction from collateral attack. State v. Knight, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008). When a defendant challenges his plea by raising an issue of double jeopardy, his ability to do so is limited. The Supreme Court has held that "[a]fter a guilty plea the double jeopardy violation must be clear from the record presented on appeal, or else be waived." Knight, 162 Wn.2d at 811 (citing also, United States v. Broce, 488 U.S. 563, 575-76, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989)).

Here, Nance's guilty plea constitutes a waiver of his unit of prosecution double jeopardy claim. The record before this Court does not make it clear that a double jeopardy violation has occurred.

In pleading guilty, Nance pled to real facts. CP 26. Attached to his plea is the certification for determination of probable cause.

CP 22. Each count of witness tampering occurred on a separate day. CP 19-21.

On February 6, 2009 (count I), Nance called Rachel² and instructed that he needed "Tweedy to get in contact with Raya, sit down with her have lunch or dinner and get with her to tell her not to come to court." CP 22. Raya, is Soraya Womack, the witness the defendant was attempting to tamper with--the victim in Nance's pending domestic violence trial. CP 22. In this call, Nance was attempting to have an intermediary nicely convince Soraya to absent herself from the proceedings.

Later that same day, Nance called Rachel again and this time instructed her to contact Soraya directly, telling her, "I need you tell that Bitch what to say and what to do. That's how you gotta do it." CP 23.

On February 7, 2009, (count II), Nance called Rachel and told her that "Tweedy and Dekayla," are "good friends with Raya," and that he needed them to hook up with Soraya and "tell her a bunch of bullshit like, 'Tell Raya to call the court and say that her other boyfriend beat her up and not me.'" CP 23. Later that day,

² None of the last names of the intermediaries used by Nance are included in the certification for determination of probable cause.

Nance spoke with Rochelle and told her, "Don't touch that girl."

CP 23. He said that he needed her to have Tweedy and Dekayla "sit down and be nice to" Soraya, "[m]ake her think I love her," so she would not come to court. CP 23.

On February 8, 2009 (count III), Nance then spoke to Dekayla by phone and when Dekayla asked if Nance wanted her to beat Soraya, Nance responded, "Fuck no. Hug her, kiss her, and take her out to dinner. Make sure she does not come to court." CP 23. He then instructed Dekayla to tell Soraya that he would "buy her a fucking corner house." CP 23.

On February 9, 2009 (count IV), Nance spoke with Dekayla and instructed her to "[c]all the bitch Raya--have her write a statement that it was a big misunderstanding--she was pregnant and emotional." CP 24. He instructed that Soraya's letter should be sent directly to the courthouse. CP 24. Later, Nance said that he would write a letter directly to Soraya and "tell the bitch what to do." CP 24.

Nance attempted to use four different intermediaries to tamper with Soraya. Two of them, Dekayla and Tweedy, were good friends of Soraya and were instructed to cajole Soraya into helping Nance. On another occasion they were instructed to

convince Soraya that Nance loved her in order to obtain her cooperation. On a third occasion, Dekayla was instructed to actually bribe Soraya into cooperating.

Nance also used Rochelle as an intermediary in order to obtain the cooperation of Dekayla and Tweedy. He used Rachel for the same purpose, as well as to strong-arm Soraya, having Rachel "tell that Bitch what to say and what to do."

As if these different attempts were not enough, Nance indicated that he would contact Soraya directly and "tell the bitch what to do."

Further, Nance variously wanted Soraya to lie for him, or not come to court, or to call the court and say they had the wrong guy, or to write a letter that things were blown out of proportion because she was pregnant.

Under these facts, Nance's claim of a double jeopardy violation after his plea of guilty is far from clear. As such, the issue is waived.

D. CONCLUSION

For the reasons cited above, this Court should find Nance's double jeopardy claim has been waived.

DATED this ¹⁹~~21~~ day of May, 2010.

Respectfully submitted,

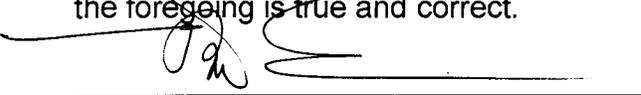
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Supplemental Brief of Respondent, in STATE V. NANCE, JR., Cause No. 64174-3-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

05/19/10
Date