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Court of Appeals  
Division I  
State of Washington

NO. 73814-3-I

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

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STATE OF WASHINGTON

Appellant

v.

STEPHEN J. HOPE,

Respondent

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REPLY BRIEF OF APPELLANT

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## **I. ARGUMENT IN REPLY**

### **A. DOUBLE JEOPARDY IS NOT VIOLATED WHEN THE STATE DID NOT REQUEST DISMISSAL OR MISTRIAL.**

The defendant is correct that double jeopardy principles bar retrial if the State “manipulate[es] the trial process by terminating the proceedings when it appears its case is weak or the jury is unlikely to convict. Br. Resp. 12; State v. Wright, 165 Wn.2d 783, 805, 203 P.3d 1027 (2009). Respondent then compares this case to Downum v. United States, a case in which the prosecutor requested mistrial (“that the jury be discharged”) because a key witness was unavailable. Br. Resp. 12-13; Downum v. United States, 372 U.S. 734, 735, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). While the legal authority cited is correct, a comparison to the facts of this case only highlights the inapplicability of that precedent to these facts.

The prosecutor in this case did not manipulate the trial process, nor did he move to terminate the proceedings. He didn’t even move for a trial recess. He requested to proceed as normal, present more information in the afternoon, and likely would have requested a recess at that time based on the advice of Deputy Poole’s doctor. RP 85-86. The court terminated the proceedings essentially on its own motion, after the defense indicated it would

be making a motion to dismiss after conducting additional research.  
RP 86, 91.

The State's immediate request was to proceed with three ready-to-testify witnesses, which the prosecutor anticipated would take the rest of the morning, to allow for Deputy Poole's doctor to provide a medical update after lunch. RP 85-86. This proposal would not have delayed the trial at all, and certainly would not have terminated it. The prosecutor *anticipated* asking for a recess into the next week depending on what Deputy Poole's doctor advised. Id. The prosecutor never had the chance to request the anticipated recess because the court precipitously dismissed the case despite both parties requesting time to brief the issue. RP 87-89, 91. To the extent the record does not reflect how long a recess Deputy Poole would have required in order to competently testify, that lack of information is attributable only to the court's unwillingness to wait a few hours for that information.

The record establishes that the State was attempting to present its case to the jury that had been empaneled and sworn, even if that required a recess into the next week. This approach is the opposite of the prosecutor-initiated mistrials in Downum and Arizona v. Washington. Br. App. 12-13; Downum, 372 U.S. at 735;

Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).

While the Court disapproved of the prosecutors' actions in those cases because it appeared they were using the "first proceeding as a trial run of his case," the same allegation is unwarranted here. See Arizona v. Washington, 434 U.S. at 508, n.24. The State's request was to continue presenting testimony to the jury that had already been selected, not to start over with a new jury. It is simply inaccurate to imply that the prosecutor was attempting to manipulate the trial process or to present his case to a second jury after a "trial run." Therefore, reversal of the trial court's dismissal order will not violate the defendant's protection against double jeopardy.

**B. A TRIAL RECESS WOULD NOT NECESSARILY HAVE REQUIRED THE SELECTION OF A NEW JURY.**

The defendant supports his claim of both double jeopardy and prejudice by unequivocally claiming that "the continuance requested by the prosecution would require picking a new jury to hear the case." Br. Resp. 13. Again, the prosecutor never requested a continuance at all; he simply predicted that he *may* seek a trial recess into the next week upon learning what Deputy

Poole's doctor had to say. RP 85-86. But even if the court had allowed the trial to proceed as requested by the prosecutor, and if ultimately Deputy Poole's doctor agreed that he would only be available to testify the next week, the record does not establish that such a delay would have required picking a new jury.

The prosecutor told the court that he was prepared to present all of the remaining State's witnesses except for Deputy Poole on the morning of July 28, 2015. Id. Had the court allowed this, only the testimony of Deputy Poole plus the three defense alibi witnesses would have remained. See RP 47-48. The likelihood is that all of those witnesses could have testified in one day, certainly no more than two. The court simply had to identify a one or two day window in which all witnesses and all jurors could return to finish the trial. The date selected for this brief window of time would not have implicated the time for trial rule, which only governs the period within which a trial must *begin*. State v. Mathews, 38 Wn. App. 180, 183, 685 P.2d 605 (1984) ("Starting the trial satisfies the purpose of a rule designed to secure a speedy trial"). The court abused its discretion by refusing to inquire into that scheduling possibility.

The further assertion by the trial court, and now the defendant, that one of the thirteen jurors was unavailable to serve

in the event of a recess was an overstated assumption that deserved further investigation. See RP 89-90; Br. Resp. 11. The juror in question said that her schedule was “controlled by doctors” and that she would have had “some difficulty” serving for any trial which lasted beyond the four consecutive days between Monday and Thursday of the current week. RP 90. But even a trial recess would not have demanded continuous service through the next week; it would have involved the jury returning to their regular lives between Wednesday and Friday of the current week, then returning for one (possibly two) days when Deputy Poole’s condition improved. This additional time could have been used for each juror to resolve potential difficulties with employers, and is a much less onerous demand on their service than some jurors are asked to make for complex trials lasting multiple consecutive weeks. The court’s refusal to further investigate the jury’s availability left the record lacking any evidence that a new jury would be required if the trial went into the next week.

While the court indicated that one of the 13 selected jurors “expressed some difficulty” with serving beyond the court’s prediction of four days, this difficulty was far from a certainty. RP 90. Besides, even if one of the 13 jurors did have a scheduling

conflict with the next week, that is exactly why the court empaneled a 13<sup>th</sup> alternate juror. The court seemed to acknowledge that, but still refused to look into the feasibility of a recess into the next week. Id.

On this record the defendant's claim of both double jeopardy and prejudice fails because it relies on the overstated and unverified assertion that a recess would have necessarily required picking a new jury. Reviewing courts demand trial courts investigate intermediate remedial steps before invoking the remedy of last resort – dismissal. State v. Koerber, 85 Wn. App. 1, 4, 931 P.2d 904 (1996). The record's absence of any meaningful inquiry into intermediate remedies can only be attributed to the court's refusal to consider them. This refusal was an abuse of discretion.

**C. THERE WOULD HAVE BEEN NO PREJUDICE ASSOCIATED WITH A TRIAL RECESS.**

The defendant on appeal has abandoned the arguments offered at trial, that a recess would have prejudiced the defendant due to the difficulty of subpoenaing the three defense witnesses for a new date, or that the defendant suffered prejudice because taxpayer dollars were used to transport his own witnesses to the trial. Compare CP 28-30; RP 86-88, with Br. Resp. 7-16.

The requirement for a showing of prejudice under CrRLJ 8.3(b) is not satisfied merely by expense, inconvenience, or additional delay within the speedy trial period; the misconduct must interfere with the defendant's ability to present his case.

State v. Chichester, 141 Wn. App. 446, 457, 170 P.3d 583 (2007).

The only assertion of prejudice on appeal is that a recess would have required selection of a new jury, thereby prejudicing the defendant's right to be free from double jeopardy. Br. Resp. 11-12. As stated above, the argument fails two ways. It was far from certain that a recess would have required selection of a new jury, and even if it had, double jeopardy is not implicated when the State did not act in bad faith or move for a mistrial. The defendant's effort to show any prejudice resulting from a potential trial recess falls short.

The defendant next claims that a showing of prejudice is not required because there are grounds beyond CrR 8.3(b) on which a trial court can dismiss a case. Br. Resp. 13-16; State v. Chichester, 141 Wn. App. 446. The basis for dismissal in Chichester was that the prosecutors' office policy of insisting that new trial attorneys receive direct supervision in their first trials was not a valid excuse to explain a shortage of prosecutors on the day of trial. Chichester, 141 Wn. App. at 451. The court held that excuse insufficient to

establish good cause for a continuance and recognized that any other ruling would effectively cede control of the court's calendar to the State. Id. at 458.

In contrast, if the prosecutor in this case had known about Deputy Poole's injury at the trial call hearing and moved for a continuance before a jury was selected, surely the court would have found good cause to continue the case. See State v. Nguyen, 68 Wn. App. 906, 914, 847 P.2d 936 (1993). The defendant does not argue otherwise.

Further, the Chichester trial court was willing to consider alternatives to dismissal, and in fact did so. Chichester, 141 Wn. App. at 456. The court in this case conducted no such inquiry, but was required to do so. State v. Koerber, 85 Wn. App. 1, 4, 931 P.2d 904 (1996).

The primary difference between this case and Chichester was that the basis for the requested continuance in Chichester was "the State's purposeful disagreement with the court's calendar policy, not a minor act of negligence by a third party." Chichester, 141 Wn. App. at 456. Here, the reasons underlying the potential continuance arose from Deputy Poole's unanticipated injury requiring surgical intervention, not a willful clash of authority

between the prosecutor and the trial court. The medical basis for a witness's unavailability, supported by the advice of a doctor, outweighs the competing demands on that witness by the legal system. See State v. Whisler, 61 Wn. App. 126, 138-139, 810 P.2d 540 (1991); In re Disciplinary Proceeding Against Sanaj, 167 Wn.2d 740, 751, 225 P.3d 203 (2009)(hearing officer abused his discretion by refusing to grant a continuance based on attorney's medical condition).

The most that can be said in this case is that Deputy Poole committed a "minor act of negligence" by failing to inform the prosecutor about his medical condition in a more timely fashion. The circumstances fell well short of justifying the extreme remedy of dismissal, and the trial court had a duty to further investigate intermediate measures to avoid that result. The two most obvious intermediate measures were to further inquire if Juror #11 could use Wednesday through Friday of the current week to arrange for an additional day of service in the next week; or to simply excuse that juror and seat the alternate juror. The trial court abrogated its duty by precipitously dismissing the case without considering those possibilities. The facts in this case are fundamentally different than

those considered by the court in Chichester. The result should also be different.

## II. CONCLUSION

Based on the above cases, the order of dismissal should be reversed and the case should be remanded for retrial.

Respectfully submitted on January 29, 2016.

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DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 29<sup>th</sup> day of January, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

REPLY BRIEF OF APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Chris Gibson, Nielsen, Broman & Koch, [gibsonc@nwattorney.net](mailto:gibsonc@nwattorney.net); and [Sloanej@nwattorney.net](mailto:Sloanej@nwattorney.net).

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

Dated this 29<sup>th</sup> day of January, 2016, at the Snohomish County Office.

  
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