69226-7

69226-7

NO. 69226-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL REEDER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY.

1. Mr. Reeder's trial attorney was burdened with a conflict of interest that was not mitigated by sequestration.

It was undisputed that attorney Roberson was contacted for legal advice by Ms. Cuzak regarding related mortgage fraud allegations. Furthermore, as the prosecutor notes, "'[e]ven a short consultation may suffice to create an attorney/client relationship....'" BOR at 9, quoting Teja v. Saran, 68 Wn.App. 793, 795-96, 846 P.2d 1375, rev. den., 122 Wn.2d 1008 (1993); 4/18/12RP 7-8. RPC 1.18 extends these duties of confidentiality and loyalty to "prospective clients" even where the initial consultations do not lead to a formal attorney-client relationship. Certainly then the fact Mr. Roberson did not create a file is no significance, therefore, in evaluating his continuing duty to Ms. Cuzak.

Furthermore, while Ms. Cuzak may have reported that she did not believe there was an ongoing attorney-client relationship between herself and Mr. Roberson at the time she contacted the prosecutor's office, that does not address whether there was a

previous relationship which continued to burden Mr. Roberson and his new firm when this prosecution was undertaken. RPC 1.9, 1.10.

The Rules of Professional Conduct serve to broadly define what constitutes the attorney-client relationship and those obligations are in turn imputed to the members of Mr. Roberson's new firm. What is critical is that pretrial discovery indicated Ms. Cuzak was involved in the related mortgage fraud case being prosecuted at the same time. 4/18/12RP 3. Although the scope of Ms. Cuzak's involvement was certainly disputed, it appeared the State alleged Mr. Reeder "used money from one source to pay off the other sources" and Ms. Cuzak, presumably as someone who worked in the mortgage banking business, had been involved in some of those transactions. Id.

The trial deputy acknowledged that Ms. Cuzak contacted Mr. Roberson for advice on whether to talk to another prosecutor in his office, Mr. Seaver. 4/18/12RP 5. Mr. Roberson confirmed, "she contacted me for legal advice. I gave it to her. If she's a witness we have a conflict." Id.[1] Under these circumstances, Ms. Cuzak's

[1] Mr. Roberson also elaborated that, "Prior to there being criminal matters involved there was a civil suit instigated by several people, and that's

interests were substantially related and as her subsequent pursuit by the prosecutor illustrates, materially adverse to Mr. Reeder's. RPC 1.10(b).

The prosecutor tries to distinguish this case from the separately charged mortgage fraud prosecution, but Mr. Pang and SCRAP represented Mr. Reeder in both matters at the same time. The conflict, therefore, runs throughout the representation. Furthermore, any "Chinese Wall" was ineffective in eliminating the conflict because there is no record that the essential notice provisions were satisfied. RPC 1.10. Judge Kessler's directions were limited to Mr. Roberson not discussing the matter and never touched on the notice requirements or the consent elements which are essential to compliance with the rule. Cf e.g. State v. Stenger, 111 Wn.2d 516, 522-23, 760 P.2d 357 (1988).

In this case, when Mr. Reeder enters a guilty plea in one case where the conflict is acute and no defense case was presented in this substantially related matter, he has demonstrated the form of

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when Ms. Cuzak called me. I gave her advice at Northwest—when I was at Northwest Defender regarding the suit, so it's not simply whether or not he should talk to Mr. Seaver. There was contact made years ago regarding the civil

compromised representation the rules are intended to avoid. Reversal is necessary where a conflict of interest adversely affecting counsel's performance. State v. Regan, 143 Wn.App. 419, 427-28, 177 P.3d 783, rev. den., 165 Wn.2d 1012 (2008) (defendant need only demonstrate that "some defense was ... not undertaken due to the attorney's other loyalties or interests."). The State cannot establish that this conflict was harmless. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct 2557, 2565, 165 L.Ed.2d 409 (2006); In re Personal Restraint of Benn, 134 Wn.2d 868, 890, 952 P.2d 116 (1998). Ms. Cuzak's natural desire to avoid potential criminal prosecution and civil liability created material and adverse interests to Mr. Reeder. Ms. Cuzak's consultation in response to a specific inquiry from this same prosecutor's office or impending civil litigation regarding mortgage fraud actions in which Mr. Reeder was a defendant created an attorney client relationship which legally followed Mr. Roberson to SCRAP.

2. The prosecution of conduct that occurred beyond the statute of limitations was improper.

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matters where I think the subject matter was either the same or very similar." 4/18/12RP 8.

Mr. Reeder argues that because the laws of Washington provide for two potentially applicable statutes limiting the state's prosecution of securities fraud, there is a conflict requiring application of the rule of lenity. RCW 9A.04.080 limits prosecutions subject to that provision to three years. Although RCW 21.20.400 provides that an information charging crimes under that chapter must commence within five years, or three years of discovery, because they set very different periods of limitation, they cannot be reconciled and the shorter period should be applied and the charges dismissed. State v. Walker, 153 Wn.App. 701, 706-07, 224 P.3d 814 (2009).

Although the prosecutor relies on a 'continuing criminal impulse' theory to reach beyond the statute of limitations, Mr. Reeder contends the evidence was insufficient to support such a finding. If the evidence was not sufficient to support this conclusion, Mr. Reeder requests the Court find the various offenses noted were completed outside the applicable statutes of limitation. In the event sufficient evidence supports this conclusion, see § 4 infra.

3. The trial court erred in failing to suppress bank records seized without a search warrant or functional equivalent and absent demonstrated compliance with RCW 10.27 and Art. 1, § 10

Mr. Reeder moved pursuant to CrR 3.6 to suppress all the evidence obtained through the warrantless search and seizure of his banking and credit card records. CP 41, 53-55; 7/2/12RP 42-43; see also 7/9/12RP 140-41, 145-47. Mr. Reeder included a written memorandum of authorities, as required by CrR 3.6, which cited in particular the Fourth Amendment of the United States Constitution, Article 1, Section 7 of the Washington Constitution, and State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007). CP 41, 53-55. Mr. Reeder explained he sought suppression of the evidence because it was an illegal search based on the failure to meet constitutionally dictated standards. 7/9/12RP 147. Mr. Reeder's reliance on the Fourth Amendment, Article 1, section 7 and State v. Miles, and his clear statement of the problem, plainly preserved the issue for appellate review. RAP 2.4.[2] To the extent that there is any doubt,

[2] The prosecutor's citation to In re Rosier, 105 Wn.2d 606, 717 P.2d 1353 (1986), is unavailing since the Court noted there that "the parties neither raised nor discussed this issue at the trial court level in either case." 105 Wn.2d at 616. Mr. Reeder raised the issue, discussed it and provided the necessary legal authority.

the issues raised herein are manifest constitutional errors fully apparent in the record. RAP 2.5.

The prosecutor asserts "the state obtained defendant's bank records using subpoenas issued by the special inquiry judge," but argues it was not required to disclose either the subpoena or the basis upon which it was obtained because "subpoenas issued by the special inquiry judge are not searches or seizures." CP 80-81.[3] On the contrary, however, they are intrusions into the core areas of privacy in Washington and such searches must be supported by a warrant or its functional equivalent. Judge Eadie's failure to suppress was based on an exercise of discretion on untenable grounds and for untenable reasons where he concluded the State had met its burden of establishing the propriety of intrusion.

The prosecutor continues to argue on appeal that Miles permits the warrantless seizure of all Mr. Reeder's banking records without a warrant or the functional equivalent. BOR at 18. They reach this erroneous conclusion by clinging to dicta in Miles and

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[3] The prosecutor also contends the State had no obligation to provide the accused a copy of the subpoenas or supporting petitions. 7/9/12RP 141-42. Judge Eadie denied Mr. Reeder's motion to suppress or compel disclosure of the subpoenas and supporting petitions. 7/9/12RP 140, 145-46; CP 241.

Neslund,[4] and ignoring the Washington Supreme Court's more recent decision in State v. Garcia-Salgado, 170 Wn.2d 76, 240 P.3d (2010), which held that such court orders are valid only where they meet the constitutional requirements of a warrant. Id. at 86.

The Washington Supreme Court has already determined that an individual's bank records fall well within the constitutional protections for "private affairs" under Article 1, section 7. Miles, 160 Wn.2d at 247 ("Little doubt exists that banking records, because of the type of information contained, are within a person's private affairs.") In order to legally invade this private area, the State must have a "judicially issued warrant or subpoena." Id. at 252. The State acknowledges there was no warrant and refused to produce either the subpoenas or the underlying request which they allege justified the intrusion. 7/9/12RP 140-41. This stands in direct contrast to the imperative of the privacy provisions of the Washington Constitution which place the burden to justify such intrusions on the State.

> We begin with the presumption that warrantless searches are per se unreasonable under our state constitution. ... Even where probable cause to search exists, a warrant must be obtained unless excused

[4] State v. Neslund, 103 Wn.2d 79, 690 P.2d 1153 (1984).

> under one of the narrow set of exceptions to the warrant requirement. ... The State bears the burden to show an exception applies.

State v. Tibbles, 169 Wn.2d 364, 368-69, 236 P.3d 885 (2010) (emphasis added). The State fails to show that any such exception applies or was satisfied here. Garcia-Salgado, 170 Wn.2d at 186-88.

The prosecutor asserts that a special inquiry judge's issuance of a subpoena duces tecum, based on less than probable cause and obtained without the crucial procedural protections of the warrant requirement, still provide the "authority of law" demanded by Article 1, section 7. BoR at 18. Any such "authority" is always contingent, however, on meeting the constitutional and statutory prerequisites.

> A court order may function as a warrant as long as it meets constitutional requirements. E.g., United States v. Mendez, 709 F.2d 1300, 1302 (9th Cir. 1983)....[It] must be entered by a neutral and detached magistrate; must describe the place to be searched and items to be seized; and must be supported by probable cause based on oath or affirmation ... .

Garcia-Salgado, 170 Wn.2d at 186. Any mention in Miles to obtaining bank records by subpoena must, therefore, be read in light Garcia-Salgado's clarification that such an order must meet these constitutionally derived substantive and procedural requirements.

The State failed to establish compliance with any of the three lynchpins of the warrant standard.[5]

Furthermore, the failure to establish compliance with the statutory scheme dooms the State's reliance on RCW 10.27. Where the special inquiry judge acts outside the statutory dictates, the evidence gathered thereby is subject to suppression. State v. Manning, 86 Wn.2d 272, 275, 543 P.2d 632 (1975). The record in this case completely fails to establish that the subpoenas were issued in accordance with the procedures dictated by the statute. The failure to establish the propriety of the invasion and seizure of Mr. Reeder's private bank and credit card records precluded its reliance on those records at trial. State v. Winterstein, 167 Wn.2d 620, 633, 220 P.3d 1226 (2009).

Finally, Article 1, section 10 of the Washington Constitution requires that "Justice in all cases shall be administered openly and

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[5] The prosecutor argues that RCW 10.27 relieves the State of its obligations to establish "probable cause" rather than a mere suspicion of unlawful activity. CP 99, 104-05; BOR 19. Probable cause is crucial, however, because it requires the State is required to establish circumstances that extend beyond mere suspicion and a nexus between the criminal activity and the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); State v. Anderson, 105 Wn.App. 223, 229, 19 P.3d 1094 (2001). The Constitution does not permit the Legislature to circumvent these foundational requirements by simply enacting a statute. Garcia-Salgado, 170 Wn.2d at 186-88.

without unnecessary delay." The rules for obtaining a warrant are intended not only to satisfy the protection of people's privacy against government intrusion, but also to hold the police and courts responsible to the public by requiring they be made available. Cowles Publishing Co. v. Murphy, 96 Wn.2d 584, 590, 637 P.2d 966 (1981). These important policy considerations are thwarted by the secrecy of the special inquiry proceedings advanced by the prosecutor here and are inconsistent with the constitutional dictate of open courts. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Nothing in this record or the prosecutor's description of the proceedings establishes any justification for failing to comply with these constitutional and statutory provisions. This is certainly not the sort of public corruption case which spawned the special inquiry statutes in the first place. There was no record of any compelling need for the secrecy surrounding what was a classic fishing expedition of the sort the warrant requirement is meant to address.

Miles and Garcia-Salgado dictate the remedy of reversal where convictions were based on the tainted records and remand for

a new trial if the state chooses. Garcia-Salgado, 170 Wn.2d at 188-89; Miles, 160 Wn.2d at 252. "[T]he right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy ... [W]henever the right is unreasonably violated, the remedy must follow." Winterstein, 167 Wn.2d at 635.

4. Multiple punishments for the same offense violated constitutional, statutory and common law protections against double jeopardy

The prosecutor argues that the 14 transactions between Mr. Reeder and Mr. McAllister justify 14 separate counts of securities fraud notwithstanding the fact that these multiple contributions were all directed at the singular investment enterprise which was the "security" at issue. BoR 19, citing RCW 21.20.050(14). The plain language of the statute, however, fails to evince a legislative intent to infinitely subdivide these fraud prosecutions by the number of checks written. Instead, this Court has already determined that the

Legislature intended RCW 21.20.010 to define a single offense. State v. Mahmood, 45 Wn.App. 200, 206, 724 P.2d 1021 (1986).[6]

The prosecutor alleged Mr. Reeder was engaged in a singular ongoing enterprise, real estate development in which McAllister provided the funding and Reeder sought out and acquired the properties. RP 585-86. The unit of prosecution for such a fraudulent enterprise is represented by Count I which alleges these practices stretched across the charging period as part of a singular criminal impulse. CP 153. The remaining counts must be vacated and dismissed.

Furthermore, here multiple counts of security fraud were alleged to have occurred within the same charging period reflected in Count I. Multiple convictions could only be sustained over the double jeopardy bar if the trial court instructed the jury "that they are to find 'separate and distinct acts' for each count. State v. Borshiem 140 Wn.App. 357, 367-68, 165 P.3d 417 (2007). In Mr. Reeder's

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[6] Federal courts may permit the government to charge separate fraudulent transactions in separate counts, but that is based on a view of legislative intent which is diametrically opposed to that identified in Mahmood. See e.g. United States v. Regenberg, 604 F.Supp.2d 625, 630 (S.D.N.Y. 2009). "[F]raudulent transactions involving different securities, even if made with the intent of furthering a single overall conspiracy, may establish the basis for separate counts of an indictment...." United States v. Rigas, 281 F.Supp.2d 660, 667 (S.D.N.Y. 2003). In Mr. Reeder's case,

case, the court's instructions to the jury never explained that it was required to find "separate and distinct acts" for each count of securities fraud. The court did not inform the jury that they must unanimously agree about the act alleged, or that they cannot rely on the conduct to support conviction on different counts. Borsheim, 140 Wn.App. at 367-68; State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The prosecutor's election fails to solve the problem in light of the permissive nature of the instructions. CP 144, 150. Where the allegations were engaging in a course of business which operates a fraud, the jury could easily rely some or all of the same conduct alleged to reach a verdict on each allegation of securities fraud and double jeopardy bars the imposition of multiple punishments.

Furthermore, the prosecution alleged that each and every one of the multitude of securities fraud offenses it charged were all part of "continuing criminal impulse." CP 153-66. The court instructed the jury that to prove the defendant's multiple offenses were "committed under a continuing criminal impulse the State must

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however, there was a single "security."

prove that the defendant's criminal impulse or intent continued unabated throughout the acts." CP 179. The jury returned verdicts finding this proposition was established beyond a reasonable doubt as to each of the securities fraud counts. CP 201-02.

Under these circumstances, Washington courts have repeatedly held:

> where the successive takings are the result of a single, continuing criminal impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny regardless of the time which may elapse between each taking.

Mermis, 105 Wn.App. 738, 745, 20 P.3d 1044 (2001); State v. Carrier, 36 Wn.App. 755, 757-58, 677 P.2d 768 (1984); State v. Vining, 2 Wn.App. 802, 808-09, 472 P.2d 564 (1970). As the Court explained, "[i]f the impulse continues, the crime is not complete until the continuing impulse has been terminated." Mermis, 105 Wn.App. at 745. "[T]here is no reason to limit the doctrine to aggregation cases." Id. Where the resulting convictions represent a "single larceny" the double jeopardy bar limits the punishment which can be imposed for the separate acts committed in support of the securities

fraud alleged. State v. Turner, 102 Wn.App. 202, 209, 6 P.3d 1226 (2000).

Similarly, double jeopardy bars theft from being punished multiple times where there is a single offense. When this Court examined the first degree theft statute, it concluded thefts by various means from the same person did not support multiple convictions. Turner, 102 Wn.App. at 209.

> The first degree theft statute makes no mention of schemes or plans in distinguishing the seriousness of the crime from other degrees of theft. And there is no wording in the statute that indicates any other relevant distinction between multiple acts of theft committed against the same person over the same period of time.

Turner, 102 Wn.App. at 209-10. The Court concluded that a lack of clarity in the first degree theft statute creates ambiguity as to whether multiple schemes or plans constitute separate units of prosecution under the first degree theft statute and therefore the rule of lenity dictates that the Court construe this ambiguity in favor of the accused. Turner, 103 Wn.App. at 210-11.

Where Washington's first degree theft statute does not define the unit of prosecution it is ambiguous as to whether multiple transactions in support of the same criminal enterprise may be

punished separately. As with the securities fraud charges, the State has charged one count with an overarching period of commission and then a variety of other narrow periods thereafter. CP 180-93. Double jeopardy bars this form of multiple punishments and Mr. Reeder is entitled to relief in the form of a new sentencing hearing.

B. CONCLUSION.

For the reasons stated above, Mr. Reeder respectfully asks this Court to reverse his conviction and sentence and remand his case to the superior court for further proceedings.

DATED this 19th day of August 2013.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69226-7-I
v.	)	
	)	
MICHAEL REEDER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** 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:

[X] SCOTT PETERSON, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF AUGUST, 2013.

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