

NO. 47835-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD WILKINS,
Appellant.

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

Cowlitz County Cause No. 14-1-01082-3

The Honorable Michael H. Evans, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The doctrine of judicial estoppel prohibits the state from asserting on appeal that Mr. Wilkins's convictions for both rape of a child and child molestation do not violate double jeopardy.
2. This court should accept the state's concession in the trial court that the two convictions merge for double jeopardy purposes.

ISSUE: The doctrine of judicial estoppel prohibits a party from asserting a position to a court when that party has previously gained an advantage by asserting an opposite position. Does judicial estoppel prohibit the state from arguing on appeal that the court should affirm Mr. Wilkins's convictions for both rape of a child and child molestation when the prosecutor persuaded the trial court to permit a late amendment to the charging document by averring that the two convictions would merge for double jeopardy purposes.

SUPPLEMENTAL STATEMENT OF FACTS AND PRIOR
PROCEEDINGS

The state charged Edward Wilkins with rape of a child in the first degree. CP 9. One the eve of trial, the state moved to amend the charging document to add a charge of child molestation in the first degree. RP 232-235; CP 9.

Mr. Wilkins objected to the late amendment of the Information. RP 232, 234.

The prosecutor acknowledged that the child molestation charge was based on the same single alleged incident as the rape charge. RP 232-233. The prosecutor told the trial court that convictions for both charges would merge for double jeopardy purposes. RP 233.

Based on that representation, the judge analogized the state's theory to charging residential burglary and second-degree burglary in the alternative. RP 233. The prosecutor agreed with that comparison. RP 233. The court granted the state's motion to amend the Information. RP 235.

The jury convicted Mr. Wilkins of both charges. CP 30-31. The trial court entered convictions for both. CP 44, 50.

Mr. Wilkins timely appealed, arguing, *inter alia*, that the court violated the constitutional prohibition against double jeopardy by entering convictions for both charges, which were based on a single alleged act. Appellant’s Opening Brief, pp. 7-10.

On appeal, the state now argues that the rape of a child and child molestation do not merge for double jeopardy purposes. Brief of Respondent, pp. 8-11.

This Court ordered supplemental briefing on the question of whether the state was judicially estopped from taking a position on appeal that is the opposite of what it represented to the trial court. Order Directing Supplemental Briefing.

ARGUMENT

JUDICIAL ESTOPPEL PROHIBITS THE STATE FROM ARGUING ON APPEAL THAT MR. WILKINS’S TWO CONVICTIONS DO NOT VIOLATE DOUBLE JEOPARDY AFTER THE TRIAL COURT ACCEPTED THE STATE’S POSITION BELOW THAT THEY WOULD MERGE.

The doctrine of judicial estoppel precludes a party from gaining an advantage by asserting one position at a court proceeding and subsequently advancing an inconsistent position. *Miller v. Campbell*, 164 Wn.2d 529, 539–40, 192 P.3d 352 (2008). The doctrine’s purpose is to “preserve respect for judicial proceedings” and to “avoid inconsistency, duplicity, and waste of time.” *Id.* (internal citation omitted).

The analysis turns on three factors:

(1) whether ‘a party's later position’ is ‘clearly inconsistent’ with its earlier position’; (2) whether ‘judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled’; and (3) ‘whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.’

Id. (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750–51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)) (other internal citations omitted).¹

The state’s change of position regarding the double jeopardy issue in Mr. Wilkins’s case meets each of the three criteria for judicial estoppel.

Id.

First, the state’s position on appeal that entry of convictions for both child molestation and rape of a child against Mr. Wilkins does not violate his right to be free from double jeopardy is “clearly inconsistent” with the state’s position at trial that convictions for both charges would merge for double jeopardy purposes. *Id.*

¹ Washington Courts have considered the issue of judicial estoppel in numerous criminal cases, but have always found that the doctrine did not apply based on the facts of those prior cases. See e.g. *State v. Hamilton*, 179 Wn. App. 870, 881, 320 P.3d 142 (2014); *State v. Herron*, 177 Wn. App. 96, 108 n. 9, 318 P.3d 281 (2013), *aff’d*, 183 Wn.2d 737, 356 P.3d 709 (2015); *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff’d*, 174 Wn.2d 909, 281 P.3d 305 (2012); *City of Spokane v. Marr*, 129 Wn. App. 890, 893, 120 P.3d 652 (2005); See also *In re Det. of Stout*, 159 Wn.2d 357, 365, 150 P.3d 86 (2007) (applying the doctrine to a criminal conviction in the context of a RCW 71.09 proceeding).

The trial prosecutor referred to the analysis as a “merger issue,” which pinpoints the issue as one of double jeopardy. RP 233; *See e.g. State v. Thompson*, 192 Wn. App. 733, 736, 370 P.3d 586 (2016), *review denied*, 185 Wn.2d 1041, 377 P.3d 766 (2016)(discussing double jeopardy issue in terms of whether two offenses “merge”). The prosecutor acknowledged to the trial court that, if Mr. Wilkins was convicted of both charges, the lesser offense should be “throw[n] out.” RP 233.

The state now argues on appeal that the two convictions do not merge for double jeopardy purposes and that both convictions should stand. *See* Brief of Respondent, pp. 8-11. The state’s current position is “clearly inconsistent” with the one it took at trial. *Id.*

Second, judicial acceptance of the state’s position on appeal would “create the perception that [the trial court] was misled” in Mr. Wilkins’s case. *Id.* The trial court permitted the state to amend its charging document – over defense objection – on the eve of trial based, in part, on the prosecutor’s representation that convictions for both charges would merge for double jeopardy purposes. RP 232-235.

Acceptance of the state’s contrary position on appeal would call into question whether the trial court would have allowed the late amendment if the state had not argued that the convictions would merge. This Court should not permit the state to maintain a position opposite of

that it took in the trial court because it would create the perception that the trial court was misled when it permitted the state to amend the charging document. *Id.*

Finally, acceptance of the state's change of position on appeal would impose an unfair detriment on Mr. Wilkins. *Id.* The additional conviction – which was entered in violation of the prohibition against double jeopardy – adds to the stigma Mr. Wilkins faces as someone convicted of multiple sex offenses.

The trial court also sentenced Mr. Wilkins above the presumptive middle of the standard range.² CP 49-50. It is possible that court would have exercised its discretion to sentence Mr. Wilkins more leniently if he had only been convicted of one offense. The additional conviction could also sway the Indeterminate Sentence Review Board to hold Mr. Wilkins in prison for longer than it would if he had only been convicted of a single offense.

The doctrine of judicial estoppel prohibits the state from changing positions in Mr. Wilkins's case as to whether his two convictions should merge for double jeopardy purposes. *Miller*, 164 Wn.2d at 539–40.

² Mr. Wilkins received an indeterminate sentence, as mandated by statute. CP 50; RCW 9.94A.507. But the court exercised its discretion to set the low end of his sentence at 300 months, when the available range was 240-318 months. CP 49-50.

This Court should accept the state's concession in the trial court that Mr. Wilkins's two convictions merge for double jeopardy purposes. *Id.*; RP 232-233. Mr. Wilkins's conviction for child molestation must be vacated. *In re Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

CONCLUSION

The doctrine of judicial estoppel prohibits the state from taking the position on appeal that Mr. Wilkins's two convictions do not violate double jeopardy it took the opposite position below and that position was accepted by the trial court. Mr. Wilkins's conviction for child molestation must be vacated.

Respectfully submitted on April 4, 2017,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Supplemental Brief, postage prepaid, to:

Edward Wilkins/DOC#856755
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
appeals@co.cowlitz.wa.us

I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on April 4, 2017.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

ELLNER LAW OFFICE
April 04, 2017 - 11:37 AM
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