IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

RESPONDENT,

V.

STEPHEN LEWIS,

APELLANT.

NO. 65923-5-I

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

The Honorable Susan Craighead, Judge

STATEMENT OF ADDITIONAL GROUNDS

— AUTHORED PRO SE —

ADDENDUM TO BRIEF OF APPELLANT

FILED BY

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E. ARGUMENT

DETECTIVE NEWELL'S IDENTIFICATION TESTIMONY WAS BARRED BY COLLATERAL ESTOPPEL.

1. The Superior Court of the State of Washington for Pierce County tried; and a jury of his peers found Lewis NOT GUILTY under cause number 08-1-05537-1 and said verdict was specifically found upon evidence given by King County and Detective Newell as to identification.

The doctrine of collateral estoppel arises from the United States Constitution out of the Fifth Amendment and the protection against double jeopardy. Double jeopardy and collateral estoppel are applicable to the states through the Fourteenth Amendment. See U.S. Const. amends. five and fourteen.

Collateral estoppel and double jeopardy are the same in that they may both preclude a defendant's subsequent prosecution; but they are at once substantially different, most notably because collateral estoppel requires the initial trial verdict be not guilty and double jeopardy works upon either a guilty or not guilty finding. See Washington Criminal Practice and Procedure, Vol. 12, Ch. 21, Sec. 2112, pgs. 478-479.

Collateral estoppel, in order to be applied, requires an affirmative answer to the following questions. FN1

(1) Is the issue identical to the one in a prior action?

(2) Did the prior action result in a final judgement on the merits?

(3) Was the party against whom the doctrine is asserted a party or in privity with a party to the action?

(4) Will the application of the doctrine not work an injustice?

"Collateral estoppel promotes judicial economy and prevents inconvenience, and even harrassment of parties." Reninger v. Dep't of Corr., 134 Wn. 2d 437, 449, 951 P.2d 782 (1998). Mr. Lewis respectfully

FN1. See Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed. 2D 212 (1971).

requests that an order of certiorari be granted in this appeal concerning the Pierce County case, cause number 08-1-05537-1, due to the fact that those proceedings are directly material to Mr. Lewis' appeal here.

Mr. Lewis moves the court to grant certiorari because; though the King County Superior Court and the Honorable Judge Susan Craighead may not have performed with all due diligence by probing the attorneys for clarity and depth of understanding concerning the appellant's, attorney's and thereby court's confusion over double jeopardy and evidence rule 404(b); the attorneys, officers of the court, had looked into the issue only preliminarily and the appellant raised the issue of double jeopardy at multiple stages of the trial and sentencing.[FN2] Mr. Lewis may not have known that the injury to his rights was called "collateral estoppel", but he knew that an injury occurred nonetheless. A seasoned jurist and two experienced court officers should have erred on the side of caution and explored the appellant's concerns on the record. Because the record of the Pierce County trial is beyond Mr. Lewis' reach; he requests the order.

Litigated in the Pierce County trial[FN3] was identity theft and the identification of the perpetrator. The Pierce County Prosecutor was in possession of a photo bulletin taken by the bank of the trial's victim. However, the prosecutor was not aware of or in receipt of any independent information as to the perpetrator's identity. At this point, on March 9, 2008, Detective Newell viewed a bulletin circulated among agencies of the bank photo and he contacted Pierce County to "assist" in their investigation. See City of Bellevue, Washington Police Report, pg. 10 of 14, dated March 7, 2008. After contacting the Pierce County authorities; after providing evidence from the King County investigation to include King County booking photos, suspect photos from his Target Stores crimes,

FN2. See Verbatim Report of Proceedings, King County No. 08-1-05161-3SEA dated February 2, 2010, pg 8, lines 11-16.

FN3. See Verbatim Report of Proceedings (in toto), Pierce County 08-1-05537-1.

3. Counsel's failure to move the court to grant an order for dismissal upon grounds the action was barred by collateral estoppel; or even raise objection, violated Lewis' constitutional right to effective representation.

Ours Indeed, the United States Supreme Court elevated collateral estopple to the level of constitutional import in Ashe v. Swenson.[FN4] In that decision, the High Court incorporated collateral estopple into the Fifth Amendment[FN5] and the Amendment's protection from former jeopardy. In another landmark case, interestingly a case from our own great state, the United States Supreme Court held that the constitutional guarantee against double jeopardy is applicable irrespective of whether the jury considered all of the relevant evidence in the case or not.[FN6]

This appellant respectfully submits that at least part of the reasoning behind the High Court's decisions on this subject is that once an ultimate fact has been decided in the defendant's favor; collateral estoppel has attached to the ultimate fact itself so that it may not be used in a subsequent proceeding to subject the defendant to continued harrassment and jeopardy. This reasoning mirrors the logic of the principle of double jeopardy; as jeopardy attaches to the verdict itself upon full litigation - notwithstanding partial proceedings, etc.

If counsel would have listened to her client; if counsel would have complied with Mr. Lewis' directions, she would have seen the improper nature of the proceedings. Indeed, she was required to comply; but she did not. "Under RPC 1.2(a), "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4,

FN4. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970).

FN5. See U.S. Const. amend. 5

FN6. See Harris v. Washington, et al., 404 U.S. 55, 30 L.Ed. 2d 212 (1971).

shall consult with the client as to the means by which they are to be pursued.'" Because "'the client controls the goals of litigation...'" State v. Saunders, 153 Wash. App. 209, 220 P.3d 1238 (2009)(citing State v. Cross, 156 Wash. 2d 580, 613, 132 P.3d 80 (2006); See RPC 1.2(a)); internal quotes appellant's.

Knowing about the rulings in Ashe and Harris; and, adhering to her client's directions to ascertain the nature and working of collateral estoppel on his King County case would have been the appropriate actions for counsel. However, even in the face of the Pierce County verdict and transferrence of same evidence; counsel did not act with due diligence to defend her client zealously.

As laid out in appellant's representatives' brief, page 10, paragraph 2, (1) counsel's failure here to act and object to the proceedings; moving to dismiss upon grounds of collateral estopple can in no way be explained as a strategic or legitimate decision, (2) under these circumstances, an objection to the admissibility of the evidence and testimony used in the Pierce County trial stood a high probability of being sustained, and finally (3) the verdict would most assuredly have differed if the King County jury was barred from hearing the estopped evidence and testimony. This appellant respectfully submits that it is indeed, highly probable that there would have been no trial at all absent the estopped material.

Counsel's failure to move in open court to attempt to defend her client with valid legal principles and sound and true defenses prejudiced Mr. Lewis and resulted in his exposure to double jeopardy, and an improper finding of guilt. Therefore, this appellant contends that this failure should be added to Ms. Winkler's contentions and viewed as further evidence of counsel's ineffective assistance. When considered together, all of these factors conspire to offend fairness and destroy the possibility of Mr. Lewis receiving a proper trial.

aware of the Pierce County jury's verdict. See Verbatim Report of Proceedings, King County No. 08-1-05161-3SEA, dated February 2, 2010, pg. 8, lines 11-16 and dated April 13, 2010, pgs. 339, 340 lines 7-25, lines 1-5. The court did not act and the court officers did not act enough.

2. Admission of the identification testimony was manifest constitutional error that Lewis raises for the first time on appeal.

As discussed above, the questions establishing that the doctrine of collateral estoppel apply in a case were all answered in the affirmative in Mr. Lewis' case from King County. The action in King County was barred by the decision made in Pierce County.

While the King County court itself may not have been fully aware; it did not act thoroughly or dutifully enough to test the detective's offered testimony as to its poisonous nature where constitutional rights afforded to the appellant are concerned. The court's failure to act on concerns left it uninformed. However, this would not have mitigated the injury to Mr. Lewis' constitutional right to not be twice put in jeopardy. "[F]ederal collateral estoppel is applicable to the states as part of the Fifth Amendment Former Jeopardy Clause." Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970).

As stated by Ms. Jennifer Winkler, counselor; in this very brief, pg. 7, "Manifest constitutional error occurs when the error causes actual prejudice or has ('"practical and identifiable consequences.") " Montgomery v. State, 163 Wn. 2d at 595, external quotes this brief's. The result of admitting the detective's barred testimony and his investigations information had definite consequences. Its exclusion would have most certainly resulted in a NOT GUILTY verdict in King County. Indeed, Mr. Lewis may not have been charged at all without the barred evidence.

F. **CONCLUSION:** Statement of Additional Grounds

An error of the magnitude of conviction of a defendant against the protections of double jeopardy or collateral estoppel is an injury to our justice system each and every instance. The injury offends the status and honor of our jurisprudence because it is so contrary to the rights we have held dear since this country began. The injury renders our protections powerless; and if not remedied, meaningless. Jeopardy twice cast its shade on this appellant; once survived, he was not supposed to endure it again.

This appellant, in light of collateral estoppel, fairness, and jurisprudence, requests the verdict against him from the People of the State of Washington in the King County trial be vacated.

Dated this March 7th day of March, 2011.

Respectfully submitted,

upon self-representation.

Stephen Lewis

Stephen Lewis

Appellant Pro se.

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