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71621-8

NO. 71621-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

DALE PERCIVAL,

Appellant.

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

The Honorable John M. Meyer, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

PERCIVAL IS ENTITLED TO AN ORDER DISMISSING WITH
PREJUDICE THE COUNT NOT SUPPORTED BY SUFFICIENT
EVIDENCE

The trial court ruled that there was insufficient evidence to sustain one of the State's child rape charges and therefore dismissed this count. CP 67; 2RP¹ 130. However, the trial court dismissed this charge without prejudice. CP 67; 2RP 149.

The State concedes this was error. Br. of Resp't at 5. Yet the State does not believe Percival is entitled to any remedy because of "two separate indications in the judgment and sentence that count two was dismissed which does not indicate that a dismissal was without prejudice." Br. of Resp't at 6-7. The State is mistaken.

The only order in the record that speaks to the question of prejudice is the order that dismissed the second count *without* prejudice. CP 67 ("The Defense motion to dismiss count II without prejudice is granted."). Thus, it is clear that the trial court ordered the dismissal to be without prejudice regardless of the trial court's notation in the judgment and sentence that the count was dismissed. This court cannot assume, as the State asks, that a judgment and sentence silent on the nature of the dismissal trumps another

¹ As with his opening brief, Percival cites the verbatim reports of proceedings as follows: 1RP—January 6, 13, and 14, 2014; 2RP—January 15 and 16, 2014; 3RP—January 17, 2014; 4RP—February 27, 2014.

trial court order that unequivocally states the dismissal was without prejudice.

Moreover, “a sentence for violation of law must be definite and certain.” Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946) (citing Davis v. Catron, 22 Wash. 183, 186, 60 P. 131 (1900)). Percival’s judgment and sentence was not definite or certain on the issue of dismissal, particularly when read in conjunction with the order of dismissal without prejudice, because it did not indicate that the dismissal was with prejudice as it should have.

In light of this indefiniteness and uncertainty, Percival is entitled to a remedy to honor his right against being placed twice in jeopardy for the same crime. See Br. of Appellant at 5-6. He requests either (1) remand to vacate the order dismissing the second count without prejudice and to replace it with an order that dismisses the charge with prejudice or (2) remand for correction of the judgment and sentence to indicate that the second count was dismissed with prejudice. Only by granting one of these remedies can this court guarantee Percival that the State will not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution by prosecuting him on a charge that was dismissed for insufficient evidence. See State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

B. CONCLUSION

This court must reverse the order dismissing the second count without prejudice and remand with instructions to enter an order dismissing it with prejudice.

DATED this 12th day of November, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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

STATE OF WASHINGTON)	
Respondent,)	
v.)	COA NO. 71621-2-1
DALE PERCIVAL,)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF NOVEMBER 2014.

X *Patrick Mayovsky*