

72714-1

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Court of Appeals
Division I
State of Washington

72714-1

NO. 72714-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH JOHNSON,

Appellant.

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

The Honorable Ellen J. Fair, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE COLLATERAL ESTOPPEL BARRED ADMISSION OF THE CELL PHONE EVIDENCE.

In his opening brief, Johnson showed that the trial court's exclusion of the cell phone evidence was a final ruling and the state's second effort to admit the same evidence was barred by collateral estoppel. Br. of Appellant, 9-18. Both parties agree collateral estoppel applies if the following four-part test is satisfied: (1) the issue in the prior adjudication is identical; (2) the prior adjudication is a final judgment on the merits; (3) the party against whom the doctrine is asserted was the party to or in privity with a party to the prior adjudication; and (4) barring relitigation of the issue will not work an injustice on the party against whom the doctrine is applied. Br. of Appellant, 10 (citing State v. Polo, 169 Wn. App. 750, 763-64, 282 P.3d 1116 (2012)); Br. of Resp't, 10.

The State argues "[c]ollateral estoppel does not apply in the present case because the first element has not been met. There was no prior adjudication with a final judgment and the trial court never heard the same argument twice." Br. of Resp't, 11. The State appears to contest the first two criteria, though conflates them at times. See Br. of Resp't, 11-14. The State, however, appears to concede the third and fourth criteria, acknowledging "the parties are identical" and making no argument that

collateral estoppel would work an injustice on the State. Br. of Resp't, 14; In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."); Cunningham v. State, 61 Wn. App. 562, 566 n.1, 811 P.2d 225 (1991) (assuming fourth criterion was undisputed where opponent of collateral estoppel failed to make any related argument).

Johnson accordingly addresses the two contested factors in turn.

1. The factual and legal issues were identical.

In his opening brief, Johnson established that the first criterion was met because the legal and factual issues were identical. Br. of Appellant, 10-12. In response, the State contends Johnson "presented no evidence that the issue of the second warrant was identical to the issue of the warrant previously suppressed." Br. of Resp't, 12. The State further claims the "controlling facts before the court on Monday were not those before the court on Friday." Br. of Resp't, 13.

The State's response does not make logical sense. It further ignores the reality that all the facts contained in the second warrant affidavit were known to the State at the time of the first affidavit. This is precisely the point Johnson made in his opening brief: the factual issues were identical "because the second warrant affidavit alleged facts already known to the State at the time of the original warrant." Br. of Appellant, 11. The second

affidavit did not contain any newly gathered facts, as in State v. Seager, 571 N.W.2d 204 (Iowa 1997). The State provides no legitimate argument as to why the factual issues are not identical.

The legal issues are also identical. The State tries but fails to undermine Johnson's reliance on State v. Longo, 185 Wn. App. 804, 343 P.3d 378 (2015). Br. of Resp't, 14. In Longo, the issue was whether collateral estoppel required suppression of evidence in a criminal case after it was suppressed in a civil forfeiture proceeding. 185 Wn. App. at 806. This Court held collateral estoppel did not apply because there was no privity among the parties in the two proceedings, therefore failing the third prong. Id. at 809. However, this Court concluded "the legal issue was the same in both proceedings: whether the evidence should be suppressed, because there was insufficient probable cause to support the search warrant." Id. at 808.

The State concedes that unlike Longo, the parties are identical here. Br. of Resp't, 14. Without any citation to the record or legal authority, however, the State claims the legal issues are not identical. See Br. of Resp't, 13-14. The State's unsupported assertions are plainly incorrect. The identical legal issues here are exactly like Longo: whether the cell phone evidence should be suppressed because the warrant affidavit failed to specify a nexus between the crime and the cell phone, and therefore failed to pass constitutional muster. Longo controls.

Furthermore, if collateral estoppel does not apply in such circumstances, then there is essentially no check on how many times the State can use CrR 3.6 hearings as meaningless dry runs to test the validity of warrants. The State has offered no persuasive reason why this Court should encourage this waste of judicial resources. Indeed, the dual purposes of collateral estoppel are to “protect prevailing parties from relitigating issues already decided in their favor, and to promote judicial economy.” Cunningham, 61 Wn. App. at 566. The State’s position undermines both of these.

2. The CrR 3.6 hearing was a final adjudication on the merits.

There is no dispute that for collateral estoppel to apply, the prior adjudication must be a “final judgment on the merits.” Polo, 169 Wn. App. at 763-64. But the State claims this requires a “formal verdict and judgment” and likewise asserts collateral estoppel “does not apply when a case is ongoing and no final judgment exists.” Br. of Resp’t, 11.

But this exceedingly narrow approach is not supported by Washington law. Instead, “final judgment on the merits” is interpreted broadly. Cunningham, 61 Wn. App. at 566-68; 14A Karl B. Tegland, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35:34 (2d ed. 2009) (“[C]ourts have often held that a determination had collateral estoppel effects despite the fact that there was no final judgment in the previous proceedings.”).

Finality in the collateral estoppel context “may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.” Cunningham, 61 Wn. App. at 567 (quoting Lummas Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89 (2nd Cir. 1961)). Washington courts accordingly look to several factors and the circumstances of each case to determine whether the prior adjudication was final. Id.; see also Br. of Appellant, 13-14 (reciting and discussing these factors). A formal verdict and judgment terminating all proceedings is clearly not required.

Several cases demonstrate the State’s position is flawed. For instance, in Cunningham, a federal court granted partial summary judgment dismissing some of the plaintiff’s claims, but not all. 61 Wn. App. at 564-65. A state court thereafter concluded relitigation of those dismissed claims was barred by collateral estoppel. Id. at 565. This Court affirmed on appeal, explaining that the parties fully and vigorously litigated the issues in federal court.¹ Id. at 569. Thus, partial summary judgment did not result in a formal verdict ending all proceedings, but collateral estoppel nevertheless applied. The parties likewise fully and vigorously litigated the CrR 3.6 issue, and the

¹ This is in contrast to actions like default judgments, judgments on the pleadings, dismissals, and so forth, which have res judicata effect but little, if any, collateral estoppel effect because the specific issue in question is unlikely to have been fully litigated. 14A Karl B. Tegland, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35:34 (2d ed. 2009).

trial court entered a final decision on the merits. This is just like Cunningham.

Similarly, in Chau v. City of Seattle, the issues of damages and liability were fully litigated at trial. 60 Wn. App. 115, 116-17, 802 P.2d 822 (1991). However, the trial court declared a mistrial when the jury returned a verdict on damages but could not agree on liability. Id. This Court held that collateral estoppel precluded the defendant from relitigating damages despite the fact that a final judgment had not yet been entered: “‘absolute’ finality is not required for collateral estoppel to operate.” Id. at 120.

Rulings in limine also provide a useful analogy. In State v. Kelly, the State argued defense counsel’s motion in limine was insufficient to preserve the issue of admissibility of rebuttal evidence for appeal. 102 Wn.2d 188, 191, 685 P.2d 564 (1984). The Washington Supreme Court disagreed, holding: “Unless the trial court indicates further objections are required when making its ruling, its decision is final, and the party losing the motion in limine has a standing objection.” Id. at 193 (emphasis added); see also State v. Saldano, 36 Wn. App. 344, 347 675 P.2d 1231 (1984) (holding the trial court’s ruling in limine was “final, not tentative or advisory,” and so it was reviewable on appeal).

A CrR 3.6 hearing and ruling is even more formal than a hearing on a motion in limine. See CrR 3.6 (requiring motions to suppress evidence to

“be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion”). There is no logical reason, then, that a CrR 3.6 ruling is not final but a ruling in limine is. See Cunningham, 61 Wn. App. at 567 (explaining that one of the factors in determining finality is whether the decision is firm, rather than tentative).

Finally, the State emphasizes from Cunningham that a final judgment “includes any prior adjudication of an issue *in another action* that is determined to be sufficiently firm to be accorded conclusive effect.” (Br. of Resp’t, 12 (quoting Cunningham, 61 Wn. App. at 567)). The State argues “another action” means there must be an entirely different, new case for collateral estoppel to be asserted. Br. of Resp’t, 12.

The State’s reading is again hypertechnical and off point. Washington courts apply collateral estoppel with “realism and rationality,” not with hypertechnicality. State v. Harrison, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003) (quoting Ashe v. Swenson, 397 U.S. 436, 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). This was plain in Chau, where the same litigation was ongoing, but collateral estoppel nevertheless applied. The reality is that a CrR 3.6 hearing is its own proceeding, to which collateral estoppel applies. The State’s restrictive reading of Cunningham is also at odds with the court’s

well-reasoned conclusion that the finality requirement must be interpreted and applied broadly. 61 Wn. App. at 566-68.

The State cites no case where a trial court entertained multiple CrR 3.6 or CrR 3.5 hearings following State failures to meet its burden to show the evidence was admissible under constitutional, statutory, and common law principles. This absence of authority speaks loudly.

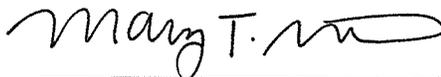
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should reverse Johnson's conviction and remand for a new trial with instructions to suppress the cell phone evidence.

DATED this 30th day of July, 2015.

Respectfully submitted,

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