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COURT OF APPEALS

NO. 33734-7

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHARLES KEITH MAYFIELD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend

No. 04-1-01851-1

CORRECTED BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Has defendant failed to provide an adequate record on which to decide his double jeopardy claim?..... 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts..... 3

C. ARGUMENT. 3

 1. DEFENDANT FAILS TO PROVIDE A SUFFICIENT RECORD ON WHICH TO DECIDE HIS DOUBLE JEOPARDY CLAIM. 3

D. CONCLUSION. 6

Table of Authorities

State Cases

<u>In re PRP of Davis</u> , 142 Wn.2d 165, 171, 12 P.3d 603 (2000).....	4
<u>State v. Adel</u> , 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).....	4
<u>State v. Blight</u> , 89 Wn.2d 38, 47, 569 P.2d 1129 (1977), overruled on other grounds, <u>State v. Crutchfield</u> , 53 Wn. App. 916, 771 P.2d 746 (1989).....	4, 5
<u>State v. Byrd</u> , 30 Wn. App. 794, 800, 638 P.2d 601 (1981).....	5
<u>State v. Jackson</u> , 36 Wn. App. 510, 516, 676 P.2d 517, <u>aff'd</u> , 102 Wn.2d 689, 689 P.2d 76 (1984).....	5
<u>State v. Riley</u> , 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)	5
<u>State v. Stockton</u> , 97 Wn.2d 528, 530, 647 P.2d 21 (1982).....	5

Constitutional Provisions

Fifth Amendment, United States Constitution.....	3
Article I, section 9, Washington State Constitution.....	4

Rules and Regulations

RAP 9.2(b)	5
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to provide an adequate record on which to decide his double jeopardy claim?

B. STATEMENT OF THE CASE.

1. Procedure

On April 13, 2004, the State filed an Information charging CHARLES KEITH MAYFIELD (hereinafter "defendant") with one count of possessing stolen property in the first degree. CP 1-3.

Defendant was arraigned on April 27, 2004. Defendant was allowed bail and later released from custody. CP 88-89. On May 13, 2004, defendant signed a scheduling order promising to appear in court on June 2, 2004. CP 90. Defendant failed to appear on June 2, 2004 and a bench warrant was authorized for his arrest. CP 91-93; RP¹ (6/2/04) 3.

On August 26, 2004, defendant signed a scheduling order promising to appear in court on September 9, 2004. CP 94. Defendant failed to appear on September 9, 2004 and a bench warrant was authorized for his arrest. CP 95-97.

¹ The verbatim report of proceedings will be referred to as "RP (date of hearing)" throughout this brief.

On October 27, 2004, defendant signed a scheduling order promising to appear in court on November 3, 2004. CP 98. Defendant failed to appear on November 3, 2004 and a bench warrant was authorized for his arrest. CP 99-101; RP (11/3/04) 3.

The State filed a Second Amended Information on February 3, 2005, charging defendant with possession of stolen property in the first degree and three counts of bail jumping for defendant's failure to appear on June 2, 2004, September 9, 2004 and November 3, 2004. CP 7-9.

On May 4, 2005, counsel appeared before the Honorable Kathryn J. Nelson for trial. RP (5/4/05) 8. Defendant did not appear. Id. Counsel for defendant asked the court to strike the defendant bail jumping charges from September 9 and November 3, 2004 on the basis that they merged with bail jumping charges on a separate cause number. RP (5/4/05) 9-10. The court refused to address the motion because the defendant was not present. RP (5/4/05) 10.

On August 12, 2005, defendant plead guilty to the Second Amended Information. CP 43-47; RP (8/12/05) 4-9. The court sentenced the defendant to 51 months. CP 51-63; RP (8/12/05) 17. The court also sentenced the defendant on cause number 04-1-02556-9² and ordered the

² Defendant was convicted of unlawful possession of a controlled substance, unlawful possession of a firearm and two counts of bail jumping under cause number 04-1-02556-9. CP 51-63.

sentences on each cause number to run concurrently. CP 51-63. CP 51-63; RP (8/12/05) 17.

Defendant signed a Stipulation on Prior Record acknowledging that his offender score was 12, which included two points for two bail jumping convictions on his “other current” case, cause number 04-1-02556-9. CP 48-50. The stipulation does not indicate the date of violation for the two bail jumping charges.

This timely appeal follows. CP 66-75.

2. Facts

The substantive facts of the defendant’s crimes, other than those referenced above, are not relevant to the issues raised in this appeal.

C. ARGUMENT.

1. DEFENDANT FAILS TO PROVIDE A SUFFICIENT RECORD ON WHICH TO DECIDE HIS DOUBLE JEOPARDY CLAIM.

Defendant claims on appeal that his bail jumping convictions in two separate cause numbers violate double jeopardy because they were based on a single act of failing to appear in court.

The United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. The Washington State Constitution provides that “[n]o person shall . . . twice put in jeopardy for the same offense.”

WASH. CONST. art. I, § 9. Washington's clause provides the same protection as the federal clause. In re PRP of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000).

When a defendant is convicted of multiple violations of the same statute, the double jeopardy analysis focuses on what the legislature intends as the "unit of prosecution," that is, what act is punishable under the statute. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).

In this case, defendant claims that the unit of prosecution for bail jumping is the act of failing to appear and, therefore, one failure to appear – regardless of how many cases the defendant is failing to appear for – can result in only one charge of bail jumping. From this premise, defendant alleges that he was "twice put in jeopardy for the same offense" when he was convicted and sentenced for multiple counts of bail jumping based on a single act of failing to appear. But in order to determine if defendant's rights were violated, this court needs to know the circumstances surrounding defendant's other convictions for bail jumping (i.e., the dates of offense on his other bail jumping convictions, the location of the crime, etc.). This information is not contained in the record that is currently before this court.

A party claiming error must provide a record sufficient to determine whether error claimed is constitutional error, unconstitutional error, or harmless error. State v. Blight, 89 Wn.2d 38, 47, 569 P.2d 1129 (1977), overruled on other grounds, State v. Crutchfield, 53 Wn. App. 916,

771 P.2d 746 (1989). Cases addressing RAP 9.2(b) hold that the party seeking review has the burden of perfecting the record so that the appellate court has before it all the evidence relevant to the issue. State v. Jackson, 36 Wn. App. 510, 516, 676 P.2d 517, aff'd, 102 Wn.2d 689, 689 P.2d 76 (1984); RAP 9.2(b). The appellate court may not speculate upon the existence of facts that do not appear in the record. Blight, 89 Wn.2d at 46. Absence of the necessary record precludes review. State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Further, matters referred to in a brief but not included in the record cannot be considered by a court on appeal. State v. Stockton, 97 Wn.2d 528, 530, 647 P.2d 21 (1982). If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal. State v. Byrd, 30 Wn. App. 794, 800, 638 P.2d 601 (1981).

The record in this case is wholly inadequate for this court to determine the merits of defendant's double jeopardy claim. Counsel sets forth facts in his brief, but these facts are not supported by independent evidence in the record. This court cannot even determine if the bail jumping offenses that defendant claims violate double jeopardy were committed on the same date. Defendant's failure to perfect the record precludes review of defendant's claim.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm the defendant's convictions for bail jumping.

DATED: September 19, 2006.

GERALD A. HORNE
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Prosecuting Attorney

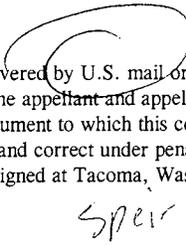


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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/19/06 [Signature]
Date Signature



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