

NO. 36381-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD YORK,

Appellant.

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

The Honorable Michael J. Sullivan, Judge

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BRIEF OF APPELLANT

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ELLEN L. ARBETTER  
CHRISTOPHER H. GIBSON  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to be free from double jeopardy under Wash. Const. article 1, § 9 and U.S.C.A. Const. amend. 5.

Issue Pertaining to Assignment of Error

The prosecution's failure to prevent its key witness from entering the jury room and speaking to jurors in violation of a direct court order resulted in a mistrial. Did the trial court's failure to dismiss the charges with prejudice thereafter violate Appellant's right to be free from double jeopardy under Wash. Const. art. 1, § 9 and U.S.C.A. Const. amend. 5?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pacific County Prosecutor charged appellant Richard D. York with two counts of delivery of methamphetamine in a school zone after previously having been convicted under Chapter 69.50. CP 18-20; RCW 69.50.401(1) and (2)(b); RCW 69.50.435(1)(d); RCW 9.94A.533(6); RCW 69.50.408;RCW 69.50.430. The State alleged York delivered methamphetamine on October 11 & 12, 2007. CP 18-19.

A jury trial was begun on May 19, 2007 before Honorable Michael J. Sullivan. 1RP.<sup>1</sup> After the jury was selected and sworn, however, a mistrial was declared. 1RP 26, 67.

On May 15, 2007, the information was amended to omit the allegations under RCW 69.50.435(1)(d), RCW 9.94A.533(6), RCW 69.50.408, and RCW 69.50.430.<sup>2</sup> York pleaded guilty as charged in the amended information. CP 74-81; 5RP 30-39. The court imposed a standard range sentence. CP 82-97. York appeals. CP 129.

## 2. Substantive Facts

On October 11 and 12, 2006, Rod Oleachea bought methamphetamine from a seller he claimed was York. CP 90-93, 101-106; 1RP 5. Oleachea, a police informant, was watched by two officers who provided the money and watched the transactions. After each sale, the officers recontacted Oleachea. They did not follow or arrest the seller. CP 90, 93, 101-106. York was arrested three months later on January 31, 2007. Supp CP \_\_\_ (sub no. 11, Return on Arrest Warrant, 1-31-2007).

York's trial was set for Monday, March 19, 2007. 1RP 2. On Friday, March 16, York's attorney told the prosecutor he would be calling

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<sup>1</sup> There are five volumes of verbatim report of proceedings referenced as follows: 1RP – March 19, 2007; 2RP – April 20, 2007; 3RP – April 27, 2007; 4RP - May 11, 2007; and 5RP - May 15, 2008.

<sup>2</sup> This amendment removed the allegation the charged crimes were committed in a school zone thus eliminating a potential 24 month sentence enhancement on each charge.

Danyelle Stigar to testify it was her, not York, who sold the methamphetamine to Oleachea. 1RP 14-15. Defense counsel had not found or spoken to Stigar before March 16th. 1RP 14. She was available at the time of trial because she was in custody. 1RP 14-15, 18, 33. The prosecutor did not want Stigar to testify. 1RP 15. He moved the court for an order precluding her testimony, stating if he had known earlier of her intent to testify for York, he would have joined her case with York's. Supp CP \_\_\_ (sub no. 38, Motion for Preclusion of Testimony, 3/19/2007); 1RP 15-16. The trial court reserved ruling on the prosecutor's motion until the close of the State's case, but its comments indicate a significant probability it would allow Stigar's proffered testimony. 1RP 19, 17-19, 20, 37. The jury was picked and sworn. 1RP 26.

The court received troubling news before it adjourned for lunch. Oleachea had been in the jury room. 1RP 34. The bailiff brought the jury into the room before lunch and found Oleachea using the telephone. 1RP 35. The trial court was upset with the prosecutor and told him:

It's the State's witness. I expect the state to ask him about ... [going into the jury room] and to make sure that no witnesses from the State during any trial go into that jury room the day of trial ever for any reason, unless there's a direct order of the Court.

1RP 35.

The court directed the prosecutor to make sure his witness did not return to the jury room. 1RP 35. The prosecutor, however, apparently ignored the court because he did not look for Oleachea before lunch; he did not ask any one else to look for Oleachea, and after lunch he did not look for Oleachea. 1RP 57. As a result, Oleachea went back into the jury room to eat and spoke to two of the jurors.<sup>3</sup> 1RP 38, 45-46.

When it was learned Oleachea had returned to the jury room the judge addressed the prosecutor:

Now, Mr. [Prosecutor], as the representative of the State, prior to lunch I had thought I made it clear that Mr. Oleachea was the State's witness and ... I thought the point was clear that the State better figure out how to control their witnesses in terms of what they're doing and now he's back in the jury room with two jurors this time. Did you talk to him at all before -- or after lunch ...?

1RP 56. The prosecutor responded.

I did not have an opportunity before lunch. I left here ... with Mr. Hatch. I didn't see Mr. Oleachea.

1RP 57. Deputy Pat Matlock was also present in the courthouse, but the prosecutor had not asked him to locate and warn Oleachea to stay out of the jury room. 1RP 57.

The judge commented

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<sup>3</sup> Bailiff Millie Clements asked the jurors if they had spoken with Oleachea and they responded "Oh, not really," implying that there had been some conversation. 1RP 46.

... I am going to find out what in the world was going through Mr. Oleachea's mind that anyone in their right mind could think that if they're a confidential informant and a witness could possibly think they have to do -- what remote possibility they should have their body inside the jury room. That's almost beyond my comprehension frankly.

1RP 57. In response, the prosecutor admitted he had directed Oleachea to the jury room. He sent Oleachea into the jury room prior to trial to use the men's room without telling him it was the jury room and did not warn Oleachea not to return. 1RP 45-46.

The defense moved for a mistrial. 1RP 59. The prosecutor considered joining in the motion. 1RP 60. The judge observed there was no way the defendant could receive a fair trial with the existing jury, expressed anger and frustration with the prosecutor, and declared a mistrial. 1RP 62-64, 67-68.

York's trial was reset to May 2, 2007. 1RP 75. It was then reset over York's objection to June 11, 2007. 3RP 7. By the time York's case was approaching trial, Stigar, his only witness, was out of custody. 3RP 6. Although defense counsel was able to reach her on April 27, her availability at the June 11 trial date was questionable. 1RP 14; 3RP 7.

C. ARGUMENT

RETRYING YORK AFTER THE MISTRIAL VIOLATED  
DOUBLE JEOPARDY PRINCIPLES UNDER BOTH THE  
STATE AND FEDERAL CONSTITUTIONS.

The prosecutor committed egregious misconduct by failing to comply with the court's order to tell his key witness to stay out of the jury room. This misconduct forced the court to declare a mistrial because York's jury had been tainted. Under these circumstances, the charges against York should have been dismissed with prejudice.

Freedom from double jeopardy is guaranteed by both the Washington State Constitution and the Fifth Amendment to the United States Constitution. Wash. Const. art 1, § 9; U.S.C.A. Const. Amend. 5. Retrial is barred if three elements are met: (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy for the same offense. State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). Jeopardy attaches after the jury is selected and sworn. It is not necessary that argument or testimony be presented. State v. Juarez, 115 Wn. App. 881, 887 64 P.3d 83 (2003).

In general, double jeopardy does not bar retrial after a mistrial. State v. Rich, 63 Wn. App. 743, 747, 821 P.2d 1269 (1992). There are, however, exceptions to this rule. Under the federal constitution, retrial is barred when a mistrial is caused by governmental misconduct intended to

goad the defendant into moving for a mistrial or intentionally trying to provoke a mistrial. Oregon v. Kennedy, 456 U.S. 667, 102 S. Ct. 2083, 72 L.Ed.2d 416 (1982); State v. Lewis, 78 Wn. App. 739, 743, 898 P.2d 874 (1995); U.S.C.A. Const. Amend. 5. Under the Oregon constitution, retrial is barred when improper State conduct is so prejudicial it cannot be cured by means short of a mistrial, the official knows the conduct is improper and prejudicial, and either intends or is indifferent to the resulting mistrial. State v. Kennedy, 295 Or. 260, 276, 666 P.2d 1316 (1983). Because the Oregon double jeopardy provision is very similar to Washington's, the Oregon rule has been favorably discussed by this Court.<sup>4</sup> See State v. Hopson, 113 Wn.2d 273, 277-279, 282, 778 P.2d 1014 (1989); Lewis, 78 Wn.App. at 742-44.

As pointed out by Justice Stevens concurring in Kennedy, the federal formulation places a heavy a burden of proof on the defendant. "It

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<sup>4</sup> Article 1 § 9 of the Washington Constitution provides:

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Washington State Constitution, Article 1 § 9 Rights of Accused Persons.

Article 1 § 12 of the Oregon Constitution provides:

No person shall be put in jeopardy twice for the same offence, nor be compelled in any criminal prosecution to testify against himself.

Oregon State Constitution, Article I § 12.

is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial ...” (Footnote omitted.) Kennedy, 456 U.S. at 688 (Stevens, J., concurring). Here, however, evidence that the prosecutor intended a mistrial is substantial. The prosecutor learned of the defense witness the Friday before trial. 1RP 16. He was upset about being presented with this witness and did not want her to testify. 1RP 16. He was also disappointed he did not get to join the witness's trial with York's. 1RP 14-15. York's witness was only available because she was in custody. The prosecutor could easily have anticipated her absence if the case were delayed. 1RP 14. The prosecutor directed his witness to the jury room men's room without informing his witness he was entering the jury room or telling him not to come back when the jury was present. 1RP 46, 57-58. The prosecutor did this after he knew the defense planned to call an unanticipated witness whose testimony he wanted suppressed. 1RP 15. The prosecutor also knew his witness had returned to the jury room during the morning. 1RP 35. Yet, in spite of the judge's warning to keep the witness from reentering the jury room, the prosecutor he did nothing to prevent the witnesses return. 1RP 57. Oleachea's return to the jury room after lunch and his prohibited contact with jurors precipitated a mistrial. 1RP 61-62.

The mistrial favored the prosecutor's goal of eliminating York's witness. There was no trial March 19 when her appearance was certain. 1RP 66. She was out of custody by York's next hearing date. 3RP 6. Defense counsel was able to reach her by telephone on April 27. 3RP 7. However, her attendance at the June 11 trial date was questionable. 1RP 14; 3RP 7.

The prosecutor sent his witness into the jury room without telling him not to return, knew his witness had returned to the jury room, and ignored the judge's emphatic order to keep his witness from going in to the jury room a second time. The logical consequence of these actions is a mistrial. A person is presumed to intend the logical consequences of actions. It is fair to conclude the prosecutor intended the mistrial. Retrial of York is barred by double jeopardy principles under the federal constitution. Kennedy, 456 U.S. at 676.

Retrial of York would also be barred under the Oregon constitution. Under the Oregon constitution, it is not necessary for the prosecutor to intend a mistrial; retrial is barred when a prosecutor's improper conduct is prejudicial and the prosecutor either intends or is *indifferent* to the resulting mistrial. Lewis, 78 Wn. App. at 744. This Court should give the Washington double jeopardy clause, Wash. Const.,

art. 1, § 9, the same interpretation as the Oregon double jeopardy clause, Or. Const. art. 1, § 12.

Whether the Washington clause should be so interpreted was addressed by the Supreme Court in Hopson, supra. There, the court independently analyzed the state provision under the factors set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). The analysis specifically recognized that "history demonstrates that [the Washington clause] was patterned after [the Oregon clause] and that the language of the two provisions is very similar." Hopson, 113 Wn.2d at 277 (citing Journal of the Washington State Constitutional Convention, 1889 498 (B. Rosenow ed. 1962)). The Court's historical analysis demonstrates that the Washington clause should not only be interpreted independently from U.S.C.A. Amend 5, but that its interpretation should be consistent to that of the Oregon clause. Gunwall, 106 Wn.2d at 61.<sup>5</sup>

An independent analysis should not be limited to state constitutional history. Factors that should also be considered are:

**Textual dissimilarities.** The federal clause says no person "for the same offense [may] be twice put in jeopardy of life or limb." U.S.C.A.

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<sup>5</sup> See also Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 512 (1984) (to interpret state constitutional provision, court should consider "the text and the judicial construction of constitutions from which various Washington provisions were drawn").

Const. Amend. 5 (emphasis added). The Washington clause says for the same offense, no person may "be twice put in jeopardy...." Wash. Const. art. 1, § 9. Thus, the clauses have a notable textual difference: the Washington clause does not contain the phrase "of life or limb." Under the maximal effect doctrine, the "life or limb" phrase cannot be construed as mere surplusage; it instead must be construed to have some meaning. Farris v. Munro, 99 Wn.2d 326, 333, 662 P.2d 821 (1983). Under the plain meaning rule, the reference only to physical punishment could be construed to limit the federal clause's application to only those cases where physical punishment is imposed. State ex rel. Albright v. City of Spokane, 64 Wn.2d 767, 770, 394 P.2d 231 (1964).

Of course, the federal clause has not been construed in that manner.<sup>6</sup> But the framers of the Washington Constitution had no way to predict how the federal clause would be construed 100 years later. Moreover, a substantial number of them were lawyers,<sup>7</sup> and likely were well aware that because of the federal "life or limb" language, the federal clause might be construed to provide less protection than they desired for

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<sup>6</sup> See, United States v. Halper, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989) (applying federal double jeopardy bar to imposition of punitive civil fine for acts for which defendant had already been punished following a criminal conviction), overruled by Hudson v. United States, 522 U.S. 93, 101-02, 139 L. Ed. 2d 450, 118 S. Ct. 488 (1997).

<sup>7</sup> Utter, 7 U. Puget Sound L. Rev., *supra*, at 515 n. 30.

Washington citizens. To achieve a goal of enhanced protection, the framers may well have decided it was simplest to drop the "life or limb" phrase. Thus, the textual difference indicates the Washington clause should be interpreted more broadly than the federal clause, and in line with the Oregon Constitution, which it mirrors.<sup>8</sup> Gunwall, 106 Wn.2d at 61 (textual language should be used to try to ascertain framers' intent); accord State ex rel. O'Connell v. Slavin, 75 Wn.2d 554, 558, 452 P.2d 943 (1969).

**Preexisting state law.** In 1909, the Washington Legislature enacted a law "overruling" the dual sovereignty exception to the prohibition on double jeopardy. See RCW 10.43.040. Although this statute's plain terms only bar prosecutions for crimes for which the defendant was previously tried in other states, the Supreme Court has interpreted it to also bar prosecutions where the defendant was previously tried in federal court. E.g., State v. Caliguri, 99 Wn.2d 501, 512, 664 P.2d 466 (1983); cf. United States v. Wheeler, 435 U.S. 313, 317, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978) (federal constitution does not bar one state from trying a person for a crime for which the person already was tried by the federal government).

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<sup>8</sup> The Oregon double jeopardy clause does not contain the "life or limb" language. Like the Washington clause, it only says, "No person shall be put in jeopardy twice for the same offence [sic]...." Or. Const. art. 1, § 12.

This statute and its judicial interpretation show that Washington has long had a preexisting commitment to providing broader double jeopardy protections than the federal government. Preexisting state law further demonstrates that the state's double jeopardy clause should be interpreted independently from the federal clause. Gunwall, 106 Wn.2d at 66.

**Matters of particular state and local concern.** In Washington, the exclusionary rule does more than merely deter police misconduct; it also serves to protect privacy interests and to preserve the integrity of the judiciary. State v. Bonds, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831 (1983); State v. White, 97 Wn.2d 92, 109 n.8, 640 P.2d 1061 (1982). The state's double jeopardy clause should serve no less a purpose. The clause should be construed to minimize the number of mistrials caused by governmental misconduct. Such a construction not only enhances the degree of protection afforded by the clause, it preserves the integrity of the judiciary -- a matter of particular state concern. Gunwall, 106 Wn.2d at 67.

In sum, this analysis shows the double jeopardy clause under Wash. Const. article 1 § 9, should be interpreted more broadly than its federal counterpart under U.S.C.A. Const. Amend. 5, and that its

interpretation should be consistent to that given to the double jeopardy clause in the Oregon constitution.<sup>9</sup>

The Oregon constitution bars retrial when the prosecutor intends or is indifferent to the consequence of mistrial. Lewis, 78 Wn. App. at 744. The required indifference is analogous to recklessness. Id. Here, the prosecutor showed clear indifference to mistrial. He demonstrated this indifference by ushering Oleachea into the jury room without telling him it was the jury room or warning him not to return, knowing Oleachea went back in to the jury room before lunch and failing to make sure Oleachea did not go in to the jury room a second time despite the court's direction. 1RP 34-35, 57-58. The prosecutor ignored the risk and went to lunch. 1RP 57.

Detective Matlock was in the courthouse. 1RP 57. The prosecutor did not ask him to find Oleachea nor did he ask the officers or prosecutor's office staff who had Oleachea's contact information to call Oleachea. Id. The prosecutor simply went to lunch and stayed away long enough for Oleachea to return to the jury room. Oleachea made himself at home in the jury room and spoke to two of the jurors, leaving the court no choice

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<sup>9</sup> Washington would not be the first state to adopt the Oregon rule. See Commonwealth of Pennsylvania v. Martorano, 559 Pa. 533, 537-38, 741 A.2d 1221 (1999); State of Hawaii v. Rogan, 91 Haw. 405, 423, 984 P.2d 1231 (1999); New Mexico v. Breit, 122 N.M. 655, 666-67, 930 P.2d 792 (1996); Pool v. Superior Court, 139 Ariz. 98, 108-09, 677 P.2d 261 (1984);

but to declare a mistrial. 1RP 62. Because this mistrial was caused by the prosecutor's apparent indifference to the risk of mistrial, or worse yet, a desire for a mistrial, the double jeopardy clause of the Oregon constitution rule bars retrial. Lewis, 78 Wn. App. at 744. Because the double jeopardy clause of the Washington constitution should be interpreted consistently with the Oregon clause, retrial should also be barred here.

D. CONCLUSION

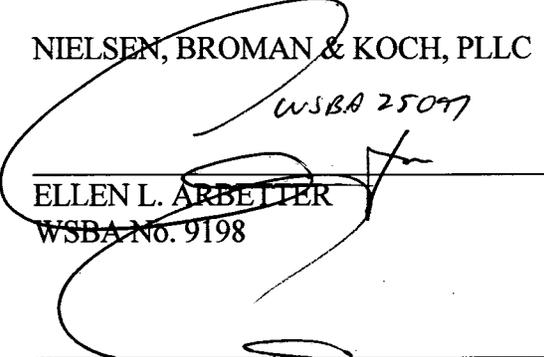
The prosecutor's intentional and reckless actions caused a mistrial. Double jeopardy principles preclude retrial in such circumstances. This Court should therefore reverse York's conviction and dismiss the charge with prejudice.

DATED this 31st day of December, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

*WSBA 25097*

  
ELLEN L. ARBETTER  
WSBA No. 9198

CHRISTOPHER H. GIBSON  
WSBA No. 25097  
Office ID No. 91051  
Attorneys for Appellant

LAW OFFICES OF  
**NIELSEN, BROMAN & KOCH, P.L.L.C.**

ERIC J. NIELSEN  
ERIC BROMAN  
DAVID B. KOCH  
CHRISTOPHER H. GIBSON

1908 E MADISON ST.  
SEATTLE, WASHINGTON 98122  
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

OFFICE MANAGER  
JOHN SLOANE

LEGAL ASSISTANT  
AMY COX

DANA M. LIND  
JENNIFER M. WINKLER  
ANDREW P. ZINNER  
CASEY GRANNIS

OF COUNSEL  
K. CAROLYN RAMAMURTI

State V. Richard York

No. 36381-0-II

Certificate of Service by Mail

On December 31, 2007, I deposited in the mails of the United States of America,  
A properly stamped and addressed envelope directed to:

David John Burke  
Attorney at Law  
PO Box 45  
South Bend WA 98586-0045

Richard York 986686  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

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Office Manager  
Nielsen, Broman & Koch  
Done in Seattle, Washington

Date

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