

NO. 43951-4

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

STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY DEAN TUCHECK, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly Grant

No. 11-1-01343-1

Reply Brief

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A. ARGUMENT.

1. THE STATE IS APPEALING THE DISMISSAL OF DEFENDANT'S CASE AND THE APPLICABLE CASE LAW APPLIES.

Defendant argues that because the trial court granted a mistrial, that defendant did not consent to and without any manifest necessity, double jeopardy has attached and retrial is prohibited. However, what defendant fails to note is that the State is appealing the trial court's dismissal of defendant's case. Double jeopardy does not prohibit retrial in this circumstance.

The State is appealing the final order of the trial court, which was a dismissal of the criminal case against defendant. RAP 2.2(b) states:

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) *Final Decision, Except Not Guilty.* A decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information, *or a decision granting a motion to dismiss under CrR 8.3(c).*

(2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

(3) Arrest or Vacation of Judgment. An order arresting or vacating a judgment.

(4) New Trial. An order granting a new trial.

(5) Disposition in Juvenile Offense Proceeding. A disposition in a juvenile offense proceeding that (A) is below the standard range of disposition for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) includes provisions that are unauthorized by law, or (D) omits a provision that is required by law.

(6) Sentence in Criminal Case. A sentence in a criminal case that (A) is outside the standard range for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) includes provisions that are unauthorized by law, or (D) omits a provision that is required by law.

RAP 2.2(b) (emphasis added). The applicable part of the rule in the instant case is the RAP 2.2(b)(1). The State could not have appealed the mistrial, there is no provision for the State to do so as the case would not have been final and the case would have been set for a new trial date. However, the State specifically can appeal a decision granting a motion to dismiss under CrR 8.3(c) as it is enumerated in RAP 2.2(b)(1) and that was the final decision that determined the case. The State did just that, appealing the final order of the trial court that dismissed the case. Appendix A and B.

The procedural history of the instant case is complicated. However, what is clear is the defendant asked for dismissal of his case.

RP 238, 239. CP 24-30. The trial court initially granted a mistrial but then changed its mind and granted the dismissal that defendant had asked for. RP 333, CP 72-77, 80-81. The trial court's final order is the order this court considers for double jeopardy purposes. *State v. Collins*, 112 Wn.2d 303, 308, 771 P.2d 350 (1989). The issue before this Court is the dismissal of defendant's case under CrR 8.3(c). Defendant obtained the relief he sought. The mistrial was not the final ruling in this case so any case law, double jeopardy or otherwise, that applies to mistrials is not relevant. Defendant's arguments ignore the procedural history of this case and ignore the fact that the case was dismissed at defendant's request under CrR 8.3(c). As the final order of the trial court was to grant defendant's motion for dismissal, this Court must look to the case law concerning dismissals.

The dismissal in this case does not violate double jeopardy and does not bar retrial. The case was not dismissed based upon insufficient judgment or any other weighing of facts. See *State v. Jubie*, 15 Wn. App. 881, 552 P.2d 196 (1976); *State v. Bundy*, 21 Wn. App. 697, 587 P.2d 562 (1978). The dismissal in this case did not weigh the merits of the case; it was a dismissal as a matter of law. See *State v. Rhinehart*, 21 Wn. App. 708, 715, 586 P.2d 124 (1978), *reversed on other grounds*, 92 Wn.2d 923, 602 P.2d 1188 (1979). RAP 2.2(b)(1) prohibits appeal of a decision that is in effect a judgment of not guilty. There was no such judgment in this case. Defendant asked for and received a dismissal under CrR 8.3(c).

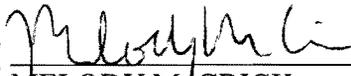
RAP 2.2(b)(1) specifically allows the State to appeal in this circumstance. The State is following the rules as set out. The case was never adjudicated on its merits and defendant was not found to be not guilty. Case law allows the State to appeal and allows a retrial should the appeal be successful. Double jeopardy does not prevent retrial in the instant case.

B. CONCLUSION.

The State respectfully requests that this Court overturn the trial court's ruling dismissing this matter, reinstate defendant's case, and remand for a new trial.

DATED: August 23, 2013.

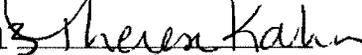
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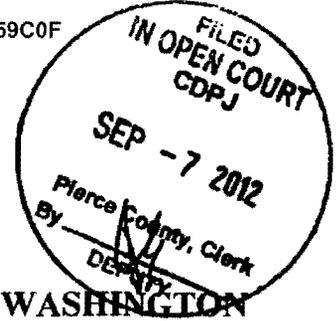
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under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

8.23.13 
Date Signature

APPENDIX “A”



11-1-01343-1 39153536 FNCL 09-10-12



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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE**

STATE OF WASHINGTON,)	NO: 11-1-01343-1
)	
Plaintiff,)	FINDINGS OF FACT AND
vs.)	CONCLUSIONS OF LAW
)	
JEFFREY DEAN TUCHECK,)	
)	
Defendant.)	

THIS MATTER having come on before the Honorable Beverly G. Grant, Judge of the above entitled court, for trial on the 2nd day of February, 2012, the defendant having been present and represented by attorney ADRIAN BLAS PIMENTEL, Co-Defendant Lisa Balkwill was represented by JOSEPH EVANS and the State being represented by Deputy Prosecuting Attorney KAREN D. PLATT, and the court having observed the demeanor and heard the testimony of the witnesses and having considered all the evidence and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. That on March 30, 2011, an Information was filed charging the defendant with UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER; UNLAWFUL USE OF BUILDING FOR DRUG PURPOSES; UNLAWFUL USE OF DRUG PARAPHERNALIA; UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE - FORTY GRAMS OR LESS OF MARIHUANA

II.

- 1
- 2 2. Trial commenced on February 2, 2012 and a jury was seated, opening statements were given by
- 3 all parties and the state began presentation of their case. The states first witness was Detective
- 4 Ray Shaviri of the Pierce County Sheriff's Department. Detective Shaviri was cross examined by
- 5 all parties in a 3.5 hearing and in front of the jury during trial and was excused from the witness
- 6 stand.
- 7
- 8 3. Deputy Kory Shaffer was the second witness called to the stand. Deputy Shaffer began to testify
- 9 as to a syringe that was found and alleged to contain a controlled substance. Both codefendants
- 10 objected on the grounds that the syringe was never booked into evidence or properly tested. The
- 11 court excused the jury and both counsels began an inquiry with Detective Shaffer outside the
- 12 presence of the jury. During the questioning, Detective Shaffer indicated that the exact
- 13 locations and existence of the substances could be verified in the photographs that had been
- 14 taken of the crime scene.
- 15
- 16 4. The State and all counsel for the defense were unaware that photographs had been taken of the
- 17 scene until Detective Shaffer mentioned them during his testimony. Neither codefendant had
- 18 received copies of the photographs.
- 19
- 20 5. The court finds that the States warrant to search the home was based upon information from a
- 21 confidential informant. The information from the confidential informant resulted in a search of
- 22 the home that ultimately lead to charges against Mr. Tucheck and Ms. Balkwill. The state refused
- 23 to disclose the information related to the confidential informant and chose not to bring any
- 24 charges that required the testimony of that informant.
- 25
- 26 6. The court finds that a review of the discovery revealed that there was a notation of photographs
- 27 booked into evidence but ^{it was the Court's impression} all counsel believed those photographs were in fact photographs found
- 28

1 to be located in the house and or related to the confidential informant, not photographs related to
2 the crime scene.

3 7. The court finds that ^{it was the Court's impression that} all three attorneys viewed the evidence the same way in that their argument
4 did not reference them and clearly made no mention of photographs. The photographs would
5 have played a significant role in the presentation of their respective cases.

6
7 8. After Detective Shaffer's testimony, Ms. Platt contacted her officers and was able to locate the
8 photographs in question and provided those photographs to counsel. The photographs were in the
9 custody of Detective Shaviri after being taken by Deputy Shaffer. Those photographs were never
10 booked formally into evidence or provided in discovery to defense counsel.

11
12 9. The reference of the photos in discovery did not raise any red flags with any of the attorneys. .
13 Based on the demeanor of the attorneys and oral argument ^{it was the Court's impression} ~~the Court finds~~ that the attorneys
14 believed that the photos related to the confidential informant, i.e., those portions of the discovery
15 that the State had refused to disclose and had no duty to disclose because they were choosing not
16 to call the CI as a witness.

17
18 10. The photographs showed that there were numerous articles of clothing and belongings within the
19 room alleged to belong to Ms. Balkwill that were men's items. There were identification cards of
20 other people in the room alleged to be Mr. Tucheck's. The pictures supported potential defenses
21 to some or all of the counts charged against both codefendants.

22
23 11. The court finds that the disclosure of the photographs was untimely and that both codefendant
24 cases were hindered by the failure to turn over the photographs. The photographs hindered the
25 codefendants ability to prepare for trial.

1 12. Detective Shaviri was aware of the photos and failed to provide them to the prosecutor. The
2 State has a responsibility to get all evidence from its witnesses. Detective Shaviri testified at a
3 CrR 3.5 hearing and at trial.

4 13. Detective Shaviri works for the Pierce County ^{Sheriff's office} ~~Prosecutor~~ and is thus an agent of the state as
5 defined by *State v. Brady* and its subsequent cases. The State had a duty to turn over all
6 potentially exculpatory evidence and Detective Shaviri did not fulfill that duty.
7

8 14. During the course of the trial there were numerous discussions out of the presence of the jury
9 wherein detective Shaviri was specifically instructed not to testify as to certain subjects and
10 alleged facts. Detective Shaviri repeatedly ignored those admonishments and testified in a
11 manner that elicited objections and could potentially prejudice the defendant's right to a fair trial.
12

13 15. On more than one occasion, Detective Shaviri was given rulings of the court and did something
14 totally different. He would then be reminded and he still elected to do whatever he wanted to do.
15

16 16. The court finds that there was mismanagement on the part of the State in that Detective Shaviri is
17 an agent of the State and continued to show an inability to comply with court directives during
18 testimony. This disregard for court orders was compounded by the fact that Detective Shaviri
19 also failed to make sure the photographs were put into discovery and turned over to all relevant
20 counsel.
21

22 17. The court finds that there is prosecutorial misconduct, due to the failure of the state to turn over
23 pertinent evidence and comply with court directives. The court finds that the mismanagement
24 was not due to the direct actions of the deputy prosecutor but was in fact due to the actions of
25 Detective Shaviri. The courts finds that the mismanagement of the witness in failing to turn over
26 evidence and testify within the boundaries laid out by the court demonstrated a disregard for the
27 court and overall misconduct.
28

- 1 18. Had the evidence been presented to the attorneys there is a strong likelihood that they would
2 have handled tried their cases differently and dramatically changed their strategies. The court
3 finds that the late disclosure of the pictures hindered the defenses ability to use the evidence in
4 that their credibility with the jury would have likely been affected by the changing of strategy
5 after presenting opening statements. The court found that Ms. Balkwill's and Mr. Tucheck's
6 defenses were substantially prejudiced.
7
- 8 19. *The court declared a mistrial sua sponte without the direction or request of either counsel. In this*
9 *factual situation, the testimony of the state's witness and the credibility issues he demonstrated in*
10 *his decisions to ignore direct judicial admonishments warranted a dismissal. Detective Shaviri*
11 *knew that these pictures existed and did not mention them during any of the witness interviews,*
12 *his discussions with the Deputy Prosecutor, the CrR 3.5 hearing or his trial testimony. The court*
13 *found that given the demeanor and responses of Detective Shaviri that it was highly unlikely that*
14 *the detective would have ever produced the pictures had they not been disclosed by Deputy*
15 *Shaffer.*
16
- 17 20. The court finds that the only proper remedy given the facts and circumstances observed by the
18 trial court was dismissal. Both codefendants cases were dismissed because these facts applied
19 equally to both cases.
20
21
22

23 CONCLUSIONS OF LAW

- 24
25 I. There was governmental mismanagement of the prosecution of both codefendant
26 cases under Criminal Rule 8.3
27
28

1 II. The governmental mismanagement resulted in the state failing to disclose critical
2 evidence that affected the defendant's due process rights.

3 III. The defendant's rights to a fair trial were violated and the proper remedy was
4 dismissal.

5 DONE IN OPEN COURT this 20th day of August, 2012. *BGG*

Beverly G. Grant

THE HONORABLE BEVERLY G. GRANT

9 Presented by:

10
11 *Adrian B. Pimentel*

12 ADRIAN B. PIMENTEL
13 Attorney for Defendant Tucheck
14 WSBA No. 23564

15 Approved as to form:

16
17 *Karen D. Platt*

18 KAREN D. PLATT
19 Deputy Prosecuting Attorney
20 WSB # 17290



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28 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 6

PIMENTEL LAW FIRM
19689 7th Avenue NE PMB 126
Poulsbo Washington 98370
Adrianp1108@gmail.com
Tacoma: (253) 439-9583

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 23 day of August, 2013



Kevin Stock, Pierce County Clerk

By /S/Lu Scott, Deputy.

Dated: Aug 23, 2013 11:34 AM



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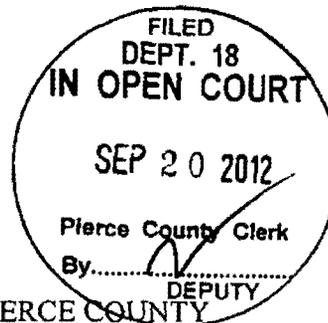
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APPENDIX “B”



11-1-01343-1 38232325 ORDSMWP 09-24-12



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 11-1-01343-1

vs.

JEFFREY DEAN TUCHECK,

Defendant.

MOTION AND ORDER FOR
DISMISSAL WITH PREJUDICE

DOB: 11-17-64

SID #: WA

MOTION

Comes now the defendant, herein, by his attorney, Adrian Pimentel, and moves the court for an order dismissing with prejudice the above entitled action, on the grounds and for the reasons set forth in the Findings of Fact and Conclusions of Law dated September 7, 2012.

DATED this 13th day of September 2012.

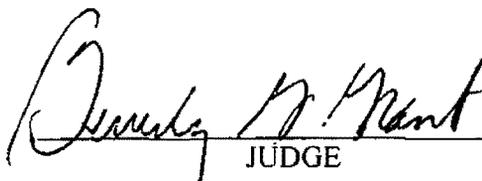
Adrian B. Pimentel
WSBA No. 23564

ORDER

1 The above entitled matter having come on regularly for hearing on motion of Adrian
2 Pimentel and the Court being fully advised in the premises, it is hereby;

3 ORDERED that the above entitled action be and same is hereby dismissed with prejudice
4 and bail is hereby exonerated.

5
6 DATED the 20th day of September, 2012.

7
8 
9 _____
10 JUDGE



State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 23 day of August, 2013



Kevin Stock, Pierce County Clerk

By /S/Lu Scott, Deputy.

Dated: Aug 23, 2013 11:34 AM



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