

COA No. 29000-0-III



COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

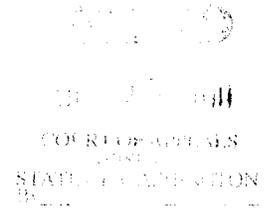
v.

RONALD STEVEN LAW, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The court erred by denying the motion to dismiss on double jeopardy grounds and the conviction should be reversed.

B. The court erred by denying the defense motion to suppress Mr. Law's statements.

C. The court erred by denying the defense motion to suppress evidence based on an illegal search.

D. The court erred by refusing to consider Mr. Law's pro se motions when he had been previously been allowed to argue pro se even though he was represented by counsel.

Issues Pertaining to Assignments of Error

1. Did the court err by finding the DOC sanction of jail time imposed on Mr. Law for violating conditions of sentence based on the same conduct for which he was criminally charged did not constitute double jeopardy? (Assignment of Error A).

2. Did the court err by denying the defense motion to suppress statements of Mr. Law, who was not given his *Miranda* warnings in a custodial interrogation? (Assignment of Error B).

3. Did the court err by denying the defense motion to suppress evidence based on an illegal search? (Assignment of Error C).

4. Did the court abuse its discretion by refusing to consider Mr. Law's pro se motions when he had been allowed to argue pro se even though he was represented by counsel? (Assignment of Error D).

II. STATEMENT OF THE CASE

On October 7, 2008, Ronald Steven Law was charged by information with one count of unlawful possession of a controlled substance – methamphetamine, one count of first degree driving while license suspended or revoked, and one count of making false or misleading statements to a public servant. (CP 1-2).

Mr. Law made a pretrial pro se motion to dismiss based on a double jeopardy violation. (CP 13-14). He argued the present criminal charge of unlawful possession of a controlled substance was barred because he had already been punished for the same offense after a DOC administrative hearing for a community placement violation. (3/26/09 RP 16-24). Relying on *State v. Prado*, 86 Wn. App. 573, 937 P.2d 636, *review denied*, 133 Wn.2d 1018 (1997), the court denied his motion. (3/26/09 RP 27-28, CP 74-77).

The court held a CrR 3.5/3.6 hearing on defense motions to suppress. (1/29/10 RP 21-40, CP 123). Finding (1) no pretext in

stopping Mr. Law to conduct a search for other purposes and (2) Mr. Law's statements were volunteered, the court denied suppression. (1/29/10 RP 38-40). It entered the required findings of fact and conclusions of law. (CP 145-147).

Over defense objection, Judge Spanner, exercising his discretion, allowed Mr. Law to proceed pro se even though he was represented by counsel. (3/19/09 RP 11; 3/26/09 RP 12). Judge Mitchell later ruled that Mr. Law could not proceed pro se while represented by counsel and refused to consider his motions to compel and to dismiss. (1/29/10 RP 21, 42-43).

After numerous continuances, a stipulated facts trial was held on February 4, 2010, before Judge Matheson. (2/4/10 RP 4). The court found Mr. Law guilty of unlawful possession of a controlled substance – methamphetamine. (2/4/10 RP 6, CP 159). The other two counts were dismissed. (CP 162). At sentencing, Judge Spanner refused to consider Mr. Law's post-trial pro se motions. (4/29/10 RP 62). This appeal follows.

III. ARGUMENT

A. The court erred by finding the DOC sanction of jail time imposed on Mr. Law for violating conditions of sentence based on

the same offense for which he was criminally charged did not constitute double jeopardy.

Mr. Law moved pro se to dismiss based on double jeopardy.

For purposes of the motion, he agreed with the court's synopsis:

THE COURT: Mr. Law, I'll help you out just a little bit. I read your declaration or affidavit wherein you indicated you went to a DOC hearing because of this current charge of possession of methamphetamine. As I understand it, the purpose of that DOC administrative hearing was to determine whether or not you violated the conditions of a prior conviction.

During the hearing you agreed that you had violated the conditions of that prior hearing by possessing or by being charged with a possession of methamphetamine, and you agreed that the appropriate sanction would be 30 days in jail.

Did I fairly state that?

THE DEFENDANT: Yes, that would be correct.

THE COURT: And I'm taking that as being true and correct for the purposes of your motion. I would understand your motion to be you're contending that those 30 days for the DOC sanction, coupled with a criminal prosecution for the possession of methamphetamine, would violate your constitutional rights with respect to double jeopardy, correct?

THE DEFENDANT: That's correct, your Honor.
(3/26/09 RP 15-16).

Relying on *State v. Prado*, 86 Wn. App. 573, 937 P.2d 636, *rev. denied*, 133 Wn.2d 1018 (1997), the court denied the motion to

dismiss because “[t]he 27 days that the DOC gave you is punishment for violating the judgment and sentence of an old crime, which is constitutionally different than the State prosecuting you for the same offense.” (3/26/09 RP 27). Accordingly, there was no double jeopardy violation. (*Id.*). By so ruling, the court necessarily found Mr. Law’s claims of ineffective assistance of counsel and cruel and unusual punishment failed. (3/26/09 RP 27-28). The court entered findings of fact and conclusions of law and order denying the motion to dismiss. (CP 74-77).

Prado, however, is distinguishable in law and fact from Mr. Law’s situation. As he argued, the community placement violation could have just been charged as a failure to obey all laws, but DOC chose to single out the crime of possession of methamphetamine, with which he had already been criminally charged, as an alleged violation. (3/26/09 RP 16-17, CP 28). Mr. Law was charged by information on October 7, 2008, and the DOC hearing was held on October 20, 2008. (CP 1, 28).

Unlike Mr. Law’s situation, *Prado* involved modifications of sentences due to violations of conditions of community supervision. The court held that such violations were deemed punishment for the original crime. 86 Wn. App. at 578. No modification of

sentence was at issue here. Rather, Mr. Law was charged with methamphetamine possession as a violation of community placement conditions. (CP 28). The DOC sanction recited that it was “based on [his] admission of guilt to these violations.” (CP 28).

Double jeopardy protects a defendant from being subjected to prosecution for the same offense more than once. *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed.2d 556 (1993); *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). It applies to successive punishments and successive prosecutions for the same offense. *Prado*, 86 Wn. App. at 576 (citing *Dixon*, 113 S. Ct. at 2855).

Prado is not directly on point as stated by the trial court. *State v. Grant*, 83 Wn. App. 98, 111, 920 P.2d 609 (1996), addresses a situation more akin to Mr. Law’s. The *Grant* court held that double jeopardy does not preclude a subsequent prosecution of acts which also are the basis for an order of confinement imposed for a violation of sentencing conditions. (*Id.*). It equated such violation as a continuing consequence of the defendant’s original conviction and stated the order of confinement was not a penalty. (*Id.*). But again, unlike Mr. Law’s predicament, the crime

charged in *Grant* was different from the alleged violation. 83 Wn. App. at 611. Mr. Law was charged for the same offense/violation.

The legal fiction that an order of confinement imposed for a sentencing condition violation is a consequence of the original conviction should not be applied when the crime charged is exactly the same as the alleged violation. DOC simply could have relied on a violation of the “obey all laws” condition. But it did not and additionally alleged as a violation the very crime with which Mr. Law had already been charged. A violation of a sentencing condition need only be proved by a preponderance of the evidence.

Detention of Davis, 109 Wn. App. 734, 745, 37 P.3d 325 (2002), *rev. denied*, 150 Wn.2d 1002 (2003). The crime must be proved beyond a reasonable doubt. Categorizing Mr. Law’s incarceration for a sentencing condition violation based on the same charged criminal offense as somehow not being a successive prosecution undermines his constitutional right against double jeopardy under the Fifth Amendment and Wash. Const. art. 1, § 9. *Cf. Davis*, 109 Wn. App. at 745.

In these circumstances, the court erred by relying on *Prado*. Double jeopardy applies. The conviction must be reversed and the charge dismissed.

B. The court erred by denying the defense motion to suppress statements by Mr. Law, who was not given his *Miranda* warnings in a custodial interrogation.

The defense moved to suppress statements made by Mr. Law to Trooper Christopher Thorson. (CP 123). The court held a CrR 3.6 hearing on January 29, 2010. In relevant part, the findings stated:

7. The defendant initially told Trooper Thorson his name was "Timothy R. Law."

8. Trooper Thorson felt this was not correct. The defendant had parked his van next to a vehicle occupied by a female. Trooper Thorson asked this female what the defendant's name was and she responded, "Ron."

9. Trooper Thorson handcuffed the defendant and told him he would be detained until Thorson could confirm his true name.

10. The defendant then told Trooper Thorson his correct name and stated that his driving status was suspended.

11. Thorson placed the defendant under arrest. . . (CP 146).

Mr. Law does not challenge the findings of fact as they reflect the testimony at the hearing. He does claim, however, that the conclusions do not flow from the findings. Those conclusions are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Nowhere in the findings is there an indication that Mr. Law's statements were voluntary. The conclusions do not reflect that his statements were even admissible. The pertinent conclusion states: "Trooper Thorson's actions leading up to placing the defendant under arrest were appropriate." (CP 147). This recitation is wholly inadequate to support the admissibility of Mr. Law's statements.

Furthermore, they were made in a custodial interrogation without the benefit of *Miranda* warnings. The Fifth Amendment right against compelled self-incrimination requires police to inform suspects of their *Miranda* rights before a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966); *State v. Cunningham*, 116 Wn. App. 219, 227, 65 P.3d 325 (2003). Suspects are deemed in custody for *Miranda* purposes as soon as their freedom is curtailed to a degree associated with a formal arrest. *State v. Watkins*, 53 Wn. App. 264, 274, 766 P.2d 484 (1989). This determination is based on how a reasonable person in the same circumstances would have perceived the situation. *Id.*

Here, Trooper Thorson testified that when he put Mr. Law in handcuffs, he did not give him his *Miranda* rights and told him he was being detained. (1/29/10 RP 32). The trooper acknowledged

Mr. Law was not free to go. (*Id.*). At this point, Mr. Law said he was lying about his name, gave the trooper his correct name, and admitted driving without a license. (*Id.*). In these circumstances, Mr. Law was in custody as his freedom was certainly curtailed to a degree associated with a formal arrest. *Watkins*, 53 Wn. App. at 274. No reasonable person could think otherwise. *Miranda* warnings were required, but were not given. Accordingly, the statements were inadmissible.

C. The court erred by denying the defense motion to suppress evidence based on an illegal search.

Mr. Law's statements to Trooper Thorson were given without the required *Miranda* rights. After he said he was driving without a license, the trooper ran Mr. Law's driver's license and found he had been revoked. (1/29/10 RP 32). Trooper Thorson then arrested him for driving while revoked and searched him incident to arrest. (*Id.* at 33). The methamphetamine was found in the course of that search. (*Id.* at 33-34). Thereafter, Trooper Thorson gave Mr. Law his *Miranda* rights. (*Id.* at 34).

The basis for arresting Mr. Law came from his statement that he was driving without a license. That statement was unlawfully obtained without benefit of *Miranda* warnings and led to Mr. Law's

unlawful arrest for driving while license revoked. The United States and Washington Constitutions require the exclusion of direct and indirect products of illegal police conduct. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963); *State v. O'Bremski*, 70 Wn.2d 425, 423 P.2d 530 (1967). Since the discovery of methamphetamine came in the process of a search incident to the unlawful arrest of Mr. Law, that evidence must be suppressed as fruit of the poisonous tree. *Wong Sun*, 371 U.S. at 485-86. Mr. Law's conviction must be reversed and the charge dismissed.

D. The court abused its discretion by refusing to consider Mr. Law's pro se motions when he had previously been allowed to argue pro se even though he was represented by counsel.

The Sixth Amendment confers no right of hybrid representation on a defendant. *State v. Hightower*, 36 Wn. App. 536, 540, 676 P.2d 1016, *rev. denied*, 101 Wn.2d 1013 (1984). This state also does not confer any constitutional right to hybrid representation. *Id.* at 541; Wash. Const. art 1, § 22 (amend. 10). The court may, however, allow hybrid representation in the exercise of its sound discretion. 36 Wn. App. at 541 (citing *United States v. Halbert*, 640 F.2d 1000, 1009 (9th Cir. 1981)). That is precisely

what Judge Spanner did when he permitted hybrid representation for Mr. Law, who was allowed to file and argue pro se motions. (3/19/09 RP 11; 3/26/09 RP 12).

Judge Mitchell later refused to consider Mr. Law's pro se motions because he was represented by counsel. (1/29/10 RP 21, 42-43). Judge Spanner, who had allowed Mr. Law to proceed pro se previously, then refused to consider further pro se post-trial motions. (4/29/10 RP 62). The record reflects no reasons for the court's refusal to consider further any pro se motions by Mr. Law other than the fact he was represented by counsel. But that is no reason for not considering his pro se motions because the court, in its discretion, could and did allow such hybrid representation before. *Hightower*, 36 Wn. App. at 541.

The court abuses its discretion when its decision is based on untenable grounds and for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 27, 482 P.2d 775 (1971). Judge Mitchell and later Judge Spanner abused their discretion by refusing to consider Mr. Law's pro se motions because they exercised no discretion at all in taking away the hybrid representation that had been allowed before. Discretion unexercised is discretion abused.

Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 976 P.2d 643

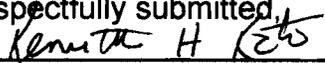
(1999). The remedy is to remand for further proceedings.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Law respectfully urges this Court to reverse his conviction and dismiss the charge.

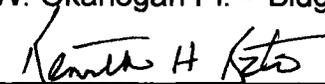
DATED this 29th day of October, 2010.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on October 29, 2010, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Andrew K. Miller, Benton County Prosecutor, 7122 W. Okanogan Pl. – Bldg. A, Kennewick, WA 99336-2359, and Ronald Steven Law, c/o Benton County Jail, 7122 W. Okanogan Pl. – Bldg. B, Kennewick, WA 99336.


Kenneth H. Kato