FILED
Mar 27, 2012
Court of Appeals
Division III
State of Washington

No. 30336-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DARRELL MCCARTER,

Appellant.

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

The Honorable Evan Sperline

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The multiple prosecutions and punishments for driving under the influence (DUI) in Grant County District Court and Superior Court violated the constitutional prohibitions against double jeopardy contained in the Fifth Amendment and article I, section 9 of the Washington Constitution.

2. The district court order imposing a fine against McCarter violated the provisions of article I, section 22.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The double jeopardy clauses of the state and federal constitution protect against multiple convictions for the same conduct and multiple punishments for the same offense. Unless the Legislature has specifically indicated its intent for multiple punishments, two convictions based on the same conduct will violate double jeopardy. The State initially filed a DUI charge against McCarter in district court. There the charge languished for 11 months and a day, before it was dismissed without prejudice and refiled as a felony in Superior Court. The day that it was dismissed the district court levied a fine of $250. Did the fine

constitute punishment, barring a second prosecution under the double jeopardy clause?

2. Article I, section 22 sets forth the constitutional rights of a person facing criminal prosecution. The provision states, "In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." Did the district court's order compelling McCarter to pay a $250 fine upon dismissal of the charge violate article I, section 22?

C. STATEMENT OF THE CASE

Based on driving that occurred on April 4, 2010, Darrell McCarter was charged in Grant County District Court with one count of driving under the influence (DUI) and one count of driving with a suspended license (DWLS) in the first degree under complaint number C07050435. CP 105. McCarter failed to appear for a hearing on April 5, 2010, and a bench warrant was issued. CP 105-06. The warrant was quashed in September 2010 but McCarter failed to appear a second time on December 16, 2010 and another warrant was issued. He was arrested on the warrant on February 23, 2011. CP 110-11.

On March 16, 2011, the State moved to dismiss the charges without prejudice and the district court assessed a fine of $250, apparently because of the warrants, to be paid in full by December 16, 2011. CP 104. That same day, the State filed an information in Grant County Superior Court charging McCarter with felony DUI and in the alternative with DUI, and DWLS in the first degree. CP 1-3. While the second prosecution was pending, McCarter made payments toward his fine in district court, paying $25 on May 3 and again on May 23, 2011. CP 53-54, 87-88.

In Superior Court, McCarter moved to dismiss the felony DUI charge, alleging that the successive prosecutions violated his right to be free from double jeopardy. CP 42-57, 67-74, 102-24, 152-55. The court took the matter under advisement and by letter inquiry, asked for supplemental briefing on the following questions:

1. What is the authority for the District Court to impose a warrant fee *before* judgment?

2. How or under what authority does such a fee survive dismissal of the case in which it was ordered? Is it a judgment; if so, who is the judgment creditor? What would be the consequence of non-payment? If collection action was necessary, in what case would it proceed?

3. What authority exists for the proposition that, for double jeopardy purposes, such a warrant fee is, or is not, "punishment."

4. What is the significance, in double jeopardy terms, to the Defendant having paid $25 toward the District Court assessment *after* the Superior Court action was filed?

CP 65-66.

Following supplemental briefing and argument on the motion to dismiss, the court denied the motion, ruling in pertinent part that (1) the district court matter was dismissed before McCarter was placed in jeopardy; (2) the warrant fee was administrative; (3) the fee was not "punishment" within the meaning of the double jeopardy clauses; and (4) to the extent that the district court exceeded its authority in ordering the fee, McCarter's remedy lay in that court. 1RP 82-83.

McCarter proceeded to a jury trial and was convicted of felony DUI and DWLS in the first degree as charged. CP 215, 217. This appeal follows. CP 238.

D. ARGUMENT

THE SUCCESSIVE PROSECUTIONS AND MULTIPLE PUNISHMENTS FOR DUI AND DWLS IN DISTRICT COURT AND SUPERIOR COURT VIOLATED McCARTER'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

1. The state and federal constitutions protect criminal defendants from being placed in double jeopardy for the same conduct. The double jeopardy clause of the United States Constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. The Fifth Amendment's double jeopardy protection is applicable to the States through the Fourteenth Amendment.[1] Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on

[1] Washington's constitution provides that no individual shall "be twice put in jeopardy for the same offense." Wash. Const. art. 1, § 9. This Court gives Article I, section 9 the same interpretation as the United States Supreme Court gives to the Fifth Amendment. State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

The double jeopardy clause was designed to prevent the government, with all its resources and power, from repeatedly attempting to convict an individual for an offense, thereby subjecting him to embarrassment, expense, and anxiety. State v. Roybal, 82 Wn.2d 577, 579, 512 P.2d 718 (1973) (citing Green v. United States, 355 U.S. 184, 190, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)). "[I]t is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection." Yeager v. United States, 557 U.S. 110, 129 S.Ct. 2360, 2365, 174 L.Ed.2d 78 (2009) (quoting Ex Parte Lange, 18 Wall. 163, 170, 21 L.Ed.2d 872 (1874) (emphasis in Lange)).

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Lange, 85 U.S. at 168.

The Court emphasized, "The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial." Id. at 169. In fact, the Court concluded that the interest in protecting against multiple punishments is at the heart of the constitutional prohibition against double jeopardy: "Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution." Id. at 174.

2. The $250 that McCarter was ordered to pay by the Grant County District Court was a fine and constituted punishment for the charged offenses of DUI and DWLS in the first degree, barring a second prosecution for the same offenses. Below the State contended, and the court found in its oral ruling, that the $250 levied against McCarter was a "warrant fee" and administrative in nature. 1RP 82-83. This position is not supported by the record, which indicates that the fee imposed was a fine, or by pertinent case law. Moreover, to the extent that courts may have the authority to levy "administrative" fees for the service of warrants

against accused persons whose cases have been dismissed (a contention which is debatable), the "fee" in this case exceeded the amount permitted by statute, and therefore was punishment.

a. The record does not support the conclusion that the $250 levied against McCarter was anything other than a fine. The State and the Court characterized the $250 McCarter was obligated to pay by the district court as an administrative assessment. CP 58;[2] 1RP 82. But the record does not support this characterization. Indeed, the record expressly establishes that the $250 assessed against McCarter was a fine. See CP 104 (minute entry reads, "total fines: $250.00"); CP 113 (docket entry states, "DEF. TO PAY $250 FINE IN FULL BY 12-16-11"). The fact that certain mandatory fines follow upon conviction for the crime of DUI (a fact pointed out by the State in support of its contention that the fine was an administrative fee, CP 58) is irrelevant to the question whether the monies assessed here were "administrative" or

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[2] The State asserted,

> When bench warrants are issued in a district court case there are fees and costs that are associated with the issuance that are not waived when and if the case is dismissed. These costs are not a punitive fine but merely administrative costs brought about when a warrant is issued.

CP 58.

punitive. Save for bare assertions, the State certainly did not present any evidence to support its claim that the $250 McCarter was obligated to pay was not a "fine." This Court should conclude, based upon the plain record, that the $250 assessment was a fine.

b. Pertinent decisional law establishes that the $250 assessed against McCarter was a fine. In Washington, the rights provided by article I, section 22 are absolute and may not be conditioned upon an accused person's ability or inability to defray the costs of the legal process. Const. art. I, § 22.[3] According to RCW 10.01.160, "Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear." RCW

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[3] Article I, section 22 provides in pertinent part:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: . . In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Const. art. I, § 22 (emphasis added).

10.01.160(1). Although the statute authorizes the court to impose costs incurred in the service of a warrant for a defendant's failure to appear, "[c]osts for preparing and serving a warrant for failure to appear may not exceed one hundred dollars." RCW 10.01.160(2). The same section provides, "Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant." Id.

RCW 10.01.160 is based upon former Ore. Rev. Stat. 161.665 (1971). Utter v. Department of Social and Health Services, 140 Wn. App. 293, 303, 165 P.3d 399 (2007). That statute was upheld against equal protection and due process challenges in Fuller v. Oregon, 417 U.S. 40, 49-54, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).

Following Fuller, the Washington Supreme Court set forth the requirements of a recoupment statute as follows:

> First, the requirement of repayment must not be mandatory. . . Second, repayment is only to be imposed upon convicted defendants. . . Third, the court may not order a convicted defendant to pay unless he 'is or Will be able to pay.' . . Fourth, the court must take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose. . . Fifth, no requirement to repay may be imposed if it appears that there is no likelihood that defendant's indigency will end. . . Sixth, a convicted person under obligation to repay may petition the court for remission of the payment of costs or of any unpaid portion thereof. . . Finally, no convicted person can be held

> in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court or to a failure to make a good faith effort to make the payment.

State v. Barklind, 87 Wn.2d 814, 817-18, 557 P.2d 314 (1976).

The Court has not abridged or modified this rule. See State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); see also State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009). Nor may it do so: as the Supreme Court stated in Fuller, "those who are acquitted, whose trials end in mistrial or dismissal, and those whose convictions are overturned upon appeal face no possibility of being required to pay." Fuller, 417 U.S. at 45 (emphasis added); accord Utter, 140 Wn. App. at 312.

Utter involved an effort by the Department of Social and Health Services (DSHS) to recoup the costs of competency restoration following the dismissal of Utter's criminal charges. Construing RCW 10.01.160 in light of Fuller and Barklind, Division Two held that the statute expressly precluded DSHS from collecting the costs because Utter had not been convicted of any crime. Utter, 140 Wn. App. at 312. The Court noted that at all times, "Utter was an accused person. . . Utter was never a convicted defendant because the State voluntarily dismissed the charges against him."

Id. Because the trial court may only impose costs upon a convicted defendant, the Court concluded that DSHS lacked statutory authority under RCW 10.01.160 to recoup the costs incurred in competency restoration and vacated the order. Id. at 312-13.

In this case, the State made no effort to distinguish Fuller or explain why, despite the unequivocal authority to the contrary, the district court could impose and collect a fine connected to the service of the warrants although the State had voluntarily dismissed the charge. In fact, the court lacked this authority. Simply put, the various "fees" that RCW 10.01.160 permits courts to impose may be imposed only because they are "expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2); Utter, 140 Wn. App. at 305-06.

The Supreme Court recognized in a related context:

> Criminal fines, civil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior. All of these sanctions are subject to constitutional constraints. A government may not impose criminal fines without first establishing guilt by proof beyond a reasonable doubt.

Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 778, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994).

The fines in this case were costs specially incurred in prosecuting McCarter. They can only be imposed following conviction. Fuller, 417 U.S. at 49-54; Barklind, 87 Wn.2d at 817.

c. The imposition of the fines triggered the protections of the double jeopardy clauses of the state and federal constitution and barred the second prosecution in Superior Court. Because the "fees" imposed pursuant to RCW 10.01.160 (a) are classified as "expenses specially incurred by the State in prosecuting the defendant" and (b) must follow conviction on the underlying crime, they are part and parcel of the judgment and are fines. Cf. Kurth Ranch, 511 U.S. at 781 (finding fact that 'tax' at issue was conditioned upon the commission of a crime "significant of penal and prohibitory intent rather than the gathering of revenue"). Thus, in this case, setting aside the question whether it was improper for the district court to fine McCarter although the State had dismissed the charges, the $250 assessed against McCarter was punishment, triggering the protections of the double jeopardy clause.

The trial court found that jeopardy had not attached, and therefore concluded that prosecuting McCarter in Superior Court

after punishing him in district court did not violate his constitutional rights. 1RP 82-83. This determination misunderstands the double jeopardy clause and, taken to its logical conclusion, would lead to absurd results.

It is the stigma and burden of multiple punishments against which the double jeopardy clause guards. Lange, 85 U.S. at 174. Multiple punishments are a distinct and independent basis for claiming a double jeopardy violation. Pearce, 395 U.S. at 717; see also State v. McClendon, 131 Wn.2d 853, 870, 935 P.2d 1334 (1996) ("The present case rises and falls on a single question: is the . . . action punishment? If it is punishment, jeopardy attaches.") (Talmadge, J., concurring).[4]

In deciding whether the prohibition against multiple punishments has been violated, the label affixed to the punishment by the legislature or the courts will not be dispositive. Rather, the Court will look to:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional

[4] It is possible that the trial court confused the prohibition against multiple punishments with the prohibition against successive prosecutions. Cf. State v. George, 160 Wn.2d 727, 743, 158 P.3d 1169 (2009) (pretrial dismissal of charges did not bar retrial because jeopardy had not attached).

> aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . .

United States v. Ward, 448 U.S. 242, 247 n. 7, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980); accord Hudson v. United States, 522 U.S. 93, 96, 99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997).

In Kurth Ranch, considering the constitutionality of a tax statute aimed at the proceeds of illegal drug distribution, the Supreme Court found that the revenue-raising purpose of an ordinary tax disappears when the taxed activity is completely forbidden, "for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction." Kurth Ranch, 511 U.S. at 782. The Court concluded:

> The proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time "for the same offence."

Id. at 784.

Important here, the Court observed that a "so-called 'penalty' may be remedial in character if it merely reimburses the government for its actual costs arising from the defendant's

criminal conduct." Id. at 777. However an excessive penalty, particularly where it is conditioned on the commission of a crime, is more likely to be punitive. Id. at 781-82.

Assuming for the sake of argument that the State incurred costs in connection with the service of the warrant, and the $250 assessed against McCarter was intended to reimburse the State for those costs (even though the docket and minute entry call it a "fine"), that fine exceeded what the State was permitted to collect by $150, or 150%. See RCW 10.01.160 ("Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars"). In addition, this Court should be aware that in a separate cause number, the State charged McCarter with operating a vehicle without an ignition interlock device based upon the same actions and imposed a separate fine, bringing the total monies assessed against McCarter to $521. CP 122. The State thus charged McCarter 420% more for his warrants than it was permitted to do under RCW 10.01.160. The excessive fine is an independent basis for this Court to conclude that McCarter's right to be free from double jeopardy was violated.

Several Washington cases are instructive. In McClendon, the Supreme Court considered whether constitutional prohibitions against double jeopardy barred the State from prosecuting the defendants for DUI where the Department of Licensing had already taken administrative action based upon their breath test results and issued them probationary licenses. 131 Wn.2d at 858-59.

The Court first considered whether the sanction was "overwhelmingly disproportionate" to the harm that the defendants had caused. Id. at 865. Given the danger that drunk drivers pose on highways, the Court concluded that it was not. Id. In so deciding, the Court noted, "a probationary license alone does not limit a person's privilege to drive, does not inevitably subject a person to imprisonment or monetary penalties, and does not cause a person to forfeit property." Id. The Court held that the imposition of probationary licenses was not retributive, but remedial, and so did not implicate the double jeopardy clause. Id. at 869. The Court reached a similar result, on similar grounds, in O'Day v. King County, 109 Wn.2d 796, 749 P.2d 142 (1988) (suspension of erotic dancers' licenses was not punitive and did not preclude future prosecution), and State v. Catlett, 133 Wn.2d 355,

365-68, 945 P.2d 700 (1997) (civil forfeiture statute served remedial function and thus did not trigger double jeopardy clause).

By contrast, the statute at issue here, RCW 10.01.160, is not a civil statute but part of Washington's code of criminal procedure. The statute applies only to "expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2); Utter, 140 Wn. App. at 305-06. The statute's provisions may not be applied where charges have been dismissed or the defendant has been acquitted. Fuller, 417 U.S. at 45; Utter, 140 Wn. App. at 312. Although the statute only permits a maximum of $100 to be assessed against an accused person as the cost for preparing and serving a warrant for failure to appear, the district court assessed a combined total of $521 in fines, 420% in excess of what it was statutorily authorized to charge as a warrant collection fee. The monetary penalty was punishment, and its imposition caused jeopardy to attach. Cf. McClendon, 131 Wn.2d at 870 ("If [the action] is punishment, jeopardy attaches") (Talmadge, J., concurring). The second prosecution in Superior Court violated double jeopardy prohibitions.

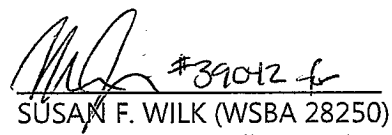
3. The remedy is vacation and dismissal of McCarter's convictions. Where an accused person faces a "successive criminal prosecution that place[s him] in jeopardy a second time 'for the same offence'" the second proceeding is invalid under the double jeopardy clauses of the state and federal constitution. Kurth Ranch, 511 U.S. at 784. Here, when the State dismissed the district court DUI and DWLS in the first degree charges against McCarter, he was fined $250. This fine was punishment and thus the State was barred from initiating a second prosecution against him. McCarter's convictions must be reversed and dismissed.

E. CONCLUSION

For the foregoing reasons, this Court should conclude that Darrell McCarter's right to be free from multiple punishments for the same offense was violated when the district court imposed fines for his DUI and DWLS charges and the State reinitiated prosecution in superior court. McCarter's convictions must be reversed and dismissed.

DATED this 27th day of March, 2012.

Respectfully submitted:



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