

FILED

NOV 02 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

308600

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Appellant,

v.

MICHAEL F. CRONIN,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY  
THE HONORABLE JEROME J. LEVEQUE

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BRIEF OF APPELLANT

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## **I. ASSIGNMENT OF ERROR**

1. The district court erred when it proceeded directly to sentencing, after revoking the defendant's deferred prosecution, without holding a postrevocation trial.
2. On RALJ appeal, the superior court erred when it held that remand of the case was barred due to jeopardy attaching.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS**

1. Did the district court err when it proceeded to sentencing without having a trial?
2. Does double jeopardy attach where there is no trial?<sup>1</sup>

## **III. STATEMENT OF THE CASE**

The defendant entered a statutory deferred prosecution pursuant to RCW 10.05 in 2007. Pursuant to that agreement, his case was held in abeyance for five years. He agreed, as required by statute, that if he violated the terms of the agreement, the agreement could be revoked, and that if it was revoked he would have a "trial" based only on the stipulated police report. Acceptance of Deferred Prosecution and Stipulation of Facts (page 2 finding #7). The stipulated police report was filed with the district court in his criminal file. Certified Appeal Board Record, Administrative Record, Attachment 3.

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<sup>1</sup> WA Const. art. I § 9; U.S. Const. amend. V

At a revocation hearing held August 4, 2010, the district court found that Mr. Cronin violated his deferred prosecution agreement by drinking and refusing to take a breath test in a new city driving while under the influence case. CP 17-29;<sup>2</sup> court's findings CP 38 and 42. However, after revoking the deferred prosecution, that court proceeded directly to sentencing on the original charges. It did so without taking any evidence. It did so without making any indication that the court was considering or entering the stipulated police report regarding those charges into the record. CP 44, lines 12-20. There was not even a pause between the trial court giving the reasons for revoking the deferred prosecution and the court's request for sentencing recommendations.

JUDGE: Well, if this [new charge] had been a first time alcohol related offense, I don't think it would be appropriate to terminate the deferred prosecution.

But I'm – having made a finding of a violation, then the question turns to what the proper disposition should be, and for the purposes of the disposition phase of the case, I am taking into consideration multiple occurrences of alcohol use and pending charges alcohol-based.

So, I am gonna terminate the deferred prosecution at this time.

Sentencing recommendations?

The Court: “So, I am going to terminate the deferred prosecution at this time; Sentencing recommendations?”

CP 44 lines 12-21 (page 31 of 40 in district court certified verbatim report of proceedings lines 12-21).

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<sup>2</sup>CP refers to the Clerk's Papers. RP refers to the transcript of Superior Court Judge Leveque on the RALJ appeal

The transcript of the lower court is clear that there was no intervening trial wherein witnesses were called, evidence submitted, or judicial acknowledgement that the court was considering the police report as evidence. The trial court just proceeded to sentencing without having the limited or abbreviated post-conviction trial contemplated by the deferred prosecution statute, RCW 10.05.

From this judgment the defendant appealed, claiming the lower court committed error by proceeding to sentencing without having a hearing or trial, that:

The record shows the lower court misunderstood and thought that, similar to a deferred sentence or probation, removing the deferred prosecution had a res judicata effect on the underlying offenses.

CP 6, lines 3-7 (Appellant's Brief page 4).

The defendant on appeal also claimed that the double jeopardy clause would be violated by remand. CP 10-11.

On direct appeal, the State agreed that the trial court erred by failing to enter the police report into the record and by failing to have a limited trial as contemplated by RCW 10.05, as explicated by *Abad v. Cozza*, 128 Wn.2d 575, 587, 911 P.2d 376 (1996). CP 55-56 (Brief of Respondent). The State also argued that remand would not be barred by

the provisions of the Double Jeopardy Clauses, because there had not been a trial – no witnesses were called, and no jury impanelled.

The superior court on RALJ appeal orally found that “[t]he record doesn’t show what the finding [of guilt] was based upon.” RP 12, lines 2-4. The State argued that there was no trial because the record went directly from the finding of violation of the deferred prosecution to sentencing, without a pause, skipping any fact finding hearing. RP 13, lines 16-25; RP 16, lines 12-22. The superior court opined that to sentence a person you must have a trial or a plea, and that there must have been a trial because there was no plea. RP 11, lines 18-25 – RP 12, lines 1-6. The superior court on appeal entered an order dismissing the cases, finding that double jeopardy attached.

#### IV ARGUMENT

**A. The trial court erred when it proceeded directly to sentencing without holding a postrevocation trial or hearing as required under *Abad v. Cozza*.**

A “[d]eferred prosecution is a special preconviction sentencing alternative that is available to petitioners who acknowledge their culpability and need for treatment.” *Abad v. Cozza*, 128 Wn.2d 575, 587, 911 P.2d 376 (1996). “As a condition for the granting of a deferred prosecution, the petitioner must state under oath the wrongful conduct

charged took place and resulted from a condition amenable to treatment.”

*Id.* Appellant Cronin did so in this case. *See* Petition for Deferred Prosecution.

“The petitioner acknowledges advisement of rights as an accused. The petitioner knowingly and voluntarily stipulates to the admissibility of the facts in the police report, and acknowledges the report and sworn statement will be admitted in any postrevocation trial or hearing and used to support a finding of guilty.” *Abad v. Cozza*, 128 Wn.2d at 587. Appellant Cronin so acknowledged and waived in this case. *See* Acceptance of Deferred Prosecution and Stipulation of Facts. “This means that the petitioner agrees to waive the right to raise other defenses, to introduce other evidence, to question or call witnesses, and to a jury. This is the import of the Legislature's strong statutory waiver language and the abbreviated structure of the postrevocation trial.” *Abad v. Cozza*, 128 Wn.2d at 587.

Under *Abad*, the abbreviated structure of the postrevocation trial consists of the judge entering the police report into evidence, and determining if there is sufficient evidence in the report to support a conviction. *Abad*, 128 Wn.2d at 587-88. In the instant case, the lower district court judge simply erred by proceeding to sentencing on the 2007

cases without the abbreviated trial mandated by *Abad v. Cozza*, 128 Wn.2d 587 (1996). The trial court treated the case like a probation violation.

In his brief, on RALJ appeal to superior court, the defendant argued that “the lower court erred when, after ordering that Mr. Cronin be removed from deferred prosecution on September 2, 2011, it acted as if the deferred prosecution had a *res judicata* effect on the 2007 charges against Mr. Cronin.” CP 4 lines 3-6. Defendant further argued that “the lower court failed to enter sufficient evidence on the record to support a conviction of the underlying charges against Mr. Cronin before it entered judgment.” CP 6, lines 8-10. The State agreed and still agrees with defendant’s argument. The sentencing of a revoked deferred prosecution, having occurred without a proper trial, even one as abbreviated as set forth in *Abad*, is contrary to case law and RCW 10.05. The sentence should be vacated and the case remanded to district court for further proceedings.

**B. On RALJ appeal, the superior court erred when it found that remand of the case was barred due to jeopardy attaching. There was no trial.**

Generally, jeopardy attaches in a jury trial when the jury is impaneled, and in a bench trial when the first witness is sworn. *State v. Hickman*, 135 Wn.2d 97, 107, 954 P.2d 900 (1998); *State v. Corrado*, 81 Wn. App. 640, 646, 915 P.2d 1121, 1125 (1996); *Crist v. Bretz*, 437 U.S. 28, 38, 98 S.Ct. 2156, 2162, 57 L.Ed.2d 24 (1978).

“The ‘attachment’ requirement arises from ‘the fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy’ and ‘[j]eopardy does not attach until a defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge.’” *State v. George*, 160 Wn.2d 727, 741, 158 P.3d 1169 (2007), quoting *Serfass v. United States*, 420 U.S. 377, 391, 393, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).

Jeopardy does not attach “merely because a charge is filed or pretrial proceedings are held.” *State v. Higley*, 78 Wn. App. 172, 179, 902 P.2d 659 (1995).

Under a Deferred Prosecution, the trial requirement is satisfied by the court’s reading of the police report. “The petitioner knowingly and voluntarily stipulates to the admissibility of the facts in the police report, and acknowledges the report and sworn statement will be admitted in any postrevocation trial or hearing and used to support a finding of guilty.” *Abad v. Cozza* at 587 (1996). Therefore, for a defendant to suffer “jeopardy,” *George* 160 Wn.2d at 742, there must be either a jury trial, or a bench trial. In the deferred prosecution setting, the postrevocation trial would be a bench trial and would consist of a reading of the police report by the judge, and the subsequent entry of a finding of guilty or not guilty.

In the instant case, no jury was sworn, no witness testified. The trial court judge did not read the police report into the record as required under *Cozza. Abad v. Cozza*, at 587. There is nothing in the record to indicate that a trial occurred. Yet, the superior court found that a trial must have occurred without being able to point out in the record where it occurred. RP 11, lines 18-25 – RP 12, lines 1-6. This conclusion is vexing. The superior court’s finding that a trial occurred is completely unsupported in the record. That court acknowledged that “the record doesn’t show what the finding [of guilt] was based upon.” RP 12, lines 3-4. There was no jury sworn. There were no witnesses testifying as to the 2007 crimes. There was no trial. Therefore, jeopardy did not attach. The defendant could not, therefore, “suffer double jeopardy.” *George*, at 742. The superior court erred in finding that remand of the case was barred due to jeopardy attaching.

## V. CONCLUSION

The trial court judge mistakenly proceeded to sentencing on the 2007 cases without the abbreviated trial mandated by *Abad v. Cozza*, *supra*. The superior court erred in finding a trial occurred absent any evidence of a trial in the inferior court record. Absent a trial, this court must hold that jeopardy did not attach.

For the reasons set forth above, the finding of the Superior Court that jeopardy attached must be reversed. Further, the sentence given Mr. Cronin must be vacated and the case remanded to the lower court for further proceedings.

Respectfully submitted this 29th day of October, 2012.

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