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JAN 04 2013

Prosecuting Attorney
Spokane County, WA

COA NO. 308600

Lower Court No. 11-1-03029-7

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL CRONIN,

Respondent.

RESPONSE TO APPELLANT'S BRIEF

Dean T. Chuang

Attorney for Respondents

CRARY, CLARK & DOMANICO, P.S.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	i
I. ISSUE.....	1
II. STATEMENT OF RELIEF SOUGHT.....	1
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT.....	3
A. The District Court’s judgment against Mr. Cronin cannot stand.....	3
B. Jeopardy attached when Mr. Cronin waived his right to a jury trial and stipulated to the facts in the police report; and where the court received the stipulated facts, found Mr. Cronin guilty, and sentenced him.....	4
C. The Superior Court’s finding that jeopardy attached is supported by substantial evidence.....	9
V. CONCLUSION.....	12

TABLE OF AUTHORITIES

Constitution, Statutes, and Court Rules:

U.S. CONST., amend. V.....	4
WASH. CONST., article 1, § 9.....	4
WASH. R. APP. P. 10.3.....	3

Federal Cases:

Supreme Court:

<i>United States v. Martin Linen Supply Co.</i> , 430 U.S. 564 (1977).....	5
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Circuit Court:

<i>United States v. Finch</i> , 548 F.2d 822 (9 th Cir. 1976).....	5
<i>United States v. Hill</i> , 473 F.2d 759 (9 th Cir. 1972).....	6
<i>United States v. Olson</i> , 751 F.2d 1126 (9 th Cir. 1985).....	5
<i>United States v. Patrick</i> , 532 F.2d 142 (9 th Cir. 1976).....	5-8
<i>United States v. Vaughan</i> , 715 F.2d 1373 (9 th Cir. 1983).....	5,9

State Cases:

Supreme Court:

<i>Abad v. Cozza</i> , 128 Wn. 2d 575 (1996).....	8-9
<i>Kansas v. Pittsburg Paving Brick Co.</i> , 230 P. 1035 (Kan. 1924).....	6

Court of Appeals:

<i>New Jersey v. Carlson</i> , 782 A. 2d 950 (N.J. Super. Ct. App. Div. 2001).....	6
<i>State v. Clark</i> , 170 Wash. App. 138 (2008).....	4
<i>State v. Mills</i> , 80 Wash. App. 231 (1995).....	3
<i>State v. Walters</i> , 146 Wash. App. 138 (2008).....	4

I. ISSUE:

Does jeopardy attach when a criminal defendant waives his right to a jury trial and stipulates to the facts contained in a police report, and where the court receives the stipulated facts, makes a final determination as to the defendant's guilt or innocence, and sentences the defendant?

II. STATEMENT OF RELIEF SOUGHT:

Respondent asks this Court to AFFIRM the Spokane County Superior Court's decision to reverse the Spokane County District Court and dismiss the charges against Mr. Cronin. The Spokane Superior Court properly reversed Mr. Cronin's convictions for "Physical Control of Vehicle Under the Influence" and "Hit and Run Unattended" because there was insufficient evidence in the record to support either conviction. The Spokane Superior Court properly dismissed the two charges because remanding them would have violated Mr. Cronin's constitutional rights under article I, section 9, and Amendment. V, or the double jeopardy clause.

III. STATEMENT OF THE CASE:

The Spokane County District Court held a hearing on September 2, 2011, and ordered that Mr. Cronin be removed from a deferred prosecution program that began in 2007. [RPT¹ at 31:20]. In addition to removing Mr. Cronin from the deferred prosecution program, the District Court also entered judgment against Mr. Cronin for the deferred offenses, “Physical Control of Vehicle Under the Influence” and “Hit and Run Unattended.” [District Court Judgment/Sentence/Commitment/Probation Order filed on 9/2/2011]. Mr. Cronin appealed the conviction on the grounds of insufficient evidence to support the conviction.

On April 27, 2012, the Spokane County Superior Court reversed the conviction and dismissed the charges against Mr. Cronin. [RPA² at 16:5-13]. The Superior Court reversed the District Court because the record showed that the lower court erred when, after ordering that Mr. Cronin be removed from deferred prosecution, it considered evidence regarding the 2007 charges and entered judgment against Mr. Cronin for such charges without sufficient evidence in the record to support the conviction. *See id.* The State agreed that the conviction should be reversed because it was not supported by sufficient evidence. [RPA 6:1-6]. The Superior Court further held that jeopardy attached to the District Court’s judgment. *Id.*

¹ “RPT” references the Verbatim Report of Proceedings, District Court Hearing 9/2/2011.

² “RPA” references the Verbatim Report of Proceedings, Superior Court 4/27/2012.

As a result of the Superior Court's findings, the charges against Mr. Cronin were dismissed. Upon dismissing the charges, the court articulated that remanding the charges back to the District Court to try Mr. Cronin again "would be placing him in jeopardy again." *Id.* Under article I, section 9, and Amendment V, or the double jeopardy clause, the Superior Court properly dismissed the 2007 charges against Mr. Cronin.

IV. ARGUMENT:

A. **The District Court's Judgment against Mr. Cronin cannot stand.**

This Court need not review whether Mr. Cronin's conviction for "Physical Control of Vehicle Under the Influence" and "Hit and Run Unattended," allegedly committed in 2007, should stand because both parties agree that it cannot.

(g) Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. ***The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.***

RAP 10.3(g) (emphasis added). "We will not consider contentions unsupported by argument or citation to authority in the appellate brief." *State v. Mills*, 80 Wash. App. 231, 234 (1995) (citing *Talps v. Arreola*, 83 Wash. 2d 655, 657 (1974)). Appellant concedes that Mr. Cronin's

conviction should be reversed because there is insufficient record evidence to support it; and appellant has never argued that the conviction should stand.

B. Jeopardy attached when Mr. Cronin waived his right to a jury trial and stipulated to the facts in the police report; and where the court received the stipulated facts, found Mr. Cronin guilty, and sentenced him.

The State cannot try Mr. Cronin a second time for “Physical Control of Vehicle Under the Influence” and “Hit and Run Unattended,” allegedly committed in 2007, because it would violate his state and federal constitutional rights under article I, section 9, and Amendment V, or the double jeopardy clause. “No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.” WASH. CONST. art. 1, § 9; *also* U.S. CONST. amend. V. “Both federal and state double jeopardy clauses are ‘identical in thought, substance, and purpose.’” *State v. Walters*, 146 Wash. App. 138, 145 (2008) (quoting *State v. Ervin*, 158 Wash. 2d 746, 752 (2006)); *also State v. Clark*, 170 Wash. App. 166 (2012) (“Our court interprets article I, section 9 in the same manner as the Supreme Court interprets the double jeopardy clause of the Fifth Amendment.”).

The object of the double jeopardy clause is to protect a defendant who has once been convicted and punished or acquitted for a particular crime from the risk of further punishment by being tried or sentenced anew for the same offense. The double jeopardy clause seeks to assure that the defendant will not be subject to the embarrassment, anxiety, insecurity, expense and ordeal of successive prosecutions for the same offense.

In determining whether the prohibition against double jeopardy has been invoked, courts have found it necessary to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of attachment of jeopardy. The question of whether jeopardy has attached must be analyzed in terms of the flexible policy considerations underlying the concept rather than hard and fast rules. In this sense, ***trial of the issue of guilt or innocence is the essence of jeopardy.***

In *Serfass* the Supreme Court reconfirmed that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge. Thus, ***in a non-jury trial, jeopardy attaches when the court begins to hear evidence.*** In a jury trial, jeopardy attaches when the jury is empaneled and sworn.

United States v. Vaughan, 715 F.2d 1373, 1376 (9th Cir. 1983) (internal citations and quotations omitted). In deciding whether jeopardy attached, reviewing courts “must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Jeopardy attaches with “the consideration of some or all of the factual elements in the case, [] and the risk of a finding of guilt based on the resolution of a fact issue.” *United States v. Olson*, 751 F.2d 1126, 1129 (9th Cir. 1985). “A trial can be upon stipulated facts or upon documentary evidence; no witness need be sworn in order to have a trial.” *United States v. Patrick*, 532 F.2d 142 (9th Cir. 1976); also *United States v. Finch*, 548 F.2d 822, 824-25 (9th Cir. 1976) *vacated on other grounds by Finch v. United States*, 433 U.S. 676 (1977) (“This

stipulation constituted a waiver of a jury trial; after it was filed, the district court undoubtedly had the power to determine the guilt or innocence of the defendant.”); *New Jersey v. Carlson*, 782 A. 2d 950, 955 (N.J. Super. Ct. App. Div. 2001) (“[J]eopardy attaches when a case is submitted on stipulated facts.”); *Kansas v. Pittsburg Paving Brick Co.*, 230 P. 1035, 1037 (Kan. 1924) (“The submission of the case on the agreed facts advanced the trial to the stage reached in a trial with a jury where the testimony of all the witnesses of both parties had been taken and presented to a duly impaneled jury, which had taken the weight and effect of the evidence under consideration.”). “Surely, a court is ‘hearing’ the evidence just as much when it receives written evidence as when it hears oral testimony of a witness. Many cases are tried solely on written evidence, sometimes on a stipulation of facts, sometimes on a transcript of a preliminary hearing or of a preliminary motion, such as a motion to suppress, sometimes upon evidentiary exhibits alone.” *United States v. Hill*, 473 F.2d 759, 761 (9th Cir. 1972).

In *Patrick*, a nineteen-year-old young woman from California went to live in the state of Washington at the headquarters of a religious sect she had just joined. *Patrick*, 532 F.2d at 144. The young woman’s parents hired Mr. Patrick to “forcibly remove her to California and ‘deprogram’ her;” Mr. Patrick did exactly that. *Id.* Mr. Patrick was indicted for kidnapping. *Id.* at 143.

About a week prior to trial, the government filed a trial memo urging the court to not allow Mr. Patrick to assert a necessity defense. *Id.* at 144. Mr. Patrick's defense counsel conceded that Mr. Patrick engaged in the conduct for which he was indicted, but stated that the necessity defense was available to Mr. Patrick where Mr. Patrick thought his conduct was necessary to avoid a greater evil. *Id.* The government recognized that the parties did not dispute the facts of the case and suggested that the court dispose of the parties' legal dispute as a matter of law. *Id.* at 144-45. Mr. Patrick agreed to the governments' suggestion and signed a waiver of jury trial. *Id.* at 145. Mr. Patrick's defense counsel presented an offer of proof whereupon if the court were to rule against Mr. Patrick it would constitute "a sufficient basis for any further review." *Id.* The government outlined rebuttal evidence it would offer, and the court received the defense's exhibits into evidence. *Id.* The trial court found that the defense of necessity was available to Mr. Patrick as an agent of the parents who hired him. *Id.* As a result, the court entered a judgment of not guilty. *Id.*

Upon considering whether jeopardy attached to the court's judgment that Mr. Patrick was not guilty, the 9th Circuit of Appeals stated:

What was contemplated was that, in lieu of requiring the government to prove that Patrick engaged in the conduct attributed to him, Patrick would admit that he did, and the court on that basis would find him guilty. Surely that would be enough to put Patrick to trial before the trier of fact, the judge. Surely Patrick would have been in jeopardy. . . .

The judge, to decide that Patrick was not guilty, had to weigh the proffered and admitted facts to determine

whether they made out the proffered defense. Surely Patrick was put to trial before the trier of fact, the judge. Surely he was in jeopardy.

Id. at 146. Similar to *Patrick*, Mr. Cronin waived his right to a jury trial and stipulated to the facts contained in the police report. *See Patrick*, 532 F.2d at 145. Both the police report and Mr. Cronin's stipulation were filed with the court and were contained in his file. [Appellant's Brief at 1]. The Spokane County District Court had Mr. Cronin's file during the proceeding on August 4, 2010, and it ultimately entered a guilty judgment against him for the 2007 offenses. [RPT at 30:1-5, 32:6-9]; *also* [District Court Judgment/Sentence/Commitment/Probation Order filed on 9/2/2011].

The appellant contends that the District Court never held a trial because it did not read the stipulated police report into the record, that the court erred, and the State should get a second shot. The appellant's argument is not supported by legal authority. The appellant contends that under *Abad v. Cozza*, the court failed to hold a postrevocation trial because the court did not read the stipulated police report into evidence. [Appellant's Brief at 5]. However, *Abad* does not stand for the proposition that jeopardy does not attach in a postrevocation trial until the court reads the police report into evidence. *See Abad v. Cozza*, 128 Wash. 2d 575, 587 (1996). *Abad* merely addresses the issue of whether the legislature exceeded its authority upon enacting the 1985 changes governing deferred prosecutions when the changes require defendants to waive certain

constitutional rights.³ Granting the State’s appeal would expose Mr. Cronin “to the embarrassment, anxiety, insecurity, expense and ordeal of successive prosecutions for the same offense.” *See United States v. Vaughan*, 715 F.2d 1373, 1376 (1983).

Mr. Cronin waived his right to a jury a trial, stipulated to the facts in the police report, the police report was filed with court, and the court ultimately found him guilty and sentenced him for the 2007 charges. Where “trial of the issue of guilt or innocence is the essence of jeopardy,” then jeopardy most definitely attached when the District Court entered a guilty judgment and sentenced Mr. Cronin for “Physical Control of Vehicle Under the Influence” and “Hit and Run Unattended.” *See Vaughan*, 715 F.2d at 1376.

C. The Superior Court did not err when it found that jeopardy attached when the District Court entered judgment against Mr. Cronin and sentenced him.

The Superior Court’s findings are supported by substantial evidence in the record.

And what I wanted to reference was right at the start of the document [Exhibit A] right underneath the identity of the defendant it says, “The Court has entered a judgment of guilty and imposes the following sentence.” And that judgment has to be either based upon a plea of guilty or a finding of guilty after trial. I don’t where else a guilty could come. I don’t know where you could get a finding of guilty unless you had a review of the evidence and a trial or a plea. And this is telling me – I know that either had a trial or he didn’t, but the matter leads me to believe that the judge had something that the judge believed was a trial,

³ *Id.* (“In effect, the 1985 changes to RCW 10.05.090 and RCW 10.05.100 in conjunction with the changes to RCW 10.05.020 evidence a legislative intent that, upon revocation of a deferred prosecution, a more streamlined process must apply.”).

because it wasn't a plea, and as a result of that he found this individual guilty. But the argument is on what basis. The record doesn't show what the finding was based upon. And the obvious is, it had to be based upon what was in the file, but the record isn't clean that way.

So the obvious is, of course the sentencing can't stand. We know that. It's whether or not there's sufficient evidence to satisfy the Court that, in effect, the Court went through some process to reach a finding of guilt. And that was – wasn't a guilty plea. It had to have been a finding of guilt based upon the evidence. That's a trial in my mind. And it's without support. The finding of guilt is without support of the elements being proven or even having it in the record.

So I don't think the individual, Mr. Cronin, can stand trial again. I do think it's a double jeopardy.

[RPA at 11:14 -12:17]. The appellant concedes that the stipulated police report was in Mr. Cronin's file at the time the District Court sentenced him. [RPA 5:13-17]; *also* [Appellant's Brief at 1]. The appellant also concedes that "the court may have read the report prior to the entry of judgment." [State's Brief 4/5/2012 at 2 n. 1]. The record indicates the District Court had Mr. Cronin's file at the time of hearing. [RPT at 32:6-9] ("Well I've -- . . . got the record here."). The appellant asserts that the court did not have a trial because the transcriptionist did not indicate a pause between the time the court terminated the deferred prosecution and the time the court requested sentencing recommendations. [Appellant's Brief at 2]. However, the record indicates a "long pause with sound of papers rustling" almost immediately before the District Court revoked the deferred prosecution and requested sentencing recommendations. [RPT at 31:10-11]. The Superior Court's finding that "the judge had something

that the judge believed was a trial” was not erroneous. [RPA 11:24-25].
This Court should affirm the Superior Court’s conclusion that trying Mr.
Cronin again for the 2007 charges after the District Court already entered
judgment against him and sentenced him “would be placing him in
jeopardy again.” *See* [RPA at 16:10-11].

V. **CONCLUSION:**

Under article I, section 9, and Amendment V, Mr. Cronin respectfully requests that this Court AFFIRM the Spokane County Superior Court's decision to reverse the Spokane County District Court and dismiss the 2007 charges against Mr. Cronin for "Physical Control of Vehicle Under the Influence" and "Hit and Run Unattended" because jeopardy attached when the District Court wrongfully convicted him and sentenced him.

Respectfully submitted this 4th day of January, 201~~2~~¹³.



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