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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 77310-6
)	
vs.)	ANSWERS TO MOTION FOR
)	DISCRETIONARY REVIEW
MICHAEL SCOTT,)	AND GROUNDS FOR DIRECT
)	REVIEW
Appellant,)	
)	
)	
)	

1. IDENTITY OF MOVING PARTY

Respondent, the STATE OF WASHINGTON, seeks the relief designated in part 2.

2. STATEMENT OF RELIEF SOUGHT

The Defendant's Motion for Discretionary Review and Grounds for Direct Review should be denied under RAP 4.2(e)(2).

3. FACTS RELEVANT TO MOTION

On April 15, 2002, the State charged Scott with murder in the second degree under alternative theories of intentional murder and felony murder predicated on assault. On April 29, 2002, Scott was

found guilty of second-degree felony murder. The trial court instructed the jury that it could convict Scott of manslaughter if it found Scott not guilty or could not reach a verdict on second-degree murder. Scott's conviction was vacated on May 2, 2005, pursuant to Andress and Hinton. On June 13, 2005, the State charged Scott with first-degree manslaughter. Scott moved to dismiss on grounds of double jeopardy.

The trial court found that double jeopardy did not preclude charging Scott with manslaughter. The Double Jeopardy Clause bars retrial on a charge when a defendant has already been acquitted on that charge. An implied acquittal exists only when the jury has had the opportunity to convict on that charge. The court found that the jury did not have that opportunity to convict on the manslaughter charge because the court instructed the jury not to consider or reach manslaughter if it found Scott guilty of second-degree murder.

A complete statement of the facts and findings relevant to this issue are accurately set forth in Judge Gain's June 13, 2005 Order on Criminal Motion and the court's Findings of Fact and Conclusions of Law. Judge Gain's ruling and findings are attached

as Appendices A and B for the Court's convenience.

4. GROUND FOR RELIEF AND ARGUMENT

Scott's motion fails to meet the criteria set forth in RAP 2.3(b) and RAP 4.2(a). This Court should deny his Motion for Discretionary Review and Grounds for Direct Review under RAP 4.2(e)(2).

A motion for discretionary review may be granted only if one or more of the following stringent criteria are satisfied:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). Moreover, a party may only seek direct review by the Supreme Court when at least one of the following additional criteria are satisfied:

(1) *Authorized by Statute*. A case in which a statute authorizes direct review in the Supreme Court.

(2) *Law Unconstitutional*. A case in which the trial court has held invalid a statute, ordinance, tax, impost, assessment, or toll, upon the ground that it is repugnant to the United States Constitution, the Washington State Constitution, a statute of the United States, or a treaty.

(3) *Conflicting Decisions*. A case involving an issue in which there is a conflict among decisions of the Court of Appeals or an inconsistency in decisions of the Supreme Court.

(4) *Public Issues*. A case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.

(5) *Action Against State Officer*. An action against a state officer in the nature of quo warranto, prohibition, injunction, or mandamus.

(6) *Death Penalty*. A case in which the death penalty has been decreed.

RAP 4.2(a).

With little elaboration, Scott asserts that his claim meets all the requirements of RAP 2.3(b), and that direct review is appropriate under RAP 4.2(3) and (4). Scott is wrong.

A. THE DEFENDANT'S CLAIMS DO NOT
SATISFY THE CRITERIA FOR
DISCRETIONARY REVIEW.

Scott claims that all of the criteria set forth in RAP 2.3(b) have been met, and that Judge Gain's ruling constitutes obvious error, probable error, and a clear departure from the accepted course of judicial proceedings. These claims are without merit, and each will be addressed in turn.

First, RAP 2.3(b)(1) states that discretionary review may be granted when the court has committed "an obvious error which would render further proceedings useless." Far from being "an obvious error," Judge Gain's ruling was thoughtful and well-reasoned. The trial court applied the undisputed rule that an implied acquittal exists when (1) the jury leaves the verdict form blank as to the charge at issue, (2) the record insufficiently shows why the court dismissed the jurors without a verdict on all charges, and (3) the jury had ample opportunity to convict the defendant on a charge but failed to do so. State v. Daniels, 124 Wn. App. 830, 844, 103 P.3d 249 (2004).

Here, the trial court correctly concluded that the jury did not have ample opportunity to convict Scott on the manslaughter charge because the court instructed the jury to leave the manslaughter verdict form blank and not consider that charge if they returned a guilty verdict on a higher charge. See Appendices A and B. Indeed, Scott cites no authority demonstrating an obvious error. Rather, he argues that because the State conceded that there was an implied acquittal on the intentional murder charge, that the jury must have followed the court's instruction that if it found Scott not guilty or could not reach a verdict on intentional murder, the jury would consider manslaughter. This interpretation ignores the context of the instruction and contradicts its plain meaning. The rational interpretation of Instruction 24 is that if the jury found Scott guilty on verdict form A, it would not consider the charges in verdict forms B or C. A court's misinterpretation of its own instruction, even if ambiguous, does not constitute obvious error. Instruction 24 is attached as Appendix C for the Court's convenience.

Scott must also demonstrate that the superior court's "obvious error" will "render further proceedings useless." RAP

2.3(b)(1). The burden to establish that the obvious error will render further proceedings useless is on the moving party. Sunbreaker Condo. Ass'n v. Travelers Ins. Co., 79 Wn. App. 368, 380, 901 P.2d 1079 (1995). Additionally, a denial of a dispositive motion is typically insufficient to establish that further proceedings will be useless. See Sea-Pac Co. v. United Food & Comm'l Workers Local Union 44, 103 Wn.2d 800, 801-02, 699 P.2d 217 (1985) (discretionary review of a denial of summary judgment is not generally granted). In this case, Scott has failed to address this requirement. Furthermore, there is no compelling reason for an interlocutory appeal of this issue.

Second, under RAP 2.3(b)(2), discretionary review may be granted if the trial court committed "probable error" that "substantially alters the status quo or substantially limits the freedom of a party to act[.]" As discussed above, Judge Gain's ruling is sound, and Scott has not shown that it was probable error. Further, Scott has failed to address whether the "error" substantially alters the status quo or substantially limits his ability to act. The status quo is not altered and Scott's ability to act is not limited because he retains his right to appeal the order if convicted.

Third, Scott argues that, under RAP 2.3(b)(3), discretionary review should be granted because the trial court has so far departed from the usual course of judicial conduct as to call for review by this Court. Scott is wrong. Judge Gain's reasoning was consistent with the usual course of judicial conduct. He applied the law to the facts and found that the jury did not have the opportunity to convict on the lesser-included manslaughter charge because it found Scott guilty of second-degree murder and followed the court's instruction to leave the manslaughter verdict form blank.

Fourth, under RAP 2.3(b)(4), discretionary review may be granted "if the superior court has certified . . . that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion" and "immediate review of the order may materially advance the ultimate termination of the litigation." A superior court's certification of appeal is not binding, and this Court may permit or deny review within its own discretion.

Scott failed to establish that any of the stringent criteria warrant discretionary review. Thus, the Defendant's Motion should be denied.

B. THE DEFENDANT'S CLAIMS DO NOT
SATISFY THE CRITERIA FOR DIRECT
REVIEW.

Scott claims that direct review is appropriate under RAP 4.2(a)(3) and (4) because there is a conflict among superior court decisions and the case involves a fundamental and urgent issue of broad public import. Scott is wrong.

First, RAP 4.2(a)(3) permits a party to seek direct review if the case involves an issue in which there is a “conflict among decisions of the Court of Appeals or an inconsistency in decisions of the Supreme Court.” Scott appears to argue without authority that a conflict among decisions of the superior courts permits direct review under this rule. To the contrary, the rule applies only when there is a conflict among decisions of the Court of Appeals or an inconsistency in decisions of this Court. Thus, the conflict among decisions of the superior courts does not permit direct review.

Second, RAP 4.2(a)(4) permits a party to seek direct review when the case involves a “fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” Most of the cases where this Court has granted review under this rule involve issues that were likely to have a substantial impact on

the public. See e.g., O'Connor v. Wash. State Dep't of Soc. and Health Serv., 143 Wn.2d 895, 903-04, 25 P.3d 426 (2001) (public access to DSHS records); Nast v. Michels, 107 Wn.2d 300, 303, 730 P.2d 54 (1986) (public access to court files). See also Pierce County Office of Involuntary Commitment v. Western State Hosp., 97 Wn.2d 264, 265, 644 P.2d 131 (1982) (obligation of state mental hospital to admit patients regardless of overcrowding). A case only involves fundamental and urgent issues of broad public import when the determination of its issues will affect the public.

This case does not involve a fundamental and urgent issue of broad public import. Rather, the only substantial impact of the determination of issues in this case will be on Scott, not the public. Indeed, the issue here is fact-specific and unlikely to arise in another case. Further, this issue is unlikely to arise in enough cases to rise to the level of a fundamental and urgent issue of broad public import. Lastly, Scott can appeal this issue after trial if he is convicted.

Scott failed to establish any of the criteria necessary to seek direct review by the Supreme Court. Thus, the Defendant's request for direct review should be denied.

5. CONCLUSION

As the Court of Appeals has observed, “[t]he delay occasioned by an interlocutory appeal prejudices both the defendant and the State[.]” State v. Brown, 64 Wn. App. 606, 617, 825 P.2d 350 (1992). Accordingly, at a minimum, a defendant must meet the stringent criteria before discretionary review will be accepted.

Scott’s claims merit neither direct review nor discretionary review. In the interests of judicial economy, the Defendant’s Motion should be denied, and the case should proceed to trial.

Submitted this _____ day of August, 2005.

Norm Maleng
Prosecuting Attorney

**FILED AS ATTACHMENT
TO E-MAIL**

MARY H. BARBOSA, WSBA #28187
Senior Deputy Prosecuting Attorney
Attorney for Respondent

ZACHARY C. ELSNER, WSBA #35783
Assistant Deputy Prosecuting Attorney
Attorney for Respondent

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Mark Larranaga, the attorney for the appellant, at 810 3rd Avenue, #800, Seattle, Washington 98104, containing a copy of the Answers to Motion for Discretionary Review and Grounds for Direct Review, in STATE V. MICHAEL SCOTT, Cause No. 77310-6, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name
Done in Seattle, Washington

Date

**FILED AS ATTACHMENT
TO E-MAIL**

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From: OFFICE RECEPTIONIST, CLERK
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Received Aug. 4, 2005

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From: Barbosa, Mary [mailto:Mary.Barbosa@METROKC.GOV]
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To: OFFICE RECEPTIONIST, CLERK
Subject: Electronic filing

RE: State of Washington v. Michael Adrian Scott
Supreme Court No. 77310-6
King County Superior Court No. 00-1-11382-6 KNT

Attached please find the State's Answer to Defendant's Motion for Discretionary Review and Grounds for Direct Review. Thank you. <<Scott - Mtn for Review.doc>>

Mary H. Barbosa, WSBA # 28187
Senior Deputy Prosecuting Attorney
(206) 296-9440
Mary.Barbosa@metrokc.gov

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From: OFFICE RECEPTIONIST, CLERK
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RE: State of Washington v. Michael Adrian Scott
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Mary Barbosa
Deputy Prosecuting Attorney
(206) 296-9440

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From: Barbosa, Mary
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RE: State of Washington v. Michael Adrian Scott
Supreme Court No. 77310-6
King County Superior Court No. 00-1-11382-6 KNT

Attached please find the State's Answer to Defendant's Motion for Discretionary Review and Grounds for Direct Review. Thank you. <<Scott - Mtn for Review.doc>>

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