

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2006 AUG -1 P 4:53

BY C.J. MERRITT

CLERK

SUPREME COURT NO. 78062-5

IN THE SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON

vs.

QUENTIN ERVIN,

RESPONSE BRIEF (CORRECTED)

HOWARD L. PHILLIPS
1111 Third Avenue, Suite 2220
Seattle, Washington 98101
(206) 725-0912

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

COVER PAGE	Page 1
TABLE OF CONTENTS	Page 2
TABLE OF AUTHORITIES	Page 3
A. IDENTITY OF PETITIONER	Page 5
B. ISSUES PRESENTED FOR REVIEW	Page 5
C. STATEMENT OF THE CASE	Page 6
D. RESPONSE	Page 8
1. Implied Acquittal	Page 8
2. Double Jeopardy	Page 14
3. Statutory Prohibition	Page 19
F. CONCLUSION	Page 21

TABLE OF AUTHORITIES

Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865

(1989).

Arizona v Washington, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717

(1978)

Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187

(1977);

Fong Foo v U.S., 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962)

Green v United States, 355 U.S. 184, 191, 78 S.Ct. 221, 2 L.Ed.2d 199

(1957)).

In re Personal Restraint of Andress, 147 Wn 2d 602, 56 P.3d 981 (2002)

In re Personal Restraint of Hinton, 152 Wn. 2d 853, 100 P.3d 801 (2004)

North Carolina v. Pearce, 395 U.S.711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d

656 (1969)

Richardson v. United States, 468 U.S. 317, 325, 104 S. Ct. 3081, 82 L. Ed.

2d 242 (1984).

State v Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000)

State v Brown, 127 Wn.2d 749, 903 P.2d 459 (1995)

State v Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995)

State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005)

State v Kirk, 64 Wn.App. 788, 790–91, 828 P.2d 1128 (1992).

State v Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991)

State v. Linton, No. 75784-4, (2006)

State v Markle, 118 S 78Wn.2d 424, 441, 823 P.2d 1101 (1992);

State v Murphy, 13 Wn. 229, 43 P. 44 (1895)

State v. Schoel 54 Wn. 2d 388, 341 P. 2d 481 (1959)

United States v DiFrancesco, 449 U.S. 117, 128, 101 S.Ct. 426, 66

L.Ed.2d 328 (1980)

.United States v Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51

L.Ed.2d 642 (1977).

Wade v Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949))).

U.S.C.A. Constitution, 5th Amendment

RCWA Constitution, Article 1, §9.

RCW 10.43.050.1

A. IDENTITY OF RESPONDENT

Respondent, Quentin Ervin, through his attorney, Howard L Phillips, hereby responds to the King County Prosecutor's opening brief objecting to the decision of King County Superior Court Presiding Criminal Judge, Ronald Kessler.

B. ISSUES PRESENTED

The issue presented is whether Double Jeopardy bars retrial on the higher degree charges when the jury implicitly acquitted the defendant of both first degree charges; when the defendant's direct appeal was final; and when the jury found the defendant guilty of a lesser included offense chosen by the prosecution.

The ruling of Judge Kessler should be affirmed for the reasons this court articulated in State v. Linton, No. 75784-4, (2006)

The Prosecution's invitation to overrule the trial court should be rejected because; 1) the Ervin jury instructions included the "after careful consideration" instruction which bars a subsequent prosecution for the greater offense; 2) the Double Jeopardy clause of the United States and Washington State Constitutions bar prosecution of the defendant for the greater offenses, and; 3) the retrial of the respondent, Quentin Ervin, for the same crime is prohibited by a Washington statute.

1. STATEMENT OF THE CASE

In June 1994, the respondent, Quentin Ervin along with Eric Smiley, was charged with Aggravated Murder and in the alternative, Attempted Murder First Degree, and Murder Second Degree predicated on Assault. The trial began in 1995 and testimony was completed in March 1996. The jury was not able to reach a unanimous verdict with regard to Smiley. The jury, after full and fair consideration of the first degree charges, unanimously found Ervin guilty of Murder Second Degree predicated on Assault. Ervin appealed and the Court of Appeals confirmed the conviction in an unpublished opinion, State v Quentin Ervin, 2000 WL 163579 (Wash. App. Div.1)

On December 29, 2004, the Court of Appeals granted Mr. Ervin's Personal Restraint Petition and remanded the case to Superior Court for proceedings consistent with In re Personal Restraint of Andress, 147 Wn. 2d 602, 56 P.3d 981 (2002) and In re Personal Restraint of Hinton, 152 Wn. 2d 853, 100 P.3d 801 (2004).

The State consequently filed a Motion for Reconsideration which the appellate court denied on March 9, 2005.

The State then petitioned this court to preempt the remand and thereby exclude the trial court and court of appeals from the process. This

motion was denied on May 25, 2005.

A Certificate of Finality was eventually issued by the Court of Appeals on September 7, 2005. The King County Prosecutor now asks this court to overrule the decision of the trial court denying a prosecution of Quentin Ervin for first degree murder or first degree attempted murder. Quentin Ervin responds and requests this court affirm the trial court's decision on remand.

D. RESPONSE

1. Implied Acquittal

This court also has adopted the implied acquittal doctrine. In State v. Schoel 54 Wn. 2d 388, 341 P. 2d 481 (1959), a jury was given the option of finding a defendant guilty of first degree murder, second degree murder, manslaughter, or finding the defendant not guilty of any such crime. Schoel at 394. Where the jury found the defendant guilty of second degree murder but left the other verdict forms blank, this court held that the jury had implicitly acquitted the defendant of first degree murder. *Id*; see also State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

In State v. Linton, 122 Wn. App.73, 93 P.3d 183 (2004), (review granted, 155 Wn 2d 1017 (2005), the defendant was charged with First Degree Robbery and First Degree Assault. The trial court instructed the jury that if they found Linton not guilty of first degree assault or, if after full and careful consideration they were not able to agree on disposition of that crime, then the jury should consider the lesser included crime of second degree assault. Linton was found not guilty of Robbery, and guilty of Assault Second Degree.

The trial court denied the State's motion for a retrial on double jeopardy grounds and imposed an exceptional sentence for the second degree assault conviction.

The State appealed the trial court's denial of its motion for retrial on first degree assault. The Court of Appeals affirmed in a published opinion. State v. Linton, 122 Wn. App. 73, 93 P.3d 183 (2004). This court then granted the State's subsequent petition for review. State v. Linton, 153 Wn.2d 1017, 108 P.3d 1229 (2005).¹

In Quentin Ervin's case the defendant was charged similarly to Linton. That is, the prosecutors elected to hedge their bet by charging the defendant with the greater degree and in the alternative thereby giving the jury the option of finding the defendant of the lesser degree crime.

Ervin was charged with Aggravated Murder First Degree Murder and Attempted First Degree Murder. Like Linton, Ervin was also charged with the lesser second degree crime.

In State v Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991), the Washington State Supreme Court made explicit that in Washington, even if a jury is not unanimous on a greater offense, it may render a verdict on a lesser degree offense. Labanowski, 117 Wn.2d at 423, 816 P.2d 26.

At issue was whether a jury could render a verdict on a lesser included offense after being unable to reach unanimity on the charged, greater included offense. Labanowski, 117 Wn.2d at 415, 816 P.2d 26. The Court concluded that "unable to agree" instructions "correctly state

¹ The King County Prosecutor requested that this court defer the motion for review pending Linton. (Ruling Denying Review, No. 76939-7, pg 2.) thereby acknowledging

the law in Washington.” Labanowski, 117 Wn.2d at 423, 816 P.2d 26.

An “unable to agree” instruction “allows a jury to render a verdict on a lesser offense either if the jurors find the defendant not guilty of the greater offense or, if after full and careful consideration of the evidence, the jurors cannot agree on a verdict for the greater offense.” Labanowski, 117 Wn.2d at 424, 816 P.2d 26. (EMPHASIS ADDED)

Thus, in Washington state, a jury may render a verdict on a lesser offense “if it is unable to reach agreement on the greater offense.” Labanowski, 117 Wn.2d at 423, 816 P.2d 26.

In the Ervin case, the jury was instructed that they could consider the alternative offense of attempted murder in the first degree only “if after full and careful consideration of the evidence you cannot agree on that crime (Aggravated Murder First Degree)”. In the same instruction, number 46, the jury was informed that they could consider the alternative of felony murder in the second degree if they find the defendant not guilty of attempted murder first degree or if after “full and careful consideration of the evidence” they could not agree on attempted murder second degree.

This is the same instruction given to the jury in Linton. This Courts’ analysis of the “after full and fair consideration” instruction found

the controlling nature of this court’s decision in Linton.

in Linton, equally applies to the Quentin Ervin matter.

The Ervin jury left blank verdict form A, which provided; “we the jury, find defendant Quentin Dwayne Ervin_____ of the crime of Murder in the First Degree, as charged in Count I.

The Ervin jury also left blank verdict form B, which provided; “we the jury, having found defendant Quentin Dwayne Ervin not guilty of the crime of Murder in the First Degree, as charged in Count I, or being unable to unanimously agree as to that charge, find the defendant _____ of the alternative crime of Attempted Murder in the First Degree, as charged in Count II”.

Finally, the jury did fill Verdict form C, thereby stating “We the jury, having found defendant Quentin Dwayne Ervin not guilty of the crime of Attempted Murder in the First Degree, as charged in Count II, or being unable to unanimously agree as to that charge, find the defendant guilty of the alternative crime of Murder in the Second Degree, as charged in Count III. (Verbatim Report of Proceedings, April 15, 1996, p. 10-11)

In Linton this court stated:

Based on the way the second degree instruction and verdict forms were written, allowing the jury to choose between acquittal and lack of resolution on first degree assault before moving to second degree assault, the jury’s disposal of first degree assault is one of those elements that inheres in its verdict on second degree assault. The jury’s resolution on first degree assault is therefore beyond the realm of inquiry. Id.

In the Ervin case the jury's second degree instruction and verdict forms were virtually identical to the Linton jury. The Ervin jury was allowed to choose between acquittal and lack of resolution on the first degree murder charges prior to considering the second degree murder charges. The Ervin jury's disposal of the first degree murder charge inhere in its verdict on the second degree murder charge, and is therefore beyond the realm of inquiry.

Moreover, in Linton, this court held;

Where an unable to agree instruction is used which allows the jury to move on to a lesser included offense when it acquits or is unable to agree on the greater charge, and the jury does move on without entering a verdict, the jury will necessarily remain "silent" on the greater offense. Had the trial court limited its inquiry into whether each juror agreed with the verdict as it was stated, the jury would have remained "silent" on first degree assault. *Id.*

The Ervin trial court limited her post verdict inquiry to whether the jury agrees with the verdict. (Verbatim Report of Proceedings, 4/15/06, 11-14) Therefore the jury was "silent" on the first degree murder charges.

The Ervin trial judge did not make an improper inquiry, and merely polled the jury. Under the implied acquittal doctrine, the judge would have had to conclude that the jury implicitly acquitted the defendant of both the first degree charges. In the instant case then, under the implied

acquittal doctrine, the jury implicitly acquitted Ervin of the first degree murder charges.

An “unable to agree” instruction was used in the Ervin trial and the jury convicted him of the lesser included offense, it must necessarily remain silent on the greater offense.

Moreover, neither the parties nor judges may inquire into the internal processes through which the jury reached its verdict. Linton at 6, citing, Breckenridge v Valley Gen. Hosp., 150 Wn.2d 197, 204, 75 P. 3rd 944 (2003).

Therefore, in accord with this court’s clarification of Washington’s implied acquittal doctrine in Linton, the Ervin jury implicitly acquitted Ervin of both the first degree charges.

The Court of Appeals in Linton held that the jury’s “conviction on second degree assault operated as an acquittal on first degree assault and thus terminated jeopardy as to first degree assault” such that retrial on first degree assault would violate Linton’s right against double jeopardy. Linton, 122 Wn. App. At 80.

As the issues are presented to this court, double jeopardy protections bar a retrial of Quentin Ervin on the First Degree Murder and Attempted First Degree murder charges based on the Implied Acquittal

Doctrine².

2. Double Jeopardy

The double jeopardy doctrine protects a criminal defendant from being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense. State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005); see also Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); North Carolina v. Pearce, 395 U.S.711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). But, the protection against double jeopardy attaches only when “some event, such as an acquittal, . . . terminates the original jeopardy.” Richardson v. United States, 468 U.S. 317, 325, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984). State v. Linton, 75784-4 (2006).

The prosecutor in the instant case objects to the trial court’s ruling that double jeopardy bars prosecution from proceeding on Aggravated First Degree Murder, and Attempted First degree murder charges. The

² The Respondent does not concede that the prosecution can lawfully proceed on Second Degree Intentional Murder charges

trial court also ruled that the prosecution could proceed on Intentional Murder Second Degree charges.

The prosecutor's objection to the Double Jeopardy bar is based on the misconception that the jury was deadlocked on the greater degree charges, coupled with the fact that Ervin's conviction was vacated as result of Ervin filing a Personal Restraint Petition. (See St v. Ervin, *supra*.)

Specifically, the prosecution posits that jeopardy was not terminated. Therefore, the prosecutor argues, there could be no bar to prosecution on First Degree Murder and Attempted First Degree Murder. They admit that the jury could not unanimously find Ervin guilty of the first degree charges. Then argue that because of this, and because Ervin filed a PRP, post-direct appeal, the prosecution should get another chance to place Ervin in jeopardy for First Degree Murder and Attempted First Degree Murder.

According to this court's analysis and holding in Linton, this argument is essentially moot because the implied acquittal doctrine founded on double jeopardy bars a retrial of Ervin under any theory.

Nevertheless, the prosecution's argument is specious because there is no logical connection between these two events occurring years apart, in different courts and under entirely different jurisprudence.

The prosecution should not be permitted to piggy back a lack of unanimity of the jury, on to the back of the defendant filing a PRP years later. These two events together do not create an exception to Double Jeopardy prohibition.

The prosecutor's argument relies in large part on Sattazahn v Pennsylvania , 537 U.S. 101,123 S. Ct. 732, 154 L.Ed.2d 588 (2003). By citing and relying on the unique facts of Sattazahn the prosecutor is failing to recognize the immutable fact that the Ervin jury did reach a verdict. The jury was deadlocked on the charges against the co-defendant Smiley, not Quentin Ervin.

Moreover, unless the State can show that the Pennsylvania statute at issue in Sattazahn is not different than the Washington's death penalty statute, Sattazahn is not controlling precedent or even should be considered by this court.

The Ervin jury did not find him guilty of either of the first degree charges; rather, "after careful consideration" of the higher charges, they found him guilty of the lesser charge of second degree murder predicated on an assault.

After deliberating, the jury returned to the court room ready to announce the verdict for Mr. Ervin, but the jury was deadlocked as to Mr. Smiley. Smiley was retried and found guilty of First Degree Murder.

The Fifth Amendment to the United States Constitution states, “...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”. The double jeopardy clause of the Washington Constitution, Article I, § 9, states that “[n]o person shall [be subject for the same offense] to be twice put in jeopardy for the same offense.”

The language of the state constitutional provision receives the same definition and interpretation as the Federal constitution by the United States Supreme Court. State v Schoel, 54 Wn.2d 388, 391, 341 P.2d 481 (1959).

A comparison of the provisions found in the United States Constitution with the Washington State Constitution, with regard to double jeopardy, reveals that the two are identical in thought, substance, and purpose. Id.

In a series of cases commencing with State v Vance, 29 Wn. 435, 70 P. 34 (1902), the Washington State Supreme Court has adhered to the rule that where the language of the State Constitution is similar to that of the Federal Constitution. The State Constitution mirrors the protections of the Federal Constitution which; 1) protects against a second prosecution for the same offense after acquittal; 2) protects against a second prosecution for the same offense after conviction, and; 3) it protects against multiple punishments for the same offense.” . State v Bobic, 140

Wn.2d 250, 260, 996 P.2d 610 (2000), State v Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). North Carolina v Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds in Alabama v Smith, 490 U.S. 794, 109 S.Ct. 2201, S 77104 L.Ed.2d 865 (1989), U.S.C.A. Const. Amend. 5; West's RCWA Const. Art. 1, § 9.

Fourthly, it also protects the defendant's "valued right to have his trial completed by a particular tribunal." United States v DiFrancesco, 449 U.S. 117, 128, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) (quoting Arizona v Washington, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (quoting Wade v Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949))).

The protection of the Double Jeopardy Clause by its terms applies when there has been some event, such as an acquittal, which terminates the original jeopardy." Richardson v United States, 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984).

Generally, jeopardy attaches in a jury trial when it is sworn State v Corrado, 81 Wn. App. 640, 645-6, 915 P.2d 1121 (1996), review denied 138 Wn.2d 1011, 989 P.2d 1138 (1996).

This court has concluded that a defendant is implicitly acquitted by a jury when the jury had a full and fair opportunity to find the defendant guilty of the greater offense, yet fails to do so, and finds the defendant

guilty of a lesser offense. Therefore the original jeopardy is terminated.

Upon retrial, however, the double jeopardy provisions bar retrial of a higher degree offense because the defendant “has implicitly been acquitted of the higher degrees of the crime.” Anderson 96 Wn.2d at 742, 638 P.2d 1205 (citing Schoel, 54 Wn.2d 388, 341 P.2d 481; State v Murphy, 13 Wn. 229, 43 P. 44 (1895)); see also State v Brown, 127 Wn.2d 749, 903 P.2d 459 (1995) (citing State v Markle, 118 S 78Wn.2d 424, 441, 823 P.2d 1101 (1992); Green v United States, 355 U.S. 184, 191, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)).

Not only is retrial precluded under the Double Jeopardy provision of the Fifth Amendment in an appropriate case, but the government’s appeal of a judgment of acquittal is similarly barred. United States v Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). State v Kirk, 64 Wn.App. 788, 790–91, 828 P.2d 1128 (1992).

Moreover, the public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though “the acquittal was based upon an egregiously erroneous foundation.” Fong Foo v U.S., 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).

Clearly, the Double Jeopardy provisions of the United States and Washington Constitutions apply in this case as all the requisite elements are met.

Moreover the jeopardy terminated when the jury rendered a verdict, and the criminal prosecution was final when the defendant exhausted his right to direct appeal.

3. Statutory Prohibition

To avoid Quentin Ervin being completely acquitted, the prosecution in this case chose to hedge their case and charged the defendant with the lesser included offense. The second degree charge based on assault meant that the prosecutors had to merely prove to the jury beyond a reasonable doubt, that the defendant committed an assault, and as a result of the assault someone died. A much easier task than proving intent to kill.

The Washington legislators promulgated legislation that ensures that a person is not tried twice for the same offense. State v. Linton at pg 9 (Chambers Concurring)

Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof. RCW 10.43.050.1

Ervin was implicitly acquitted of count one and two of the Information. He was found guilty of count three of the same information for the same crime and presented to the same jury. Therefore the

prosecutor is statutorily prohibited from proceeding against Ervin, for the same crime, with murder first degree degree, or for an attempt of murder first degree charges. The prosecutor should not another bite of the “first degree apple.” This is especially so since the King County Prosecutor chose to give the jury the option of finding a lesser offense.

F. CONCLUSION

This Court should affirm King County Criminal Presiding Judge Kessler’s ruling because; 1) the jury instructions included the “after careful consideration” instruction that result in implied acquittal and bars a subsequent prosecution for the greater offense; 2) the Double Jeopardy clause of the United States and Washington State Constitutions bar prosecution of the defendant for the greater offenses, and; 3) the retrial of the respondent, Quentin Ervin, for the same crime is prohibited by a Washington statute.

Respectfully Submitted this 7th Day June, 2006

PHILLIPS LAW

Howard L. Phillips
1111 Third Avenue, Suite 2220
Seattle, Washington 98101
(206) 725-0912

Attorney for Quentin Ervin, Respondent