

55745-9

55745-9

78465-5

NO. 55745-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

OLIVER M. WRIGHT,

Respondent.

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~~FILED~~

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER

BRIEF OF APPELLANT

NORM MALENG
King County Prosecuting Attorney

ANDREA R. VITALICH
Senior Deputy Prosecuting Attorney
Attorneys for Appellant

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ASSIGNMENT OF ERROR

The trial court erred in granting the defendant's motion to dismiss a charge of second-degree murder on grounds of double jeopardy. CP 214.

B. ISSUES PRESENTED

1. Double jeopardy does not act as a bar to a criminal prosecution unless three essential elements have been satisfied: 1) jeopardy has previously attached; 2) jeopardy has previously terminated; and 3) the defendant is again in jeopardy for the same offense. Jeopardy has previously terminated for purposes of the second element only if the defendant's conviction has become unconditionally final, or if the defendant has been expressly or impliedly acquitted of the crime.

In this case, the defendant was originally charged with both second-degree intentional murder and second-degree felony murder, but was convicted only of felony murder because intentional murder was never submitted to the jury. The defendant's conviction was then vacated in In re Hinton. On remand, the State charged the defendant with second-degree intentional murder. The trial court dismissed this charge on grounds of double jeopardy, even though the defendant's original

conviction was vacated and he has never been expressly or impliedly acquitted of any charge. Did the trial court err in ruling that double jeopardy applies?

2. The mandatory joinder rule, CrR 4.3.1, generally requires that all related charges against a defendant be consolidated in a single trial. If related charges are not properly joined, the defendant may move to dismiss any charges that were not consolidated for trial. However, CrR 4.3.1 expressly states that the defendant waives any objection on this basis when he fails to request consolidation of charges of which he was aware at the time of trial.

In this case, the defendant was originally charged with both intentional murder and felony murder, but only felony murder was submitted to the jury. On remand, the State filed an amended information charging intentional murder, and the defendant moved to dismiss this charge under CrR 4.3.1. However, the defendant was aware of this charge at the time of his first trial and never moved for consolidation. Has the defendant waived his joinder claim, thus eliminating CrR 4.3.1 as an alternative basis for the trial court's ruling?

C. **STATEMENT OF THE CASE**

The defendant, Oliver Wright, was originally charged with second-degree murder for causing the death of Aisa Cameron on April 6, 1993. The information alleged this crime by alternative means: felony murder predicated on second-degree assault, and intentional murder.¹ CP 1-10; RCW 9A.32.050(a) and (b).

Wright's trial occurred in July and August 1993 before the Honorable Ricardo Martinez. RP (Vol. I – III).² Although Wright was charged with second-degree murder by alternative means, neither the State nor Wright proposed any jury instructions on intentional murder. Rather, both the State and Wright submitted instructions only as to felony murder predicated on second-degree assault. CP 11-40, 41-84. In fact, neither the parties nor the Court mentioned intentional murder at any time during trial. Accordingly,

¹ Wright was also charged with and convicted of first-degree robbery and two counts of first-degree assault. CP 1-10, 112-113. These convictions are still in effect, and are not at issue in this appeal.

² The verbatim report of the original proceedings in 1993, filed under cause number 33525-1-I, have been made part of the record for purposes of the current appeal. The original verbatim report of proceedings consists of four volumes, referenced as follows: the proceedings from July 16, 1993 is referenced as "7/16/93 RP"; "RP (Vol. I)" references proceedings from July 26, 27, and 28, 1993; "RP (Vol. II)" references proceedings from July 29 and August 2, 1993; and "RP (Vol. III)" references proceedings from August 3 and 4 and September 17, 1993. The verbatim report of proceedings on remand comprises only one volume, and will be referenced as "2/17/05 RP."

the Court instructed the jury on only felony murder without exceptions or objections from either party. CP 85-111; RP (Vol. III) 716.

The jury found Wright guilty, and the court imposed a standard range sentence totaling 534 months on all counts. CP 112-113, 114-122; RP (Vol. III) 797. Wright appealed, and this court affirmed in an unpublished opinion. State v. Wright, 79 Wn. App. 1065 (1995 WL 944397), review denied, 129 Wn.2d 1010 (1996). This court held, among other things, that Wright's conviction for felony murder violated neither the constitution nor the merger doctrine. Id.

More than ten years after the jury found him guilty, Wright's murder conviction was vacated by the Washington Supreme Court. In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). The court remanded the case to the trial court for "further lawful proceedings[.]" Id. at 861. On remand, the State filed an amended information charging Wright with second-degree intentional murder, and the case was set for trial. CP 127-130. Wright filed a motion to dismiss the amended information on grounds of mandatory joinder and double jeopardy, and the State responded. CP 131-190; 191-204.

The Honorable Ronald Kessler heard argument on Wright's motion on February 17, 2005.³ 2/17/05 RP. At the conclusion of the hearing, Judge Kessler granted Wright's motion to dismiss the amended information on double jeopardy grounds. However, Judge Kessler denied Wright's request to enter judgment on the lesser-included offense of second-degree assault; rather, the court allowed the State to file a second amended information alleging first-degree manslaughter in accord with this court's decision in State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004). CP 214, 209-213; 2/17/05 RP 17-18.

The State moved for discretionary review, which was granted by Commissioner Neel on April 21, 2005. This appeal timely follows. Further proceedings in the trial court are stayed pending the outcome of this appeal.

³ Judge Kessler also heard argument in State v. Vance McGee, No. 55767-0-I, a case presenting similar issues. The State filed a notice of appeal in McGee, and this case and McGee were linked for consideration on appeal by order of Commissioner Neel on April 21, 2005. The State filed its opening brief in McGee on April 26, 2005.

D. ARGUMENT

1. DOUBLE JEOPARDY DOES NOT APPLY BECAUSE THE DEFENDANT'S ORIGINAL CONVICTION HAS BEEN VACATED, AND BECAUSE THE DEFENDANT HAS NEVER BEEN ACQUITTED OF ANY CHARGE.

The trial court dismissed a second-degree murder charge against Wright on grounds of double jeopardy in circumstances where the elements of double jeopardy have not been satisfied. In so doing, the trial court expanded the boundaries of double jeopardy beyond any state or federal appellate court decision. The trial court's ruling is erroneous, and this court should reverse.

Under both the state and federal constitutions, a defendant cannot be placed in jeopardy twice for the same crime. State v. Ahluwalia, 143 Wn.2d 527, 535-36, 22 P.3d 1254 (2001). The state and federal constitutions provide the same double jeopardy protections, and are interpreted identically. State v. Linton, 122 Wn. App. 73, 76, 93 P.3d 183 (2004), review granted, 153 Wn.2d 1017 (2005). Double jeopardy under either constitution protects the criminal accused against three possible events: 1) a second prosecution following an acquittal; 2) a second prosecution following a conviction; and 3) multiple punishments for the same

offense. North Carolina v. Pearce, 295 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

But before double jeopardy can bar further prosecution in any case, three essential elements must be satisfied: 1) jeopardy has previously attached; 2) jeopardy has previously terminated; and 3) the defendant is again in jeopardy for the same offense in fact and law. State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). As the Corrado court observed, “The first two elements define ‘former’ jeopardy, which is a prerequisite to ‘double’ jeopardy.” Id. Thus, the third element should be used to determine whether there is “double jeopardy” only when “former jeopardy” has been established under the first two elements. Id.

In this case, the second element – whether jeopardy has previously terminated – is at issue. Jeopardy attaches for purposes of the first element when a jury is sworn to hear the defendant’s case. Corrado, 81 Wn. App. at 646. Thus, there is no dispute that jeopardy attached in this case when Wright was put on trial in 1993. Moreover, the third element – whether the defendant faces the same offense in fact and law – should not be considered unless and until the first two elements are satisfied. But contrary to the trial court’s ruling, jeopardy has never terminated in this case.

Rather, Wright's original jeopardy for second-degree murder is continuing, and hence double jeopardy should not apply.

Jeopardy terminates for purposes of the second element of former jeopardy only if one of two possible requirements has been satisfied: 1) the defendant's conviction has become unconditionally final; or 2) the defendant has been expressly or impliedly acquitted of the charge in question. Corrado, 81 Wn. App. at 646-48. In order for either of these requirements to be fulfilled, the law contemplates "a final adjudication as to each offense charged." Ahluwalia, 143 Wn.2d at 538. Therefore, "if the jury does not reach a verdict as to each offense charged, the defendant has not been acquitted or convicted upon the indictment or information[.]" Id. Moreover, if the defendant's conviction has been set aside by an appellate court on any basis other than insufficiency of the evidence, "the defendant may be retried for the convicted offense and any lesser included offenses" because such a conviction is, by definition, not unconditionally final for double jeopardy purposes. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); see also United States v. Scott, 437 U.S. 82, 90-91, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978).

In this case, Wright's second-degree murder conviction never became unconditionally final. To the contrary, Wright's conviction was vacated – at his request – in In re Hinton. See Pearce, 395 U.S. at 720 (the double jeopardy clause “imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside”). Therefore, the only basis upon which the trial court could have found double jeopardy is by concluding that Wright was acquitted of second-degree murder. Furthermore, because Wright has never been expressly acquitted of anything, the trial court's ruling must necessarily rest on an application of the implied acquittal doctrine. But in so doing, the trial court expanded the implied acquittal doctrine beyond where any appellate court has previously held that it applies. This ruling is erroneous, and should be reversed.

In general, as stated above, if a jury “does not reach a verdict as to each offense charged, the defendant has not been acquitted or convicted upon the indictment or information[.]” Ahluwalia, 143 Wn.2d at 538. The implied acquittal doctrine is an exception to this general rule that applies in some cases where the factfinder is given a full opportunity to consider more than one

charge, but fails to render a verdict on one or more of those charges.

Specifically, implied acquittal applies in most cases where the factfinder is asked to consider a greater charge and a lesser charge and, after actual deliberation on all charges, the factfinder renders a verdict only on the lesser offense. See Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) (implied acquittal bars retrial on greater offense when verdict returned only on lesser offense); Linton, 122 Wn. App. at 79 (implied acquittal applies where jury unable to reach verdict on greater offense but finds defendant guilty of lesser offense). Implied acquittal has also been applied in a case where the jury was given three separate charges for deliberation, but, without explanation, the jury returned a verdict on only one of the three crimes. State v. Davis, 190 Wash. 164, 67 P.2d 894 (1937). Further, only one Washington case has applied implied acquittal to a trial on alternative means. State v. Hescok, 98 Wn. App. 600, 989 P.2d 1251 (1999).

But whatever the context, the common thread in all implied acquittal cases is the factfinder's *actual consideration* of the charge at issue coupled with its failure to render a verdict. Indeed, it is the failure to render a verdict "*after full and careful consideration*" that

makes the factfinder's silence tantamount to an acquittal. Linton, 122 Wn. App. at 79 (quoting State v. Labanowski, 117 Wn.2d 405, 424, 816 P.2d 26 (1991)) (emphasis supplied); see also Green, 355 U.S. at 191 (implied acquittal occurred because the jury "*was given a full opportunity to return a verdict* and no extraordinary circumstances appeared which prevented it from doing so") (emphasis supplied). This requirement of actual deliberation by the factfinder is consistent with the axiomatic principle that the law contemplates "a final adjudication as to each offense charged" before double jeopardy will apply to bar further prosecution. Ahluwalia, 143 Wn.2d at 538.

In this case, unlike any other case in which implied acquittal has been found to apply, the jury at Wright's trial did not actually consider intentional murder and fail to render a verdict. Rather, the jury was never asked – by either party – to consider intentional murder during its deliberations. Because the jury never deliberated on intentional murder, there has been no implied acquittal on that charge. Moreover, contrary to Judge Kessler's ruling, the one Washington case in which implied acquittal has been applied to alternative means (as opposed to a greater offense) does not support a finding of implied acquittal in this case.

In State v. Hescock, a juvenile was found guilty of forgery following a bench trial. Although the juvenile was charged with committing forgery by alternative means, the trial court rendered its verdict on only one of those means and was silent as to the other. Hescock, 98 Wn. App. at 603. On appeal, the court held that the evidence was insufficient to sustain the means found by the trial court. Id. Further, in finding that the trial court's silence as to the other means constituted an implied acquittal, the court suggested that implied acquittal might not apply in these circumstances if the conviction had been overturned on a basis other than insufficient evidence:

Hescock's appeal is based on insufficient evidence. When a conviction is reversed due to trial error, generally, *the defendant may be retried for the same offense*. But when a conviction is reversed based on insufficient evidence, retrial is barred.

Hescock, 98 Wn. App. at 611 (emphasis supplied).

This observation is consistent with the well-settled principle that alternative means are not separate crimes, but different means of committing a single crime. State v. Russell, 33 Wn. App. 579, 586, 657 P.2d 338 (1983), *rev'd in part on other grounds*, 101 Wn.2d 349, 352, 678 P.2d 332 (1984) (intentional murder and felony murder are not different crimes, but alternative methods of

committing one crime). Therefore, in departing from the general rule that a defendant “may be retried for *the convicted offense* and any lesser included offenses”⁴ when a conviction is reversed on appeal, the Hescock court found it significant that the juvenile’s conviction was reversed specifically due to insufficient evidence. Accordingly, the court found that double jeopardy should apply.

In granting Wright’s motion to dismiss the second-degree murder charge on remand, the trial court applied double jeopardy in circumstances where no prior appellate decision has done so. Wright’s former jeopardy has never terminated because the original conviction was vacated and because he has never been expressly or impliedly acquitted of any charge. Therefore, the trial court erred in finding that the essential elements of double jeopardy have been satisfied in this case. This court should reverse, reinstate the second-degree murder charge, and remand this case for trial.

2. THE DEFENDANT HAS WAIVED HIS RIGHTS UNDER THE MANDATORY JOINDER RULE BY FAILING TO MOVE FOR CONSOLIDATION DURING THE FIRST TRIAL.

Wright also asked Judge Kessler to dismiss the second-degree murder charge on grounds of mandatory joinder under CrR 4.3.1. CP 131-142. But under the plain language of the court rule,

⁴ Anderson, 96 Wn.2d at 742 (emphasis supplied).

Wright has waived any argument on this basis. Although Judge Kessler granted Wright's motion to dismiss based only on double jeopardy, this court should reject mandatory joinder as an alternative basis to uphold Judge Kessler's ruling.

Under CrR 4.3.1(b)(2), related charges arising from the same conduct should be consolidated for trial. If related charges are not consolidated for trial, any subsequent charges should be dismissed with prejudice unless "the right of consolidation was waived" or "the ends of justice would be defeated if the motion were granted." CrR 4.3.1(b)(3). A defendant's failure to make a timely motion for consolidation "*as to related offenses with which the defendant knew he or she was charged*" constitutes waiver under the rule. CrR 4.3.1(b)(2) (emphasis supplied). A defendant's knowledge for purposes of waiver under this rule means that the defendant knew of the additional charges "at such a time and in such a manner as to allow the defendant a reasonable opportunity to assess the information and react." State v. Holt, 36 Wn App. 224, 229, 673 P.2d 627 (1983) (record insufficient to establish waiver where defendant was informed of additional charges on the morning of trial, but record did not "reveal the substance of the information given").

In this case, Wright had actual knowledge of the intentional murder charge when the original information was filed. CP 1-10. Nevertheless, he did not move for consolidation. To the contrary, Wright, the State, and the original trial court proceeded solely on the alternative means of felony murder. Therefore, under the plain language of the mandatory joinder rule, Wright has waived any objection to the intentional murder charge on these grounds. Accordingly, CrR 4.3.1 does not provide an alternative basis to uphold Judge Kessler's ruling, and this court should reverse.

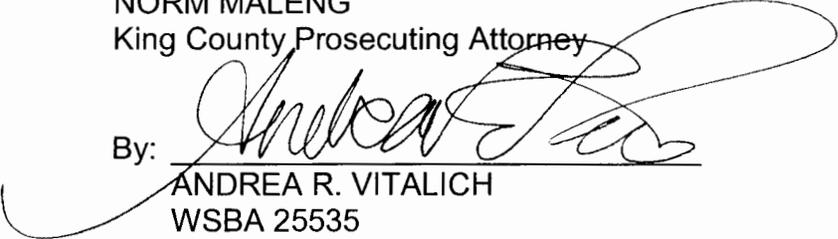
E. CONCLUSION

The trial court erred in dismissing the second-degree murder charge in this case on grounds of double jeopardy. Moreover, mandatory joinder does not provide alternative grounds for dismissal. This court should reverse the trial court's ruling, reinstate the second-degree murder charge, and remand for trial on that charge.

DATED this 14th day of June, 2005.

RESPECTFULLY submitted,

NORM MALENG
King County Prosecuting Attorney

By: 

ANDREA R. VITALICH
WSBA 25535
Senior Deputy Prosecuting Attorney
Attorneys for the Appellant

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 Marcus Naylor, the attorney for the respondent, at Northwest Defenders Association, 900 Fourth Avenue, Suite 3700, Seattle, WA 98164-1018, containing a copy of the Brief of Appellant, in STATE V. OLIVER WRIGHT, Cause No. 55745-9-1, in the Court of Appeals, Division I, 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.

U Brame
Name
Done in Seattle, Washington

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