No. 81445-7

IN THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SANTIAGO RIVERA-SANTOS,

Petitioner

Superior Court of Clark County, No. 07-1-01555-8

PETITIONER'S BRIEF

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I. Assignment of Error

Assignments of Error

No. 1: The Superior Court erred in its Order for Remand entered on March 14, 2008, which reversed the decision of the District Court dismissing the case with prejudice. CP 84-85; RP 23

In assigning this error, exception is taken to the Findings of Fact entered on March 11, 2008, numbers 1, 2, 3, 4, 5, 6 and 7 in so far as they suggest, find or infer that the civilian witness identified or is able to identify the defendant as the driver of the vehicle involved. CP 81-83

Issues Pertaining to Assignments of Error

No. 1: When a person drives a vehicle in Washington over the border to another sovereign jurisdiction, like the State of Oregon, and that other jurisdiction charges and convicts the person of Driving While Under the Influence of Intoxicants, is Washington precluded by RCW 10.43.040 from prosecuting the person in Washington for a Driving While Under the Influence of Intoxicants (RCW 46.61.502) charge stemming from that same course of conduct?

II. Statement of the Case

On January 12, 2007, Washington State Patrol Troopers received information from dispatch of a black 2007 Chevrolet Tahoe, license plate

number OR CU 15443, being driven in an erratic manner in Clark County, State of Washington. CP 43.

Dispatch gave Washington State Patrol Troopers the following information, which it reportedly received from a civilian informant, who was following the vehicle: The vehicle took the exit to eastbound SR 500 in the State of Washington, stopped at a signal light at St. Johns Boulevard, then performed a u-turn from the right lane, crossing the eastbound lanes and two turn lanes. The vehicle then took off at a high rate of speed. The vehicle entered I-5, going southbound, using all lanes near SR 14. CP 43.

Washington State Patrol Troopers first began observation of the vehicle south of the Interstate Bridge in the State of Oregon. The troopers followed the vehicle and observed extremely poor lane travel, then an erratic swerve from the right lane onto Interstate Avenue. Approximately ¼ mile further, troopers observed the vehicle stop abruptly for about 15 seconds before continuing. The vehicle was observed swerving left and right, driving up onto a curb and across the center line several times. At one point, the vehicle crossed the center line, almost causing a head on collision with a Portland police vehicle. Portland police stopped the vehicle. Washington State Patrol Troopers observed the driver exit the vehicle, the defendant following instructions by Portland police to do so.

Troopers described the driver as showing a lack of coordination and trouble following orders. CP 43.

Portland police officers identified the driver of the vehicle by an Oregon driver's license as Santiago Rivera-Santos. CP 57. Portland police placed Rivera-Santos under arrest and brought him to the Central Precinct in Portland Oregon, where they processed him for a DUI. At the precinct, Rivera-Santos was not able to stand up without assistance and was unable to perform sobriety tests. CP 57; 46-48. Rivera-Santos agreed to give breath samples. Breath samples were given on a CMI Intoxilyzer. Two readings of .184 and.175 were obtained. CP 46-47; 52.

Oregon charged Rivera-Santos with Driving Under the Influence of Intoxicants. CP 61. In March of 2007, Rivera-Santos was convicted of the charge. CP 82. This charge was based on the driving incident that occurred on January 12, 2007. CP 61.

Rivera-Santos was also charged in Washington with Driving Under the Influence of Intoxicants for the same driving incident that occurred on January 12, 2007. CP 1. The citation was issued on January 16, 2007. CP 1.

Following the conviction for DUII in Oregon, a motion to dismiss the charge based on Constitutional Double Jeopardy and Statutory Double Jeopardy was heard by the court. RP 1-17. On August 15, 2007, the court

granted the motion on the ground that the charge violated Statutory Double Jeopardy and dismissed the charge with prejudice. CP 23-24. The State appealed the decision and the Superior Court reversed the decision of the District Court. CP 84.

III. Argument

RCW 10.43.040 provides, in pertinent part, as follows:

> Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted upon the merits, in a judicial proceeding conducted under the criminal laws of such state or country, founded upon the act or omission with respect to which he is upon trial, such former acquittal or conviction is a sufficient defense.

Whereas constitutional double jeopardy requires that both offenses be identical both in fact and law, RCW 10.43.040 prohibits multiple prosecutions for the same act or omission and focuses on identity of fact and not identity of law. *State v. Caliguri*, 99 Wn.2d 501, 513, 664 P.2d 466 (1983). RCW 10.43.040 prohibits state prosecution "for any offense which is in fact alone identical to or included within an offense for which a defendant has been previously prosecuted in another jurisdiction." *Caliguri*, supra, at 514.

While *Caliguri* and other Washington cases have interpreted the meaning of "founded upon the act or omission", no Washington cases have interpreted the meaning of the clause in the statute which states as follows: "Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof". A statute must be construed as a whole and each word given a meaning in relation to all of the other words in the statute in order to give effect to the intent and purpose of the legislature as expressed in the statutory provision. *Burlington Northern, Inc. v. Johnston*, 89 Wn.2d 321, 326, 572 P.2d 1085 (1977).

A number of jurisdictions have enacted statutory double jeopardy provisions. See Federal-State Prosecutions, 97 ALR5th 201. The above "under such circumstances" language appears to be unique to Washington at this time. At the beginning of Chapter 249 of the Session Laws, which enacted the original version, it is stated that "the Criminal Code was taken largely from New York and Minnesota." Laws 1909, Chapter 249, Pg. 890. New York enacted Penal Code § 33 in 1881, which contains language almost word for word identical to the original statutory double jeopardy provision of Washington. See *People v. Lo Cicero*, 14 N.Y.2d 374, 200 N.E.2d 622, 623 (1964). The differences in language are

cosmetic, not substantive. New York amended its statute in 1970. Like Washington, the cases in New York focused on the "act or omission" language of its statute. See *Abraham v. Justices of New York Supreme Ct., Bronx Cty.*, 37 N.Y.2d 560, 338 N.E.2d 597, 600 (1975) The rule in those cases was codified in CPL § 40.20 (1)of the amended statute and stated as follows: "[a] person may not be twice prosecuted for the same offense. *Abraham*, supra, at 338 N.E.2d at 600. CPL § 40.10 provides a definition for "offense." A-1

Shortly after this Court's decision in *State v. Ivie*, 136 Wn.2d 173, 961 P.2d 941 (1997), the legislature amended the statute. Laws 1999, Ch. 141 § 1. The new language limited the scope of statutory double jeopardy to judicial proceedings conducted under the criminal laws of the other jurisdiction. It also added that "nothing in this section affects or prevents a prosecution in a court of this state of any person who has received administrative or nonjudicial punishment, civilian or military, in another state or country based upon the same act or omission." The amendments did not change either the "act or omission" language or the "under such circumstances" language. Since this language was not amended it is not repealed and continues in force, without interruption, from the time the statute was amended. *In re Assessment of Yakima Amusement Co.,* 192 Wash. 174, 178, 73 P.2d 519 (1937).

In this case, the offense committed in Oregon was Driving While Under the Influence of Intoxicants. ORS 813.010 (1) provides, as pertinent to this case, that "[a] person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person: (a) has .08 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath or blood of the person made under ORS 813.100, 813.140 or 813.150; (b) is under the influence of intoxicating liquor, a controlled substance or an inhalant; or . . ."

RCW 46.61.502 (1), as pertinent to this case, provides that "[a] person is guilty of driving while under the influence of intoxicating liquor or any drug in the person drives a vehicle within this state: (a) and the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or (b) while the person is under the influence of or affected by intoxicating liquor or any drug . . ."

The driving in Washington is not sufficient to establish that the defendant was driving while under the influence of intoxicants. Any number of other reasons for the driving could exist. The witness, whether a police officer, or, as in this case, a civilian witness, can only describe the manner of driving in Washington but cannot provide evidence from that

driving that intoxicants were involved that affected the ability of the defendant to drive or that the defendant was under the influence of intoxicants or had an alcohol concentration of .08 or higher. This evidence must come after the defendant is stopped in Oregon. The offense of Driving While Under the Influence of Intoxicants was committed in Oregon. Washington has jurisdiction because the defendant drove within Washington directly into Oregon. Washington is going to need to prove its DUI case with facts identical to and included within the offense in Oregon for which the defendant has already been prosecuted. It is axiomatic that each state is going to have to prove that the act was committed within its jurisdiction and this is going to be true with any crime and should not be a distinguishing factor. This Court, in Caliguri, noted that a jurisdictional element should be ignored because it does not require proof of an additional act. *Caliguri*, supra, at 514. The identity of fact is driving a motor vehicle within the state.

Three other jurisdictions have considered the issue presented in this case.

In California, the issue was addressed in *People v. Bellacosa*, 54 Ca. Rptr. 3d 691 (2007). The California statute, Penal Code § 656 provided as follows: [w]henever on the trial of an accused person it appears that upon a criminal prosecution under the laws of the United

States, or of another state or territory of the United States based upon the act or omission in respect to which he or she is on trial, he or she has been acquitted or convicted, it is a sufficient defense." This statute does not contain the "under such circumstances" language that is contained in the Washington statute.

In *Bellacosa*, the court concluded that the physical act of driving in California was separate from the physical act of driving in Nevada and therefore statutory double jeopardy did not apply. *Bellacosa*, supra, at 697. The court noted that California had rejected the "course- of -conduct rule for application of the prior conviction or acquittal defense." *Bellacosa*, supra, at 697. The court then held that "a defendant may not be convicted after a prior acquittal or conviction in another jurisdiction if all the acts constituting the offense in this state were necessary to prove the offense in the prior prosecution." *Bellacosa*, supra, at 695. Under its holding, California requires that the act of driving a vehicle in California be necessary to prove the DUI charge in Nevada before an acquittal or conviction would act as a bar to a prosecution in California. Thus, driving a vehicle in California was not necessary to prove the DUI charge in Nevada, nor visa versa, and therefore a prosecution in California following a conviction or acquittal in Nevada did not violate statutory double jeopardy. *Bellacosa*, supra, at 697-698.

Under this rationale, it is difficult, if not impossible, to imagine any crime committed in another state to come within the provisions of the statute. A statute must be given a reasonable construction to avoid absurd consequences. *State v. Cann*, 92 Wn.2d 193, 195, 595 P.2d 912 (1979).

An application of the California holding to the facts presented in *State v. Mathers*, 77 Wn. App. 487, 891 P.2d 738 (1995) is instructive. In *Mathers*, the defendant took a woman's vehicle after assaulting and stealing from her. This crime occurred in Washington. Pursued by police officers, he crossed a bridge over the Columbia River, and drove into Oregon, where he was eventually apprehended. Among a multitude of charged crimes he was charged in Washington with Taking a Motor Vehicle Without Permission. In Oregon, among other crimes, he was convicted prior to the Washington prosecution of Unauthorized Use of a Vehicle.

The court found that statutory jeopardy applied to Taking a Motor Vehicle Without Permission. The elements of the first offense, in Washington, required the prosecution to prove that the defendant intentionally take or drive away without the owner's permission a motor vehicle. In Oregon, unauthorized use of a vehicle required the prosecution to prove that the defendant took, operated or exercised control over, rode in or otherwise used the vehicle without the consent of the owner. Case

law also imposed an element of intent. The court found that the statutes were of the same character and had substantial identity and therefore reversed the conviction on that charge. See *Mathers*, supra at 491-492.

Under the California holding, it is clear that the defendant intentionally taking or driving away another person's vehicle without the permission of the owner in Washington is not necessary or sufficient to prove the charge of unauthorized use of a vehicle in Oregon. The person must be driving the vehicle in Oregon without the owner's permission. However, Oregon will have to rely on the acts in Washington to prove its case, just as Washington will have to rely on the acts in Oregon to prove its DUI in this case.

California did hold that an unlawful driving or taking a car was precluded by a prior Oregon conviction for unauthorized use of a vehicle. *People v. Comingore*, 20 Cal.3d 142, 141 Cal. Rptr. 542, 570 P.2d 723 (1977). As noted in *Bellacosa*, however, the State agreed that the California charges were based on the same acts as the Oregon charge and therefore the court accepted that concession without consideration. *Bellacosa*, supra, at 54 Cal. Rptr.3d 697.

The Supreme Court of Kansas considered the issue in *State v. Russell*, 229 Kan. 124, 622 P.2d 658 (1981). The Kansas statute provided as follows:

> (3) A prosecution is barred if the defendant was formerly prosecuted in a district court of the United States or in a court of general jurisdiction of a sister state or in the municipal court of any city of this state for a crime which is within the concurrent jurisdiction of this state, if such former prosecution:
>
> (a) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the offense was not consummated when the former trial began;"

K.S.A. 1979 Supp. 21-3108(3); *Russell*, supra, at 622 P.2d 663.

The Court, in *Russell*, described a DUI as a "unique crime". The crime is defined in terms of doing a particular act under a particular condition. Neither driving a motor vehicle nor drinking intoxicating liquor, in and of themselves, is illegal. A DUI conviction requires that the State prove that the act and condition occurred at a particular place and time. The offense may be committed and completed within a very short time, even less than a minute. The determination of being under the influence is based on a number of factors, such as the "amount consumed, type of liquor consumed, weight of the person, tolerance to alcohol, food ingested, and the time lapse from ingestion of alcohol, to name a few." *Russell*, supra, at 622 P.2d 664.

Following this analysis, the Court concluded that the DUI offense in Kansas was separate and complete from the Missouri DUI and therefore the conviction in Missouri did not preclude a DUI prosecution in Kansas. The Kansas statute does not contain the "under such circumstances" language.

The analysis of the Kansas court is instructive, however. The Court makes a specific point that the crime may be committed and completed within a short time frame and a number of factors must be looked at to make that determination. In this case, Washington will need to rely on the facts in Oregon to prove beyond a reasonable doubt that the defendant's driving a motor vehicle in Washington was affected by intoxicants or that he was under the influence of intoxicants when he drove. These facts are identical to the facts that Oregon will need to prove its DUI charge. If a breathalyzer or blood test is taken, it will be taken after the defendant's apprehension in Oregon, and the result, if more than .08 and in compliance with Washington's testing procedures, is a per se violation if it is taken within two hours of driving the motor vehicle in Washington. In other words, Washington will have to rely on identical facts in Oregon to prove its DUI charge no matter the circumstances.

The Supreme Court of Kentucky has also considered the issue in the context of its statutory provision. KRS 505.050 provided as follows:

> When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state, a prosecution in such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:
>
> (1) The former prosecution resulted in an acquittal, a conviction which has not subsequently been set aside, or a determination that there was insufficient evidence to warrant a conviction, and the subsequent prosecution is for an offense involving the same conduct unless:
>
> (a) Each prosecution requires proof of a fact not required in the other prosecution; or
>
> (b) The offense involved in the subsequent prosecution was not consummated when the former prosecution began; or
>
> (2) The former prosecution was terminated in a final order or judgment which has not subsequently been set aside and which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution.

KRS 505.050; *Commonwealth v. Stephenson*, 82 SW3d 876, 882 (2002)

In *Stephenson*, the Court based its decision on its interpretation of "concurrent jurisdiction." That term was defined as "jurisdiction exercised simultaneously by more than one court over the same subject matter *and within the same territory*" *Stephenson*, supra, 82 SW3d at 883-884. In the context of a DUI charge, each state provides for criminal sanctions for driving within its borders and therefore concurrent

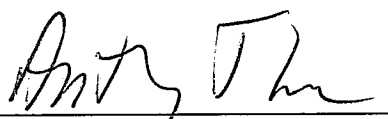
jurisdiction does not exist and statutory double jeopardy does not apply. *Stephenson*, supra, 82 SW3d at 884.

The Washington statute uses substantially different language than the Kentucky statute. In particular, the Washington statute does not speak in terms of "concurrent jurisdiction" nor does the Kentucky statute speak in terms of "under such circumstances." Therefore, the Kentucky decision is not particularly useful to this court.

IV. Conclusion

Based on the foregoing analysis, the Petitioner respectfully requests that this Court reverse the decision of the Superior Court and affirm the decision of the District Court, which dismissed the charge with prejudice.

DATED: September 25, 2008.



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Effect of guilty plea, see Menna v. New York, U.S.N.Y.1975, 96 S.Ct. 241, 423 U.S. 61, 46 L.Ed.2d 195.

Mistrial by reason of hung jury, see U. S. v. Sanford, 1976, 97 S.Ct. 20, 429 U.S. 14, 50 L.Ed.2d 17, on remand 547 F.2d 1085.

Multiple punishments, civil in rem forfeitures, criminal prosecutions, drug and money laundering violations, see U.S. v. Ursery, U.S.Mich.1996, 116 S.Ct. 2135, 518 U.S. 267, 135 L.Ed.2d 549, on remand 92 F.3d 1485, on remand 109 F.3d 1129, on remand 122 F.3d 1285.

Suppression of evidence, government's right to appeal, see U. S. v. Morrison, 1976, 97 S.Ct. 24, 429 U.S. 1, 50 L.Ed.2d 1. See, also, United States v. Rose, 1976, 97 S.Ct. 26, 429 U.S. 5, 50 L.Ed.2d 5.

Successive criminal prosecutions, double jeopardy, see Jeffers v. U.S., U.S.Ind.1977, 97 S.Ct. 2207, 432 U.S. 137, 53 L.Ed.2d 168, rehearing denied 98 S.Ct. 241, 434 U.S. 880, 54 L.Ed.2d 164. See, also, Brown v. Ohio, 1977, 97 S.Ct. 2221, 432 U.S. 161, 53 L.Ed. 187.

§ 40.10 Previous prosecution; definitions of terms

The following definitions are applicable to this article:

1. "Offense." An "offense" is committed whenever any conduct is performed which violates a statutory provision defining an offense; and when the same conduct or criminal transaction violates two or more such statutory provisions each such violation constitutes a separate and distinct offense. The same conduct or criminal transaction also establishes separate and distinct offenses when, though violating only one statutory provision, it results in death, injury, loss or other consequences to two or more victims, and such result is an element of the offense as defined. In such case, as many offenses are committed as there are victims.

2. "Criminal transaction" means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture.

(L.1970, c. 996.)

Practice Commentaries

by Peter Preiser

Article 40 sets forth New York's statutory protection against double jeopardy in the context of exposure to multiple prosecutions. This is to be distinguished from the aspect of double jeopardy that protects against "multiple punishments for the same offense" (*North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 [1969]), which deals with matters such as credit for punishment already inflicted when imposing

sentence for the same crime after retrial (*i*
lative sentencing specifically prescribed by
more charges of the same conduct pro
Missouri v. Hunter, 459 U.S. 359, 367–3
L.Ed.2d 535 [1983]; *People v. Gonzalez*,
Note though that some statutory protectior
ishments in New York is provided in
e.g.,§§ 70.25, 70.30, 70.35, 80.15.

The federal double jeopardy provision (
became binding upon the states in 1969 (*B*
U.S. 784, 89 S.Ct. 2056,, 23 L.Ed.2d 70
Court of Appeals has not construed thi
counterpart (Art. 1, § 6) as vouchsafing
than the federal requirement. But New Yc
on both aspects of double jeopardy is bro
of the federal law or New York consti
construed in judicial decisions.

Article 40 exceeds constitutional require
respects:1) broad limitation upon separate
ple crimes committed by a single act or d
transaction; and 2) virtual prohibition of
stemming from conduct already prosecut
tion within the United States, or by th
These will be discussed in further detail in
taries on the ensuing sections. For pre
note the definition of the term "criminal t
sion 2 of this section. The statutory c
transaction" is a key provision applied th
construing both of the two purely statutory

Before turning to the substantive pro
matters of procedure should be mentione
issue on a claim of previous prosecution is
has power to proceed with the action, a c
ing in the nature of prohibition (CPLR
Matter of Abraham v. Justices of the Sup
560, 376 N.Y.S.2d 79, 338 N.E.2d 597 (
even though the claim is based upon a sta
from constitutional) bar, and notwithsta
motion to dismiss has been made and de
Matter of Abraham.v. Justices of N.Y. Supr
376 N.Y.S.2d 79, 337 N.E.2d 597 (1975).
defendant would move to dismiss the indi
(see CPL § 210.20 [1(e)]) and, if that mc
commence a separate civil Article 78 proc
Division (CPLR 506[b]1). This, in effect
against collateral review interruption of
ceeding and "provides a mechanism fc

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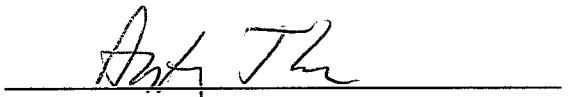
CERTIFICATE OF SERVICE

I certify that I hand-delivered a copy of the foregoing to John Peterson, Deputy Prosecuting Attorney at 1013 Franklin St., Vancouver Washington 98660 on September 25, 2008 and, on that same day, mailed, postage prepaid, a copy to Santiago Rivera-Santos at 534 SE 13th Ave., Hillsboro OR 97123.



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