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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NO. 84452-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,

v.

RICHARD CHARLES TRACER, Respondent.

RESPONSE TO PETITION FOR REVIEW

AND

CROSS PETITION FOR REVIEW

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I. IDENTITY OF CROSS-PETITIONER

The State of Washington, by and through its attorney, Pamela B. Loginsky, Special Deputy Prosecuting Attorney for Jefferson County, asks this Court to accept review of that portion of the Court of Appeals decision terminating review designated in part B of this cross-petition.

II. COURT OF APPEALS DECISION

The State seeks review of the published Court of Appeals decision which held that the truancy of any deputy prosecutor could justify a trial court's appointment of a special prosecutor. *See State v. Tracer*, COA No. 37812-4-II, slip op. at 10-11 (2010). A copy of the Court of Appeals decision is in the appendix at pages A-1 through A-18. Division II's opinion was filed March 16, 2010. Richard Tracer filed a timely petition for review on April 12, 2010.

III. ISSUE PRESENTED BY THE STATE OF WASHINGTON

The office of prosecuting attorney is created by the state constitution.¹ Office holders are either directly elected by the people or, in the case of a vacancy, appointed by the duly elected legislative branch.² The office holder is authorized to represent the public personally, or through deputy prosecuting attorneys and special deputy prosecuting attorneys.³ May a court

¹Const. art. XI, §§ 4, 5.

²See generally RCW 36.16.030, RCW 36.16.110 and RCW 36.16.115.

³See generally RCW 36.27.040.

disenfranchise the public by replacing the popularly chosen prosecuting attorney, who appears through one agent, solely because another of her agents is absent from court due to illness?

IV. STATEMENT OF THE CASE

The defendant, Richard Charles Tracer, was charged with one count of vehicular assault on May 29, 2007. CP 1. Because Tracer was related to some employees of the Jefferson County Sheriff's Office, Juelanne Dalzell, the elected Jefferson County Prosecuting Attorney, appointed a special deputy prosecuting attorney, Andrea Vingo. CP 3, 86, 134. Ms. Dalzell, however, did not recuse her office from the case as no conflict of interest existed. *See* CP 20, 90, 134.

Tracer's case was scheduled for a pre-trial hearing on May 9, 2008. CP 175. In anticipation of the pre-trial hearing, Tracer's attorney, Richard Davies and Ms. Vingo discussed a negotiated resolution of the matter. The two agreed in principle that the charge would be amended from vehicular assault to driving while under the influence of intoxicants ("DUI"). CP 134, 140-41. No agreement, however, was reached prior to the pre-trial hearing with respect to restitution, jail term to be served, length of supervision, court costs, or the date upon which the agreement would be consummated. CP 134-35, 140-42, 145.

On May 9, 2008, Ms. Vingo was absent from court due to illness when

Tracer's case was called. CP 86, 134. Deputy Prosecuting Attorney (DPA) Ted DeBray, however, appeared on behalf of the State. CP 89. DPA DeBray requested a one week continuance of the pre-trial hearing to allow for Ms. Vingo to appear. CP 89.

Tracer objected to the continuance on the grounds that he had a job offer that was contingent upon his resolving this matter today, and he was "prepared to plead guilty to a DUI with a breath test/blood test below .15." CP 89. When DPA DeBray indicated an unwillingness to accept such a plea, Judge Verser indicated that if Ms. Vingo could not appear over the noon hour he would appoint Noah Harrison, a public defender who was in court on behalf of three defendants, as a special prosecutor. CP 90, 112-122, 149, 168, 174, 175.

After a brief recess, Tracer expressed a willingness to have Mr. Harrison step in as a special prosecutor to convert the plea proposal into a plea agreement. CP 91. Based upon Tracer's representations, Judge Verser orally appointed Mr. Harrison to represent the State of Washington. *Id.* Mr. Harrison, based on Tracer's counsel's erroneous assertion that he had reached a "deal" with Ms. Vingo, indicated that it appeared that a change of plea to DUI was an appropriate resolution. CP 93. With prompting from Judge Verser, Mr. Harrison ultimately made an oral motion to amend the information from vehicular assault to DUI. CP 96. Tracer's guilty plea was accepted, and

a minimal sentence was imposed that omitted both restitution and the mandatory crime victim compensation assessment. CP 5-10; 96-98.

Ms. Dalzell promptly filed a motion to preclude Mr. Harrison from representing the State of Washington in the Tracer matter, a motion to vacate the appointment of Mr. Harrison, and a motion to vacate the judgment. CP 13-100. Although Ms. Dalzell brought a motion to shorten time, Judge Verser set the hearing on the State's motion beyond the 30-day period for filing an appeal. CP 11-12; CP 163. The State, therefore, filed an appeal from the judgment and sentence on June 2, 2008. CP 127.

The hearing on the State's motion to vacate was held on June 13, 2008. During this hearing, Judge Verser indicated that he never removed the prosecuting attorney in this case, but instead asked Mr. DeBray to stand in and to find out if a deal had been entered. 1RP 15.⁴ Judge Verser denied the motions to vacate, indicating that he did not see that "there was any harm done" in the resolution of the case. CP 178; 1RP 20. The State filed a timely notice of appeal from this order. CP 180.

The notice of appeal from the judgment and sentence and the notice of appeal from the denial of the State's motion to vacate the judgment were

⁴The two volumes of transcripts will be cited as follows:

1RP – June 13, 2008, hearing
2RP - June 27, 2008, hearing

consolidated on appeal.⁵ Tracer challenged the notices in his brief of respondent, claiming that the State was not entitled to an appeal as a matter of right. In response, the State defended the propriety of the appeals under RAP 2.2(b)(1) and also requested discretionary review pursuant to RAP 5.1(c) and RAP 2.3(b)(3). The Court of Appeals entered alternative holdings, finding that the State's appeal was authorized by RAP 2.2(b)(1) and that discretionary review was proper under RAP 2.3(b)(3).

Tracer filed a timely petition for review that contains no challenge to the Court's RAP 2.3(b)(3) ruling. Tracer's petition for review does contain a double jeopardy claim and a claim that Mr. Harrison was a "de facto" prosecutor, whose actions cannot be collaterally attacked.

The State's timely filed response, contains a request for review of the Court of Appeal's erroneous conclusion that a court may appoint a special prosecutor pursuant to RCW 36.27.030, when a specific deputy prosecuting attorney fails to attend a hearing. *See State v. Tracer*, COA No. 37812-4-II, slip op. at 10-11 (2010).

⁵A third appeal from the order awarding a fee to Mr. Harrison was also filed by the State. Mr. Harrison did not file a timely petition for review from that portion of the Court of Appeal's decision that vacated the fee award.

V. ARGUMENT

A. **RCW 36.27.030 Permits A Court to Appoint a Special Prosecuting Attorney Only When the Duly Elected or Appointed Prosecuting Attorney Fails to Discharge Her Duties**

The Washington Constitution vests the criminal prosecution function in the constitutionally created locally elected-executive branch office of prosecuting attorney. Const. art. XI, §§ 4, 5; *State v. Campbell*, 103 Wn.2d 1, 25-26, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985). This same constitution assigns the Legislature the task of determining the duties of the prosecuting attorney. *See* Const. art. XI, § 5 (Legislature to prescribe the duties of the prosecuting attorney). Among the duties assigned to the prosecuting attorney is the obligation to “[p]rosecute all criminal and civil actions in which the state or the county may be a party.” RCW 36.27.020(4).

In conformity with the 1889 constitution’s designation of the prosecuting attorney as an independently elected officer, the legislature took affirmative action to limit the ability of the courts to remove the people’s chosen lawyer. *See generally* Bal. Code, §§ 466, 471, 4755; Laws of 1893, ch. 52, § 1. The limitations placed upon court action by the legislature have remained virtually unchanged to this day. *Compare* Laws of 1893, ch. 52, § 1 *with* RCW 36.27.030.⁶

Within a decade, this Court had the opportunity to consider the

⁶These two statutes appear side-by-side in appendix B.

propriety and efficacy of the legislature's action. In a decision that upheld the doctrine of separation of powers, this Court held that a superior court judge may only replace a prosecuting attorney as authorized by statute. The only statutory grounds for replacing a prosecuting attorney with a special prosecuting attorney is when the prosecuting attorney fails, from sickness or other cause, to attend court. *State v. Heaton*, 21 Wash. 59, 61-62, 56 P. 843 (1899).

Subsequent case law has been equally respectful of the boundary between the executive and judicial branches. Thus the phrase “other cause” is limited to a conflict of interest⁷ and, even then, a superior court may not make an appointment pursuant to RCW 36.27.030 if the prosecuting attorney has already appointed a suitable person to act. *See Herron v. McClanahan*, 28 Wn. App. 552, 625 P.2d 707, *review denied*, 95 Wn.2d 1029 (1981). And district courts, which are not mentioned in RCW 36.27.030, may never appoint a special prosecutor. *Ladenburg v. Campbell*, 56 Wn. App. 701, 784 P.2d 1306 (1990).

The Court of Appeals erroneously held that the phrase “any prosecuting attorney” in RCW 36.27.030 allows a court to appoint a special prosecutor based upon the truancy of a deputy prosecuting attorney or a special

⁷*See Westerman v. Carey*, 125 Wn.2d 277, 892 P.2d 1067 (1994) (prosecutor disagreed with his client's position); *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988) (defendant was prosecutor's former client); *State v. Tolia*, 84 Wn. App. 696, 929 P.2d 1178 (1997), *rev'd on other grounds*, 135 Wn.2d 133, 954 P.2d 907 (1998) (prosecutor had mediated dispute that gave rise to criminal charges).

deputy prosecuting attorney. *Tracer*, slip op. at 10-11. This conclusion, however, is contrary to the plain language of RCW 36.27.030.

Title 36 RCW governs counties. Chapter 36.16 RCW deals with elected county officers in general and contains a general authorization for the appointment of deputies. *See* RCW 36.16.030; RCW 36.16.070. A separate chapter sets out the duties and authority of each of the elected officers. *See* Chapter 36.21 - 36.24 RCW; Chapter 36.27 - 36.28 RCW; Chapter 36.29 - 32 RCW.

Chapter 36.27 RCW pertains to prosecuting attorneys. Chapter 36.27 RCW uses the terms “prosecuting attorney”, “deputy prosecuting attorney”, and “special prosecuting attorney” in different sections. *See, e.g.* RCW 36.27.040 (authorizes “the prosecuting attorney” to appoint “one or more deputies” and “one or more special deputy prosecuting attorneys”); RCW 36.27.060 (authorizes “deputy prosecuting attorneys” of moderate size counties to “serve part time and to engage in the private practice of law if the county legislative authority so provides”, but not “the prosecuting attorney”). These three terms must each refer to different people. *See, e.g., State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (“[w]hen the legislature uses different words within the same statute, we recognize that a different meaning is intended.”).

RCW 36.27.005 and RCW 36.27.010 clearly limit the application of

the phrase “the prosecuting attorney” to the person who is elected to serve as the prosecuting attorney by the people of the county. Since RCW 36.27.030 only uses the phrase “the prosecuting attorney”, the absence of a “deputy prosecuting attorney” or a “special deputy prosecuting attorney” does not authorize a court to appoint a special prosecuting attorney. This conclusion is only bolstered by the fact that the court-appointed special prosecuting attorney is to be compensated from “the stated salary of the prosecuting attorney.” RCW 36.27.030.⁸

The linguistic analysis only reinforces the basic constitutional considerations. *See generally McCall v. Devine*, 334 Ill. App. 3d 192, 777 N.E.2d 405, 416-17 (2004) (recognizing that the removal of a duly elected public official is a drastic measure for it disenfranchises the electorate). The elected prosecutor is the individual chosen by the people to exercise their sovereign power of prosecution. Deputy prosecutors, whether regular or special, are the prosecutor’s agents in performing this function. If one of these agents fails to perform his or her duties, corrective measures should be taken

⁸Not surprisingly, every court that has considered similar language in their appointment statutes has determined that a special prosecutor may not be appointed by a court without providing notice and an opportunity for the elected prosecuting attorney to be heard on the appointment. *See, e.g., State ex rel. Ilvedson v. District Court*, 70 N.D. 17, 291 N.W. 620, 627-28 (1940); *In re Disqualification of Cirigliano*, 105 Ohio St. 3d 1223, 826 N.E.2d 287 (2004); *Lattimore v. Vernor*, 142 Okla. 105, 288 P. 463 (1930); *In re Guerra*, 235 S.W.3d 392, 420-24 (Tex. App. 2007) (notice must be given to the district attorney unless the grand jury on its own initiative is investigating the district attorney for possible criminal wrongdoing); *State ex rel. Preissler v. Dostert*, 163 W. Va. 719, 260 S.E.2d 279 (1979). No such notice was provided to Ms. Dalzell.

by the elected prosecutor. See RCW 36.27.040 (“The prosecuting attorney shall be responsible for the acts of his or her deputies and may revoke appointments at will.”). It is only if the prosecutor herself fails to perform her duties that there is any need for an outsider (the judiciary) to act.

The Court of Appeals, relying upon *State v. Blake*, 71 Wn.2d 356, 428 P.2d 555 (1967), greatly expanded the legislative authorization by which judges act. This presents an issue of substantial public interest that merits review by this Court. See RAP 13.4(b)(4). This is particularly true as the statement in *Blake* was mere dicta,⁹ that cites to a court rule that was adopted 70 years after the Legislature enacted the provisions that are currently codified at RCW 36.27.030. Compare Laws of 1893, ch. 52, § 1, with 61 Wn.2d lxxiii (1963) (Criminal Rules for Courts of Limited Jurisdiction “Adopted February 13, 1963 with revisions dated June 14, 1963; effective July 1, 1963.”). In addition, the phrase “prosecuting attorney” in the court rules cited in *Blake* was construed to include “deputy prosecuting attorneys” by operation of J 3,¹⁰

⁹The entire discussion on this point in *Blake* consists of the following statement:

 Parenthetically, we note that a deputy prosecutor is a “prosecuting attorney” within the scope of J Crim. R 2.01 and 2.02. RCW 36.27.040.

Blake, 71 Wn.2d at 359.

¹⁰J 3 provided in pertinent part as follows:

 As used in these rules, unless the context clearly requires otherwise:

 (4) “Prosecuting Attorney” or “prosecutor” includes deputy prosecuting attorneys, and city attorneys, corporation counsels, and their

not as a result of any common law principle or statute. The existence of J 3(4) and its modern counterparts, CrR 1.4, CrRLJ 1.4(c) and IRLJ 1.2(k),¹¹ are only necessary if the phrase “prosecuting attorney” is normally understood as referring solely to the duly elected or appointed holder of the constitutionally created executive branch office.

B. The Granting of the State’s Alternative Motion for Discretionary Review is Unchallenged by Tracer

Tracer contends that the Court of Appeals erred in holding that the State had a right to appeal from the judgment and sentence entered in this case. *Petition for Review*, at 8. Tracer, however, does not challenge the Court of Appeals’ alternative holding that the State was entitled to discretionary review pursuant to RAP 2.3(b)(3).¹² Review should not be granted on this issue.

C. The Well Established Doctrine of Mislea Authorizes the Setting Aside of Tracer’s Guilty Plea to DUI

Tracer, who affirmatively misled the trial court into believing that Ms. Vingo’s nascent plea proposal was a binding plea agreement and who affirmatively supported the appointment of an unqualified special prosecutor,

deputies and assistants.

61 Wn.2d xxvii (1963).

¹¹The text of the modern rules may be found in appendix C.

¹²The State identified RAP 2.3(b)(3) as the basis for discretionary review in its reply brief. *See Reply Brief* at 2-3. The Court of Appeals indicated that the State had “amply demonstrated cause to believe that the trial court so far departed from the accepted and usual course of judicial proceedings as to call for our review.” *Tracer*, slip op. at 7. The Court of Appeals, however, cited to RAP 2.3(d)(4), which only applies to review of superior court decisions of court of limited jurisdictions. This appears to be a non-substantive typo.

claims that the Double Jeopardy Clause of the Fifth Amendment allows him to enjoy the fruits of his perfidy. Tracer's claim has been repeatedly rejected by courts in a large number of jurisdictions.

Where a trial ends with the discharge of a jury before verdict because of some compelling circumstance, double jeopardy does not bar a retrial under both the Fifth Amendment and Const. art. I, § 9. Retrial is only necessary under this standard where, taking all of the circumstances into consideration, there is a high degree of manifest necessity to avoid defeating the ends of public justice. *Arizona v. Washington*, 434 U.S. 497, 506, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); *State v. Jones*, 97 Wn.2d 159, 641 P.2d 708 (1982).

Although this Court has not addressed this issue yet, a number of other jurisdictions recognize that a similar finding of manifest necessity authorizes a court to set aside a guilty plea. *See, e.g., State v. Horrocks*, 2001 UT App. 4, 17 P.3d 1145 (2001). A declaration of a misplea is appropriate and the vacation of a guilty plea is authorized when the court that accepted the defendant's guilty plea lacked the authority to do so. *See, e.g., State v. Singleton*, 340 Ark. 710, 13 S.W.3d 584 (2000) (double jeopardy did not bar trial as the court that accepted the defendant's guilty plea did not have the authority to do so as the State did not consent to a waiver of a jury as required by state law); *Genesee Prosecutor v. Genesee Circuit Judge*, 391 Mich. 115, 215 N.W.2d 145 (1974) (double jeopardy does not bar prosecution as the

judge did not have the authority to accept a guilty plea, over the prosecutor's objection, to a lesser included offense); *Cummings v. Koppell*, 212 A.D.2d 11, 627 N.Y.S.2d 480 (N.Y. App. Div.), *lv denied*, 86 N.Y.2d 702, 655 N.E.2d 703, 631 N.Y.S.2d 606 (1995) (double jeopardy did not bar trial on felony as local criminal court did not have subject matter jurisdiction to accept guilty pleas and dismiss charges after actions of a grand jury or superior court); *People v. Brancoccio*, 189 A.D.2d 525, 596 N.Y.S.2d 856 (1993) (double jeopardy did not bar prosecution of defendant as the court that accepted the guilty plea to the misdemeanor was divested of jurisdiction when the court was advised that the prosecutor intended to present charges to the grand jury; people's "acquiescence" or "concurrence" in the plea does not mandate a different conclusion); *People v. Anderson*, 140 A.D.2d 528, 528 N.Y.S.2d 614 (1988) (double jeopardy did not bar prosecution for multiple felonies as the court that accepted a guilty plea to a misdemeanor in satisfaction of the felonies in the complaint had been divested of jurisdiction to accept the plea); *see also State v. Brown*, 709 N.W.2d 313 (Minn. App. 2006) (granting the State's appeal and remanding for trial where the trial court accepted a guilty plea to a lesser included offense over the State's objection).

The Court of Appeal's rejection of Tracer's double jeopardy claim was clearly based upon this accepted basis for a misplea. Specifically, the Court found that the trial court accepted Tracer's guilty plea to an invalid amended

information in excess of its authority. That authority, as established by this Court in *State v. Bowerman*, 115 Wn.2d 794, 799-801, 802 P.2 116 (1990), is to accept the defendant's plea to the crime as charged by the prosecutor. See *State v. Tracer*, slip op. at 13-14 and 16.

The Court of Appeals' rejection of Tracer's double jeopardy claim is also consistent with the Supreme Court case of *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984). *Johnson* recognizes that a defendant may not convert the double jeopardy shield into a sword by pleading guilty, without the State's concurrence, to lesser included charges. 467 U.S. at 501-02. In such cases, the State's prosecution of the greater offense may go forward and the issue is dealt with at sentencing. See *Johnson*, 467 U.S. at 500. The rule announced in *Johnson* has been extended to other situations in which a defendant pleads guilty to a lesser included offense in an attempt to avoid prosecution on the greater offense and there is no prosecutorial overreaching. See, e.g., *State v. Trainer*, 762 N.W.2d 155 (Iowa App. 2008) (surveying cases).

Washington case law is consistent with *Ohio v. Johnson*. A defendant may not obtain a dismissal of a greater offense solely by pleading guilty, without a plea agreement with the prosecutor, to a lesser offense. See, e.g., *Bowerman*, 115 Wn.2d at 801 n. 4 (noting that a guilty plea to felony murder would not have prevented trial on the aggravated murder charge); *State v.*

Netling, 46 Wn. App. 461, 731 P.2d 11, *review denied*, 108 Wn.2d 1011 (1987) (Const. art. I, § 9 did not protect a defendant, who plead guilty to a possession charge without a plea agreement, from continued prosecution on the delivery charge).

Here, an unauthorized person amended the charge from vehicular assault to DUI. This action is not binding upon the State of Washington, and cannot constitute the “consent” necessary to remove Tracer’s case from the rule announced in *Ohio v. Johnson*. See generally *State v. Sanchez*, 146 Wn.2d 339, 348, 46 P.3d 774 (2002) (a prosecutor is not bound by a plea agreement entered between the defendant and any other person); *People v. Stackpoole*, 144 Mich. App. 291, 375 N.W.2d 419 (1985) (when an unauthorized person attempts to act on behalf of the state, the district court is without authority to pass on the matters raised by the unofficial person; the dismissal of the criminal charge and its replacement with an infraction are invalid and not binding upon the State); *State v. Brown*, 709 N.W.2d 313 (Minn. App. 2006) (trial court did not have the authority to accept a guilty plea to lesser charge when the prosecuting attorney declined to move to amend the charge to the lesser offense).

In addition, there has been no overreaching on the part of the State. Rather than holding Tracer to his plea and pursuing the greater charge, the State has consistently sought to return the parties to their pre-plea position.

This remedy would shield Tracer's admission of guilt from being utilized in any subsequent proceeding. See Reply Brief at 9-10, citing ER 410. Accordingly, there is no injustice for this Court to review.

D. The De Facto Public Official Doctrine Does Not Apply When the Public is Objecting to the Pretender

Tracer, who contributed directly to the improper appointment of Noah Harrison, claims that Mr. Harrison's actions should bind the State under the de facto public official doctrine. To reach this conclusion, Tracer cites to cases involving challenges brought by criminal defendants. These cases are irrelevant to a State of Washington challenge to the authority of the person who purported to be the prosecutor.

Courts have explained the purpose of the de facto public official doctrine as follows:

The *de facto* doctrine will, validate, on grounds of public policy and prevention of a failure or public justice, the acts of officials who function under color of law. *People v. Townsend*, 214 Mich 267, 270; 183 NW 177 (1921), *People v. Matthews*, 289 Mich 440, 447-48; 286 NW 675 (1939).

In 46 CJ, Officers, § 366, p. 1053, it states as follows:

“A person will be held to be a de facto officer when, and only when, he is in possession, and is exercising the duties, of an office; his incumbency is illegal in some respect; he has at least a fair color of right or title to the office, or has acted as an officer for such a length of time, and under such circumstances of reputation or acquiescence by the public and authorities, as to afford a presumption of appointment or election, and induce people, without inquiry, and relying on the supposition that he is the officer he assumes to be, to submit to

or invoke his action; and, in some, although not all, jurisdictions, only when the office has a de jure existence.” (Footnotes omitted).

People v. Davis, 86 Mich. App. 514, 272 N.W.2d 707, 710 (1978).

These factors are generally satisfied when the elected prosecuting attorney or the attorney general appointed the deputy prosecuting attorney whose authority is being challenged by the defendant. *See, e.g., State v. Breeze*, 873 P.2d 627 (Alas. App. 1994) (defendant brought a challenge to a special prosecutor appointed by the state attorney general); *Anderson v. State*, 699 N.E.2d 257 (Ind. 1998) (defendant brought challenge to inactive attorney from other state who was admitted pro hoc vice to participate in the prosecution team that was led by the elected prosecuting attorney); *State v. Cook*, 84 Wn.2d 342, 525 P.2d 761 (1974) (defendant brought challenge to legal interns appointed by the county prosecuting attorney).

These factors are also satisfied when the elected prosecuting attorney or the state attorney general petitions the court for the appointment of the special prosecuting attorney whose authority is being challenged by the defendant. requests the appointment of , or when a court appointed a special deputy prosecuting attorney at the request of the elected prosecuting attorney. *See, e.g., State v. Bell*, 84 Idaho 153, 370 P.2d 508, 511 (1962) (defendant brought challenge to a special prosecutor who was appointed by the district court in response to a petition filed by the prosecuting attorney); *State v.*

Waldon, 481 N.E.2d 1331 (Ind. App. 1985) (defendant brought challenge to special prosecutor who was appointed to the position upon the request of the newly elected prosecuting attorney); *People v. Davis, supra* (defendant brought challenge to special prosecutor appointed pursuant to a petition for a special prosecutor filed with the court by the county prosecutor).

The factors that support the de facto officer doctrine do not apply when a court, acting on its own and without statutory authority, appoints an individual to serve as a special prosecutor. A person appointed under these circumstances does not have a fair color of right to the office. Nor, has such an individual occupied the office for a sufficient period of time that no one would reasonably assume that the individual has the authority he claims. Finally, an individual appointed under these circumstances cannot demonstrate acquiescence by officials, as most challenges to their authority are mounted by the lawfully elected legal representative of the people— the prosecuting attorney.

The earliest Washington opinion that dealt with a judge's sua sponte appointment of a special prosecutor when such an appointment was not authorized by statute, held that the actions taken by such an individual must be set aside when challenged. *See State v. Heaton*, 21 Wash. 59, 56 P. 843 (1899) (affirming the dismissal of an indictment obtained by an unlawfully court appointed special prosecutor). This holding is consistent with cases

from other jurisdictions. *See, e.g., Smith v. State*, 42 Okla. Crim. 308, 275 P. 1071, 1073 (1929) (ordering a new trial where the judge sua sponte appointed a special prosecutor because “[t]he appointment of James W. Smith as special prosecutor being without authority of law, all his acts are void.”); *Brunty v. State*, 22 Va. App. 191, 468 S.E.2d 161, 164 (1996) (holding that a final order that was signed by a person that the court illegally appointed as a “special prosecutor” must be vacated as it “was entered improperly, without endorsement of counsel of record”).

Here, Noah Harrison was not appointed special prosecutor at the request of the Jefferson County Prosecuting Attorney’s Office. Instead, his appointment was made at Tracer’s request. *See* CP 91 (“Mr. Tracer is willing to have Mr. Harrison step in as a special. . .”). This case, therefore, is governed by the rule established in *State v. Heaton, supra*, rather than by the de facto officer rule utilized in *State v. Cook, supra*. The Court of Appeals, therefore, correctly determined that all of the actions taken by Mr. Harrison were void, and must be vacated.

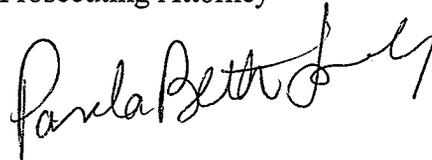
VI. CONCLUSION

The State respectfully requests that this Court accept review of the issue identified in section III. of this pleading.

Dated this 28th day of April, 2010, 2008.

Respectfully Submitted,

Juelanne B. Dalzell
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Pamela B. Loginsky". The signature is written in a cursive style with a large initial "P" and a long, sweeping underline.

Pamela B. Loginsky, WSBA 18096
Special Deputy Prosecuting Attorney

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Appellant,

v.

RICHARD CHARLES TRACER,
Respondent.

No. 37812-4-II
(Consolidated with 37939-2-II and 37892-2-II)

PUBLISHED OPINION

QUINN-BRINTNALL, J. — According to his defense attorney, on May 25, 2007, Richard Charles Tracer collided with another vehicle after the car he was driving was hit by a meteor. Tracer's counsel told the Jefferson County Superior Court that because it was the meteor and not Tracer's .13 blood alcohol level that caused the collision, the special deputy prosecutor appointed to handle the case had agreed to allow Tracer to plead guilty to driving while under the influence (DUI). When the special prosecutor¹ appointed to handle the case did not appear, Superior Court Judge Craddock Verser appointed a local defense counsel special deputy prosecutor for the case directing that he make the motions necessary to accept Tracer's proffered guilty plea. Jefferson County Prosecutor Juelanne Dalzell appeals from the judgment and

¹ Because Tracer is the son of a Jefferson County Sheriff's office employee, the Jefferson County Prosecutor, Juleanne Dalzell appointed a special prosecutor.

sentence entered on Tracer's guilty plea to DUI with a blood alcohol content (BAC) of less than .15.

The parties present a host of novel legal issues, including (1) the State's right to appeal; (2) limits on the judicial appointment of special prosecutors, and the qualifications, authority, and compensation of judicially appointed special prosecutors; and (3) whether principles of due process and double jeopardy prohibit remand for further proceedings in this case. We hold that (1) the State has a right to appellate review of the removal without notice of a duly appointed special deputy prosecuting attorney as well as the substitution of a defense attorney to perform special prosecuting attorney duties in accord with the trial court's directions; (2) the trial court lacked authority to appoint the substitute special prosecuting attorney in this case and to award him compensation; and (3) because the actions of the improperly appointed special prosecutor were conducted without lawful authority, neither due process nor double jeopardy prohibit a remand for further proceedings before a different trial judge. Accordingly, we reverse and remand.

FACTS

According to Tracer's defense counsel, an accident reconstructionist determined that on May 25, 2007, Tracer collided with another vehicle after the car he was driving was hit by a meteor. Defense counsel acknowledged that Tracer's BAC level measured .13; nevertheless, she told Judge Verser that because it was the meteor and not the alcohol that caused the collision, the State's special deputy prosecutor had agreed to reduce Tracer's charges from vehicular assault to DUI in exchange for Tracer's plea of guilty.

Tracer, who is the son of a Jefferson County Sheriff's office employee, and his defense counsel appeared in Jefferson County Superior Court to enter a guilty plea to a reduced charge of

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DUI under BAC level .15 on May 9, 2008, but the special prosecutor, Andrea Vingo, did not appear that day. Instead, Ted DeBray, a duly authorized deputy for the elected prosecuting attorney Dalzell, appeared and requested that the matter be set over for one week to allow Vingo to continue to represent the State in the matter. Tracer objected to the continuance, arguing that he had a job offer that was contingent on his resolving the matter that day and that he was "prepared to plead guilty to a DUI with a breath test/blood test below [BAC level] .15." Clerk's Papers (CP) at 89.

The trial court denied the State's motion for a one-week continuance. It appointed Noah Harrison, a criminal defense attorney who happened to be in the courtroom representing defendants in three other matters, as a special deputy prosecuting attorney to represent the State at a hearing, to be held that afternoon, at which Tracer would enter a guilty plea to the reduced DUI charge. At that hearing, the trial court directed Harrison as follows:

[COURT]: Mr. Harrison[,] is the state orally moving to amend the information to charge driving while under the influence with a breathalyzer of less than [BAC level] .15.

HARRISON: I do, your honor, I make that motion.

CP at 96.

In his statement to the trial court in support of the plea, Harrison did not indicate that he had been in contact with the victim, *see* RCW 9.94A.421, nor did he recommend that mandatory restitution be set at a later date. He requested \$314.08 in restitution to law enforcement. He expressly declined to recommend that Tracer be placed on probation and suggested that "the

court might consider a deferred sentence in this matter to give Mr. Tracer the opportunity to keep this off his record and show the court that this was an anomaly.”² CP at 93.

The trial court initially seemed to decline Harrison’s suggestion that it impose a suspended sentence, but it then sentenced Tracer to 5 days plus a suspended sentence of 360 days if he did not pay his financial obligations within 24 months, stating, “if you get this paid off that’s all the court care[s] about.” CP at 98. It set a review hearing 10 months later to determine whether Tracer’s driver’s license would be administratively suspended; according to the trial court, “if the legal financial obligations are fairly close, *if they are close to being paid I’ll suspend.*” CP at 97 (emphasis added). The trial court then said to Tracer, “Well good luck to you. I think this . . . I’m glad it worked out this way. I’m glad this wasn’t your fault but it certainly could have been.” CP at 98.

A week later, the State filed an emergency motion to reconsider the trial court’s removal of Vingo, appointment of Harrison, and all subsequent actions in the case, including its acceptance of Tracer’s guilty plea. Specifically, the State argued that the trial court had exceeded its statutory authority to appoint special prosecutors under former RCW 36.27.030 (1963) and it had, therefore, violated the separation of powers doctrine. The State further argued that Harrison was not qualified to serve as a prosecutor because his representation of other criminal defendants in the jurisdiction created a conflict of interest with the State.

Finally, the State submitted a declaration from Vingo stating that, while she had “had no problem with” amending the charges to DUI the night before the plea hearing, she “was

² We note that as a serious traffic offense, the trial court was required to report Tracer’s conviction to the Department of Licensing within 10 days of entry of the judgment and sentence. See former RCW 46.20.270 (2006).

noncommittal as to all the details of the proposed resolution.” CP at 134. According to Vingo, she was ill when she awoke the next morning so did not attend the May 9 hearing; nonetheless, she would not have been able to reduce the charges that day because she had not been able to communicate with the victim, as RCW 9.94A.421 required. Tracer’s attorney filed his own declaration disputing Vingo’s account. He indicated that he did not request an amendment to the charges; rather, after months of negotiations, Vingo voluntarily offered to amend the charge to DUI. He further declared that on May 8, Vingo agreed to standard DUI first time offense penalties and indicated that she would complete the paperwork before the hearing scheduled for the following day. Additionally, Tracer’s attorney stated that Vingo did not inform him of any “formalities” that prevented her from amending the DUI charge.

The trial court set the hearing on the State’s emergency motion after the 30-day appeal deadline for the judgment and sentence. To avoid missing the appeal deadline, the State filed its notice of appeal before the hearing on the emergency motion.

In the meantime, Harrison filed a motion for compensation under former RCW 36.27.030. His request for \$1,000 (five hours at \$200 per hour) included time spent several days after the plea hearing calling the Washington State Bar Association (WSBA) ethics hotline. The State objected to Harrison’s fee request, arguing that Harrison’s performance as a prosecutor had been deficient and that, because any compensation would come out of Dalzell’s salary, former RCW 36.27.030 provided she had a due process right to actual notice and an opportunity to be heard regarding the amount of the fee. The State offered a “certification” by a senior deputy prosecutor in King County that described prosecutorial standards of practice and concluded that Harrison had failed to meet them. The State also offered Dalzell’s declaration stating that her

hourly salary with benefits was only \$56.61 and argued that Harrison's compensation should at least be limited to that amount.

The trial court denied the State's emergency motion, ruling that its appointment of Harrison fell within the scope of former RCW 36.27.030 because Vingo was "any prosecuting attorney" and she had failed to attend a court session. Report of Proceedings (RP) (June 13, 2008) at 19. It explicitly declined to conclude that the entire Jefferson County Prosecuting Attorney's Office was unable to perform its duties because of a conflict of interest. The State appealed from this ruling.

The trial court subsequently granted Harrison's fee request as well, albeit at a lower hourly rate. It used the hourly rate given by "conflict counsel," or \$65, for a total of \$325. RP (June 27, 2008) at 7. The trial court also ruled that the county would pay rather than taking the funds out of Dalzell's salary. The State filed a notice of appeal from this ruling, which we consolidated with the other two appeals from the judgment and denial of the motion to vacate judgment.

ANALYSIS

APPEALABILITY

As a preliminary matter, Tracer argues that the trial court's denial of the State's motion to vacate the judgment is not appealable under RAP 2.2(b). There are two requirements for a superior court decision to be appealable by the State in a criminal case: (1) the decision must fall within a category enumerated in RAP 2.2(b)(1) through (6), and (2) the appeal must not place the defendant in double jeopardy. RAP 2.2(b).

Under the plain language of RAP 2.2(b)(1), the State may appeal from

[a] decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).

Here, the State's appeal from the judgment arising from Tracer's guilty plea falls within the scope of RAP 2.2(b)(1). The trial court's actions discontinued prosecution of the vehicular assault charge and determined the resolution of that charge by a means other than a judgment or verdict of not guilty.

Moreover, the non-exclusive language in RAP 2.2(b)(1) allows the State to appeal in extraordinary circumstances. *See, e.g., State v. Whitney*, 69 Wn.2d 256, 260-61, 418 P.2d 143 (1966) (interlocutory review granted to correct patently erroneous construction of statute likely to recur, which deprived the State of a long-accepted, highly useful and reliable means of establishing responsibility for a crime). In cases where the public has an important and justified interest in the proper administration of criminal justice and there is a serious question as to whether the appealed conduct interfered with the legitimate prosecution of criminal cases, RAP 2.2(b)(1) does not preclude the State's appeal.³ *See also* RAP 1.2(a) ("These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.").

Here, the State appeals the trial court's appointment of an attorney to follow the trial court's express direction that the appointed attorney amend the information to facilitate the court's acceptance of Tracer's guilty plea to a reduced charge. Under these unique circumstances, the State has amply demonstrated cause to believe that the trial court so far departed from the accepted and usual course of judicial proceedings as to call for our review.

³ We note that RAP 2.2(b)(1) does not preclude appeals from guilty judgments—although the cases in which the State would *want* to appeal from a guilty judgment will be very rare.

See RAP 2.3(d)(4). See, e.g., *State v. Meacham*, No. 38548-1-II, 2010 WL 436459 (Wash. Ct. App. Feb. 9, 2010) (the trial court lacks authority to dismiss a special allegation over the State's objection).

SEPARATION OF POWERS

The State's arguments hinge on the premise that a trial court's conduct in this case impinged on the constitutional principle of separation of powers. We agree.

In *State v. Ramos*, 149 Wn. App. 266, 270 n.2, 202 P.3d 383 (2009), we noted that an appellant may raise a separation of powers violation for the first time on appeal. This is not only because the separation of powers is a constitutional principle, *State v. David*, 134 Wn. App. 470, 478-79, 141 P.3d 646 (2006), review denied, 160 Wn.2d 1012 (2007), but also because an entity that acts in violation of the separation of powers doctrine acts without authority. See *Ramos*, 149 Wn. App. at 271.

Under separation of powers principles, the decision to determine and file appropriate charges is vested in the prosecuting attorney as a member of the executive branch. *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990); see also *State v. Walsh*, 143 Wn.2d 1, 10, 17 P.3d 591 (2001) (Alexander, C.J., concurring). Although, in the proper circumstances, trial courts have authority to dismiss charges with prejudice for prosecutorial mismanagement or misconduct under CrR 8.3(b) or without prejudice under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), trial courts do not have the authority to substitute their judgment for that of the prosecutor's. *State v. Starrish*, 86 Wn.2d 200, 205, 544 P.2d 1 (1975); see also *State v. Korum*, 157 Wn.2d 614, 655, 141 P.3d 13 (2006) (Johnson, J., concurring) (prosecutor's discretion to file charges is an executive function).

Thus, the trial court lacked authority to amend the information, sua sponte, to dismiss the vehicular assault charge and to accept Tracer's proffered guilty plea to the reduced charge of DUI under BAC level .15. By appointing and then directing the special deputy prosecutor to perform his duties in a manner predetermined by the court, Judge Verser exceeded his authority and effectively moved to amend the information sua sponte. It is axiomatic in law that one may not do indirectly what he may not do directly. *Pierce County v. State*, 159 Wn.2d 16, 48, 148 P.3d 1002 (2006) ("All the powers of the states, as sovereign states, must always be subject to the limitations expressed in the United States Constitution What is forbidden to them, and which they cannot do directly, they should not be permitted to do by color, pretence, or oblique indirection.") (quoting *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 516, 12 L. Ed. 535 (1848)). The trial court lacked the authority to amend the information on its own motion and was not authorized to direct the special prosecutor to do so. The motion to amend the information was invalid and Tracer remains charged with vehicular assault.

We briefly address the remaining issues.

A. APPOINTMENT OF SPECIAL PROSECUTOR

The State argues that former RCW 36.27.030 did not provide statutory authority for appointment of a special prosecutor because (1) it was not the *elected* prosecuting attorney who had failed to appear and (2) Harrison was not "qualified" to serve as a prosecuting attorney.

The statute at issue is former RCW 36.27.030, which provides in relevant part:⁴

When any prosecuting attorney fails, from sickness or other cause, to attend a session of the superior court of his county, or is unable to perform his duties at such session, the court or judge may appoint some qualified person to discharge the duties of such session, and the appointee shall receive a compensation to be fixed by the court, to be deducted from the stated salary of the prosecuting attorney.

The State raises two issues with regard to the applicability of this statute to this case: (1) whether Vingo was “any prosecuting attorney” or whether that term refers only to the elected prosecuting attorney of the county, and (2) whether Harrison was “qualified” to serve as a prosecutor.

Our goal in construing a statute is to carry out the legislature’s intent. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). If a statute is unambiguous, we apply it according to its plain language. *Watson*, 146 Wn.2d at 954. But if the statute’s language is susceptible to more than one reasonable interpretation, it is ambiguous, which allows this court to look to principles of statutory construction and legislative history to discern the legislature’s intent. *Watson*, 146 Wn.2d at 955.

1. “ANY PROSECUTING ATTORNEY”

The State contends that under former RCW 36.27.030, “any prosecuting attorney” means that a trial court judge may appoint a special prosecutor only if the *elected* prosecuting attorney fails to be available for a hearing. We disagree.

⁴ The preceding paragraph to this section provides:

When from illness or other cause the prosecuting attorney is temporarily unable to perform his duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

Former RCW 36.27.030. Parts of the parties’ briefing suggest that the trial court appointed Harrison under this paragraph because the elected prosecuting attorney had a conflict of interest arising from Tracer’s relationship with the Jefferson County Sheriff’s Office. But the trial court explicitly stated that that was not the reason for its appointment.

The State argues that “any prosecuting attorney” only includes the elected prosecutor because other provisions of chapter 36.27 RCW distinguish between the phrases “prosecuting attorney,” “deputy prosecuting attorney,” and “special prosecuting attorney.”

Generally, when different words are used within the same statute, courts recognize that the legislature intended separate meanings. *See State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002). Yet, in at least one other context, the Washington Supreme Court has held that a deputy prosecutor can be included in the phrase “the prosecuting attorney.” *See State v. Blake*, 71 Wn.2d 356, 359, 428 P.2d 555 (1967) (interpreting provisions of Rules for Courts of Limited Jurisdictions (CrRLJ) (former CrRLJ 2.01 and former CrRLJ 2.02 referring to “the prosecuting attorney.”) (citing RCW 36.27.040, which states, “[t]he prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal”). And the qualifying term “any” suggests that the provision applies to more than one possible prosecuting attorney.

Furthermore, to the extent that the language may be ambiguous, it is extremely unlikely that the legislature contemplated that only the elected prosecuting attorney would be responsible for “attend[ing] session[s] of the superior court.” Former RCW 36.27.030. Although we share the State’s concern that the truancy of any deputy prosecutor would justify a trial court bypassing sanctions and more conventional courtroom control procedures altogether to appoint a special prosecutor to conduct the proceeding, we conclude that the statute’s reference to “any” prosecuting attorney is not limited to the elected prosecuting attorney.

2. HARRISON'S QUALIFICATIONS

The State argues that Harrison was not "qualified" to serve as a special prosecutor because, as an attorney for criminal defendants in concurrent litigation against the State in Jefferson County, he had a conflict of interest. We agree.

An attorney who represents criminal defendants may not contemporaneously represent the government in criminal cases. WSBA INFORMAL OPINIONS 1766 (1997); A.B.A. PROSECUTION FUNCTION STANDARD 3.13(b); A.B.A. DEFENSE FUNCTION STANDARD 4-3.5(g); A.B.A. COMMITTEE ON PROF. ETHICS & GRIEVANCES, FORMAL OP. 142 (1935); UTAH ST. BAR ETHICS ADVISORY OPINION COMMITTEE: OPINION No. 1998-04 (1998); WIS. ST. BAR STANDING COMMITTEE ON PROF. ETHICS, FORMAL OPINION E-81-5, 54 WIS. BAR BULL. No. 8, at 68 (Aug. 1981); J. BURKOFF, CRIMINAL DEFENSE ETHICS 2D: LAW & LIABILITY § 6:11, at 304-07 (2005 ed.) (surveying cases); J. HALL, PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE § 13.8 at 536 (3rd ed. 2005).

The trial court here did not investigate Harrison's qualifications before conscripting him to act as a special prosecutor at the trial court's direction. We appreciate the difficult position in which the trial court's purported special prosecutor appointment placed Harrison. When Judge Verser first jokingly suggested the appointment, Harrison immediately stated, "It's a conflict." CP at 90.

Numerous courts have recognized that "[t]he interference of the Courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief." *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516, 10 L. Ed. 559 (1840); see also *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 131-32, 60 S. Ct. 869, 84 L. Ed. 1108 (1940); *United States v. Bliss*, 430 F.3d 640, 650 (2d Cir. 2005); *Skwira v. United States*,

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344 F.3d 64, 72 (1st Cir. 2003), *cert. denied*, 542 U.S. 903 (2004); *Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, LLC*, 176 P.3d 737, 745 (Colo. 2007); *Kolp v. Bd. of Trustees of Butte County Joint Sch. Dist. No. 111*, 102 Idaho 320, 330, 629 P.2d 1153 (1981). The functions vested solely in the executive branch prosecuting attorney include whether to initially file charges, what charges to file, and when to file them. *State v. Finch*, 137 Wn.2d 792, 809, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999); *see United States v. Nixon*, 418 U.S. 683, 693, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (“the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case”) (citing *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 19 L. Ed. 196 (1869)). Another function delegated entirely to the executive branch is deciding whether to plea bargain with a criminal defendant. *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); *State v. Crawford*, 159 Wn.2d 86, 102, 147 P.3d 1288 (2006); *State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003). *See also People v. Municipal Court*, 27 Cal. App. 3d 193, 207, 103 Cal. Rptr. 645 (1972) (when the “so-called ‘special prosecutor’ became the deputy of the judge in attempting to press forward with [a] prosecution,” this was “in clear violation of the doctrine of the separation of powers”). Because the trial court not only appointed an attorney who was not qualified to serve as a special prosecuting attorney, but also controlled and directed the special prosecutor’s representation during the case, the appointment was ineffective and the motion to amend the information invalid.

Because he was not serving as a properly appointed special prosecuting attorney, Harrison’s motion to dismiss the vehicular assault charge was invalid. Judge Verser did not appoint Harrison to use his best professional judgment and represent the State as a special deputy prosecuting attorney; he appointed Harrison and directed him to assist the court in amending the

information and accepting Tracer's proffered guilty plea to a reduced charge. As such, the trial court lacked authority to amend the information to remove the vehicular assault charge and had no authority to accept Tracer's guilty plea to a different charge. *See State v. Bowerman*, 115 Wn.2d 794, 799, 802 P.2d 116 (1990) (the defendant's right to plead guilty is limited to the crime as charged); *see also* CrR 4.2(a) (At arraignment, a defendant may plead not guilty, not guilty by reason of insanity, or guilty.).

B. DE JURE / DE FACTO PUBLIC OFFICIAL DOCTRINE

Tracer argues that, even if the trial court's appointment of Harrison was improper, the State may not collaterally attack the acts of a de facto prosecutor.

The de facto public official doctrine bars collateral attacks on the authority of a de facto public official to act. *State v. Cook*, 84 Wn.2d 342, 350, 525 P.2d 761 (1974). To constitute a person as an officer de facto, he must be in actual possession of the office, exercising its functions and discharging its duties under color of title. *State v. Smith*, 52 Wn. App. 27, 29, 756 P.2d 1335 (1988). Tracer argues that because the trial court appointed Harrison, he acted with "at least colorable title to office." Br. of Resp't at 18. But the prosecuting attorney's undisputed role is to select his prosecutor for any given case unless there is a valid appointment under former RCW 36.27.030. *See* former RCW 36.27.040 (2000).

We agree with the State that Harrison's motion to amend the information was void because former RCW 36.27.030 did not authorize the appointment or allow his conduct in the case to be directed by the trial court. *See* RCW 2.44.020 (if attorney appears for party without authority, court may relieve the party from the consequences of attorney's act); *see also* *People v. Stackpoole*, 144 Mich. App. 291, 375 N.W.2d 419 (1985) (unauthorized prosecutor's dismissal

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of case was not binding on real prosecutor's office); *Smith v. State*, 42 Okla. Crim. 308, 275 P. 1071 (1929); *Brunty v. Smith*, 22 Va. App. 191, 196, 468 S.E.2d 161 (1996).

C. COMPENSATION

The State maintains that the trial court improperly awarded Harrison's special prosecuting attorney fees. Harrison did not file a response brief on this subject and he has relinquished his right to be heard.

Under former RCW 36.27.030, a special prosecuting attorney is entitled to "compensation to be fixed by the court, to be deducted from the stated salary of the prosecuting attorney." Generally, if appointment of a special prosecutor was improper, the unauthorized attorney is not entitled to fees under former RCW 36.27.030. *See Osborn v. Grant County*, 130 Wn.2d 615, 628, 926 P.2d 911 (1996). Accordingly, we vacate the trial court's award of fees to Harrison.

AUTHORITY TO REMAND

A. DOUBLE JEOPARDY

Tracer contends that once the trial court accepted his guilty plea, the double jeopardy clause barred the State's requested relief. Double jeopardy is implicated in appeals where the government seeks to subject the defendant to a second trial for the same offense. *See United States v. Scott*, 437 U.S. 82, 87, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978). Tracer argues that remanding for trial on the original vehicular assault charge would violate his right against double jeopardy for the same offense because jeopardy attached when the trial court accepted his guilty plea. We disagree.

The prosecutor and the defendant are the only parties to a plea agreement. *State v. Pouncey*, 29 Wn. App. 629, 935-36, 630 P.2d 932, review denied, 96 Wn.2d 1009 (1981). "The

judge's role is not that of a party to the negotiation but rather as an examiner to assure that the plea procedure is characterized by fairness and candor." *State v. Tourtellotte*, 88 Wn.2d 579, 583, 564 P.2d 799 (1977). Although the superior court has some latitude in conducting the proceedings before it, that latitude does not extend to engaging in plea negotiations, appointing special prosecutors and directing them in the manner in which to conduct their duties so as to affect the outcome of those negotiations, or using that special prosecutor to alter the charging documents duly filed before it to effectuate the agreement.

Accordingly here, the trial court accepted Tracer's guilty plea to an invalid amended information. Because Harrison's motion to amend the information was done without lawful authority, it is void and because Tracer cannot bargain with the court to accept a guilty plea to a portion of the charges filed in the information, Tracer remains charged with vehicular assault. *Bowerman*, 115 Wn.2d at 800-01.

B. DUE PROCESS

Tracer argues that he has a due process right to the benefit of his plea agreement. A defendant does not have a constitutional right to plea bargain, *see Weatherford*, 429 U.S. at 561, and, thus, the failure to enforce an alleged plea *proposal* cannot violate substantive due process. *State v. Yates*, 161 Wn.2d 714, 741, 168 P.3d 359 (2007), *cert. denied*, 128 S. Ct. 2964 (2008). Absent some detrimental reliance by the defendant, the State may withdraw from any plea agreement before the actual entry of a guilty plea, which constitutes acceptance by both parties. *Yates*, 161 Wn.2d at 741. The trial court lacked authority to amend the information or to accept Tracer's guilty plea to a lesser charge and the judgment and sentence based thereon is void. Tracer has not demonstrated any detrimental reliance either before or after the hearing at issue in this case that would bind this court to perpetuate the error that the trial court committed below.

C. REMAND

Assuming a plea agreement between Vingo and Tracer existed, the State, through a duly appointed special prosecuting attorney, is technically free to withdraw it. We note, however, that the record contains no suggestion that Tracer contributed to the circumstances that form the basis of this appeal. It is tempting to resolve the matter on equitable grounds and allow Tracer's plea to stand. But such a decision would contribute to the further misuse of judicial authority in violation of the separation of powers doctrine and ignore the law. We leave the decision of the proper disposition of this case to the sound independent exercise of the judgment and duties of a properly appointed qualified special deputy prosecuting attorney and remand for further proceedings consistent with this opinion before a different trial judge.

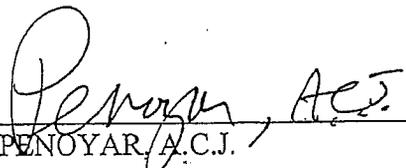

QUINN-BRINTNALL, J.

I concur:


HOUGHTON, J.

Consol. Nos. 37812-4-II / 37939-2-II / 37892-2-II

Penoyar, A.C.J. (concurrency) — I concur in the majority's result. I agree that the trial court improperly directed Special Deputy Prosecutor Noah Harrison's exercise of discretion.


PENoyAR, A.C.J.

Appendix B

Laws of 1893, ch. 52, § 1
provides as follows:

When any prosecuting attorney fails, from sickness or other cause, to attend a session of the superior court of the county for which he was elected or is unable to perform his duties at such session, the court or judge may appoint some qualified person to discharge the duties of such session, and the person so appointed shall receive a compensation to be fixed by the court, to be deducted out of the stated salary of such prosecuting attorney, not exceeding, however, one-fourth of the quarterly salary of such prosecuting attorney: *Provided*, That in counties wherein there is no person qualified for the position of prosecuting attorney, or wherein no qualified person will consent to perform the duties of that office, the judge of the superior court of that county shall appoint some suitable person, a duly admitted and practicing attorney at law and resident of the State of Washington to perform the duties of prosecuting attorney for such

RCW 36.27.030 currently¹
provides as follows:

When from illness or other cause the prosecuting attorney is temporarily unable to perform his or her duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

When any prosecuting attorney fails, from sickness or other cause, to attend a session of the superior court of his or her county, or is unable to perform his or her duties at such session, the court or judge may appoint some qualified person to discharge the duties of such session, and the appointee shall receive a compensation to be fixed by the court, to be deducted from the stated salary of the prosecuting attorney, not exceeding, however, one-fourth of the quarterly salary of the prosecuting attorney: PROVIDED, That in counties wherein there is no person qualified for the position of prosecuting attorney, or wherein no qualified person will consent to perform the duties of that office, the judge of the superior court shall appoint some suitable person, a duly admitted and practicing attorney-at-law and resident of the state to perform the duties of prosecuting attorney for such county, and he or she shall receive such reasonable

county, and he shall receive such reasonable compensation for his services as shall be fixed and ordered by the court, the same to be paid by the county for which such services are performed.

compensation for his or her services as shall be fixed and ordered by the court, to be paid by the county for which the services are performed.

¹RCW 36.27.030 was amended by Laws of 2009, ch. 549, § 4046. Since this amendment merely added gender neutral language and made no substantive change, the State has chosen to quote the most recent version of the law.

APPENDIX C

CrR 1.4 states that:

Whenever used in these rules, prosecuting attorney shall include deputy prosecuting attorneys, or such other person as may be designated by statute.

CrRLJ 1.4 provides, in relevant part that:

As used in these rules, unless the context clearly requires otherwise:

....

(c) "Prosecuting authority" includes prosecuting attorneys, city attorneys, corporation counsel, and their deputies and assistants, or such other persons as may be designated by statute.

IRLJ 1.2 provides, in relevant part, that:

For the purposes of these rules:

....

(k) Prosecuting Authority. "Prosecuting authority" includes prosecuting attorneys, city attorneys, corporation counsel, and their deputies and assistants, or such other persons as may be designated by statute.

PROOF OF SERVICE

I, Amber Haslett-Kern, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

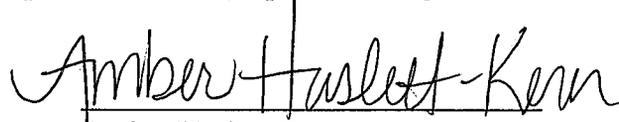
On the 28th day of April, 2010, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

Noah Harrison
Harrison Law, Inc., P.S.
210 Polk St Suite 4A
Port Townsend, WA 98368

Thomas E. Weaver, Jr.
Attorney at Law
P.O. Box 1056
Bremerton, WA 98337-0221

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

Signed this 28th day of April, 2010, at Olympia, Washington.


Amber Haslett-Kern