No. 95080-6

No. 35204-8-III

FILED

MAY 0 3 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON,

DIVISION III

MIKHAIL KARPOV, PETITIONER

v.

STATE OF WASHINGTON, RESPONDENT

APPEAL FROM THE DISTRICT COURT

OF SPOKANE COUNTY

RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

LAWRENCE H. HASKELL
Prosecuting Attorney

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TABLE OF AUTHORITIES

RAP 2.3(d)

City of Spokane v. Lewis, 16 Wn. App. 791, 559 P.2d 581 (1977)
Forks v. Fletcher, 33 Wn. App. 104, 652 P.2d 16 (1982)
State v. Boyd, 109 Wn. App. 139, 876 P.2d 963 (1994)
State v. Johnson, 45 Wn. App. 794, 727 P.2d 693 (1986)
State v. Jubie, 15 Wn. App. 881, 552 P.2d 196 (1976)

Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)
United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed.300 (1896)
United States v. Scott, 437 U.S. 82, 98 S.Ct. 2197, 57 L.Ed.2d 65 (1978)

I. SUMMARY

After the State rested at trial, the Court dismissed all charges against Mikhail Karpov because no witness testified that the events happened in Spokane County. On appeal, the superior court found that decision to be in error and remanded the case for a new trial. Now, Mr. Karpov has petitioned this court for discretionary review asserting that the superior court's decision and the pending retrial violates his right not to be put twice in jeopardy. However, the decision of the superior court simply followed established precedent; because the location of the crime is unrelated to actual guilt or innocence, the dismissal does not amount to a legal acquittal which would trigger double jeopardy protections. Consequently, there is neither an unresolved constitutional issue nor a conflict with precedent that would merit this Court accepting discretionary review under RAP 2.3.

II. STATEMENT OF THE CASE

From November 2015 through May 2016, Mikhail Karpov masturbated in front of six young women at various locations in Spokane and Spokane Valley. RP at 29-36, 50-54, 74-76, 92-95, 137-141, 116-120. At trial each of these young women testified, describing the locations where these events occurred. *Id.* They gave the names of the major streets, schools, and descriptions of buildings and the surroundings. *Id.* The investigating detective

later testified to investigating these incidents in Spokane and Spokane Valley. *See* RP at 157-160.

At the close of the State's case, Mr. Karpov brought a motion to dismiss arguing that jurisdiction is a necessary element that must be proven to the jury, and that while witnesses testified to locations, no one testified that these locations were in Spokane County. RP at 218-19. The trial court agreed with Mr. Karpov and dismissed the charges for failure to prove jurisdiction. RP at 225-26.

The State appealed this decision, arguing: (1) that jurisdiction is a question of law determined by the court and not the jury; (2) that the issue raised was actually one of venue, which was sufficiently proven to the jury; and (3) double jeopardy will not bar retrial. *See* Br. of Appellant. The superior court found on appeal that there was sufficient evidence to prove the situs of the crime beyond a reasonable doubt, and reversed the dismissal, remanding the case for a new trial. *See* Decision and Order at 5 (attached to Petition for Review). Now, Mr. Karpov has petitioned this Court to review that determination.

III. ARGUMENT

In reviewing an appeal from a court of limited jurisdiction, this Court may only accept discretionary review if (1) the decision is in conflict with established precedent, (2) a significant constitutional

question is involved, (3) the decision is an issue of public interest, or (4) the superior court has radically departed from the usual course of proceedings. RAP 2.3(d). Mr. Karpov asserts that this court should accept review under either of the first two prongs, arguing that his constitutional right not to be twice put in jeopardy will be infringed. However, the superior court decision, here, is consistent with well-established case law and does not infringe on Mr. Karpov's constitutional rights.

When a judge dismisses a case during or after trial for insufficient evidence of some element of the crime, this amounts to a judgment of acquittal and constitutional protections against double jeopardy bar any retrial. *See Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). A verdict of acquittal terminates jeopardy, triggering the constitutional protections that prohibit a future trial for the same crime. *United States v. Ball*, 163 U.S. 662, 671, 16 S.Ct. 1192, 41 L.Ed.300 (1896). Even if an acquittal is erroneous, the defendant cannot be retried. *Id*; *see also State v. Jubie*, 15 Wn. App. 881, 552 P.2d 196 (1976). However, where the defendant obtains a termination of trial unrelated to his factual guilt or innocence, the State may reinstate proceedings upon reversal of that decision on appeal. *United States v. Scott*, 437 U.S. 82, 94-96, 98 S.Ct. 2197, 57 L.Ed.2d 65 (1978).

At each court level, Mr. Karpov has created the issue here by asserting that the situs of the crime is an element of the charge.[1] However, this proposition exists nowhere in the law. Rather, the situs of the crime relates to both jurisdiction and venue.[2] Regardless which of these two, legal issues are addressed, the situs is not an element of the crime. Whether the events happened in Spokane County has no impact on whether Mr. Karpov is guilty of the crime of indecent exposure. Consequently, when the court erroneously resolved this factual issue, there was no judgment of acquittal. *See Town of Forks v. Fletcher*, 33 Wn. App. 104, 652 P.2d 16 (1982); *State v. Johnson*, 45 Wn. App. 794, 727 P.2d 693

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[1] When the motion was presented to the trial court, defense counsel stated, "Jurisidiction is a necessary element." RP at 218. Similarly on appeal, Mr. Karpov asserted that the district court "made a determination that an essential element was not proven." Br. of Respondent at 4. Now in his motion for discretionary review, Mr. Karpov continues to argue that the district court decision resolved an issue of fact on a necessary element. *See* Motion at 5-6.

[2] There has been much confusion over whether the issue being addressed relates to venue or jurisdiction. Mr. Karpov has maintained that this is purely a jurisdictional question. *See* RP at 218-19; Br. of Respondent at 5-7; Motion for Discretionary Review at 5-7. Meanwhile, the State has argued that jurisdiction is an issue of law resolved by the court and not by a jury; whereas the required proof of the situs of the crime relates to venue. *See* RP at 224-25; Br. of Appellant at 4-5; *see also State v. Boyd*, 109 Wn. App. 139, 876 P.2d 963 (1994) (discussing the shifting burdens of proof on jurisdiction); *Johnson*, 45 Wn. App. at 797 ("situs must be established because it is essential to proper venue of trial."). Since the distinction is irrelevant to the double jeopardy analysis and the State adequately proved the situs of the crime beyond a reasonable doubt, the superior court did not resolve this question. *See* Decision and Order.

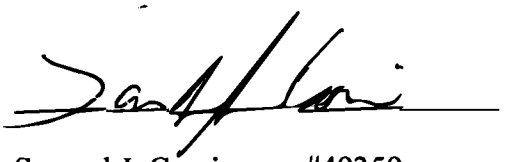
(1986); *City of Spokane v. Lewis*, 16 Wn. App. 791, 559 P.2d 581 (1977). As a result, the superior court correctly determined that there was no constitutional bar to a new trial. *Id.*

IV. CONCLUSION

Because the decision of the Superior Court is consistent with prior decisions of this Court, and there is no novel constitutional issue to resolve, this Court should deny Mr. Karpov's petition for discretionary review.

Dated this 20th day of May, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Samuel J. Comi #49359
Deputy Prosecuting Attorney
Attorney for Appellant

CERTIFICATE OF SERVICE

I Samuel J. Comi, certify and declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a resident of Spokane County. I have personal knowledge as to the facts herein contained. I am over the age of eighteen years. On the third day of May, 2017, I caused to be mailed a copy of the State's Response to Motion for Discretionary Review, Court of Appeals case number 35204-8-III to Dean Chuang, counsel for Petitioner at the following address:

Dean T. Chuang
East 9417 Trent Avenue
Spokane, WA, 99206-4258

Signed in Spokane County, Washington.

Dated: 5-3-17

Samuel J. Comi, WSBA# 49359