

62468-7

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No. 62468-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

TONY COOPER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Cheryl B. Carey  
The Honorable Steven C. Gonzalez

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APPELLANT'S AMENDED OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The constitutional protection against double jeopardy unequivocally prohibits successive prosecutions for the same offense. Was the prohibition against double jeopardy violated when Tony Cooper was tried and convicted in King County Superior Court with the same charges which had previously had been dismissed in Seattle Municipal Court?

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where a defendant is charged with misdemeanors in municipal court, the charges are dismissed with prejudice, and the defendant is charged with the same offenses as felonies in superior court, is the prohibition against double jeopardy violated?

C. STATEMENT OF THE CASE

Tony Cooper was initially charged in Seattle Municipal Court with misdemeanor theft, property destruction, and first degree criminal trespass. CP\_\_ (Sub No. 101c), Ex. 2, attached at Appendix A. The charges arose from an alleged incident of attempted shoplifting at a Macy's department store. On October 8, 2007, the charges were dismissed. The docket stated all three charges were dismissed *with* prejudice, while the order of dismissal stated they were dismissed *without* prejudice. Id.; CP\_\_ (Sub No.

101c), Ex. 1, attached at Appendix B. On December 6, 2007, Mr. Cooper was charged with second degree burglary in King County Superior Court, arising from the same incident. CP 1-3. On April 17, 2008, the information was amended to add charges of second degree malicious mischief and bail jumping. CP 6-7.

Representing himself, Mr. Cooper moved to dismiss the case four times, arguing the underlying charges had already been dismissed *with* prejudice in Municipal Court. 5/23/08RP 4, 7/15/08RP 23, 8/4/08RP 2, 8/13/08RP 20; CP 8, 9-10, 11-16. The court denied the motions, relying on the order of dismissal and the recording of the October 7, 2007, indicating the charges were dismissed without prejudice to find that the Municipal Court docket was in error. CP 8; 78/13/08RP 20; CP\_\_ (Sub No. 101c), Ex. 2, 3.

The court then granted the State's request, over Mr. Cooper's objection, to introduce testimony regarding Mr. Cooper's prior arrest and trespass from a Macy's department store.

8/13/08RP 30-38. Almost immediately thereafter, Mr. Cooper announced he wished to plead guilty, but the court proceeded with the CrR 3.5 hearing. 8/13/08RP 43. After the hearing, Mr.

Cooper, now represented by counsel, pled guilty to second degree

burglary and second degree malicious mischief and the bail jumping charge was dismissed. CP 18-19, 23-45.

The court imposed a standard range sentence of 43 months for the burglary and 19 months for the malicious mischief, to be served concurrently. CP 48-55. This appeal timely follows. CP 57-65.

D. ARGUMENT

PROSECUTION IN KING COUNTY SUPERIOR COURT ON CHARGES PREVIOUSLY DISMISSED WITH PREJUDICE VIOLATES THE PROHIBITION AGAINST DOUBLE JEOPARDY.

Mr. Cooper's prosecution and convictions in King County Superior Court for the same acts previously dismissed in Seattle Municipal Court violated the prohibition against double jeopardy. The double jeopardy clauses of the federal and state constitutional prohibit successive prosecutions for the same offense. U.S. Const. Amend. V; Wash. Const. art. 1, § 9; United States v. Dixon, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L.Ed.2d 556 (1993); State v. Crediford, 130 Wn.2d 747, 760, 927 P.2d 1129 (1996).

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and

ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 211, 2 L.Ed.2d 199 (1957). The state double jeopardy clause provides the same scope of protection as does the federal double jeopardy clause. State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

On October 4, 2007, the City of Seattle filed misdemeanor charges against Mr. Cooper for theft, criminal trespass in the first degree, and property destruction in the first degree. Ex. 1. On October 8, 2007, all three charges were dismissed. Ex. 1, 2. The order of dismissal states the charges were dismissed for “felony filing” without prejudice. Ex. 2. However, the docket states that each of the three charges was dismissed *with* prejudice. Ex. 2. On December 6, 2007, Mr. Cooper was charged in King County Superior Court. CP 1-3. The State conceded the felony charges were from the same incident as the dismissed misdemeanor charges. 8/4/08RP 15. He proceeded to trial and pled guilty on August 13, 2008. CP 23-45.

The court admitted a CD recording of the October 7, 2007 hearing, in which the Municipal Court judge stated the charges

were dismissed without prejudice, and therefore assumed that an error had been made in the docket and the Superior Court charges were properly filed.

A dismissal with prejudice is “[a] dismissal, usu[ally] after an adjudication on the merits, barring the plaintiff from prosecuting any later lawsuit on the same claim.” BLACK'S LAW DICTIONARY 502 (8th ed.2004). For purposes of a double jeopardy analysis, a dismissal for insufficient evidence is the equivalent of an acquittal. State v. Corrado, 81 Wn. App. 640, 647, 915 P.2d 1121 (1996) and cases cited therein. When a defendant is acquitted or a charge is dismissed with prejudice, the double jeopardy clause unequivocally prohibits retrial for the same offense. United States v. DiFrancesco, 449 U.S. 117, 129-30, 101 S. Ct. 426, 66 L.ed.2d 328 (1980); State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

Based on the plain language of the docket, the misdemeanor charges were dismissed with prejudiced, prohibiting retrial in Superior Court. Double jeopardy prohibits successive prosecutions regardless of whether the reviewing court agrees with the lower court's dismissal. See, e.g., Fong Foo v. United States, 369 U.S. 141, 143, 82 S. Ct. 671, 7 L.Ed.2d 629 (1962); Corrado, 81 Wn. App. at 646-47.

Cases which suggest a contrary result can be distinguished. In City of Spokane v. Lewis, 16 Wn. App. 791, 559 P.2d 581 (1977), the defendant alleged double jeopardy prohibited a prosecution in superior court on charges that previously had been dismissed in district court after the city's case in chief, for failure to establish jurisdiction. Id. at 792. It should be noted, however, the Lewis court did not state whether the charge was dismissed with or without prejudice. Also in Lewis, the State sought review of the order of dismissal in the district court which had issued the order. Id. at 792-94. In contrast, here the State did not seek to review the order of dismissal or reconcile it with the docket. When a defendant is charged for the same offense in different courts, the court where the charge was first filed has priority.

If two or more charging documents are filed against the same defendant for the same offense in different courts, and if each court has jurisdiction, the court in which the first charging document was filed shall try the case.

CrRLJ 5.3.

In State v. George, 160 Wn.2d 727, 158 P.3d 1169 (2007), misdemeanor charges in Kent Municipal Court were dismissed with prejudice for insufficient evidence, then refiled as felonies in King County Superior Court. The Supreme Court found jeopardy had

not attached so the dismissal with prejudice had no significance in the double jeopardy context. Id. at 743. The Court did not address in that case the distinction between a dismissal with prejudice and a dismissal without prejudice. The holding begs the question, what is the difference, if the State can refile charges just as easily where they have been dismissed with prejudice?

The prohibition against double jeopardy is a personal protection independent of the sovereign entity pursuing a charge. See Green, 533 U.S. at 187 (“The constitutional prohibition against ‘double jeopardy’ was designed to protect an *individual* . . . .” (emphasis added)). Further, the principal of “dual sovereignty,” in which a person could be tried for the same offense in both municipal and state courts, was rejected over thirty years ago.

In Waller v. Florida, 397 U.S. 387, 25 L. Ed.2d 435, 90 S. Ct. 1184 (1970), the United States Supreme Court rejected the “dual sovereignty” theory in this context and held that a defendant could not lawfully be tried for the same alleged crime by both a municipal government and the state. . . . The state and its municipalities are not separate sovereign entities with reference to the double jeopardy prohibition.

State v. Roybal, 82 Wn.2d 577, 580, 512 P.2d 718 (1973). Thus, if double jeopardy prohibited resurrection of the charge in municipal court, it also prohibited pursuit of the charge in superior court.

The dismissal with prejudice in Seattle Municipal Court was a shield to any subsequent prosecution for the same offense. See Tibbs v. Florida, 457 U.S. 31, 41, 102 S. Ct. 2211, 72 L.Ed.2d 652 (1982). This shield prohibits the State from refiling charges in an alternate venue to avoid the consequences of the dismissal. The convictions must be reversed and the charges dismissed with prejudice, again.

#### E. CONCLUSION

For the foregoing reasons, Mr. Cooper respectfully requests this Court order all three convictions reversed and the charges dismissed with prejudice.

DATED this 31<sup>st</sup> day of August, 2008.

Respectfully submitted,



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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 62468-7-I
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	)	
TONY COOPER,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF AUGUST, 2009, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF AUGUST, 2009.

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*Gray*

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