

66248-1

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NO. 66248-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

PEDRO POLO,

Appellant.

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FILED  
SUPERIOR APPEALS DIV 1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Steven J. Mura, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE STATE'S USE OF COLLATERAL ESTOPPEL  
VIOLATED APPELLANT'S RIGHT TO A JURY TRIAL.

In his opening brief, appellant Pedro Polo argues the State's use of his DUI conviction as proof of the possession element of the current charge (possession of a stolen vehicle) constituted offensive collateral estoppel, thus violating his constitutional right to jury trial. Brief of Appellant (BOA) at 9-25. In response, the State concedes offensive collateral estoppel in criminal proceedings is "problematic." Brief of Respondent (BOR) at 12 (citing State v. Mullin-Coston, 152 Wn.2d 107, 112, 95 P.3d 321 (2004)). It argues, however, that there was no such estoppel because the conviction was admitted merely as substantive evidence and had no preclusive impact. BOR at 12-17. The record does not support this argument.

The prosecutor clarified the admission of Polo's DUI conviction precluded the defense from arguing Polo did not drive the vehicle. RP 38-39. The Court agreed, explaining the admission of the conviction precluded Polo from arguing he was not driving the vehicle the State charged him with possessing. RP 39-40. These statements indicate the State's use of the conviction resulted in more than merely presenting substantive evidence.

Because the conviction was functionally preclusive, its use constituted unconstitutional offensive collateral estoppel. In fact, the State's argument to the contrary was rejected in State v. Ingenito, 87 N.J. 204, 218-20, 432 A.2d 912 (1981). The facts of Ingenito are similar to those in Polo's case. Ingenito was convicted of the unlicensed transfer of weapons. He was also charged with possession of a firearm by a felon. Both charges were based on Ingenito's possession of the same weapon. During his trial for the possession charge, the State introduced Ingenito's unlicensed transfer conviction as substantive proof he possessed the gun. The jury convicted. Id. at 207.

On appeal, Ingenito argued the State had unconstitutionally used his prior conviction in a manner consistent with collateral estoppel. Id. at 208. The State responded that its use of the conviction was not true collateral estoppel because the conviction was merely supporting evidence and not binding on the jury. Id. at 218. The New Jersey Court of Appeals agreed with the State. Id. at 219.

The New Jersey Supreme Court reversed the Court of Appeals, explaining:

We believe that the use of the prior conviction in this case was not merely evidential in character, but amounted to de facto collateral estoppel. The technique constituted a preclusive device serving to establish affirmatively an essential element of the crime charged, rather than one

leading merely to the admissibility of a piece of evidence generally relevant to the underlying charges.

Id. It further held the effect of the conviction “was to create a near-mandatory presumption in the minds of the jurors” as to proof of possession. Id. at 220. The Court concluded collateral estoppel (even de facto collateral estoppel) violates the right to a jury trial when applied affirmatively against a criminal defendant because it “seriously hobble[s] the jury in its quest for truth by removing significant facts from the deliberation process” and “it constitutes a strong, perhaps irresistible, gravitational pull towards a guilty verdict.” Id. at 216-17.

The same analysis applies here. As in Ingenito, the State used Polo’s DUI conviction to prove he possessed the vehicle. The effect was to create “a near-mandatory presumption” regarding an essential element of the charge. Contending that Polo could have nevertheless claimed he did not possess the vehicle because the evidence did not bind the jury is tantamount to saying Polo could have argued the earth is flat because photos of the round planet did not “bind” the jury. Plainly, the evidence had a preclusive effect on the defense that amounts to de facto collateral estoppel. As such, it violated Polo’s right to a jury trial and prejudiced the outcome in his case. See BOA at 20-26 (explaining in detail the constitutional impact of this error).

For the reasons stated above and those set forth in appellant's opening brief, this Court should reverse Polo's conviction.

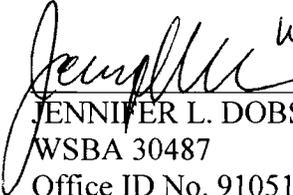
B. CONCLUSION

This Court should reverse Polo's conviction.

DATED this 6<sup>TH</sup> day of September, 2011.

Respectfully submitted,

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