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NO. 67376-9-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JORDYN B. WEICHERT,

Appellant.

APPELLANT'S REPLY BRIEF
AND RESPONSE TO CROSS-APPEAL
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

APPELLANT'S REPLY BRIEF
AND RESPONSE TO CROSS-APPEAL

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY..... 1

 1. Trial counsel’s failure to move to exclude prejudicial drug-related evidence after driving under the influence charges were dismissed constitutes ineffective assistance of counsel 1

 a. There was no tactical basis for trial counsel’s failure to seek exclusion of the evidence 2

 b. Once the driving under the influence charges were dismissed, the relevance of the drug-related evidence changed entirely 3

 c. The drug-related evidence was highly prejudicial 4

 2. The trial court must find by substantial evidence at the time of sentencing that the defendant has or likely will have the future ability to pay in order to impose discretionary costs..... 5

 3. Principles of double jeopardy bar the State’s cross-appeal, which should be dismissed..... 7

 a. The prosecution is prohibited from appealing a dismissal based on insufficient evidence 7

 b. If the Court considers the State’s cross-appeal, the trial court’s dismissal for insufficient evidence should be upheld 13

B. CONCLUSION..... 17

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Detention of Williams, 147 Wn.2d 476, 55 P.3d 597 (2002)..... 8

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) 6

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 13

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996)..... 10

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 2, 3

State v. Hennings, 100 Wn.2d 379, 670 P.2d 256 (1983) 9, 10

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) 9

State v. McNeal, 145 Wn.2d 352, 37 P.3d 380 (2002)..... 14, 15, 16

State v. Rhinehart, 92 Wn.2d 923, 602 P.2d 1188 (1979)..... 9

State v. Ridgley, 70 Wn.2d 555, 424 P.2d 632 (1967) 9, 11

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992)..... 13

Washington Court of Appeals Decisions

Forks v. Fletcher, 33 Wn. App. 104, 652 P.2d 16 (1982)..... 8

In re Pers. Restraint of Candelario, 129 Wn. App. 1,
118 P.3d 349 (2005) 11

State v. Barnes, 158 Wn. App. 602, 243 P.3d 165 (2010) 8

State v. Brown, 64 Wn. App. 606, 825 P.2d 350 (1992)..... 11

State v. Corrado, 81 Wn. App. 640, 915 P.2d 1121 (1996)..... 12

State v. Curry, 62 Wn. App. 676, 814 P.2d 1252 (1991) 7

State v. Hescoek, 98 Wn. App. 600, 989 P.2d 1251 (1999) 11, 12

State v. Wilhelm, 78 Wn. App. 188, 896 P.2d 105 (1995) 14

United States Supreme Court Decisions

Fong Foo v. United States, 369 U.S. 141, 82 S. Ct. 671,
7 L. Ed. 2d 629 (1962)..... 11

Green v. United States, 355 U.S. 184, 78 S. Ct. 221,
2 L. Ed. 2d 199 (1957)..... 9

Justices of Boston Mun. Court v. Lydon, 466 U.S. 294,
104 S. Ct. 1805, 80 L. Ed. 311 (1984)..... 11

North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072,
23 L. Ed. 2d 656 (1969)..... 11

Tibbs v. Florida, 457 U.S. 31, 102 S. Ct. 2211,
72 L. Ed. 2d 652 (1982)..... 9

United States v. Martin Linen Supply Co., 430 U.S. 564,
97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977).....11

United States v. Scott, 437 U.S. 82, 98 S. Ct. 2187,
57 L. Ed. 2d 65 (1978)..... 9, 11

Statutes

RCW 10.01.160 6

Rules

ER 403 4

RAP 2.2 8, 9, 11

A. ARGUMENT IN REPLY

1. Trial counsel's failure to move to exclude prejudicial drug-related evidence after driving under the influence charges were dismissed constitutes ineffective assistance of counsel.

Ms. Weichert's trial counsel sought to exclude drug-related evidence prior to trial and during the State's case, when the charges against his client included driving under the influence of an intoxicating substance. *E.g.*, 4/1/11RP 89; 4/1/11RulingsRP 10; 4/21/11RP 36; 4/29/11RP 651-54 (renewed motion and to clarify basis for admission of drug blood tests). At the close of the State's case, trial counsel successfully moved to dismiss the driving under the influence charges because the State had presented no evidence Ms. Weichert's driving was impaired. Significantly, the State's expert toxicologist testified she could not say that Ms. Weichert would have been impaired; the combined effect of the drugs found in her system—if there even was an effect—varies among individuals. 4/29/11RP 891-92. Outside the presence of the jury, trial counsel moved to dismiss the driving under the influence (DUI) charges because there was no evidence Ms. Weichert's driving was impaired. The court concurred and dismissed the charges. Dismissal of the DUI charges clearly eliminated or at least dramatically decreased the relevance of the drug-

related evidence to the remaining charges. But while outside the presence of the jury, trial counsel failed to move to exclude or limit the jury's consideration of the highly prejudicial evidence.

Contrary to the State's assertions, there was no tactical basis for trial counsel's failure to move to exclude in light of the dismissal of the drug-related charges. The court's prior ruling admitting the evidence should have been reconsidered in light of the dismissal. Such a motion would likely have succeeded because the risk of prejudice deriving from the drug-related evidence was substantial and its probative value low. The admission of the drug-related evidence was prejudicial.

- a. There was no tactical basis for trial counsel's failure to seek exclusion of the evidence.

No tactical basis can explain trial counsel's failure to seek limited consideration or exclusion of the drug-related evidence. Trial counsel's vigorous objections to admission of the drug-related evidence prior to trial and during the State's case-in-chief demonstrate counsel's understanding that the evidence, if admitted, would prejudice Ms. Weichert's defense. In fact, defense counsel asked the jury in closing argument to not use the drug-related evidence as a basis for prejudice or conviction. *E.g.*, 5/22/11RP 1018-20; *cf. State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (trial counsel's failure to object

to prejudicial evidence regarding prior convictions cannot be regarded as tactical in light of counsel's overall trial conduct).

In a particular case, trial counsel may make a tactical choice not to object, or make a motion, to avoid further drawing the jury's attention to the matter. But here, trial counsel had an opportunity to move to exclude or limit the evidence outside the presence of the jury. 5/2/11RP 948-49. Moreover, counsel argued its concern to the jury in closing. *See Hendrickson*, 129 Wn.2d at 78-79 (failure to object found not to be tactical when compared with other conduct during trial). Accordingly, there was no tactical reason not to make the argument to the court to ensure that the jury was prohibited from considering the prejudicial evidence.

- b. Once the driving under the influence charges were dismissed, the relevance of the drug-related evidence changed entirely.

The State argues that any defense motion would have been futile. But the State's argument is unavailing.

The trial court had carefully considered the State's proffered drug-related evidence prior to trial and excluded much of it as irrelevant and/or highly prejudicial. *E.g.*, 4/21/11RP 38, 49-55; 4/1/11RulingsRP 10-21. Those rulings, however, were made while the

State had pending charges under the DUI prong of the vehicular assault and homicide offenses. With the mid-trial dismissal of the DUI charges, the calculus changed. The drug-related evidence could no longer be considered by the jury as relevant to impairment. If the evidence remained relevant to the State's remaining charges, its relevancy was minimal. But its prejudicial value was high. Trial counsel objectively should have moved the court to reconsider its ER 403 balancing test.

c. The drug-related evidence was highly prejudicial.

The continued admission of the irrelevant drug-related evidence was prejudicial to the outcome of the case. Unlike alcohol consumption, the use of illicit drugs is not an experience commonly understood by the average juror pool. The State's remaining evidence, on the other hand, was specifically relatable to by the very jury deciding Ms. Weichert's case. 4/26/11RP 126, 130-31 ("many" prospective jurors indicate they had changed clothing while driving and had a passenger take control of the steering wheel). Where several jurors had conducted the act of changing clothing while driving, it is far from certain they would have convicted Ms. Weichert of driving with disregard for the safety of others where the evidence showed she had

temporarily shared control of the steering wheel with her passenger and friend.

But the jury did not consider only this evidence. Due to trial counsel's failure to object, the jury considered evidence of the use of more than one drug as well as the presence of paraphernalia at the accident scene. The continued admission of evidence showing drug use and potential dealing was exacerbated by the State's extensive reliance on the prejudicial evidence during its closing argument. *E.g.*, 5/2/11RP 978, 985, 987, 990, 993-95, 1043.

Absent the drug-related evidence, there is a reasonable probability that the jury would not have found Ms. Weichert acted in disregard for the safety of others by putting on an extra layer to stay warm and having her passenger take the wheel.

Trial counsel's failure to object was prejudicial and requires the convictions be reversed.

2. The trial court must find by substantial evidence at the time of sentencing that the defendant has or likely will have the future ability to pay in order to impose discretionary costs.

Ms. Weichert argued in her opening brief that the court's boilerplate finding that she had or likely would have the future ability to pay discretionary costs and fees was clearly erroneous because the

only evidence regarding her financial capacity showed she lacked income, means of employment, and any savings. Op. Br. at 25-29. In response, the State argues the issue is not ripe because the State has not attempted to collect the discretionary fees and costs. Resp. Br. at 13-16. The State's argument misses the mark.

Ms. Weichert seeks review of the trial court's basis for imposing discretionary costs in the first instance. The constitution and statutes require the sentencing court to find the defendant has an ability to pay by substantial evidence. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). That substantial evidence must be presented at sentencing. See RCW 10.01.160(3).

Ms. Weichert's ability to ask for the costs to be reduced once payment is enforced does not justify the court's imposition of discretionary fees and costs absent evidence she has or will have a likely ability to pay such costs. As discussed in her opening brief, the State presented no evidence regarding Ms. Weichert's ability to pay discretionary costs. On the other hand, Ms. Weichert was sentenced to 96 months in confinement and appointed counsel on appeal based on her indigence. CP 6. Substantial evidence does not support the court's boilerplate finding that Ms. Weichert has or will likely have the ability

to pay discretionary costs. *Cf. State v. Curry*, 62 Wn. App. 676, 683, 814 P.2d 1252 (1991) (affirming imposition of discretionary costs where evidence before trial court showed likely future ability to pay). Accordingly, the discretionary costs were erroneously imposed and this Court should strike that portion of the judgment and sentence.

3. Principles of double jeopardy bar the State's cross-appeal, which should be dismissed.

- a. The prosecution is prohibited from appealing a dismissal based on insufficient evidence.

Ms. Weichert moved to dismiss the State's cross-appeal because the State lacks authority to appeal a dismissal for insufficiency of the evidence after the jury is sworn and such an appeal is barred by the constitutional prohibition against double jeopardy. The Commissioner set that motion over to the merits panel. *See* March 20, 2012 notation ruling. The Court should dismiss the State's cross-appeal.

Ms. Weichert was effectively acquitted of vehicular assault and vehicular homicide predicated upon driving under the influence. Double jeopardy undoubtedly bars the State from retrying her on those charges.

The rules of appellate procedure limit the circumstances under which the State may appeal in a criminal case. *In re Detention of*

Williams, 147 Wn.2d 476, 492, 55 P.3d 597 (2002); *see generally* RAP 2.2. “RAP 2.2(b) permits the State to appeal in a criminal case only from certain limited superior court decisions and only if the appeal does not place the defendant in double jeopardy.” *State v. Barnes*, 158 Wn. App. 602, 614, 243 P.3d 165 (2010). For the State to appeal a superior court decision: (a) the decision must fall within a category enumerated in RAP 2.2(b)(1) through (6), and (b) the appeal must not place the defendant in double jeopardy.

A mid-trial dismissal for insufficient evidence is not one of the enumerated categories in RAP 2.2(b). Thus, there is no statutory basis for the State to appeal the dismissal for insufficient evidence.

Further, the State cannot appeal the court’s dismissal for insufficient evidence because it would place Ms. Weichert in double jeopardy. When a court’s dismissal is based upon weighing of evidence and considerations of a defendant’s guilt or innocence as revealed by the facts, double jeopardy principles preclude the State from appealing. *Forks v. Fletcher*, 33 Wn. App. 104, 106, 652 P.2d 16 (1982). “When a trial court dismisses a criminal case for insufficient evidence at the close of the State’s case, no matter how erroneous that ruling may be, retrial of the defendant is precluded by the rule that one

may not be twice placed in jeopardy for the same offense.” *State v. Rhinehart*, 92 Wn.2d 923, 929, 602 P.2d 1188 (1979) (Hicks, J. concurring). A factual finding necessarily establishes the defendant’s lack of criminal culpability and therefore is the legal equivalent of an acquittal. *United States v. Scott*, 437 U.S. 82, 98, 98 S. Ct. 2187, 2194, 57 L. Ed. 2d 65 (1978).

“A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial.” *State v. Hennings*, 100 Wn.2d 379, 384, 670 P.2d 256 (1983) (quoting *Tibbs v. Florida*, 457 U.S. 31, 41, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982)). The State may not appeal an acquittal. RAP 2.2(b)(1); *State v. Ridgley*, 70 Wn.2d 555, 556-57, 424 P.2d 632 (1967) (citing *Green v. United States*, 355 U.S. 184, 188, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)).

The State’s cross-appeal is precluded because even if this Court found error in the trial court’s dismissal of the driving under the influence allegation, no remedy could follow. Remand for a new trial on the charge would violate double jeopardy principles. *See, e.g., State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (“Retrial following reversal for insufficient evidence is ‘unequivocally

prohibited' and dismissal is the remedy.”) (quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)); *Hennings*, 100 Wn.2d at 384.

The State’s argument its cross-appeal should be heard misses the mark on two grounds. First, jeopardy terminated as to the charges predicated on driving under the influence when the trial court dismissed for insufficient evidence. Accordingly, double jeopardy principles would be implicated in a retrial on those charges. Second, the State is not entitled to a second full and fair opportunity to prosecute Ms. Weichert for the driving under the influence charges, even if Ms. Weichert’s appeal results in a reversal of convictions on other charges.

The State correctly notes that a defendant’s double jeopardy rights are violated when (1) jeopardy previously attached, (2) jeopardy previously terminated, and (3) the defendant is again put in jeopardy for the same offense. Resp. Br. at 16. The State concedes that the first step is satisfied—the jury was empanelled and sworn. Resp. Br. at 17.

The State’s attempt to argue that jeopardy has not terminated on the driving under the influence charges lacks merit. A factual finding, such as the trial court’s mid-trial dismissal for insufficient evidence, necessarily establishes the defendant’s lack of criminal culpability as to

those charges and therefore is the legal equivalent of an acquittal. *E.g.*, *Scott*, 437 U.S. at 98; *In re Pers. Restraint of Candelario*, 129 Wn. App. 1, 7, 118 P.3d 349 (2005); *State v. Brown*, 64 Wn. App. 606, 614 n.8, 825 P.2d 350 (1992) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572, 97 S. Ct. 1349, 1355, 51 L. Ed. 2d 642 (1977)). An acquittal terminates jeopardy and may not be appealed. RAP 2.2(b)(1); *Ridgley*, 70 Wn.2d 555; *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); *Fong Foo v. United States*, 369 U.S. 141, 142-43, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962). Consequently, principles of double jeopardy prevent the State from retrying Ms. Weichert on vehicular assault or vehicular homicide charges predicated on driving under the influence.

The State's argument analogizing the case at bar to a conviction or a hung jury misses the mark. As the State's authority recognizes, an acquittal, the circumstance at bar, unlike a conviction, terminates the initial jeopardy. *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 308, 104 S. Ct. 1805, 80 L. Ed. 311 (1984); *State v. Hescoek*, 98 Wn. App. 600, 604-05, 989 P.2d 1251 (1999). Likewise, contrary to a hung jury, which fails to unanimously agree to convict or acquit, the trial court's dismissal of the State's charges necessarily found that no

rational juror could convict Ms. Weichert of vehicular homicide or vehicular assault predicated on driving under the influence. *State v. Corrado*, 81 Wn. App. 640, 646-47, 915 P.2d 1121 (1996) (dismissal for insufficient evidence is equivalent to acquittal and unlike hung jury in determining whether jeopardy terminated). The court's dismissal constitutes the equivalent of an acquittal, not a hung jury. Thus, the State is incorrect that jeopardy has not terminated.

The rationale for preventing retrial after acquittal is firmly established and justly applied here. The government is prevented from using its unlimited resources and power to make repeated attempts at conviction. *Hescock*, 98 Wn. App. at 603-04 (citing authority). The State is entitled to one full and fair opportunity to prosecute an accused for a criminal charge. *Id.*; *Corrado*, 81 Wn. App. at 645-46. Jeopardy terminates once that opportunity expires. A second opportunity does not arise where a defendant successfully appeals a separate, even if related, conviction. *See Corrado*, 81 Wn. App. at 648-49.

The State had its one full, fair bite at the apple to convict Ms. Weichert of vehicular homicide and vehicular assault predicated on driving under the influence. It failed to present sufficient evidence to enable any rational juror to convict. The State cannot claim a second

bite at the apple simply because Ms. Weichert exercises her constitutional right to appeal her criminal convictions on other charges.

- b. If the Court considers the State's cross-appeal, the trial court's dismissal for insufficient evidence should be upheld.

If this Court reviews the State's cross-appeal, its argument that the trial court erred in granting Ms. Weichert's motion to dismiss the driving under the influence charges is wrong.

Because such an appeal is barred by double jeopardy principles, Ms. Weichert has found no decisions discussing the applicable standard of review where the State appeals a dismissal for insufficient evidence.

However, the trial court properly dismissed the charges for insufficient evidence. The State's evidence is not sufficient because, after it is viewed in a light most favorable to the State, a rational trier of fact could not have found Ms. Weichert was driving her vehicle while under the influence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State cites to no case law, and Ms. Wiechert is aware of none, in which the court found sufficient evidence of a driving while intoxicated offense where the State's toxicologist testified she could not conclude the accused was impaired while driving. The State was

required to prove beyond a reasonable doubt that Ms. Weichert's "ability to handle an automobile was lessened in an appreciable degree by the consumption of intoxicants or drugs." *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995). Where the State's expert toxicologist could not conclude that Ms. Weichert's ability to handle the vehicle was lessened to an appreciable degree by the drugs in her system, the trial court correctly found that no reasonable juror could make that finding either.

The State mistakenly argues the facts of this case are similar to the facts in *State v. McNeal*, 145 Wn.2d 352, 37 P.3d 380 (2002). Resp. Br. at 19. In *McNeal*, the defendant drove his car across the centerline causing a head on fatality collision. *Id.* at 355. The defendant's blood tests showed .31 methamphetamine per liter; a Washington State Trooper described the defendant at the time of the accident as having a lethargic demeanor, consistent with the "down phase" of methamphetamine use; two witnesses and an attending nurse corroborated the officer's observations; and four baggies of methamphetamine as well as used paraphernalia was found in Mr. McNeal's car, in which there were no passengers. *Id.* at 355, 360-61. The Court held Mr. McNeal waived his right to challenge inconsistent

verdicts—vehicular assault for driving under the influence and vehicular homicide based on disregard for the safety of others. *Id.* at 362.

This case is distinguishable from *McNeal* for several reasons. First, the evidence at trial was consistent with an accident resulting without Ms. Weichert having been under the influence of methamphetamine—she was changing her clothing and she and the passenger misread each other’s cues regarding regaining control of the steering wheel. In *McNeal*, there was no such alternative explanation for the accident. Additionally, although the State argues Ms. Weichert’s blood test showed more than 0.3 milligrams of methamphetamine per liter of blood and her driving resulted in her vehicle driving into oncoming traffic, there is no evidence that the detected methamphetamine in Ms. Weichert’s blood sample caused Ms. Weichert to be impaired at the time of the accident. Resp. Br. at 20. Unlike the state toxicologist in *McNeal*, who indicated the symptoms that were observed by a police officer were consistent with those of a person who had such a concentration methamphetamine in his or her blood, the state toxicologist in this case testified she could not conclude that Ms. Weichert was impaired by drugs in her system at the time of

the accident. *Compare McNeal*, 145 Wn.2d at 360 with 4/29/11RP 891-92. The toxicologist in *McNeal*, on the other hand, introduced evidence from a study in which 85% of accidents caused by drivers under the influence of methamphetamine occurred in an identical fashion to the accident at issue in that case. *McNeal*, 145 Wn.2d at 360.

The State also argues, like in *McNeal*, a law enforcement officer observed Ms. Weichert's blood pressure and pulse were elevated and her eyes were bloodshot and watery. But unlike in *McNeal*, the singular officer's observations of Ms. Weichert are easily attributed to experiencing a head-on collision in which her boyfriend and friend were killed. *See McNeal*, 145 Wn.2d at 361 (*McNeal's* lethargy and demeanor seemed contrary to normal reaction to major accident). Though Officer Nichols was certified in drug recognition, he did not analyze the 12-step drug-recognition protocol. 4/27/11RP 401-05. Moreover, in *McNeal* two other witnesses and an attending nurse testified that the defendant showed symptoms consistent with methamphetamine use. In this case, however, the law enforcement officer who reported to the scene said that he found nothing that caused him to suspect drugs or alcohol were involved or that Ms. Weichert

was impaired. 4/27/11RP 340-42. Further, several others witnessed the accident or attended to the accident scene, but none of them observed any signs that Ms. Weichert was impaired. 4/27/11RP 223, 287-88.

In sum, to the extent review is not barred by double jeopardy principles, the trial court did not err in granting the motion to dismiss because a rational trier of fact could not have found beyond a reasonable doubt that Ms. Weichert was driving her vehicle while under the influence.

B. CONCLUSION

As set forth above and in Ms. Weichert's opening brief, Ms. Weichert's convictions should be reversed because trial counsel unreasonably allowed the jury to consider prejudicial drug-related evidence after all DUI charges were dismissed. The drug-related evidence was irrelevant and any probative value was substantially outweighed by the risk of unfair prejudice. Alternatively, if the convictions are upheld, the Court should strike the discretionary costs imposed because the court is required to find at sentencing that Ms. Weichert has the present or likely future ability to pay, and that finding here was clearly erroneous.

Finally, the State appeals the trial court's dismissal of the DUI charges for insufficient evidence. Because an acquittal, whether rendered by the jury or the court, cannot be appealed from, the State's appeal is barred by the Double Jeopardy Clause and must be dismissed.

DATED this 23rd day of July, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Zink', written over a horizontal line.

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