

Freedom of Choice

By: Wayne C. Fricke; March 2004

Recently, Division III of the Court of Appeals decided a case confirming that the double jeopardy clause is alive and well in the State of Washington. See State v. Juarez, 19547-3-III, 2/27/03. In Juarez the defendant was convicted of a drug offense and sentenced to 67 months. Division III reversed the conviction because of the state's failure to provide discovery, which resulted in the defendant being faced with a Hobson's choice of either seeking a continuance or agreeing to a speedy trial.

The state did not provide transcriptions of tapes, or the tapes themselves, which were crucial to both the prosecution and the defense. After several indications that the information would be provided, and after pressure from the trial court, the prosecution ultimately provided the tapes the day before trial. Defense counsel moved to exclude the tapes. The court indicated that it would probably suppress the evidence. The trial date was not changed. After a motion for reconsideration by the prosecutor and a request that the case be dismissed by the defendant, the court denied the motion for dismissal but reserved ruling on the motion for reconsideration. The court then selected and swore in a jury.

The next day, the state again moved for the admission of the tapes, conceding that the newest transcripts contained highly incriminating evidence. The state also indicated the reason for postponing the ordering of the transcripts was to save money until the trial date was near. The trial court found that this late discovery was inexcusable and prejudicial to the defendant, but was not in bad faith. The court also indicated that it would allow introduction of the tapes.

The court then indicated that it would not continue the trial unless Mr. Juarez formally moved for a continuance. Defense counsel did so under protest because of the newly discovered evidence, indicating he didn't "have any choice." The court at that point declared a mistrial and dismissed the jury. At the second trial Mr. Juarez was convicted.

Avoiding the discovery issues that were brought by the defendant, the court simply ruled that double jeopardy prevented the second trial and that the case should have been dismissed.

Following prior precedents, the court held that jeopardy attached after the jury was selected and sworn. Citing Downum v. United States, 372 U.S. 734, 737, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). In its decision the court noted that the prosecutor acquiesced in the court's decision to impanel a jury and the mistrial was granted because the defense was put in an untenable position of requesting a continuance or going forward unprepared. In deciding no choice existed at all, the court noted that it was the trial court that proceeded with jury selection before deciding crucial matters necessary to determine that the case was ready to be tried. Because the defense was placed in a position of making the request, it was not truly a free choice and double jeopardy prevented the retrial.

This case is a reminder that appellate courts do take the Constitution seriously and will not force defendants to make false choices when they are not the cause for the violation.

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