WASHINGTON DEFENDER ASSOCIATION

PRACTICE TOOL | **6/16/2023** | Sheri M. Oertel

SHERI'S SIDEBAR – EDITION # 8

Happy Friday everyone.

I am back again with things I wish I had known during practice, things that have changed, interesting tidbits, and random tips for practice. Welcome back to:

SHERI'S SIDEBAR

1. **Do you know if your jurisdiction is holding people in jail without an attorney for any length of time, or out of custody individuals have been charged and repeatedly brought to court and had their case continued without an attorney – you should be arguing 1) Due Process violations – right to counsel at critical stages; 2) Speedy trial issues – the court cannot waive speedy trial for an unrepresented person who wants an attorney and has no idea the legal consequences of waiving speedy trial, or what speedy trial even is; and 3) Other areas: violation of right to plead as charged at ARR because Court enters NG plea for unrepresented person who qualifies for and requested an attorney; waiver of speedy ARR; Government mismanagement CrR 8.3 – remember the State is not only prosecutors, commissioners, county and OPD are all "the State" and many jurisdictions have badly mismanaged recruiting, contracting and retaining attorneys.**
    a. **NOTE NOT ALL JURISDICTIONS ARE IN THIS PLACE.** Some jurisdictions lacking attorneys the problem is more due to the overall attorney shortage, not pay necessarily, not failure of the OPD Administrator to recruit or retain, and maybe not due to the work environment. Those are not the counties discussed.

    b. If you are in a county with failures however, you have a duty to protect the rights of your client and demand dismissal when appropriate.

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"The law distinguishes between ineffective assistance of counsel *and deprivation of counsel*. With respect to a claim of deprivation of counsel, this court applies the *Cronic* standard from *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed. 2d 657 (1984). Cronic, decided the same day as Strickland, governs total and near-total deprivations of counsel—situations when counsel functions only as "a warm body with a bar card." *State v. Anderson*, 19 Wn. App. 2d 556, 562, 497 P.3d 880 (2021), *review denied* 199 Wn.2d 1004, 504 P.3d 832 (2022). These situations include ***(1) denial of counsel at a critical stage of proceedings***, (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, and ***(3) when counsel acts under conditions that even competent counsel could not render effective assistance, such as insufficient time to prepare for trial.*** *In re Matter of Pers. Restraint of Biggs*, No. 37306-1-III, 2023 WL 3116659, at 10 (Apr. 27, 2023)(emphasis added)(citing *Bell v. Cone*, 535 U.S. 685, 695-96, 122 S. Ct. 1843, 152 L.Ed. 2d 914 (2002)).

2. **Are you aware that many of the 2022, effective 2023 rule changes were performed solely to remove the pronouns? See e.g. CrR 4.7, new rule effective Jan. 1, 2023.**
    a. If you see a rule with the new effective date, do check the prior version to see what words/changes were made. Many were only removal of pronouns, but you need to be aware if other changes were made.

3. **If you have a passenger bag search issue, have you read *State v. Jerome Isaiah Garner*, No. 56861-6-II (May 31, 2023)? Also review if you have an inevitable discovery doctrine issue!**
    a. If not, you should. It distinguishes other prior passenger search cases, in the benefit of the defendant passenger.

> "The dissent focuses on the fact that Garner was fleeing law enforcement. But in determining whether a person relinquished their reasonable expectation of privacy in their property, Washington case law directs us to focus primarily on where the item was located and whether the defendant showed an intent to recover it. *Evans*, 159 Wn.2d at 409-10; *Hamilton*, 179 Wn. App. at 885-86; *Samalia*, 186 Wn. App. at 277-79. It does not direct us to heavily weigh a person's reason for leaving the item behind. Thus, the *Samalia* court noted the defendant's flight from law enforcement only while discussing the defendant's lack of a privacy interest in the stolen car and the unlikelihood that a person in his position would have gone back to retrieve his phone. 186 Wn.2d at 277-279. The *Samalia* court did not rely exclusively on the fact that Samalia was fleeing the police."
>
> In contrast, Garner left his belongings in a place he reasonably expected they would remain private, in the driver's car, and he showed an intent to recover his backpacks by attempting to conceal them. Under these circumstances, we hold that the abandoned property exception to article I, section 7 does not apply. Our holding accords with case law emphasizing that exceptions to the warrant

requirement should remain "carefully drawn and jealously guarded." *Ortega*, 177 Wn.2d at 122.

MY FAVORITE PART: Inevitable Inventory Search: The State argues that even if the search was improper, it did not violate Garner's "constitutional rights because officers would have conducted an inventory search of the bags if they were taken to the jail with Garner." Resp't's Br. at 9. This argument asks us to apply the inevitable discovery doctrine, which "allows for the admission of evidence that would have been discovered even without the unconstitutional source." *Utah v. Strieff*, 579 U.S. 232, 238, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016). **However, the Washington Supreme Court has held that the inevitable discovery doctrine is incompatible with article I, section 7. *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). It cannot justify admission of evidence from the backpacks.**

Hey prosecutor, and police, remember the FOURTH AMENDMENT?!?   

4. **Speaking of prosecutors, I know a former prosecutor that found some prior resources she would like to share with you….use these things to see what is and is not in police reports related to the stop that occurred prior to the felony charge(s). Interview the officers and impeach or show lack of proper procedure/investigation to get reasonable doubt or to win motions to suppress.**

See attachments

a. DRE cues and "signs" of different types of drugs
    1. https://defensenet.org/wp-content/uploads/2023/07/DRE-Cues-2-scaled.jpg
    2. https://defensenet.org/wp-content/uploads/2023/07/Back-of-DRE-Cue-Card-1.jpg
    3. https://defensenet.org/wp-content/uploads/2023/07/Classes-Types-of-Drugs-and-Signs-1-1-scaled.jpg
    4. https://defensenet.org/wp-content/uploads/2023/07/Classes-Types-of-Drugs-and-Signs-2-1.jpg
b. FST tests and number of cues before Officer
    1. https://defensenet.org/wp-content/uploads/2023/07/FST-Horizontal-Nystagmus-1.jpg
    2. https://defensenet.org/wp-content/uploads/2023/07/FST-Walk-and-Turn-1.jpg
    3. https://defensenet.org/wp-content/uploads/2023/07/FST-1-Leg-Stand-3-scaled.jpg

    i. The Romberg/Balance test is no longer a standard FST. So, if it is used, it should be a flag to investigate further whether PC was actually found.
        a. https://defensenet.org/wp-content/uploads/2023/07/Romberg-Balance-Test-NOT-FST-Red-Flag-if-given-2-scaled.jpg

ii. Same for Modified Finger to Nose test
    a. https://defensenet.org/wp-content/uploads/2023/07/Modified-Finger-to-Nose-Test-NOT-FST-Red-Flag-if-given-3-scaled.jpg

iii. Questions and chronology the officer is supposed to ask and document

1. https://defensenet.org/wp-content/uploads/2023/07/FST-Chronology-and-Questions-scaled.jpg

c. DV procedure Info
    1. https://defensenet.org/wp-content/uploads/2023/07/Domestic-Violence-Info-Police-have-to-give-to-AV.jpg
d. Intermediate License info (juveniles)
    1. https://defensenet.org/wp-content/uploads/2023/07/Intermediate-Licensing-Info.jpg
    2. https://defensenet.org/wp-content/uploads/2023/07/Back-Side-Intermediate-Licensing-Card.jpg
e. Other DOL Information related to suspensions
    1. https://defensenet.org/wp-content/uploads/2023/07/General-DOL-Info-on-Charges-Consequences-Front-of-Card-scaled.jpg
    2. https://defensenet.org/wp-content/uploads/2023/07/General-DOL-Info-on-Charges-and-Consequences-Back-of-Card.jpg

5. Do you remember the higher courts finally ruled in favor of defense on tox supervisor testimony being insufficient, a violation of the Confrontation Clause, if the supervisor didn't perform the testing?

Held: admission of toxicology results of blood testing through testimony of reviewing toxicologist violated defendant's right to confrontation. *City of Seattle v. Wiggins*, 23 Wn. App. 2d 401, 515 P.3d 1029 (2022)

6. If you see an issue with entry into a home and the community caretaking exception being alleged, review Caniglia v. Strom*, 209 L. Ed. 2d 604, 141 S. Ct. 1596, 1597 (2021)(*basically finding the community caretaking exception does not allow entry into the home; although some exigency circumstances might*). Thanks Magda!!*

"The very core of the Fourth Amendment's guarantee is the right of a person to retreat into his or her home and "there be free from unreasonable governmental intrusion." *Florida v. Jardines, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495. A recognition of the existence of "community caretaking" tasks, like rendering aid to motorists in disabled vehicles, is not an open-ended license to perform them anywhere. Pp. 1599 – 1600."*

7. **Did you know this statute exists and governs? Even as a prosecutor I wasn't aware…not that I improperly charged any case that went to trial. I wasn't that dumb, I made my mistakes on lesser cases Oops, human, sorry.**

RCW 10.43.050. Acquittal, when a bar

No order of dismissal or directed verdict of not guilty on the ground of a variance between the indictment or information and the proof, or on the ground of any defect in such indictment or information, shall bar another prosecution for the same offense. Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he or she cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof.

> In *State v. Pelkey,* 109 Wash.2d 484, 491, 745 P.2d 854 (1987), this court held that an information may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same crime or a lesser included offense. Any other amendment is deemed to be a violation of the defendant's article [I], section 22 ... right to demand the nature and cause of the accusation against him or her. *Id.* Instead, the proper remedy is dismissal of the charge *without* prejudice. *Id.* at 792–93, 888 P.2d 1177. *State v. Quismundo*, 164 Wn.2d 499, 503–04, 192 P.3d 342, 344 (2008)

- Anyone else but me think this was dismissal with prejudice? When I was a prosecutor, we had weekly staff meetings on cases. I don't recall any DPA or the Elect ever trying to retry a charge dismissed based on the charge being incorrect, or unproven by the time the State rests. How does that not violate Double Jeopardy?? Because truly the defendant was tried on the crime charged in the information and there was insufficient evidence to prove the charge.
- More importantly, does this mean you need to let the case go to verdict and win an acquittal in closing so that double jeopardy DOES attach???!!! What the holy … cow.

Double jeopardy has been held not to bar retrial following a mistrial in the following circumstances:

- (1) Where mistrial is declared because of state's failure to provide discovery to the defendant.[8]
- (2) Where trial judge entertains motion to suppress evidence after jury sworn, suppresses evidence, and grants motion for mistrial. Double jeopardy does not bar retrial in such circumstances because the government has a right to appeal such orders to suppress evidence.[9]

- (3) Where mistrial was declared after a juror contrary to express instructions was seen talking to one of the defendant's witnesses, defendant's wife, and defendant's daughter.[10]
- (4) Where mistrial was declared after it was learned that one of the jurors had been acquainted with the defendant.[11]
- (5) Where mistrial was declared after it had been learned that a juror had formed an opinion about a critical issue in the case before jury had heard any evidence.[12]
- (6) Where trial judge declared a mistrial over defendant's objection after learning that a key prosecution witness had become ill during the trial and could not testify.[13]
- (7) Where mistrial is declared because of prejudicial publicity.[14]
- (8) Where on defendant's motion there is a mistrial after defendant's lead counsel was expelled from the courtroom by trial judge for persisting in improper remarks during opening statements.[15]
- (9) Where trial judge grants prosecutor's motion for a mistrial after defense counsel made improper and highly prejudicial comments during his opening statement.[16]
- (10) Where trial judge declares a mistrial on defendant's motion after a police officer on cross examination improperly and unexpectedly drew jury's attention to a prior conviction of the defendant.[17]

§ 2109. Double jeopardy—Mistrial, 12 Wash. Prac., Criminal Practice & Procedure § 2109 (3d ed.)

- Seriously? We need some good cases to take to the US Supreme Court. I think WA has lost its mind on double jeopardy. Not to mention retrials are apparently allowed under the 1800's common law where jeopardy did not attach until verdict. Jeopardy now attaches when the jury is sworn in and trial begins. See law article attached.

https://1.next.westlaw.com/Document/I4fc706314b0311dba16d88fb847e95e5/View/FullText.html?navigationPath=%2FFoldering%2Fv3%2FSMOertel%2Fhistory%2Fitems%2FdocumentNavigation%2F538023c8-b7cd-4fb2-933c-09add0f29e6a%2FxeTl24kZwZX2HlCbzg1wRhJaqebdRRvQ%7CAr20wT%60VSfVOQQ%7CkOmKJGo2N9lW5LSpMncDLN%60ujzpV2iPJHsi2cmz0qIAXU9FJ&listSource=Foldering&list=historyDocuments&rank=1&sessionScopeId=e2a12bbf9daaf9276f6b2287b6dd3c155c0bccbde9bc1d11ef06a8339f903406&originationContext=MyResearchHistoryAll&transitionType=MyResearchHistoryItem&contextData=%28oc.Search%29&VR=3.0&RS=cblt1.0

**NOTE THE WA SUPREME COURT HAS DISAGREED WITH THIS ARTICLE IN STATE v. RUSSELL, BUT WITHOUT ANY ANALYSIS.

Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem,* 129 U.Pa.L.Rev. 701 (1981). We do not agree.

While the Findlater article is of novel interest, neither this court nor the United States Supreme Court has ever held that a hung jury bars retrial under the double jeopardy clauses of either the Fifth Amendment or Const. art. 1, § 9. *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824); *Arizona v. Washington,* 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *State v. Jones,* 97 Wash.2d 159, 641 P.2d 708 (1982); *see also State v. Connors,* 59 Wash.2d 879, 883, 371 P.2d 541 (1962). We are not inclined to do so now.

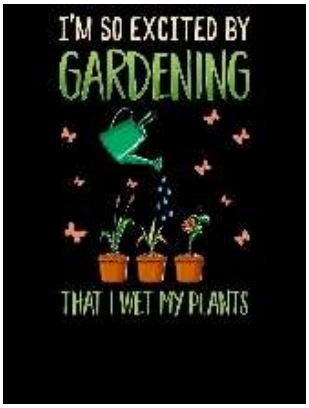
State v. Russell, 101 Wn. 2d 349, 351, 678 P.2d 332, 335 (1984).

Do NOT forget self-care! I have been bad for the past two months after two family emergencies, and looming deadlines.

ME:  **Don't follow me in the bad things** 😉

THE REST OF THE SMART

PEOPLE:



Even during rest, you sometimes find a case…

Enjoy your weekend, enjoy the summer, take time off this weekend. Be one of the other smart people!