

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. _____

JOHN WESLEY BUCHANAN,

PETITIONER,

v.

**THE MONTANA FOURTEENTH JUDICIAL DISTRICT COURT,
MEAGHER COUNTY, The Honorable Randal I. Spaulding,
Presiding,**

RESPONDENT.

PETITION FOR WRIT OF SUPERVISORY CONTROL

STATE OF MONTANA v. JOHN WESLEY BUCHANAN, CAUSE NO. DC-21-01,
MONTANA FOURTEENTH JUDICIAL DISTRICT COURT
MEAGHER COUNTY, THE HONORABLE RANDAL I. SPAULDING, PRESIDING

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PETITION FOR WRIT OF SUPERVISORY CONTROL

John Wesley Buchanan petitions the Supreme Court for a writ of supervisory control pursuant to M.R.App.P. 14(3)(b) and (5). This petition is made for the reason that the District Court has erroneously denied Buchanan's pre-trial challenge that a second prosecution will violate § 46-11-504(1), MCA, and Buchanan's state and federal double jeopardy protections.

1. The facts which make it appropriate that the Supreme Court accept jurisdiction.

John Buchanan has already been charged, tried, convicted, and sentenced in Lewis and Clark County by District Judge Kathy Seeley for the same conduct and transaction that is the subject of the Information filed in Meagher County before District Judge Randal Spaulding. Buchanan contends that the Meagher County charge is barred by the double jeopardy protections of the Fifth Amendment to the United States Constitution, Article II, Section 25 of the Montana Constitution, and § 46-11-504 of the Montana Code Annotated, all of which protect against multiple prosecutions.

Buchanan therefore moved to dismiss the Meagher County

charges. When deciding the motion, the District Court stated that it had examined the Montana Supreme Court decisions cited by the State, but did “not the find the decisions particularly analogous or helpful in determining the issue presented. Consequently, this Court has looked to other courts who have discussed the issue at length for guidance.” *App.* 1, 2:19-22. The District Court then relied upon cases decided by the Tennessee and Colorado supreme courts and denied Buchanan’s motion to dismiss. *Id.*, 2:23 to 4:5.

Buchanan’s petition is therefore made because constitutional issues of statewide importance are involved in this matter, i.e., whether this Court’s decisions cited below provide district courts sufficient guidance when deciding whether a second prosecution will violate § 46-11-504(1), MCA, and state and federal double jeopardy protections in a case of this nature. M.R.App.P. 14(3)(b).

a. The Meagher County charges.

John Buchanan was charged by Information filed on March 8, 2021, with one count of Sexual Intercourse Without Consent in violation of § 45-5-503(1) and (3)(a), MCA. The Information alleges that

between January 1, 2015 and December 31, 2016, in Meagher County, Buchanan purposely or knowingly had Sexual Intercourse Without Consent with K., at a time when K. was less than 16 years of age and the Defendant was four or more years older than K. See, *App.* 2, p. 1.

The affidavit in support of the Information states in relevant part, “[h]owever, during a hunting trip to Meagher County, in approximately October 2016, the Defendant had sexual intercourse with K. at a motel in White Sulphur Springs.” See, *App.* 2, p. 4.

b. The Lewis and Clark County charges.

On October 19, 2017, almost two-and-a-half years *before* the Meagher County charges were filed, an Information was filed in Lewis and Clark County in *State v. John Wesley Buchanan*, CDC 2017-425. See, *App.* 3. Count II of the Information alleged that, “between on or about January 1, 2015, and on or about September 25, 2017, the . . . defendant committed the offense of SEXUAL INTERCOURSE WITHOUT CONSENT, a felony, in that the defendant knowingly had sexual intercourse without consent with K., in violation of Section 45-5-503(1), MCA.” *Id.*, p. 2.

The Affidavit of Probable Cause stated, “[a]ccording to K., the defendant had vaginal intercourse and oral intercourse with her, each on more than one occasion.” *Id.*, 2:5-6.

c. The Lewis and Clark County trial.

A jury trial was held in Lewis and Clark County in CDC 2017-425 between September 9 and 13, 2019, after which the jury returned a verdict of guilty. Excerpts of the trial transcript are appended hereto. *App.* 4. The trial was fraught with evidence pertaining to the events that are the subject of the Meagher County Information, in particular “a hunting trip to Meagher County, in approximately October 2016, the Defendant had sexual intercourse with K. at a motel in White Sulphur Springs.” See, *App.* 2, p. 4. The details of these events were discussed at length and presented to the jury throughout the trial. The State presented evidence of and referred to the Meagher County incident during its opening statement,¹ in its case-in-chief, and during closing argument. The prosecutor presented evidence of and made multiple references to an incident occurring at a motel in White Sulphur Springs

¹ *App.* 4, pp. 175-178. Defense Counsel also discussed it during his opening statement. *Id.*, pp. 184, 187.

between January 1, 2015, and September 25, 2017, when K.B. was laying on the bed and Buchanan got behind her on the bed and put his penis in her vagina. [K.] described the alleged conduct occurring in Meagher County:

Q. And then you told us that he had penis to vagina sex with you.

A. Yes.

Q. How many times do you think that happened?

A. Only once or twice. The best instance that I can remember was we went to a hotel room in White Sulphur Springs. We were going to go hunting, and we were watching a scary movie or something, and he had sex with me on the hotel bed.

Q. Okay. And how were you situated on the bed?

A. I was laying down, facing the window, I think. And he was behind me facing the same way.

Q. Okay. When he had penis-to-vagina sex with you, can you tell us whether or not there was any protection used by either of you?

A. I think so. Again, I don't remember seeing it. I hope so.

* * * * *

Q. And can we go to 21? Do you want me to show you which one that is? What are you talking about in this text?

A. Probably about the upcoming hunting trip that we had together. I expected it to be like the last hunting trip we had where we stayed at a hotel, which was the one in White Sulphur Springs.

Q. Was the possibility of an upcoming hunting trip something that prompted you to tell somebody about what was happening?

A. I think it came out, like, after I started going down that road. Like, I was scared it was going to happen again, but I don't think that was, like, the only reason that I kind of came forward.

* * * * *

Q. All right. I think I already asked you this, but what

happened with the condoms?

A. I don't know. One time I think it went into the trash can at the hotel. But the rest of the time I didn't really see what happened.

* * * * *

Q. Okay. So the first time that – or the trip you talked about to White Sulphur Springs when he had penis-to-vagina sex with you, how long did you stay in White Sulphur Springs?

A. I think only one night, or maybe two. I know we left early because I felt, like, super sick. So I was, like, really anxious. My stomach was super upset, so we left early.

Q. Were you sick because of what happened or were you sick because you were getting ill?

A. I wasn't ill afterward, so I assume it was because of what happened.

Q. And did he ever talk to you about why he used condoms?

A. Like, why he used them?

Q. Correct. Yeah. Did he tell you why he was using a condom when he had vagina – penis-to-vagina sex with you?

A. He had a sex talk with me, so I assume it was to not get pregnant.

* * * * *

Q. All right. And so your concern about that Friday was you said, “because that’s when he wants us to go hunting together all weekend starting Friday night.”

A. I think so.

Q. Okay. So you’re talking about White Sulphur Springs?

A. I think that’s where he was taking me, yes.

Q. And do you know what type of a hunt that was going to be?

A. I assume just like the early youth hunt or something –

Q. Okay.

A. – for whitetail.

Q. How old were you when you were sending these texts?

A. Sixteen, maybe.

* * * * *

Q. So was – I'm just trying to be accurate here. And yesterday you were asked some questions about the number of times you had sexual intercourse with John where he put his penis in your vagina. And, you know, just to be accurate, was your testimony one or two times?

A. Yes.

Q. Okay. No more than those times with his penis in your vagina?

A. I believe so, yes.

Q. Okay. And so would you agree that one of the times you're talking about, then, would be White Sulphur Springs, the hunting trip in 2016?

A. Yes.

Q. Okay. Now, do you know if John had sexual intercourse with you the first day there or the second day?

A. I don't remember.

Q. Okay. So we have – we have that date in 2016 where there was a hunt. When then was the other event of sexual intercourse where he had his penis your vagina?

A. I don't remember, honestly. It might have been in my bedroom. A lot of those I don't remember very well because it was always in my bedroom.

* * * * *

Q. Okay. Yeah. That would be tough. So you don't recall actually being asked that date, when the last time was that you had sexual intercourse with your father?

A. No.

Q. And just trying to go back in your mind – so there's the White Sulphur Springs hunting trip in 2016, and the disclosure is September 25, 2017. You would be a sophomore, then, right?

A. I was a junior.

* * * * *

Q. You were asked about the time in White Sulphur Springs 2016, the hunt, where your testimony is that John had sexual intercourse with you. And you were asked a question about whether you had hunted and shot any animals. Do you recall that question?

A. Yes.

Q. What was your answer?

A. I probably shot something.

* * * * *

Q. Okay. All right. So we then go to 2017. And is it accurate – and one of the primary reasons you came forward in the discussion with your friend Lindsay is because you were going to go on a hunt again to White Sulphur Springs?

A. I think I was also just generally anxious about everything.

Q. Okay. Would you agree that when you spoke to your teacher and then the counselor, that you referred to a hunt coming up –

A. Yes.

Q. – in White Sulphur Springs.

Furthermore you told a police officer, a detective,
that same information.

A. I believe so, yes.

Q. Okay. Thank you for providing the verbal answer.
She can't get the nod.

So then in the forensic interview you again
discuss the same thing. There's a three-day hunting
trip coming up to White Sulphur Springs, right?

A. Yes.

* * * * *

Q. And you talk about the time that he had vaginal
intercourse with you in White Sulphur Springs.

A. Yeah.

Q. Didn't you tell the interviewer it was the first time or
one of the first times?

A. Yes.

Id., pp. 336-337, 368-369, 380, 382, 391-392, 445-447, 452-455, 476.

Buchanan referred to the Meagher County events when testifying in his own defense:

Q. Okay. So we go to 2016. Did you have a hunting trip with [K.] that year?

A. Yes, sir.

Q. Okay. Where was – how many hunting trips?

A. So that year we had one planned, and if she didn't fill her tags, then we could hunt around the house.

Q. Okay. And so did you go on a hunt to White Sulphur Springs?

A. We did.

Q. Do you know the date?

A. It would have – so 2016 would have been her last youth hunt. So it's the week before general deer and rifle – general deer and elk.

Q. Okay. And at that time did you have a hotel that you two were going to stay at?

A. Yes.

Q. Was anyone else with you?

A. No.

Q. Okay. And where was that hotel?

A. White Sulphur Springs.

Q. Okay. And so if you could, tell me when you left then to White Sulphur Springs.

A. So we left on a Friday afternoon. We actually had dinner at the house and then drove to White Sulphur Springs.

Q. Do you know approximately what time you got to White Sulphur Springs?

A. Roughly 9:00.

Q. And what time did you getting up the next day?

A. So we would have gotten up about 4:30 to 5:00.

Q. All right. Did you and your daughter share the same bed?

A. No, sir.

Q. Okay. What was the arrangement?

A. Two twins.

Q. Okay. So did you – you guys did get there. Did you guys watch TV?

A. We may have watched TV, yes.

Q. Okay. And do you know what time the TV was turned off?

A. I don't know that it was.

Q. All right. And did you touch your daughter at all that night?

A. No, sir.

Q. You deny all touching?

A. I deny all touching.

Id., pp. 846-850.

Q. And each year sounds like you went back to White Sulphur Springs.

A. We alternated. We went to White Sulphur Springs in 2013, we stayed in Helena valley the next year, and then the following year we went back to White Sulphur Springs.

Q. So 2013 you were in White Sulphur, 2014 you were in Helena valley.

A. Yes.

Q. 2015 you were in White Sulphur.

A. Yes.

Q. I think your testimony on direct was you were also in White Sulphur Springs in 2016.

A. Yes.

Q. You planned to go in 2017.

A. Not for the youth hunt. She wasn't eligible.

Q. You had plans for the White Sulphur Springs hunt.

A. Well, it ended up we were going to go to Indian Flats.

Q. At some point you had plans to go to White Sulphur Springs in 2017 as well, right?

A. Yes.

Id., 863-864.

Other witnesses also referred to the Meagher County incident.

Id., pp. 271, 289-290 (Tammy Jenkins); pp. 588, 629-630, 644 (Det.

Robert Kinyon). The Prosecution and Defense Counsel even discussed the events in Meagher County when arguing the admissibility of records. *Id.*, p. 655.

During closing argument the prosecutors stated, "And she told you he had vaginal intercourse on at least two occasions. One of those times was in White Sulphur Springs on a hunting trip. And she said they stayed in a motel one night, and she was laying on the bed and he

got behind her on the bed and he put his penis in her vagina. She said she cried the whole time.” The prosecutor then argued that Buchanan’s purpose for the conduct was “to arouse or gratify the sexual desire of either party” and “she had an orgasm” while “he also had one and ejaculated.” *Id.* 4, 892-897; 930-931; *cf.*, MCJI 5-125(b)(2018 Supp.) (definition of “sexual intercourse”).

d. The Lewis & Clark County sentence.

On February 5, 2020, Buchanan was sentenced by Judge Seeley to incarceration in the Montana State Prison for a period of 50 years, with 15 years suspended. During the sentencing hearing a statement from victim K.B. was read to the Court, who referred to “my abuse,” “the pain my father caused,” contended that she lost her virginity to “my father,” and that she had “been hurt repeatedly throughout my entire life by my father in countless different ways, because I believe he’s a cruel man who only pursues his own vices” and that he should be sentenced to life in prison. *App.* 5, 9:5, 10:8, 11:8, 15-18, 21. K.B.’s mother, Tammy Jenkins, told the Court that K.B. “never wants to see her rapist, her father, John Buchanan ever again” and then asked “that

he remain incarcerated for the rest of his life.” *Id.*, 12:8-10, 13:4-5.

Buchanan’s Presentence Investigation Report identified the “Circumstances of the Offense” as “[a]ccording to K., the defendant had vaginal intercourse and oral intercourse with her, each on one or more occasion.” The Psychosexual Evaluation stated, “[a]ccording to the victim, Mr. Buchanan had vaginal and oral intercourse with her on more than one occasion.” Encompassed within this offense conduct was the Meagher County hunting trip conduct which was testified to at length at trial, as related above.

When imposing sentence Judge Seeley stated that Buchanan was convicted of sexual intercourse without consent with his child, “[K. testified] at trial under extensive cross-examination to years of sexual abuse.” Judge Seeley’s reference to these events included the Meagher County conduct. Judge Seeley then specifically referred to the “element of punishment” and sentenced Buchanan to 50 years of incarceration, with 15 years suspended. *App.* 5, 33:4-20.

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e. Buchanan’s motion to dismiss and the District Court’s Order.

Buchanan filed his motion to dismiss the Meagher County charges on March 1, 2022, for the reason that the Meagher County charges were barred by the state and federal protections against double jeopardy and § 46-11-504(1), MCA. The District Court denied his motion on July 7, 2022. *App.* 1.

Trial is currently set for October 3, 2022, in White Sulphur Springs.

2. The legal questions and issues involved.

A district court’s decision to grant or deny a defendant’s motion to dismiss a charge on the basis of double jeopardy presents a question of law that this Court reviews for correctness. *State v. Cech*, 2007 MT 184, ¶ 7, 338 Mont. 330, 167 P.3d 38. When denying Buchanan’s motion to dismiss, the District Court did not find this Court’s precedent “particularly analogous or helpful” and turned to decisions of the Tennessee and Colorado supreme courts for instruction. See, *App.* 1, 2:19-24.

The settled Montana law is, however, directly on point and applies a very specific three-part test for determining whether a prosecution is barred by double jeopardy in these circumstances. See, §§ 46-11-504(1), MCA; 46-1-202(23), MCA; *Cech*, supra; *State v. Neufeld*, 2009 MT 235, ¶ 11, 351 Mont. 389, 212 P.3d 1063; *State v. Fox*, 2012 MT 172, ¶ 19, 366 Mont. 10, 285 P.3d 454; *State v. Cline*, 2013 MT 188, ¶ 9, 371 Mont. 18, 305 P.3d 55; and *State v. Burton*, 2017 MT 306, ¶ 25, 389 Mont. 499, 407 P.3d 280, 286.

The legal question presented by this case is therefore whether the District Court applied the correct double jeopardy analysis under settled Montana statutory law. Subsumed in this question is whether this Court's decisions provide district courts sufficient guidance when deciding whether a second prosecution will violate § 46-11-504(1), MCA, and state and federal double jeopardy protections in a case of this nature.

3. Supreme Court Jurisdiction.

This Court holds that “constitutional double jeopardy rulings by a district court may be challenged prior to a final judgment only by way

of a petition for writ of supervisory control, as authorized by” Montana Rule of Appellate Procedure 14(3)(b) before a defendant’s exposure to a second trial. *Burton*, ¶ 18. The Court should accordingly accept supervisory control and consider Buchanan’s petition.

4. The District Court incorrectly failed to apply settled Montana law when analyzing the double jeopardy issue.

The District Court incorrectly “examined case law from around the nation and various tests utilized to determine whether charges in either type of case are part of the same act or ‘same transaction’ for double jeopardy purposes.” *App. 1*, 3:3-5. Except for the conclusory statement that “the Montana Supreme Court decisions” were not particularly analogous or helpful in determining the issue presented” (*App. 1*, 2:19, 20), nowhere in the District Court’s order does it refer to or apply § 46-1-202(23)(b)’s definition of “same transaction.” Nor is the three-part test employed by this Court in *Cech*, *Neufeld*, *Fox*, *Cline*, and *Burton* discussed, distinguished, or analyzed.

The law for determining whether a prosecution is barred by double jeopardy is well-settled in Montana. § 46-11-504(1), MCA,

provides that “[w]hen conduct constitutes an offense within the jurisdiction of any state or federal court, a prosecution in any jurisdiction is a bar to a subsequent prosecution in this state if: (1) the first prosecution resulted in . . . a conviction and the subsequent prosecution is based on an offense arising out of the *same transaction*.” (Italics added.)

§ 46-1-202(23)(b), MCA, defines “same transaction” as “conduct consisting of a series of acts or omissions that are motivated by . . . a common purpose or plan that results in the repeated commission of the same offense or effect upon the same person or the property of the same person.”

This Court interprets § 46-11-504(1) as providing criminal defendants with greater protection against double jeopardy than the United States Constitution. *Cech*, ¶ 13. A three-part test is applied to determine whether double jeopardy bars a subsequent prosecution under § 46-11-504. *Id.*; see also, *State v. Tadewaldt*, 277 Mont. 261, 922 P.2d 463 (1996), superseded by statute as stated in *Heddings v. State*, 2011 MT 228, 362 Mont. 90, 265 P.3d 600; *Neufeld*, ¶ 11; *Fox*, ¶

19; *Cline*, ¶ 9. The first inquiry is whether the defendant’s conduct constitutes an equivalent offense within the jurisdiction of the court where the first prosecution occurred and within the jurisdiction of the court where the subsequent prosecution is pursued. Next, the Court looks to whether the first prosecution resulted in an acquittal or a conviction. The final determination is whether the second jurisdiction based the subsequent prosecution on an offense that arose from the same transaction. As stated above, § 46-1-202(23)(b), MCA, defines “same transaction.” All three factors must be met to bar a subsequent prosecution. *Fox*, ¶ 19.

The District Court did not apply this test. It simply concluded that the conduct for which Buchanan was convicted in Lewis and Clark County was separate and distinct from the conduct with which Buchanan is charged in Meagher County. The District Court did not address the fact that the Meagher County conduct was a substantial part of the proof utilized by the State in the Lewis and Clark County prosecution for which Buchanan has been punished. The prosecutor in the Lewis and Clark County trial argued that Buchanan engaged in a

series of acts in both Lewis and Clark County and Meagher County motivated to accomplish a criminal objective: to have sexual intercourse without consent for the purpose of arousing or gratifying the sexual desire of either party. It was therefore the same conduct. It was engaged in for the same purpose. It happened in the same place. It happened at the same time period. It involved the same people. It constitutes the same offense. It is unquestionably the “same transaction” both as a matter of fact and as a matter of law. By failing to apply the three-part test of *Cech, Neufeld, Fox, Cline, and Burton*, and looking to the supreme courts of Tennessee and Colorado for “guidance,” it made an error of law and its ruling was legally incorrect.

REQUEST FOR RELIEF

Buchanan requests that the Court accept supervisory control and consider his petition. Because trial is scheduled to begin on October 3, 2022, Buchanan further requests that the Court order a stay of further proceedings in the District Court pending the Supreme Court’s disposition of this petition. He also requests that the Court order a summary response, more extensive briefing, hold oral argument on the matter, and finally, that the District Court dismiss the Information as

barred by double jeopardy.

DATED this 1st day of September, 2022.

By: s/ Palmer Hoovestal
Palmer Hoovestal
Attorney for Petitioner
John Wesley Buchanan

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this amicus brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect is 3,889 and not averaging more than 280 words per page, excluding caption, table of contents, table of authorities, and certificate of compliance.

DATED this 1st day of September, 2022.

By: s/ Palmer Hoovestal

CERTIFICATE OF SERVICE

I, Palmer A. Hoovestal, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 09-01-2022:

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