

**FILED**

31020-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON A. GRAHAM, APPELLANT

APR 23 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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BRIEF OF RESPONDENT

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STEVEN J. TUCKER  
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Andrew J. Metts  
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Jason Graham assigns error to the entry of the judgment and sentence in this case.
2. The trial court erred as a matter of law when it concluded that its “hands [were] tied” at sentencing and that it lacked a legal basis to impose an exceptional sentence downward.
3. The trial court erred as a matter of law when it concluded that the “multiple offense policy” mitigating factor set forth in RCW 9.94A.535(1)(g) does not apply to multiple serious violent offenses sentence under RCW 9.94A.589(1)(b).
4. To the extent that the trial court considered the “multiple offense policy” mitigating factor at all, it misstated the prevailing legal standard governing the application of that factor.

II.

ISSUES PRESENTED

- A. DID THE RESENTENCING COURT HAVE AUTHORITY TO DO A FULL RESENTENCING OF THE DEFENDANT WHEN THE APPELLATE COURT REMANDED ON A NARROW (AND DIFFERENT) ISSUE?

B. ARE THE DEFENDANT’S ARGUMENTS POINTLESS IN THAT THEY APPLY TO ACTIONS THE RESENTENCING COURT DID NOT HAVE THE AUTHORITY TO UNDERTAKE?

III.

STATEMENT OF THE CASE

For the purposes of this appeal the State accepts the defendant’s version of the Statement of the Case.

IV.

ARGUMENT

The State notes that none of the defendant’s appeal is relevant or valid. The reason the defendant’s appeal is pointless is that the resentencing was time barred and without authority.

Quite simply, this case was remanded by Division III to correct a sentencing error pertaining to deadly weapon/firearm enhancements consistent with the ruling in Williams-Walker. *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010). At no point was the Superior Court given the authority to completely re-sentence the defendant. This issue was pointed out to the Superior court but the sentencing court re-sentenced the defendant in a completely “ground

up” procedure. The court doing the resentencing never mentioned the issue of a narrow mandate for resentencing.

In this court’s opinion on the issue raised for appeal here, the court stated “[t]he Washington Supreme Court granted Jason Graham's petition for review *solely* on the firearm enhancement issue and remanded the matter to this court for reconsideration in light of *State v. Williams–Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010).” *State v. Graham*, 163 Wn. App. 1011 (2011). (unpublished). This court clearly understood the scope of the resentencing. “We remand Mr. Graham's sentence for resentencing consistent with deadly weapon enhancements.” *Id.*

Despite the clarity of the appellate and Supreme Court decisions, the Superior Court ignored the fact that the resentencing was not sent back to re-open the entire sentencing. The sole issue was deadly weapons/firearms. The Superior court had no authority to resentence the defendant on anything *except* the deadly weapons/firearm issue.

The defendant was originally sentenced in 2003. The time restraints of RCW 10.73.090 expired nearly a decade ago. Had the original sentence not been appealed, the Superior court would not have any authority to resentence the defendant as his original sentence would have been beyond RCW 10.73.090. However, the defendant appealed the original sentence in a timely fashion, thus maintaining a viable appeal issue. The defendant did not appeal the entire

sentence. Rather, the defendant appealed only on narrow issue: deadly weapons/firearms.

Thus, the only issue still viable and not barred by RCW 10.73.090 was the single special verdict issue. All the rest of the defendant's arguments, as well as the Superior court's actions were outside the time bar and without authority.

Even though the judge that handled the resentencing was the same judge that handled the original sentencing, the resentencing judge reduced the defendant's sentence far more than just changing the enhancements to "deadly weapon" designations. The defendant was resentenced with a reduction from the original 1225.50 months of incarceration to 985.5 months of incarceration. While a small amount of that change is due to the changing of the deadly weapon enhancements, the remainder of the massive reduction was based on the resentencing court's feelings that the defendant had "improved" during the incarceration he served prior to the resentencing. RP 24-25.

As noted previously, the resentencing court did not have the authority to modify any part of the defendant's sentence other than the deadly weapon enhancements. The resentencing court's discretion to resentence following remand is limited by the scope of the appellate court's mandate. *State v. Kilgore*, 167 Wn.2d 28, 42,216 P.3d 393 (2009).

The defendant attempts to begin a completely new set of arguments regarding the resentencing court's decisions on a "mitigating factor." This case



takes a turn to the truly strange in that the defendant attempts to challenge the resentencing court's holdings, when the resentencing court should never have been dealing with the areas addressed by the defendant on appeal. The defendant had no more authority to file an appeal on the grounds he did file, than the resentencing court had to issue the rulings which the defendant now attacks.

If the actions of the resentencing court in undertaking a full resentencing as countenanced, then there will be no end to the legal procedures in this case. The actions of the resentencing court have opened this case to a full resentencing, followed by the defendant's appeal, followed by the State's response and potentially *another* resentencing with yet more appeals. What has been set up by the resentencing court is a recipe of lawlessness.

The defendant is partially correct. This case *should* be remanded and the defendant resentenced under instructions to return the incarceration periods used in the original sentencing minus, of course, the relatively minor changes to the special verdict totals. The resentencing court should be directly instructed to confine its actions to the issue of the special verdicts *only*.

V.

CONCLUSION

For the reasons stated, the resentencing should be struck and the defendant's punishment returned to those amounts listed in the original sentence. The only other action that should be taken by the re-resentencing court should be to follow the appellate court decisions pertaining to special verdicts.

Dated this 22<sup>nd</sup> day of April, 2013.

STEVEN J. TUCKER  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

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