No. 30672-1-III (consolidated with 31043-4-III)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

MARQUIS JONES,

Defendant/Appellant.

Consolidated w/

IN RE THE PERSONAL RESTRAINT

OF MARQUIS JONES,

Petitioner.

REPLY BRIEF

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INTRODUCTION

The state does not dispute the merits of Mr. Jones' appeal – that Counts 4 and 5, charging Mr. Jones with attempted robbery by threats of or use of force against the same victim, violate double jeopardy clause protections of the federal and state constitutions[1] or, alternatively, that Count 5 must be dismissed due to insufficiency of the evidence. Instead, the state denies that Mr. Jones is entitled to an appeal yet fails to cite any support for its position.[2]

Mr. Jones' case was remanded to the Superior Court to vacate the first degree robbery and first degree attempted burglary convictions, and for resentencing. This was not a ministerial

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[1] U.S. Const. amend. V, XIV; Wash. Const. art. 1, §9.

[2] The state appears to use the terms "PRP" and "CrR 7.8 Motion" interchangeably, rendering some portions of its Response Brief confusing and imprecise. *E.g., see generally* Response, p. 12. For a reliable description of the post-conviction procedural history of this case, please refer to the direct appeal Opening Brief, pp. 6-13. In summary: this case was remanded to the Superior Court for resentencing following a decision on Mr. Jones' third PRP, *In re Jones,* Washington Supreme Court Case No. 78255-5. After the resentencing hearing in the Spokane County Superior Court, Mr. Jones filed this direct appeal, Case No. 30672-1-III. Mr. Jones also filed a timely CrR 7.8 Motion to Vacate; the Superior Court transferred that CrR 7.8 Motion to this Court as a PRP, Case No. 31043-4-III. This Court consolidated the direct appeal and collateral attack after separate Opening Briefs were filed.

correction, but a full resentencing. At that lengthy hearing on February 10, 2012, the court rejected the state's proposal to increase the sentence, considered evidence on juvenile brain development, rejected Mr. Jones' motion for a downward departure, and imposed a sentence within the standard range. The court imposed a sentence within the calculated standard range not because it had no power to do otherwise, but because it made a decision about what was appropriate – it exercised discretion. Mr. Jones is entitled to an appeal under Washington Const. art. I, §22.

The state relies on this same theory to argue that the CrR 7.8 motion is untimely. Mr. Jones has one year from the conclusion of the last direct appeal following remand for a sentencing hearing to file either a PRP or a CrR 7.8. *In re Skylstad*, 160 Wn.2d 944, 950-54, 162 P.3d 413 (2007). This CrR 7.8 motion is therefore timely. The trial court agreed, finding the motion to be a collateral attack and not time barred pursuant to RCW 10.73.090. Order Transferring Case as a PRP, CP:335.

The state does refute the merits of the CrR 7.8 motion, stating that the defendant did receive actual notice of the charges, and even if he did not, he was not prejudiced by this failure. This is also incorrect. In this case, the failure to inform Mr. Jones of the

changed nature of the charges, including the elements to be proven, caused substantial prejudice – Mr. Jones made the decisions regarding plea negotiations and jury waiver based on the belief that the state needed to prove premeditation. Instead, the amended charges of felony murder required no intent other than commission of the underlying felony. Mr. Jones was prejudiced by not receiving notice that premeditation was no longer an element needed to be proven in order to convict him of first degree murder.

I. Mr. Jones Has a Right to Appellate Review Following Remand Because the Resentencing Court Exercised Its Independent Judgment

Mr. Jones' case was remanded to the Superior Court to vacate the first degree burglary and attempted first degree robbery convictions and "to resentence Mr. Jones accordingly." Supreme Court Order, CP:134. RAP 2.5(c)(1) allows trial courts discretion to revisit an issue on remand that was not the subject of the earlier appeal. *State v. Kilgore,* 167 Wn.2d 28, 38, 216 P.3d 393 (2009). If the trial court elects to exercise this discretion, its decision may be the subject to review of the appellate courts, thus reinstating the defendant's right to appeal. *Id.*, p. 39. *See also State v. Rowland,* 174 Wn.2d 150, 272 P.3d 242 (2012); *State v. Barberio*, 121 Wn.2d

48, 51, 846 P.2d 519 (1993) (no issue to review on appeal because trial court did not exercise its independent judgment on remand).

The record shows that the sentencing court did exercise its independent judgment at the resentencing hearing for Mr. Jones. Both Mr. Jones and the state submitted sentencing memoranda for the court's consideration. The court described the detailed preparation he had taken for this resentencing:

> In preparation for today's extensive hearing, everyone should know that I spent a great deal of time preparing for this. I read the entire court file, which is actually four full volumes. I read all of counsels' respective memorandums. I read the defense memorandum from top to bottom, which was quite voluminous. I also was apprised of a great deal of case law, and I think the parties and Mr. Jones deserve to have the best the Court has to offer. So I took the time to go through all of that material, and I actually spent till almost 9:00 at night here last night going through this. That's how important I think this is.

VRP:46-47. The court heard from both the victim's and Mr. Jones' families: "I appreciate those folks here today that have taken the time to speak to the Court regarding their thoughts and feelings, and *I've taken all of that into consideration.*" VRP:47 (emphasis added). The court heard from Mr. Jones. VRP:37-39. The court considered the extensive information provided on adolescent brain functioning. VRP: 53-54. The court did not merely defer to the

original trial court's decision, but exercised its own judgment when imposing the new sentence on the remaining counts:

> So, having considered all of the above, the Court would resentence Mr. Jones today as follows:
>
> The first-degree burglary and attempted first-degree robbery convictions are vacated forthwith.
>
> Turning then to Count One, the Court would sentence Mr. Jones, coming in at a score of nine-plus, with a range therein of 411 months to 548 months with a 120-month enhancement. The Court would therefore sentence Mr. Jones to 649 months, which includes the 120-month enhancement.
>
> Turning then to Count Four, the range is 96.75 months to 120 months. There is a 120-month enhancement. So the Court would sentence Mr. Jones to a term of 120 months as to Count Four, which of course includes the enhancement.
>
> Count Five, the range is again 96.75 months to 120 months. There is, again, as to this count, a 72-month enhancement. So the sentence the Court would order this morning again, including the enhancement, would equal 120 months.
>
> That leaves then Count Seven. Again, with Mr. Jones coming in at a nine-plus, the range would be 87 to 116 months. There are no enhancements as to this count, so the Court would find it appropriate to sentence Mr. Jones as to Count Seven to a term of 116 months.

VRP:56-57.

Mr. Jones' resentencing was no mere ministerial correction, but a full resentencing hearing. Mr. Jones has the right granted by

Wash. Const. art. I, §22, to seek appellate review of the duplicative nature of Counts 4 and 5. *See* Resentencing Memo, Section IX, CP:93-101; VRP:35 (double jeopardy issue on Counts 4 and 5 raised at resentencing hearing).

II. Mr. Jones' CrR 7.8 Motion is Timely and Not an Abuse of the Writ

The state argues that the CrR 7.8 motion is untimely. Mr. Jones has one year from the conclusion of the last direct appeal following remand for a sentencing hearing to file a collateral attack. *In re Skylstad*, 160 Wn.2d 944, 950-54. As discussed above, the resentencing court's exercise of independent discretion restored the pendency of the case, providing Mr. Jones with the right to an appeal. The CrR 7.8 motion was filed on February 15, 2012, immediately following the resentencing hearing and is therefore timely. The resentencing court came to the same conclusion: "It is timely. The case law provides that he may bring this motion because the most recent Judgement [sic] and Sentence decision of this Court is only a matter of weeks ago. It's not past the one-year timeframe provided for by the rule, so it is not time-barred pursuant to RCW 10.73.090." VRP:82. *See also* Order Transferring Case as a PRP, CP:335.

The state also argued for dismissal based on the abuse of the writ doctrine. As an initial matter, the state Supreme Court has ruled that the "abuse of the writ" doctrine is an affirmative defense that the state has to plead and prove before a PRP can be dismissed on that ground. *In re Turay,* 153 Wn.2d 44, 48, 101 P.3d 854 (2004), *cert. denied*, 544 U.S. 952 (2005) ("we agree with the United States Supreme Court that the *government has the burden of pleading abuse of the writ.*") (citing *McCleskey v. Zant*, 499 U.S. 467, 494, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991)) (emphasis added). Hence, a necessary prerequisite to consideration of the abuse of the writ doctrine was the state pleading and proving this defense: "Thus, we conclude under state law that before we will consider dismissing a personal restraint petition on the basis that it constitutes an abuse of the writ, the State must allege an abuse of the writ, note the petitioner's prior history of personal restraint petitions, and identify the claims that appear for the first time." *Turay*, 153 Wn.2d at 48.

The state's Response includes a general statement about the doctrine, without any real attempt to identify the claims involved or demonstrate why the abuse of the writ doctrine should apply: "This PRP should be dismissed as the petitioner is attempting to

raise new issues." Response, p. 11. This conclusory statement is not clarified at all by the accompanying footnote: "If the defendant wishes to argue that he has not raised any new issues, then the PRP should be dismissed because the courts have previously ruled on the defendant's PRPs and dismissed them." Response, p. 11, fn. 1. These equivocal and indefinite statements do not meet the burden of pleading and proving this defense.

Under RAP 16.4(d), "[n]o more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown." The failure to arraign Mr. Jones on the amended charges has not been addressed on the merits in any prior petition. Therefore, RAP 16.4(d) does not require dismissal of Mr. Jones' petition. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 362-63, 256 P.3d 277 (2011); *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 564-65 (2010). Further, RAP 18.8 allows this Court to "waive or alter the provisions of any of these rules ... in a particular case in order to serve the ends of justice."

RCW 10.73.140 calls for dismissal of a PRP if it raises an issue that was available but not brought up in a prior petition without good cause shown. *In re Adolph,* 170 Wn.2d at 565. Mr. Jones did not realize the significance of the failure to arraign him

until subsequent counsel provided him a copy of the amended information and explained the different elements of intent. *See* Declaration, CP:306-07. Because he was not provided a copy of the amended information until long after his conviction, the abuse of the writ doctrine should not apply. If, however, this Court finds that RCW 10.73.140 does bar its review of this petition, the proper remedy is transfer to the state Supreme Court. *In re Martinez,* 171 Wn.2d at 362.

III. Mr. Jones was Entitled to Receive Actual Notice of the Amended Charges; the Failure to Receive Notice Caused Substantial Prejudice

A. Mr. Jones Did Not Receive Actual Notice of the Amended Charges

Finally, the state argues that Mr. Jones did have actual notice of the charges. The state's sole evidence is the affidavit by Deputy Prosecuting Attorney Mark Cipolla. Response, Attachment E. Nowhere in that affidavit does Mr. Cipolla state that an arraignment was held.[3] Instead, he states that he believes that Mr.

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[3] *State v. Anderson,* 12 Wn.App. 171, 173, 528 P.2d 1003 (1974), is often cited for the proposition that failure to arraign, alone, does not necessarily violate the defendant's due process right to notice. Yet the trial court in *Anderson* expressly found that both defendant and his counsel had actual notice of the charges in advance of the trial. *Id.* There was no such finding here.

Jones received actual notice of the amended charges. Mr. Cipolla recounts "lengthy discussions with defense counsel" and "free talk" with both defense counsel and Mr. Jones, in which the potential sentencing consequences were discussed. Response, Attachment E. It is not at all clear how many discussions took place, and whether Mr. Jones was present when the amended charges were discussed. Mr. Cipolla also takes the position that since the court generally reviews amended information at motion hearings, it likely did so here, and there are no facts to prove he did not. *Id.* Mr. Cipolla does not cite any evidence in the record that Mr. Jones received adequate notice of this substantial amendment to the charges. *See State v. Alferez,* 37 Wn.App. 508, 681 P.2d 859 (1984) (off-the-record discussions do not meet the requirements of due process).

Mr. Jones' Declaration, CP:306-07, shows that no one explained to him that the premeditated murder charge had been changed to a felony-murder charge and that other charges had been added. Other evidence submitted with the CrR 7.8 motion included the docket sheet (CP:295-99), which shows an entry for an arraignment on the original information, but does not have any entries for an arraignment on the amended information; the motion

to amend (CP:301) and the amended information (CP:302-04), neither of which includes a certificate of service; and the fact that the verbatim report of proceedings contains no transcript of an arraignment on the amended information.[4] CrR 7.8 Motion, p. 3, CP:288.

The state Supreme Court in *In re the Personal Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992), articulated the procedure governing whether a reference hearing in the Superior Court is merited. Once the petitioner makes a threshold showing, the state must meet the petitioner's evidence with its own competent evidence. If this Court finds that the state's proffered affidavit regarding off-the-record discussions and customary practices of the court establishes a material disputed issue of fact, then this factual dispute – over whether Mr. Jones received actual notice of the nature of the charges against him – must be resolved with a reference hearing. *In re Rice,* 118 Wn.2d at 886.

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[4] Counsel for Mr. Jones contacted the Clerk of the Spokane Superior Court to try to obtain the pretrial transcripts and was told there was nothing to transcribe. There were no notes, tapes, or anything else from which they could provide a transcript. VRP:67.

B. Mr. Jones Suffered Substantial Prejudice

Mr. Jones has a right to notice of the charges against him under the due process clauses of the State and U.S. Constitutions. This right is especially important here, where the charges were amended from premeditated murder, requiring the element of premeditation, to felony murder, requiring no such intent. As explained in the Opening Brief, p. 14 & fn.7, the idea of strict liability for homicides committed by anyone, foreseen or unforeseen, during the course of another felony, is a difficult concept to understand. The difference in required intent is a tremendous change to the original charges, and rearraignment is necessary when there has been a substantial amendment to the information. *State v. Whelchel,* 97 Wn. App. 813, 988 P.2d 20 (1999); *State v. Allyn,* 40 Wn.App. 27, 35, 696 P.2d 45 (1985); *State v. Hurd,* 5 Wn.2d 308, 312, 105 P.2d 59 (1940).

An analogous situation occurred in *State v. Alferez,* 37 Wn.App. 508, 681 P.2d 859 (1984). In *Alferez*, the state added a deadly weapons enhancement after arraignment on the original information. The amended information was sent to defense counsel. *Id.* at 515. The record did not reflect that the amended information was ever served on Mr. Alferez and there was no

evidence on the record that would indicate that Mr. Alferez was either arraigned on the amended information or advised of the enhanced penalty provision. *Id.* This Court found that "[n]either off-the-record discussions nor the inferences that might arise from [jury instructions] meet that '[p]rocedural due process of the highest standard ...'" *Id.,* (quoting *State v. Frazier,* 81 Wn.2d 628, 503 P.2d 1073 (1972)).

Further, this Court found it significant that Mr. Alferez had no notice during the period of time in which he still had the opportunity to negotiate a plea bargain. *Alferez,* 37 Wn.App. at 516. "The defendant must know all the possible consequences of pending charges and allegations at a time when he may consider alternatives to not guilty pleas." *Id.* at 514. This is particularly significant in Mr. Jones' case – not only was he involved in plea negotiations, he also made the decision to waive his right to a jury. It was critical for Mr. Jones to have notice of the nature of the charges against him to make an intelligent and informed decision in these matters. *See* Mr. Jones' Declaration, CP:306-07 (Mr. Jones would have taken a different approach to plea bargaining if he had known about the changed intent requirement).

Mr. Jones was not arraigned on the amended information, nor did he receive actual notice of the nature of the new charges against him. As a result, he suffered substantial prejudice during a critical stage of the proceeding – plea negotiations and the decision to waive his right to a jury. This is the type of harm that the due process clauses of the state and federal constitutions, as well as CrR4.1, are intended to guard against. The remedy is to vacate all convictions and remand for a new trial.

CONCLUSION

Mr. Jones' appeal is timely as it seeks review of issues raised at a full resentencing hearing where the trial court exercised its own independent judgment. The state does not dispute the merits of Mr. Jones' appeal. As explained in the Opening Brief, Counts 4 and 5 charge attempted robbery, purporting to name two separate victims, but relying on the same act towards only one of the victims as the basis – the actus reus for both crimes. This double charging violates double jeopardy protections of the federal and state constitutions. [5] If Count 5 is not vacated based on this double jeopardy clause violation, then it should merge with Count 4

[5] U.S. Const. amend. V, XIV; Wash. Const. art. 1, §9.

at sentencing because they are based on the exact same actus reus. Alternatively, Count 5 should be vacated and dismissed due to insufficiency of the evidence; the 120-month firearm enhancement on Count 5 should also be vacated.

Mr. Jones filed a timely CrR 7.8 motion, which the trial court transferred to this Court as a PRP. Mr. Jones was not arraigned on the amended information, and did not receive actual notice of the nature of the charges against him. This violates due process clause protections of the state and federal constitutions, as well as CrR 4.1. The remedy is to vacate all convictions and remand for a new trial.

DATED this 26th day of December, 2012.

Respectfully submitted,

Stacy Kinzer, WSBA No. 31268
Attorney for Appellant Marquis Jones

CERTIFICATE OF SERVICE

I certify that on the 26th day of December, 2012, a true and correct copy of the foregoing was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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Stacy Kinzer