

62078-9

62078-9

No. 62078-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,
v.
FRANK LEE EVANS III,
Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Deborah Fleck

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing firearm enhancements attached to Mr. Evans' convictions for assault with a firearm.

2. The trial court erred in imposing multiple firearm enhancements based on the use of a single gun.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred and violated the defendant's double jeopardy rights in imposing firearm enhancements attached to Mr. Evans' convictions for assault with a firearm.

2 Whether the trial court erred and violated the defendant's double jeopardy rights in imposing multiple firearm enhancements based on the use of a single gun.

C. STATEMENT OF THE CASE

Frank Lee Evans, age 24 at the time of sentencing, was convicted following a King County jury trial on five counts of first degree assault and attached firearm enhancements. CP 50-58. The original charges were based on allegations that Mr. Evans, who was physically assaulted during a late-night altercation inside a Denny's Restaurant on Central Avenue North, reacted violently by re-entering the establishment and firing shots from a .38 caliber handgun that struck and injured five patrons. CP 1-4. The

conflicted evidence at trial later showed that only some of persons struck were, by chance, among those who had been involved in the prior dispute. CP 1-10.

Despite urging by his counsel and the trial court's pre-trial order of a recess for consideration of the matter, Mr. Evans, who had no previous felony history, refused a State's plea offer, and exercised his right to take the case to trial. CP 154; 5/7/08RP at 2-5.

Following jury trial, the court sentenced Mr. Evans on five counts of First Degree Assault, imposing consecutive sentences of 93 months on each count and consecutive 60 month enhancements on each count. Supp. CP ____, Sub # 155 (judgment and sentence). Mr. Evans appeals. CP 198.

D. ARGUMENT

- 1. THE IMPOSITION OF ADDITIONAL INCARCERATION FOR FIREARM ENHANCEMENTS IN CONJUNCTION WITH MR. EVANS' PRISON SENTENCES FOR THE ASSAULT CONVICTIONS VIOLATED HIS FEDERAL AND STATE DOUBLE JEOPARDY RIGHTS.**

Mr. Evans was convicted of five counts first degree assault, each with a firearm enhancement. CP 50-58, 49-57. Because Mr. Evans was convicted of the assaults for assaulting the five

complainants with a firearm pursuant to RCW 9A.36.011(1)(a), see Supp. CP ____, Sub # 155 (Jury instructions 19, 22, 25, 28, 31), while also being convicted of firearm enhancements on each assault count for being armed with a firearm during the commission of these offenses, see Supp. CP ____, Sub # 155 (Jury instruction 34), Mr. Evans contends that he was in each “count” twice convicted and – more constitutionally significant – duplicatively punished for the presence and use of a firearm. This sentencing violated the constitutional prohibition against double jeopardy, and his firearm enhancements must therefore be vacated.

Mr. Evans’ double jeopardy argument is now supported by recent Supreme Court caselaw that makes clear that firearm enhancements are effectively elements of a greater “aggravated” offense to which they are attached and for which he was punished. Put another way, a firearm enhancement is the “same offense” as assault in the first degree because it is included wholly and completely within the assault crimes of which he was convicted.

a. The double jeopardy provisions of the federal and state constitutions protect criminal defendants from duplicative punishment. The double jeopardy clause of the Fifth Amendment to the federal constitution provides that no individual

shall “be twice put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. Amend. 5; Wash. Const. Art. 1, § 9. The Fifth Amendment's double jeopardy protection is applicable to the several States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The Washington courts interpret Article 1, § 9's double jeopardy provision coextensively with the United States Supreme Court's reading of the double jeopardy clause of the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).¹

Under double jeopardy law, the State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding. State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). Courts may not, however, enter multiple convictions and impose punishment for conduct that amounts to a constitutional “same offense” without offending the defendant's double jeopardy protections. State v. Vladovic, 99

¹Double jeopardy violations are manifest constitutional errors that may be raised for the first time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000).

Wn.2d 413, 422, 662 P.2d 853 (1983) (citing Albernaz v. United States, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

Where a defendant's conduct can support charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the "same" offense. In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

The legislature has the power to define offenses and set punishments. See State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995) (rape and incest are separate offenses). If the legislature has authorized cumulative punishments for both statutory crimes, then double jeopardy is not offended by convictions and sentences for both of the crimes. Calle, 125 Wn.2d at 776; In re Pers. Restraint of Burchfield, 111 Wn. App. 892, 896, 46 P.3d 840 (2002); see generally William S. McAninch, Unfolding the Law of Double Jeopardy, 44 S. C. L. Rev. 411, 483-84 (1993).

However, if legislative intent does not reveal specific authorization of punishment for the two offenses, the courts turn to the Blockburger test to determine if convictions are duplicative. Calle, 125 Wn.2d at 777-78; Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under this analysis,

"where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses [that can be punished separately], is whether each provision requires proof of a fact which the other does not." Orange, 152 Wn.2d at 817 (quoting Blockburger, 284 U.S. at 304); Gavieres v. United States, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489 (1911); see also United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) (affirming the use of Blockburger "same evidence" test in double jeopardy analysis).

b. The question of legislative intent as to firearm enhancements must be reexamined after *Blakely v. Washington's* reconception of the meaning of what constitutes an "offense" and the elements of an offense. As stated above, the first question is one of express legislative intent. Courts assume the punishment provisions drafted by the Legislature do not violate double jeopardy. Id.; Albernaz v. United States, 450 U.S. 333, 340, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981) (reasoning Congress is predominately a body of lawyers and presumed to know the law); but see Albernaz, 450 U.S. at 345 (concurring opinion of Stewart, J.) (legislative intent is first step in determining if punishments violate double jeopardy, but not the controlling determination). Thus, to

determine if the Legislature intended multiple punishment for the violation of separate statutes, courts begin with the language of the statute. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005).

RCW 9.94A.510, since recodified as RCW 9.94A.533, provides for additional time to be added to the range if the offender or an accomplice was “armed with a firearm” during the crime:

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum

sentence of ten years, or both, and not covered under (f) of this subsection;

* * *

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.

Former RCW 9.94A.510; RCW 9.94A.533.

The original firearm enhancement statute, part of the “Hard Time for Armed Crime Act” of 1995 (Initiative 195), was designed to provide increased penalties for criminals using or carrying deadly weapons, provide greater punishment for those using or carrying firearms, to stigmatize the use of weapons, and to hold individual judges accountable for their sentencing for serious crimes. Laws of 1995, ch. 129 (Findings and Intent); State v. DeSantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003).

The language of the statute demonstrates that the voters intended that an enhanced sentence, in the form of increased duration of incarceration, be imposed for those who participate in crimes where a principal or accomplice is “armed with a firearm.” RCW 9.94A.533.

The statute does expressly create a specific exception for certain delineated crimes where possessing or using a firearm is a

necessary element of the crime, listing these as including drive-by shooting or possession of a stolen firearm, thus demonstrating some sensitivity to double jeopardy concerns. RCW 9.94A.510(3)(f). However, the voters did not consider the problem of redundant punishment created when a several-year firearm enhancement is added to a crime and using a firearm, or a deadly weapon that is a firearm, is one of the alternative ways an offense may be committed. In this respect, legislative intent for duplicative punishment cannot be discerned from the language of the statute.

Importantly, the Hard Time for Armed Crime Act was passed significantly before the transformative decision in Blakely v. Washington, and its progeny in the form of other United States Supreme Court cases, made it clear that a fact – here, being armed with a firearm – that exposes a person to increased punishment is an element of an effectively greater offense punished which contains as its elements those of the nominal offense and the so-called “enhancement.” Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 604-05, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 490, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Jones v. United States, 526 U.S.

227, 243, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (Stevens, J., concurring).

The relevant determination following Blakely and its predecessors is not what label a fact has been given by the Legislature or its placement in the statutory scheme, but rather the effect it has on the maximum sentence to which the person is exposed. Apprendi, 530 U.S. at 494; Ring, 536 U.S. at 602. This concept was succinctly stated in Ring:

If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and the aggravating factor together constitute an aggravated crime. The aggravated fact is an element of the aggravated crime.

Ring v. Arizona, 536 U.S. at 605. This reasoning leads inescapably to the conclusion that crimes involving firearm elements, when further “enhanced” by firearm penalties, violate double jeopardy protections because such crimes include double punishment for the same act of being armed with a firearm. The given legislative appellation of an “enhancement” fails to disguise the fact that a firearm enhancement, imposed in conjunction with a base offense, is

an offense in itself that is the same crime, or a duplicative element within the aggravated crime.

The Ring concept “succinctly stated” in the case was subsequently reiterated when the United States Supreme Court considered in a later case whether double jeopardy principles were violated by seeking the death penalty on retrial after appeal where the first jury was unable to reach a unanimous verdict on whether to impose life or death.

Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). Justice Scalia explained Ring and its significance:

[W]e held that aggravating circumstances that make a defendant eligible for the death penalty “operate as ‘the functional equivalent of an element of a greater offense.’ “ That is to say, for purposes of the Sixth Amendment’s jury-trial guarantee, the underlying offense of “murder” is a distinct, lesser included offense of “murder plus one or more aggravating circumstances.”

Ring, 537 U.S. at 111 (internal citations omitted). The Court went on to find “no principled reason to distinguish” what constitutes an offense for purposes of the Sixth Amendment and for purposes of double jeopardy. Id. This reasoning requires reviewing courts to consider the implications that Blakely’s reconceptualization of the constitutional meaning of

“offense” and “elements” has on double jeopardy jurisprudence.

Furthermore, the need to reexamine the nature and extent of appropriate judicial deferral to the legislature in double jeopardy jurisprudence, in light of Blakely, has been emphasized by legal scholars. See Timothy Crone, “Double Jeopardy, Post Blakely,” 41 Am. Crim. L. Rev. 1373 (2004). The problems of “redundant” counting of conduct under the Federal Sentencing Guidelines, for example, was thoroughly examined by one commentator, who called for a reorientation of double jeopardy analysis to protect defendants from unfairly consecutive sentences. Jacqueline E. Ross, “Damned Under Many Headings: The Problem of Multiple Punishment,” 29 Am. J. Crim. L. 245, 318-226 (2002). Legislative intent reveals no clear or express plan that in the particular case of first degree assault as charged and convicted in the present case, that a duplicative firearm enhancement should also be imposed.

c. Each of Mr. Evans' firearm enhancements are the same in fact and law as the convictions for first degree assault to which they are attached, violating double jeopardy. When, as here, it is not clear that double punishment is authorized by statute, courts utilize the Blockburger, or "same evidence" test to determine if two convictions violate double jeopardy. United States v. Dixon, 509 U.S. at 697; Gocken, 127 Wn.2d at 101-02. The test requires the court look to the crimes to determine if each crime, as charged and proved, differ from the other. State v. Gohl, 109 Wn. App. 817, 821, 37 P.3d 293 (2001), rev. denied, 146 Wn.2d 1012 (2002).

Following Blakely, there is no question that each of Mr. Evans' firearm enhancements are the same in fact and law as the convictions for first degree assault to which they are attached. First, each count and its enhancement involves the same criminal act. Evans was convicted of first degree assaults for his acts of shooting the five occupants of the Denny's restaurant with a firearm, and he was also convicted of being armed with a firearm, a fact required to be found for punishment on the firearm enhancement.

In each instance, Mr. Evans' convictions and enhancements violate double jeopardy. The first degree assault statute reads:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death[.]

RCW 9A.36.011(1)(a).

It is clear from the evidence and the State's closing argument that the prosecutor sought, and obtained, the first degree assault convictions based on assault with a firearm. 5/20/08RP at 713.²

On each count, the jury found the defendant guilty of assault in the first degree (assault with a firearm) along with a firearm enhancement. RCW 9.94A.510(3) required the sentencing court to add additional time to Mr. Evans' standard range "if the offender or an accomplice was armed with a

²The prosecutor effectively "elected" the assault with a firearm alternative of first degree assault in closing argument, telling the jury that Mr. Evans assaulted to complainants "with a firearm," and indicating,

That is all the State has to prove in order for you to find the defendant guilty of assault in the first degree[.]

5/20/08RP at 713. The prosecutor continued on to tell the jury that the burden of proof beyond a reasonable doubt applied to "those four elements and those four elements alone." 5/20/08RP at 713.

firearm as defined in RCW 9.41.010.” But the defendant could not assault the complainants with a firearm without necessarily also being armed with a firearm. A conviction for first degree assault by means of shooting another with a firearm is the same in law as the enhancement – in essence an element of aggravated first degree assault, or a second offense – that was attached to the conviction.

Of course, each of these constitutional offenses involves the same criminal “act” as well as the same victim. Mr. Evans was convicted of first degree assault for assaulting each diner with a firearm. No other weapon or act constituted a second act supporting the firearm enhancement, which simply required Mr. Evans commit the assault while armed with a firearm.

And secondly, Mr. Evans’ first degree assault conviction is the same in law as the enhancement, on counts 1 through 5. Mr. Evans could not assault the complainants with a firearm without being armed with a firearm. A conviction for first degree assault by means of shooting another person with a firearm is the same in law as the firearm

enhancement that was attached to the conviction, increasing punishment.

Before the United States Supreme Court opinion in Blakely, the Washington Courts held that duplicative punishment such as that represented by the sentences and enhancements imposed in the present case did not violate double jeopardy principles, holding, for example, that sentencing for both first degree burglary committed with a deadly weapon, and a deadly weapon enhancement did not violate double jeopardy. State v. Caldwell, 47 Wn. App. 317, 734 P.2d 542, review denied, 108 Wn.2d 1018 (1987); accord, State v. Pentland, 43 Wn. App. 808, 719 P.2d 605, review denied, 106 Wn.2d 1016 (1986) (first degree rape and deadly weapon enhancement). This Court reasoned that RCW 9.94A.310 clearly showed the Washington Legislature's intent that a person who commits certain crimes while armed with a deadly weapon receive an enhanced penalty even if being armed with a deadly weapon was an element of the offense. Caldwell, 47 Wn. App. at 320; Pentland, 43 Wn. App. at 811.

These opinions, however, did not have the benefit of the United States Supreme Court's analysis in Blakely, and thus did not address, under the newly emerging constitutional understanding of the meaning of an "offense" and the "elements" thereof, whether a person can be twice convicted and duplicatively punished for the same effectively single element of a crime. Clearly this can no longer occur.

2. THE MULTIPLE CONSECUTIVE SENTENCE ENHANCEMENTS IMPOSED BY THE COURT FOR THE JURY'S FINDINGS THAT MR. EVANS' USED A SINGLE FIREARM IN THE ASSAULT COUNTS VIOLATE DOUBLE JEOPARDY.

In addition to the double jeopardy violations inhering in the attachment of enhancements to the crimes of first degree assault with a firearm, the imposition of multiple firearm enhancements for Mr. Evans' possession of a single weapon during the crimes also violated his double jeopardy protections. U.S. Const. Amend. 5; Wash. Const. Art. 1, § 9. Based on a single act, Mr. Evans' possession of a firearm in the course of the incident, the trial court imposed five separate enhancements on the first degree assault counts, which were ordered to be served consecutively to each other

and to the underlying convictions as well. Supp. CP ____, Sub # 155. See State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999).

Where, as here, a single act yields multiple punishments, double jeopardy principals are offended unless the Legislature has expressed its intent for such a result. Whalen v. United States, 445 U.S. at 689.

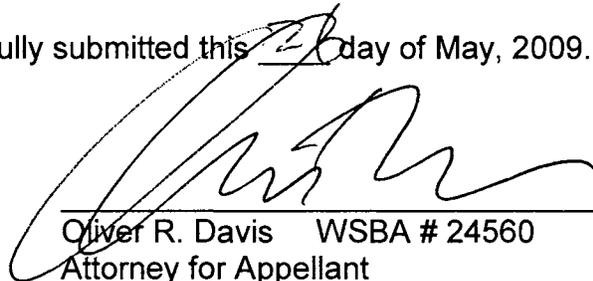
Nowhere in its language does the firearm enhancement statute, RCW 9.94A.533, provide for the imposition of a separate firearm enhancement for each of multiple current offenses where a single act of firearm possession has occurred during the incidents. Admittedly, the firearm enhancement statute sets forth the procedure to be followed where multiple enhancements are imposed. Id. But this is not the same as directing that multiple punishments be imposed based on the possession of a single weapon. The firearm enhancement statute certainly does not provide that the circumstances in this case warrant the imposition of multiple enhancements. In these circumstances, the “rule of lenity” requires the conclusion that the Legislature did not intend the stacking of enhancements for a single weapon. See Whalen, 445 U.S. at 694.

Because there is not a clear expression of legislative intent for multiple punishment in these circumstances, double jeopardy does not permit the imposition of five firearm enhancements on the first degree assault convictions.

E. CONCLUSION.

Based on the foregoing, the appellant Frank Lee Evans III respectfully requests that this Court reverse the trial court's order entering judgment and sentence.

Respectfully submitted this 26 day of May, 2009.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 FRANK LEE EVANS,)
)
 Appellant.)

NO. 62078-9-I

FILED
 COURT OF APPEALS DIV. #1
 STATE OF WASHINGTON
 2009 MAY 26 PM 4:50

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF MAY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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