

66079-9

66079-9

NO. 66079-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HUNG VAN NGUYEN,

Appellant.

FILED
COURT OF APPEALS
DIVISION I
2011 MAR 25 PM 4:37

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. Nguyen alleges that the trial court improperly denied his pro se collateral attack rather than holding a hearing or transferring it to this Court. But the record reflects that the trial court transferred the motion to this Court, where it was later dismissed. Should Nguyen's claim of error be rejected?

2. A court does not err in imposing a standard range sentence unless there is some indication in the record that the court mistakenly believed it could not impose an exceptional sentence. No request for an exceptional sentence was made at the sentencing hearing in this case, and there is no indication that the court misunderstood the sentencing options. Should Nguyen's claim that the trial court erred in imposing a standard range sentence be rejected?

3. A defendant may not raise an issue in his second appeal that could have been litigated in his first appeal. Nguyen's claim that multiple weapon enhancements violate his right against double jeopardy could have been raised in his first appeal, but was not. Should this Court decline to consider the double jeopardy claim for the first time in his second appeal?

4. Double jeopardy only protects against the imposition of more punishment than the legislature intended. As this Court has previously held, the legislature clearly intended to impose multiple weapon enhancements for multiple crimes, regardless of whether the crimes were committed in the same incident. Should this Court reject Nguyen's claim that multiple weapon enhancements for multiple crimes violate his right against double jeopardy?

B. STATEMENT OF THE CASE.

In 1996, Hung Van Nguyen and accomplices shot into a car full of passengers, striking two of them. CP 132-33. He was charged with three counts of assault in the first degree, with each count involving a separate victim. CP 118-20. In 1997, a jury found him guilty as charged. CP 121-23. A special verdict form was submitted to the jury asking whether Nguyen was armed with a "deadly weapon" at the time of commission of the crime. CP 133. The jury answered yes as to all three counts. CP 133.

Nguyen absconded and remained at large for seven years before he was sentenced in 2004. CP 122, 133. At that time, the trial court imposed a term of total confinement of 494 months,

which included three consecutive 60-month firearm enhancements. CP 123, 125. On appeal, Nguyen argued that the trial court erred in imposing 60-month firearm enhancements based on special verdicts that found that Nguyen was armed with a deadly weapon only. CP 134. This Court agreed, vacated the firearm enhancements, and remanded for resentencing. CP 134, 137. Mandate issued August 6, 2010. CP 131.

At resentencing, held on September 22, 2010, the trial court imposed the same standard range sentences it had imposed at the first sentencing: 128 months for Count I, 93 months for Count II, and 93 months for Count III. RP 9/22/10 11; CP 125, 141. The court also imposed three consecutive 24-month deadly weapon enhancements for each count, for a term of total confinement of 386 months. RP 9/22/10 11; CP 139, 141.

Both parties briefly addressed a pro se motion for a new trial filed by Nguyen. RP 9/22/10 3-4, 6-8. The motion, dated September 7, 2010, primarily alleged that the State failed to provide exculpatory evidence and alleged ineffective assistance of counsel. CP 47-65.¹ The State requested that the trial court transfer the

¹ The CP numbers used in this brief for CPs 44-117 are the amended numbers provided in the August 23, 2010 Index to Clerk's Papers.

motion to this Court for consideration as a personal restraint petition, pursuant to CrR 7.8(c)(2). RP 9/22/10 9. Nguyen's counsel objected to transfer. RP 9/22/10 9. The trial court stated:

I received his handwritten materials, and I instructed my bailiff at that time to file out a referral to the Court of Appeals. Now, I thought I signed that already and have already sent this issue to the Court of Appeals. If not, I will do so.

RP 9/22/10 12. An order transferring Nguyen's motion to the Court of Appeals for consideration as a personal restraint petition was filed on September 28, 2010. CP 115. On October 14, 2010, Nguyen moved to withdraw the personal restraint petition. CP 117. The motion was granted. CP 117.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY TRANSFERRED NGUYEN'S PRO SE COLLATERAL ATTACK TO THIS COURT FOR CONSIDERATION AS A PERSONAL RESTRAINT PETITION.

In his assignments of error, Nguyen alleges that the trial court summarily denied his pro se motion for relief from judgment, and that the court should have either held a hearing or transferred the motion to this Court pursuant to CrR 7.8(c)(2). Nguyen misreads the record. The trial court transferred the motion to this

Court for consideration as a personal restraint petition pursuant to CrR 7.8(c)(2). CP 115; RP 9/22/10 12. Nguyen then voluntarily withdrew the personal restraint petition. CP 117. Nguyen's claim of error should be rejected on this basis alone.

Although Nguyen does not allege in his opening brief that the trial court could not transfer the motion, the State will address that issue in case this Court wishes to reach it. CrR 7.8(c) provides that the superior court *shall* transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition *unless* the superior court determines that the motion is not time-barred by the provisions of RCW 10.73.090 *and* either (1) the defendant has made a substantial showing that he is entitled to relief, or (2) resolution of the motion requires a factual hearing. RCW 10.73.090 provides that no motion collaterally attacking a judgment and sentence may be filed more than one year after the judgment becomes final, if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090(1). A judgment becomes final on the date that it is filed with the clerk of the trial court, or the date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction, whichever is later. RCW 10.73.090(3). In the present

case, Nguyen's conviction was not yet final because he had yet to be resentenced. The motion for new trial was timely pursuant to RCW 10.73.090.

Nonetheless, CrR 7.8(c)(2) requires that a timely collateral attack must be transferred to this Court if the defendant fails to make a substantial showing that he is entitled to relief, or fails to show that resolution of his motion would require a factual hearing. Unless one of these two conditions is met, CrR 7.8(c)(2) requires the superior court to transfer a collateral attack. Nguyen made two claims in his motion: (1) ineffective assistance of counsel, and (2) the State withheld material exculpatory evidence. These two claims do not meet either of the conditions of CrR 7.8(c)(2).

As to the first claim, Nguyen may not relitigate his ineffective assistance of counsel claim because that claim was already rejected on its merits on direct appeal. A collateral attack is not meant to serve as a forum for relitigation of issues already considered on direct appeal. In re Personal Restraint of Lord, 123 Wn.2d 296, 329, 868 P.2d 835 (1994); In re Personal Restraint of Pirtle, 136 Wn.2d 467, 491, 965 P.2d 593 (1998). Simply revising a previously rejected legal argument neither creates a new claim nor constitutes good cause to reconsider the original claim. In re

Personal Restraint of Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). Nor may a petitioner create a different ground for relief merely by alleging different facts, asserting different legal theories, or couching the argument in different language. In re Lord, 123 Wn.2d at 329; In re Pirtle, 136 Wn.2d at 491.

In In re Lord, supra, 123 Wn.2d at 330, Lord raised the issue of ineffective assistance of counsel on direct appeal by alleging that counsel had failed to call certain witnesses and made an inadequate closing argument. Lord filed a personal restraint petition raising ineffective assistance of counsel by alleging that counsel failed to conduct an adequate investigation, failed to call other witnesses and failed to present mitigating evidence. Id. The state supreme court summarily rejected the new claim as an attempt to relitigate an issue already raised and rejected on appeal. Id. at 329-30.

In general, the limitations placed on collateral attacks apply to attacks brought in both the trial court and the appellate court. In re Personal Restraint of Becker, 143 Wn.2d 491, 497, 20 P.3d 409 (2001). On direct appeal, Nguyen alleged ineffective assistance of trial counsel and this Court rejected his claim on the merits. CP 135-36. Nguyen may not relitigate his claim of

ineffective assistance of counsel in a collateral attack, whether that attack is filed in the trial court or the appellate court. Id. (citing State v. Brand, 65 Wn. App. 166, 174, 828 P.2d 1 (1992), reversed on other grounds, 120 Wn.2d 365, 842 P.2d 470 (1992), in stating, "it would be irrational and indefensible to apply a different standard to applications for post conviction relief depending on whether a proceeding is filed in the appellate court or in the trial court.").

The second claim brought in Nguyen's motion for new trial is wholly frivolous. He claims, without factual support, the State failed to provide the defense with a copy of witness Dong Che's May 17, 1996 statement identifying Vu Nguyen as one of the two "shooters." However, in the statement in question Dong Che does not identify anyone as one of the shooters, but rather "as a person who was there" and "I think he was the one who tried to open Lai's door." CP 49. Moreover, there is no indication from the materials submitted whom Dong Che actually identified in photograph number four. CP 50-51. Notably, the Certification for Determination of Probable Cause explains that Vu Nguyen had been identified by witnesses as one of the occupants of the Honda, along with Hung Nguyen and Mahiet Tong. CP 58. Thus, Dong

Che's identification of Vu Nguyen as being present was not inconsistent with the State's theory of the case.

In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court held that due process requires the State to disclose evidence that is favorable to the accused and material either to guilt or punishment. Evidence is "material" only if there is a reasonable probability that if the evidence had been disclosed to the defense the result of the proceeding would have been different. In re Personal Restraint of Gentry, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999). Nguyen has fallen far short of showing that there was a due process violation in this case. He has presented no credible evidence that the State failed to provide the statement in question, nor is the statement material exculpatory evidence.

Because the motion for new trial did not contain a substantial showing of a basis for relief or require a factual hearing, the trial court properly transferred the motion to this Court. Because Nguyen voluntarily moved to dismiss the petition after it was transferred, the issues raised in the motion for new trial are no longer before this Court.

2. THE TRIAL COURT DID NOT ERR IN REIMPOSING A STANDARD RANGE SENTENCE.

Nguyen argues that the trial court erred in "refusing" to consider an exceptional sentence. However, the record reflects that neither Nguyen nor his attorney requested an exceptional sentence at the sentencing hearing. There is no evidence that the trial court refused to consider any valid sentencing options.

Nguyen was represented by an attorney at the resentencing hearing. RP 9/22/10 2. The State recommended that the trial court impose the same standard range sentences that had been imposed previously and impose three consecutive 24-month deadly weapon enhancements, resulting in a period of total confinement of 386 months. RP 9/22/10 3. Defense counsel asked the trial court not to impose any enhancements, arguing that this Court's opinion remanding the matter did not authorize imposition of deadly weapon enhancements. RP 9/22/10 6. No request for an exceptional sentence was made at the hearing. Defense counsel argued that the law required that deadly weapon enhancements be served concurrently with each other. RP 9/22/10 13-17. The trial court rejected that argument. RP 9/22/10 17.

Nguyen attempts to rely on In re Personal Restraint of Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007). Mulholland is inapposite. In that case, the record of the sentencing hearing demonstrated that the trial court mistakenly believed that it did not have the discretion to impose an exceptional sentence, which was significant because the court indicated "some openness toward an exceptional sentence." Id. at 333. In the present case, there is no evidence that the court was under a mistaken belief that it could not impose an exceptional sentence, or that it indicated any openness toward imposing an exceptional sentence. No request for an exceptional sentence or basis for an exceptional sentence was presented by the defense at the hearing.

Nguyen's pro se "Motion for Resentencing After Appeal Is Final and For Relief Under CrR 7.4, CrR 7.5 and CrR 7.8" does contain a brief argument that the court should "exercise its discretion" and impose concurrent weapon enhancements pursuant to RCW 9.94A.535. CP 9-10. When a defendant is represented by counsel, the attorney has the ultimate authority in deciding which legal arguments to advance, both at trial and at sentencing. State v. Bergstrom, 162 Wn.2d 87, 96, 169 P.3d 816 (2007). The trial court may decline to consider a pro se motion when the defendant

is represented by counsel. Id. at 97. Because Nguyen was represented by counsel, who did not request an exceptional sentence, the sentencing court did not err in failing to rule on Nguyen's written pro se request for an exceptional sentence, and imposing a standard range sentence.

3. IMPOSITION OF A WEAPON ENHANCEMENT FOR EACH SEPARATE CRIME OF ASSAULT DOES NOT VIOLATE NGUYEN'S RIGHT AGAINST DOUBLE JEOPARDY.

Nguyen argues, for the first time in his second appeal, that the Double Jeopardy Clause is violated by imposing three separate deadly weapon enhancements, although he was found to have assaulted three separate victims with a deadly weapon. Nguyen is barred from raising this claim for the first time in this appeal because it could have been raised in his first appeal. Moreover, well-reasoned and controlling precedent holds that his right against double jeopardy is not violated under these circumstances.

Nguyen is barred from raising this double jeopardy claim in this appeal. A defendant may not raise an issue in a second appeal that he could have raised in a first appeal, unless the issue was reconsidered by the trial court in the proceedings upon

remand. State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993); State v. Jacobsen, 78 Wn.2d 491, 493, 477 P.2d 1 (1970) ("We adhere to our policy which prohibits issues from being presented on a second appeal that were or could have been raised on the first appeal") (citing State v. Bauers, 25 Wn.2d 825, 172 P.2d 279 (1946)).

Even though an appeal raises issues of constitutional import, at some point the appellate process must stop. Where...the issues could have been raised on the first appeal, we hold they may not be raised in a second appeal.

State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983) (declining to address Sauve's constitutional search issues in his second appeal).

Nguyen could have raised this double jeopardy claim in his first appeal, but he did not. Nguyen did not raise this double jeopardy claim at the resentencing either. Nguyen is barred from raising this issue in his second appeal.

Moreover, Nguyen's double jeopardy claim is without merit. As this Court explained in State v. Husted, 118 Wn. App. 92, 74 P.3d 672 (2003), review denied, 151 Wn.2d 1014 (2004), double jeopardy analysis is based on legislative intent: double jeopardy only prevents the imposition of greater punishment for a single

offense than the legislature intended. Husted argued that the single act of being armed for the crimes of rape in the first degree and burglary in the first degree, committed in the same incident with armed with a knife, could not be punished twice by the imposition of two deadly weapon enhancements. This Court found that the deadly weapon enhancement statute, RCW 9.94A.533(4) (former RCW 9.94A.510(4)), unambiguously provides that an enhancement must be imposed for each qualifying crime committed with a deadly weapon. Id. at 96. Thus, the trial court had properly imposed a deadly weapon enhancement for each of Husted's convictions. Id. Similarly, in State v. Claborn, 95 Wn.2d 629, 637, 628 P.2d 467 (1981), the state supreme court rejected the defendant's claim that imposition of deadly weapon enhancements for both assault in the first degree and burglary in the second degree arising from the same incident and a single act of being armed, violated his right against double jeopardy. See also State v. Elmi, 138 Wn. App. 306, 321-22, 156 P.3d 281 (2007) (refusing to reconsider Husted); State v. Esparza, 135 Wn. App. 54, 67, 143 P.3d 612 (2006) (same).

There can be no doubt that the legislative scheme unambiguously shows a legislative intent to impose a separate

enhancement for each crime that is committed with a weapon.

RCW 9.94A.533 provides, in pertinent part:

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 deadly weapon other than 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 deadly weapon enhancements based on the classification of the completed felony crime. **If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses**, regardless of which underlying offense is subject to a deadly weapon enhancement.

e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, **including other firearm or deadly weapon enhancements, for all offenses** sentenced under this chapter.

RCW 9.94A.533(4) (emphasis added). The legislature clearly intended courts to impose an enhancement for each qualifying crime in which a weapon is used, and to impose multiple enhancements regardless of whether the crimes occurred at the same time.

Washington courts have adhered to the reasoning of Claborn and Husted. The legislature is presumed to be aware of

judicial interpretations of statutes, and thus, legislative inaction for a substantial time following a decision indicates legislative acquiescence in the decision. State v. Coe, 109 Wn.2d 832, 750 P.2d 208 (1988). The legislature's inaction indicates that the courts have correctly interpreted RCW 9.95A.533(4). Nguyen's double jeopardy claim must be rejected.

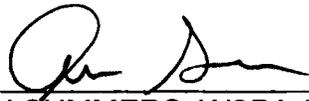
D. CONCLUSION.

Nguyen's sentence should be affirmed.

DATED this 24 day of August, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jodi Backlund and Manek Mistry, the attorney for the appellant, at Backlund and Mistry, P.O. Box 6490, Olympia, WA 98507, containing a copy of the Brief of Respondent, in STATE V. NGUYEN, Cause No. 66079-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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