

66335-6

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NO. 66335-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JESS SMITH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN

BRIEF OF RESPONDENT

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DIVISION I
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JESS SMITH

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A. ISSUES PRESENTED.

1. Whether the trial court properly transferred Smith's collateral attack to this Court pursuant to CrR 7.8(c)(2) where Smith failed to make a substantial showing that he is entitled to relief and his claims require no factual hearing.

2. Whether Smith's claim of double jeopardy is without merit where he continued jeopardy by successfully appealing his felony murder conviction.

3. Whether Smith's claim that retrial violated the constitutional notice requirements is without merit where there was no charging error in this case.

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

In 2000, Jess Smith was charged with the crime of felony murder in the second degree. CP 57. The information alleged that Smith caused the death of Patrick Bateman while committing the crime of assault in the second degree. CP 57.

In 2001, Smith pled guilty to the crime of murder in the second degree as charged in the information. CP 62-72. Smith was sentenced to 325 months of total confinement. CP 85.

Smith appealed his conviction. While the appeal was pending, the state supreme court issued the decision in In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), holding that the felony murder in the second degree statute in effect at that time did not allow felony murder to be predicated on the crime of assault in the second degree. This Court reversed Smith's conviction and remanded "for further proceedings consistent with Andress, Hinton, and Ramos." CP 38-39.

Upon remand, the trial court vacated the conviction for murder in the second degree. CP 13. Neither party objected. The State filed an amended information charging Smith alternatively with felony murder in the first degree and intentional murder in the second degree. CP 13. A jury convicted Smith of felony murder in the first degree and the lesser offense of manslaughter in the first degree. CP 14. On September 1, 2006, Smith was sentenced to 384 months of total confinement. CP 1-9.

On appeal, this Court affirmed Smith's conviction for felony murder in the first degree, finding that substantial evidence supported the jury's verdict. CP 19. This Court remanded for vacation of the manslaughter in the first degree conviction on double jeopardy grounds because Smith had erroneously been

sentenced on both crimes although they constituted the same offense based on the same victim for double jeopardy purposes. CP 4, 20, 26. Mandate issued on April 9, 2010. CP 10. On October 21, 2010, the trial court entered an order vacating Count II. CP 49.

On October 18, 2010, Smith filed a "Motion to Vacate Sept. 1, 2006 Judgment and Sentence," arguing that the court erred in granting the State's motion to vacate the 2001 judgment and sentence. CP 27-36. Smith argued, for the first time, that his subsequent conviction for felony murder in the first degree constituted double jeopardy. CP 32. The court transferred the motion to vacate to this Court for consideration as a personal restraint petition pursuant to CrR 7.8(c)(2). CP 100.

2. FACTS OF THE CRIME.

The facts of the crime are set forth in this Court's 2009 unpublished opinion affirming Smith's conviction for felony murder in the first degree:

In the early morning hours of September 9, 2000, Dale Bateman was viciously attacked by a group of men in the parking lot of a motel in Federal Way. Bateman was transported to a nearby hospital, where he was treated for injuries to his face and

head. Among the assailants was Shane Accetturo, who believed that Bateman had stolen approximately \$20,000 in cash and marijuana from his residence. After leaving the hospital, Bateman was contacted by his drug dealer, Matt Stoemmer, who offered to set up a drug deal between Bateman and Calvin Wilson at a restaurant in Federal Way. Unbeknownst to Bateman, the meeting was arranged so that Wilson and Smith could "question" him about Accetturo's money and drugs. Upon arriving at the restaurant later that night, Bateman, who was there with several friends, got into the back seat of Wilson's car and they drove off. And, while Wilson was supposed to return Bateman in several minutes after the drug transaction was completed, he never did.

After a missing person report was filed several days later, authorities commenced an investigation into Bateman's disappearance. Police interviewed a number of individuals, including Stoemmer, and learned that Smith and Wilson had planned to physically intimidate Bateman so that he would disclose the whereabouts of the missing drugs and money. A "BOLO" or "be on the lookout" warning for Wilson's car was entered into a police database. The vehicle was later stopped by police and impounded. The vehicle was searched after authorities obtained a search warrant. The search revealed blood in the back seat and on the inside of the passenger door window of the vehicle. Two bullet holes were also located under the rear seat cushions.

During subsequent questioning, Smith and Wilson both admitted that Bateman had been shot and killed. Upon leaving the restaurant, Wilson drove several blocks to a residential side street, where he parked the car near a vacant lot. During the trip, Bateman took a Tec 9 pistol out of his backpack and said he was ready if Accetturo decided to come after him again. Bateman then put the gun back in his backpack and zipped it shut. When Bateman asked to

see the marijuana he thought he would be purchasing, Smith grabbed Bateman's backpack with the gun, pointed his own gun in Bateman's direction and shot him four times. Bateman died shortly thereafter. After the shooting, Smith and Wilson drove to a remote area, removed Bateman's wallet, and other personal items, and dumped the body in a ravine. They also drove to a park in Auburn, where they burned Bateman's possessions, except for Bateman's gun, which Smith kept.

CP 11-13.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY TRANSFERRED SMITH'S COLLATERAL ATTACK.

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, Smith's conviction was final on April 9, 2010, when the mandate issued. CP 10. Any collateral attacks filed on or before April 9, 2011, would not be barred by RCW 10.73.090. The motion to vacate was filed on October 19, 2010, and was not untimely 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.

For the reasons set forth below, Smith has failed to make a substantial showing that he is entitled to relief. The issues presented here do not require a factual hearing. Although the motion to vacate was timely, the trial court properly transferred it to this Court for consideration as a personal restraint petition pursuant to CrR 7.8(c)(2).

2. SMITH'S FELONY MURDER IN THE FIRST DEGREE CONVICTION DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE.

Smith argues that his conviction for felony murder in the first degree is barred by double jeopardy. Smith's argument is based on a factual assertion that is not supported by the record. Smith's appeal of his felony murder in the second degree conviction continued jeopardy so that when he was granted the relief he requested, vacation of that conviction, the State was free to pursue a second prosecution.

Smith's double jeopardy claim is based on a factual assertion that is simply not supported by the record. Smith claims that double jeopardy is violated in this case, as opposed to the other cases where convictions have been obtained after a prior conviction was vacated pursuant to Andress, because it was the State who moved to withdraw the plea. However, there is no evidence in the record that this was the case. It is Smith who appealed his murder in the second degree conviction. CP 38. Smith's argument on appeal was that he was entitled to withdraw his plea. CP 38. This Court remanded for that purpose. CP 39. The order vacating the 2001 judgment and sentence simply states that vacation is ordered pursuant to Andress. CP 93. There was

no hearing held on that day. There is no evidence that the State, rather than Smith, moved to withdraw the plea, or that Smith objected to withdrawal of his plea, which was relief he requested on appeal. A defendant who asserts double jeopardy has the burden of proving that he has been twice placed in jeopardy. State v. Ridgely, 70 Wn.2d 555, 557, 424 P.2d 632 (1967); State v. Hite, 3 Wn. App. 9, 11, 472 P.2d 600, (1970). Smith has failed to meet that burden.

State v. Ervin, 158 Wn.2d 746, 749, 147 P.3d 567 (2006), is directly on point. Like Smith, Ervin's felony murder conviction was vacated pursuant to Andress. Id. On appeal, the question was whether the State could retry Ervin for aggravated murder in the first degree. Id. at 748. Ervin argued that retrial on a greater charge would violate double jeopardy. Id. at 749. The state supreme court explained that the double jeopardy clause would prevent retrial if (1) jeopardy had previously attached, (2) jeopardy had terminated, and (3) the defendant is in jeopardy a second time for the same offense. Id. at 752. Jeopardy is not terminated when the defendant files a successful appeal that results in vacation of a conviction for reasons other than insufficient evidence. Id. at 757. In other words, jeopardy is continued when the defendant

successfully appeals his conviction. Id. Because jeopardy continues and has not terminated when the defendant successfully appeals, a second prosecution for the same offense does not constitute double jeopardy. Id. at 758-59. Because Smith successfully challenged his felony murder in the second degree conviction on appeal, jeopardy did not terminate and Smith's subsequent conviction for felony murder in the first degree does not violate double jeopardy.

Smith's reliance on State v. Hall, 162 Wn.2d 901, 177 P.3d 680 (2008), is misplaced. In Hall, the defendant had been convicted of felony murder in the second degree based on assault in the second degree, but did not seek to challenge his conviction pursuant to Andress. Id. at 904-05. At the time the Andress decision was issued, Hall was near the end of his prison term and wanted to serve the remainder of his term. Id. at 905. While Hall took no action to challenge his conviction, the State filed a motion in superior court to vacate the conviction. Id. The trial court granted the motion over Hall's objection. Id.

The state supreme court held that retrial on an amended charge would violate double jeopardy, even if the retrial resulted in no additional punishment. Id. at 908. The court distinguished Hall's

case from other Andress defendants who "sought relief from their prior convictions before any action occurred." Id. at 908-09. By seeking relief from their convictions, these defendants continued jeopardy. Id. at 909. The court explained, "In a situation where a defendant seeks to gain relief, our cases recognize that the double jeopardy clause does not impose limitations on the power of the State to retry defendants who have succeeded in getting their convictions set aside." Id. at 684.

In the present case, Smith challenged his conviction on appeal, and sought relief by requesting this Court's permission to withdraw his plea. This Court granted Smith the relief he sought. On remand, the trial court vacated Smith's conviction in accordance with this Court's mandate without any objection from Smith. By seeking relief, Smith continued jeopardy and retrial was proper because Smith was successful in getting his conviction set aside. Smith's conviction for felony murder in the first degree does not violate double jeopardy principles.

3. SMITH'S FELONY MURDER IN THE FIRST DEGREE CONVICTION DOES NOT VIOLATE ARTICLE I, SECTION 22 OF THE WASHINGTON CONSTITUTION.

Smith argues that because the information to which he pled guilty was deficient pursuant to the state supreme court's subsequent decision in Andress, article I, section 22 of the Washington Constitution bars him from being retried on a greater charge. Smith's argument is without merit and must be rejected. There was no charging error in this case.

Article I, section 22 of the Washington constitution requires that a defendant be given notice of the charges against him or her. A charging document must include all essential elements of the crime charged in order to be constitutionally adequate. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). If a conviction is reversed due to the State's failure to include all essential elements of the crime in the charging document, the remedy is to dismiss the charge without prejudice. Id. at 791. The State may recharge and retry the defendant. Id.¹

¹ The State would generally be barred by the mandatory joinder rule of CrR 4.3.1(b)(3) from filing a greater charge on retrial, but in State v. Gamble, the state supreme court held that the mandatory joinder rule did not bar retrial on a greater charge for Andress cases because the Andress decision was an extraordinary circumstance. State v. Gamble, 168 Wn.2d 161, 167-75, 225 P.3d 973 (2010).

In the present case, however, Smith's conviction was not reversed because the State failed to charge all essential elements of the crime of felony murder based on assault in the second degree. Rather, Smith's conviction was reversed because the Andress decision held that felony murder in the second degree based on assault in the second degree was a nonexistent crime. State v. Gamble, 168 Wn.2d 161, 170, 225 P.3d 973 (2010). The Andress decision affected more than 25 years of convictions for second degree felony murder. Id. These convictions were "presumptively valid." Id. at 172. In considering whether the State could file different charges on retrial, the state supreme court characterized the Andress decision as an extraordinary circumstance, noting that its effect was not within the control of prosecutors. Id. at 171.²

The State did not fail to charge all essential elements of the crime of felony murder in the second degree based on assault in the second degree in 2000. Smith's conviction was not vacated

² Significantly, in Gamble, the state supreme court affirmed defendant Alexander's conviction for homicide by abuse after his second degree felony murder conviction was vacated pursuant to Andress. 168 Wn.2d at 186.

because of an insufficient charging document. Article I, section 22, did not bar retrial for murder in the first degree.

D. CONCLUSION.

The superior court properly transferred Smith's collateral attack to this Court for consideration as a personal restraint petition. Smith's collateral attack is without merit. This appeal should be converted to a personal restraint petition, and the petition should be dismissed.

DATED this 3rd 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 Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SMITH, Cause No. 66335-6-1, 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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Done in Seattle, Washington

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