

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JESS R. SMITH
APPELLANT,

vs.

STATE OF WASHINGTON,
RESPONDENT,

)
)
)
)
)
)
)
)
)
)

Cause No. 66335-6-1

MEMORANDUM OF LAW AND
STATEMENT OF ADDITIONAL
GROUNDS PURSUANT TO
RAP 10.10

- (1) The Appeals Court remanded "To the trial court for any proceedings ~~that~~ are necessary". Does this authorize Judicial action?
- (2) Does proper legal etiquette require Mr. Smith to bring this issue before the court of original conviction before seeking an extraordinary remedy as a Personal Restraint Petition?
- (3) Mr. Smith raised and objected to the legality of the error presented by the State's amended higher charges in every proceeding, does this distinguish Mr. Smith's case from State v. Toney?
- (4) Under RCW 10.73.100, Double Jeopardy issues are never time barred, and can be raised at anytime. This provides a necessary proceeding which isn't ministerial.
- (5) Mr. Smith plead to original charges and information, he did not plea down from higher charges and although no new evidence or facts supported

2011 SEP -8 AM 10:39
COURT OF APPEALS DIV I
STATE OF WASHINGTON

1 aggravated higher charges upon remand, under a "conventional filing"
2 policy the state filed higher charges and jeopardy does attach even
3 though Mr. Smith moved to withdraw his plea.
4

5
6 I. FACTS
7

8 Mr. Smith was charged with RCW 9A.32.050(1)(b), second degree felony
9 murder, with assault 2 as the predicate. Mr. Smith was never
10 charged with any higher charges and in February 2001 plead guilty as
11 charged. The deal was that the prosecution would recommend the mid-range
12 and allow for the defense to argue for the low end. The prosecution didn't
13 uphold his end of the bargain, and the Judge sentenced Mr. Smith to the
14 high end. It's very important to notice that the original charges were
15 plead to, and Mr. Smith didn't plead down. Upon receiving the high end
16 he received the maximum punishment allowed for his charge. Mr. Smith
17 appealed immediately because the state didn't recommend the middle range.

18 The state notified Mr. Smith of the Andress and Hinton decision. Gregory
19 Link raised the issue in a supplemental brief in Mr. Smith's appeal.

20 On January 31, 2005, the Appeals Court, Div. 1, allowed the state to
21 to only "Pursue such additional charges as are authorized by law". They
22 remanded to King County Superior Court for further proceedings consistent
23 with Andress, Hinton, and Ramos.

24 Upon remand at Mr. Smith's co-defendant's arraignment outside his presence,
25 the state brought a third amended information order to be signed in front
26 of Judge McDermott who signed it. Mr. Smith wasn't given a chance to
27 object.

28 On April 7, 2005, Mr. Smith's arraignment took place in front of Judge
29 Trickey. Defense counsel objected to the third information because the
30 predicate was different. Judge Trickey reserved objection for a special
31 Andress hearing. Which Mr. Smith never received. Over defense objection,
32 the third information was filed. No new evidence or facts
33 were used to support this new information or the higher charges. The old

1 defective information was used to support new higher charges never
2 originally filed. An important fact is that Mr. Smith was only charged with
3 2° felony murder and assault 2 as the predicate, and he plead guilty as
4 charged. He didn't plea down.

5 On April 17, 2006, during a pre-trial motion hearing in front of the
6 Judge Gain Mr. Smith attempted, pursuant to North Carolina v. Pearce, 395
7 US 711, 89 S.Ct 2072 (1969) to dismiss the higher charge of murder 1° with
8 kidnapping & robbery as a predicate. He pointed out the information is
9 based on the old defective information, and doesn't even give notice to
10 what he robbed or who he kidnapped. (See Proceedings April 17, 2006,
11 No. 00-1-05900-7-KNT, pgs. 46, 50-51)

12 Judge Gain asked the state to clarify Mr. Maleng's filing policy. This
13 also tried to justify the portion of the original plea agreement which
14 stated no further charges will be filed. Which didn't mean the state
15 threatened to file higher charges. It is a special policy made by King
16 County, called "conventional filing". No law supports this filing policy.
17 No notice is given either.

18 Court: Just so the record is clear Mr. Smith, Mr. Peterson, would you
19 state Mr. Maleng's policy on filing charges.

20 Mr. Peterson: Yes. Filing charges, we basically file charges based
21 on the evidence presented to the office. And any charge filed has
22 to be supported by evidence. And any charge that we go to trial, we
23 have to feel that conviction of a violent crime is likely to ensue.

24 Court: Well, I guess my question is, it has been alleged that in the
25 various counties that there are different policies on filing.
26 Allegedly, the two main policies are file what you think you can
27 prove and plea bargain down, and it's reputed to be in King County
28 that you file what you are willing to accept a plea to, and if the
29 agreement is not reached, to amend to what you think is supported
30 by the facts.

31 Mr. Peterson: And that is absolutely correct, your honor. In King
32 County we file what we call "conservative filing", and we file what
33 we believe should be the outcome of the case. If the case then goes
to trial, we may amend the charges or add additional charges, but
certainly, the initial filing decision is a very conservative one.

34 This "conventional filing" charged Mr. Smith with what the state admits
35 should be the outcome of the case. Mr. Smith plead guilty as charged. No
36 higher charges were filed until a successful remand to withdraw the plea

1 agreement. The state then over Mr. Smith's objections filed higher
2 aggravated charges of 1° murder. They never allowed him to plead down, and
3 forced him to trial where the trial court wouldn't allow a defense on the
4 1° felony murder. The jury had to convict of the 1° murder. They
5 acquitted on the 2° felony murder, and found guilt on the lesser included
6 of 1° manslaughter.

7 On September 1, 2006, at sentencing after the jury convicted. Mr. Smith
8 moved to dismiss counts 1 & 2 based on double jeopardy, the court denied
9 this motion.

10 Mr. Smith appealed, and on January 26, 2009, Div. 1, vacated count 2, 1°
11 manslaughter based on double jeopardy. Div. 1 rejected the states
12 suggested ministerial remedy which was "the conviction should remain in
13 place, but should play no part in the sentencing". The court reasoned "to
14 avoid double jeopardy problem, the judgment and sentence must reflect that
15 the defendant is convicted of only one crime and receives only one
16 sentence". This means "that vacation of the manslaughter conviction is the
17 proper remedy". This will take off 207 months plus the manslaughter
18 conviction from Mr. Smith's judgment and sentence. The appeals court
19 order to "strike the manslaughter conviction, and remand to the trial court
20 for any further proceedings that are necessary".

21 At resentencing on Oct. 21, 2010, defense counsel raised the preserved
22 issues in a CrR 7.8(b) motion. Although Mr. Smith was present at the
23 hearing, and being heard the Judge wouldn't address the merits of the
24 motion. The prosecution was under the impression that Mr. Smith must
25 receive a decrease in his prison sentence before the Judge can hear a
26 sentencing motion. Over defense objections pursuant to CrR 7.8(c)(2) the
27 trial court transferred the motion (which was properly before them) to the
28 appeals court.

29 The Petitioner makes the claim that the trial court had the authority to
30 address the motion, and the Judge wasn't bound by an ministerial act.
31
32
33

1 As in Ramos (supra), the appeals court in Mr. Smith's case directed
2 the trial court to go beyond a mere ministerial duty by their "any further
3 proceedings that are necessary", language. The court in sentencing had
4 the authority to address Mr. Smith's 7.8 motion.

5
6 (A) DOES PROPER LEGAL ETIQUETTE REQUIRE MR. SMITH TO BRING THIS ISSUE
7 BEFORE THE COURT OF ORIGINAL CONVICTION BEFORE SEEKING AN
8 EXTRAORDINARY REMEDY AS A PERSONAL RESTRAINT PETITION?

9 The Superior Court has original authority to grant whatever relief deemed
10 appropriate. Superior Court jurisdiction in habeas is mandated by the
11 constitution and the rules leave the Superior Court's jurisdiction
12 unaffected. WA.Const.Art.IV§6; Toliver v. Olsen, 109 Wn.2d 607, 746 P.2d
13 809 (1997); RCW 7.36.130. Sentencing errors such as those raised in Mr.
14 Smith's 7.8(b) can be heard at resentencing and is proper. See Brooks
15 v. Rhay, 92 Wn.2d 876, 602 P.2d 300 (1991).

16 The PRP rules only apply to proceedings initiated in the appellate
17 courts. The PRP rules "Do not supersede and do not apply to Habeas corpus
18 proceedings initiated in the Superior Court". (RAP 16.3(b)) The availabil-
19 ity of the Writ of Habeas in "superior courts". (id.)

20 CrR 7.7 didn't achieve complete unity of appellate court post-conviction
21 remedies because appellate court Habeas still existed separately.
22 Consequently, as part of the general promulgation of the rules of appellate
23 procedures in 1976, the PRP was adopted to encompass all Habeas and post-
24 conviction matters initiated in the appellate court. A PRP is an extra-
25 ordinary remedy, one should never forego an available remedy in favor of
26 a personal restraint. Mr. Smith tried, since original remand pursuant
27 to Andress and Hinton, to resolve the errors in the state's aggravated
28 amendment. The 7.8(b) filed for the October 21, 2010, resentencing is
29 proper, and the Judge has a duty to address the merits because of the
30 extreme prejudice. The court rules allow the Superior Court judge to grant
31 relief.

32 Even under Cr 60-CrR 60(b) the Superior Court **has power** to vacate
33 judgments. Washington State Supreme Court ruled these rules applicable to

1 criminal cases such as Mr. Smith's, in State v. Scott, 92 Wn.2d 209, 595
2 P.2d 549 (1979). In 1986, CrR 7.3 gave authority to allow Superior Court
3 to grant relief for "errors" in sentencing, trial, and etc... The Superior
4 Court in the instant case, due to the rare and unique circumstances
5 affecting Mr. Smith, encompass a broader range of potential claims in which
6 they can address in resentencing.

- 7
8 (i) Discretion must be used by the Superior Court when using CrR
9 7.8(C)(2) to transfer a motion to the appeals court.

10 Under Toliver, the Superior Court is required to exercise discretion
11 in an "informed manner"! (Id. at 609) Habeas proceedings are to be
12 "expeditious" and conducted "without delay". RCW 7.36.040 Especially
13 in a case such as Mr. Smith's, where speedy relief is critical, proof is
14 fairly clear, and the law deems that the Superior Court should have kept
15 the motion. Toliver makes clear that no case must be transferred; that
16 the Superior Court "may itself handle and determine the matter". (Id.
17 at 609) The error is clear the state is not allowed to charge Mr. Smith
18 with higher aggravated charges that were never charged. If the state would
19 have charged with 1° murder and Mr. Smith plead down to 2° felony murder,
20 then upon remand on a motion to withdraw plea, the state may charge the
21 original 1° murder charges. However, that is not the case and Mr. Smith
22 has been victimized by a fantasy "conventional filing" policy exclusive
23 to Mr. Maleng and King Co. prosecutors. The U.S. Supreme Court and our
24 state supreme court doesn't allow aggravating charges to be filed based
25 on original information which charged lower offenses and was plead guilty
26 as charged to by the Petitioner. Jeopardy does attach in this situation.
27 See N.C. v. Pearce, 395 US 711, 89 S.Ct 2072 (1969)(state can't charge
28 higher based on painting blacker picture with original facts on remand);
29 Taylor v. Kindelee, 920 F.2d 599, 602-04 (9th Cir. 1990)(double jeopardy
30 is not implicated by his subsequently being recharged and tried on the
31 same count); State v Schoel, 54 Wn.2d 388 (1959)(defendant may not, however,
32 be retried on an offense of a higher degree because he has implicitly been
33 acquitted of the higher degrees of the crime); Woods v. Rhay, 68 Wn.2d

1 601, 414 P.2d 601 (1966)(plea of guilty, accepted by the court, has the
2 same affect as a verdict of guilty). Mr. Smith plead guilty as charged,
3 and only upon successful appeal did the state amend the charges higher
4 than ever originally charged. Jeopardy does attach in such circumstances,
5 and the Superior Court Judge should have addressed this CrR 7.8(b) motion.

6 It's fair to all parties because if granted the prosecution may file
7 a notice of appeal pursuant to RAP 16.14(b), then on direct review have
8 a much more powerful vehicle for challenging the courts ruling. The same
9 applies to the Petitioner if the shoe is on the other foot.

10 A person can seek relief via CrR 7.8(b) without going to the appeals
11 court first. Under the metabolism of the rules and laws surrounding
12 Superior Court habeas provide the original court of conviction with the
13 proper authority to correct errors arising under the Judgment & Sentence.
14 "Every person whose liberty is restrained may prosecute a writ of habeas
15 corpus in the Superior Court to inquire to the cause of the restraint and,
16 if the restraint is found to be illegal, the person must be released."

17 RCW 7.36.010

18 Under the rules and laws of a 7.8(b) a channel is opened that allows
19 at resentencing the Superior Court judge to use Judicial Power, and that
20 by itself separates the from a ministerial hearing. Mr. Smith's motion
21 should have been addressed. Especially because the issues raised are
22 meritorious and a proceeding which is necessary to fix the severe
23 constitutional violation.

24
25 (B) MR. SMITH OBJECTED TO THE AMENDING OF ORIGINAL CHARGES AND FILED
26 MOTIONS ATTEMPTING TO RESOLVE THIS ISSUE SINCE INITIAL ADDRESS/
27 HINTON REMAND, THIS DISTINGUISHES HIS CASE FROM STATE V. TONEY.

28 In State v. Toney, 149 Wn.App 787, 205 P.3d 944 (Div.II, April 21, 2009),
29 the appeals court held that defendant may raise issues on a second appeal
30 if, on first appeal, the appellate court vacates the original sentence
31 or remands for an entirely new sentencing proceeding, but not when the
32 appellate court remands for only a ministerial correction of the original
33 sentence.

1 A big factor is that Mr. Smith's original sentence is vacated, and 207
2 months has been removed as well as an entire conviction.

3 Another huge deal is that in Toney the issue is whether Toney can raise
4 and argue issues he did not raise on his first appeal. The legal basis
5 for Toney's constitutional claims was not established at the time of his
6 first appeal.

7 The legal basis was established for Mr. Smith's issues, and he raised
8 them, and objected at every hearing. The Superior Court claimed the Supreme
9 Court wasn't clear on the proper way to handle Address/Hinton proceedings.
10 This is incorrect, and Mr. Smith preserved his issues. In Toney case law
11 developed that wasn't clear before his first appeal. Toney did preserve
12 the issues. His appellate attorney didn't raise them on direct appeal.
13 So, as proper Mr. Smith raised these issues in a CrR 7.8(b) at resentencing
14 to give the original court of conviction a chance to correct error before
15 seeking the extraordinary remedy of a Personal Restraint Petition. The
16 prosecutors try to tell the Judge that because Mr. Smith's total sentence
17 wasn't affected by the 207 months being removed that the hearing is
18 ministerial. This is incorrect, no case law has established that only when
19 time is reduced is the hearing then not ministerial, rather it depends on
20 whether the Judge has Judicial Power. In this case the Superior Court
21 under the authority of the Appeals Court, laws and rules of Superior Court
22 Habeas, had Judicial Power to address Mr. Smith's proper 7.8(b), and the
23 Judge has the power to remedy the prejudice.

24 Like in Toney, Mr. Smith's Appeals Court didn't remand for a ministerial
25 correction. The trial court could under the court rules and laws exercise
26 it's discretion in determining what the laws are, and what rights of the
27 parties are, with reference to a transaction already had, at the
28 resentencing.

29
30 (C) UNDER RCW 10.73.100 DOUBLE JEOPARDY ISSUES CAN BE RAISED AT ANYTIME,
31 THIS PROVIDES A NECESSARY PROCEEDING WHICH ISN'T NECESSARY.

32 Double jeopardy issues can even be raised once a Petitioner has been
33 time barred under RCW 10.73.090. If Double Jeopardy under RCW 10.73.100

1 provides an exception to the very powerful time barr statute then certainly
2 it provides an exception to a ministerial act.

3 Double Jeopardy is so powerful that a criminal defendant isn't
4 required to face trial when oppossing the state filing charges on Double
5 Jeopardy grounds. He or she can file for a direct appeal and trial must
6 wait while the appeals court rules on the Double Jeopardy issue.

7 Clearly with the importance that the United States Supreme Court, and
8 our own legislation have placed on Double Jeopardy errors, and the
9 exceptions swarming around this important doctrine there must be a similar
10 rule which automatically makes such an issue exempt from a ministerial bar.
11 The Superior Court has the authority and duty to resolve this issue at
12 sentencing.

13
14 (D) MR. SMITH PLEAD TO THE ORIGINAL CHARGES AND INFORMATION, HE DIDN'T
15 PLEAD DOWN FROM HIGHER CHARGES AND ALTHOUGH NO NEW EVIDENCE OR FACTS
16 SUPPORTED AGGRAVATED HIGHER CHARGES UPON REMAND, UNDER A
17 "CONVENTIONAL FILING" POLICY THE STATE FILED HIGHER CHARGES AND
18 JEOPARDY DOES ATTACH EVEN THOUGH MR. SMITH MOVED TO WITHDRAW HIS
19 PLEA.

20 Mr. Smith was originally charged with 2nd degree felony murder with
21 assault 2 as the predicate. The second amended information filed Oct. 20,
22 2000, only added co-defendant Shane N. Acceturro. Under
23 the states "conventional filing" policy Mr. Smith plead guilty as charged.
24 Mr. Smith didn't bargain down, he pled guilty as charged because the
25 prosecutor said he would request the mid-range then allow the defense to
26 argue for the low end. At sentencing the state didn't request mid-range.
27 Mr. Smith appealed on these grounds. The state gave Mr. Smith notice on
28 Andress/Hinton decision. Appeals attorney Greg Link added supplemental
29 briefing addressing this issue.

30 On January 31st, 2005, Appeals Court ordered that "the state may pursue
31 such additional charges as are AUTHORIZED BY LAW. See State v. Ramos.

32 On April 5, 2005, at Mr. Smith's co-defendants arraignment, and outside
33 Mr. Smith's presence, the state filed a "Motion and Order permitting
filing of a third amended information". The reason for

1 this amendment says "pursuant to In re Andress... In re Hinton... State v.
2 Ramos".

3 The state is bound by law to charge only the same type of offense or
4 lesser. When no new evidence or facts emerged justifying the filing of
5 amended aggravated higher charges, and the state charged Mr. Smith with 1st
6 degree felony murder with two new predicates jeopardy reattaches.

7 If the state would have charged the same or lesser jeopardy would not
8 reattach. However, that is not the case. The state amended upon remand
9 unlawful charges higher than originally charged and convicted upon. The 1st
10 degree murder conviction because of this violates Double Jeopardy and must
11 be dismissed, or in the alternative the defective information must be
12 dismissed without prejudice, and the state must file lawful charges.

13
14 (i) King County has an illegal "conventional filing" policy.

15
16 On April 17, 2006, prosecutor Mr. Peterson explained Norm Maleng made up
17 a filing policy called "conventional filing". See April 17, 2006, Motions
18 Hearing No. 00-1-05900-7 KNT at pgs. 50-51.

19 The state admitted they filed what "they believed should be the maximum
20 outcome of the case". Then if Mr. Smith wouldn't plead guilty as charged
21 they would amend charges higher or file further charges to force the plea.
22 The distinction between amending higher charges and filing further charges
23 is made under their policy.

24 Because Mr. Smith plead guilty as charged under this policy he plead to
25 what the state admits the outcome of his case should be. Also because he
26 plead guilty to original charges no amended higher charges or further
27 charges would be filed against Mr. Smith not as a bargain down, but merely
28 as part of the Maleng policy. No bargain was made to benefit Mr. Smith.

29
30 (ii) Plea rules CrR 4.2 demand the state verbally make record at plea
31 hearing of any bargain down.

32 Under CrR 4.2(e) any form of bargain down must be filed with the court
33 before the plea is entered.

1 Under RCW 9.94A.431 the prosecutor's agreement to reduce charges as part
2 of plea agreement is subject to the courts acceptance in "the interest
3 of justice". Pursuant to RCW 9.94A.421 the prosecutor must verbally
4 notify the court at the plea hearing of the nature of the agreement. Any
5 reduction of charges must be stated on record. The Judge must make a
6 determination of whether plea ramifications and specifications are
7 according to the interest of justice. It must be stated on record what
8 what the prosecution is promising to do.

9 There is no filing before Mr. Smith's plea hearing showing a dismissal
10 of charges or reduction. Even at the plea hearing it was made clear
11 Mr. Smith plead guilty as charged to the original information.

12 The state may argue that because in the statement of plea of guilt the
13 state may note that they wouldn't file any additional charges that this
14 is a benefit.

15 This logically fails because (1) it is only placed on the agreement
16 by default once Mr. Smith plead guilty as charged because of the King
17 County "coventional filing" policy. Mr. Peterson voiced once defendant
18 pleads guilty, King County, per policy will not amend charges or file
19 further charges. This isn't something agreed to by defendant and state
20 to lead Mr. Smith into a plea. It is an automatic action based on King
21 County policy. It get's written on the plea automatically. (2) Under
22 the "conventional filing" policy amending higher charges and filing further
23 charges are separated. On the plea agreement the state said they wouldn't
24 file further charges meaning the same or lesser, not higher. (3) Higher
25 charges were never filed, or dismissed, nor reduced. Mr. Smith plead
26 guilty as charged and this is equivalent to a conviction by jury. Woods
27 v. Rhay, 68 Wn.2d 601, 414 P.2d 64 (1966).

28 State charged with 2° murder and assault as the predicate. Mr. Smith
29 plead guilty as charged. The factual basis supports Mr. Smith's plea
30 to original charges. The state upon remand was only allowed to charge
31 same or lesser charges. The original information and factual basis of
32 the plea are not "inextricably bound up together". Ellis v. US Dist.
33 Court, 356 F.3d 1198, 1205 (9th Cir. 2001). The plea is still binding

1 and the state violated Mr. Smith's substantive due process rights, and
2 jeopardy reattached once the state aggravated the charges to 1° murder.
3 This also violated Division One's order to only pursue lawful additional
4 charges.

5
6 (iii) No new evidence or facts supported amendment. The state only
7 painted a blacker picture with defective old facts.

8 Since Mr. Smith plead guilty as charged the state can only charge if
9 new evidence or facts came to light since trial. Then the state must
10 prove due diligence. This isn't the case, and the state used the same
11 facts they had originally to amend two new predicates and higher charges.
12 Mr. Smith and his attorney objected. Although the trial court judges
13 kept claiming they have no guidance in how Mr. Smith should be charged
14 the US Supreme Court, and Washington State Supreme Court have been very
15 clear for over forty years. In N.C. v. Pearce, 395 US 711, 89 S.Ct 2072,
16 23 L.Ed.2d 656 (1969) the court held that, absent some proper reason the
17 state can't impose a longer sentence than originally agreed to in plea
18 agreement. Even upon a successful remand for withdrawal of plea. In
19 US v. Coke, 404 F.2d 836 (2nd Cir. 1968) they held it legal for the state
20 to amend charges based on painting a blacker picture using the same facts
21 as originally charged. The Pearce court overruled this, holding it is
22 not legal to paint a blacker picture from original facts to amend charges
23 higher than originally charged. This is exactly what the court did in
24 Mr. Smith's case, and Mr. Smith even objected to this in the April 17,
25 2006, motions hearing (see Hearing pg. 46). See also Diaz v. US, 223
26 US 442 (1912).

27 The state's amendment is unconstitutional, and jeopardy reattached
28 as soon as the state amended the charges and plead to 2° felony murder
29 with assault 2 as predicate.

30
31 (iv) Mr. Smith's case is distinguish from Taylor And Barker because
32 he plead guilty as charged.

33 In Taylor v. Kincheloe, 920 F.2d 599, 604 (9th Cir. 1990) and US v.

1 Barker, 681 F.2d 589, 590-92 (9th Cir. 1982). Both Taylor and Barker
2 were charged with higher charges and plead down. Upon successfully
3 withdrawing their plea the state reinitiated original charges. Taylor
4 and Barker challenged on Double Jeopardy. The court held that where the
5 defendant has the plea set aside, however, the rule is that Double Jeopardy
6 is not implicated by being recharged and "tried on that same court".
7 Taylor at 602; Barker at 590-92.

8 Washington courts use the same reasoning because plea of guilty,
9 accepted by the court, has the same effect as a verdict of guilty. Woods
10 at 601. Upon successful appeal on any ground other than insufficiency
11 of evidence of evidence, the defendant may be retried for the convicted
12 offense or any lesser. Defendant may not, however, be retried on an
13 offense of a higher degree because he has implicitly been acquitted of
14 the higher degrees of the crime. See State v. Schoel, 54 Wn.2d 388, 341
15 P.2d 481 (1959); State v. Powell, 34 Wn.App 791 (1983 Div. 1).

16 It is true that jeopardy doesn't attach when upon a defendant's
17 successful withdrawal of a plea agreement, the state charges the same or
18 lesser. However, Mr. Smith's case isn't anything like Taylor and Barker
19 because he plead guilty as charged, and upon remand the state amended
20 charges beyond the same. Under these unique facts jeopardy does attach,
21 and the 1° felony murder conviction is double jeopardy.

22 Also interesting to note is the plethora of cases in State v. Gamble,
23 168 Wn.2d 161, 225 P.3d 973 (2010), an Andress/Hinton/Ramos remand. Every
24 one of these cases were recharged with same charges or lesser, not one
25 received higher charges than originally charged like Mr. Smith did. Mr.
26 Smith's case is extremely prejudicial and the murder in the 1° must be
27 dismissed, or because the information is defective charges could be
28 dismissed without prejudice and the state could refile same or lesser
29 charges.

30 The correct course of action would have been for the state to charge
31 Mr. Smith with 2° intentional murder, or manslaughter from the intentional
32 murder. Instead the state forced Mr. Smith to trial on aggravated charges.
33 Never originally charged, and offered no plea agreement. Mr. Smith should

1 have never been subjected to the 1° murder. If the state would have
2 followed the law Mr. Smith would have went to trial on 2° murder with
3 1° manslaughter as a lesser included. The jury would have acquitted on
4 the murder, and Mr. Smith would have received the manslaughter. Instead,
5 they forced him to trial on illegal charges, and wouldn't allow Mr. Smith
6 any defense on the 1° murder, and Mr. Smith was found guilty of
7 manslaughter and 1° felony murder. This is a constitutional violation
8 to proper notice, and double jeopardy.

9
10 (E) BECAUSE MR. SMITH'S FACTUAL BASIS SUPPORTED SAME OR LESSER CHARGES
11 THE 2° ASSAULT WAS STILL BINDING UPON REMAND.

12 In State v. DeRosia, 124 Wn.App 138 (2004), DeRosia entered into an
13 Alford Plea to 2° felony murder with 2° assault as predicate. The state
14 offered DeRosia no reduction in charges, just like the instant case.
15 Instead the state offered leniency in the court, and DeRosia like Mr.
16 Smith plead guilty as originally charged in hopes of receiving the low
17 end. DeRosia was remanded on Andress/Hinton, and withdrew the plea
18 bargain. The DeRosia court held that Andress compels the plea to be set
19 aside, unless it can be determined that by pleading guilty a petitioner
20 may be resentenced for a lesser included offense based on his statement
21 of guilty. Unfortunately DeRosia entered into an Alford plea, so no
22 factual basis supported lesser charges. Mr. Smith didn't enter into an
23 Alford plea, and his factual basis does support and 2° assault or some
24 other lesser charge. The 2° assault predicate was plead to and Mr. Smith
25 admitted committing the 2° assault in his statement of guilt on the record
26 just as CrR 4.2 requires. Pursuant to RCW 9.94A.421 the prosecutor
27 notified the court on record the nature of the agreement. This included
28 that Mr. Smith reads into the record that he committed an 2° assault,
29 and a murder resulted from this assault. The Judge accepted the plea
30 agreement in the iterest of justice. The Appeals Court remanded the 2°
31 murder because it is a non-existent crime with 2° assault as the predicate.
32 The 2° assault isn't a non-existent crime and is a lesser included of
33 of 2° felony unintentional murder. The 2° assault is still valid upon

1 remand. The original information and factual basis of the plea are still
2 valid for the same or lesser included charges. Just because the agreement
3 is no good doesn't mean the plea meets the same fate. The plea agreement
4 and the plea are not "inextricably bound up together". See Ellis at 1205
5 (supra).

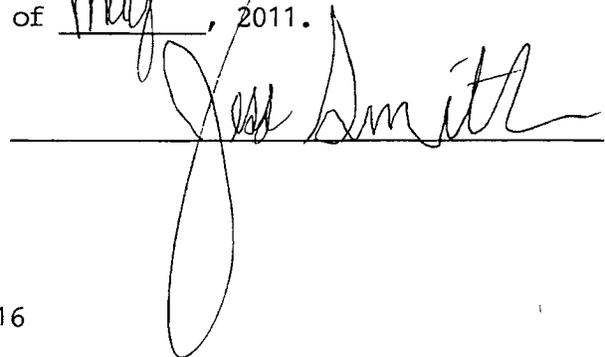
6 If DeRosia's facts were like Mr. Smith's the appeals court would have
7 remanded with instruction to charge with the lesser. Mr. Smith's trial
8 court Judge had plenty of guidance in how to handle Mr. Smith's remand.
9 Instead the trial judge ignored the law and allowed the prosecution to
10 violate Mr. Smith's due process rights, and violate the Appeals Court
11 order. Mr. Smith should be remanded and charged with a lesser like 2°
12 assault which is binding, and never void. Mr. Smith had the choice to
13 keep that valid portion of his plea.

14
15 (F) CONCLUSION

16
17 Clearly due to the magnitude of Mr. Smith's serious unconstitutional
18 prejudicial errors, the resentencing Judge has discretion to cure these
19 wounds by addressing Mr. Smith's CrR 7.8 which is also proper court
20 etiquette based on the rules and laws governing state habeas and collateral
21 attack. The Judge is not bound by some ministerial order the Appeals
22 Court gave the leeway for Judicial Power to be exercised. The double
23 jeopardy claim is so powerful that clearly some exception can be given
24 that allows the trial judge to fix the error.

25 Please transfer Mr. Smith's CrR 7.8 back down to the trial court with
26 instructions for additional briefing, and for the judge to reach the
27 merits.

28
29
30 Respectfully submitted this 18th day of May, 2011.

31
32
33


DECLARATION OF SERVICE BY MAIL

GR 3.1(c)

I, Jess Smith, declare that, on this 6 day of Sept., 2011. I deposited the forgoing documents:

S.A.G. 10-10 16 PUMAS

or a copy thereof, in the internal legal mail system of

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 SEP - 8 AM 10:39

And made arrangements for postage, addressed to: (name & address of court or other party.)

Div. One Ct. of Appeals
One Union Square 600 University St.
Seattle, WA. 98101

KING Co. Prosecutors Office
Appeals Division 516 3rd Ave # W554
Seattle, WA. 98104-2362

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

Dated at Clallam Bay, WA. on Sept. 6, 2011
(City & State) (Date)

Jess Smith
Signature

Jess Smith
Type / Print Name

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66335-6-I
v.)	
)	
JESS SMITH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF SEPTEMBER, 2011, I CAUSED A TRUE COPY OF THE **PRO SE MEMORANDUM OF LAW AND STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
--	---	-------------------------------------

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF SEPTEMBER, 2011.

X _____ 

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP 9 PM 4:57

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710