

67239-8

67239-8

No 67239-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ALLEN DUNN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael C. Hayden

BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
STATE OF WASHINGTON
COURT OF APPEALS DIVISION ONE
2011 SEP 13 PM 4:55

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE2

D. ARGUMENT 4

 1. THE IMPOSITION OF AN EXCEPTIONAL SENTENCE
 BASED ON THE SEXUAL MOTIVATION FINDING
 VIOLATED THE FIFTH AMENDMENT PROHIBITION
 AGAINST DOUBLE JEOPARDY..... 4

 2. THE TRIAL COURT ERRED WHEN IT ENTERED
 JUDGMENT ON DUNN’S CONVICTIONS THAT VIOLATED
 THE FIFTH AMENDMENT PROHIBITION AGAINST DOUBLE
 JEOPARDY 10

 a. The trial court entered judgment on Dunn’s convictions that
 violated double jeopardy..... 10

 b. The remedy is reversal and remand for entry of a judgment
 in which the convictions that violate double jeopardy are
 vacated from the judgment 12

E. CONCLUSION 13

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Personal Restraint of Strandy</u> , 171 Wn.2d 817, 256 P.3d 1159 (2011)	12, 13
<u>State v. Bobic</u> , 140 Wn.2d 250, 996 P.2d 610 (2000)	4
<u>State v. Freeman</u> , 153 Wn.2d 735, 108 P.3d 753 (2005)	6, 11
<u>State v. Kelley</u> , 168 Wn.2d 72, 226 P.3d 773 (2010)	7, 9
<u>State v. Roybal</u> , 82 Wn.2d 577, 512 P.2d 718 (1973)	5, 6
<u>State v. Sutherby</u> , 165 Wn.2d 870, 204 P.3d 916 (2009)	10
<u>State v. Turner</u> , 169 Wn.2d 448, 238 P.3d 461 (2010)	12
<u>State v. Womac</u> , 160 Wn.2d 643, 160 P.3d 40 (2007)	11, 12, 13

Washington Court of Appeals Decisions

<u>State v. Trujillo</u> , 112 Wn. App. 390, 49 P.3d 935 (2002)	12
-----------------------------------------------------------------------	----

United States Supreme Court Decisions

<u>Alabama v. Smith</u> , 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)	5
<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	6, 7
<u>Benton v. Maryland</u> , 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)	4
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)	6
<u>Blockburger v. United States</u> , 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)	5, 7
<u>Green v. United States</u> , 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)	5, 6
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)	5
<u>Ring v Arizona</u> , 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)	7
<u>Sattazahn v. Pennsylvania</u> , 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003)	7

<u>United States v. Dixon</u> , 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993)	5
--------------------------------------------------------------------------------------------	---

United States Constitutional Provisions

U.S. Const. amend. V	1, 2, 4, 7
U.S. Const. amend. XIV	4

Statutes

9.94A.030	8
Laws of 1995, Ch. 129, § 1	8
RCW 9.94A.525	8
RCW 9.94A.533	8
RCW 9.94A.535	9
RCW 9.94A.835	8

A. ASSIGNMENTS OF ERROR

1. The imposition of an exceptional sentence on count I violated the Fifth Amendment prohibition against double jeopardy.

2. The trial court erred in failing to vacate and strike from the judgment and sentence Dunn's convictions which violated double jeopardy.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The double jeopardy clause of the Fifth Amendment is violated when multiple punishments are imposed for the same conduct. Absent clear legislative intent for multiple punishment, a sentence imposed in violation of double jeopardy must be vacated. The Legislature has provided that a sexual motivation special verdict may be the basis for an exceptional sentence, but has not declared such a sentence to be mandatory. Dunn was convicted of kidnapping in the first degree with a finding that the offense was committed with sexual motivation. Based on this finding and Dunn's conviction for another sex offense, Dunn's offender score was tripled, elevating the maximum punishment that could be imposed from 75 to 89 months incarceration. Where the trial court also imposed an exceptional sentence, did the sentence imposed violate double jeopardy prohibitions? (Assignment of Error 1)

2. When multiple convictions have been entered in violation of the Fifth Amendment's prohibition against double jeopardy, the remedy is to wholly vacate the convictions. Where the judgment and sentence reflects that the convictions have been entered, then the convictions are not wholly vacated. Did the trial court err in entering judgment on multiple convictions that were obtained in violation of double jeopardy prohibitions? (Assignment of Error 2)

C. STATEMENT OF THE CASE

Appellant Richard Dunn was convicted by a King County jury on November 8, 2004, of kidnapping in the first degree, child molestation in the first degree, and six counts of possession of depictions of minors engaged in sexually explicit conduct. CP 23, 29. The jury found by special verdict that the kidnapping and possession of depiction of minors had been committed with sexual motivation. CP 24. The jury was also instructed on the aggravating circumstances of deliberate cruelty and particularly vulnerable victim, and answered these verdicts in the affirmative. Id. The court imposed an exceptional sentence of 360 months in prison. CP 26.

Dunn challenged his convictions on the merits as well as his sentence on direct appeal. His appeal was unsuccessful, but Dunn

prevailed in a subsequent personal restraint petition (PRP) in having his sentence vacated on several grounds. CP 37-43. Specifically, the Court concluded that Dunn's multiple convictions for possession of depictions of minors engaged in sexually explicit conduct violated double jeopardy prohibitions against multiple charges for a single unit of prosecution, that trial counsel had been ineffective for failing to argue that Dunn's convictions for kidnapping in the first degree with sexual motivation and child molestation in the first degree were the same criminal conduct, and that the exceptional sentence was invalid because it was imposed based upon improperly-submitted aggravating circumstances, i.e., the deliberate cruelty and vulnerable victim allegations. Id.

On remand, Dunn noted that because of the sexual motivation allegations and findings, his offender score was tripled. CP 51-52. This tripling of his offender score resulted in an increase of the standard sentence range for the kidnapping count from 57-75 months to 67-89 months incarceration. Dunn contended that in light of this increase in punishment, to then impose an exceptional sentence based on this same finding would violate double jeopardy. CP 51-52.

The trial court rejected this argument and imposed an exceptional sentence of 250 months on count I, exceeding the otherwise-available statutory maximum by 161 months.¹ CP 105. Dunn appeals. CP 101-114.

D. ARGUMENT

1. THE IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED ON THE SEXUAL MOTIVATION FINDING VIOLATED THE FIFTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY.

The double jeopardy clause of the United States Constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. V. The Fifth Amendment’s double jeopardy protection is applicable to the States through the Fourteenth Amendment.² Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the

¹ The court did not enter findings of fact and conclusions of law in support of its exceptional sentence.

² Washington’s constitution provides that no individual shall “be twice put in jeopardy for the same offense.” Wash. Const. art. 1, § 9. This Court gives Article I, section 9 the same interpretation as the United States Supreme Court gives to the Fifth Amendment. State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). The double jeopardy clause was designed to prevent the government, with all its resources and power, from repeatedly attempting to convict an individual for an offense, thereby subjecting him to embarrassment, expense, and anxiety. State v. Roybal, 82 Wn.2d 577, 579, 512 P.2d 718 (1973) (citing Green v. United States, 355 U.S. 184, 190, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)).

To determine if separate prosecutions violate double jeopardy prohibitions, the courts utilize the Blockburger, or “same elements” test. United States v. Dixon, 509 U.S. 688, 697, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

The applicable rule is that 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 or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304; 52 S.Ct. 180, 76 L.Ed. 306 (1932); Dixon, 509 U.S. at 696. Two offenses are the same offense for purposes of double jeopardy analysis when one offense is necessarily included within the other and, in the

prosecution for the greater offense, the defendant could have been convicted of the lesser. Roybal, 82 Wn.2d at 582. Thus, conviction or acquittal on a lesser included offense bars the government from prosecuting the defendant for the greater offense. Green, 355 U.S. at 190-91. Likewise, while the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. State v. Freeman, 153 Wn.2d 735, 770-71, 108 P.3d 753 (2005).

In Apprendi and Blakely, the Court clarified the long-standing requirement that any fact that increases the maximum punishment faced by a defendant must be submitted to a jury and proved beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This is true even when the fact is labeled a “sentencing factor” or “sentence enhancement” by the Legislature. Blakely, 542 U.S. at 306-07; Apprendi, 530 U.S. at 482-83.

The United States Supreme Court addressed aggravating factors that permitted the court to impose the death penalty rather than life imprisonment in Ring v Arizona, 536 U.S. 584, 122 S.Ct.

2428, 153 L.Ed.2d 556 (2002). The Court held that “aggravating circumstances that make a defendant eligible for the death penalty or an exceptional sentence ‘operate as the functional equivalent of an element of a greater offense.’” Ring, 536 U.S. at 609 (quoting Apprendi, 530 U.S. at 494 n.19).

The aggravating factors that make a defendant eligible for the death penalty also operate as elements of a greater offense for purposes of double jeopardy. Sattazahn v. Pennsylvania, 537 U.S. 101, 111-12, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). In fact, in Sattazahn, Justice Scalia, writing for a plurality of the Court, found “no principled reason to distinguish” between what constitutes an offense for purposes of the Sixth Amendment right to a jury trial and what constitutes an offense for purposes of the Fifth Amendment’s Double Jeopardy Clause. 537 U.S. at 111.³

In the absence of clear legislative intent for multiple punishment, the Blockburger test applies. State v. Kelley, 168 Wn.2d 72, 77, 226 P.3d 773 (2010). In Kelley, the Court

³ Justice Scalia wrote the plurality opinion for the Court, in which he was joined by Justices Kennedy, Rehnquist and Thomas, except as to part III of the opinion, in which he was joined by Justices Rehnquist and Thomas. 537 U.S. at 103. Justice O’Connor filed a separate opinion concurring in the judgment, but rejecting section III of the Court’s opinion, based on her belief that Apprendi was wrongly decided. 537 U.S. at 117. In light of the Court’s subsequent decisions interpreting and applying Apprendi, it can no longer be said Sattazahn’s construction of Apprendi was an improper application of the Sixth Amendment right to jury trial.

considered whether, in a case where use of a firearm was an element of the offense, the imposition of a firearm enhancement pursuant to Legislative Initiative 159, the “Hard Time for Armed Crime” act violated double jeopardy prohibitions. In enacting the statute, the Legislature declared its intent to “provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms.” Laws of 1995, Ch. 129, § 1. The Legislature also explicitly provided for multiple punishment by declaring that in every instance in which a jury returned a firearm special verdict, the imposition of a sentence enhancement would be mandatory. See RCW 9.94A.533(3)(e).

In the context of a sexual motivation allegation, according to statute, the prosecutor “shall file a special allegation of sexual motivation in every criminal case other than sex offenses.” RCW 9.94A.835(1). If the jury returns a finding that a felony was committed with sexual motivation, then the crime is a sex offense. See former RCW 9.94A.030(38)(c). The defendant’s offender score is then tripled for each other current or prior sex offense, see former RCW 9.94A.525(9), effectively increasing the maximum punishment based solely on the sexual motivation finding.

According to a different statutory subsection, the sexual motivation finding also may be a basis for an exceptional sentence. Former RCW 9.94A.535. The decision whether to impose such a sentence, however, is left entirely to the discretion of the trial court. The Legislature has not declared such a sentence to be mandatory, and it is silent on the question whether an exceptional sentence should be imposed where an offender's SRA offender score is tripled.

In Kelley, the Legislature declared its intent for multiple punishment by mandating sentencing enhancements upon entry of a firearm special verdict. Here, however, in lieu of a clear expression of legislative intent for multiple punishments, the Legislature has instead determined that the decision whether additional punishment in the form of an exceptional sentence should be imposed should be vested in the trial court. While such a sentence may not always violate double jeopardy prohibitions, where, as here, an offender suffers increased punishment based upon the tripling provisions of the SRA as well as an exceptional sentence based upon the same factual finding, he is suffering multiple punishments for the same conduct. This Court should conclude the exceptional sentence violates double jeopardy.

2. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT ON DUNN'S CONVICTIONS THAT VIOLATED THE FIFTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY.

a. The trial court entered judgment on Dunn's convictions that violated double jeopardy. Relying on State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009), in Dunn's PRP the Court of Appeals held that five of Dunn's convictions for possession of child pornography violated double jeopardy prohibitions because the several counts constituted the same unit of prosecution. CP 37-38. The State conceded error on this issue and the Court vacated five of the six convictions. CP 38.

On remand, however, the State merely stated that "Washington law has changed regarding a number of the sentencing issues." RP 9. The judgment and sentence reflected that Dunn's convictions that should be vacated, but nonetheless listed those convictions on its face. RP 43; CP 119-20, 126. Specifically, the judgment and sentence noted (1) that Dunn had been found guilty of Counts III – VIII, "Possessing Depiction of Minors Engaged in Sexually Explicit Conduct"; (2) the sexual motivation finding with regard to those counts; (3) Dunn's standard sentence ranges for those counts; and (4) that the jury made

findings of fact and the court conclusions of law with regard to the exceptional sentence imposed on those counts. CP 120. The court, in fact, entered judgment on the counts that violated double jeopardy: “It is adjudged that the defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A...” Id.

The Washington Supreme Court has held the protections of the state constitutional provision are coextensive with the protections provided by the federal constitution. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). If two convictions violate double jeopardy protections, the remedy is to vacate the conviction for the crime that forms part of the proof of the other. Freeman, 153 Wn.2d at 777.

In State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), the Supreme Court held that a trial court that has determined multiple convictions violate double jeopardy has an affirmative obligation to vacate from the judgment convictions which have been found to violate double jeopardy prohibitions. Id. at 659-61. The trial court has this duty even if it has not imposed sentence on the count that offends double jeopardy. Id. “[C]onvictions may not stand for all offenses where double jeopardy protections are violated.” Id. at 658 (emphasis in original, citation omitted); see also State v.

Trujillo, 112 Wn. App. 390, 411, 49 P.3d 935 (2002) (“where the jury returns a verdict of guilty on each alternative charge, the court should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense”).

The Supreme Court reaffirmed its holding in Womac in State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010) and In re Personal Restraint of Strandy, 171 Wn.2d 817, 256 P.3d 1159 (2011). In Strandy, the Court reiterated that “[w]hen a conviction violates double jeopardy principles, it must be wholly vacated.” 256 P.3d at 1160.⁴ The Court in Strandy explained:

It is clear when the judgment and sentence is read in conjunction with the information that Strandy was convicted twice for each homicide (aggravated murder and felony murder). The double jeopardy violation is therefore evident on the face of the judgment and sentence, making Strandy's collateral challenge on this issue timely.

Id. at 1160-61.

b. The remedy is reversal and remand for entry of a judgment in which the convictions that violate double jeopardy are vacated from the judgment. Here, likewise, it is clear when the judgment and sentence is read in conjunction with the information

⁴ At the time of this writing, pin citations to the Washington Supreme Court Reporter were not available.

in Dunn's case that Dunn was convicted for multiple counts of child pornography, making the double jeopardy violation evident on the face of the judgment and sentence.⁵ The judgment and sentence was contrary to the holdings of Womac and Strandy and this matter should be remanded for entry of a judgment and sentence that does not violate double jeopardy prohibitions.

E. CONCLUSION

For the foregoing reasons, this Court should vacate the exceptional sentence imposed and remand for a standard range sentence. In addition, this matter should be remanded for correction of the judgment and sentence.

DATED this 15th day of September, 2011.

Respectfully submitted:

Susan F. Wilk by PWink (#7780)
SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

⁵ This error was sufficient for the Court to grant Strandy's otherwise time-barred PRP; in Dunn's case, which is a direct appeal, the standard for relief is not so onerous.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67239-8-I
v.)	
)	
RICHARD DUNN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF SEPTEMBER, 2011, 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> RICHARD DUNN 876899 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 1839 AIRWAY HEIGHTS, WA 99001	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF SEPTEMBER, 2011.

X _____ 

FILED
DIVISION ONE
COURT OF APPEALS
STATE OF WASHINGTON
2011 SEP 15 PM 4:55

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