

67239-8

67239-8

NO. 67239-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ALLEN DUNN,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIAN M. McDONALD
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Whether the trial court's imposition of an exceptional sentence based upon the jury's sexual motivation finding violated double jeopardy.

2. Whether Dunn has failed to show a double jeopardy violation given that the trial court unconditionally vacated five of his convictions for possession of child pornography.

B. STATEMENT OF THE CASE

On June 20, 2001, Dunn grabbed six-year-old D.C., put him in his car, and took him to his apartment. CP 35. Dunn molested D.C. and hit him with a belt. CP 35-36. The next day, the police broke into Dunn's apartment and found D.C. tied up on a bed. CP 36. Dunn's semen was later found on D.C.'s underpants and on his perineum. Id. Child pornography was found on Dunn's computer. Id.

The State charged Dunn with one count of first-degree kidnapping, one count of first-degree child molestation and six counts of possession of depictions of minors engaged in sexually explicit conduct, more commonly known as possession of child pornography. CP 16-20. With respect to the kidnapping and the

possession of child pornography counts, the State alleged an aggravating circumstance that Dunn committed the crimes with sexual motivation. Id. On the kidnapping and child molestation counts, the State also alleged aggravating circumstances of deliberate cruelty and particularly vulnerable victim. Id.

In November of 2004, the jury returned verdicts of guilty on all charges and found all of the aggravating circumstances alleged on each count. CP 36, 69. The trial court imposed exceptional sentences of 360 months on the kidnapping and child molestation convictions, and exceptional sentences of 60 months on the possession of child pornography convictions. Id.

Dunn appealed. On April 23, 2007, in an unpublished opinion, this Court affirmed Dunn's convictions and exceptional sentences. CP 94-100.

Dunn then filed a personal restraint petition, asserting numerous challenges to his convictions and sentence. The Court granted Dunn relief on several issues. CP 35-43. First, the Court held (and the State conceded) that based upon the recent case of State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009), Dunn's six convictions for possession of child pornography violated double jeopardy. CP 37-38. The Court vacated five of the convictions.

CP 38. The Court further held that Dunn's convictions for first-degree kidnapping and first-degree child molestation constituted the "same criminal conduct" under the Sentencing Reform Act ("SRA"). CP 38-40. Finally, the Court concluded that, at the time of trial, the trial court did not have authority to submit the deliberate cruelty and particularly vulnerable victim aggravating circumstances to the jury. CP 40-43. The Court remanded the case for re-sentencing, and expressly recognized that the trial court could still consider the sexual motivation aggravating circumstance. CP 43.

At the re-sentencing hearing on June 3, 2011, the parties agreed that Dunn's offender score on the first-degree kidnapping charge was 3 and that he faced a standard range of 67 to 89 months. CP 45, 71. This offender score was based upon Dunn's other current conviction for a sex offense: the remaining count of possession of child pornography. CP 119-20. Dunn argued that the imposition of an exceptional sentence on the kidnapping conviction would violate double jeopardy because the sexual motivation finding also had the effect of increasing his offender score. CP 51-53; RP 14-18. The trial court rejected this argument and imposed an exceptional sentence of 250 months on the

first-degree kidnapping conviction and an exceptional sentence of 60 months on the remaining conviction for possession of child pornography. CP 119-24.

The court explained that Dunn's offender score "really played no part in my exceptional sentence decision, nor did I think it is of consequence today." RP 22-23. Instead, the court explained, "What carried the day were the facts of the abduction, how it was done, and what was done to [D.C.] during the course of the abduction and what it did to the community and what it did to the family." RP 23.

C. ARGUMENT

1. THE TRIAL COURT'S IMPOSITION OF THE EXCEPTIONAL SENTENCE DID NOT VIOLATE DOUBLE JEOPARDY.

Dunn argues that the trial court's reliance on the sexual motivation finding to impose an exceptional sentence violated double jeopardy because this sexual motivation finding also resulted in an increase of his offender score. However, the legislature clearly intended that both sentencing consequences result from a jury's finding of sexual motivation on a single criminal

charge. Dunn's double jeopardy challenge to his exceptional sentence is without merit.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that “[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.” Article I, section 9 of the Washington State Constitution provides that “[n]o person shall ... be twice put in jeopardy for the same offense.” The two clauses provide the same protection. State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). Among other things, the double jeopardy clauses bar multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); Kelley, 168 Wn.2d at 76. “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). If the legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause. Id. at 368.

Dunn claims that he has suffered multiple punishments because the sexual motivation finding on his first-degree

kidnapping conviction increased his offender score and provided a basis for his exceptional sentence. However, Dunn cites no authority that double jeopardy is offended when the legislature provides for multiple sentencing consequences based upon a single conviction or jury finding. Instead, the double jeopardy cases cited by Dunn involve *multiple* convictions or *multiple* findings, and the issue addressed is whether the legislature intended that the defendant be punished for the multiple convictions and/or findings. See, e.g., Kelley, 168 Wn.2d at 76-83 (rejecting double jeopardy claim based upon punishment for firearm enhancement and second-degree assault).

The fact that the legislature provides for multiple consequences stemming from a single conviction or finding does not constitute a double jeopardy violation. "It is not at all uncommon, for example, for Congress or a state legislature to provide that a single criminal offense may be punished both by a monetary fine and by a term of imprisonment. In that situation, it could not be seriously argued that the imposition of both a fine and a prison sentence in accordance with such a provision constituted an impermissible punishment." Whalen v. United States, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980). Here, a review

of the relevant statutes reveals that the legislature intended the multiple consequences arising from the sexual motivation finding.

Under RCW 9.94A.835(1), the prosecuting attorney “shall file a special allegation of sexual motivation in every criminal case, felony, gross misdemeanor, or misdemeanor, other than sex offenses as defined in RCW 9.94A.030, when sufficient admissible evidence exists, which... would justify a finding of sexual motivation by a reasonable and objective fact finder.” The prosecutor may not withdraw the sexual motivation allegation without approval of the court. RCW 9.94A.835(3).

A sexual motivation finding has several consequences under the SRA. It qualifies as an exceptional sentence aggravating circumstance. RCW 9.94A.535(3)(f). A sexual motivation finding also means that the conviction qualifies as a “sex offense,” and numerous consequences result from that designation. RCW 9.94A.030(46)(c). Due to the “sex offense” designation, the individual is not eligible for various sentencing alternatives. See RCW 9.94A.650; RCW 9.94A.655; RCW 9.94A.660. An individual convicted of a “sex offense” may be sentenced to an indeterminate sentence. RCW 9.94A.507. A defendant convicted of a sex offense is also subject to a longer period of community custody -

three years. RCW 9.94A.701(1)(a). Finally, when calculating the offender score for a sex offense, other sex offenses are scored as three points, rather than one point. RCW 9.94A.525(17).

With respect to this last consequence, the premise of Dunn's double jeopardy argument is that the legislature did not intend that the trial court could rely upon the sexual motivation finding in order to impose an exceptional sentence if the finding also had the effect of increasing his offender score. There is no support in the plain language of the statutes to support this claim and such an interpretation would lead to absurd results.

The legislature was certainly aware that the sexual motivation finding, in addition to impacting the offender score, could also be used to justify an exceptional sentence. Both provisions at issue were added to the SRA at the same time in 1990 as part of the same act. Laws of 1990, ch. 3, §§ 603 and 706. The legislature placed no restriction on the use of the sexual motivation finding as an exceptional sentence aggravating circumstance. By contrast, the legislature has placed other limits on aggravating circumstances, restricting them to particular crimes. RCW 9.94A.535(3)(c), (d), (e), (h), (l), (u), and (z). If the legislature had

intended to restrict the trial court's use of the sexual motivation finding, it could have explicitly done so.

In addition, Dunn's argument would have absurd results. As Dunn's case demonstrates, it would mean that recidivist sex offenders would be subject to less punishment than first-time sex offenders. Dunn's standard range on the first-degree kidnapping conviction was 67 to 89 months. CP 120. Because of the sexual motivation finding, the trial court was authorized to impose an exceptional sentence up to the statutory maximum of life in prison. Id. Under Dunn's interpretation of the statutes, because his other conviction was a sex offense and was scored as three points in his offender score, the maximum sentence that the trial court could impose was 89 months. However, if Dunn's other conviction was for a non-sex offense, such as theft, he would have faced a potential exceptional sentence of up to life in prison. The legislature could not possibly have intended such a result, particularly given that the obvious purpose of these sentencing provisions is to increase punishment for sex offenses.

The trial court did not violate double jeopardy by imposing the exceptional sentence. This Court should affirm Dunn's sentence on his first-degree kidnapping conviction.

**2. THE TRIAL COURT PROPERLY VACATED
DUNN'S CONVICTIONS FOR POSSESSION OF
CHILD PORNOGRAPHY.**

For the first time on appeal, Dunn claims that the trial court violated double jeopardy by "failing to vacate and strike from the judgment and sentence Dunn's convictions which violated double jeopardy." Brief of Appellant at 1. This claim concerns Dunn's five convictions for possession of child pornography, which this Court vacated in its unpublished opinion. The trial court, in fact, entered an order vacating the convictions, and Dunn's claim should be rejected.

At the outset, Dunn's claim that the trial court did not vacate the convictions is factually incorrect. Dunn's judgment and sentence lists the jury's verdicts in the case, including the six counts for possession of child pornography. CP 119, 125. In Part III of the judgment and sentence, the trial court vacated five of those convictions. CP 120 ("The court VACATES Count(s) IV, V, VI, VII and VIII and the aggravating factors of 'deliberate cruelty' and 'particularly vulnerable victim...' as to count(s) I and II, per the decision of the Court of Appeals in this matter..."). Dunn does not acknowledge this fact or explain why such an order violates double jeopardy.

In the cases cited by Dunn, the trial court either (1) did not vacate the conviction, or (2) conditionally vacated the conviction and indicated that it remained valid or subject to reinstatement. For example, in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), the defendant was convicted of three crimes -- homicide by abuse, second-degree felony murder, and first-degree assault -- for causing the death of his son. The trial court denied Womac's motion to dismiss two of the convictions, and then sentenced him on only one count. Id. at 647. The Supreme Court rejected the State's argument that Womac's three convictions should stand since he was sentenced for homicide by abuse only, and held that Womac was entitled to vacation of the other two convictions. Id. at 656-60.¹

State v. Turner, 169 Wn.2d 448, 160 P.3d 40 (2007), involved two consolidated cases where, due to double jeopardy concerns, the court *conditionally* dismissed the convictions at issue. In Turner's case, the trial court sentenced him on his first-degree robbery conviction and issued a written order vacating his

¹ Similarly, in In re Personal Restraint of Strandy, 171 Wn.2d 817, 256 P.3d 1159 (2011), cited by Dunn, the Supreme Court held that the trial court erred by not vacating the convictions at issue.

second-degree assault conviction "for sentencing purposes but insisting that the assault conviction was 'nevertheless a valid conviction' for which Turner could be sentenced if his remaining robbery conviction did not survive appeal." Id. at 452-53. In the consolidated case involving Faagata, the court sentenced Faagata for first-degree murder and conditionally dismissed his second-degree felony murder conviction, stating that this conviction was subject to being reinstated. Id. at 453.

The Supreme Court acknowledged that the vacated convictions were subject to being reinstated, but held that the trial courts erred by declaring the conditionally vacated convictions valid. Id. at 460-64. Citing prior precedent, the court observed that "even a conviction alone, without an accompanying sentence, can constitute 'punishment' sufficient to trigger double jeopardy protections." Id. at 454-55. The court concluded "that a court may violate double jeopardy either by reducing to judgment both the greater and the lesser of two convictions for the same offense or by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid." Id. at 464.

Unlike in Womac and Turner, Dunn's judgment and sentence reflects that the trial court unconditionally vacated the convictions at issue. CP 120. There is no indication that the convictions were subject to reinstatement or somehow remained valid. There is no basis for Dunn's claim that the trial court failed to properly vacate his five convictions for possession of child pornography.

Dunn also argues that the trial court erred by not striking the vacated convictions from his judgment and sentence. While the better practice is to not reference the vacated convictions in the judgment and sentence, it does not amount to a constitutional violation to do so. Therefore, Dunn has waived this claim on appeal.

As a general rule, issues cannot be raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). There is a limited exception where the issue being raised involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 684, 757 P.2d 492 (1988). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The defendant must make a plausible showing that the

asserted error had practical and identifiable consequences in the case. Id.

At Dunn's resentencing, the prosecutor indicated that the judgment and sentence would include reference to the possession of child pornography convictions and the fact that they were vacated. RP 43-44. Dunn made no objection and signed off on the judgment and sentence. Id.; CP 123.

In Turner, the Supreme Court indicated that vacated convictions should not be listed in the judgment and sentence or mentioned at the sentencing hearing. "To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing." 169 Wn.2d at 464-65. However, this language in Turner must be understood in the context of the history of the issue and the consolidated cases before the court. As demonstrated in Womac and Turner, trial courts had repeatedly

struggled with how to treat convictions that had to be vacated on double jeopardy grounds but were subject to potential reinstatement. Understandably, the Supreme Court instructed trial courts to avoid any possible double jeopardy issue by not including any reference to the vacated convictions at the sentencing hearing. While this is a wise practice, there is no case that holds that an order unconditionally vacating a conviction, even if made part of a judgment and sentence, violates double jeopardy. Because Dunn has not shown that the failure to strike the vacated convictions from his judgment and sentence constitutes a manifest error affecting a constitutional right, this Court should hold that the issue is waived.

However, should this Court conclude that Dunn has raised a meritorious issue, this Court should simply remand for entry of a new judgment and sentence that omits any reference to the vacated convictions. The court should clarify that the case is not remanded for a third sentencing hearing.

D. **CONCLUSION**

For the reasons cited above, this Court should affirm Dunn's sentence.

DATED this 16th day of November, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
BRIAN M. McDONALD, WSBA #19986
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Susan Wilk, 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. RICHARD DUNN, Cause No. 67239-8-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.

U Brame
Name
Done in Seattle, Washington

11/16/11
Date