

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 DERRICK KIRKWOOD,)
)
 Appellant.)

No. 34224-3-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

FILED
COURT OF APPEALS
DIVISION TWO
JAN 11 2011
MONTPELIER, VT

I, _____, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

SEE ATTACH

Additional Ground 2

1
K. Proctor
R. Griffith
SAG

If there are additional grounds, a brief summary is attached to this statement.

Date: _____

Signature: Kirkwood

**STATEMENT OF ADDITIONAL
GROUNDS**

ARGUMENT

The Appealant's Robbery in the First Degree(Attempted) And his Burlary in the First Degree, attached Weapon enhancement violates the Special/Geneal Statute Rule.

Where a special statute punishes the same conduct that is punished under a 'general statute', the special statute applies and the accused can be only charged under that statute. State v. Shriner, 101 Wn.2d 576, 681 P.2d 237 (1984). Courts will assure in such a case that the legislature intended the specific crime be charged where the defendant's conduct violates both the specific and more general statutes. This specific construction applies only where the statutes are concurrent, that is, where the general statute will be violated in each instance where the special statute has been violated. Shriner, 101 Wn.2d at 580.

The special/general rule exist to give effect to the legislative intent to treat the subset activity apart from the general scheme. State v. Greco, 57 Wn. App. 196, 204, 787 940 (1990).

In the case at bar, Mr. Kirkwood was charged by information on the counts of Attempted Frist degree Robbery, First Degree Burglary, and a Weapons enhancement violation pursuant to RCW 9.94A.125 and RCW 9.94A.310. Mr. Kirkwood asserts that the robbery and burglary statute are concurrent to the weapon enhacnement statute.

Under RCW 9A.56.200 (Robbery in the First degree) there are four ways to violate this statute however, in Mr. Kirkwood's case he was charged under subsection (1) (a) (i), where it states, "a person is guilty of robbery in the first degree if (a) in the commission of a robbery or immediate flight therefrom, he or she, is armed with

a deadly weapon or displays what appears to be a deadly weapon. Below the actual charge it states, "the defenadant or another participant in the crime was armed with a deadly weapon, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310 and adding addtional time to the presumptive sentence as provided in RCW 9.94A.370 contrary to RCW 9A.52.020 (1) (a) and 9A.08.020, against the peace and dignity of the state of Washington."

This statute is concurrent and has the same element as armed with a deadly weapon that is used to increase the punishment in both cases. The Robbery statute uses the 'armed with the deadly weapon element to increase it to a level of first degree, which increases the punishment. The enhancement statute uses the same exact element to further increase the punishment of up to 60 more months. The Burglary statute shares the same exact conduct under RCW 9A.52.020, (burglary in the first degree), where it states, 'a person is guilty of Burglary in the first degree, if with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building or immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon."

The elemental language that is at issue in the element of "armed with a deadly weapon/firearm". In the special statute that the state charged the defendant with in order to increase his punishment has the same elemental language. According to RCW 9.94A.125, now 9.94A.602 and RCW 9.94A.310, now 9.94A.533 it states that " In all criminal cases wherein there has been a special allegation and evidence

establishing that the accused or an accomplice was 'armed with a deadly weapon' at the time of the commission of the crime, or if a jury trial is had, that jury shall, if it finds the defendant guilty also find a special verdict as to whether or not the defendant or an accomplice was 'armed with a deadly weapon' at the commission of the crime."

Under the Washington law, the Special Statute prevails over the general rule, where the two statutes are concurrent. In re Personal Restraint Petition of Taylor, 105 Wn.2d 67, 70, 711 P.2d 345 (1985): Shriner, 101 Wn.2d at 576. To determine whether two statutes are concurrent, this court is persuaded to look at the elements of both and ask "whether a person can violate the special statute without necessarily violating the general statute." State v. Karp, 69 Wn. App. 369, 372, 848 P.2d 1304 (1993). If the answer is yes the statutes are concurrent and the special statute supercedes the general. Id. at 371-72. The statutory rule of construction promotes equal protection of the laws by subjecting persons committing the same misconduct to the same potential punishment. See State v. Cann, 92, Wn.2d 193, 196 595 P.2d 912 (1979).

In the case at bar, it is impossible for the defendant to violate the first degree robbery and first degree Burglary statute without violating the Weapon enhancement statute. The weapon enhancement statute is solely based upon the finding that the defendant or an accomplice was 'armed with a deadly weapon/firearm while in the

commission of the crime. This is the same element that is needed in order to secure the verdict of guilt for the other charges.

Where it is true that there are other elements in the robbery statute however, there is only one element that is crucial to the degree of the crime and that is the same element of the weapon enhancement statute. Meaning that in order to find Mr. Kirkwood guilty of the higher degree of the crime there has to be a deadly weapon involved. This is also true for the burglary in the first degree. Moreover, the burglary in the first degree statute is more dependant on the 'armed with a deadly weapon/firearm element. Therefore, there is no way that Mr. Kirkwood's conduct could violate either statute without violating RCW 9.94A.602, former RCW 9.94A.125.

Moreover, the State had an opportunity to charge the petitioner with a lesser degree of Second degree robbery and second degree burglary and still charge the defendant with the special statute, due to the fact that the lesser charges do not have the element of armed with a deadly weapon. The enhancement statute is based solely on the fact of 'whether there is evidence' 'that the accused was armed with a deadly weapon'. Therefore, this court should find that the three statutes are concurrent to eachother and that they violate the defendant right to equal protection, therefore this court is persuaded to remand this case back to the superior court for resentencing on the special statute or general statute only.