

No. 35612-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jason Walker,

Appellant.

STATE OF WASHINGTON
DIVISION II
APPELLATE
JUL 27 2006
11:55 AM
BY [Signature]

Grays Harbor Superior Court

Cause No. 06-1-00095-4

The Honorable Judge F. Mark McCauley

Appellant's Reply Brief

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ARGUMENT

I. UNDER THE FACTS OF THIS CASE, THE TWO CONVICTIONS VIOLATE DOUBLE JEOPARDY.

As charged and prosecuted, Mr. Walker's convictions for theft and trafficking violate double jeopardy. U.S. Const. Amend. V; Wash. Const. Article I, Section 9. He was charged with theft by wrongfully obtaining or exerting unauthorized control over timber with intent to deprive. CP 1; Instructions Nos. 2, 4, 7, Supp. CP. He was charged with trafficking by knowingly possessing or obtaining control of the same stolen timber with intent to sell or dispose of it to another person. CP 1; Instructions Nos. 2, 5, 8. The prosecution established that Mr. Walker obtained control over the timber and planned to dispose of it, thereby establishing both theft and trafficking. As charged and prosecuted, the crimes fail the "same evidence" test. *State v. Leming*, 133 Wn. App. 875 at 881, 138 P.3d 1095 (2006).

Respondent's claim that the two crimes "target different behavior and do not define a single crime"¹ ignores the way the two offenses were charged and prosecuted in this case. For the trafficking charge, Mr. Walker was not accused of selling or transferring stolen property; instead,

¹ See Brief of Respondent, p. 7.

the state alleged and proved that he knowingly obtained control over the stolen timber with intent to sell it. This necessarily established that he wrongfully obtained control over the property with intent to deprive the owner of it. Thus, in this case, proof of the trafficking charge established the theft.

Some cases involving theft and trafficking do not violate double jeopardy; this is not such a case. The conviction for theft must be vacated, and the case must be remanded for resentencing on the trafficking charge. *In re Pers. Restraint of Burchfield*, 111 Wn. App. 892 at 899, 46 P.3d 840 (2002).

II. MR. WALKER SHOULD HAVE BEEN SENTENCED WITH AN OFFENDER SCORE OF ZERO.

Mr. Walker's "same criminal conduct" issue is not waived, despite his failure to object in the trial court. An erroneous sentence may be challenged for the first time on appeal. *State v. Cassel*, 128 Wn. App. 481 at 486, 115 P.3d 1062 at 1064 (2005). Although an accused may affirmatively waive the "same criminal conduct" issue, failure to object does not amount to a waiver and will not preclude appellate review. *See, e.g., State v. Anderson*, 92 Wn.App. 54 at 61, 960 P.2d 975, review denied 137 Wn.2d 1016, 978 P.2d 1099 (1999); *State v. Rowland*, 97 Wn.App. 301 at 305, 983 P.2d 696 (1999); *see also State v. Nitsch*, 100 Wn.App.

512 at 521, 997 P.2d 1000, *review denied* 141 Wn.2d 1030, 11 P.3d 827 (2000) (noting the issue could be raised for the first time on review if not affirmatively waived). Nothing in the record suggests Mr. Walker affirmatively waived review of the trial court’s “same criminal conduct” determination.²

The factual basis for the “same criminal conduct” determination was fully developed during trial. The evidence shows (and Respondent apparently concedes) that the two offenses occurred at the same time and place and involved the same victim. The only issue on appeal, therefore, is whether or not the two offenses shared the same criminal intent.

Mr. Walker’s objective criminal intent remained the same, because the theft charge furthered the trafficking charge: Mr. Walker stole the timber and planned to profit from its sale. *See State v. Garza-Villarreal*, 123 Wn.2d 42 at 46-47, 864 P.2d 1378 (1993). Respondent’s argument that theft and trafficking involve different mental elements³ is incorrect: Respondent focuses on the mental elements in the abstract; the proper inquiry requires examination of the specific facts of each charge.

² If the issue is waived, Mr. Walker was denied the effective assistance of counsel.

³ Brief of Respondent, pp. 10-11.

See, e.g., State v. Miller, 92 Wn.App. 693, 964 P.2d 1196 (1998); *State v. Taylor*, 90 Wn.App. 312, 950 P.2d 526 (1998).

The two crimes comprised the same criminal conduct. The trial court should have counted them as one offense and sentenced Mr. Walker with an offender score of zero. RCW 9.94A.589(1)(a); *Garza-Villarreal*.

III. IF THE OFFENDER SCORE ISSUE IS WAIVED, MR. WALKER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Walker stands on the argument made in the opening brief.

CONCLUSION

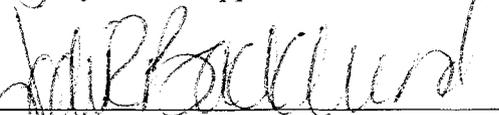
Mr. Walker's conviction theft conviction must be vacated and the charge dismissed. In the alternative, the sentence must be vacated and the case remanded for sentencing with an offender score of zero.

Respectfully submitted on August 1, 2007.

BACKLUND AND MISTRY



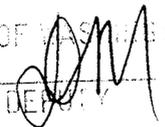
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STATE OF WASHINGTON
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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and to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 1, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 1, 2007.



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