

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

STATE OF WASHINGTON,

Respondent,

v.

FORREST EUGENE AMOS
(d.o.b. 5/16/83),

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF LEWIS COUNTY
OF THE STATE OF WASHINGTON

The Honorable H. John Hall
The Honorable Richard Brosey
The Honorable Nelson E. Hunt

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The judgment and sentence in Mr. Amos' case is facially invalid for inclusion of a conviction for second degree assault that violates double jeopardy, requiring re-sentencing.

2. The trial court miscalculated Mr. Amos' offender score.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the judgment and sentence, when properly considered in combination with the defendant's plea statements, is facially invalid for including punishment on a conviction for second degree assault, where the assault was merely the force used to satisfy the "force" element of the robbery conviction.

2. Whether Mr. Amos' double jeopardy challenge may be heard by this Court, despite the fact that Mr. Amos plead guilty, where the plea to the duplicative offense was taken on a different date than his plea to the other offenses charged, where the double jeopardy violation is evident on the face of the judgment and sentence when that document is properly considered in combination with the defendant's plea statements, and where the defendant did not actively seek inclusion of the duplicative assault conviction in his judgment and sentence.

3. Whether State v. Ermels¹ bars the defendant's double jeopardy claim, where Mr. Amos, in contrast to Mr. Ermels, never waived his right to appeal his sentence.

4. Whether the trial court miscalculated Mr. Amos' offender score by including his 2005 Walla Walla conviction in his criminal history at his 2005 re-sentencing, when that offense was not a "prior conviction" at the time of his original sentencing in 2000, and his re-sentencing in 2005 was held merely to correct an error in his 2000 sentencing.

C. STATEMENT OF THE CASE

1. Procedural history. On January 16, 2000, Forrest Amos, age 16, accompanied three male friends, including co-defendant Matthew Collett, to the Lewis County home of their friend Brian Hull. CP 157-62. According to the affidavit, the group planned to steal marijuana from Brian's house, but were met at the door by Brian's father Joe Hull. The boys assaulted Mr. Hull and "then left the residence with the marijuana and his Ruger pistol." Brian Hull later told police that Amos had been to the house before and knew that his father had marijuana. The police contacted Amos' parents and

¹State v. Ermels, 156 Wn.2d 528, 131 P.3d 299 (2006).

proceeded to the Tacoma area where they took him into custody.
CP 157-62.

After obtaining consent from Amos' mother, law enforcement administered a polygraph ("lie detector") test. Amos told the interrogating detectives that he, Matthew Collett, Kapsh, and Steele drove to the Hull house and that "all we were gonna do is take some weed." However, after using a ruse about needing to use the telephone, Lance Kapsh walked up behind Mr. Hull and started punching him, asking where the marijuana and guns were. Steele, and Collett, the latter of whom used a walkie-talkie to hit Mr. Hull, joined in the assault by Kapsh, and then the four boys left the residence with the stolen marijuana and pistol. The defendant cooperated with police by drawing a map of the area and their route once exiting the house, enabling the deputies to locate gloves and the walkie talkie that Steele used to strike Mr. Hull. CP 157-62.

Amos was charged with burglary in the first degree, robbery in the first degree, assault in the first degree, theft of a firearm, possession of a stolen firearm, and unlawful possession of a firearm, by an information filed January 26, 2000 (Lewis County Superior Court cause no. 00-1-00033-7). CP 163-67 (Information).

(Information). On February 16th, 2000, Amos plead guilty as charged pursuant to a plea agreement. His plea statement acknowledging a factual basis for the plea stated that he and his friends assaulted Mr. Hull and caused him great bodily injury with a deadly weapon (a walkie-talkie), and then stole marijuana and a gun from Hull. CP 148. Subsequently, on April 25th, 2000, a new plea agreement was reached which resulted in reducing the charge of assault in the first degree to assault in the second degree, dismissing the charge of possession of a stolen firearm, and dismissing the firearm enhancements originally attached to the burglary and robbery counts. 4/25/2000RP at 4-8. In his supplemental plea agreement, entered "as to count III only," Amos stated that he "assaulted another with a deadly weapon" and that he was armed with a firearm at the time of the assault for purposes of a firearm enhancement. CP 133.

On April 25th, 2000, the sentencing court found that the burglary and the robbery constituted the same criminal conduct pursuant to RCW 9.94A.400. CP 120. Amos' criminal history was stated to be four juvenile adjudications for two counts of burglary in the second degree, possession of stolen property, and malicious

mischief. CP 121. The sentencing court imposed a total of 120 months incarceration. CP 124.

In May of 2004, Amos filed a Personal Restraint Petition arguing that there had been a miscalculation of his offender score, and raising double jeopardy claims. Personal Restraint Petition in Court of Appeals No. 31735-4-II. On February 28, 2005 the Court of Appeals agreed that two "washed out" juvenile adjudications had been erroneously included in Amos' offender score, and stayed decision on Amos' double jeopardy claims pending a decision in State v. Freeman, 153 Wn.2d 765, 108 P.2d 753 (2005).

Amos then asked the Court of Appeals to allow him to withdraw his double jeopardy claims under the assumption that he could seek the same type of relief by use of the same criminal conduct analysis at his re-sentencing following reversal for the miscalculated offender score. On April 18, 2005, the Court of Appeals granted this request. During this time, on June 20th, 2005, Amos plead guilty in Walla Walla Superior Court to a charge of assault in the second degree. CP 104-114.

At re-sentencing on July 19, 2005, Amos argued that State v. Freeman required the court to merge his convictions for robbery in the first degree and assault in the second degree pursuant to the

guarantee against Double Jeopardy. The court disagreed, stating that it was “gratuitous” for Amos to hit Hull with the walkie-talkie and that doing so was “not necessary to facilitate the robbery.”

7/19/05RP at 35-36; CP 14-22 (Felony judgment and sentence). In addition to refusing to vacate the assault conviction, the trial court also included the conviction for assault in the second degree from Walla Walla County in Amos’ offender score. 7/19/05RP at 37-38. See CP 14-22 (Felony judgment and sentence).

Mr. Amos filed a Personal Restraint Petition on January 10, 2006, arguing, inter alia, that his conviction and sentence for assault in the second degree violated double jeopardy, and that the sentencing court erred in including his Walla Walla conviction in his offender score. This Court ordered that Mr. Amos’ petition be treated as a direct appeal (since the record revealed Amos had been told a Personal Restraint Petition was his sole avenue of appeal of the sentencing court’s orders), and directed further briefing on specified questions. Orders On Review in No. 34375-4-II (March 29, 2007).

D. ARGUMENT

1. MR. AMOS' SECOND DEGREE ASSAULT CONVICTION VIOLATED HIS STATE AND FEDERAL DOUBLE JEOPARDY PROTECTIONS.

(a) The double jeopardy clauses preclude multiple

punishments for the same offense. The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense." U.S. Const. Amend. 5; Wash. Const. Art. 1, § 9. The Fifth Amendment's double jeopardy protection is applicable to the several States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); U.S. Const. Amend. 14. The Washington courts interpret Article 1, § 9's provision coextensively with the United States Supreme Court's reading of the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Double jeopardy violations are, in general, manifest constitutional errors that may be raised for the first time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000).

Consistent with double jeopardy, the State may bring multiple charges arising from the same criminal conduct in a single

proceeding. State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). Courts may not, however, enter multiple convictions and impose punishment for conduct that amounts to a constitutional “same offense” without offending the defendant’s double jeopardy protections. State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 853 (1983) (citing Albernaz v. United States, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

Where a defendant's conduct can support charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the “same” offense. In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). This focus on legislative intent is required because the legislature has the power to define offenses and set punishments. See State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995) (rape and incest are separate statutory offenses). If the legislature has authorized cumulative punishments for both statutory crimes, then double jeopardy is not offended by convictions and sentences for both of the crimes. Calle, 125 Wn.2d at 776; In re Pers. Restraint of Burchfield, 111 Wn. App. 892, 896, 46 P.3d 840 (2002); see William S. McAninch, Unfolding the Law of Double Jeopardy, 44 S. C. L. Rev. 411, 483-84 (1993). However,

our Supreme Court has found that second degree assault is the “same offense” as first degree robbery in certain circumstances, which are manifestly present in Mr. Amos’ case.

(b). Second degree assault is the “same offense” as first degree robbery unless the assault has an “independent purpose or effect.” Under double jeopardy analysis, the Washington Supreme Court, following a thorough analysis of legislative intent and previous appellate court decisions, has stated that a “case by case approach” is required to determine whether first degree robbery and second degree assault are the “same offense” for double jeopardy purposes. State v. Freeman, 153 Wn.2d 765, 780, 108 P.3d 753 (2005). The Freeman Court stated that these two crimes will be considered the same offense unless they have “an independent purpose or effect.” State v. Freeman, 153 Wn.2d at 780; see also State v. Frohs, 83 Wn. App. 803, 807, 924 P.2d 384 (1996); State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). The Court found, in particular, that there was “no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.” (Emphasis added.) Freeman, at 776.

These double jeopardy principles apply squarely in the present case. On July 19, 2005, at re-sentencing, the trial court held that the conduct supporting Mr. Amos' assault in the second degree was an assault with a firearm, and that the conduct supporting robbery in the first degree was an assault with a walkie talkie. 7/19/05 at 35-36. This analysis is in error. The charge of robbery in the first degree in both the original and amended informations alleged that Amos committed robbery and that the charge was elevated to robbery in the first degree by virtue of Amos being armed with a deadly weapon, "to-wit: a walkie-talkie." CP 163-67 (Information, at p. 2); CP 135-36. Robbery is defined as follows:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190. The charge of assault in the first degree in the original information alleged that Amos, with intent to inflict great bodily harm or death, assaulted Mr. Hull with a "firearm or deadly weapon or by any force or means likely to produce great bodily

harm or death,” and further alleged that he was armed with a firearm and a deadly weapon during the commission of the crime. CP 163-67 (Information). The amended charge of assault in the second degree, to which Amos plead guilty in the supplemental plea agreement, stated that he assaulted Hull “with a deadly weapon or with intent to commit a felony, Robbery in the First Degree or Burglary in the First Degree.” CP 136.

The charges in Mr. Amos’s case, along with the factual statements made by Mr. Amos in pleading guilty, make clear that Amos was guilty of one assaultive action, with a walkie-talkie, that was the force used to support the “use or threatened use of immediate force or violence” element of robbery. See RCW 9A.56.190. There was no assault with a firearm that would support a second degree assault under that theory. Thus these facts do not support a separate charge of assault in the second degree.

For example, in the companion case of Mr. Zumwalt, described in the Freeman decision, the Supreme Court found that Zumwalt’s convictions for first degree robbery and second degree assault violated double jeopardy where the defendant, Zumwalt, and accomplices, offered to sell drugs to a woman and met her in the parking lot, where Zumwalt punched the victim hard in the face with

his fist, knocking her to the ground, and causing serious injuries, then robbed her of \$300 in cash and casino chips. State v. Freeman, 153 Wn.2d at 770. The Court concluded that the assault and robbery of Zumwalt's victim did not have an independent purpose or effect, despite the fact that the force used was excessive in relation to the crime charged. Freeman, at 779.

Here, because there was no assault with the stolen firearm, there were therefore no facts that could support a separate and distinct assault action using the walkie-talkie that was gratuitous to commission of the robbery. The verbatim reports of February 16, 2000, indicate that when pleading guilty to the robbery and the assault, Amos admitted that the assault was committed when he “[h]it Joe Hull over the head with a walkie-talkie that caused bodily injury” and in so doing used an instrument that “would likely produce great bodily harm or death.” 2/16/2000 at 15-16. Amos admitted that the robbery was committed when Amos hit Hull and took Hull's gun and marijuana. 1/16/2000 at 15. The new plea to an amended charge of assault in the second degree related to an amended information based on the same facts, which alleged that Amos assaulted Hull “with a deadly weapon or with intent to commit a felony, Robbery in the First Degree or Burglary in the First Degree,”

CP 136. Plainly, the assaultive conduct with the walkie-talkie was the force that satisfied the force element of robbery.

The exhibit entitled "Exhibit X," approved as part of the record by an order of this Court on September 13, 2007, provides further support for the conclusion that there was no separate assault with a firearm. That exhibit, a transcript of a statement by the complainant Joe Hull, shows that after the stolen gun came into the perpetrators' possession, there was no further assault, much less an assault with a firearm. See Exhibit X, at pp. 4-5 (attached as Appendix A). Therefore there was only one offense – first degree robbery -- and the second degree assault conviction must be vacated.

As the Freeman Court noted, this result is nothing new. In State v. Bresolin, 13 Wn. App. 386, 534 P.2d 1394 (1975), Bresolin was convicted of robbery and second degree assault. Bresolin beat the victim with a gun, threatened him with a knife if he did not disclose the location of drugs, and then took the victim's money and weapons. State v. Bresolin, 13 Wn. App. at 388-89. The Court of Appeals vacated the assault conviction:

We find the acts of force necessary to commit the robbery of Mark Medearis to be the same as the acts of force inflicted upon him as alleged in the count charging assault in the second degree. The litany of injuries inflicted upon the victim was part of a

continuing, uninterrupted attack to secure "dope" or money, and constituted proof of an element included within the crime of robbery. Under the evidence in this case, the assaults inflicted were not separate and distinct from the force required for the robbery. . . . The purpose of the acts of the defendant was the single purpose of effectuating the robbery of the victim. Where an act constituting a crime also constitutes an element of another crime, a defendant is placed in double jeopardy if he is charged with both crimes. . . . Under the pleadings and the proof presented, the conviction of assault in the second degree based upon the force used to accomplish the robbery of Mark Medearis must be set aside.

(Citations omitted.) State v. Bresolin, 13 Wn. App. at 394.

In the present case, because there was plainly no independent purpose or effect to the use of the walkie-talkie to hit Hull and rob him, that act cannot be punished as a separate offense of assault. Frohs, 83 Wn. App. at 803, 807; Johnson, 92 Wn.2d at 680. Under Freeman, duplicative punishment violated double jeopardy. State v. Freeman, 153 Wn.2d at 780.

The appropriate remedy in Mr. Amos' case is remand for resentencing and vacation of the assault conviction. State v. Weber, 127 Wn. App. 879, 885, 112 P.3d 1287 (2005) ("The remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense"), affirmed, 159 Wn.2d 252, 149 P.3d 646 (2006).

(c). Amos' double jeopardy claims are not waived by his plea of guilty. It is well established that merely because a conviction may be the result of a plea agreement does not foreclose a challenge to that conviction on the grounds of double jeopardy. Blackledge v. Perry, 417 U.S. 21, 30, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974). In Menna v. New York, 423 U.S. 61, 62, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975), the United States Supreme Court held that “[w]here the State is precluded by the United States Constitution from hailing a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.” See also In re Pers. Restraint of Butler, 24 Wn. App. 175, 178, 599 P.2d 1311 (1979) (double jeopardy claim not waived by the entry of plea to assault and robbery arising out of the same facts).

It is also true that an “indivisible” plea bargain exists in cases involving multiple charges where the pleas of guilty were made at the same time, were described in one document, and were accepted in a single proceeding. State v. Turley, 149 Wn.2d 395, 398, 69 P.3d 338 (2003); see also State v. Ermels, 156 Wn.2d 528, 541, 131 P.3d 299 (2006); State v. Bisson, 156 Wn.2d 507, 519, 130 P.3d 820 (2006). In the case of In re PRP of Shale, 160 Wn.2d

489, 158 P.3d 588 (2007), the Supreme Court held that a defendant's double jeopardy argument seeking dismissal of only some convictions as duplicative was barred by the indivisibility of his plea package, where the offenses pled to were committed on the same day and the pleas were entered on the same day, making the pleas an indivisible package deal, despite the fact that there were separate plea agreements to each offense. In re PRP of Shale, 160 Wn.2d at 494-94. The Court stated that a defendant cannot challenge individual convictions where his plea to a series of convictions was entered as part of an "indivisible package deal." In re PRP of Shale, 160 Wn.2d at 494.²

Here, however, Amos' double jeopardy claims are not waived by the fact that he pled guilty, because he plead guilty to the duplicative assault conviction in a separate plea statement on a separate day, months after his initial plea. Furthermore, the assault conviction in Amos' judgment and sentence in this case is facially duplicative in violation of double jeopardy.

²Only four justices in the Shale opinion, a decision in which only eight justices participated, signed on to the plurality opinion which stated that Shale could not raise a double jeopardy challenge to only certain convictions in an indivisible plea deal.

First, Mr. Amos entered his plea to assault in the second degree in a separate plea statement. On February 16th, 2000, Amos plead guilty as charged pursuant to a plea agreement that specified all the counts listed in the information. CP 148. However, on April 25th, 2000, a supplemental plea statement was entered “as to count III only” in which Mr. Amos pled guilty to second degree assault. CP 133. The plea to second degree assault – the offense Mr. Amos argues is violative of his double jeopardy rights – was entered on a separate date. There is no “indivisibility” that precludes his challenge to that conviction on double jeopardy grounds, and the general rule applies – a defendant does not waive his right to claim a double jeopardy violation on appeal by pleading guilty. In re Pers. Restraint of Butler, 24 Wn. App. at 178; State v. Cox, 109 Wn. App. 779, 782, 37 P.3d 1240 (2002).

Furthermore, the Shale Court noted that it could grant relief even from indivisible plea agreements in limited circumstances where a conviction or sentence was invalid on its face. Shale, 160 Wn.2d at 496. The United States Supreme Court agrees that where a double jeopardy violation is evident on the face of a judgment and sentence, a guilty plea does not foreclose a defendant from attacking a conviction on that ground. Menna, 423 U.S. at 62 and

n.2 (a guilty plea does not waive a facial double jeopardy violation). In Mr. Shale's case, no invalidity based on double jeopardy was apparent because "Shale made no factual statements supporting the guilty pleas and instead allowed the judge to review the police reports and statement of probable cause." Shale, 160 Wn.2d at 496. The Court stated that those facts established the "separate nature of each charge." Shale, 160 Wn.2d at 496.

In contrast, Mr. Amos's case supports a grant of relief based on double jeopardy, because the invalidity of his assault conviction is apparent on the face of the judgment. Importantly, collateral documents, signed as part of a plea agreement, may be considered when those documents are relevant in assessing the validity of the judgment and sentence. In re Pers. Restraint of West, 154 Wn.2d 204, 211 n. 4, 110 P.3d 1122 (2005); In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). Thus the plea agreements in this case are relevant to validity of the judgment and sentence. See also CP 14-22 (judgment and sentence, referring to both guilty pleas).

Here, Amos provided a factual basis for his pleas of guilty which can only be read as showing that the act of hitting Mr. Hull

with a walkie-talkie was the force effected for purposes of robbing

Hull. Amos' first plea statement stated as follows:

On January 16th, 2000, in Lewis County, I was in a person's building, I had permission to go in but not to remain as long as I did. I went with the intent to help my friends take some marijuana. While we were there, we assaulted Mr. Hull and caused him great bodily injury with a deadly weapon (walkie-talkie), we stole the marijuana and a gun. I have been convicted of a serious felony in the past and I cannot possess a gun.

CP 148. In his supplemental plea agreement, Amos stated the following factual basis for his plea to the charge of second degree assault. "I assaulted another with a deadly weapon, and I was in possession (armed) of a firearm at the time of the assault." CP 133. Neither of these pleas incorporate the facts alleged in the affidavit of probable cause, because Amos provided his own factual bases and did not check the box on either of the plea forms stating that he would allow the sentencing court to "review my police reports and/or a statement of probable cause supplied by the prosecution." CP 145, CP 133.

The factual statements admitted in the pleas of guilty show the judgment and sentence to be invalid on its face. A judgment and sentence is invalid on its face if it exceeds the sentence allowed by statute and the alleged defect is evident on the face of the

document without further elaboration. See In re Pers. Restraint of Hemenway, supra, 147 Wn.2d at 532; In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). Whether the sentencing court has exceeded its statutory sentencing authority under the Sentencing Reform Act of 1981, chapter 9.94A RCW, is an issue of law. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Under these authorities, given that a violation of double jeopardy principles is evident from the factual bases offered for the pleas, Amos' judgment and sentence must be deemed invalid on its face by inclusion of the duplicative assault conviction and attached firearm enhancement. The appropriate remedy in Mr. Amos' case is remand for resentencing and vacation of the assault conviction. State v. Weber, 127 Wn. App. at 885.

(d). Amos' double jeopardy claims are not barred on ground that he pled guilty pursuant to a plea bargain and received the "benefit of his bargain" where he did not waive his right to appeal his sentence. Direct appeal and collateral attack are not always available for defendants who have entered into plea agreements. Goodwin, 146 Wn.2d at 874 ("waiver can be found where the alleged error involves an agreement to facts, later

disputed, or where the alleged error involves a matter of trial court discretion"). But "waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence." Goodwin, 146 Wn.2d at 874.

Indeed, the Supreme Court has repeatedly held that an individual cannot, even by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law. In re Pers. Restraint of Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004); see also Goodwin, supra, 146 Wn.2d at 870 ("a plea bargaining agreement cannot exceed the statutory authority given to the courts." (citing In re Pers. Restraint of Gardner, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980)); In re Pers. Restraint of Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000) ("[T]he actual sentence imposed pursuant to a plea bargain must be statutorily authorized").

Simply put, a defendant "cannot empower a sentencing court to exceed its statutory authorization." State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980). Thus, the fact that Amos agreed to a particular sentence does not cure a plain facial defect in the judgment and sentence where the sentencing court acted outside its authority. As argued supra, the judgment and sentence in Amos' case is invalid on its face because the only possible reading of the

facts set out in the plea statements shows that the judgment imposes punishment for an assault that was merely incidental to the robbery. There is no waiver, since the double jeopardy violation is shown on the face of the documents. See Goodwin, 146 Wn.2d at 877 ("[T]he court has granted relief to personal restraint petitioners in the form of resentencing within statutory authority where a sentence in excess of that authority had been imposed, without regard to the plea agreements involved."). Specifically, the Court in Goodwin held that "[t]he portion of a sentence in excess of statutory authority must be reversed, and a plea agreement to the unlawful sentence does not bind the defendant." Goodwin, at 877.

On the other hand, a defendant may waive a double jeopardy claim through some affirmative act which indicates waiver. Jeffers v. United States, 432 U.S. 137, 154, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977) (defendant waived double jeopardy by opposing government's motion to join two separate criminal prosecutions). "[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." United States v. Scott, 437 U.S. 82, 99, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978). Thus a defendant's participation

in bringing about a double jeopardy violation can constitute a waiver of such violation.

In Jeffers, for example, the defendant was charged with committing a continuing criminal enterprise under 21 U.S.C. § 848 and conspiracy under 21 U.S.C. § 846. The government moved to consolidate the indictments for trial, which the petitioner and his codefendants opposed. The court denied the motion and the charges went forward in separate trials. Jeffers v. United States, 432 U.S. at 154. Following convictions for both charges, the defendant argued that the convictions violated the prohibition against double jeopardy, but the Supreme Court rejected the defendant's argument, holding that the defendant had waived his right to complain that his consecutive trials violated double jeopardy because it was he who insisted on successive trials for the conspiracy offense and the continuing-criminal-enterprise offense. Jeffers v. United States, 432 U.S. at 154.

Unlike the appellant in Jeffers, Mr. Amos, age 16, did not actively participate in a plea to the duplicative robbery and assault counts in such a way as to affirmatively bring about the double jeopardy violations. This case involves a juvenile who essentially pled guilty as charged in an initial plea agreement. CP 163-67.

His second plea agreement was required because of partial compliance with the original plea agreement. 4/25/2000 at 7. At no time did Mr. Amos agree to waive his double jeopardy rights or purposely seek addition of the duplicative second degree assault count, which was merely a reduction from the original charges listed in the first plea agreement which already contained the double jeopardy violation.

Finally, for similar reasons, there was no waiver of the right to appeal based on State v. Ermels, 156 Wn.2d 528, 131 P.3d 299 (2006). In Ermels, the State Supreme Court held that Ermels could not challenge either his stipulation to facts supporting his exceptional sentence or his express waiver to the right of appeal in a plea agreement without challenging the entire agreement. Ermels, 156 Wn.2d at 541. Here, Mr. Amos did not waive his right to appeal his sentence; none of the plea documentation even purports to suggest that he did so. CP 128-34, CP 140-150. Certainly, there was no knowing, intelligent and voluntary waiver of his right to appeal, as this State requires for forfeiture of the important right to appeal. See State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978); State v. Kells, 134 Wn.2d 309, 313, 949 P.2d 818 (1998); State v. Tomal, 133 Wn.2d 985, 988, 948 P.2d 833

(1997). This Court may properly consider Mr. Amos' double jeopardy claim, and should order that the second degree assault conviction be vacated.

**2. MR. AMOS' OFFENDER SCORE WAS
MISCALCULATED BY INCLUSION OF HIS WALLA
WALLA CONVICTION AS A PRIOR OFFENSE.**

A court lacks statutory authority to impose a sentence based on a miscalculated offender score and it "has the power and duty to correct the erroneous sentence, when the error is discovered." In re Personal Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955)).

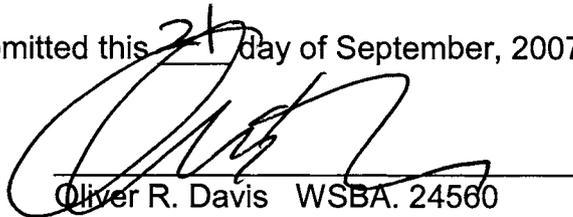
In the present case, Mr. Amos' offender score was miscalculated at his 2005 sentencing when the trial court included his Walla Walla County assault conviction in his criminal history, because that conviction post-dates his original sentence. CP 14-22. RCW 9.94A. 525 (1) provides in relevant part: "A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed." Mr. Amos was originally sentenced on April 25, 2000. CP 120-24. His Walla Walla conviction was entered in 2005. Although Mr. Amos was subsequently re-sentenced in the present case in 2005, this re-

sentencing merely corrected an error in the inclusion of certain juvenile convictions in his original 2000 sentencing. At that time the Walla Walla conviction did not exist as criminal history as defined at RCW 9.94A.525. The 2005 re-sentencing, held in order to correct an error in the 2000 sentencing, was merely a correction of a ministerial error in his 2000 sentence, not a new sentencing hearing. Mr. Amos should be re-sentenced without inclusion of the Walla Walla conviction in his criminal history.

E. CONCLUSION.

Based on the foregoing, Mr. Amos respectfully requests that this Court reverse his sentence and remand for resentencing.

Respectfully submitted this 21 day of September, 2007.



Oliver R. Davis WSBA. 24560
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APPENDIX A

TAPED STATEMENT OF JOE HULL
CASE NUMBER 00C590

1

This is a taped interview/statement with Joe Hull, H-U-L-L, residing at 118 Urquhart Road. This is reference to case number 00C590. My name is Deputy Stull with the Lewis County Sheriff's Office. This interview is being conducted at 118 Urquhart Road. The time is now 0506, the date is 01/16/00.

Q. Joe Hon, Hull, do you understand this is being tape recorded?

A. Yes, I do.

Q. And is this being done with your permission?

A. Yes, it is.

Q. This is in reference to an incident that happened at your residence. Can you tell me how this started?

A. Uh, I had four, kids I think or come to the front door and ask for my son, Brian and I told them they were, he was not here and they wanted to use the phone for, to page somebody for a ride. So, I gave them the cordless phone and they did page or I assumed they punched in some numbers and set the phone down and then one of them asked to use the restroom, he did. They came back and they used the phone again and then another one asked to use the restroom and he came back and they asked to use the phone or I did tell them well, I said, well, guys, you know, I don't know what to tell you, but Brian's not here and then they said, well, can we use the phone one more time. And that was the third time and they punched into it, punched in the numbers and then handed me the phone so I could punch in my phone number cause they thought they might be punching it in wrong. After I punched in my number, he reached over and punched in the pound key or star key, whatever they use and they all jumped me. Uh, they asked for, if I had any pot. They asked me if I had any handgun, my handguns and my pot.

Q. Now, before that, you said there was some exchange of a receipt?

A. Yeah, right, right at the last before they jumped me, the guy in the red coat, pulled out a little piece of paper out of his pocket, handed it to the guy in the other (inaudible) larger guy and then at that time, when he reached over and tried to punch in the phone and that's when they all jumped (inaudible).

Q. And you think it was some kind of a signal when they—

A. --It's the only thing I can think of cause it wasn't (inaudible) all wadded up.

Q. Okay. And you also said that uh, when you told them Brian wasn't here, they said that they drove all the way down here and what did you think what they meant by driving all the way down here?

COPY

TAPED STATEMENT OF JOE HULL
CASE NUMBER 00C590

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A. Uh, I, I guess I was thinking, I thought I heard that they said they drove down from Tacoma, but I'm not sure. It might have been somewhere else.

Q. And—

A. --But that's why they wanted to use the phone because they didn't have a ride.

Q. But they were dropped off here?

A. Yeah.

Q. And you said that they told you that they were suppose to meet Brian here at midnight.

A. Midnight.

Q. And you think this was about 12:30?

A. Yes.

Q. Okay. So, after they all pretty much hit you. Is that right?

A. Yep.

Q. Okay. What did they hit you with?

A. Their fists, uh, some sort of a "billy" club.

Q. Okay. Can you describe the club to me at all?

A. Uh, just a club that's sixteen inches long. Black, I think, it was dark in here so I can't tell.

Q. So, the lights were off in the house. Is that right?

A. Yeah.

Q. And did all of them have clubs or just one?

A. They had, they had them underneath their coats, it's hard to tell, I—

Q. --So, you're not sure.

A. I'm not sure.

COPY

TAPED STATEMENT OF JOE HULL
CASE NUMBER 00C590

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Q. Okay. And did all four of them hit you or did any certain one hit you?

A. Um, (inaudible) tall guy hit me several times. The guy in the red coat hit me several times. The guy in the blue coat, I think hit me in the back of the head with his "billy" club and the guy in the ski mask or, I don't know. I lost track of him, so I don't know what happened.

Q. Okay. So, they began hittin' you in the kitchen?

A. Yes, yes.

Q. And you said that you threw one of them?

A. Yeah, we were wrestling and threw me into that closet and then I (inaudible) like that and that's when he got me on the back of the head, I think.

Q. And then you ended up being in the living room?

A. Yes.

Q. Okay. What happened next?

A. They kept yelling and screaming, wanting guns and pot.

Q. And?

A. Wouldn't, wouldn't let me move or turn the lights on.

Q. And you think that one of them they called Jeff?

A. As near as I can remember.

Q. The one with the blue coat.

A. The one with the blue coat.

Q. Okay. And they were asking you for your pot and your, your handgun. Is that right?

A. Yes.

Q. Okay. Now, this was still in the living room?

A. Yes.

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Q. And what happened next?

A. We went to the bed, I said it's in the bedroom. So, we went in the bedroom and they wanted to turn the light on and I got a light switch, it switches on, but you also got to turn the lamp on, so they flipped the switch on and it didn't come on, so they thought I was trying to pull a fast one, I guess, started hittin' me again and uh, finally got to reach over and turn the light on and told them where they could find what they wanted to, what they were looking for and the big guy, the one who got the gun and the pot and the other guy's ransacked (inaudible) knocking shit over.

Q. Okay. So, they got, you had some marijuana under the bed.

A. Yeah.

Q. And you had a handgun in their night stand?

A. In the night stand.

Q. In the night stand. Okay. They took the handgun. Can you describe the handgun to me?

A. .22 Ruger.

Q. Do you know what model it was?

A. I'd know if I heard. I can't remember off the top of my head. It's the common one.

Q. And it was a .22 and you've had it for how long?

A. Uh, I think I bought it probably '82.

Q. And you bought it brand new?

A. Yes.

Q. And the gun was in a holster. Is that right?

A. Yes.

Q. And in the holster also was a knife?

A. Yes.

Q. Can you describe the knife to me?

COPY

A. A folding knife, it had (inaudible) handles, brass handles.

Q. Okay. Was there anything special about it?

A. Probably about a four inch blade, yeah, I made, or, my father-in-law found it, it was laying in the road I guess and I (inaudible) the handle (inaudible..).

Q. Okay. And they also went in your closet where were you, you were growing marijuana. Is that right?

A. Yes.

Q. And they took a plant?

A. Yes.

Q. And how big was the plant?

A. I don't know, two feet.

Q. Two feet, okay. And did—

A. --(inaudible).

Q. Did they take anything else?

A. Not that I saw.

Q. And after that, did they hit you again?

A. I don't think so, but I was falling down on the wall and that's when they left.

Q. Okay. So, you were going in and out of consciousness. Is that right?

A. (inaudible).

Q. And did they say anything else to you before they left?

A. No, not to me. They were talking to themselves, you know, yelling back and forth to themselves.

Q. Okay. Well, let's get into describing the people. Um, the first person you said, you thought that he was about 6'00" tall. Is that right?

COPY

TAPED STATEMENT OF JOE HULL
CASE NUMBER 00C590

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A. Yes.

Q. And he was, you think he was Oriental?

A. Well, something, Phillipino, Korean, you know, I don't know.

Q. And he was wearing a dark cap that as a knit cap?

A. Yes.

Q. And it was rolled up?

A. Well, either that or cut off, you know, how they cut them off.

Q. Just above the ears?

A. Yeah.

Q. Okay. Did he have any facial hair?

A. I think he had a mustache.

Q. And the age on these people? Are they all about the same age?

A. I would say so, eighteen.

Q. About eighteen, okay. And can you describe the pants or shoes or anything? Can you remember any of that?

A. No.

Q. Can you remember anything else about the person that was, the first person?

A. No.

Q. Okay. The person uh, number two. You think he was about 5'08" or 5'10"?

A. Yeah.

Q. And you say that he was Caucasian?

A. Yes.

Q. He had a red coat on?

COPY

TAPED STATEMENT OF JOE HULL
CASE NUMBER 00C590

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A. Yes.

Q. And he had a hat on?

A. He had a hood with a coat.

Q. A hood with a coat and it was a red hood with a coat?

A. Yes.

Q. Can you remember his pants? His shoes? Anything particular?

A. No, afraid not.

Q. Anything else you can think of about him?

A. No.

Q. Okay. Number, the person number three. You're saying that uh, he was a Caucasian, you believe?

A. (inaudible..).

Q. He was wearing a full mask?

A. Yes.

Q. He had a—

A. --And I believe he was Caucasian. I (inaudible..).

Q. He had a full mask on with eye holes?

A. Eye holes and nose holes and mouth holes.

Q. And do you know what color the mask was?

A. No.

Q. Did you remember it when the light was on in the bedroom?

A. I (inaudible).

Q. Do you remember what kind of—

COPY

**TAPED STATEMENT OF JOE HULL
CASE NUMBER 00C590**

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A. --I, I wanted to say uh, red.

Q. Okay. Can you remember what kind of coat he was wearing? What color or description of the coat?

A. Gosh, I couldn't say.

Q. Okay. What about the pants or shoes?

A. (inaudible).

Q. Okay. Anything else you can remember about that person?

A. No.

Q. Okay. The person number four, you say he was wearing a blue coat with a hood?

A. The second that, person we were just talking about, the third person, he must have been right handed because he was holding the, (inaudible) like this, so.

Q. Okay.

A. (inaudible..).

Q. And the person, you think he was about 5'06", 5'08"?

A. Yes.

Q. And how much did he weigh? Do you think?

A. 130.

Q. Okay. What about the person number four? How tall do you think he was?

A. 5'06".

Q. About how much do you think he weighed?

A. 150.

Q. And he was wearing a blue coat, like a ski coat or?

A. He was probably one of the youngest ones.

Q. And it had a hood on it?

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A. It had a hood on it.

Q. Did he have any kind of stocking cap or anything else on it?

A. Not that I remember.

Q. Was the hood up or down?

A. Up.

Q. And was he a Caucasian?

A. Uh, dark complected.

Q. Okay.

A. (inaudible).

Q. Okay. Anything else you can think about him?

A. Other than I seen him before.

Q. You've seen him before?

A. I'm sure he's been at this house (inaudible) Brian before.

Q. Okay. What about the other three?

A. Uh, uh, tall one, I couldn't swear to it, but I almost think that he might have been here before too.

Q. The one with the Oriental, the Oriental with the stocking cap?

A. Yeah.

Q. Now, you're saying they, you think they were all wearing gloves?

A. Yes.

Q. Like knit gloves or ski gloves or?

A. (inaudible) type (inaudible) gray and one of them was black.

COPY

**TAPED STATEMENT OF JOE HULL
CASE NUMBER 00C590**

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Q. Okay. And the coats that they were wearing, what kind of coats were they wearing? Were they like ski coats or?

A. Like ski coats.

Q. Okay. Anything else you remember about the gentlemen?

A. Uh, they're not gentlemen.

Q. (inaudible).

A. No.

Q. Nothing else you can remember?

A. No.

Q. Okay.

A. (inaudible..).

Q. Is there anything else you can remember to help me investigate this case?

A. God, I wish (inaudible..) I (inaudible..).

Q. Okay. I'll now end this interview. The time is 0519 hours, the date is 01/16/00.

Deputy Alan Stull, #230
Lewis County Sheriff's Office
Chehalis, WA

AS:la
January 19, 2000

COPY

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

STATE OF WASHINGTON,)	
)	COA NO. 36104-3-II
RESPONDENT,)	
)	
V.)	
)	
FORREST AMOS,)	
)	
APPELLANT.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 10TH DAY OF OCTOBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **SUBMISSION OF REPLACEMENT PAGES FOR OPENING BRIEF OF APPELLANT PURSUANT TO COURT ORDER** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] LORI ELLEN SMITH LEWIS CO. PROSECUTOR'S OFFICE 360 NW NORTH ST. CHEHALIS, WA 98532	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] FORREST AMOS 809903 CEDAR CREEK CORRECTIONS CENTER PO BOX 37 LITTKLE ROCK, WA 98556	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF OCTOBER, 2007.

X _____ *me*

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