

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

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STATE OF WASHINGTON,

Respondent,

v.

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

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2008 FEB -6 PM 4:53

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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

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

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APPELLANT'S REPLY BRIEF

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## A. REPLY ARGUMENT

### THE SECOND DEGREE ASSAULT CONVICTION VIOLATED DOUBLE JEOPARDY UNDER ESTABLISHED CASELAW WHICH THE RESPONDENT FAILS TO DISTINGUISH.

(1) Mr. Amos has never argued that second degree assault will always violate double jeopardy when accompanied by a first degree robbery conviction. The Respondent devotes four pages of briefing to the false implication that Mr. Amos is contending that twin convictions for first degree robbery and second degree assault will always violate double jeopardy protections. Brief of Respondent, at pp. 21-24. In fact, in his Appellant's Opening Brief, Mr. Amos placed the correct rule of law before this Court, as follows:

[T]he 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[.]

Appellant's Opening Brief, at p. 10. The Respondent foists a classic "straw man" fallacy upon this Court when it misrepresents Mr. Amos'

argument as attempting to draw a precise parallel between the present case and the facts and legal context of Freeman. Mr. Amos' argument is that the force used in the second degree assault -- the conduct of Mr. Amos' accomplice in hitting the complainant with a walkie-talkie -- was the very force necessary to support the element of 'force or threat of force' required for a valid plea of guilty to the offense of robbery. Appellant's Opening Brief, at pp. 12.

In support of this argument, Mr. Amos relied specifically on State v. Bresolin, 13 Wn. App. 386, 534 P.2d 1394 (1975). In the Bresolin case the defendant was convicted of robbery and second degree assault after he 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 for the very reason that the assault conviction in the present case violates double jeopardy:

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.

(Emphasis added.) (Citations omitted.) State v. Bresolin, 13 Wn. App. at 394; see Appellant's Opening Brief, at pp. 13-15. The critical point of Mr. Amos' comparison to Bresolin is that an assault, where it is merely the force used to accomplish a robbery, is not an independent crime that can be punished separately. Bresolin, 13 Wn. App. at 394; see Freeman, at 780.

The State is of course correct that Freeman involved vacation of an assault conviction where the assault was the act that elevated the appellant's robbery conviction to the first degree by infliction of injury. See Brief of Respondent, at pp. 21-27. Mr. Amos' brief relied on Freeman for the general rule that a separate conviction for assault cannot be sustained if the assaultive act merely forms the proof of an element of a greater crime, as was the case in both Freeman and in Bresolin. Bresolin, 13 Wn. App. at 394; Freeman, at 780; see also In re Pers. Restraint of Orange, 152 Wn.2d 795, 820, 100 P.3d 291 (2004) (convictions for attempted murder and assault, committed by shooting the victim, violated double jeopardy where the shooting was the substantial step element of the attempted murder). Whether the assault was duplicatively used an

“elevator” element of the degree of the offense, as in Freeman, or as an element of the core robbery offense, as in Bresolin, is a distinction without an difference. In both instances the gravamen of the double jeopardy issue is that the assault conviction was merely one of the several elements of the greater crime. The State’s failure to address Bresolin in its Brief of Respondent or to recognize the import of the rule of that case and of Freeman, in favor of drawing immaterial distinctions between the present case and the particular factual application of the rule in Freeman, merely draws attention to the objective absence of any colorable rebuttal to Mr. Amos’ double jeopardy challenge.

**(2). The Respondent misstates the plain record when it asserts that there was an “assault with a firearm.”** The Respondent asserts that the trial court properly denied merger of the robbery and the assault on ground that “two assaults occurred here—one with the walkie-talkie (which comprised the robbery first degree count) and another assault with a firearm (comprising one of the alternative ways the assault second degree was accomplished).” Brief of Respondent, at p. 28. But Mr. Amos was not charged with second degree assault with a deadly weapon in any way such that the firearm in question formed a part of the allegation of guilt as to

the assault. The firearm, which was stolen from the complainant in the course of the robbery, resulted in the allegation of an enhancement in the 2nd amended information (April 25, 2000) for being armed with an available firearm during the second degree assault. The allegation of an assault with a deadly weapon was based on the striking of the complainant with the walkie-talkie, not on the pointing of a firearm at the complainant that would amount to an assault with that gun as an assault with a deadly weapon. The presence of an available firearm was a basis for an enhancement, and it does not provide, not was it ever intended to provide, support for the conviction for assault with a deadly weapon. Compare RCW 9A.36.021(1); State v. Krup, 36 Wn. App. 454, 676 P.2d 507, review denied, 101 Wn.2d 1008 (1984); State v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966) (all stating that second degree assault under subsection (1)(c) involves assaulting another with a deadly weapon where the weapon is the instrument of the assaultive act), with RCW 9.94A.533(4)(b) and State v. O'Neal, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007) (a defendant is "armed" for purposes of an enhancement merely by being in proximity of a readily available deadly weapon during the offense, including even a weapon located under a mattress in another room at the location of the crime).

More to the point, the defendant did not provide a factual basis in his written plea for anything other than an assault with the walkie-talkie, and an enhancement based on stealing the gun and carrying it out of the residence. In the 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." (Emphasis added.) CP 133.

Neither of Mr. Amos' pleas incorporated any version of events supporting acts of force with both the walkie-talkie and the firearm, and unincorporated statements are not part of the factual basis for the plea. In re Keene, 95 Wn.2d 203, 210 n.2, 622 P.2d 360 (1980). Mr. Amos provided his own factual bases and did not check the box allowing the court to "review my police reports and/or a statement of probable cause". CP 145, CP 133; see Appellant's Opening Brief, at pp. 19-20. Respondent ignores this circumstance, and instead engages in a lengthy recitation of the language of that affidavit, see Brief of Respondent, at pp. 1-3. The State also provides this Court with extended quotations of statements made by the court in which the court engages in the very erroneous factual representations that Mr. Amos has cited as error, because these

factual representations are not supported by his plea statements, which are the facts of the case. Brief of Respondent, at pp. 6-11.

The trial court's misunderstanding of the factual grounds for the plea – the true basis of which, as shown in the plea statement, was an assault with the walkie-talkie, while armed with a firearm possessed by the defendant but not employed in any assault (thus forming the basis of the enhancement) – is evident on the very face of the State's quotations of the trial court's reasoning. The trial court told Mr. Amos,

[Y]ou told me in your own words that that you assaulted Joe Hull with a deadly weapon, and I asked you what that was, and you said a firearm and a walky-talky. So as far as I'm concerned, you admitted that you assaulted him with a firearm.

Brief of Respondent, at p. 10 (citing 9/12/05 RP 11, 12). But in fact, as shown by the Respondent's own quotations from the transcript of that earlier hearing, Mr. Amos had specifically and very properly disagreed with the trial court's assertion that he assaulted Hull with a firearm, by referring to the court to his "actual plea statement" in which he had admitted to assaulting Hull with a deadly weapon and being "in possession of a firearm at the time of the assault" with the walkie-talkie. Brief of Respondent, at p. 9 (citing 9/12/05 RP 11, 12).

The State's quoted sections of transcript merely portray the trial court's efforts to pressure Mr. Amos into stating that he committed assault by assaulting another with a firearm, which efforts by the court were, in the first place, unsuccessful, and in the second place would not matter even if they had succeeded, because the defendant's written plea statement governs over any oral statements that the court might have extracted from him.

For this same reason – the fact that the written plea statement, and not the charging document, constitutes the facts admitted to by Mr. Amos – this Court should reject all argument premised on the fact that the defendant was charged in the alternative with assault committed “with intent to facilitate robbery.” See Brief of Respondent, at pp. 25-27.

Because there was no assault with the stolen firearm – merely an assault with a walkie-talkie with an attached firearm enhancement – the facts do not support a separate and distinct assault action using the walkie-talkie that was gratuitous to commission of the robbery, as the trial court erroneously reasoned and as the Respondent argues. Brief of Respondent, at pp. 27-28. The Respondent's arguments merely add insult to the already existing injury of the trial court's and the trial prosecutor's failure to

recognize that the “facts” of this case for double jeopardy purposes are those contained in the defendant’s plea statements, not in other unincorporated charging documents or in the erroneous representations made by the court and the prosecutor.

The assault violates double jeopardy – and importantly, this violation appears on the very face of the conviction, therefore requiring it, and its attached term of incarceration for the enhancement, to be vacated despite Amos’ negotiated plea agreement.

**(3). Amos’ double jeopardy claims are not waived by a negotiated plea of guilty where the double jeopardy error is apparent on the face of the conviction.** Respondent State of Washington offers no response to Mr. Amos’ argument that a double jeopardy violation, where it is evident on the face of a conviction, is not foreclosed from challenge by virtue of a guilty plea made with an understanding of the State’s sentencing recommendation. Appellant’s Opening Brief, at pp. 16-25 (citing, inter alia, Menna v. New York, 423 U.S. 61, 62 and n.2, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975) (a guilty plea does not waive a facial double jeopardy violation)). 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, as argued in the Opening Brief.<sup>1</sup> 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. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). Courts may not exceed legislative authority by imposing multiple punishments for the same offense. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing Albernaz v. United States, 450 U.S. 333, 334, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

Neither State v. Moten, 95 Wn. App. 927, 976 P.2d 1286 (1999), nor any of the cases cited therein, have application to the present case. See Brief of Respondent, at pp. 12-19. Moten argued on appeal that his sentence was cruel and unusual and that his equal protection rights were violated because another possible sentencing statute could also govern his case and provide for lesser punishment. State v. Moten, at 928-29. Neither that case nor any

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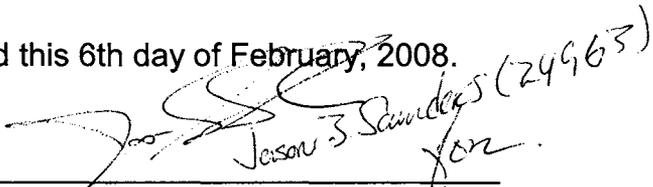
<sup>1</sup>As noted in the Opening Brief, collateral documents, signed as part of a plea agreement, may be considered when those documents are relevant in assessing the facial validity of the imposition of punishment for twin convictions. See In re Pers. Restraint of West, 154 Wn.2d 204, 211 n. 4, 110 P.3d 1122 (2005). Thus the plea agreements in this case are relevant to validity of the judgment and sentence under double jeopardy scrutiny. See also CP 14-22 (judgment and sentence, referring to both guilty pleas).

of those cited by the Respondent in its brief involve punishment that violated double jeopardy on the face of the convictions. Indeed, the Moten Court reiterated the rule that “a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one that the State may not constitutionally prosecute.” Moten, at 932 (quoting Menna, 423 U.S. at 63 n. 2). The present case involves precisely that type of charge – the State could not bring Mr. Amos to trial on a charge of robbery and an independent charge of assault where there was no assault by a firearm that would render the assault with the walkie –talkie a separate offense, and his conviction for a separate assault under those facts violates double jeopardy, on the face of the conviction record. 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.”).

**B. CONCLUSION**

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

Respectfully submitted this 6th day of February, 2008.

  
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