

Supp. Reply-PRP

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STATE OF WASHINGTON

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

PERSONAL RESTRAINT SUPPLEMENT REPLY BRIEF

No. 34375-4-II

Consol. to 36104-3

Forrest Eugene Amos #809903
MCC-Wash. State Reformatory
P.O. Box 777
Monroe, WA 98272-0777

CERTIFICATE OF SERVICE

I certify that I mailed
1 copies of Reply
to Jeremy Randolph
& _____

Date 10/18/06 Signed [Signature]

I. IDENTITY OF PETITIONER

FORREST EUGENE AMOS, Petitioner herein, is currently incarcerated at the Monroe Correctional Complex, Washington State Reformatory Unit, P.O. Box 777, Monroe, WA 98272-0777.

II. STATEMENT OF RELIEF SOUGHT

It is requested that this Court grant review of Mr. Amos' Personal Restraint Petition and grant Mr. Amos the relief required which is merger of his Robbery First Degree and Assault Second Degree based on Double Jeopardy purposes, resentencing within the statutory authority without the use of Mr. Amos' subsequent offense and conviction for Assault Second Degree in the calculation of his offender score because it exceeds the legislature's intent (statutory authority), breaches the plea agreement, violates Double Jeopardy, Collateral Estoppel, speedy sentencing rights, and constitutes vindictiveness on the part of the resentencing judge. Mr. Amos should also be given his right to appeal therefore this petition should be considered as a direct appeal and appoint counsel.

III. FACTS RELEVANT TO MOTION

On January 10, 2006, Mr. Amos filed a Personal Restraint Petition. After processing the petition the response date was March 12, 2006. The respondent filed an untimely response brief on May 1, 2006, and their response brief did not include a response to all of the issues raised by Mr. Amos.

Mr. Amos filed a timely reply brief on May 31, 2006. Then on August 3, 2006, the honorable judge Van Deren issued an order for the respondent to file a supplemental response brief within 20 days on Mr. Amos' supplemental issues they failed to initially respond to.

On September 25, 2006, the respondent filed an untimely supplemental response brief thereby defying the honorable judge Van Deren's order of August 3, 2006. On top of defying the honorable judge's order, the respondent further defied the honorable judge by not responding to all of Mr. Amos' issues as ordered

by the honorable judge Van Deren. The respondent only responds to Mr. Amos' issue regarding the denial of his right to appeal.

Mr. Amos now replies to the respondent's latest response brief.

IV. GROUNDS FOR RELIEF AND ARGUMENT

Mr. Amos in his petition claimed that he was denied his right to appeal an adverse decision by the trial court. CONST. AMEND. 6; Article 1, § 22 of the WASH. CONST. The respondent argues in their supplemental response brief that Mr. Amos does not have the constitutional nor statutory right to appeal his sentence because he waived his right to appeal when pleading guilty and that because his sentence was within the standard range or an exceptional sentence downward he cannot appeal such sentence.

The respondent's argument is off base. Mr. Amos when pleading guilty only waived his right to appeal a finding of guilt after a trial. See exhibit A and B. Now where did Mr. Amos waive his right to appeal a trial judge's ruling on sentencing issues such as Double Jeopardy or the use of a subsequent offense and conviction in the calculation of the defendant's offender score which is the case here.

A criminal defendant who has been aggrieved by an adverse decision in the trial court may appeal as a matter of right. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); U.S. CONST. AMEND. 6; Article 1, § 22 of the WASH. CONST.

Mr. Amos has never wished to appeal his finding of guilt which was the only appeal issue he waived when pleading guilty. See exhibit A and B. Mr. Amos only wishes to appeal the trial judge's finding that Mr. Amos' Robbery First Degree and Assault Second Degree do not violate Double Jeopardy protections and the trial judge's use of Mr. Amos' subsequent offense and conviction in the calculation of his offender score at resentencing.

A Double Jeopardy claim can be made for the first time on appeal. Menna

v. New York, 423 U.S. 61, 62-63, 96 S.Ct. 241, 242, 46 L.Ed.2d 195 (1975).

Also when the sentencing court acts outside the structure set by the SRA, the defendant has the right to appeal and appellate court may review any such departure. State v. Mail, 121 Wn.2d 707, 711-12, 854 P.2d 1042 (1993); State v. Roberts, 117 Wn.2d 576, 587, 817 P.2d 855 (1991).

The courts have already held that the state bears the burden of showing that a criminal defendant has made a voluntary, knowing and intelligent waiver of the right to appeal. State v. Tormal, 133 Wn.2d at 989. In other words, the State is required to "make some affirmative showing the defendant understood his right to appeal and chose not to exercise it." State v. Kells, 134 Wn.2d at 315.

No where did the respondent in their response brief show a voluntary waiver of Mr. Amos' right to appeal the trial judge's adverse ruling on Mr. Amos' issue of Double Jeopardy or the use of his subsequent offense and conviction at his resentencing when the subsequent offense and conviction occurred years after the erroneous sentence was imposed against Mr. Amos.

In State v. Frampton, 45 Wn.App. 554, 560-61, 726 P.2d 486 (1983), the court said if a personal restraint petitioner shows that, in effect, he received no appeal, then reinstatement of the appeal may be granted without a showing of whether there is a reasonable probability of prevailing on appeal.

In Mr. Amos' petition he shows he received no right to appeal the trial judge's adverse rulings at his resentencing. Mr. Amos' claim is supported by Appendix B of the respondent's supplemental response brief at page 21 which states "THE COURT: As stated earlier, if you think that the court is wrong on my determination of the issue on merger, your remedy is to file a PRP on that issue, which you already know how to do." That statement shows this court Mr. Amos was never given a right to appeal the adverse decision of the trial judge. Therefore, Mr. Amos shall prevail in this petition and reinstatement

of his appeal shall occur and his petition shall be considered as his appeal.

Moving on to the other issues raised by Mr. Amos in his supplemental petition, the respondent failed to address those issues in their supplemental response brief as they were directed by the honorable judge Van Deren of this court.

Mr. Amos believed that Double Jeopardy precluded the trial court from using his subsequent offense and conviction in the calculation of his offender score at his resentencing because he had a legitimate expectation of finality at his sentencing date where the erroneous sentence was imposed and his subsequent offense and conviction never existed at that time. See Mr. Amos' supplemental brief at 4-10.

Also Mr. Amos believed that his right to speedy sentencing precluded the use of his subsequent offense and conviction in the calculation of his offender score at resentencing because the subsequent offense and conviction occurred after Mr. Amos was initially sentenced and after the statutorily imposed speedy sentencing deadline of 45 court days expired. RCW 9.94A.500(1). See Mr. Amos' supplemental brief at 10-17.

Finally, Mr. Amos believed the resentencing judge acted vindictively when he used the subsequent offense and conviction in question at Mr. Amos' resentencing in order to increase his offender score and such while knowing the subsequent offense and conviction never existed at the time of Mr. Amos' initial sentencing date. See Mr. Amos' supplemental brief at 17-21.

V. CONCLUSION

In conclusion, this Court shall grant Mr. Amos the relief requested in his petition. The respondent's arguments throughout their briefs range from misstatement of facts, misapplication of law, and a flat out attempt to muddy the waters from the key issues of Mr. Amos' petition.

Mr. Amos stresses to this Court the importance of reaching the merits of Mr. Amos' petition throughout his petition.

Respectfully submitted,

x.

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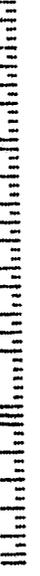


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