

NO. 36442-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LEON GLENNQUAREE TONEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bruce W. Coho

No. 96-1-04907-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Under *State v. Kilgore*¹, is the defendant precluded from relief when the trial court was ordered by this court to run the defendant's firearm sentencing enhancements concurrently and the trial court complied with that order?
2. Even, assuming arguendo, that the defendant is not precluded from raising this issue in his second appeal under *Kilgore*, does the defendant's sentence and community placement exceed the statutory maximum when the defendant's statutory maximums were life and ten years?
3. Even, assuming arguendo, that the defendant is not precluded from raising this issue in his second appeal under *Kilgore*, is the well-settled rule of law that a criminal defendant is not placed in double jeopardy by an imposition of a firearm sentence enhancement when the underlying offense has use of a deadly weapon unaffected under a *Blakely* analysis?

¹141 Wn. App. 817, 172 P.3d 373 (2007)

4. Even, assuming arguendo, that the defendant is not precluded from raising this issue in his second appeal under *Kilgore*, is the defendant still precluded from asserting that the trial court did not have the statutory authority to apply the firearm sentencing enhancement when the defendant cannot establish that such an issue was properly preserved below?

B. STATEMENT OF THE CASE.

On August 28, 1997, LEON GLENNQUAREE TONEY, hereinafter “defendant,” was sentenced to a total of 336 months on convictions for burglary in the first degree, assault in the first degree, and unlawful possession of a firearm in the first degree. CP 51-61. The defendant filed a direct appeal, and on May 7, 1999, the Court of Appeals issued an opinion affirming the petitioner’s convictions but remanding for re-sentencing. (Appendix “A,” Unpublished Court of Appeals Opinion). In the court’s original opinion, the defendant raised the following issues: (1) he was denied his right to a speedy trial, (2) he received ineffective assistance of counsel because his attorney failed to present alibi evidence, (3) his offender score was calculated incorrectly because three of his convictions constituted the same criminal conduct, and (4), his multiple firearm enhancements should have been run consecutively. *Id.* This court affirmed the defendant’s convictions and remanded for resentencing with

instructions to run the firearm enhancements consecutively. *Id.*

On September 29, 2000, the defendant was re-sentenced in accordance with this court's unpublished opinion. CP 67-79. On June 20, 2007, the defendant filed a notice of appeal. CP 84. The Supreme Court ultimately permitted the untimely filing of the defendant's notice of appeal, and this appeal follows.

C. ARGUMENT.

1. UNDER *STATE V. KILGORE*, THE DEFENDANT IS PRECLUDED FROM RELIEF WHEN THE TRIAL COURT WAS ORDERED BY THIS COURT TO RUN THE DEFENDANT'S FIREARM SENTENCING ENHANCEMENTS CONCURRENTLY, AND THE TRIAL COURT COMPLIED WITH THIS COURT'S ORDER, MAKING THE REMAND PROCEEDING MINISTERIAL IN NATURE.

Kilgore appealed his seven convictions for child molestation and child rape, alleging that the trial court erred in suppressing evidence. *State v. Kilgore*, 141 Wn. App. 817, 820-821, 172 P.3d 373 (2007). This court reversed two of the seven counts, and remanded for "further proceedings." *Id.* The State did not retry Kilgore on the counts that had been reversed, but asked the trial court to add appellate costs. *Id.* at 821. Approximately two years later, the trial court entered an order correcting the defendant's judgment and sentence by striking the two reversed counts from the judgment and sentence and reducing his offender score. *Id.* at 822. Kilgore appealed again, arguing that he was entitled to a resentencing after

his first appeal. *Id.* at 823. This court held that a resentencing was not required for the affirmed convictions on remand. *Id.* The court held that a reduced standard range, not a reduced offender score, required a resentencing. *Id.* at 824. The court held:

When the trial court chose not to exercise its discretion under *Barberio*² to resentence Kilgore on remand “for further proceedings,” our remand became ministerial in nature: The trial court merely corrected Kilgore’s original judgment and sentence by ordering deletion of his two reversed convictions; the trial court did nothing to alter Kilgore’s 1998 exceptional sentences for his five affirmed convictions. Again, as we have previously noted, there was no resentencing on remand for Kilgore to appeal. *Kilgore had already exercised his right to appeal his original judgment and sentence, and he had lost an appeal with respect to his five affirmed convictions*, the exceptional sentences for which he had chosen not to challenge.

Id. at 829-830 (emphasis added).

Kilgore also sought a resentencing relief under *Blakely*³, arguing that he was entitled to a resentencing with a standard range sentence. *Id.* at 822. This court held that the defendant was not entitled to such relief, holding that *Blakely* did not apply to the defendant’s remaining five exceptional sentences because they were final before *Blakely* was decided. *Id.* The court ultimately held that there was nothing for the defendant to appeal because his exceptional sentences were not challenged in his first

² *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993).

³ *Blakely v. Washington*, 542 U.S. 303-304, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004).

appeal. *Id.* at 830. The court dismissed his appeal and did not grant Kilgore relief.

In the present case, the defendant seeks review of new issues; however, under *Kilgore*, review is precluded as the defendant has already appealed his original convictions and sentence and was not successful. The defendant asserts that (1) the length of imprisonment, which combined with the length of community custody, exceeds the high end of the standard range and therefore is not lawful, (2) that the application of the firearm enhancement violated double jeopardy, and (3) that there is no statutory procedure for applying RCW 9.94A.510(3)'s firearm enhancement, and that the trial court lacked the authority to create such procedures. Brief of Appellant at pages i-ii. The defendant in this case also did not receive a reduction in his standard ranges following his first appeal. Rather, the standard ranges remained the same. CP 51-61, 67-79. Under the analysis of *Kilgore*, a resentencing is required when there is a reduction in the standard range. Such reduction did not occur here. All of the issues raised by the defendant should not be considered by this court under *Kilgore*. The defendant asserts that *Kilgore* is not applicable because the trial court conducted a full resentencing and exercised discretion. Brief of Appellant at page 18. Such assertion is without merit. This court did not order that the trial court start anew with a brand new sentencing. Rather, this court ordered:

[R]emand for resentencing with instructions to run the firearm enhancements consecutively with the base sentences for the offenses to which they apply but to determine whether the total sentences should be run consecutively or concurrently according to the rules set forth in RCW 9.94A.400.

Appendix “A.” This court specifically stated that the defendant’s conviction was affirmed. *Id.*

In *Kilgore*, this court reversed two convictions but affirmed five, and remanded the case “for further proceedings.” *Kilgore*, 141 Wn. App. 817 at 821. The trial court then did the ministerial act of deleting the reversed convictions from the defendant’s judgment and sentence. *Id.* at 822. Similarly, this court reversed the defendant’s firearm sentencing enhancements only, concluding that they were to be run consecutively to the base sentences. Whether the trial court then heard additional argument regarding the sentence is irrelevant, because the trial court’s specific directive from this court was with respect to the firearm enhancements only. The trial court did not, and could not have, modified the other aspects of the defendant’s sentence. Similar to *Kilgore*, the trial court here merely performed the ministerial act of following this court’s order regarding the firearm enhancements, and therefore the defendant is not entitled to seek additional review of the new issues he now raises. This court should decline to address the defendant’s claims.

The defendant asserts that *Kilgore* does not preclude him from raising a *Blakely* and *Apprendi*⁴ challenge because those issues are constitutional in nature. In *Kilgore*, however, the defendant attempted to raise similar claims and this court held that he was still precluded from doing so because the remand was ministerial in nature and the trial court did not exercise its discretion.

As the defendant correctly states, *Kilgore* is currently pending before the Washington Supreme Court under Case Number 81020-6. If this court deems it appropriate, it should stay the present case until *Kilgore*'s petition for review is accepted and his case is adjudicated by the Supreme Court, or his petition for review is denied.

2. EVEN, ASSUMING ARGUENDO, THAT THE DEFENDANT IS NOT PRECLUDED FROM RAISING THIS ISSUE IN HIS SECOND APPEAL UNDER ***KILGORE***, THE DEFENDANT'S SENTENCE AND COMMUNITY PLACEMENT DID NOT EXCEED THE STATUTORY MAXIMUM.

When a court sentences an offender for a violent felony offense, such as assault in the second degree, the court "shall in addition to the other terms of the sentence, sentence the offender to community custody." RCW 9.94A.715(1)(a). The community custody term begins upon completion of the term of confinement or when the offender is transferred

⁴ *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000).

to community custody in lieu of earned early release. *Id.* The presumptive sentence ranges for total confinement do not include the periods of community placement. *In Re Caudle*, 71 Wn. App. 679, 680, 863 P.2d 570 (1993); *see also State v. Bader*, 125 Wn. App. 501, 504-05, 105 P.3d 439 (2005) (defendant's period of confinement would not be reduced by three years, the term of his mandatory community custody). Community custody is not an exceptional sentence based on aggravating circumstances. RCW 9.94A.535(2). Rather, community custody automatically applies when the defendant is convicted of certain crimes. RCW 9.94A.715(1). *Blakely v. Washington*, *Apprendi v. New Jersey*, and *State v. Hughes* deal with the maximum sentences a judge may impose absent additional factual findings by a jury. *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000); *State v. Hughes*, 154 Wn.2d 118, 134-35, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006). These cases do not prevent a court from imposing a term of community custody because community custody results directly from the jury verdict and no additional fact finding is required. RCW 9.94A.715(1).

According to *Blakely*, the “statutory maximum” means “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely*, 542

U.S. 296 at 303. It is “not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” *State v. Kinneman*, 155 Wn.2d 272, 278, 119 P.3d (2005) (quoting 542 U.S. 296 at 302).

The total time served between incarceration and community custody cannot exceed the *statutory maximum* sentence for the crime. *State v. Zavala-Reynoso*, 127 Wn. App. 119, 124, 110 P.3d 827 (2005); *State v. Sloan*, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004). Under the Sentencing Reform Act it is possible for a court to impose a sentence where the combined terms of confinement and community custody facially exceed the statutory maximum sentence, but which, due to the possibility of earned early release credits, will not result in the offender actually serving a sentence that exceeds the statutory maximum. *Sloan*, 121 Wn. App. at 221; *State v. Vanoli*, 86 Wn. App. 643, 655, 937 P.2d 1166 (1997). When a court imposes a combination of terms of confinement and community custody that facially exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum. *State v. Sloan*, 121 Wn. App. at 223-224.

Blakely does not require any additional factual findings before the mandatory term of community custody is imposed. In the instant case, the trial court imposed standard range sentences of 75 months on count one,

216 months on count two, and 48 months on count three. CP 67-79. The court also imposed 60 months for the firearm sentencing enhancement, and community placement for “two years or up to the period of earned early release awarded,” whichever is longer. *Id.* The statutory maximum for counts one and two is life, and the statutory maximum for count three is ten years. In this case, none of the sentences on any of the counts exceeded the statutory maximum on each count.

The defendant asserts that the term “statutory maximum” as applied to the present case means the high end of the standard range, and, therefore, the combined term of incarceration and community custody cannot exceed the high end of the range. Such assertion is without merit. Under the defendant’s analysis, a trial court could never impose the high end of the standard range and a term of community custody. As the court in *Kinneman* stated, the “maximum sentence” is not the maximum sentence the court can impose after the finding of additional facts, but the maximum the court can impose without any additional findings. As argued above, the trial court can impose community custody without any additional facts having to be found under *Blakely*. The trial court did not err in sentencing the defendant to the high end of the standard range on each count in addition to a period of community custody. The defendant’s claim is without merit.

3. EVEN, ASSUMING ARGUENDO, THAT THE DEFENDANT IS NOT PRECLUDED FROM RAISING THIS ISSUE UNDER **KILGORE**, THE WELL-SETTLED RULE THAT A CRIMINAL DEFENDANT IS NOT PLACED IN DOUBLE JEOPARDY BY AN IMPOSITION OF A FIREARM SENTENCE ENHANCEMENT WHEN THE UNDERLYING OFFENSE HAS USE OF A DEADLY WEAPON AS AN ELEMENT IS UNAFFECTED BY **BLAKELY**.

Washington courts have repeatedly rejected arguments that weapons enhancements violate double jeopardy. *State v. Husted*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003) (citing *State v. Claborn*, 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981)); *see also*, *State v. Nguyen*, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006), petition for review filed on October 19, 2006). In *State v. Claborn*, the defendant received separate weapons enhancements for burglary and theft convictions arising from the same event. 95 Wn.2d at 636-38. On appeal, Claborn argued that separate enhancements for the “single act” of being armed with a deadly weapon during the burglary and theft violated double jeopardy. Noting that burglary and theft have separate elements and that the enhancement statutes did not themselves create criminal offenses, the *Claborn* court held that the enhancements did not create multiple punishments for the same offense.

Courts have also rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon was an element of the crime charged. *See*, *State v. Caldwell*, 47 Wn. App. 317, 319, 734

P.2d 542, *rev. denied*, 108 Wn.2d 1018 (1987); *State v. Pentland*, 43 Wn. App. 808, 811, 719 P.2d 605, *rev. denied*, 106 Wn.2d 1016 (1986); *State v. Harris*, 102 Wn.2d 148, 160, 685 P.2d 584 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). These cases make clear that, for purposes of sentence enhancements, “the double jeopardy clause does no more than prevent greater punishment for a single offense than the Legislature intended.” *Caldwell*, 47 Wn. App. at 319 (quoting *State v. Pentland*, 43 Wn. App. 808, 811-12, 719 P.2d 605 (1986) (citing *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L.Ed.2d 535 (1983))). That court concluded that the Legislature had clearly expressed its intent that a person who commits certain crimes while armed with a deadly weapon will receive an enhanced sentence, notwithstanding the fact that being armed with a deadly weapon was an element of the offense. *Caldwell*, 47 Wn. App. at 320.

It is also clear that the Legislature intended to impose separate enhancements for each crime committed with a firearm, regardless of whether the crimes involved the same weapon. RCW 9.94A.533(3) provides in part:

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense,

the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9A.01.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

...

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4);

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

The “statute unambiguously shows legislative intent to impose two enhancements based on a single act of possessing a weapon, where there are two offenses eligible for an enhancement.” *State v. Husted*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003) (evaluating the deadly weapon

enhancement section of chapter RCW 9.94A, which contains the same language as the firearm enhancement section). No exceptions are contemplated.

In the case before the court, defendant was convicted of burglary in the first degree, assault in the first degree, and unlawful possession of a firearm in the first degree. CP 67-79. The jury found firearm enhancements on both the burglary in the first degree and assault in the first degree. CP 48-49. Thus, defendant's sentence included two firearm enhancements that run concurrently for a total of 60 months of enhancement time added to the standard ranges. CP 77-89.

Defendant now challenges the 60 months of firearm enhancements he received on his conviction for burglary in the first degree and assault in the first degree, arguing that in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), this court must reexamine the well-settled rule that a sentence enhancement imposed for being armed with a firearm does not violate double jeopardy where the use of a deadly weapon is also an element of the offense. This same claim has been raised and rejected in Division One. In *State v. Nguyen*, 134 Wn. App. 863, 869, 142 P.3d 1117 (2006) (petition for review filed on October 19, 2006) Division One found that "nothing in *Blakely* gives reason to question prior Washington cases holding that double jeopardy is not violated by weapon enhancements even if the use of the weapon is an

element of the crime.” The court relied on legislative intent in reaching its decision:

[U]nless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent. The intent underlying the mandatory firearm enhancement is unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies.

Nguyen, 134 Wn. App. at 868. This analysis follows the holdings of the United States Supreme Court pointing out that the *Blockburger*⁵ test is a tool used to discern legislative intent; when the legislature has made its intent clear, however, then the *Blockburger* test is irrelevant.

Our analysis and reasoning in *Whalen*⁶ and *Albernaz*⁷ lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in *Whalen* is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court’s power to impose convictions and punishments when the will of Congress is not clear. Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.

⁵ *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed.2d. 306 (1932).

⁶ *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980).

⁷ *Albernaz v. United States*, 450 U.S. 333, 101 S. Ct. 1137, 67 L.Ed.2d 275 (1981).

Missouri v. Hunter, 459 U.S. 359, 368, 103 S. Ct.673, 74 L.Ed.2d 535 (1983).

The Washington Legislature specifically exempted certain crimes from being eligible for enhancement. The Legislature did not include crimes on this list that had use of a deadly weapon as an element of the crime, such as burglary in the first degree or assault in the first degree. RCW 9.94A.533(3)(f). Because the intent of the Legislature is unambiguous in its desire to authorize additional punishment on crimes committed with a firearm, even when such crimes include the use of a deadly weapon as an element, double jeopardy is not violated. *Nguyen*, 134 Wn. App. at 868.

The court also rejected a claim similar to the one that defendant makes here—that the firearm allegation essentially is duplicative of an element of the crime.

Nguyen’s argument is essentially based upon semantics, and he assigns an unsupportable weight to the Blakely Court’s use of the term “element” to describe sentencing factors. But the meaning of the Court’s language in *Blakely* was made clear in *Recuenco*, wherein the Court pointed out that “elements and sentencing factors must be treated the same for Sixth Amendment purposes.” Nguyen does not contend his Sixth Amendment rights to a unanimous jury and proof beyond a reasonable doubt were violated.

Nguyen, 134 Wn. App. at 869 (citations omitted).

Defendant provides no persuasive argument why this court should not follow Division I and the analysis in *Nguyen*. Any legislative redundancy in mandating enhanced sentences for offenses involving the use of a firearm is intentional. Imposition of additional time for the enhancement does not violate double jeopardy principles or *Blakely*.

As the defendant correctly states, the Washington Supreme Court is currently considering a petition for review in *Nguyen*. The court has stayed consideration of *Nguyen* pending decisions in *State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007), and *State v. Recuenco*, ___ Wn.2d, ___ P.3d ___ (2008). Both *Surge* and *Recuenco* have now been decided. If this court deems it appropriate, it can stay this case until *Nguyen* has been accepted for review and adjudicated, or until review has been denied.

4. EVEN, ASSUMING ARGUENDO, THAT THE DEFENDANT IS NOT PRECLUDED FROM RAISING THIS ISSUE UNDER *KILGORE*, THE DEFENDANT'S CLAIM THAT THERE WAS NO STATUTORY AUTHORITY FOR APPLYING THE FIREARM SENTENCING ENHANCEMENT UNDER RCW 9.94A.510(3) IS STILL NOT PROPERLY BEFORE THIS COURT FOR REVIEW BECAUSE THE DEFENDANT SHOULD HAVE RAISED SUCH A CLAIM IN HIS FIRST APPEAL AND CANNOT ESTABLISH THAT THE CLAIM WAS PROPERLY PRESERVED BELOW.⁸

As argued above, this court should not consider the issues raised by the defendant after this court remanded for a ministerial act. Moreover, there would have had to be an objection below in order for this new issue to be preserved for appeal. The defendant is not raising a constitutional claim, but is arguing that the trial court acted without statutory authority. Such issue must have been raised below. Because the defendant should be limited to the record from the remand hearing, he cannot show that this issue was properly preserved.

In *State v. Nguyen*, 134 Wn. App. 863, 868 P.3d 1117 (2006), the defendant asserted that there was no statutory authority for the trial court

⁸ The State's position is that the defendant cannot rely on the transcripts from the trial below, and has filed a separate motion to strike those transcripts. If, however, this court denies the State's request to strike those transcripts, they do support the State's claim that this issue was not preserved for appeal because the defendant did not object to the special verdict forms for the firearm sentencing enhancements at trial below. RP (7/2/97) 431.

to impose the firearm enhancement because, although the legislature created a procedure for the imposition of a deadly weapon enhancement, it did not create a parallel procedure for the imposition of a firearm enhancement. *Id.* at 869. The court held that the defendant failed to object to the special verdict forms at trial, and therefore had not preserved the issue for appeal. *Id.* at 870, n. 13. The defendant cannot establish that this asserted statutory error was preserved below, and therefore this court should not reach the merits of the defendant's claim.

Finally, as the defendant asserts, *State v. Nguyen, supra*, is currently pending review before the Washington Supreme Court. If this court deems it appropriate, it could stay resolution of this case until Nguyen is granted review and his case is adjudicated, or until review is denied. The defendant also asserts that this claim can be raised for the first time in this appeal because this issue could not have been raised before *Blakely* and *Apprendi* were decided. Brief of Appellant at page 35. Such claim is without merit. The defendant's argument regarding the trial court's lack of statutory authority does not rely on *Blakely* or *Apprendi*. It is an issue that is statutory in nature, not constitutional, and was an issue that clearly could have been raised in the trial court below and in the defendant's first appeal. The defendant is not entitled to review of this new issue in this appeal.

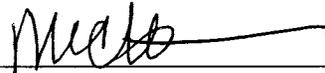
D. CONCLUSION.

For the above stated reasons, the defendant is not entitled to relief.

This court should affirm the defendant's sentence.

DATED: May 14, 2008.

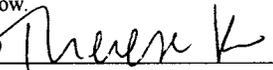
GERALD A. HORNE
Pierce County
Prosecuting Attorney



MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.14.08 
Date Signature

APPENDIX "A"

Unpublished Opinion

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON *Bridgewater*

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LEON GLENQUAREE TONEY

Appellant.

No. 22392-9-II

96-1-04907-9

UNPUBLISHED OPINION

Filed: MAY 07 1999

BRIDGEWATER, C.J. - Leon Glenquaree Toney appeals from his conviction of burglary in the first degree, assault in the first degree, and unlawful possession of a firearm in the first degree. He claims that he was denied his right to a speedy trial under CrR 3.3, that his offenses were the same criminal conduct for sentencing purposes, that he was denied his right to effective assistance of counsel, and that the sentencing court improperly applied the deadly weapon enhancements for the burglary and assault consecutively to each other. We find merit only to this last claim and, therefore, affirm his conviction but remand for resentencing.

In October 1996, Diana Ames agreed to sew some infant clothing for Tahaira Spice, who paid Ames \$45 in advance. On the afternoon of December 20, 1996, Spice went to Ames' home, angrily confronting Ames because Ames had not yet finished the clothing, took Ames' sewing machine and the nearly completed clothes, and demanded her money back as a condition of returning the sewing machine.

That evening, Spice returned to Ames' home; this time accompanied by Billy Ray Griffith and Leon Toney. Patrick Callahan, one of Ames' roommates, saw Spice at the front door but did not open it because of the earlier confrontation. He then told Ames and Steve Alex,

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another roommate, that Spice was at the front door and advised them not to open it. But Alex opened the door, only to have Griffith hit him over the head and to the ground. Toney entered the house; upon seeing Callahan, Toney kicked him in the chest, knocked him to the floor, beat him with his fists, and stomped on him with his boots. Ames tried to pull Toney back, but Spice grabbed Ames by the hair and began knocking her head against the wall. Toney, who had fallen to the floor in the scuffle with Ames, looked across the bathroom floor at Callahan, pulled a handgun from his waistband and shot Callahan in the stomach. The three intruders then fled.

All three were apprehended by the police and charged. Toney was charged by amended information with one count each of assault in the first degree, burglary in the first degree, and unlawful possession of a firearm in the first degree. Spice and Griffith pleaded guilty and agreed to testify against Toney. Toney's case went to trial, but a mistrial was declared on April 2, 1997. A new trial date was set for June 2, 1997, 60 days after the mistrial.

On June 2, 1997, the case was called, the parties appeared, and the court entertained a motion by defense counsel to withdraw. The court denied the motion and then discussed with the attorneys how they could hold trial when both the court and defense counsel were beginning a murder trial the next day. The court then continued the case until June 3, 1997, to see if either the murder trial would go on or that defendant would plead guilty. The murder trial did go on and the court continued the Toney trial until June 9, 1997. On June 9, the murder trial was still going on and the court granted another continuance until June 23, 1997. This was because of the murder trial and because the case had to be assigned to another deputy prosecutor who was unavailable until then because of a training seminar in Chelan.

During opening arguments, Toney's counsel explained to the jury that he would be presenting an alibi defense and that certain witnesses would testify that Toney was playing

basketball at the time of the assaults. But defense counsel did not call any such witnesses nor present any such testimony. During closing arguments, the prosecutor reminded the jury of this. Defense counsel acknowledged this, but he explained that the defense strategy had changed during the trial. The jury found Toney guilty of the charged offenses and found that he was armed with a deadly weapon during the assault and burglary. Toney was sentenced based upon an offender score of six; three points being for criminal history and three points being for current offenses. The court imposed a sentence of 216 months, the high end of the standard range for assault in the first degree, imposed concurrent sentences for the burglary and firearm convictions, and imposed two consecutive 60 month terms of confinement for the deadly weapon enhancements for a total term of confinement of 336 months.

CRR 3.3 SPEEDY TRIAL PERIOD

Toney first argues that he was denied his right to a speedy trial under CrR 3.3. This is so, he argues, because he was not tried within 60 days of the mistrial and he never waived his right to a speedy trial. He claims the trial court abused its discretion in setting his trial over from June 2 to June 3, then to June 9, and finally to June 23. He claims that neither CrR 3.3(d)(8) nor CrR 3.3(h)(2) applied under the circumstances and that his case should, therefore, be dismissed with prejudice as proscribed in CrR 3.3(i).

Without reaching the merits of the court's rulings under these rules, we find that no speedy trial violations occurred because trial commenced on the 60th day of the speedy trial period. In *State v. Carson*, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996), the defendant claimed a violation of his CrR 3.3 speedy trial right when trial actually began on the 61st day and the trial court had not previously granted an extension of time. The Supreme Court found no speedy trial violation because the case commenced on the 60th day:

[F]or speedy trial purposes, a trial commences when the case is assigned or called for trial and the trial court hears and disposes of preliminary motions. Disposition of preliminary motions is a customary and practical phase of a trial. In this case, on August 5, 1992, the date set for trial, defense counsel appeared before the court and moved for a continuance. The trial court denied the motion. From this we conclude the trial actually commenced on August 5, 1992. Under this circumstance, there was no necessity for a one-day extension from August 5 to August 6.

Similarly, in *State v. Carlyle*, 84 Wn. App. 33, 36-37, 925 P.2d 635 (1996), this court held that trial commenced for speedy trial purposes when the trial court ruled on a preliminary motion to exclude witnesses and on a motion in limine regarding a gaze nystagmus test. “[N]othing more need be done to comply with CrR 3.3 than that the case be called and the court entertain a preliminary motion.” *Carlyle*, 84 Wn. App. at 36 (quoting *State v. Andrews*, 66 Wn. App. 804, 810, 832 P.2d 1373 (1992), *review denied*, 120 Wn.2d 1022 (1993) (discussing *State v. Redd*, 51 Wn. App. 597, 608, 754 P.2d 1041, *review denied*, 111 Wn.2d 1008 (1988) and *State v. Mathews*, 38 Wn. App. 180, 183, 685 P.2d 605, *review denied*, 102 Wn.2d 1016 (1984))).

Here, on June 2, the case was called, the attorneys appeared prepared to go to trial, and the trial court ruled on Toney’s counsel’s motion to withdraw. The court denied the motion and continued the case until the next day. Under *Carson* and *Carlyle*, for purposes of the speedy trial rule, trial commenced that day. Thus, we find no error.

EFFECTIVE ASSISTANCE OF COUNSEL

Toney argues that he was denied his constitutional right to effective assistance of counsel because his attorney failed to present alibi evidence he told the jury that he would be providing. He claims that this failing diminished both his and his attorney’s credibility and, in light of the inconsistent identification evidence presented at trial, led to his wrongful conviction.

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The Washington State and United States Constitutions guarantee a criminal defendant the right to effective assistance of counsel. Wash. Const. Art. 1, § 22; U.S. Const. amend. 14, § 1. The test for ineffective assistance of counsel has two parts. One, it must be shown that the defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness. Two, it must be shown that such conduct prejudiced the defendant, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopted test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

In reviewing this type of challenge, this court must presume that the assistance was effective. *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986). Generally, a court will not consider those matters it regards as tactical decisions or matters of trial strategy. *State v. Carter*, 56 Wn. App. 217, 224, 783 P.2d 589 (1989). "If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel." *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986); *State v. Adams*, 91 Wn.2d 86, 90-91, 586 P.2d 1168 (1978); *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). See *State v. McFarland*, 127 Wn.2d 322, 334-38, 899 P.2d 1251 (1995) ("Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.").

After the State reminded the jury that Toney had not presented the alibi evidence he claimed he would, defense counsel explained his actions to the jury:

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criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.400(1)(a). The crimes must share all these features; if not, they are counted separately. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

Toney argues that his three offenses held the same objective purpose, occurred at the same time and place, and involved the same victim. We disagree. As was made clear in *State v. Davison*, 56 Wn. App. 554, 784 P.2d 1268, *review denied*, 114 Wn.2d 1017 (1990), a burglary against multiple residents precludes application of the same criminal conduct statute. Here, Ames, Callahan, and Alex were victims of the burglary and only Callahan was the victim of the assault. Thus, the crimes involved multiple victims and were not same criminal conduct. As to the unlawful possession of a firearm, again different victims were involved. While the assault and burglaries involved specific victims, the unlawful possession of a firearm did not. *See also State v. Thompson*, 55 Wn. App. 888, 894, 781 P.2d 501 (1989) (unlawful possession of a firearm and assault require different objective criminal intents and involve different times and places). The trial court did not err in calculating Toney’s offender score at six.

DEADLY WEAPON ENHANCEMENTS

Toney contends that the trial court erred by ordering his multiple firearm enhancements to run consecutively to each other under RCW 9.94A.310(3)(e)² because RCW 9.94A.400 governs whether sentences must be served consecutively or concurrently.

In a case decided after Toney’s sentencing, our Supreme Court concluded that “RCW 9.94A.310(3)(e) is ambiguous with regard to whether firearm enhancements are to always run consecutively to each other or whether RCW 9.94A.400 is to be used to determine whether they

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are consecutive or concurrent.” *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 250, 955 P.2d 798 (1998). And because the court could not ascertain which interpretation the Legislature intended when it enacted RCW 9.94A.310(3)(e), the rule of lenity required it to resolve the statutory ambiguity in favor of criminal defendants. *Charles*, 135 Wn.2d at 253. Therefore, the court held that although RCW 9.94A.310(3)(e) mandates that firearm enhancements run consecutively to their underlying sentences, RCW 9.94A.310(3)(e) does not mandate that multiple firearm enhancements run consecutively to each other. *Charles*, 135 W.2d at 253. Instead, RCW 9.94A.400 governs whether multiple firearm enhancements run consecutively or concurrently to each other. *Charles*, 135 Wn.2d at 254. In this case, the trial court incorrectly interpreted RCW 9.94A.310(3)(e) as mandating that Toney’s multiple firearm enhancements run consecutively to each other. Therefore, we reverse Toney’s sentence and “remand for resentencing with instructions to run the firearm enhancements consecutively with the base sentences for the offenses to which they apply but to determine whether the total

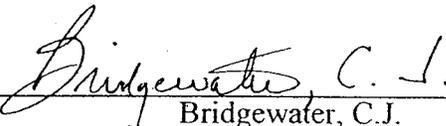
² RCW 9.94A.310(3)(e) provides: "Notwithstanding any other provision of law, any and all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provisions."

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sentences should run consecutively or concurrently according to the rules set forth in RCW 9.94A.400.” *Charles*, 135 Wn.2d at 255.

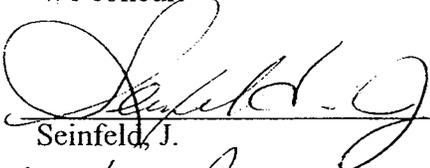
We affirm and remand for proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

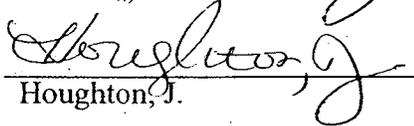


Bridgewater, C.J.

We concur:



Seinfeld, J.



Houghton, J.