

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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38377-2-II

NO. 04-1-00323-1

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WADE WILLIAM PIERCE,

Appellant.

BRIEF OF APPELLANT

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PM 3-27-09

ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it denied the defendant's motion for relief from judgment under CrR 7.8(b).

2. The trial court violated the defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Sixth Amendment, when it added sentencing enhancements that were also elements of the underlying crimes charged.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it denies a defendant's motion for relief from judgment under CrR 7.8(b) when the affidavits given in support of the motion prove the existence of newly discovered evidence, the use of which would have resulted in the suppression of the evidence the state used to prove the defendant guilty?

2. Does a trial court violate a defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Sixth Amendment, when it adds a firearm enhancement on an offense that has the possession of the same firearm as an essential element?

STATEMENT OF THE CASE

Shortly before 5 a.m. on the morning of December 31, 2003, Jerry Coble and his wife were awakened to an intruder shining a flashlight in their faces and ordering them to stay in bed. CP 27-30. Both Mr. and Mrs. Coble believed the intruder was carrying a firearm. *Id.* Upon the orders of the intruder, Mr. and Mrs. Coble pulled the covers over their heads while the intruder ransacked the room. *Id.* They also heard another person in the living room, and saw a woman briefly look into the bedroom. *Id.* They did not know if anyone else was present in the house. *Id.* After the intruders left, Mrs. Coble saw a small black two-door car leaving the long driveway. *Id.* They then called the police, who found tire tracks and shoe prints outside in the mud and snow. *Id.* Neither Mr. or Mrs. Coble was able to identify the intruders. *Id.*

A little over a month later, on the evening of February 7, 2004, Jack Cartwright went to a tavern in Onalaska with his ex-girlfriend Norma Woodard. CP 27-30. After they arrived, the defendant and his friend Denise Secrist also came into the tavern. *Id.* When they did, Ms Woodard and Ms Secrist, who were friends, spoke for a few minutes, after which the defendant and Ms Secrist left. *Id.* Later that evening, when Mr. Cartwright returned home, he discovered that his house had been burglarized and six guns had been stolen, along with property belonging to his daughter. *Id.* When the

police responded to the scene, they were unable to find any fingerprints, although they were able to photograph tire prints in the driveway and see two distinct sets of footprints. *Id.*

A couple of months later, April of 2004, Wanita Hidalgo, the defendant's mother, called the police and told them she thought the defendant was storing stolen property in the garage and storage sheds behind her house. CP 27-30, 133-137. With her consent, she allowed the police to search her property on April 19, 2004. *Id.* During this search, the police found items taken in both the Coble burglary and the Cartwright burglary. *Id.* The next day, Wanita Hidalgo believed she saw her son's car behind her house. *Id.* Upon seeing this, she called the police to give them this information. *Id.* However, she did not give them permission to enter or search her house or property. *Id.*

Once the police responded to the Hidalgo residence, they went around back, where they saw the defendant coming out from the area of an building. CP 27-30, 133-137. They placed him under arrest. *Id.* After arresting the defendant, the officer went to the front door to talk with the defendant's mother. *Id.* Receiving no reply, they went to the back door and knocked, again receiving no reply. *Id.* However, when they went to the back, they saw the defendant's vehicle for the first time. *Id.* It was a black Ford Probe. *Id.* They seized this vehicle and later searched it, finding items stolen during the

Coble burglary, a Ruger .22 pistol, 90 grams of methamphetamine, scales, a syringe, and about a dozen small plastic bindles. *Id.* They also found a set of work boots matching some of the prints outside the Coble house. *Id.* According to the officers, the tire prints they saw at the Coble residence matched the tire prints from the defendant's vehicle. *Id.*

By amended information filed November 23, 2004, the Lewis County Prosecutor charged defendant Wade Pierce with twelve separate felonies out of the three separate incidents occurring in December of 2003, and February and April of 2004. CP 1-7, 8-14. The following lists the counts and the factual allegations on each charge:

Count I: *First Degree Burglary while Armed with Firearm*, alleging that in February of 2004, the defendant, while armed with a deadly weapon (a rifle), unlawfully entered or remained in Mr. Cartwright's house, and was armed with a firearm (a rifle) during the incident;

Counts II-VI: *Theft of a Firearm*, alleging that in February of 2004, the defendant stole five firearms during the Cartwright burglary;

Count VII: *Possession of a Stolen Firearm*, alleging that in April of 2004, the defendant possessed the firearm the police found during the search of his car, and that it was stolen;

Count VIII: *First Degree Robbery while Armed with a Firearm*, alleging that in December of 2003, the defendant robbed the Cobles with a firearm and that during the incident, he was armed with a firearm;

Count IX: *First Degree Burglary while Armed with Firearm*, alleging that in December of 2003, the defendant, while armed with

a deadly weapon (a pistol), unlawfully entered or remained in the Coble residence, and that he was armed with a firearm (a pistol) during the incident;

Count X: *Second Degree Assault while Armed with a Firearm*, alleging that in December of 2003, the defendant assaulted Mr. Coble with a firearm, and that while committing that crime he was armed with the same firearm;

Count XI: *Second Degree Assault while Armed with a Firearm*, alleging that in December of 2003, the defendant assaulted Mr. Coble with a firearm, and that while committing that crime he was armed with the same firearm;

Count XII: *First Degree Theft while Armed with a Firearm*, alleging that in December of 2003, the defendant took over \$1,500.00 in property that belonged to the Cobles, and that during the commission of the crime he was armed with a firearm; and

Count XIII: *Possession of Methamphetamine with Intent to Deliver While Armed with a Firearm*, alleging that in April of 2004, the defendant, while armed with the firearm the police found in his car, possessed methamphetamine the police found during the search of his car and that he had the intent to deliver the methamphetamine.

CP 8-14.

Following the filing of information in this case, the defendant moved to suppress all evidence seized from the defendant's vehicle, arguing that the police violated his right to privacy under Washington Constitution, Article 1, § 7, when they went to the rear of the defendant's mother's residence and discovered the vehicle without a warrant and without any exception to the warrant requirement. CP 323-326. At the time the defense brought the motion, it knew that the defendant's mother had not been in her home at the

time she called the police on April 20, 2004. *Id.* What the defense did not know, because the police and prosecutor did not reveal it, was that (1) when the defendant's mother called 911 to report the presence of her son, she told the dispatcher that she was not present in her home but was at another location, and (2) that presumably the dispatcher had told the police officers that the defendant's mother was not present at her house when she told them that the defendant was at the house. CP 57-97, 126-127, 128-169.

Following a hearing, the trial court denied the motion to suppress, and later entered the following findings of fact and conclusions of law:

FINDINGS OF FACT

1.1 On April 19, 2004, LCSP Det. B. Kimsey and S. Brown were called to the residence of the defendant's mother, Wanita Hidalgo at 1471 Centralia Alpha Rd at the request of Mrs. Hidalgo.

1.2 Wanita Hidalgo contacted law enforcement regarding the possibility that she had stolen property at her residence which came from her son Wade William Pierces' residence which was at 1473 Centralia Alpha Dr.

1.3 1473 Centralia Alpha Rd. is a residence formerly occupied by Wade Pierce prior to his eviction from the residence in a domestic relations matter which had occurred earlier in the month of April, 2004. 1473 Centralia Alpha Dr. is contiguous with 1471 Centralia Alpha Rd. and there are out buildings between the two residences which are open to foot traffic between the two residences.

1.4 Ms. Hidalgo explained to the detective that her son had been evicted from his residence at 1473 Centralia Alpha Fd. and that she had brought the property to her residence. She recalled that Det. Kimsey had talked with her son regarding a burglary and suspected that some of the property she had recovered from his residence was

stolen.

1.5 On April 19, 2004, Ms. Hidalgo had expressed concern about Wade Pierce being on the premises and so advised the detectives.

1.6 Ms. Hidalgo explained to the detectives that her son had been evicted from his residence at 1471 Centralia Alpha Rd. for stolen property.

1.7 Ms. Hidalgo showed the detectives the suspected stolen property which they confirmed matched the description of property stolen from two different burglaries. The detectives left the Hidalgo residence and Ms. Hidalgo contacted Det. Kimsey later in the day asking that he return as she and her husband had found additional property which they believed was also stolen.

1.8 The search consent granted by Ms. Hidalgo to the LCSO did not carry over after April 19, 2004.

1.9 On April 20, 2004, Ms. Hidalgo thought that Wade Pierce had returned to her property as she saw the top of what she believed to be his vehicle driving in the area of her back yard. Immediately after making this observation she left the residence at 1471 Centralia Alpha Rd. and called 911 from a friend's home to report Wade Pierce's presence on her property.

1.10 On April 20, 2004, LCSO Insp. P. Smith went to 1471 Centralia Alpha Rd. in an effort to locate Mr. Pierce. Insp. Smith was briefed by Det. Kimsey along the way to the residence as to the general nature of the investigation.

1.11 Insp. Smith found Mr. Pierce coming out from an out building between the two residences from the general direction of 1473 Centralia Alpha Rd., Insp. Smith met Mr. Pierce near the back corner of Ms. Hidalgo's residence. From the vantage point of the initial contact, Insp. Smith could not see Mr. Pierce's Ford Probe which was parked behind the residence and specifically behind a room extension which blocked a direct view of the vehicle.

1.12 Insp. Smith was aware, from conversation with Mr. Pierce,

that his vehicle was parked at the back of Ms. Hidalgo's residence at 1471 Centralia Alpha Rd. The vehicle could only be observed if the observer walked to the rear of the residence and went behind the room extension. Mr. Pierce had told Insp. Smith that he had driven his vehicle and had parked it behind his mother's residence. Insp. Smith and Det. Kimsey could see the tire tracks leading behind Ms. Hidalgo's residence.

1.13 Det. Kimsey arrived and spoke with Mr. Pierce for a short time and he was eventually taken into custody. During this time neither Insp. Smith nor Det. Kimsey had had any contact from Ms. Hidalgo. Det. Kimsey or Insp. Smith attempted contact with Ms. Hidalgo by knocking on the front door. With no answer at the door they attempted contact by calling into the residence. They received no answer. Insp. Smith or Det. Kimsey walked around Ms. Hidalgo's residence in an effort to determine if she was present.

1.14 While Det. Kimsey talked with Mr. Pierce, Insp. Smith went to the rear of the residence at 1471 Centralia Alpha Rd to confirm that Mr. Pierce's vehicle was parked behind the residence.

1.15 At a later point Mr. Pierce was arrested. The location of Mr. Pierce's arrest was remote from the location of his vehicle at the rear of his mother's residence. Det. Kimsey went to the rear of 1471 Centralia Alpha Rd to make observations, in addition to Insp. Smith's observations, of the defendant's vehicle. Det. Kimsey could see from outside of Mr. Pierce's vehicle a black suitcase which matched two suitcases recovered from his mother's residence the prior day.

1.16 Mr. Pierce, after further discussion with Det. Kimsey, consent to allow Det. Kimsey retrieve the suitcase from his vehicle and signed a consent to search form.

1.17 Mr. Pierce had his mother's permission to go onto the property of Ms. Hidalgo.

CONCLUSIONS OF LAW

2.1 The defendant has standing to challenge the search in this case as a result of the elements of the charges before the Court in this case and his permission to be present on his mother's property.

2.2 The search of the defendant's vehicle after the defendant's arrest was not incident to the defendant's arrest.

2.3 As a result of the concern expressed by Ms. Hidalgo to the Detectives on April 19, 2004, regarding her son, Insp. Smith and Det. Kimsey were continuing their investigation regarding the 911 call that morning and operating under the community safety exception to the general search warrant requirement by walking around Ms. Hidalgo's residence to secure the residence and determine if she was present.

2.4 The observations of Insp. Smith and Det. Kimsey were proper under the circumstances as set forth above.

RP 133-137.

The defendant later went to trial on all of the charges. CP 26-47. The jury returned verdicts of guilty on each count, along with special verdicts that the defendant was armed with a firearm in each instance in which the state alleged a firearm enhancement. CP 15-22. The court later sentenced the defendant and imposed all of the firearm enhancements, even though possession of a firearm was the fact that elevated many of the crimes charged to a higher degree. *Id.* The defendant thereafter filed timely notice of appeal. CP 26. In an unpublished opinion mandated back to the superior court on October 22, 2007, the Court of Appeals affirmed every conviction and firearm enhancement except the conviction in Count VII (possession of a stolen firearm), which it dismissed without prejudice based upon a defective charge in the information. CP 26-47. Consequently, the court remanded the case to the trial court to allow the state to refile the dismissed count, or for

resentencing should the state elect to proceed without filing new charges. *Id.*

On May 14, 2008, less than a year after the filing of the mandate from the direct appeal and prior to resentencing in this case, the defendant brought a motion for a new trial under CrR 7.5. CP 57-97. On June 11, 2008, still less than one year after the filing of the mandate from the direct appeal and again prior to resentencing, the defendant filed a Motion for Relief from Judgment under CrR 7.8(b). CP 128-169. In essence, the defense argued in both of these motions that the fact that the defendant's mother had told the 911 operator that she was not at home, and the fact that the 911 operator had presumably given this information to the police she dispatched, constituted newly discovered evidence, the use of which would have (1) compelled the trial court to grant the motion to suppress, thereby vitiating the charge of possession methamphetamine while armed with a firearm, and (2) would have resulted in a "not guilty" verdict on the other charges given the fact that the items in the vehicle and the vehicle itself were the best evidence the state had connecting the defendant to both of the burglaries. CP 57-97, 128-169. The defense did not discover this evidence until after the original trial. CP 323.

Following a hearing on the defendant's motion for a new trial under CrR 7.5, and the defendant's motion for relief from judgment under CrR 7.8(b), the trial court denied the requested relief and later entered the

following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Defendant claims that documents showing a 911 call are “newly discovered evidence” warranting a new trial;
2. According to the Defendant’s own materials, this evidence was discovered January 11th of 2005, four days after sentencing in this case;
3. The Motion for a New Trial was filed on February 29, 2008, over three years after the judgment and sentence was entered in this case.
4. There was no attempt to file a motion for a new trial pursuant to RAP 8.3 while this matter was on appeal;
5. The “new evidence” as claimed by the Defendant is that dispatch received a call saying that Mrs. Hildago (the defendant’s mother) was at some other place when she made the call;
6. The “new evidence” does not say that Detective Smith or Detective Kimsey were informed of, or knew that Mrs. Hildago was at some other place;
7. There is no showing that the whereabouts of Ms. Hidalgo were relayed to the detectives, and without that it is irrelevant whether the dispatch center knew where she was, or that it was a different location, or that it was a markedly different location, or that she hadn’t returned to the particular spot;
8. The findings of fact and conclusions of law clearly show that Judge Hall knew that the defendant’s mother (Mrs. Hildago) was not at the location of the search;
9. Judge Hall specifically found that Detective Smith and Detective Kimsey had no contact with her (Mrs. Hildago) prior to locating the vehicle;
10. The only evidence of what trial counsel was told and what he

told the defendant comes from the defendant's self-serving declaration sometime thereafter;

11. It is more likely that trial counsel requested the 911 recording and the recording is destroyed either 30 or 90 days later, as indicated by the communications person who testified here.

Based on the foregoing Findings of Fact, the court enters the following:

CONCLUSIONS OF LAW

1. There is no showing of any diligence whatsoever regarding the 911 tape within a reasonable period of time after its discovery;

2. It is clear that the 911 tape could have been discovered prior to trial and therefore this is not "newly discovered evidence";

3. This evidence was of questionable materiality and it was not admissible at trial because it would be hearsay;

4. The 911 tape evidence would have been used for cross examination solely to impeach the testimony and credibility of Detective Smith and Detective Kimsey;

5. The motion for new trial is untimely even if the 911 documentation can be characterized as newly discovered evidence;

6. There are five requirements as set out in *State v. York*, 41 Wn.App. 538, 543 (1985), for granting a new trial, all of which must be shown and a fatal lapse in any one of them means the motion for new trial should be denied;

7. Of the five requirements to be met for granting a new trial, four of them fail;

8. There has been no showing by affidavit as required by the rule for granting a new trial;

9. The discovery of this "new evidence" would not have changed the result of the trial in this matter. The defense has failed to

demonstrate that the claimed new evidence would alter the decision at the suppression hearing, even assuming that the defense had shown that the suppression motion should have been granted, the defense has not shown how that would have affected the trial , i.e. how the verdicts (and on which counts) would have been “not guilty.”

CP 323-326.

At resentencing, the trial court again imposed each and every firearm enhancement, even though the fact of being armed with the same firearm that constituted the enhancement was an element of both first degree burglaries, the first degree robbery, and both second degree assaults. CP 328-229. The defendant thereafter filed timely notice of appeal for both the denial of his motions for relief from judgment and from his resentencing. CP 341-353.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT UNDER CrR 7.8(b).

Under CrR 7.8(b), adopted on September 1, 1986, the Washington State Supreme Court has set out five bases upon which a defendant can obtain relief from a final judgment. This rule states:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.6;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b).

Under this rule, the defendant must seek this relief “within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken” for reasons (3), (4), (5). To warrant a new trial under CrR 7.8(b) for “newly discovered

evidence,” a defendant bears the burden of proving that the newly evidence:

(1) would probably change the result of the trial; (2) could not have been discovered before trial by the exercise of due diligence; (3) was actually discovered since the trial; (4) is material and relevant to the issues; and (5) is not merely cumulative or impeaching.

State v. Canaday, 79 Wn.2d 647, 488 P.2d 1064 (1971) (citing *State v. Adams*, 181 Wash. 222, 43 P.2d 1 (1935)) (other citations omitted).

For example, in *State v. Slanaker*, 58 Wn.App. 161, 791 P.2d 575 (1990), the defendant was charged with multiple counts of first degree robbery and first degree assault. None of the witnesses could positively identify the defendant as one of the three masked men who had perpetrated the crime. At trial, the defendant presented an alibi defense, testifying that on the night in question he had played poker with friends in his apartment complex for a number of hours, and then gone home with two women named Margaret Warner and Brenda Gift. Although the defendant's roommate corroborated the testimony concerning the poker game, the defendant was unable to locate the two women with whom he returned home. Following the submission of evidence, the jury found the defendant guilty on all counts, and the court sentenced him to 17 concurrent 180 month sentences.

Following his conviction, the defendant was finally able to locate Margaret Warner and Brenda Gift, who later signed affidavits supporting the defendant's alibi, and explaining why the defendant had been unable to locate

them until after his trial. Based upon these affidavits, the defendant moved for relief from judgment under CrR 7.8(b)(2). After the trial court granted the motion, the state appealed, arguing, among other things, that (1) the evidence was known to the defendant prior to trial, and therefore could not qualify as “newly discovered,” and (2) that the evidence was merely cumulative in nature. As concerned the first argument, the trial court quoted the following:

The State’s contention ignores the interrelatedness of the [*State v. Williams*, [96 Wn.2d 215, 634 P.2d 868 (1981)]] “newly discovered” and “due diligence” factors. A previously known witness’ testimony can be newly discovered when that witness could not be located before trial with the exercise of due diligence. *See generally What Constitutes “Newly Discovered Evidence” Within Meaning of Rule 33 of Federal Rules of Criminal Procedure Relating to Motions for New Trial*, 44 A.L.R Fed. 77-78 (1979).

State v. Stanaker, 58 Wn.App. at 166-67.

The court also rejected the state’s second argument that the evidence was merely cumulative, noting the following:

Here, only Stanaker and his roommate, Hall, gave testimony on Stanaker’s alibi defense. During closing arguments the prosecutor impeached their testimony by arguing from the evidence that both men had a motive to lie, whereas the State’s witnesses had “no motive, except to tell the truth.” In light of the State’s approach, Gift’s and Warner’s apparently impartial alibi testimony could be extremely significant. This consideration, coupled with the wide discretion the trial court has to grant a new trial, compels us to uphold the trial court’s ruling.

State v. Stanaker, 58 Wn.App. at 168.

In the case at bar, the defendant's affidavits, coupled with the evidence presented and argued during the motion for relief from judgement, establish all five criteria for relief under *Canaday*. The following examines each criterion under the facts of this case.

Under the first criterion, the defendant has the duty of showing that the newly discovered evidence "would probably change the result of the trial." The defendant in this case met this requirement, because the introduction of the evidence would have proven to the trial court that the officers were not acting out of concern for Ms Hidalgo's safety when they invaded her and her son's privacy when they entered a portion of Ms Hidalgo's home (the rear of the house) that was protected under Washington Constitution, Article 1, § 7. As the original findings from the suppression motion reveal, the "community caretaking" exception to the warrant requirement, triggered by the officers' claimed concern for Ms Hidalgo's safety, was the only exception to the warrant requirement that stopped the court from suppressing the evidence seized when the police went to the back of the Hidalgo residence. This newly discovered evidence went to prove that (1) the 911 dispatcher knew Ms Hidalgo was not present, and (2) any reasonable 911 operator would have relayed this critical evidence to the officers she dispatched to the scene. With the granting of this motion to suppress, the state would have been bereft of all of its evidence on the

possession of methamphetamine with intent to deliver charge, and it would have been denied the use of the defendant's tire tracks and his boots, which were the best evidence the state had that the defendant was one of the perpetrators of the crimes. Consequently, this evidence would have changed the result of at least one charge, and more likely than not have changed the result of the remaining counts. Thus, the defendant's evidence meets the first criterion.

Under the second and third criteria for relief from judgment based upon newly discovered evidence, the defendant has the burden of proving that he or she could not have discovered the evidence before trial by the exercise of due diligence, and that he did not discover the evidence until after the trial. In its findings of fact on the motion for relief from judgment, the trial court appears to accept the defendant's contention on the second criterion. In any event, the defendant's affidavit and supporting filing demonstrate that this evidence was withheld and not available to the defense during the trial. As to the third criterion, the trial court's findings on the motion for relief from judgment under CrR 7.8(b)(1) specifically states that the defendant found the evidence after the entry of the judgment and sentence in this case, well after the trial. Thus, the defendant has met the second and third criteria.

Under the fourth and fifth *Canaday* criteria, the defendant has the burden of proving that the newly discovered evidence was both material and

relevant to the issues, as well as not merely cumulative or impeaching. The affidavits and other evidence in this case meet both of these criteria because, as was argued above, the introduction and use of this evidence would have compelled the trial court to grant the defendant's motion to suppress, and would have denied the state the evidence necessary to bring two of the charges, and would have so weakened the state's evidence tying the defendant to the crime charged that, more likely than not, the verdicts on the other counts would have been not guilty. As a result, the evidence was material and relevant to the issues at trial. In addition, there was no evidence presented at the suppression motion to show that the officers were not acting under a community caretaking function. Thus, this evidence was far from "merely cumulative or impeaching." Consequently, the defendant in this case met all of the *Canaday* criteria, and the trial court erred when it denied the defendant's motion for relief from judgment under CrR 7.8(b).

In this case, one of the apparent reasons the trial court denied the motion for relief from judgment under CrR 7.8(b) was upon its finding the motion untimely. This occurred in finding of fact on the denial of the motion for relief, wherein the court stated:

3. The Motion for a New Trial was filed on February 29, 2008, over three years after the judgment and sentence was entered in this case.

CP 324.

The trial court did not err factually when it entered this finding, as it had the dates correct on the entry of the original judgment and sentence and the filing date of the Motion for a New Trial. However, to the extent the trial court relied upon this fact as a basis to deny the defendant's motion for relief, the trial court erred legally. The reason is that under the terms of CrR 7.8(b), any motion brought under its provisions is specifically "subject to RCW 10.73.090, .100, .130, and .140." Section .090 of RCW 10.73 states as follows:

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

RCW 10.73.090.

In the case at bar, the defendant brought his Motion for Relief from Judgment under CrR 7.8(b)(1) on June 11, 2008, some 41 months after the entry of the original judgment and sentence on January 7, 2005. However, the entry of the sentence is not the trigger for the running of the one year time limit in CrR 7.8(b) because the defendant timely filed a direct appeal following entry of his original judgment and sentence. The mandate on this direct appeal was filed in the Lewis County Superior Court on October 22, 2007. Thus, less than 8 months passed from the filing of the mandate from the direct appeal on October 27, 2007, to the filing of the Motion for Relief from Judgment under CrR 7.8(b)(1) on June 11, 2008. Consequently, the motion was filed within the one year time limit, and the trial court erred to the extent it denied the defendant's requested relief on the basis that the motion was not timely under CrR 7.8(b).

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ADDED SENTENCING ENHANCEMENTS THAT WERE ALSO ELEMENTS OF THE UNDERLYING CRIMES CHARGED.

The double jeopardy prohibitions found in both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same

offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969); *United States v. Halper*, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989); *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).

In order for two prosecutions or punishments to violate double jeopardy, they must both have arisen out of the same offense. *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed.2d 306, 52 S.Ct. 180 (1932). In *Blockburger*, the United States Supreme Court adopted a "same elements" test to determine whether the two punishments or prosecutions arose out of the same offense. In this case, the court stated as follows:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied is whether each provision requires proof of an additional fact which the other does not A single act may be an offense against two statutes; and *if each statute requires proof of an additional fact which the other does not*, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Blockburger, 76 L.Ed. at 309 (emphasis added; citations omitted).

By definition, a lesser included offense does not constitute one for which "additional facts" are required. On this issue, the Washington Supreme Court has stated as follows.

A person is not put in second jeopardy by successive trials unless they involve not only the same act, but also the same offense. There

must be substantial identity of the offenses charged in the prior and in the subsequent prosecutions both in fact and in law. . . .

The rule is, however, subject to the qualification that the offenses involved in the former and in the latter trials need not be identical as entities and by legal name. It is sufficient to constitute second jeopardy if one is necessarily included within the other, and in the prosecution for the greater offense, the defendant could have been convicted of the lesser offense.

State v. Roybal, 82 Wn.2d 577, 582, 512 P.2d 718 (1973) (quoting *State v. Barton*, 5 Wn.2d 234, 237-38, 105 P.2d 63 (1940)); See also *State v. Laviollette*, 118 Wash.2d 670, 675, 826 P.2d 684 (1992) (“If the elements of each offense are identical, or if one is a lesser included offense of the other, then a subsequent prosecution is barred.”) (citing *Brown v. Ohio*, 432 U.S. 161, 166, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977)).

For example, in *State v. Culp*, 30 Wn.App. 879, 639 P.2d 766 (1982), the Court of Appeals found a violation of double jeopardy in subsequent prosecutions for DWI and Negligent Homicide out of the same incident. In this case the defendant had been charged in Municipal Court with Negligent Driving and Driving While Intoxicated out of an incident in which a person was injured, and later died. Defendant eventually plead guilty to the DWI and a reduced charge from the Negligent Driving. Later she was charged with negligent homicide out of the same incident, and the State appealed the ultimate dismissal of the charges as a violation of double jeopardy. However,

the court affirmed, noting that since the DWI and Negligent Driving charges contained no elements independent of the elements for the negligent homicide charge, allowing the state to pursue the latter after having prosecuted on the former would twice put the defendant in jeopardy on the former charges. Thus, the trial court correctly ruled that the state was barred from bringing the negligent homicide charges. *State v. Culp*, 30 Wn.App. at 882.

The Legislature has the power to define offenses and set punishments within the boundaries of the constitution. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Thus, the first step in deciding if punishment violates the double jeopardy clause is to determine what punishment is authorized by the Legislature. *Freeman*, 153 Wn.2d at 771. Courts assume the punishment intended by the Legislature does not violate double jeopardy. *Id.*; *Albernaz v. United States*, 450 U.S. 333, 340, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981) (reasoning Congress is predominately a body of lawyers and presumed to know the law). *But See Albernaz*, 450 U.S. at 345 (Stewart, J., concurring) (Legislative intent is first step in determining if punishments violate double jeopardy, not controlling determination). Thus, to determine if the Legislature intended multiple punishment for the violation of separate statutes, courts begin with the language of the statutes. *Freeman*, 153 Wn.2d

at 771-72.

For offenses occurring in 2003 and the first half of 2004, such as those in the case at bar, RCW 9.94A.510 provided for additional time to be added to an offender's standard range if the offender or an accomplice was armed with a firearm. This statute read:

(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 sentence for one of the crimes listed in this subsection as eligible for 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. . . .

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection. . . .

(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.

RCW 9.94A.510(3)(b)&(f) (Effective until July 1, 2004).

The statutory provision, part of the *Hard Time for Armed Crime Act of 1995* (Initiative 195), was designed to provide increased penalties for criminals using or carrying guns, in order to "stigmatize" the use of weapons, and to hold individual judges accountable for their sentencing of serious

crimes. *Laws* of 1995, ch 129 § 1. It provides that all firearm enhancements are mandatory and must be served consecutively to any base sentences and to any other enhancements. RCW 9.94A.510(3)(e); *State v. DeSantiago*, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003).

The language of the statute demonstrates the voters intended a longer standard sentence range, and therefore greater punishment, for those who participate in crimes where a principal or accomplice is armed with a firearm. But the statute creates a specific exception for those crimes where possessing or using a firearm is a necessary element of the crime, such as drive-by shooting or unlawful possession of a firearm, demonstrating some sensitivity to double jeopardy concerns. RCW 9.94A.510(3)(f). The voters apparently did not consider the problem of redundant punishment created when a firearm enhancement is added to a crime and using a firearm is the way the offense was committed.

Significantly, the *Hard Time for Armed Crime Act* was passed before *Blakely, infra*, and other United States Supreme Court cases made it clear that a fact that exposes a person to increased punishment is an element of an offense. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004); *Ring v. Arizona*, 536 U.S. 584, 604-05, 122 S.Ct. 2428, 153 L.Ed.2d 18 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Jones v. United States*, 526 U.S.

227, 243, 119 S.Ct. 1215, 153 L.Ed.2d 311 (1999) (Stevens, J., concurring).

Those cases have made it clear that the relevant determination is not what label the fact has been given by the Legislature or its placement in the criminal or sentencing code, but rather the effect it has on the maximum sentence to which the person is exposed. *Apprendi*, 530 U.S. at 494; *Ring*, 536 U.S. at 602. This concept was succinctly stated in *Ring*:

If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and the aggravating factor together constitute an aggravated crime. The aggravated fact is an element of the aggravated crime.

Ring, 536 U.S. at 605.

This concept was reiterated when the United States Supreme Court considered whether double jeopardy principles were violated by seeking the death penalty on retrial after appeal where the first jury was unable to reach a unanimous verdict on whether to impose life or death. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). Justice Scalia explained the holding of *Ring* and its significance:

[W]e held that aggravating circumstances that make a defendant eligible for the death penalty “operate as ‘the functional equivalent of an element of a greater offense.’” That is to say, for purposes of the Sixth Amendment’s jury-trial guarantee, the underlying offense of “murder” is a distinct, lesser included offense of “murder plus one or more aggravating circumstances.”

537 U.S. at 111 (internal citations omitted).

The Court went on to find “no principled reason to distinguish” what constitutes an offense for purposes of the Sixth Amendment and for purposes of double jeopardy. *Id.*

The need to reexamine the court’s deferral to the Legislature in double jeopardy jurisprudence in light of *Blakely* has already been noted by legal scholars. Timothy Crone, *Double Jeopardy, Post Blakely*, 41 Am. Crim. L. Rev. 1373 (2004). The problems of “redundant” counting of conduct under the Federal Sentencing Guidelines, for example, was thoroughly examined by one commentator, who called for a reorientation of double jeopardy analysis to protect defendants from unfairly consecutive sentences. Jacqueline E. Ross, *Damned Under Many Headings: The Problem of Multiple Punishment*, 29 Am. J. Crim. L. 245, 318-226 (2002).

The voters and the Legislature were unaware that the firearm enhancement they created was an element of a higher offense because it increased the offender’s maximum sentence. *See Blakely*, 124 S.Ct. at 2537-38; *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005) (violation of Sixth Amendment rights to due process and jury trial to sentence defendant to firearm enhancement when jury verdict supported only deadly weapon enhancement). Because a firearm enhancement acts like an element of a higher crime, the initiative simply adds a redundant element of use of a firearm for crimes where use of a firearm was already an element, a result the

voters would not have intended. *See* RCW 9.94A.501(3)(f) (Effective until July 1, 2004). Thus, the use of a firearm enhancement in a charge that has possession or use of the firearm as an element of the offense violates a defendant's right to double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment.

In the case at bar, the amended information included two counts of first degree burglary, one count of first degree robbery, and two counts of second degree assault. In each of these crimes, the state alleged the defendant possession or use of a firearm as one of the elements of each offense. Although each offense had different methods of committing the crime that did not require the possession or use of a firearm, the state did not allege such alternatives in any of these five charges. Thus, when the trial court added firearms enhancements to the sentence in each case, it violated the defendant's right under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, to be free from double jeopardy. Consequently, this court should vacate each of these enhancements and remand with instructions to strike the firearms enhancements from these five charges.

In *State v. Nguyen*, 134 Wn.App. 863, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053, 187 P.3d 752 (2008), and *State v. Kelley*, 146 Wn.App. 370, 189 P.3d 853 (2008), *review granted* March 3, 2009).

Divisions I and II of the Court of Appeals have rejected the specific double jeopardy argument made herein. Although the Washington Supreme Court denied review in *State v. Nguyen*, the court recently accepted review in *State v. Kelley* on the double jeopardy issue. Appellant in this case respectfully submits that for the reasons set out herein, the decisions in *Nguyen* and *Kelley* are incorrect, and will be reversed by the Washington Supreme Court.¹

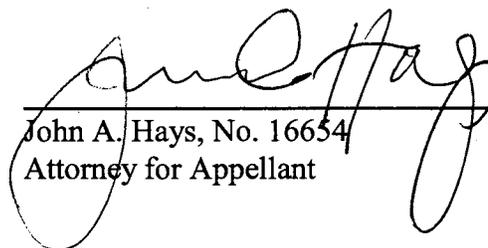
¹The majority of the briefing on the double jeopardy issue herein comes directly from the able brief written by attorney David L. Donnan of the Washington Appellate Project in *State v. Nguyen*. Counsel herein wishes to acknowledge his work, thank him, and recognize that his arguments on the law of double jeopardy, in current counsel's opinion, need no rewriting.

CONCLUSION

The defendant is entitled to a new trial based upon the effect of the newly discovered evidence set out in the defendant's Motion for Relief from Judgment. In the alternative, this court should vacate the firearms enhancements added to the sentence in the courts charging robbery, burglary, and second degree assault.

DATED this 27th day of March, 2008.

Respectfully submitted,



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APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

CrR 7.8(b)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090,.100,.130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

(c) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) Transfer to Court of Appeals. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(3) Order to Show Cause. If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

