

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

FINOS D. FOX, III,

Petitioner.

NO. 52392-2-II

STATE'S SUPPLEMENTAL
RESPONSE TO PERSONAL
RESTRAINT PETITION

A. INTRODUCTION:

Finos D. Fox, III got the benefit of his bargain when he pleaded guilty to one count of third degree assault based on an original factual basis and three counts of third degree assault pursuant to *Barr/Zhao*,¹ receiving a 20 year sentence, rather than going to trial and facing a Persistent Offender life without the possibility of parole sentence. Fox now challenges the three counts of third degree assault as violating double jeopardy.

Fox's claim is based on *Robinson*.² *Robinson* wrongly held that every plea made pursuant to *Zhao* must be rooted in an individual factual basis, as its holding conflicts with

¹ *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984); *State v. Zhao*, 157 Wn.2d 188, 190, 137 P.3d 835 (2006).

² 8 Wn. App. 2d 629, 439 P.3d 710 (2019).

the facts and holding in *Zhao*, and the court failed to conduct the proper double jeopardy “unit of prosecution” analysis in reaching its holding. Under the proper analysis, when knowingly, intelligently, and voluntarily made, as in this case, *Zhao* pleas cannot fail a “unit of prosecution” analysis because they necessarily do not have a factual basis to evaluate. This Court should dismiss this petition.

B. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Does *Robinson* incorrectly hold that pleas made pursuant to *Zhao* must be rooted in an individual factual basis?
2. Was *Robinson* decided without conducting the proper double jeopardy analysis?
3. Do Fox’s convictions violate double jeopardy when his convictions fail the unit of prosecution double jeopardy analysis?

C. STATUS OF PETITIONER:

See State’s Response to Personal Restraint Petition Filed October 21, 2019.

Following the State’s Response, this Court appointed counsel to address the effect of *State v. Robinson*, 8 Wn. App. 2d 629, 439 P.3d 710 (2019), and directed the State to respond. Accordingly, the State submits the following supplemental response brief.

D. ARGUMENT:

A guilty plea “is more than a confession which admits that the accused did various acts.” *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). It is an “admission that he committed the crime charged against him.” *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). “A guilty plea generally insulates the defendant’s conviction from collateral attack.” *State v. Knight*, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008).

There are, however, exceptions to the general rule, particularly where “on the face of the record the court had no power to enter the conviction or impose the sentence.” *U.S. v. Broce*, 488 U.S. 563, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989). This exception includes a facial violation of double jeopardy. *Id.* Claims of double jeopardy are questions of law, reviewed de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

Double jeopardy principles protect a defendant from being “twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. 5; *see also*, Wa. Const. art. I, § 9. The double jeopardy provisions of the United States and Washington State Constitutions preclude convicting a defendant more than once under the same criminal statute if only one “unit” of the crime has been committed. *In re Newlun*, 158 Wn. App. 28, 32, 240 P.3d 795 (2010). When a defendant is convicted of multiple violations of a single statute, the double jeopardy question follows the “unit of prosecution” framework. *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002); *State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998).

Under the unit of prosecution double jeopardy framework, Washington courts follow a three-step analysis. *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007). The first step is to analyze the statute in question. *Id.* Next, courts review the statute's history. *Id.* Finally, courts perform a factual analysis as to the unit of prosecution, because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one “unit of prosecution” is present. *Id.*, citing *State v. Bobic*, 140 Wn.2d 250, 263-66, 996 P.2d 610 (2000).

Petitioner relies on *Robinson*, 8 Wn. App. 2d 629, to argue that his bargained-for plea agreement violates double jeopardy.

1. *Robinson* incorrectly holds that pleas made pursuant to *Zhao* must be rooted in an individual factual basis.

In *Robinson*, the defendant was charged with felony violation of a no-contact order in 2016, predicated on two prior 2015 misdemeanor convictions for violating a no-contact order. *Id.* at 632. Because the State, as an element of the felony charge, needed to prove the validity of the predicate misdemeanor convictions, *Robinson* was permitted to collaterally attack those convictions in his appeal of the 2016 felony conviction. *Id.* at 635.

The complication was that the two prior misdemeanor convictions arose out of the same incident against the same victim. *Id.* at 632. The 2015 case started as an original charge of felony violation of a no-contact order, predicated on an assault. *Id.* *Robinson* negotiated with the State and entered a guilty plea to two misdemeanor violations of a no-contact order to avoid a long sentence for the felony conviction. *Id.* The first misdemeanor charge was a plea to a willful violation of the no-contact order, and the second plea was entered pursuant to *Zhao*³ and *Barr*.⁴ *Id.* at 633.

Division I of this Court held that *Robinson*'s negotiated plea agreement violated double jeopardy because the probable cause certificate only described evidence of one criminal act. *Id.* at 637-38. The *Robinson* court attempted to clarify the holding of *Zhao*, stating that "*Zhao* allows a defendant to plead guilty to an amended charge for which there is no factual basis, so long as there is a factual basis for the original charge. *Zhao* does not, however, allow a defendant to be convicted of two separate crimes based on one criminal act and one original charge." *Id.* at 635-36. (internal citations omitted). *Robinson* was wrongly decided.

³ 157 Wn.2d 188, 190, 137 P.3d 835 (2006).

⁴ 102 Wn.2d 265, 684 P.2d 712 (1984).

First, *Robinson* misinterprets *Zhao* as the *Robinson* Court’s analysis conflicts with the facts and holding in *Zhao*. In *Zhao*, the defendant was charged with two counts of first degree child molestation stemming from allegations of two children. 157 Wn.2d at 190-91. To avoid indeterminate sentencing, Zhao entered guilty pleas to two counts of conspiracy to commit indecent liberties and one count of second degree assault. *Id.* at 191.

In other words, Zhao was convicted of three separate crimes based on two criminal acts and two original charges. The Washington Supreme Court upheld the plea bargaining tool used in *Zhao*, recognizing that such a system “supports a flexible plea bargaining system through which a defendant can choose to plead guilty to a related charge that was not committed, in order to avoid near certain conviction for a greater offense.” *Id.* at 200.

Accordingly, the *Robinson* Court’s rationale that *Zhao* did not authorize “a defendant to be convicted of two separate crimes based on one criminal act and one original charge” conflicts with *Zhao* because one count of Zhao’s conspiracy to commit indecent liberties, for which there was no factual basis supporting the conspiracy element, necessarily relied on the same criminal act, against the same victim, as the assault charge.

To give effect to the *Robinson* holding would require that every plea made pursuant to *Zhao* have a factual basis, but not necessarily a factual basis that establishes each element of the crime that the defendant ultimately pleaded guilty to. Requiring this one-to-one ratio is contrary to the facts *Zhao*.

2. *Robinson* was decided without conducting the proper double jeopardy analysis.

Second, *Robinson* wrongly held that every plea made pursuant to *Zhao* must be rooted in a separate criminal act to avoid offending double jeopardy because the court did not conduct the proper analysis.

As mentioned above, where a defendant is convicted of multiple counts of the same offense, the proper double jeopardy analysis requires the court to conduct a factual inquiry that asks whether the defendant was convicted more than once under the same criminal statute when only one “unit” of the crime has been committed. *Varnell*, 162 Wn.2d at 168. If the answer to the court’s inquiry is yes, a double jeopardy violation has occurred. *Id.*

It is unsurprising that the *Robinson* court did not conduct this step of the analysis, because by definition, the answer to that inquiry is always “no” in a plea pursuant to *Barr* and *Zhao*. To answer “yes” would assume what the legal system knows to be false: that there is a factual basis for a *Zhao* plea.⁵

3. The proper double jeopardy analysis fails in this case based on the framework approved by our Supreme Court.

Likewise, the double jeopardy analysis fails here where no unit of prosecution violation can be found. Fox was originally charged with one count of assault in the first degree with a deadly weapon enhancement. App. at 25. Fox avoided a mandatory life sentence by taking the benefit of a plea bargain, where he pleaded guilty to four counts of third degree assault pursuant to the holdings in *Barr* and *Zhao*. App. at 32, 41; *Barr*, 102 Wn.2d at 271; *Zhao*, 157 Wn.2d at 204. Because the lesser offenses selected to accomplish the plea are legal fictions, there is no factual basis underlying those crimes, as permitted by *Barr* and *Zhao*. *Id.* Thus, when this court reaches the third step of the unit of prosecution analysis, no violation can be found. *Varnell*, 162 Wn.2d at 168.

The fictitious lesser counts were charged to give Fox the benefit of avoiding a life sentence and allowed the parties to negotiate a just resolution of his case. All involved

⁵ The *Robinson* court made this mistake. It extended the factual basis for Robinson’s original charge and construed it to be the factual basis for his *Zhao* plea, ignoring that a *Zhao* plea does not have a factual basis.

parties understood that no factual basis existed for those counts by nature of the plea: a framework the Washington Supreme Court approved in *Barr* and *Zhao*.⁶

Fox has not established that he meets an exception to the rule that “a guilty plea generally insulates the defendant’s conviction from collateral attack.” *Knight*, 162 Wn.2d at 811. This petition should be denied.

E. CONCLUSION:

For the reasons stated above and set forth in the State’s Response to Personal Restraint Petition, the State respectfully requests this Court deny Fox’s petition.

DATED: May 18, 2020

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⁶ The Court in *Zhao* also noted that Washington is not the only state to allow this type of framework, rather, California and New Mexico also permit similar plea bargaining tools. *See Zhao*, 157 Wn.2d at 200 n. 6.

Certificate of Service:

The undersigned certifies that on this day she delivered by efile to attorney of record 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.

5/18/20 s/ Therese Kahn
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

May 18, 2020 - 10:17 AM

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