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NO. 52392-2-II

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

IN RE THE PERSONAL RESTRAINT OF

FINOS FOX,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

Pierce Cause No. 12-1-02627-2

The Honorable John A. McCarthy, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
A. SUPPLEMENTAL ISSUES.....	1
B. STATEMENT OF THE CASE.....	1
1. Procedural History.....	1
2. Substantive Facts.....	3
C. ARGUMENT.....	6
1. THE TRIAL COURT VIOLATED FOX'S FIFTH AMENDMENT AND ART. I, § 9 RIGHT TO BE FREE FROM DOUBLE JEOPARDY WHEN IT CONVICTED FOX OF FOUR COUNTS OF THIRD DEGREE ASSAULT BASED ON ONLY ONE CRIMINAL ACT	6
2. FOX'S CLAIMS ARE NOT TIME BARRED UNDER RCW 10.73.100(3) AND (6)	13
D. CONCLUSION.....	14

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>In re Barr</i> , 102 Wn.2d 265, 684 P.2d 712 (1984)....	1, 2, 4, 9, 10, 11, 12, 13, 14
<i>In re Coats</i> , 173 Wn.2d 123, 267 P.3d 324 (2011).....	13
<i>In re Hinton</i> , 152 Wn.2d 853, 100 P.3d 801 (2004).....	13
<i>State v. Gocken</i> , 127 Wn.2d 95, 896 P.2d 1267 (1995).....	7
<i>State v. Mutch</i> , 171 Wn.2d 646, 254 P.3d 803 (2011).....	10, 12
<i>State v. Robinson</i> , 8 Wn. App. 2d 629, 439 P.3d 710 (2019)1, 2, 6, 7, 8, 9, 10, 11, 12, 13	
<i>State v. Tili</i> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	11
<i>State v. Villanueva-Gonzalez</i> , 180 Wn.2d 975, 329 P.3d 78 (2014).....	11
<i>State v. Zhao</i> , 157 Wn.2d 188, 137 P.3d 835 (2006).....	1, 7, 8, 9, 10, 11, 12

FEDERAL CASES

<i>Alabama v. Smith</i> , 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)	7
<i>North Carolina v. Pearce</i> , 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)	7

TABLE OF AUTHORITIES

	Page
FEDERAL CASES, continued	
<i>U.S. v. Broce</i> , 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989)	6
RULES, STATUTES, AND OTHERS	
RCW 10.73.090	2, 13
RCW 10.73.100	1, 13
RCW 9A.36.031	4, 5
RCW10.73.090	13
U.S. Const. Amend. V	1, 6
Wash. Const. art. I, § 9	1, 6

A. SUPPLEMENTAL ISSUES

1. Did the trial court violate Fox's Fifth Amendment and Wash. Const. art. I, § 9 rights to be free from double jeopardy when it convicted Fox of four counts of assault three based on only one criminal act?

2. Is Fox's Double Jeopardy challenge exempted from the one year time bar under RCW 10.73.100(3) and (6) when Fox did not waive any double jeopardy violation but merely relied on *In re Barr*¹ and *Zhao*² which under *Robinson*,³ 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, but does not, however, allow a defendant to be convicted of two separate crimes based on one criminal act and one original charge?

B. STATEMENT OF THE CASE

1. Procedural History

Finos D. Fox, III was originally charged by information with one count of first degree assault with a deadly weapon

1 *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984).

2 *State v. Zhao*, 157 Wn.2d 188, 200, 137 P.3d 835 (2006).

3 *State v. Robinson*, 8 Wn. App. 2d 629, 439 P.3d 710 (2019).

enhancement. Supp. CP (Information 7/12/12). By plea agreement, Fox ultimately pled guilty to four separate counts of third-degree assault pursuant to *Barr*, 102 Wn.2d 265. Supp. CP (Statement of Def. on Plea of Guilty 11/13/13, Amended Information 11/13/13). The parties agreed to an exceptional sentence of 60 months on each count to be served consecutively for a total of 240 months. Supp. CP (Judgment and Sentence 11/15/13).

Fox did not file a direct appeal and his sentence became final on November 14, 2014. Supp. CP (Judgment and Sentence 11/15/13); RCW 10.73.090(3)(a). In 2019, Fox filed a personal restraint petition, pro se, arguing among other things that sentencing Fox to four separate crimes arising out of only one criminal act violated double jeopardy. See *Petition for PRP and opening brief*.

The Court of Appeals stayed Fox's petition pending the decision in *Robinson*, 8 Wn. App. 2d 629. When *Robinson* became final this Court lifted the stay and appointed counsel to specifically address what, if any, impact *Robinson*, 8 Wn. App. 2d 629 had on Fox's case. (Commissioner's Ruling 1/19/2019, 12/20/19).

This timely supplemental brief follows.

2. Substantive Facts

The declaration in support of probable cause for the first degree assault states in relevant part:

That in Pierce County, Washington, on or about the 11th day of July 2012, the defendant, FINOS DALE FOX, III, did commit the crime of Assault in the First Degree (Deadly Weapon Sentencing Enhancement).

On July 11, 2012 the defendant repeatedly stabbed the victim (Charles Kenneth Lloyd). The stabbing occurred in the 11800 block of 101st Avenue East in Pierce County. The defendant's actions were witnessed by several people who positively identified the defendant as the person who stabbed the victim. The victim is the ex-boyfriend of Melissa Dotson. The defendant had recently become a friend of Melissa Dotson. The stabbing occurred near Melissa Dotson's house. A K9 of the Tacoma Police Department tracked the defendant from the scene of the stabbing to the house he was living in. The defendant was contacted by the Pierce County Sheriff's Office.

Supp. CP (Determination for Probable Cause 7/12/12).

The Declaration for Determination of Probable Cause identified only one alleged victim, Lloyd, and one altercation between Lloyd and Fox. Supp. CP (Determination for Probable Cause 7/12/12).

Fox's criminal history included one Washington strike offense and one Louisiana conviction which he believed was a strike. Supp. CP (Stipulation to Prior Record 11/13/13). To avoid a possible third strike and a sentence of life without parole, Fox pled guilty to four

counts of assault in the third degree. Supp. CP (Statement of Def. on Plea of Guilty 11/13/13).

At the time of the plea, Fox acknowledged “there is a significant risk that I would be convicted at trial as charged, a potential third strike with a possible sentence of life imprisonment without parole, I therefore plead guilty to take advantage of the State’s willingness to reduce the charge to a non-strike offense.” Supp. CP (Statement of Def. on Plea of Guilty 11/13/13). The prosecutor also agreed Fox pled guilty “to avoid his third strike.” Supp. CP (Statement of Prosecuting Attorney 11/13/13).

Pursuant to *Barr*, 102 Wn.2d 265, Fox acknowledged that his guilty plea was predicated on the factual basis for the original charge of first degree assault. Supp. CP (Statement of Def. on Plea of Guilty 11/13/13).

In the Amended Information count one stated as follows:

That FINOS DALE FOX, III, in the State of Washington, on or about the 11th day of July 2012, did unlawfully and feloniously, under circumstances not amounting to assault in the first or second degree, with criminal negligence, cause bodily harm to Charles Lloyd by means of a weapon or other instrument or thing likely to produce bodily harm, contrary to RCW 9A.36.031(1)d), and against the peace and dignity of the State of Washington.

Counts two, three, and four were identical and stated as follows:

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse FINOS DALE FOX, III of the crime of ASSAULT IN THE THIRD DEGREE, a crime of the same or similar character, and /or crime based on the same conduct or on a series of acts connected together or constituting parts of the single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That FINOS DALE FOX, III, in the State of Washington, on or about the 11th day of July, 2012, did unlawfully and feloniously, under circumstances not amounting to assault in the first or second degree, with criminal negligence, cause bodily harm to a person by means of a weapon or other instrument or thing likely to produce bodily harm, contrary to RCW 9A.36.031 (1)(d), and against the peace and dignity of the State of Washington.

Supp. CP (Amended Information 11/13/13).

The sentencing court accepted the plea and sentenced Fox to 60 months for each count for a total term of 20 years' confinement.

Supp. CP (Judgment and Sentence 11/15/13).

C. ARGUMENT

1. THE TRIAL COURT VIOLATED FOX'S FIFTH AMENDMENT AND ART. I, § 9 RIGHT TO BE FREE FROM DOUBLE JEOPARDY WHEN IT CONVICTED FOX OF FOUR COUNTS OF THIRD DEGREE ASSAULT BASED ON ONLY ONE CRIMINAL ACT

To sentence a defendant to a sentence that violates double jeopardy, the defendant must know and agree to waive double jeopardy. *Robinson*, 8 Wn. App. 2d at 639-40 (citing *U.S. v. Broce*, 488 U.S. 563, 568, 575, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989)) The protection against double jeopardy is subject to waiver, but a defendant does not waive a double jeopardy challenge by merely pleading guilty to a claim the state may not constitutionally prosecute. *Robinson*, 8 Wn. App. 2d at 639-40.

Here, the trial court violated Fox's right to be free from double jeopardy under the Fifth Amendment and art. I, § 9, when it convicted Fox of four counts of third degree assault based on only one criminal act.

No individual can be punished more than once for the same offense, unless he knowingly agrees to waive this right. U.S. Const. Amend. V; art. I, § 9; *Robinson*, 8 Wn. App. 2d at 639-40. To do so

violates the prohibition against double jeopardy enshrined in both the state and federal constitutions. *Robinson*, 8 Wn. App. 2d at 638 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)).

In the context of a guilty plea the Washington Supreme Court has upheld a defendant's agreement to plead guilty to a lesser fictitious charge to avoid the near certain conviction of the original greater conviction. *Zhao*, 157 Wn.2d at 200. Because guilty pleas are founded on the concept of voluntariness, a defendant may plead guilty to a fictitious charge as long as (1) the defendant knows there is no factual basis for the fictitious charge but voluntarily enters the plea anyway and (2) there is evidence in the record to establish a factual basis for the original charge. *Robinson*, 8 Wn.2d at 636 (citing *Zhao*, 157 Wn. 2d at 200).

In *Zhao*, the defendant was originally charged with two counts of first degree child molestation based on two separate incidences involving two separate children. *Zhao*, 157 Wn.2d at 191. To avoid a possible indeterminate sentence Zhao pled guilty to the amended

charges of two counts of conspiracy to commit indecent liberties despite no factual basis supporting the conspiracy element. *Zhao*, 157 Wn.2d at 191. However, because the factual basis for the two original charges established two independent criminal acts, the Court did not address whether one original charge that only established one criminal act could support multiple fictitious charges. See *Generally Zhao*, 157 Wn.2d 188.

Recently, the Court of Appeals squarely addressed this issue in *Robinson* and expressly held that *Zhao* “does not provide a basis to avoid double jeopardy and convict a person for two crimes based on one criminal act.” *Robinson*, 8 Wn. App. 2d at 631.

In *Robinson*, the state charged Robinson with felony violation of a court order in 2015 when Robinson violated a court order by assaulting the protected party. *Robinson*, 8 Wn. App. 2d at 632. Because of Robinson’s criminal history he faced a long sentence for a felony conviction. *Robinson*, 8 Wn. App. 2d at 632. Instead of risking a long sentence, Robinson agreed to plead guilty to two counts of Violation of a Court Order, which were lesser misdemeanor offenses, even though only one assault, and thus only one violation of the court order occurred. *Robinson*, 8 Wn. App. 2d at 632-33.

The state, defense counsel, and Robinson all agreed there was no factual basis for the second misdemeanor because it was pure fiction. *Robinson*, 8 Wn. App. 2d at 631, 633. However, the parties agreed it was permissible under *Zhao*, 157 Wn. 2d at 200 and *Barr*, 102 Wn.2d 265 because Robinson knew there was no factual basis and he pled guilty to avoid a conviction on the greater offense of Felony Violation of a Court Order. *Robinson*, 8 Wn. App. 2d at 632-33.

Subsequently, in 2016 Robinson was convicted of a felony violation of the same court order based on both his real and fictitious 2015 misdemeanor convictions. *Robinson*, 8 Wn. App. 2d at 633-35. On appeal, Robinson argued there was insufficient evidence for his 2016 felony conviction because it was predicated on a conviction that violated double jeopardy. The Court of Appeals agreed. *Robinson*, 8 Wn. App. 2d at 635.

In *Robinson*, the Court of Appeals clarified that the factual basis for each original count can only support one corresponding lesser or fictitious charge. Otherwise, either (a) one criminal act is supporting multiple convictions or (b) the defendant's conviction is based on pure fiction. *Robinson*, 8 Wn. App. 2d at 638-39 (citing

State v. Mutch, 171 Wn.2d 646, 664, 254 P.3d 803 (2011)). The state cannot use more than one fictitious charge to support multiple charges because to do so violates double jeopardy by punishing the defendant multiple times for the same criminal act. *Robinson*, 8 Wn. App. 2d at 638-39 (citing *Mutch*, 171 Wn.2d at 664).

Because Robinson's 2015 charging document only identified one criminal act of assault, the second fictional count violated double jeopardy. *Robinson*, 8 Wn. App. 2d at 637-38. Further, the Court of Appeals rejected the state's argument that Robinson's conviction should stand because he agreed to the plea. *Robinson*, 8 Wn. App. 2d at 639.

Robinson did not agree to waive his right to be free from double jeopardy. *Robinson*, 8 Wn. App. 2d at 639. To the contrary, Robinson mistakenly believed his plea was legal and permissible under *Zhao* and *Barr*. *Robinson*, 8 Wn. App. 2d at 633, 640.

Similarly, Fox did not waive his right to challenge his convictions and sentence because as in *Robinson*, the state, Fox, and Fox's defense counsel all mistakenly believed that pleading guilty to three crimes everyone knew stemmed from only one course of conduct was legal and permissible under *Barr* to avoid conviction

of a greater charge. Supp. CP (Statement of Def. on Guilty Plea 11/13/13).

This mistake does not amount to an agreement to waive double jeopardy. Rather, as in *Robinson*, Fox acknowledged there was a factual basis for the original charge only, but did not agree to or understand that to support multiple counts the state needed a separate factual basis for each to pass muster under *Zhao* and *Barr*.

Assault is a course of conduct crime meaning not every punch thrown or stab wound inflicted forms the basis of a separate crime. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 985, 329 P.3d 78 (2014) (citing *State v. Tili*, 139 Wn.2d 107, 116, 985 P.2d 365 (1999)). Thus, language in the Amended Information that counts two, three, and four are based on a series of acts connected together or constituting parts of the single scheme or plan does not create separate criminal acts when the declaration of probable cause only identifies one fight, one place where the fight occurred, and one victim. *Villanueva-Gonzalez*, 180 Wn.2d at 985; Supp. CP (Determination for Probable Cause 7/12/12).

The state in its response brief conceded counts two, three, and four are pure fiction. (State's Response to PRP 10/21/19 at 4).

Convicting and punishing Fox of three fictional counts of third degree assault based on the same criminal act violates double jeopardy, and is impermissible even with an express agreement that the plea was legal and permissible under *Zhao* and *Barr* since *Robinson* established that *Zhao* and *Barr* do not provide a legal basis for the fictional convictions based on the same criminal conduct. *Robinson*, 8 Wn. App. 2d at 631, 633. Fox, like Robinson, mistakenly relied on *Barr* and, in doing so, unknowingly agreed to an illegal punishment. *Robinson*, 8 Wn. App. 2d at 638-39. Supp. CP (Statement of Def. on Guilty Plea 11/13/13).

The double jeopardy violation is clear from the face of the record, thus, this Court should vacate Fox's three fictitious third degree assault convictions. *Robinson*, 7 Wn. App. 2d at 639; *Mutch*, 171 Wn.2d at 664. After counts two, three, and four are properly vacated, Fox's total term of confinement is 60 months. Supp. CP (Judgment and Sentence 11/15/13). Because Fox has spent longer than 60 months in prison, this Court should remand with direction to immediately release Fox.

2. FOX'S CLAIMS ARE NOT TIME
BARRED UNDER RCW 10.73.100(3)
AND (6)

RCW10.73.090 prohibits a collateral attack beyond the one year time limit, unless the issue involves a facially invalid judgment and sentence. RCW 10.73.090 (1). In addition, RCW 10.73.100 specifically exempts a petition from the one year time bar if the conviction was barred by double jeopardy or there has been a significant change in the law which is material to the conviction. RCW 10.73.100(3), (6); *In re Coats*, 173 Wn.2d 123, 135, 267 P.3d 324 (2011); *In re Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004).

Robinson constitutes a change in the law material to Fox's conviction. Under *Robinson*, the parties' reliance on *Barr* is insufficient for an effective waiver. Instead, the defendant must expressly waive any double jeopardy challenge. *Robinson*, 8 Wn. App. at 639-40. Fox's judgment and sentence violates double jeopardy and is invalid on the face.

Fox did not waive his right to challenge his convictions and sentence as a facial violation of double jeopardy because, as in *Robinson*, the state, Fox, and Fox's defense counsel all mistakenly believed that pleading guilty to three crimes everyone knew

stemmed from only one course of conduct was legal and permissible under *Barr* to avoid conviction of a greater charge. Supp. CP (Statement of Def. on Plea of Guilty 11/13/13).

D. CONCLUSION

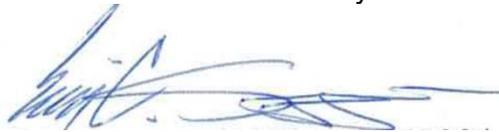
Finos D. Fox III respectfully requests that this Court vacate counts two, three, and four as violations of double jeopardy and remand for Fox's immediate release.

DATED this 18th day of February 2020.

Respectfully submitted,

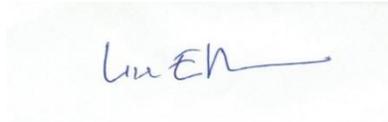


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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcecf@co.pierce.wa.us and Finos Fox/DOC#331675, Monroe Correctional Complex-SOU, PO Box 514, Monroe, WA 98272 a true copy of the document to which this certificate is affixed on February 18, 2020. Service was made by electronically to the prosecutor and Finos Fox by depositing in the mails of the United States of America, properly stamped and addressed.

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Signature

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