

FILED
Court of Appeals
Division II
State of Washington
6/1/2020 2:57 PM
No. 53832-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS PLEASANT,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. ISSUES.....1

II. STATEMENT OF THE CASE1

III. ARGUMENT4

 A. THE STATE CONCEDES PLEASANT’S CONVICTIONS FOR ROBBERY IN THE FIRST DEGREE AND ASSAULT IN THE SECOND DEGREE MERGED, THEREFORE PLEASANT SHOULD HAVE ONLY BEEN SENTENCED FOR THE ROBBERY CONVICTION4

 1. Standard Of Review.....4

 2. The Assault In The Second Degree Elevated The Robbery To A Robbery In The First Degree, Therefore The Trial Court Erred By Failing To Vacate The Assault Conviction As It Merged With The Robbery Conviction4

 B. PLEASANT’S OTHER ARGUMENTS ARE MOOT DUE TO THE STATE’S CONCESSION REGARDING THE ASSAULT IN THE SECOND DEGREE MERGING WITH THE ROBBERY IN THE FIRST DEGREE9

IV. CONCLUSION.....9

TABLE OF AUTHORITIES

Washington Cases

In re Pers. Restraint of Francis, 170 Wn.2d 517, 242 P.3d 866
(2010)5, 9

In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291
(2004)6

State v. Barbee, 187 Wn.2d 375, 386 P.3d 729 (2017) 4

State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005)..... 5, 6

State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008)5, 6

Federal Cases

Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180
(1932)5

Washington Statutes

RCW 9A.36.021(1)(c) 6, 8

RCW 9.94A.535(2)(c)9

RCW 9A.56.1908

RCW 9A.56.200(1) 6, 7, 8

RCW 9A.56.2107, 8

Constitutional Provisions

Washington Constitution, Article I, § IX..... 4

U.S. Constitution, Amendment V 4

I. ISSUES

- A. The State concedes Pleasant's Assault in the Second Degree merges with his Robbery in the First Degree, therefore the assault must be vacated and the matter remanded for resentencing.
- B. Pleasant's other arguments are rendered moot by the State's concession regarding the vacation of the Assault in the Second Degree and remand for resentencing.

II. STATEMENT OF THE CASE

Pleasant accepted a plea deal and pleaded guilty to a reduction in charges from Rape in the First Degree and Robbery in the First Degree to Robbery in the First Degree and Assault in the Second Degree. CP 34-35. The charges stem from Pleasant's robbery of a Subway store and his attack on the employee working at the store. *Id.*

While the incident occurred and was charged in 2008, Pleasant did not plead guilty until March 2016. CP 9-19. The plea form indicates the State's offer was for a persistent offender sentence. CP 12. The plea form also states, "On 7-15-08 in Lewis County I robbed a Subway employee of cash from the store. At the same time I pointed a firearm at her during the robbery." CP 18. Pleasant was sentenced to life in prison as a persistent offender. CP 20-30. There is a notation on the judgment and sentence that Counts I and II do not encompass the same criminal conduct and do not

count as one crime in determining the offender score, but the box is not checked, even though the information is handwritten in. CP 22.

Pleasant appealed his sentence and other issues surrounding his conviction. CP 33-44. Pleasant successfully raised that the trial court failed to conduct a comparability analysis of his Colorado conviction for purposes of determining if it would qualify as a most serious offense in Washington. *Id.* The State also conceded the trial court, absent Pleasant's express consent, lacked the authority to enter the conviction for Assault in the Second Degree because the State filed the amended information after the statute of limitations had run. *Id.* at 37-41. This Court remanded Pleasant's case back to the trial court for Pleasant to decide whether to expressly waive the statute of limitations or withdraw his guilty plea. *Id.* If Pleasant waived the statute of limitations he would be entitled to resentencing due to the comparability analysis error. *Id.* at 37-44.

Pleasant was returned to Lewis County for further proceedings. RP (7/10/10); RP (9/20/19). After the trial court further explained the resentencing procedure and how whichever judge that determined the sentence would consider all the information that was presented to him or her and applicable law, Pleasant opted to not withdraw his guilty plea. RP (7/10/19) 4-14. Pleasant expressly

waived the statute of limitations on the Assault in the Second Degree charge. *Id.* at 14.

Prior to resentencing the State filed a memorandum for resentencing regarding its request for an exceptional sentence. CP 48-96. The State requested an exceptional sentence based upon Pleasant's high offender score and multiple current offenses would result in some of the offenses not being punished. CP 49-51. At the sentencing hearing, the State reiterated its request for an exceptional sentence RP (9/20/19) 5-9. Pleasant's attorney argued against the exceptional sentence and requested a standard range sentence. *Id.* at 14-15. There was discussion regarding same criminal conduct. *Id.* at 14-17. The trial court sentenced Pleasant to an exceptional sentence of 25 years, running the two counts concurrent, and finding the two counts did not encompass the same criminal conduct. *Id.* at 21-22; CP 97-107. Pleasant timely appeals his sentence. CP 108.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. THE STATE CONCEDES PLEASANT'S CONVICTIONS FOR ROBBERY IN THE FIRST DEGREE AND ASSAULT IN THE SECOND DEGREE MERGED, THEREFORE PLEASANT SHOULD HAVE ONLY BEEN SENTENCED FOR THE ROBBERY CONVICTION.

Pleasant argues his convictions for Robbery in the First Degree and Assault in the Second Degree merged due to the assault elevating the robbery offense. Brief of Appellant 8-11. Pleasant asserts the merger doctrine requires this Court to vacate Pleasant's sentence and remand the matter back for resentencing only on the Robbery in the First Degree count. The State concedes Pleasant's analysis is correct, and this Court should remand the matter back to the trial court to vacate the Assault in the Second Degree conviction and resentence on the Robbery in the First Degree conviction.

1. Standard Of Review.

Double jeopardy claims are reviewed de novo. *State v. Barbee*, 187 Wn.2d 375, 382, 386 P.3d 729 (2017).

2. The Assault In The Second Degree Elevated The Robbery To A Robbery In The First Degree, Therefore The Trial Court Erred By Failing To Vacate The Assault Conviction As It Merged With The Robbery Conviction.

The Fifth Amendment of the United States Constitution and Article One, Section Nine of the Washington State Constitution

provide that no person shall be put in jeopardy twice for the same offense. This prohibition does not preclude the state from bringing multiple charges that arose “from the same criminal conduct in a single proceeding.” *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). A court may not “enter multiple convictions for the same conduct without offending double jeopardy.” *Freeman*, 153 Wn.2d at 770.

The power rests in the legislature to define crimes and determine if two offenses constitute separate offenses. *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 523, 242 P.3d 866 (2010). The inquiry into “whether the legislature intended two separate offenses” starts with consideration of “any express or implicit representations of legislative intent.” *In re Francis*, 170 Wn.2d at 523. If there is no clear legislative intent, the inquiry moves to the *Blockburger* test, the merger doctrine, and whether the two offenses had an independent purpose or effect. *Id.*, citing *Blockburger v United States*, 284 U.S. 299, 52 S. Ct 180, 76 L. Ed. 306 (1932); *Freeman*, 153 Wn.2d at 772-73. This analysis is conducted on a case by cases basis, no one factor compels the court’s outcome. *In re Francis*, 170 Wn.2d at 523.

The *Blockburger* test requires the court to evaluate “if the crimes are the same in law and in fact.” *State v. Kier*, 164 Wn.2d 798,

804, 194 P.3d 212 (2008). “Where *the same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provisions *requires proof of a fact* which the other does not.” *Freeman*, 153 Wn.2d at 772, *citing In re Pers. Restraint of Orange*, 152 Wn.2d 795, 817, 100 P.3d 291 (2004) (emphasis original).

Legislative intent can be derived, if applicable, by the merger doctrine, “even when two crimes have different elements.” *Id.* “[W]hen the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime.” *Id.* at 773-74. If the crimes merge, the court is not done with its analysis. *Id.* at 774. The court must then determine if each crime had an independent purpose or effect, if so the court may punish each crime separately. *Id.*

Pleasant was charged and pleaded guilty to Robbery in the First Degree and Assault in the Second Degree. CP 7-19; RCW 9A.36.021(1)(c); RCW 9A.56.200(1). The elements of Assault in the Second Degree, as charged and pleaded are: “Assaults another with a deadly weapon.” RCW 9A.36.021(c); CP 18. The elements of

Robbery in the First Degree, as charged and pleaded are: “In the commission of a robbery...displays what appears to be a firearm or other deadly weapon.” RCW 9A.56.200(1)(a)(ii); CP 18. Pleasant’s Statement of Defendant on Plea of Guilty states:

The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: On 7-15-08 in Lewis County I robbed a Subway employee of cash from the store. At the time I pointed a firearm at her during the robbery.

CP 18. The State concedes the limited record in Pleasant’s case leaves no choice but merge the Assault in the Second Degree with the Robbery in the First Degree, as the assault elevated the robbery charge.

Robbery in the Second Degree requires the State to prove a person commits a robbery. RCW 9A.56.210. Robbery is defined as:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190. Robbery in the Second Degree is a class B felony. RCW 9A.56.210. The action of pointing the firearm at the store clerk constituted the Assault in the Second Degree. RCW 9A.36.021(1)(c); CP 18. This same action, displaying “what appears to be a firearm or other deadly weapon,” is what elevated the Robbery in the Second Degree to Robbery in the First Degree. RCW 9A.56.200; RCW 9A.56.210. There was no independent purpose for the Assault in the Second Degree. The only reason for the assault contained within the record for the assault was to aid in the commission of the robbery; therefore, there was no independent purpose for the Assault in the Second Degree. *Freeman*, 153 Wn.2d at 774, 778-79. Finally, Robbery in the First Degree is a class A felony, a more serious offense than Robbery in the Second Degree. *Id.*

The trial court sentenced Pleasant to an exceptional sentence of 25 years for the Robbery in the First Degree count and a concurrent 84 months for the Assault in the Second Degree count. CP 97-107. The State concedes this sentence was erroneous, as the Assault in the Second Degree should have merged with the Robbery in the First Degree and Pleasant should have only been punished for the greater offense. Because the Assault in the Second Degree was used to elevate the robbery, the proper remedy is for this Court to

vacate the assault charge and remand for resentencing. *In re Francis*, 170 Wn.2d at 532.

B. PLEASANT’S OTHER ARGUMENTS ARE MOOT DUE TO THE STATE’S CONCESSION REGARDING THE ASSAULT IN THE SECOND DEGREE MERGING WITH THE ROBBERY IN THE FIRST DEGREE.

The State is not addressing Pleasant’s remaining arguments as they all surround sentencing and the State’s concession makes those arguments moot. The State has already acknowledged the Assault in the Second Degree must be vacated, therefore, whether the two convictions are same criminal conduct are of no consequence. The only basis for an exceptional sentence was the “multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.” RCW 9.94A.535(2)(c); CP 106. The vacation of the Assault in the Second Degree leaves only one count, thereby eliminating this possibility. Finally, the interest accrual will be readdressed at the resentencing hearing. Therefore, all of these remaining issues are moot.

IV. CONCLUSION

The State concedes Pleasant’s Assault in the Second Degree should have merged with his Robbery in the First Degree. Therefore, this Court must vacate the Assault in the Second Degree and remand

the matter back to the trial court for resentencing. This action renders Pleasant's remaining arguments moot.

RESPECTFULLY submitted this 1st day of June, 2020.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

June 01, 2020 - 2:57 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53832-6
Appellate Court Case Title: State of Washington, Respondent v Thomas Loel Pleasant, Appellant
Superior Court Case Number: 08-1-00600-4

The following documents have been uploaded:

- 538326_Briefs_20200601145617D2283815_1801.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Pleasant.tho Response 43832-6.pdf

A copy of the uploaded files will be sent to:

- appeals@lewiscountywa.gov
- tom@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Lori Jendryka-Cole - Email: lori.cole@lewiscountywa.gov

Filing on Behalf of: Sara I Beigh - Email: sara.beigh@lewiscountywa.gov (Alternate Email: teri.bryant@lewiscountywa.gov)

Address:
345 W. Main Street
2nd Floor
Chehalis, WA, 98532
Phone: (360) 740-1240

Note: The Filing Id is 20200601145617D2283815