

FILED

AUG 27 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 28543-0-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

ERNEST JAMES SORRELL,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. MULTIPLE CONVICTIONS ALONE, EVEN WHEN THEY HAVE NO IMPACT ON THE SENTENCE IMPOSED, CONSTITUTE "PUNISHMENT" FOR PURPOSES OF THE DOUBLE JEOPARDY CLAUSE

The State contends Mr. Sorrell's two convictions for second degree incest do not violate the Double Jeopardy Clause because, in part, they had no impact on Mr. Sorrell's offender score for the two convictions for third degree child molestation. SRB at 4. But the Washington Supreme Court has consistently and unequivocally held that multiple criminal convictions alone, even when they have no impact on the sentence imposed, constitute "punishment" for purposes of the Double Jeopardy Clause.

The Supreme Court reiterated this principle recently in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). In that case, Womac was convicted of homicide by abuse, second degree felony murder, and first degree assault for the death of his son. Id. at 647. The trial court entered judgment on all three convictions but imposed a sentence only for the conviction for homicide by abuse. Id. Further, the court did not include the other two convictions in the offender score, finding that the multiple convictions amounted to the "same criminal conduct" for purposes of calculating the offender

score. State v. Womac, 130 Wn. App. 450, 455, 123 P.3d 528 (2005), rev'd, 160 Wn.2d 643, 160 P.3d 40 (2007); see RCW 9.94A.589(1)(a). Nonetheless, the Supreme Court held the multiple convictions violated the constitutional prohibition against double jeopardy, explaining, "[t]hat Womac received only one sentence is of no matter as he still suffers the punitive consequences of his convictions." Womac, 160 Wn.2d at 656. The court reiterated the long-standing principle that "conviction, and not merely imposition of a sentence, constitutes punishment." Id. at 657 (quoting State v. Gohl, 109 Wn. App. 817, 822, 37 P.3d 293 (2001)); see also id. at 658 ("Conviction in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect.") (quoting State v. Johnson, 92 Wn.2d 671, 679, 600 P.2d 1249 (1979)). The court recognized that, even though the convictions for second degree felony murder and first degree assault had no impact on Womac's sentence, the "stigma and impeachment value" of those convictions remained. Womac, 160 Wn.2d at 657. Thus, the multiple convictions violated the Double Jeopardy Clause and two of them had to be vacated. Id. at 660.

Similarly, here, although Mr. Sorrell's two convictions for second degree incest had no impact on his sentence, they are

nonetheless punitive. Because the multiple convictions violate the Double Jeopardy Clause, the two incest convictions must be vacated

2. RCW 9.94A.701 REQUIRES THE SENTENCE BE REVERSED, BECAUSE THE TERM OF CONFINEMENT, TOGETHER WITH THE TERM OF COMMUNITY CUSTODY, EXCEEDED THE STATUTORY MAXIMUM SENTENCE

At sentencing, the trial court imposed a standard-range sentence of 60 months confinement, in addition to a 36- to 48-month term of community custody. CP 146. In the opening brief, Mr. Sorrell argued the sentence must be reversed and remanded, because the term of confinement, when added to the term of community custody, exceeded the five-year statutory maximum sentence. Mr. Sorrell relied on Laws 2009, ch. 375, § 5<sup>1</sup>, which provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

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<sup>1</sup> This provision is now codified at RCW 9.94A.701(9). The opening brief cites to RCW 9.94A.701(8), but the statute was recodified in 2010. See Laws 2010, ch. 224, § 5. The Legislature made no substantive changes to the statute relevant to this appeal. *Id.*

The State makes no mention of RCW 9.94A.701 and instead relies entirely on In re Personal Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009). SRB at 5. But as the Supreme Court acknowledged in Brooks, that case was superseded by Laws 2009, ch. 375, § 5, and is not controlling.

The facts in Brooks are similar to the facts here. Brooks was convicted of three counts of attempted first degree robbery and one count of residential burglary. Brooks, 166 Wn.2d at 666. At sentencing the trial court imposed a standard-range sentence of 120 months confinement, which equaled the statutory maximum, and a term of community custody of either 18 to 36 months, or the period of earned early release awarded, whichever was longer. Id. at 666-67. The Supreme Court upheld the sentence, holding it did not exceed the statutory maximum sentence. Id. at 673.

But in the process, the court recognized its holding would have limited impact due to the recently-enacted amendments to the Sentencing Reform Act, which had not yet taken effect. Id. at 672 n.4 (citing Laws 2009, ch. 375, § 5). The court stated, "[h]aving reviewed the upcoming amendments, it appears the legislature has addressed the very questions we are asked to answer in this case."

Brooks, 166 Wn.2d at 672 n.4. The court specifically cited Laws 2009, ch. 375, § 5, on which Mr. Sorrell relies. Id.

Laws 2009, ch. 375, § 5, took effect on July 26, 2009, after the crimes in this case, but before the August 18, 2009, sentencing hearing. The act unequivocally applies to sentencing proceedings held after July 26, 2009. See Laws 2009, ch. 375, § 20 ("This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, *or sentenced after July 26, 2009.*") (emphasis added).

Admittedly, applying the statute to Mr. Sorrell's case is contrary to the general rule in Washington that crimes are punished according to the law in effect at the time they were committed. See State v. Pillatos, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007). Washington's "saving" clause presumptively "saves" all offenses already committed and all penalties or forfeitures already incurred from the effects of amendment or repeal. Pillatos, 159 Wn.2d at 472 (citing RCW 10.01.040 and RCW 9.94A.345). RCW 10.01.040 provides in part:

Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or

penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, . . . pending at the time of its enactment, unless a contrary intention is expressly declared therein.

Further, RCW 9.94A.345 provides, "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed."

But the "saving" clause applies *only* if the Legislature does not express a contrary intention in new legislative amendments. By its own terms, the saving clause applies to statutory amendments "unless a contrary intention is expressly declared therein." RCW 10.01.040; see also State v. Kane, 101 Wn. App. 607, 611-12, 5 P.3d 741 (2000) (and cases cited therein) (saving clause applies only in absence of contrary expression from Legislature). The Legislature need not *explicitly* state its intent that amendments apply retroactively to pending prosecutions for crimes committed before the amendments' effective date; "[i]nstead, 'such intent need only be expressed in 'words that fairly convey that intention.'"  
State v. Ross, 152 Wn.2d 220, 238, 95 P.3d 1225 (2004) (quoting Kane, 101 Wn. App. at 612 (quoting State v. Zornes, 78 Wn.2d 9,

13, 475 P.2d 109 (1970))). Because the saving statute departs from the common law, it is applied narrowly and its exception is interpreted broadly. Kane, 101 Wn. App. at 612.

Here, the Legislature's intent is explicit and clear. The 2009 amendments expressly state that they apply "retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, *or sentenced after July 26, 2009.*" Laws 2009, ch. 375, § 20 (emphasis added). This language fairly conveys the Legislature's intent that the amendments apply to offenders, such as Mr. Sorrell, who were sentenced after the amendments' effective date of July 26, 2009, regardless of when the crime occurred.

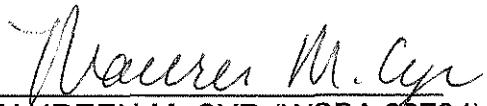
In sum, because the term of confinement in combination with the term of community custody exceeded the five-year statutory maximum sentence, RCW 9.94A.701(9) requires Mr. Sorrell's sentence be reversed and remanded for resentencing.

#### B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Sorrell's two convictions for second degree incest must be vacated.

Also, his sentence must be reversed and remanded for  
resentencing.

Respectfully submitted this 25th day of August 2010.

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

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STATE OF WASHINGTON,            )  
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                  Respondent            ) Court of Appeals No. 28543-0-III  
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                                  v.            )  
  )  
ERNEST JAMES SORRELL,        )  
  )  
                  Appellant.            )

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**DECLARATION OF SERVICE**

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 25th DAY OF AUGUST, 2010, A COPY OF **APPELLANT'S REPLY BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

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SIGNED IN SEATTLE, WASHINGTON THIS 25th DAY OF AUGUST, 2010

x *Ann Joyce*