

FILED
Apr 11, 2017
Court of Appeals
Division III
State of Washington

NO. 34954-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

RUSTY JOE ABRAMS,

Appellant.

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

The Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

A jury found Rusty Joe Abrams guilty of both assault in the second degree and assault in the third degree. On appeal, this Court found the assaults arose from identical conduct and to punish Mr. Abrams for both violated double jeopardy. The court ordered, on remand, the assault in the third degree be vacated. On remand, the sentencing court dismissed, rather than vacated, the assault in the third degree.

In reimposing the same 96 month sentence-84 months of standard range plus 12 months for an aggravating sentencing factor found by the jury-the court noted in the amended judgment and sentence the jury's special interrogatory was attached. In fact, it is not attached.

Mr. Abrams appeals the sentencing court's failure to abide by this Court's mandate to vacate the assault in the third degree conviction and its error in representing the jury special interrogatory is attached to the amended judgment and sentence.

B. ASSIGNMENTS OF ERROR

1. The trial court erred on remand by dismissing Mr. Abrams' assault in the third degree conviction rather than ordering it vacated as required by this court's unpublished opinion. See *State v. Rusty Joe Abrams*, 195 Wn. App. 1045 (2016) (No. 32982-8-III).

2. The trial court erred in leaving any reference to the assault in the third degree on the amended judgment and sentence.

3. The amended judgment and sentence notes, in error, the attachment of the jury's special interrogatory supporting an aggravating sentencing factor.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether, on remand, the trial court must abide by this Court's directive to vacate the third degree assault conviction under its holding in *State v. Rusty Joe Abrams*, 195 Wn. App. 1045 (2016) (No. 32982-8-III), that convictions for assault in the second degree and assault in the third degree for the same conduct violates double jeopardy?

2. Whether language at section 2.4 of the amended judgment and sentence noting the attachment of the jury special interrogatory to support the aggravated sentencing factor must be stricken as inaccurate because the interrogatory is not attached?

D. STATEMENT OF THE CASE

This Court remanded Mr. Abrams' case to the trial court after a successful appeal of his jury convictions for assault in the second degree and assault in the third degree. RP 10/4/16 at 3; Supplemental Designation of Clerk's Papers, Mandate with Court's Opinion. This Court held the

assault in the second degree and the assault in the third degree arose from identical conduct. Mandate with Court's Opinion (*State v. Rusty Joe Abrams*, 195 Wn. App. 1045 (2016) (No. 32982-8-III)). As such, Mr. Abrams was entitled to vacation of the lesser assault in the third degree as it violated double jeopardy.

On remand, the parties disagreed over the scope of the hearing. RP 11/22/16 at 8-9. The prosecutor argued for entry of an order to "delete" the third degree assault. RP 11/22/16 at 8-10. Abrams argued for a full resentencing hearing. RP 11/22/16 at 9-10. The court naturally coalesced to a happy medium. RP 11/22/16 at 12-25. It listened to what each side had to say. RP 11/22/16 at 12-25. It provided Mr. Abrams allocation. RP 11/22/16 at 17-19. No one disputed Mr. Abrams' offender score on the second degree assault exceeded the 9 point offender scoring maximum. RP 11/22/16 at 1-25.

The court reimposed the same sentence: 96 months split as 84 months as the high end of the standard range and 12 months additional months for the aggravating factor of a law enforcement officer performing

his official duties at the time of the offense.¹ RP 11/22/16 at 15; CP 6-7.

The court also imposed 18 months of community custody. CP 8.

However, rather than vacating the assault in the third degree conviction as directed by the Court in its opinion, the trial court dismissed it and made specific reference to the third degree assault on page 5 of the amended judgment and sentence. Supp. Mandate and Court's Opinion; CP 7. The amended judgment and sentence at section 2.4 wrongly notes the jury special interrogatory is attached. CP 6. Supp. DCP. Special Verdict Form D.

Mr. Abrams appeals from the entry of the amended judgment and sentence. CP 26.

E. ARGUMENT

Issue 1: Mr. Abrams' assault in the third degree should be vacated.

Mr. Abrams is entitled to have his assault in the third degree vacated as it violates double jeopardy. This Court is in agreement. See opinion at No. 32982-8-III. Our state constitution provides, "No person shall be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9; accord, U.S. Const. Amend. V. If double jeopardy results from a

¹ RCW 9.94.533(3)(v)

conviction for more than one crime, the remedy is vacation of the lesser offense. *State v. Weber*, 159 Wn.2d 252, 265-66, 149 P.3d 646 (2006).

Merely dismissing the assault in the third degree conviction is inadequate. See CP 7. A trial court must avoid (i) entering judgment on a defendant's lesser conviction and (ii) referencing that conviction when sentencing a defendant convicted of multiple crimes for the same criminal conduct. *State v. Turner*, 169 Wn.2d 448, 464, 238 P.3d 461 (2010). A conviction that retains validity may cause adverse consequences and so constitutes punishment; at a minimum a conviction carries a societal stigma. *Ball v. United States*, 470 U.S. 856, 865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); *State v. Calle*, 125 Wn.2d 769, 773-75, 888 P.2d 155 (1995).

At resentencing, the trial court acknowledged the stigma of a conviction dismissed as double jeopardy. RP 11/22/16 at 13, 14. Nonetheless, the court still erred in failing to vacate the third degree assault conviction. CP 7. The error requires remand to vacate the conviction.

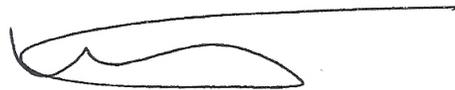
Issue 2: The judgment and sentence contains a misstatement that should be corrected: it indicates the jury special interrogatory on the aggravating sentencing factor is attached to the amended judgment and sentence.

The jury found by special interrogatory that Mr. Abrams committed the second degree assault against a law enforcement officer performing his official duties and that Mr. Abrams knew he was a law enforcement officer. Supp. DCP, Special Verdict Form D. The amended judgment and sentence entered after resentencing specifies the special interrogatory is attached to the amended judgment and sentence. CP 6. It is not. Therefore, on remand to vacate the assault in the third degree, the trial court should either (1) correct the misstatement or (2) attach the jury's special interrogatory. *See, e.g., State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

F. CONCLUSION

Mr. Abrams' case should be remanded to vacate the assault in the third degree conviction. The trial court should also append the jury's special interrogatory the amended judgment and sentence or strike from the judgment and sentence language saying it is appended.

Respectfully submitted April 11, 2017.



LISA E. TABBUT/WSBA 21344
Attorney for Rusty Abrams

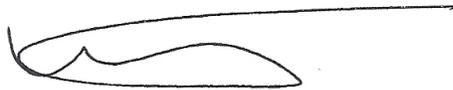
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Grant County Prosecutor's Office, at kburns@grantcountywa.gov and gdano@grantcountywa.gov; (2) the Court of Appeals, Division III; and (3) I mailed it to Rusty Abrams/DOC#798502, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed April 11, 2017, in Seattle, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Rusty Abrams, Appellant

LISA E TABBUT LAW OFFICE
April 11, 2017 - 1:31 PM
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Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to gdano@grantcountywa.gov and kburns@grantcountywa.gov.

Sender Name: Lisa E Tabbut - Email: ltabbutlaw@gmail.com