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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36314-7-III

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STATE OF WASHINGTON, Respondent,

v.

TOMMY D. CANFIELD, Appellant.

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**APPELLANT'S REPLY BRIEF**

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Andrea Burkhart, WSBA #38519  
Two Arrows, PLLC  
8220 W. Gage Blvd #789  
Kennewick, WA 99336  
Phone: (509) 572-2409  
Andrea@2arrows.net  
Attorney for Appellant

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## I. ARGUMENT

The State contends that the standard for determining whether offenses are “related” within the meaning of CrR 4.3.1(b)(1) is the same standard as whether offenses are part of a continuing course of conduct for purposes of a unanimity instruction. *Respondent’s Brief*, at 4. It cites no authority supporting this equivocation and the cases it relies upon, *State v. Thompson*, 36 Wn. App. 249, 673 P.2d 630 (1983), *review denied*, 101 Wn.2d 1002 (1984) and *State v. Lee*, 132 Wn.2d 498, 939 P.2d 1223 (1997), factually demonstrate the error in the State’s argument. Moreover, the State deliberately omits the *Lee* Court’s explanation that “same conduct” for purposes of mandatory joinder includes separate acts occurring during a single criminal episode, as well as mischaracterizes its own actions in levying additional charges against Canfield after remand based on the same actions it tried him for initially.

In *Thompson*, the defendant sold drugs or counterfeit drugs on four separate occasions between November and January. 36 Wn. App. at 250. A week after the final sale, he was arrested during the delivery of a large amount of cocaine to his house and was also found to be in possession of marijuana. *Id.* The State first charged the defendant with the two possession charges arising from his arrest, and subsequently charged him in a separate information with the four prior deliveries. *Id.* at 250-51. In

holding that the State was not precluded from charging the prior deliveries separately from the later possessions, the *Thompson* court concluded that while the prior deliveries *could* have been joined because they were of the same or similar character, they were not “related offenses” within the meaning of the mandatory joinder rule because they were four separate incidents. *Id.* at 254.

Similarly, in *Lee*, the defendant advertised houses for rent in a local newspaper that he did not own and stole rent and deposit money from the prospective tenants. 132 Wn.2d at 500. He was convicted of theft for accepting a \$700 check from the Red Cross to rent a house to a couple who moved in and later purchased it from the true owner. *See State v. Lee*, 128 Wn.2d 151, 153-54, 904 P.2d 1143 (1995) (“*Lee I*”). Separately, the State charged Lee with stealing rent and deposit money from eight other prospective tenants, and from the Red Cross relating to a different tenant than in *Lee I*. *Lee*, 132 Wn.2d at 500-01. The *Lee* Court concluded that the mandatory joinder rule did not preclude the second set of charges. *Id.* at 505.

Factually, *Thomson* and *Lee* are readily distinguishable from the present case because they involve separate criminal acts on separate days involving separate individuals, with no apparent relationship between

them besides a singular objective – to sell drugs, in the case of *Thompson*, and to steal from prospective tenants, in the case of *Lee*. Here, the events supporting the charges occurred within moments of each other, in the course of a single arrest on a warrant. Nor did either *Thompson* or *Lee* involve the facts present here, where the State actually tried Canfield initially for the acts constituting the new charges under the theory that each act constituted obstruction. These facts bring the present case factually within the reasoning of *State v. Gamble*, 168 Wn.2d 161, 225 P.3d 973 (2010) and *State v. Russell*, 101 Wn.2d 349, 678 P.2d 332 (1984), which, unlike *Lee* and *Thompson*, involve the State filing additional charges in a second trial for conduct at issue in the first.

In addition to being factually distinguishable, *Lee* does not stand for the legal proposition the State asserts. In holding that the State was permitted to file separate informations, the *Lee* Court noted that permissive, rather than mandatory, joinder rules apply to conduct constituting part of a common scheme or plan. 132 Wn.2d at 502. Clarifying the distinction between permissive and mandatory joinder standards, the *Lee* Court held:

“[S]ame conduct” for purposes of deciding what offenses are “related offenses” and, therefore, subject to mandatory joinder is *conduct involving a single criminal incident or episode*. We do not attempt to describe the exact

boundaries of “same conduct,” but it would include, for example, offenses based upon the same physical act or omission *or same series of physical acts*. Close temporal or geographic proximity of the offenses will often be present; however, a series of acts constituting the same criminal episode *could span a period of time and involve more than one place, such as one continuous criminal episode involving a robbery, kidnapping, and assault on one victim occurring over many hours or even days*.

132 Wn.2d at 503-04 (emphasis added).

The *Lee* Court’s reasoning squarely contradicts the State’s argument that it was allowed to pile on new charges and seek increased punishment after remand because feigning sleep, reaching in the direction of car keys, and stiffening in response to handcuffing during a single detention and arrest are separate physical acts. *Respondent’s Brief*, at 5. Indeed, *Lee* squarely acknowledges that “same conduct” for purposes of mandatory joinder evaluates the entire criminal episode, not the individual acts, and the State’s assertion to the contrary is a stark misrepresentation of the law.

In addition to misrepresenting the law, the State misrepresents the facts when it asserts that the concerns expressed by the Washington Supreme Court in *Gamble* are not present because it merely retried the case “in accord with the appellate court’s order.” *Respondent’s Brief*, at 6. Of course, nothing in the appellate court’s order directed or authorized the

State to harass Canfield with additional charges after he obtained a minor win on appeal. *See* CP 84, 96 (“In the event that *the charge* is retried and *a conviction* again ensues, a sentence would have to be imposed for *the offense*.”) (emphasis added). Yet, this is what the State actually did.

Canfield originally received a sentence of 7 months, consecutive to the sentences imposed for his felony convictions, for the obstructing conviction. CP 78. After his retrial and conviction on the subsequently added charges, Canfield was sentenced to 7 months for making a false statement and 4 months for obstructing, both counts consecutive to each other and to the other charges. CP 41, 42, 44. This increased Canfield’s sentence from a total of 181 months to 185 months. CP 44, 78. Moreover, this increase occurred at the State’s request and based upon its argument that Canfield should be punished more harshly because he exercised his right to a trial and was convicted of additional charges.

Specifically, the State argued at sentencing:

To say that -- that since he’s now been convicted of three crimes instead of one crime the punishment shouldn’t be greater -- doesn’t seem to follow. If punishment is designed -- If incarceration is designed to be punishment for crimes then -- then, yes, it should be greater.

Also if -- if -- I have no doubt whatsoever that if Mr. Canfield would have prevailed on all three charges, he

would be outraged if we tried to impose a higher sentence after he had prevailed.

So the fact that -- that -- he -- took this matter to trial and lost should carry -- He's been convicted of two more crimes than he was last time around. It should carry -- greater sanction. That's why -- But we're keeping it in line. Last time he got seven months for obstructing; we're asking the court to give him seven months for obstructing. He's now picked up a conviction for making false statements; we're asking for seven months on that, in accord with the previous sentence on the obstructing.

He's now been convicted of attempted tampering with physical evidence; we're asking for a midrange sentence there, 45 days.

There should be a greater cost for greater crimes.

RP 86-87. The argument that Canfield should receive harsher punishment because he successfully appealed and exercised his right to a trial against additional charges levied by the State after remand is precisely the kind of "harassment of the defendant through multiple trials" anticipated by the *Gamble* Court. 168 Wn.2d at 168.

In sum, the State's argument against applying the mandatory joinder rule to its actions in charging Canfield with additional crimes after remand and seeking additional punishment based upon those additional convictions depends upon ignoring the *Lee* Court's explanation of what "same conduct" is in the context of mandatory joinder and mischaracterizing its own harassing conduct as mere compliance with the Court of Appeals' directions. This court should decline to reward the

dubious animus reflected in the State's argument as well as its post-remand conduct toward Canfield.

## **II. CONCLUSION**

For the foregoing reasons, Canfield respectfully requests that the court VACATE and DISMISS his convictions for making a false statement to a public official, obstructing a law enforcement officer, and tampering with evidence, or alternatively, STRIKE the non-mandatory LFOs imposed and the provision imposing interest on unpaid nonrestitution LFOs, and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 21 day of August, 2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Reply Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Tommy D. Canfield, DOC #877137  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

Benjamin Curler Nichols  
Asotin County Prosecutors Office  
PO Box 220  
Asotin, WA 99402-0220

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 21 day of August, 2019 in Kennewick, Washington.

  
Andrea Burkhart

**BURKHART & BURKHART, PLLC**

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Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net  
Address:  
8220 W. GAGE BLVD #789  
KENNEWICK, WA, 99336  
Phone: 509-572-2409

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