

56206-1

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NO. 56206-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DALE L. SCHWAB,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. ISSUES

(1) A jury found the defendant guilty of both second degree murder and first degree manslaughter. On appeal, this court found that cumulative punishment for those crimes constituted double jeopardy. It therefore vacated the manslaughter conviction. Subsequently, the court granted the defendant's petition to vacate the murder conviction. Does this allow reinstatement of the manslaughter conviction?

(2) On a collateral attack brought by the defendant, this court set aside a portion of its decision on the direct appeal. Does the "law of the case" doctrine preclude the court from re-examining other portions of its decision that were based on the portion that was set aside?

(3) After setting aside a portion of its original decision, this court remanded the case to the trial court for "further lawful proceedings." Did this authorize the trial court to consider the continuing validity of other portions of the original decision that were based on the portion that was set aside?

II. STATEMENT OF THE CASE

On the early morning of December 23, 1997, Dale Schwab, Jr. (defendant/appellant) and Aaron Beymer encountered Earnest

Sena. They assaulted Mr. Sena and rendered him unconscious. They then covered him with carpet and debris and placed him on nearby railroad tracks. Minutes later, a train ran over Mr. Sena and killed him. At trial, there was conflicting evidence concerning the extent of the defendant's participation in these acts. 1 CP 58-59.

The defendant was charged with both premeditated first degree murder and second degree felony murder, with assault and/or theft as the underlying felonies. 1 CP 80. The court also instructed the jury on first degree manslaughter as a lesser included offense of first degree murder. The jury hung on the first degree murder charge. It found the defendant guilty of first degree manslaughter and second degree murder. The court imposed concurrent sentences on both counts. 1 CP 70-79.

On appeal, this court affirmed the conviction for second degree murder. It held, however, that convicting the defendant for both that crime and first degree manslaughter constituted double jeopardy. It therefore vacated the conviction and sentence for manslaughter. State v. Schwab, 98 Wn. App. 179, 988 P.2d 1045 (1999); 1 CP 56-69.

Three years later, the Supreme Court held that a felony murder conviction could not be based on an underlying felony of

assault. In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). The defendant filed a motion in Superior Court to vacate his murder conviction under Andress. The court transferred the motion to this court, for consideration as a personal restraint petition cause no. 53035-6-I. This court stayed consideration of the petition, pending the Supreme Court's decision on the retroactive effect of Andress.

On November 18, 2004, the Supreme Court held that Andress is retroactive. In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). On December 6, this court sent a letter to the prosecutor, directing him to do one of two things: either confirm that the murder conviction needed to be vacated, or file a formal response to the petition.¹

The prosecutor responded with a letter stating the following:

The murder conviction was based on felony murder, with a predicate of second degree assault. Consequently, the State concedes that this conviction should be vacated pursuant to Andress and Hinton. Once this is accomplished, there will no longer be any double jeopardy bar to punishment for first degree manslaughter, so that conviction should be reinstated.

There may also be issues concerning whether any additional charges can be filed against the defendant. I assume that these issues will be open for the trial court to resolve on remand.

¹ This letter is in the records of this court under cause no. 53035-6-I.

1 CP 36.

This court issued an order “accept[ing] the concession of error.” The court vacated the murder conviction. It “remand[ed] this matter to the Snohomish County Superior Court for further lawful proceedings consistent with Andress and Hinton.” 1 CP 23-24.

On remand, the State decided not to file any additional charges. Instead, it asked the court to re-impose sentence on the first degree manslaughter. 1 CP 33-35. The court granted this request and imposed a standard-range sentence for that crime. 4/14/RP 9-14; 1 CP 3-15.

III. ARGUMENT

A. SINCE IT NO LONGER CONSTITUTES DOUBLE JEOPARDY TO SENTENCE THE DEFENDANT FOR MANSLAUGHTER, JUDGMENT CAN BE ENTERED ON THE JURY’S VERDICT FINDING HIM GUILTY OF THAT CRIME.

1. Although Double Jeopardy Requirements Prevent A Defendant From Receiving Multiple Sentences For “The Same Offense,” This Does Not Invalidate The Underlying Verdicts.

On direct appeal, this court vacated the defendant’s conviction for manslaughter but upheld his conviction for felony murder. 1 CP 56-69. Subsequently, the court vacated the murder conviction. 1 CP 22-24. The defendant claims that the manslaughter conviction could nevertheless not be reinstated. To

analyze this argument, it is necessary to understand the legal premises that gave rise to the vacation.

The doctrine of double jeopardy protects a defendant in three areas: from being tried a second time after an acquittal; from being tried a second time after a conviction; and from multiple punishments for the same offense. Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977). When multiple charges are adjudicated in a single trial, the first two of these protections are irrelevant. Consequently, the double jeopardy clause does not prevent a person from being tried on multiple counts. If, however, the defendant is convicted on more than one count, he cannot be separately punished for crimes that constitute “the same offense.” State v. Waldenburg, 9 Wn. App. 529, 532-33, 513 P.2d 577, review denied, 83 Wn.2d 1002 (1973).

In the present case, the defendant was charged with both first and second degree murder. The trial court also instructed the jury on first degree manslaughter, as a lesser included offense of first degree murder. The jury found the defendant guilty of second degree murder and first degree manslaughter. All of those proceedings were proper. Since, however, first degree manslaughter and second degree murder are “the same offense”

for double jeopardy purposes, the defendant could not be *punished* for both of those crimes. Consequently, when this court affirmed the murder conviction, it vacated the conviction for the lesser crime of manslaughter. State v. Schwab, 98 Wn. App. 179, 988 P.2d 1045 (1999); 1 CP 56-69.

On collateral attack, this court set aside the murder conviction. 1 CP 23-24. That decision did not alter the validity of the jury verdict finding the defendant guilty of manslaughter. At this point, there was no longer any problem of multiple punishment. Consequently, it was proper for the trial court to enter judgment and sentence on the existing and valid jury verdict.

2. When A Conviction No Longer Constitutes Multiple Punishment, That Conviction Can Be Reinstated.

In both this and other jurisdictions, courts have addressed situations comparable to the present case. State v. Ward, 125 Wn. App. 138, 104 P.3d 61 (2005); Taflinger v. State, 698 N.E.2d 325 (Ind. App. 1998); Byrd v. United States, 500 A.2d 1376 (D.C. App. 1985), modified en banc, 510 A.2d 1035 (D.C. App. 1986). All three of these cases agree that a conviction can be reinstated if it was set aside on double jeopardy grounds, when those grounds cease to exist.

In Ward, a jury found the defendant guilty of first degree manslaughter and second degree felony murder. To avoid double jeopardy problems, the trial court did not enter judgment on the manslaughter charge. On appeal, this court overturned the murder conviction. The defendant argued that the manslaughter conviction could not be “revived.” This court rejected that argument:

[The defendant] would receive a large windfall if we vacated his felony murder conviction *and* ignored the guilty verdict on the charge of manslaughter. Instead, the appellate court may seek to place the defendant in exactly the same position in which he would have been had there been no error in the first instance. [The defendant] was found guilty of first degree manslaughter. Entering judgment and sentence against him now is not a violation of his constitutional rights.

Ward, 125 Wn. App. at 146 (court’s emphasis, citations omitted).

The situation in the present case is essentially the same. As in Ward, the defendant was convicted of murder under a felony-murder theory that was later held invalid. Had this error not occurred, the defendant would have been sentenced for first degree manslaughter. By imposing that sentence now, the defendant is restored to the position he would have been in had there been no error in the first instance. Conversely, ignoring the

jury verdict on the manslaughter would give the defendant an undeserved windfall.

The defendant's brief does not discuss Ward. In the trial court, he argued that the cases were different because "his sentence for First Degree Manslaughter was vacated by the Court of Appeals, unlike Ward's situation in which the trial judge did not sentence him at all." 1 CP 27. This "distinction" is meaningless. Once this court vacated the defendant's manslaughter conviction, he was in exactly the same position as the defendant in Ward: a jury had found him guilty of manslaughter, but no judgment had been entered. In Ward, this court held it permissible to "revive" a conviction on which no judgment had been entered. In the present case, the trial court "reinstated" a conviction on which judgment had been entered and then vacated. There is no significant difference between these situations.

Cases from other jurisdiction have reached similar results. In Taflinger, a jury found the defendant guilty of attempted murder and neglect of a dependent child. At sentencing, the defendant moved to set aside the neglect conviction on double jeopardy grounds. In response, the State moved for dismissal of that

conviction. The court granted the motion and sentenced the defendant for only the murder.

On appeal, the appellate court reversed the murder conviction. On remand, the State moved to reinstate the dismissed neglect conviction. The trial court granted that motion. The Indiana Court of Appeals held that this action did not constitute double jeopardy:

By reinstating the jury's verdict of guilty and sentencing [the defendant] accordingly, the trial court was not affording the State another opportunity to prove its case. The State had already convicted [the defendant] in a jury trial of neglect of a dependent child causing serious bodily injury. He was merely resentenced on a jury verdict that had been previously dismissed. Because [the defendant] was not threatened with nor subject to a re prosecution there was no double jeopardy bar.

Taflinger, 698 N.E.2d at 328.

In Byrd, the District of Columbia Court of Appeals discussed a situation virtually identical to the present case. The defendant was convicted of felony murder and premeditated murder for killing the same victim. The Court of Appeals held that imposing judgment for both crimes constituted multiple punishment. It therefore directed the trial court to vacate one of the convictions. The Court of Appeals then noted:

If the unvacated murder conviction is subjected later to a successful collateral attack, the trial court should consider favorably a government motion to reinstate the vacated murder conviction.

Byrd, 500 A.2d at 1389 n. 16.

In short, when a conviction is vacated, the underlying jury verdict does not vanish. If the vacation was based on multiple punishment concerns, and the conviction that gave rise to those concerns is later set aside, judgment can again be entered on that verdict. Granting this remedy neither creates double jeopardy nor violates any other right of the defendant. The trial court properly applied this remedy.

B. THE “LAW OF THE CASE” DOCTRINE DOES NOT PREVENT THIS COURT FROM RECONSIDERING ITS DECISION ON THE ORIGINAL APPEAL.

1. After This Court Sets Aside A Portion Of Its Decision, It Can Reconsider Other Interrelated Portions Of That Decision.

The defendant argues that the reinstatement of his manslaughter conviction violates the “law of the case” doctrine. That phrase can refer to three different principles. First, it can refer to “the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case or which were necessarily implicit

in such prior determination.” Second, it can refer to “the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand.” Third, it can refer to “the rule that instruction give to the jury by the trial court, if not objected to, shall be treated as the properly applicable law.” Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992). The third meaning is not relevant to the present case. The other two require separate discussion.

With regard to the first meaning of “law of the case,” the defendant ignores a critical fact. *This court’s decision on the original appeal has already been set aside, at his request.* The “law of the case,” as determined by the original appellate decision, was that the defendant was guilty of second degree murder. That “law” was the essential predicate for the vacation of his manslaughter conviction. The defendant now wants to preserve the second half of the decision, while ignoring the first half on which it was based.

In the context of sentencing challenges, courts have rejected comparable arguments. If a defendant successfully challenges his sentence on one count, he can be resentenced on all counts. Such a defendant “has no legitimate expectation in the finality of any discrete part of the original sentence, whether or not that discrete

part is legal in isolation.” State v. Larson, 56 Wn. App. 323, 329, 783 P.2d 1093 (1989), review denied, 114 Wn.2d 1015 (1990). Similarly, if a sentence on one count is invalidated on the State’s petition, that also leads to re-sentencing on other counts that are “indivisible” from the invalid sentence. Brooks v. Rhay, 92 Wn.2d 876, 877, 602 P.2d 356 (1979).

In the present case, this court’s opinion on the direct appeal is “indivisible.” The affirmance of the murder conviction provided the sole basis for the vacation of the manslaughter conviction. Once the former part of the decision was invalidated, the latter part became invalid as well. There is no longer any “law of the case” that restricts this court’s decision.

2. This Court Can Reconsider A Prior Decision If The Governing Law Has Changed Or The Decision Is Clearly Erroneous.

Even if this court’s decision had not already been invalidated, the court would not be required to follow it. In Washington, the “law of the case” doctrine is flexible:

Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

...

(2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the

propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 2.5(c).

Under this rule, the “law of the case” doctrine is discretionary, not mandatory.

[A] holding [on a previous appeal] should be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.

Folsom v. Spokane County, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988). The court should also decline to follow its previous decision if there has been a change in the controlling law. Coffel v. Clallam County, 58 Wn. App. 517, 521, 794 P.2d 513 (1990).

Here, there has been a change in the law. This court has recognized that Andress departed from “an unbroken line of precedent.” State v. Ramos, 124 Wn. App. 334, 342, 101 P.3d 872 (2004). Based on Andress, this court has already modified its decision on the original appeal in this case, by setting aside the defendant’s murder conviction. As discussed above, the existence of that conviction was the sole basis for the vacation of the manslaughter conviction.

The defendant points out that this court's decision on the original appeal was correct *at the time it was handed down*. That, however, is not the standard. RAP 2.5(c)(2) expressly authorizes courts to decide a second appeal "on the basis of the appellate court's opinion of the law at the time of the later review." Under the law as it exists *today*, this court's decision on the original appeal is clearly erroneous. It upheld a murder conviction under an invalid charging theory. It then overturned a valid manslaughter conviction because it was cumulative with that invalid murder conviction.

To adhere to this holding would be manifestly unjust to the State – it would allow the defendant to escape any punishment for his crime, despite a valid jury verdict that he was guilty of manslaughter. There would be no corresponding injustice to the defendant in punishing him for the manslaughter that he committed. Consequently, this case falls within an exception to the "law of the case" doctrine. This court can and should re-examine its holding on the direct appeal.

C. WHEN THIS COURT DIRECTED THE TRIAL COURT TO CONDUCT “FURTHER LAWFUL PROCEEDINGS,” IT AUTHORIZED THE TRIAL COURT TO DETERMINE THE IMPACT OF VACATING THE MURDER CONVICTION.

The defendant’s principal argument is with regard to the other aspect of the “law of the case” doctrine. He claims that the trial court lacked the authority to “unvacate” a conviction that had been vacated by this court. Again, he ignores a critical fact – *this court gave the trial court permission to do so.*

In responding to the defendant’s personal restraint petition, the State asserted that the manslaughter conviction should be reinstated. 1 CP 36. The court did not rule on this assertion. Instead, it “remand[ed] this matter to the Snohomish County Superior Court for further lawful proceedings consistent with Andress and Hinton.” 1 CP 24. Such “lawful proceedings” properly included a determination of whether vacation of the murder conviction eliminated the double jeopardy problems arising from the manslaughter conviction. The trial court did not “ignore” this court’s determination. Rather, it *followed* this court’s order to conduct “lawful proceedings” with regard to the defendant’s conviction.

Even if this court had not directed such proceedings, the trial court would have had authority to conduct them. Again, the law is not as rigid as the defendant claims.

[A]ppellate leave is not required where a party seeks modification of a decision after issuance of the appellate mandate if the modification sought relates to later events not before the appellate court during the first appeal.

Alpine Industries, Inc. v. Gohl, 101 Wn.2d 252, 256, 676 P.2d 488 (1984). Such action is “subject to review as any other trial court decision.” Id. at 252-53.

Here, the modification does relate to a “later event” – this court’s vacation of the murder conviction. That vacation was not before this court during the first appeal. The trial court had the authority to decide whether that new event justified modification of the judgment entered pursuant to this court’s original mandate.

The defendant’s argument is a classic example of wanting to “have your cake and eat it too.” His manslaughter conviction was set aside *only* because he was also convicted of murder. Later, he sought and obtained vacation of the murder conviction – but he still wants to retain the benefit that resulted from that conviction. The court should not countenance such an absurd and unjust result. The defendant was properly convicted of manslaughter. The

reason for vacating that conviction has disappeared. The trial court properly imposed sentence for that crime.

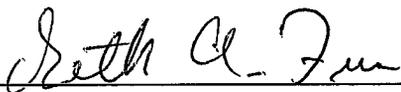
D. THE STATE'S MOTION TO RECALL THE MANDATE IS MOOT.

The State has also filed a motion to recall the mandate in the original appeal. As discussed above, however, this court's authority does not depend on a recall of the mandate. The State's motion is therefore moot and will not be discussed further.

IV. CONCLUSION

The judgment and sentence imposed on remand should be affirmed.

Respectfully submitted on January 13, 2006.



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THE STATE OF WASHINGTON,

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DALE L. SCHWAB,

Appellant.

No. 56206-1-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 13 day of January, 2006, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 13 day of January, 2006.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit