

81626-3

FILED
COURT OF APPEALS
DIVISION II

08 MAY 23 PM 3: 04

Court of Appeals No. 33678-2-II

STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GUY DANIEL TURNER,

Petitioner.

FILED
MAY 29 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON
[Signature]

PETITION FOR REVIEW

PETITION FROM THE COURT OF APPEALS
OF THE STATE OF WASHINGTON-DIVISION II
No. 33678-2-II

DINO G. SEPE, WSBA# 15879
Attorney for Petitioner

DEPARTMENT OF ASSIGNED COUNSEL
949 Market Street, Suite 334
Tacoma, WA 98402-3696
(253) 798-6989

TABLE OF CONTENTS

Page

A. IDENTITY OF PETITIONER

PETITIONER GUY DANIEL TURNER ASKS THIS COURT TO ACCEPT REVIEW OF THE COURT OF APPEALS DECISION TERMINATING REVIEW DESIGNATED IN PART (B) OF THIS PETITION.....1

B. COURT OF APPEALS DECISION TO BE REVIEWED

MR. TURNER SEEKS REVIEW OF THE OPINION FILED BY DIVISION II OF THE COURT OF APPEALS ON APRIL 29, 2008. A COPY OF THIS OPINION IS ATTACHED AS APPENDIX A.....1

C. ISSUES TO BE PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS ERRED BY REFUSING TO VACATE PETITIONERS ASSAULT IN THE SECOND DEGREE CONVICTION AS VIOLATIVE OF DOUBLE JEOPARDY DESPITE THIS COURTS RULING IN STATE V WOMAC, 160 Wn.2d 643, 160 P.3d 40 (2007).....1

2. WHETHER A TRIAL COURT CAN AVOID THIS COURT'S HOLDING IN STATE V WOMAC, 160 Wn.2d 643, 160 P.3d 40 (2007) BY CONDITIONALLY VACATING A CONVICTION AS VIOLATIVE OF DOUBLE JEOPARDY, AND NOT INCLUDING THE CONVICTION IN THE FINAL JUDGEMENT AND SENTENCE, SUBJECT TO IT BEING REINSTATED IF THE REMAINING CONVICTION IS REVERSED ON APPEAL OR SET ASIDE BY COLLATERAL ATTACK..1

D. STATEMENT OF THE CASE.....2

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Division II of the Court of Appeals has once again tried to establish a creative way to avoid vacating a charge that should be vacated as violative of double jeopardy and in the process has published an opinion in direct conflict with this Court’s ruling in Womac.....3

2. This Court has, by previously accepting review in Womac, already determined that the issues here raise a significant question of law under the Washington and United States Constitutions.....7

F. CONCLUSION.....8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

STATE V WOMAC, 160 Wn.2d 643, 160 P.3d 40
(2007).....1,3,4,5,6,7&8

A. IDENTITY OF PETITIONER

Petitioner Guy Daniel Turner asks this Court to accept review of the Court of Appeals decision terminating review designated in part (B) of this Petition.

B. COURT OF APPEALS DECISION TO BE REVIEWED

Mr. Turner seeks review of the opinion filed by Division II of the Court of Appeals on April 29, 2008. A copy of this opinion is attached as Appendix A.

C. ISSUES TO BE PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS ERRED BY REFUSING TO VACATE PETITIONERS ASSAULT IN THE SECOND DEGREE CONVICTION AS VIOLATIVE OF DOUBLE JEOPARDY DESPITE THIS COURTS RULING IN STATE V WOMAC, 160 Wn.2d 643, 160 P.3d 40 (2007).
2. WHETHER A TRIAL COURT CAN AVOID THIS COURT'S HOLDING IN STATE V WOMAC, 160 Wn.2d 643, 160 P.3d 40 (2007) BY CONDITIONALLY VACATING A CONVICTION AS VIOLATIVE OF DOUBLE JEOPARDY, AND NOT INCLUDING THE CONVICTION IN THE FINAL JUDGEMENT AND SENTENCE, SUBJECT TO IT BEING REINSTATED IF THE REMAINING CONVICTION IS REVERSED ON APPEAL OR SET ASIDE BY COLLATERAL ATTACK.

D. STATEMENT OF THE CASE

Petitioner Guy Daniel Turner was convicted after a jury trial of Assault in the Second Degree and Robbery in the First Degree. Mr. Turner moved at sentencing to have the assault conviction merge with the robbery conviction for double jeopardy purposes. Mr. Turner further moved that the assault conviction be permanently and finally vacated. The trial court granted the double jeopardy merger motion but only conditionally vacated the assault conviction. The trial court did not include the assault conviction in the judgment and sentence, but instead signed a separate order which stated that the assault conviction should be vacated for sentencing purposes but remains a valid conviction for which the defendant could be sentenced if the robbery conviction was reversed on appeal or otherwise set aside. CP 16-17 (Attached as Appendix B.). Division II of the Court of Appeals on August 1, 2006 affirmed the defendant's robbery conviction but did not address the assault merger double jeopardy issue. Mr. Turner then appealed to Division II asking that the assault conviction be permanently and finally vacated. A commissioner ruled against him and the court denied his motion to modify the commissioner's ruling.

Mr. Turner then filed a pro se petition of review to this Court in light

of its decision in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). This Court remanded the case to Division II with orders to reconsider the merger/double jeopardy issue in light of the Womac decision.

On April 29, 2008 Division II of the court of Appeals issued a published opinion refusing to vacate Mr. Turner's assault conviction despite this Court's ruling in Womac.

Division II in its opinion in this case interpreted this court's ruling in Womac to mean that a trial court can avoid double jeopardy by not reducing the merged conviction to judgment and not sentencing him on that conviction. Division II's opinion allowed Petitioners assault conviction to remain alive, subject to it being revived if the Petitioner's main conviction were to be set aside by collateral attack. This opinion is in direct conflict with the complete essence of this Court's ruling in Womac and is a creative way to avoid this Court's holding in Womac. Mr. Turner is asking this Court to accept review of this case for the reasons stated in Part E. of this Petition.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Division II of the Court of Appeals has once again tried to establish a creative way to avoid vacating a charge that should be vacated as violative of double jeopardy and in the process has published an opinion in direct conflict with this Court's ruling in Womac.

Petitioner believes that review should be granted under RAP 13.4 (b) for the following reasons:

- (1) The decision of Division II is in conflict with decisions of this Court.
- (2) The issues in this case raise a significant question of law under the Washington and United States constitutions.

This Court's holding in Womac emphasized that the fact of conviction itself and not imposition of sentence constitutes punishment for purposes of double jeopardy. Womac at 657.

In Calle we held double jeopardy may be violated when a defendant receives multiple convictions for a single offense (regardless of whether concurrent sentences are imposed). Calle, 125 Wn.2d at 775; see also In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). [*657] Relying on Ball v United States, 470 U.S. 856, 864-65, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985), this court found the stigma and impeachment value of multiple convictions remains despite passage of the Sentencing Reform Act of 1981, chapter 9.94A RCW, and overruled a line of cases following the "concurrent sentence rule." Calle, 125 Wn.2d at 775. In Gohl the State conceded the convictions for attempted murder and assault were based on the same acts and caused the same harm but argued lack of sentencing for the assaults avoided any double jeopardy violation. Gohl, 109 Wn. App. at 819. The court countered, "[the State's] argument

contradicts the rule that conviction, and not merely imposition of a sentence, constitutes punishment.” Id. at 822.

Both federal and state courts have cited Ball for the proposition that double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently. Calle, 125 Wn.2d at 773. The Supreme Court in Ball emphasized the punitive nature of a conviction, finding:

The separated conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant’s eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant’s credibility and certainly carries the societal stigma accompanying any [***20] criminal conviction.

In the present case, the same problems that existed in Womac do not suddenly disappear with the separate order signed by the trial court. Division II in its opinion concluded that there was no double jeopardy violation because the assault conviction was not reduced to judgment and the conviction did not appear in the judgment and sentence. This is an arbitrary distinction which makes no sense in light of the order signed by the trial court

which acts as an addendum to the judgment and sentence. The trial court did by separate order exactly what the trial court did in Womac in the judgment and sentence, finding a double jeopardy violation and conditionally vacating the lesser charge allowing for reinstatement. The fact that the trial court addressed the lesser conviction in a separate order to the judgment and sentence does nothing to change the fact in this case that a conviction found to have been violative of double jeopardy can be reinstated. A major part of this court's decision in Womac was that:

As Womac's counsel correctly asserts, it is unjust to find a double jeopardy violation and hold these convictions in a safe for a rainy day, in the event that the homicide by abuse gets reversed...then they can sort of rise from the dead like Jesus on the third day and bite my client, and he can be sentenced on convictions that the court already ruled violated double jeopardy.

7VRP at 1072.

To permit such a practice allows the State multiple bites at the apple by labeling one crime by three different names and upholding any and all resulting convictions. And the State, "with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of

anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” Green v United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed.2d 199 (1957).

Womac at 651.

The opinion by Division II in this case directly conflicts with this Court’s opinion in Womac and allows for the same harm that this Court specifically found to be unjust in Womac. Division II has once again, as it did in Womac, attempted to find a creative way to avoid vacating a lesser conviction by concluding that double jeopardy is only implicated when a defendant receives more than one sentence, a point this Court held to be incorrect. Womac at 656.

This Court should accept review to avoid the substantial likelihood that Division II’s error will be repeated, at which time this Court would likely have to decide this issue anyway.

2. This Court has, by previously accepting review in Womac, already determined that the issues here raise a significant question of law under the Washington and United States Constitutions.

The issues raised in the opinion by Division II concern the Double Jeopardy Clauses of both the Washington and United States Constitutions. Division II, by refusing to follow this Court’s opinion in Womac and issuing

an opinion in direct conflict with it does not diminish the constitutional importance of the double jeopardy issue raised by Mr. Turner in this case. Division II has attempted to create an exception to Womac and although the issues in this case are slightly different than Womac because of Division II's opinion, their constitutional significance remains the same as in Womac to which this Court found significant enough to accept review.

F. CONCLUSION

The published opinion by Division II in this case is in direct conflict with this court's opinion in Womac and the double jeopardy issues involved raise significant issues under the Washington and United States Constitutions. It is for these reasons that the Petitioner respectfully requests that this court accept review of this matter.

Respectfully submitted this 23rd day of May, 2007



DINO G. SEPE, WSBA# 15879
Attorney for Petitioner
949 Market Street, Ste 334
Tacoma, WA 98402
(253) 798-6989

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GUY DANIEL TURNER,

Appellant.

No. 33678-2-II

PUBLISHED OPINION

Bridgewater, P.J. — Guy Daniel Turner requests that this court vacate his second degree assault conviction, which the trial court did not reduce to judgment, based on double jeopardy considerations. Our Supreme Court asked us to reconsider this issue in light of its recent decision in *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007). After reviewing *Womac*, we decide not to vacate Turner's second degree assault conviction because it does not violate double jeopardy.

The State charged Turner in the alternative with first degree assault and first degree robbery. A jury convicted Turner of second degree assault and first degree robbery. Turner

moved to have the assault conviction merge with the robbery conviction and the State agreed, citing *State v. Freeman*, 153 Wn.2d 765, 778, 108 P.3d 753 (2005). The *Freeman* court held, “Under the merger rule, assault committed in furtherance of a robbery merges with robbery and without contrary legislative intent or application of an exception, these crimes would merge.” *Freeman*, 153 Wn.2d at 778. Neither party contests that in order to prove first degree robbery, the State had to prove that Turner committed an assault in furtherance of the robbery.

The State asked the trial court to sign an order indicating that (1) a jury found Turner guilty of both the first degree robbery count and the second degree assault count, (2) the second degree assault charge merged into the robbery charge, and (3) the trial court would vacate the assault charge for purposes of sentencing. But it also asked the trial court to indicate that the conviction for assault was valid and could be taken to sentencing if the Court of Appeals found any problems with the robbery conviction. Over Turner’s double jeopardy-based objection, the trial court signed the order.

On appeal, Turner argued, *inter alia*, for us to vacate the assault conviction. Our commissioner entered a ruling affirming judgment, noting that because we upheld the robbery conviction, there was no need to address Turner’s merger argument. After we denied his motion to modify the commissioner’s ruling, Turner petitioned for review, *pro se*, to our Supreme Court, which remanded to us for reconsideration in light of *Womac*.

As a preliminary matter, we note that this issue is moot because the Supreme Court did not overturn Turner’s first degree robbery conviction. Nevertheless, we are bound by the Supreme Court to consider the issue.

Womac makes it clear that in order to avoid double jeopardy, a trial court must vacate a charge that it has reduced to judgment but chooses not to sentence. *Womac*, 160 Wn.2d at 660. That is not the case here because the trial court never reduced Turner's second degree assault conviction to judgment.

The *Womac* court considered *State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005), and *State v. Trujillo*, 112 Wn. App. 390, 410, 49 P.3d 935 (2002), *review denied*, 149 Wn.2d 1002 (2003), two cases that we rely on today as dispositive in Turner's case. *Womac*, 160 Wn.2d at 659-60. In *Ward*, the jury found the defendant guilty of second degree felony murder and, alternatively, first degree manslaughter, which was a lesser-included offense of second degree intentional murder. *Ward*, 125 Wn. App. at 144. The trial court entered a judgment and sentence solely on the second degree felony murder conviction. *Ward*, 125 Wn. App. at 144. The trial court denied the defendant's motion to vacate the first degree manslaughter conviction but it chose not to mention the valid manslaughter conviction in the judgment and sentence. *Ward*, 125 Wn. App. at 142, 144. When the court subsequently vacated his judgment and sentence for second degree felony murder, he argued that the trial court could not charge, try, or sentence him on the first degree manslaughter conviction because the trial court should have vacated that verdict, or that it was vacated by "operation of law." *Ward*, 125 Wn. App. at 144.

Division One of this court determined that convicting and sentencing a defendant for both second degree felony murder and first degree manslaughter would violate double jeopardy and noted that where there is a violation of double jeopardy, the remedy is to vacate one of the convictions and sentences. *Ward*, 125 Wn. App. at 144. But Division One found no double

jeopardy violation because the trial court had entered judgment and sentenced the defendant on only the second degree felony murder conviction. *Ward*, 125 Wn. App. at 144. Because there was no violation of double jeopardy, the trial court was not required to vacate the defendant's manslaughter conviction. *Ward*, 125 Wn. App. at 145.

Similarly, in *Trujillo*, a jury convicted four defendants of first degree assault, and in the alternative, first degree attempted murder. *Trujillo*, 112 Wn. App. at 408-09. We held, "[W]here the jury returns a verdict of guilty on each alternative charge, the court should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense." *Trujillo*, 112 Wn. App. at 411. We then reasoned that because the trial court did not reduce the verdict for first degree assault to judgment, it "does not subject the appellants to any future jeopardy." *Trujillo*, 112 Wn. App. at 411. We also noted that if the trial court had reduced the jury's verdict on assault to judgment, "the trial court should enter an order vacating the assault judgment." *Trujillo*, 112 Wn. App. at 412 n.15.

The *Womac* court noted that the defendant in that case was not charged in the alternative and then based its decision to vacate the conviction on the fact that the trial court reduced the defendant's convictions to judgment. *Womac*, 160 Wn.2d at 660. As such, the *Womac* court determined that the remaining counts violated double jeopardy and, accordingly, ordered the trial court to vacate both. *Womac*, 160 Wn.2d at 660.

Here, the trial court did not reduce Turner's second degree assault conviction to judgment and did not sentence him for the conviction. Nor did the trial court include any information about the second degree assault conviction in Turner's judgment and sentence. Thus, this case is

33678-2-II

distinguishable from *Womac*, and under *Ward* and *Trujillo*, Turner's second degree assault conviction did not subject him to double jeopardy. Accordingly, we do not vacate Turner's conviction for second degree assault.

Bridgewater, P.J.

We concur:

Hunt, J.

Penoyar, J.

APPENDIX B



05-1-00021-1 23463621 ORRE 08-01-05



4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON **JUL 29 2005**
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

GUY DANIEL TURNER,

Defendant

Cause No. 05-1-00021-1

ORDER REGARDING
CONVICTION IN COUNT I

THIS MATTER having come on regularly for sentencing, the defendant having been present in person and represented by counsel, Dino G. Sepe, and the State having been represented by Deputy Prosecuting Attorney S.M. Penner, and the Court being in all thing duly advised, NOW THEREFORE

THE COURT FINDS as follows:

That the defendant was found guilty, by jury, in Count I of the crime of Assault in the Second Degree, and in Count II of the crime of Robbery in the First Degree;

That the conviction for Assault in the Second Degree in Count I merges into the conviction for Robbery in the First Degree in Count II, and should be vacated for the purposes of sentencing; and

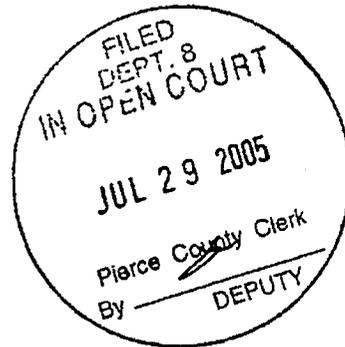
Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

ORDER RE: CONVICTION
PROPERTY

1
2
3 That the conviction for Assault in the Second Degree was nevertheless a valid conviction,
4 and the defendant could be sentenced on it, if, on appeal, the conviction for Robbery in the First
5 Degree is vacated or otherwise set aside.

6 SO ORDERED this 29th day of JULY, 2005.

7
8 
HON. BRIAN TOLLEFSON
JUDGE

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


Presented by:


S.M. PENNER, WSB#25470
Deputy Prosecuting Attorney

Approved as to Form:

Signed in the presence of Mr. Sepe and Mr. Turner in open court

DINO G. SEPE, WSB#15879
Attorney for Defendant

21
22
23
24
25
26
27
28
[Faint, illegible text]