

86416-1

FILED
COURT OF APPEALS
DIVISION II

NO. 40853-8

11 JAN 28 PM 1:20

STATE OF WASHINGTON

BY C DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

COREY IRISH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann vanDoorninck

No. 07-1-02193-2

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Did the trial court error when it followed the mandate of the Court of Appeals and the same criminal conduct issue had been settled by this Court?..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT. 4

 1. THE TRIAL COURT FOLLOWED THIS COURT'S REMAND ORDER AND DID NOT READDRESS AN ISSUE ALREADY SETTLED BY THIS COURT..... 4

D. CONCLUSION..... 7

Table of Authorities

State Cases

<i>State v. Hightower</i> , 36 Wn. App. 536, 541, 676 P.2d 1016 (1984)	5
<i>State v. Romero</i> , 95 Wn. App. 323, 326, 975 P.2d 564, <i>review denied</i> , 138 Wn.2d 1020, 989 P.2d 1139 (1999).....	5

Constitutional Provisions

Const. art. 1, section 22 (amend. 10)	5
---	---

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court error when it followed the mandate of the Court of Appeals and the same criminal conduct issue had been settled by this Court?

B. STATEMENT OF THE CASE.

The State charged defendant, Corey Irish, on April 24, 2007, with one count of robbery in the first degree, three counts of assault in the second degree, one count of unlawful possession of a controlled substance with intent to deliver, one count of unlawful possession of a firearm in the first degree and one count of possession of a stolen firearm. CP 1-4. The robbery, assault and controlled substance charges all were charged with a firearm enhancement. CP 1-4. The State amended the charges on March 10, 2008, to dismiss the possession of a stolen firearm charge and reduce the possession charge to attempted unlawful possession of a controlled substance with intent to deliver. CP 5-8.

After being found guilty at trial, defendant was sentenced on April 4, 2008. CP 9-21. The parties agreed that the assault in count three

(against victim Garibay) merged with the robbery in count one. ¹CP 22-46. Defendant's offender score was determined to be a 9+ on the robbery and two assault counts. CP 9-21. His offender score was determined to be an 8 on the unlawful possession of a controlled substance charge and the unlawful possession of a firearm. CP 9-21. Defendant was sentenced to the high end of 171 months, with all the counts to run concurrent, plus 150 months of flat time for the firearm enhancements, for a total of 321 months. CP 9-21.

Defendant filed a direct appeal. CP 22-46. Defendant argued that 1) the trial court erred in failing to vacate his conviction for unlawful possession of a controlled substance when he obtained the controlled substance during the first degree robbery, 2) that there was insufficient evidence to find him guilty of two counts of assault in the second degree, and 3) that his sentence for unlawful possession of a firearm exceeded the standard range. CP 22-46. Defendant also filed a Statement of Additional Grounds in which he argued that 1) the assault and unlawful possession of a controlled substance convictions merged with robbery and also violated double jeopardy, 2) that his due process rights were violated, 3) that the

¹ As the substantive facts of this case are not relevant to the issue on appeal, the State had omitted them. They are, however, laid out in this Court's previous opinion which is at CP 22-46.

firearm enhancement violated equal protection, and 4) that his prior convictions were the same criminal conduct and should be counted as one conviction in his offender score. CP 22-46. This Court affirmed the majority of defendant's convictions, vacated the unlawful possession of a controlled substance conviction and remanded for resentencing based on the vacated conviction and the fact that the court erred in the length of sentence for the unlawful possession of a firearm charge. CP 22-46.

On June 6, 2010, the trial court held a sentencing hearing. The State and defense counsel agreed that the same criminal conduct argument had already been decided by this Court. RP 2. Defendant did not raise any kind of claim of double jeopardy. Instead, defendant, pro se, indicated that he did not believe there was proof that he committed his prior offenses. RP 5. The court sentenced defendant to the high end of the standard range on all counts with the counts to run concurrent for a total of 171 months. RP 5, CP 47-60. With enhancements, defendant's sentence totaled 303 months. CP 47-60.

Defendant filed a timely notice of appeal. RP 5-6, CP 61-75.

Defendant also filed a personal restraint petition. *See* 40665-9-II. Defendant argued that his convictions for first degree robbery and assault violated double jeopardy and that the firearm statute violated equal protection. *Id.* This Court dismissed defendant's petition as frivolous. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT FOLLOWED THIS COURT'S REMAND ORDER AND DID NOT READDRESS AN ISSUE ALREADY SETTLED BY THIS COURT.

The trial court did not error when it held a sentencing hearing as directed by this Court. The trial court re-sentenced defendant per the instructions of this Court. The vacated charge of unlawful possession of a controlled substance was removed from defendant's judgment and sentence and defendant was re-sentenced in accordance with this Court's directive. RP 2-5, CP 47-60. The parties reviewed this Court's decision and agreed that this Court had already addressed the same criminal conduct issue. RP 2. The trial court adhered to the ruling from this Court.

On appeal, defendant now claims that the trial court should have addressed whether his prior convictions constituted double jeopardy. There are several problems with defendant's argument on appeal. First, a claim of double jeopardy as to the prior convictions was never raised in the trial court. It is difficult to see how the trial court can error in failing to hear a motion that was never raised. There is nothing that indicates that this argument would even properly be before the trial court. The trial court did not error.

Second, defendant was represented by an attorney, so any motion he made pro se was not properly before the trial court. “In criminal prosecutions the accused shall have the right to appear and defend in person, *or* by counsel, . . .” Const. art. 1, section 22 (amend. 10) [emphasis added]. “[T]here is no constitutional right, either state or federal, to ‘hybrid representation,’ through which an accused may serve as co-counsel with his or her attorney.” *State v. Romero*, 95 Wn. App. 323, 326, 975 P.2d 564, *review denied*, 138 Wn.2d 1020, 989 P.2d 1139 (1999). In state courts as well as federal courts, the great weight of judicial authority is that there is no right to be represented by counsel and to simultaneously actively conduct one’s own defense. *State v. Hightower*, 36 Wn. App. 536, 541, 676 P.2d 1016 (1984) (citations omitted). That is particularly true in the State of Washington where the rights are granted in the disjunctive. *Id.* “The right to self-representation in a criminal matter . . . is an all-or-nothing process.” *Romero*, 95 Wn. App. at 326. Even if defendant has raised a double jeopardy claim, it was not properly before the trial court since it was not adopted by his counsel. Defendant does not have a right to hybrid representation and any pro se motion was not properly before the trial court.

Third, while defendant cannot bring a pro se motion, the information he relayed to the trial court does not support his argument on appeal that he raised a double jeopardy claim. Defendant told the court

that he didn't think there was evidence of assault on his priors. RP 5. Defendant claimed there was no factual basis that he assaulted people. RP 5. Defendant's statement is not clear as to what case he is addressing. Defendant references this Court's decision on his direct appeal and says that this Court, "brought it up but I didn't get to state any case law saying what I was saying." RP 5. If defendant was referring to the sufficiency of the evidence related to the assault charges in this case, then that clearly was addressed by this Court is his previous appeal. CP 22-46. And as defendant filed both a Statement of Additional Grounds and a PRP, it's difficult to understand how he was not allowed to present case law since he had two opportunities to do so. However, if defendant is contesting the factual basis for his previous assaults that were committed in 1998 on a separate cause number, that was neither before the trial court nor is it before this Court now. A challenge to the sufficiency of his prior offenses would have had to have been made under that cause number, not the current case. Even if counsel had adopted defendant's argument, there is nothing to preserve as this Court already addressed the sufficiency of the assault charges under this cause number, and sufficiency of the evidence of another case had to be raised under that cause number.

There is no evidence that the trial court did not follow this Court's ruling. Defendant asks this Court to remand back to the trial court to address a motion that was never raised. This is improper and defendant has cited no case law that allows this. As the trial court followed this

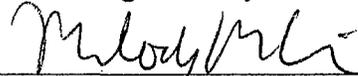
Court's mandate and sentenced defendant appropriately, this Court should affirm defendant's judgment and sentence.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm defendant's judgment and sentence below.

DATED: January 27, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-27-11 Theresa Ka
Date Signature

FILED
COURT OF APPEALS
DIVISION II
11 JAN 28 PM 1:20
STATE OF WASHINGTON
BY _____
DEPUTY