

86416-1

NO. 40853-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

COREY IRISH,

Appellant.

STATE OF WASHINGTON
BY  DEPUTY

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FILED
COURT OF APPEALS
DIVISION II

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

The Honorable Kitty-Ann van Doorninck, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court misinterpreted this Court's decision on appellant's prior appeal.

Issue pertaining to assignment of error

At resentencing after remand, the lower court declined to address appellant's argument that his prior convictions arose out of a single course of conduct, mistakenly believing that this Court had already addressed the issue. Where this Court held that the prior convictions did not encompass the same criminal conduct but did not address the double jeopardy implications of multiple punishments arising out of a single course of conduct, must the case be remanded so that appellant can pursue that challenge?

B. STATEMENT OF THE CASE

In April 2008, appellant Corey Irish was sentenced in Pierce County Superior Court on one count of first degree robbery, two counts of second degree assault, unlawful possession of a controlled substance, and unlawful possession of a firearm. CP 12-21. His prior convictions included two counts of first degree robbery and two counts of second degree assault, all committed on the same day. CP 13. On appeal this Court vacated the conviction for unlawful possession of a controlled substance and remanded for resentencing. CP 25. In response to Irish's

challenge to his offender score, this Court also held that Irish's prior convictions did not encompass the same criminal conduct because the offenses involved four separate victims. CP 45.

On remand for resentencing before the Honorable Kitty-Ann van Doorninck, the prosecutor noted that Irish was raising an issue about whether his prior convictions consisted of the same course of conduct. RP 2. The prosecutor argued that that issue had been addressed by the Court of Appeals and was therefore moot. RP 2. The sentencing court agreed with the prosecutor and declined to consider the issue further. RP 2.

Irish told the court he felt there was no factual basis for his prior assaults. He wanted to reserve the issue regarding his prior convictions because the Court of Appeals had not yet addressed it. RP 5.

The court imposed high-end standard range sentences plus consecutive sentence enhancements, for a total of 303 months confinement. CP 53. Irish filed this timely appeal. CP 61.

C. ARGUMENT

THE SENTENCING COURT MISINTERPRETED THIS COURT'S DECISION ON IRISH'S FIRST APPEAL, AND REMAND IS REQUIRED.

The court below declined to address Irish's argument that his prior convictions arose out of a single course of conduct, stating that this Court had already addressed the issue in Irish's first appeal. RP 2. The court

was mistaken. The only question this Court addressed regarding Irish's prior convictions was whether they encompassed the same criminal conduct. CP 45.

Crimes encompass the same criminal conduct if they involved the same criminal intent and were committed against the same victim at the same time and place. RCW 9.94A.589(1)(a). Multiple prior convictions are generally counted separately in computing the offender score, except that prior convictions which encompass the same criminal conduct may be scored as a single conviction. RCW 9.94A.525(5)(a)(i). Thus, although the multiple convictions remain valid, they count as a single offense when calculating the offender score.

Multiple convictions resulting from a single course of conduct, however, can violate double jeopardy. Under the double jeopardy provisions of the United States and Washington constitutions, a defendant may not be convicted more than once under the same criminal statute if only one unit of the crime has been committed. U.S. Const. amend. V; Wash. Const. art. I, § 9; State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (citing State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)); State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). When the defendant's actions are part of a single, continuing course of conduct

which represents a single unit of prosecution, multiple convictions violate double jeopardy. See State v. Hall, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010); State v. Johnson, 48 Wn. App. 531, 535-36, 740 P.2d 337 (two convictions arising out of robbery of video store violated double jeopardy, even though two video store clerks were involved), review denied, 109 Wn.2d 1011 (1987).

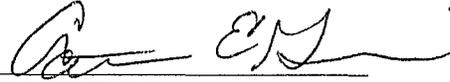
Here, Irish had two prior convictions for first degree robbery and two prior convictions for second degree assault, all committed on the same day. CP 13. While this Court previously addressed whether these convictions encompassed the same criminal conduct under RCW 9.94A.589(1)(a), it did not address whether his multiple convictions for the same offense arose out of the same course of conduct and thus violated double jeopardy. The sentencing court mistakenly concluded that this Court had already resolved the same course of conduct issue, and its refusal to address the issue on remand was therefore an abuse of discretion. This Court should remand for resentencing, at which Irish should be permitted to pursue the challenge the court declined to hear.

D. CONCLUSION

The sentencing court misinterpreted this Court's decision on Irish's first appeal, and remand is required.

DATED this 19th day of November, 2010.

Respectfully submitted,

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

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

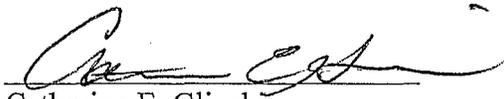
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Corey Irish*, Cause No. 40853-8-II, directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
November 19, 2010

11:58
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STATE OF WASHINGTON
BY _____
DEPUTY

