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NO. 88073-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Personal Restraint Petition Of:

FONOTAGA TILI,

Petitioner

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

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ISSUE STATEMENTS

1. Whether double jeopardy prohibitions require that Tili's assault conviction and sentence be vacated.

2. Whether double jeopardy also prohibits consideration of the vacated conviction when calculating Tili's offender score for burglary.

B. SUPPLEMENTAL STATEMENT OF THE CASE

Tili was convicted of three counts of Rape in the First Degree, one count of Burglary in the First Degree, and one count of Assault in the Second Degree for his 1997 offenses against L.M. The sentencing court ran the three sentences for rape consecutively to one another and concurrently with the sentences for burglary and assault, resulting in a total sentence of 417 months. State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999).

Tili appealed several aspects of his judgment and sentence. This Court rejected his argument that, because he committed all three acts of rape in quick and uninterrupted succession, he had committed only one crime of rape and, therefore, the two additional rape convictions violated double jeopardy. Tili, 139 Wn.2d at 112-119. But this Court agreed all three rape convictions met the criteria for "same criminal conduct," requiring they be treated as a

single offense when calculating Tili's offender scores and that his sentences for these crimes run concurrently. Id. at 119-125.

This Court also accepted Tili's argument, and the State's concession, that Tili's assault and rape convictions violated double jeopardy under Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and Washington's similar "same evidence" test. Id. at 125-126. This Court ruled as follows:

While the State *concedes* that the language used in the charging document causes Tili's second-degree assault conviction to merge with his first-degree rape conviction, the State argues that "when sentencing on the burglary, both the assault and the rape may be separately punished because of the burglary anti-merger statute." Br. Of Resp't at 45-46. To support this proposition, the State relies on State v. Collicott, 118 Wash.2d 649, 657-658, 827 P.2d 263 (1992).

In Collicott, the defendant burglarized a counseling center where the victim was staying. During the course of the burglary, Collicott raped his victim. After completing these two acts; Collicott kidnapped his victim. Collicott, 118 Wash.2d at 650-51 n.4, 827 P.2d 263. Relying on the burglary anti-merger statute, RCW 9A.52.050 this Court concluded that it was proper to charge and punish the defendant with "burglary in the first degree (count 1), rape in the first degree (count 2) and kidnapping in the first degree (count 3)." Collicott, 118 Wash.2d at 658, 827 P.2d 263. While we agree with the State's position that under Collicott and RCW 9A.52.050, there is no merger of the assault and burglary convictions, the assault may be used in calculating

the offender score for the burglary conviction only, and not for the rape charges.

Tili, 139 Wn.2d at 125-126 (footnotes omitted).

On remand, the sentencing court treated all three rapes as one offense and merged the assault with the rapes (but not the burglary), resulting in the following offender scores and standard ranges:

Count	Offense	Level	Offender Score	Standard range (mos.)
Count I	Rape 1	XII	2 (Burglary 1)	111-147
Count II	Rape 1	XII	2 (Burglary 1)	111-147
Count III	Rape 1	XII	2 (Burglary 1)	111-147
Count IV	Burglary 1	VII	4 (Rape 1/Assault 2)	36-48
Count V	Assault 2	IV	2 (Burglary 1)	12+ -14

State v. Tili, 148 Wn.2d 350, 358-359, 60 P.3d 1192 (2003).

Because all sentences were to run concurrently, Tili faced a maximum standard range sentence of 147 months' incarceration. Tili, 148 Wn.2d at 359. The sentencing court avoided that result, however, by imposing an exceptional sentence of 417 months (precisely what the court imposed at the original sentencing) for the rapes. Id. at 357. The court also imposed concurrent sentences of

48 months for the burglary and 14 months for the assault. See Judgment (attached to State's Response to Personal Restraint Petition).

Tili appealed again, arguing (1) the sentencing court had miscalculated his offender scores (based on incorrect numbers in the judgment and sentence and an incorrect oral statement by the court); (2) the sentencing court was collaterally estopped from imposing an exceptional sentence because it had declined to impose an exceptional sentence at the original sentencing; and (3) the aggravating circumstances were not supported by the evidence and/or the law. On January 9, 2003, this Court rejected Tili's claims and affirmed his sentences. Tili, 148 Wn.2d at 357-377.

In March 2012, Tili filed a Personal Restraint Petition in the Court of Appeals, arguing that because his rape and assault convictions were a single offense for double jeopardy purposes, his assault had to be vacated and could not appear on his judgment. Moreover, because his judgment was invalid on its face, and his petition alleged a double jeopardy violation, his claim was exempt from the one-year deadline for PRPs under RCW 10.73.090(1) and 10.73.100(3). See PRP (cause no. 43148-3).

On October 10, 2012, Division Two dismissed the petition as untimely. See Order Dismissing Petition. The court held that Tili's argument had already been considered and rejected in his direct appeal when the Supreme Court decided his assault could be used to calculate the offender score for his burglary conviction under RCW 9A.52.050, the burglary anti-merger statute. The court found an absence of good cause to revisit the issue. Order, at 2 (citing Tili, 139 Wn.2d at 126).

Tili filed a Motion for Discretionary Review. See Motion (cause no. 88073-5). In denying review, Commissioner Goff agreed the issue had already been decided against Tili:

Ordinarily, vacation of the conviction that offends double jeopardy is indeed the proper remedy. See In re Pers. Restraint of Francis, 170 Wn.2d 517, 525, 242 P.3d 866 (2010). But this issue was effectively decided against Mr. Tili in his first appeal. There, this court agreed that for double jeopardy purposes the assault could not be punished separately from the rapes, but it held that under the burglary antimerger statute it *could* be separately punished in relation to the burglary. Thus, the court held that the assault could not be counted in the offender scores of the rapes and the rapes could not be counted in the offender score of the assault, but that the assault could be counted in the offender score of the burglary and the burglary could be counted in the offender score of the assault. Tili, 139 Wn.2d at 128. Necessarily, therefore, the court allowed the assault conviction to stand. It avoided double punishment by disallowing the assault and the rapes to count against

each other for sentencing purposes.

Ruling Denying Review, at 2-3.

Tili filed a Motion to Modify the Commissioner's ruling, arguing the focus in his direct appeal had been *whether* the assault merged with the rapes, whereas his PRP focused on the proper *remedy* once it was determined the rapes and assault merge. See Motion to Modify, at 3. Tili argued that, by including the assault conviction on his judgment and by using both that conviction and the rape convictions to increase his offender score on the burglary, he was twice punished for the same offense. Id., at 5-6. This Court granted review.

C. ARGUMENT

USE OF TILI'S ASSAULT CONVICTION VIOLATES  
DOUBLE JEOPARDY.

The double jeopardy clauses of the State and Federal Constitutions prevent the imposition of multiple punishments for the same offense. U.S. Const. amend. 5; Wash. Const. art. 1, § 9; State v. Calle, 125 Wn.2d 769, 772, 776, 888 P.2d 155 (1995). The protection is constitutional, but because the Legislature is free to define crimes and fix punishments as it will, "the role of the constitutional guarantee is limited to assuring that the court does not

exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

In 1999, this Court held that Tili's assault and rape convictions violate double jeopardy under Blockburger and Washington's "same evidence" test and, therefore, must merge. Tili, 139 Wn.2d at 125-126. Merged crimes are not separately punishable. State v. Vladovic, 99 Wn.2d 413, 419, 662 P.2d 853 (1983). Thus, merger typically requires that the conviction for the lesser crime (Tili's assault) be vacated, meaning it is excluded from the judgment and has no impact whatsoever on the sentences for the remaining convictions. See, e.g., Francis, 170 Wn.2d at 525; State v. Womac, 160 Wn.2d 643, 656-660, 160 P.3d 40 (2007); State v. Weber, 159 Wn.2d 252, 269, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007); see also State v. Turner, 169 Wn.2d 448, 464-466, 238 P.3d 461 (2010) (double jeopardy violated even "by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid").

This Court deviated from the usual rule in Tili's direct appeal when it held that the assault could still be used to score the

burglary. Tili, 139 Wn.2d at 125-126. A review of the briefs from that appeal reveals the issue received little attention from the parties. It was not addressed at all in Tili's opening brief. See Brief of Appellant (cause no. 66695-4).<sup>1</sup> After conceding the assault and rapes merged, the State merely cited to the burglary antimerger statute and Collicott in arguing the assault could still be used to score the burglary. Brief of Respondent (no. 66695-4), at 46, 50. Defense counsel did not address the issue in Tili's reply brief, either. See Reply Brief of Appellant (no. 66695-4).

This Court's analysis of the issue was similarly thin, relying solely on the State's cited authorities, Collicott and RCW 9A.52.050, in permitting the sentencing court to use the assault when calculating Tili's offender score for burglary. Tili, 139 Wn.2d at 125-126. A more thorough examination of Collicott and the statute, however, reveals they do not support the decision in Tili's case.

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<sup>1</sup> This Court can take judicial notice of its own files and court records in the same or a related case. K. Tegland, 5 Wash. Practice, Evidence, § 201.9, at 172 (5th ed. 2007); Swak v. Department of Labor & Indus., 40 Wn.2d 51, 53-54, 240 P.2d 560 (1952); State v. Perkins, 32 Wn.2d 810, 872, 204 P.2d 207, cert. denied, 338 U.S. 862, 70 S. Ct. 97, 94 L. Ed. 529 (1949); State v. Duran-Davila, 77 Wn. App. 701, 705, 892 P.2d 1125 (1995).

In Collicott, the defendant broke into a counseling center to steal electronic equipment. The victim discovered him and attempted to call police. Collicott bound and raped the victim. He then drove the victim, in her own car, to another location, where he took the car keys with him and left her behind. Using a hidden spare key, the victim was able to drive away and contact police. State v. Collicott, 112 Wn.2d 399, 400-402, 771 P.2d 1137 (1989) (Collicott I).<sup>2</sup>

Collicott pleaded guilty to Burglary in the First Degree, Rape in the First Degree, and Kidnapping in the First Degree. Collicott I, 112 Wn.2d at 402. The sentencing court determined that all three offenses involved the same criminal conduct for purposes of Collicott's offender scores and imposed a high-end standard range sentence of 154 months. Id. at 402-403. The Court of Appeals concluded that none of the offenses involved the same criminal conduct and reversed. State v. Collicott, 50 Wn. App. 1046 (1988).<sup>3</sup>

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<sup>2</sup> Collicott's case was twice before this Court on appeal. The first opinion was filed in 1989 and the second in 1992. Hereafter, they are referred to as Collicott I and Collicott II, respectively.

<sup>3</sup> Tili cites to the Court of Appeals unpublished opinion for historical context and not as legal authority. See GR 14.1 (prohibiting citation to unpublished opinions as authority).

In Collicott I, this Court reversed the Court of Appeals. Adopting a new “shared elements” approach to same criminal conduct, the Court concluded that Collicott’s three crimes involved the same criminal conduct. Collicott I, 112 Wn.2d at 404-410. This Court also distinguished a same criminal conduct finding from the merger doctrine, concluding that none of Collicott’s offenses merged. Id. at 410-411. Although this Court upheld the trial court’s treatment of Collicott’s offenses as the same criminal conduct, it remanded the matter because the trial court had, nonetheless, “incorrectly counted each offense to apply to the remaining two in calculating the offender score.” Id. at 412.

On remand, the trial court recalculated Collicott’s offender scores. With the scores now reduced, Collicott faced a new maximum standard range sentence of 120 months. Seeking to avoid that result, the trial court imposed 154 months again, this time as an exceptional sentence. State v. Collicott, 118 Wn.2d 649, 652-654, 827 P.2d 263 (1992) (Collicott II). Collicott appealed again and his case was certified to this Court. Id. at 650.

In Collicott II, this Court withdrew its decision in Collicott I and, with it, the short-lived “shared elements” test for same criminal conduct. Collicott II, 118 Wn.2d at 650, 668. Based primarily on

collateral estoppel and the narrow scope of the mandate in Collicott I (merely ordering recalculation of the offender scores), this Court rejected the trial court's attempt to impose an exceptional sentence on remand. Id. at 658-667. But this Court also reversed its finding in Collicott I that Collicott's offenses met the test for same criminal conduct, thereby increasing Collicott's offender scores and permitting the sentencing court to once again impose the 154-month sentence it clearly wished to impose. Id. at 667-669.

The issues in Collicott II were collateral estoppel, a trial court's sentencing authority to impose an exceptional sentence on remand, and whether Collicott's three offenses involved the same criminal conduct. Collicott II, 118 Wn.2d at 652, 655. In its discussion of Collicott's sentence, however, this Court also briefly examined whether RCW 9A.52.050, the burglary antimerger statute, imposed any limitation on the sentencing judge's discretion. After noting that, in State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979), it had held that kidnapping and assault convictions merged with Johnson's rape conviction, this Court distinguished Collicott's situation:

But in this case, we must additionally consider the burglary antimerger statute, RCW 9A.52.050, which provides "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may

be prosecuted for each crime separately.” In this case Mr. Collicott was charged with burglary in the first degree (count 1), rape in the first degree (count 2) and kidnapping in the first degree (count 3). This is proper under RCW 9A.52.050. Under that statute it is proper also for Mr. Collicott to be punished for each of the three offenses for which he has been charged. There is no conflict between the burglary antimerger statute and the SRA.

Id. at 657-658.

This is the discussion in Collicott II cited by this Court in Tili’s direct appeal for the proposition his assault could be used to calculate his offender score for burglary. The problem, of course, is that, unlike Tili’s case, Collicott did not involve a situation where two non-burglary offenses merged. Not even the defense argued that Collicott’s non-burglary offenses merged. In fact, in Collicott I, this Court affirmatively found that none of Collicott’s offenses merged with each other. Collicott I, 112 Wn.2d at 411. Thus, the issue of how to treat merged offenses vis-à-vis burglary was never argued, considered, or decided.

To the extent Collicott can nonetheless be interpreted to hold that, where a defendant’s offenses include burglary, RCW 9A.52.050 authorizes punishment for all convictions regardless whether they otherwise violate double jeopardy, it should be overruled. Such a rule is both incorrect and harmful because it would result in greater

punishment than the Legislature intended. See State v. Kier, 164 Wn.2d 798, 804-805, 194 P.3d 212 (2008) (under doctrine of stare decisis, prior precedent set aside if incorrect and harmful).

The State properly conceded, and this Court properly held, Tili could not be convicted of both Rape in the First Degree and Assault in the Second Degree under Blockburger and the same evidence tests. Typically, this would require that the assault conviction be vacated, meaning it would not appear on the judgment and have no impact whatsoever on Tili's sentences.

The Blockburger and same evidence tests are not dispositive where there is a clear indication of contrary legislative intent. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005); Calle, 125 Wn.2d at 778. Therefore, the question is whether, by enacting RCW 9A.52.050, the Legislature clearly intended to change the result of these tests. And the answer is no.

Questions of statutory interpretation are reviewed de novo. State v. Morales, 173 Wn.2d 560, 567 n.3, 269 P.3d 263 (2012). RCW 9A.52.050 simply states that “[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for burglary, and may be prosecuted for each crime separately.” The statute does not define “other

crime” or “each crime,” but there is nothing to indicate the Legislature meant to render irrelevant determinations that two other non-burglary crimes are really a single crime for double jeopardy purposes.

Such an interpretation would be both unique and absurd.

It would be unique because, under the burglary antimerger statute, the relationship between other, non-burglary crimes, is not simply disregarded. For example, when non-burglary crimes are found to be the same criminal conduct as to each other, they are treated as a single offense when calculating the defendant’s score for burglary. This is what occurred in Tili’s case. Because Tili’s three rape convictions were the same criminal conduct, they were treated as a single offense and added 2 points total (instead of 2 points each) to his burglary score. Tili, 148 Wn.2d at 359.

The same is true for double jeopardy purposes. Tili’s convictions for rape and assault are one crime. That relationship is not disregarded under RCW 9A.52.050. The assault conviction is vacated, it should not appear on the judgment, and it adds no points to Tili’s burglary score. Currently, however, the judgment still lists the assault conviction, imposes a separate sentence for that

conviction, and also adds two points to the burglary score based on that conviction. As Tili astutely observes:

The effect of Petitioners current J & S structural posture is such that the trial Court is counting the Rapes as 2 points in calculating the offender score for the Burglary and then subsequently also counting an element of the Rapes (the merged Assault 2) as an additional 2 points. Petitioner is suffering punishment twice for the same offense because the trial Court is counting the Rapes twice in calculating the offender score for Burglary. . . .

Motion to Modify Commissioner's Ruling, at 5.

The burglary antimerger statute ensures sentencing courts have the discretion to punish burglary and any other offense even where burglary and another offense involve the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). The statute also provides discretion to punish burglary and any other offense even where burglary and another offense would otherwise merge under double jeopardy analysis. State v. Sweet, 138 Wn.2d 466, 476-479, 980 P.2d 1223 (1999). Thus, while apparent the Legislature intends to punish separately both burglary and any additional crime committed during the course of that burglary, there is no indication the Legislature intended to suspend traditional double jeopardy rules when determining *how many* additional crimes have been committed beyond the burglary.

Permitting a sentencing court to ignore the usual double jeopardy rules in determining how many offenses can be counted against a burglary would lead to absurd results. The State could charge and obtain convictions for multiple offenses clearly intended by the Legislature to be a single offense. Yet, so long as there is also a burglary conviction, every conviction would be listed on the judgment and counted toward the offender score for burglary. Even where, for example, the prosecution obtained 10 convictions for assault based on precisely the same act, all 10 would have to be listed on the judgment under RCW 9A.52.050 simply because the defendant also was convicted of burglary.

There is no indication the Legislature intended this. Statutes are interpreted to avoid absurd consequences. State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). Moreover, such an interpretation would “frustrate[ ] one of the SRA’s major purposes – proportionality.” Lessley, 118 Wn.2d at 781 (citing RCW 9.94A.010(1)). Whenever a defendant was convicted of burglary, his criminal history would turn on how many additional criminal charges the prosecutor chose to file despite the fact conviction for those crimes would otherwise violate double jeopardy.

To the extent the Legislature's intent is ambiguous, the rule of lenity applies and requires that RCW 9A.52.050 be interpreted in the light most favorable to the defendant. See Whalen v. U.S., 445 U.S. 684, 694-695, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980). The rule of lenity also requires that the assault conviction merge into the rapes, that it be vacated, and that it have no impact whatsoever on Tili.

One final issue. In response to Tili's PRP, the State argued he could not raise the double jeopardy violation because his claim had already been decided in his direct appeal and revisiting the issue would not serve the ends of justice. State's Response to PRP, at 3-6. That this Court has now agreed to consider Tili's PRP seems to indicate rejection of the State's position.

Tili's PRP is properly before this Court. Review is appropriate where an earlier decision is clearly erroneous, such that the defendant was prejudiced and the ends of justice would be served by reconsidering the matter. Notably, an erroneous prior decision resulting in a double jeopardy violation satisfies this standard. In re Percer, 150 Wn.2d 41, 48, 75 P.3d 488 (2003).

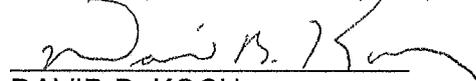
D. CONCLUSION

In light of Tili's rape convictions, the Legislature did not intend an additional conviction for assault. Listing that conviction on the judgment, sentencing Tili for that conviction, and using the conviction to increase Tili's offender score for burglary violates double jeopardy. The judgment should be amended and Tili resentenced.

DATED this 15<sup>th</sup> day of November, 2013.

Respectfully submitted,

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Attached for filing today is a supplemental brief of petitioner for the case referenced below.

In re Personal Restraint Petition of: Fonotaga Tili

No. 88073-5

Supplemental Brief of Petitioner

Filed By:  
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