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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHAD CURTIS CHENOWETH,

Petitioner.

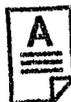
ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Dave Needy

SUPPLEMENTAL BRIEF OF PETITIONER CHAD CHENOWETH

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A. ISSUE BEFORE THE COURT

Offenses that involve the same victim, occur at the same time, and share the same intent are the same criminal conduct for sentencing purposes. The trial court here found the incest and child rape convictions involved the same victim, occurred at the same time and place, and shared the same intent, but refused to find them to be the same criminal conduct, finding that to do so would contravene the intent of the Legislature to punish incest and child rape separately. Did the trial court erroneously conflate the double jeopardy analysis with the same criminal conduct analysis, where the former involves the imposition of the conviction while the latter involves the calculation of the sentence?

B. STATEMENT OF THE CASE

Chad Chenoweth was convicted of six counts of third degree child rape and six counts of first degree incest, each incest count corresponding to one of the child rape counts. The prosecutor made this distinction clear in closing argument:

The way that those are structured, you will notice the rape of a child are all odd numbers, and the incest are all even numbers, so it goes rape of a child, incest; rape of a child, incest. The reason why that is, is it's designed to be one count of rape of a child and incest for one particular -- you know, each specific act. So there's six

acts, so Count 1, rape of a child, Count 2, incest, that's one act; Count 3 and Count 4, one act.

...
Now, the other thing that I want to explain to you is jury instruction No. 21. Juror instruction 21 says, in alleging that the defendant committed rape of a child and incest, the state relies upon evidence regarding a single act constituting each count of the alleged crime. So a single act, one specific incident constituting each count. So what I mean by that, again, is we've got a specific -- six specific separate and distinct incidences. We are electing to basically assign each one of those incidences to a charge, to a count, okay? And to convict the defendant on any count, you must unanimously agree that this specific act was proved. And what that means, so again, six separate incidences, two charges per incident, you have to be satisfied, all eleven [sic] of you must be unanimous as to each specific act.

4/26/2013RP 15-17.

At sentencing, Mr. Chenoweth moved the court to find the incest counts were the same criminal conduct as the corresponding rape of a child counts. 10/11/2013RP 146-47. Conflating the analysis for same criminal conduct with the analysis for double jeopardy, the court refused to find the counts to be the same criminal conduct. CP 181-85; 10/11//2013RP 149-50. The court agreed that the incest counts and rape of a child counts were the exact same act; the same victim, the same time and place, the same intent. 10/11/2013RP 150. But, the court ruled the two offenses were intended to be punished separately, relying on

the decision in *State v. Bobenhouse*, 166 Wn.2d 881, 896-97, 214 P.3d 907 (2009):

So under an analysis, they are a single act, each of the two counts that are coupled together in this case are a single act with the same intent, same victim, same time, but it is clear from *Bobenhouse* that they are to be punished separately. And that's the authority that the State -- excuse me, that the Court will follow, given the state Supreme Court's previous guidance.

I can't reconcile the language in *Calle* with that, but I don't believe I have to because I have nothing that specifically overrules *Bobenhouse*, in my opinion, before me.

So I will find that although they in fact consist of the same act, that they are, by a very distinct and a separate rule of law, to be punished separately. So each one will be, and as indicated by everyone, it makes no practical difference to the standard range or the potential punishment that Mr. Chenoweth is facing.

11/20/2013RP 149-50.

C. ARGUMENT

**THE INCEST AND CHILD RAPE COUNTS
CONSTITUTED THE SAME CRIMINAL
CONDUCT.**

1. *As the trial court found, the acts involved the same victim, occurred at the same time and place, and involved the same intent.*

When imposing a sentence for multiple current offenses, the sentencing court determines the offender score by considering all other current and prior convictions as if they were prior convictions. RCW 9.94A.589(1)(a). However, if the sentencing court finds that some or all of the current convictions encompass the same criminal conduct, then those offenses are counted as a single crime. RCW 9.94A.589(1)(a).

Crimes constitute the “same criminal conduct” when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). The offenses are counted as a single offense where all three elements are present. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). In construing the intent element, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

Here, the prosecutor argued in closing argument, and the trial court ruled at sentencing, that the same acts constituted the incest and rape of a child counts. 11/20/2013RP 149-50. The counts involved the same victim, and each rape count and corresponding incest count were committed at the same time and same place. Further, Mr. Chenoweth's criminal intent was the same; to have sex with his daughter. Thus, under a strict same criminal conduct analysis, the incest and rape of a child counts were the same criminal conduct.

2. *The Legislature's intent regarding punishment was relevant only to a double jeopardy analysis, not to a same criminal conduct analysis.*

The trial court relied on the language from this Court's decisions in *Bobenhouse, supra*, and *State v. Calle*, 124 Wn.2d 769, 888 P.2d 155 (1995), finding that the Legislature intended to punish incest and child rape separately, thus it would be error to find these offenses to be the same criminal conduct. Since the Legislature's intent regarding punishment was only relevant to a double jeopardy analysis, the trial court erred.

The guaranty against double jeopardy protects against multiple punishments for the same offense absent an intent by the Legislature to punish the offenses separately. *Whalen v. United States*, 445 U.S. 684,

688-89, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). In same criminal conduct, the statute, RCW 9.94A.589(1)(a), is a clear expression of the Legislature's intent regarding sentencing. *See State v. Bond*, 98 Wn.2d 1, 15-16, 653 P.2d 1024 (1982) (burglary anti-merger statute clear expression of intent of the Legislature that burglary does not merge with first degree rape).

Under the Double Jeopardy Clause, even two very similar offenses may be punished separately if the Legislature intends to do so. *State v. Freeman*, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005). This double jeopardy analysis turns on the intent of the Legislature. *See Calle*, 125 Wn.2d at 776 (“Therefore, the question whether punishments imposed by a court, following conviction upon criminal charges, are unconstitutionally multiple cannot be resolved without determining what punishments the legislative branch has authorized.”). The initial examination is the language of the statutes. *Id.* If that is inconclusive, the examination turns to statutory construction. *Id.* at 777. This examination typically focuses on the *Blockburger* test. *Id.* citing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).

It was within this framework that this Court decided *Calle* and *Bobenhouse*. In *Calle*, the trial court found convictions for second degree rape and first degree incest to be the same criminal conduct. 125 Wn.2d at 772. This Court addressed only whether these two offenses also violated double jeopardy. This Court ruled that the Legislature intended the two offenses to be punished separately for *double jeopardy* purposes, but left the same criminal conduct analysis intact.¹ *Id.* at 781-82 (“We hereby affirm the order of the Court of Appeals upholding the Defendant’s convictions for second degree rape and first degree incest”). Thus, *Calle* implicitly ruled that same criminal conduct applied to the calculation of the offender score.

In *Bobenhouse*, among the issues examined was whether trial court erred in refusing to find first degree child rape and first degree incest were the same criminal conduct. 166 Wn.2d at 896. Citing the decision in *Calle*, the Court ruled the trial court did not err in finding they were not the same criminal conduct:

Bobenhouse further argues the trial court abused its discretion when it did not find that the underlying rape and incest charges (stemming from forcing the children to have sexual intercourse with each other) constituted

¹ In the *Calle* opinion, the Court began its analysis noting that “The trial court found that the current offenses encompassed the same criminal conduct.” 125 Wn.2d at 772.

the “same criminal conduct” for purposes of sentencing. Bobenhouse would have this court hold that first degree child rape and first degree incest involve the same criminal intent, sexual intercourse. But this argument has no merit. We have previously held that “the Legislature intended to punish incest and rape as separate offenses, even though committed by a single act.” *State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995). Bobenhouse’s argument must fail in light of the precedent set by our decision in *Calle*.

Bobenhouse, 166 Wn.2d at 896.

This portion of the *Bobenhouse* decision, suggesting that rape and incest cannot be the same criminal conduct, was dicta and had no bearing on the ultimate decision in the case. Mr. Bobenhouse received an exceptional minimum sentence as part of an indeterminate sentence imposed pursuant to RCW 9.94A.507(3)(a)-(c). *Id.* at 895. In addition, Mr. Bobenhouse had an offender score for each of the scored convictions of 20, thus the same criminal conduct argument was irrelevant to the ultimate holding of the Court. *Id.* at 896-97.

Further, by using the Legislative intent to punish language, the *Bobenhouse* Court conflated the double jeopardy analysis and same criminal conduct analysis. Double jeopardy involves multiple *punishments*; in contrast same criminal conduct involves the calculation of the offender score. As this Court noted in *Calle*, a defendant whose offenses have been found to be the same criminal conduct is still being

punished for double jeopardy purposes. 125 Wn.2d at 774-75. *See also State v. French*, 157 Wn.2d 593, 611-12, 141 P.3d 54 (2006) (“A double jeopardy violation claim is distinct from a “same criminal conduct” claim and requires a separate analysis. The double jeopardy violation focuses on the allowable unit of prosecution and involves the charging and trial stages. The “same criminal conduct” claim involves the sentencing phase and focuses instead on the defendant’s criminal intent, whether the crimes were committed at the same time and at the same place, and whether they involved the same victim. *State v. Tili*, 139 Wn.2d 107, 119 n. 5, 985 P.2d 365 (1999).”).

Rejecting the State’s argument that the imposition of concurrent sentences defeated a double jeopardy claim, this Court noted that, in light of the decision in *Ball v. United States*, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985) which had expressly rejected this argument, there were punitive aspects of multiple convictions other than the type or length of the sentence imposed:

In light of *Ball*, this court now must take into account the punitive aspects of multiple convictions, regardless of the type of sentence imposed, when reviewing such convictions in light of the Fifth Amendment’s double jeopardy clause. Although the passage of the Sentencing Reform Act of 1981 eliminates any need to consider the effect of multiple convictions on parole decisions, the stigma and impeachment value of multiple convictions

remain. Thus, double jeopardy is at issue here because of the possibility that rape and incest are the same offense when they arise out of the same act of intercourse, regardless of the concurrent sentences imposed in this case. We hereby reject the concurrent sentence rule and hold that double jeopardy may be implicated when multiple convictions arise out of the same act, even if concurrent sentences have been imposed. To the extent that prior case law interpreting the Fifth Amendment conflicts with the rule of law we adopt today, it is overruled.

Calle, 125 Wn.2d at 774-75. Thus, even if a defendant's offenses are found to be the same criminal conduct, the defendant is still being punished for the two offenses because the two convictions remain despite the length of the sentence imposed.

An example of this situation can be found in *State v. Gohl*, 109 Wn.App. 817, 37 P.3d 293 (2001), *review denied*, 146 Wn.2d 1012 (2002), where the defendant was convicted of first degree murder and first degree assault involving the same act against the same victim. The trial court had found the offenses to be the same criminal conduct, and on appeal the defendant argued imposition of these two convictions for the same act violated double jeopardy. *Id.* at 822. Rejecting the State's argument that there was no double jeopardy violation because the trial court found the offenses to be the same criminal conduct and the

defendant received no additional imprisonment, the Court of Appeals found the two offenses violated double jeopardy:

In this case, the State concedes that the attempted first degree murder and first degree assault convictions were based on the same facts, and that the harm was also the same for both offenses. But the State argues that the presence of both convictions does not violate double jeopardy because the trial court imposed no sentence for the assaults, finding them to encompass the same criminal conduct. This argument contradicts the rule that conviction, and not merely imposition of a sentence, constitutes punishment. The fact of multiple convictions, with the concomitant societal stigma and potential to increase sentence under recidivist statutes for any future offense violated double jeopardy even where, as here, the trial court imposed only one sentence for the two offenses. Because the attempted first degree murder and first degree assault convictions are the same in law and in fact, they constitute double jeopardy. For this reason, we vacate the assault convictions and the corresponding deadly weapon sentence enhancements.

Id. (internal footnotes omitted). *See also State v. Womac*, 160 Wn.2d 643, 656-67, 160 P.3d 40 (2007) (citing *Gohl* in agreeing with the trial court that homicide by abuse, second degree murder, and first degree assault constituted the same criminal conduct *and* imposition of convictions for all three offenses violated double jeopardy where the offenses involved same victim and same acts); *Tili*, 139 Wn.2d at 119-20 (convictions for three rapes involving separate penetrations did not

violate double jeopardy but offenses did constitute the same criminal conduct).

This Court should hold that the trial court and the Court of Appeals erroneously conflated the double jeopardy and same criminal conduct analyses in refusing to find the child rape and incest convictions to be the same criminal conduct, where the trial court found that the offenses involved the same victim, occurred at the same time in the same place, and involved the same intent. Finding the offenses to be the same criminal conduct would have still imparted the separate punishment upon Mr. Chenoweth as required by *Calle* because the convictions would still remain with all of their collateral consequences intact.

D. CONCLUSION

For the reasons stated, Mr. Chenoweth asks this Court to find the incest and child rape convictions were the same criminal conduct.

DATED this 5th day of October 2015.

Respectfully submitted,

s/Thomas M. Kummerow

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

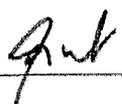
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)	
Respondent,)	
)	NO. 91366-8
v.)	
)	
CHAD CHENOWETH,)	
)	
Petitioner.)	

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To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Supplemental Brief of Petitioner

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