

62078-9

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NO. 62078-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
FRANK LEE EVANS, III,
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE DEBORAH FLECK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Consecutive deadly weapon enhancements do not violate double jeopardy because the Legislature clearly intended to impose duplicative punishment where a deadly weapon was used in the commission of a crime. In both State v. Nguyen¹ and State v. Tessema², this Court held that a firearm enhancement is not an “element of a higher crime” so as to implicate Blakely v. Washington³, and affirmed again that firearm enhancements do not violate double jeopardy. Nevertheless, Evans argues that his double jeopardy rights were violated when the court imposed five firearm enhancements consecutive to the standard range for five counts of Assault in the First Degree. Without mentioning Nguyen or Tessema, Evans suggests that longstanding precedent should be reexamined in light of Blakely. Should Evans’s claim be rejected?

2. The deadly weapon enhancement statute unambiguously indicates the Legislature’s intent to impose multiple consecutive sentence enhancements based on the possession of a

¹ 134 Wn. App. 863, 142 P.3d 1117 (2006).

² 139 Wn. App. 483, 162 P.3d 420 (2007).

³ 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

single deadly weapon. In both State v. Husted⁴ and State v. Esparza⁵, this Court rejected the argument that multiple enhancements for a single weapon violate double jeopardy. Yet, Evans makes precisely that argument. Should his claim be rejected?

B. STATEMENT OF THE CASE

Defendant Frank Lee Evans III was charged by information in King County Superior Court with five counts of Assault in the First Degree under cause number 07-C-00828-1 KNT. The State also charged a firearm enhancement under RCW 9.94A.533(3) for each count. CP 1-4.

The State alleged that at approximately 2:20 a.m. on January 21, 2007, Frank Lee Evans III entered a Denny's Restaurant in Kent and opened fire with a .40 caliber semiautomatic handgun. CP 5-10. That night Evans, eager to pick a fight with someone, found other patrons in the restaurant were sitting at "his" table. RP 125. Evans initially entered the restaurant acting aggressively and belligerently, threw chairs and food, and incited a brawl where he ended up getting punched in the face and

⁴ 118 Wn. App. 92, 74 P.3d 672 (2003).

⁵ 135 Wn. App. 54, 143 P.3d 612 (2006), *review denied*, 161 Wn.2d 1004 (2007).

falling to the floor. RP 125-27. With anger in his eyes, he briefly left, only to return moments later to indiscriminately fire into the crowd of innocent patrons. RP 129-136. Five people were shot. CP 8.

Evans took his case to trial. The jury returned with verdicts of guilty on each of the five counts of Assault in the First Degree, and affirmed by special verdicts that he was armed with a firearm at the time of each offense. CP 50-58. The trial court sentenced Evans to the low end of the standard range (93 months) on each count consecutive, with the additional 60-month enhancements on each count to be served consecutively, totaling 765 months. CP 199-207. Evans timely appeals. CP 198.

C. ARGUMENT

1. EVANS'S SENTENCE DOES NOT VIOLATE THE DOUBLE JEOPARDY PROHIBITION AGAINST MULTIPLE PUNISHMENTS.

Evans contends that the sentence imposed violates the double jeopardy prohibition against multiple punishments in two ways. First, he claims that imposing additional time for firearm enhancements violates double jeopardy because the legislative intent as to duplicative punishment for firearm enhancements is

unclear following Blakely v. Washington⁶, and a Blockburger⁷ analysis shows that the underlying crime of Assault in the First Degree by means of a firearm and the firearm enhancements are the same in fact and law. App. Br. at 7-17. Second, Evans argues that imposing multiple consecutive enhancements for the use of a single firearm violates double jeopardy because “a single act yields multiple punishments.” App. Br. at 18-20. Both of these arguments have been repeatedly rejected by this Court in decisions issued both prior to and since Blakely, and should be rejected yet again in this case.

- a. Blakely Does Not Change The Analysis Regarding The Legislature’s Intent That The Deadly Weapon Enhancement Statute Shall Result In Longer Sentences.

Both the United States Constitution and the Washington Constitution protect a defendant from double jeopardy. U.S. Const. amend. 5; Const. art. 1, § 9. This constitutional principle has been construed to encompass three separate protections: (1) protection

⁶ 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Blakely held that other than the fact of a prior conviction, any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be pled and proved to a jury, and that failure to do so is a violation of the defendant’s Sixth Amendment rights. 542 U.S. at 301.

⁷ United States v. Blockburger, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). The standard of review is *de novo*. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Subject to constitutional constraints, the Legislature has the absolute power to define criminal conduct and assign punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). A defendant can be subject to multiple punishments for a single criminal act that violates more than one criminal statute. Calle, 125 Wn.2d 769 (no double jeopardy violation where a single act of intercourse violated both the rape and incest statutes). Additionally, while the constitutional guaranty against double jeopardy protects a defendant against multiple punishments for the same offense, the courts reject the notion that offenses committed during a “single transaction” are necessarily the “same offense.” State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983), *citing* State v. Roybal, 82 Wn.2d 577, 512 P.2d 718 (1973). If the court exceeds the authority granted by the Legislature and imposes multiple punishments where multiple punishments are not

authorized, double jeopardy may be implicated. Calle, 125 Wn.2d at 776.

In Calle, the court set forth a three-part test for determining whether multiple punishments were intended by the Legislature. First, the court must review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. Calle at 776. Should this step not result in a definitive answer, the court next applies the two-part "same evidence" or Blockburger test. This test asks whether the offenses are the same "in law" and "in fact." Calle at 777. Offenses are the same in fact when they arise from the same act. Offenses are the same in law when proof of one offense would always prove the other offense. Id. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Id. Failure under either prong creates a strong presumption in favor of multiple punishments, which can only be overcome where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. Id. at 778-80. This search for clear evidence of contrary legislative intent is the third step of the analysis.

In the case of firearm enhancements, multiple punishments—even where the use of a weapon is an element of the underlying offense—are clearly authorized by the Legislature in RCW 9.94A.533(3). The relevant portions state as follows:

The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement....

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;...

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;...

RCW 9.94A.533(3). Multiple cases affirm the lack of any ambiguity in the plain language regarding that intent. See State v. Pentland, 43 Wn. App. 808, 811-12, 719 P.2d 605 (1986); State v. Caldwell,

47 Wn. App. 317, 320, 734 P.2d 542 (1987); State v. Horton, 59 Wn. App. 412, 418, 798 P.2d 813 (1990).

Evans argues that Blakely requires a reexamination of what is meant constitutionally by the terms “element” and “offense” as those terms relate to double jeopardy. This argument has no merit because Blakely does not implicate double jeopardy.

Directly on point is State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), a post-Blakely decision. In Nguyen, the defendant was convicted of multiple counts of robbery, burglary, and assault with multiple firearm enhancements. 134 Wn. App. at 866. Nguyen made *precisely* the same double jeopardy arguments as Evans. They both argue that the firearm enhancement is effectively an “element” of a greater aggravated crime (App. Br. at 4; Nguyen, 134 Wn. App. at 867), and that the voters, in passing Initiative 159 (the Hard Time for Armed Crime Act that is the genesis of RCW 9.94A.533), “did not consider the problem of redundant punishment created when a ... firearm enhancement is added to a crime, and using a firearm...is one of the alternative ways an offense may be committed.” App. Br. at 10; see Nguyen, at 867-68. Like Evans, Nguyen argued that the longstanding precedents holding that deadly weapon enhancements do not

violate double jeopardy must be reexamined in light of Blakely, Nguyen, at 866.

This Court soundly rejected these arguments, and in doing so noted, yet again, the clear legislative intent regarding enhancements where use of a firearm is an element of the underlying offense:

We see no basis for this argument. First, unless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent. The intent underlying the mandatory firearm enhancement is unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies. The exemptions defeat Nguyen's argument that the present situation is unintended. Where possession of the firearm is itself the crime, the enhancement is unnecessary to the statutory purpose. It is therefore unsurprising that the offenses of theft of firearms and possession of a machine gun are exempt from the enhancements. The legislature also, however, exempted drive-by shooting and use of a machine gun in a felony, which demonstrates that whether use of a firearm is an element of the crime is not the test for the enhancement. Any "redundancy" in mandating enhanced sentences for other offenses involving use of a firearm is intentional.

Second, Blakely does not implicate double jeopardy but rather involves the procedure required by the Sixth Amendment for finding the facts authorizing the sentence. [citation omitted] A jury found Nguyen guilty on each count, and entered a special verdict finding that Nguyen or an accomplice was armed with a firearm at the time of the crimes. This procedure complies fully with Blakely.

Nguyen, 134 Wn. App. at 868.

Both Nguyen and Evans also cite Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), to bolster the argument that Blakely reconceptualizes the constitutional meaning of “offense” and “elements” as it pertains to double jeopardy. App. Br. at 12-13; Nguyen, at 868-69. The Nguyen court correctly pointed out the flaw in this argument:

[N]othing in Blakely gives reason to question prior Washington cases holding that double jeopardy is not violated by weapon enhancements even if the use of the weapon is an element of the crime. And Sattazahn is not applicable, because the question there was whether double jeopardy prevented a second death penalty sentencing proceeding. Nguyen has been subjected to only one proceeding. [citation omitted]

Nguyen’s argument is essentially based upon semantics, and he assigns an unsupportable weight to the Blakely Court’s use of the term “element” to describe sentencing factors. But the meaning of the Court’s language in Blakely was made clear in Recuenco,⁸ wherein the Court pointed out that “*elements and sentencing factors* must be treated the same for Sixth Amendment purposes.” Nguyen does not contend his Sixth Amendment rights to a unanimous jury and proof beyond a reasonable doubt were violated.

The double jeopardy clause does no more than ensure that punishment is not more than the

⁸ Washington v. Recuenco, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

legislature intended. The intent of the legislature here is abundantly clear.

Nguyen, at 869 (emphasis added by Nguyen Court). Like Nguyen, Evans is not contesting that his Sixth Amendment rights were violated and was subject to only one proceeding; thus, double jeopardy is not implicated.

Quickly following Nguyen, this Court decided State v. Tessema, 139 Wn. App. 483, 162 P.3d 420 (2007). In Tessema, the defendant made the same arguments as Nguyen regarding Blakely and voter intent. Tessema, 139 Wn. App. at 492-93. Once again, the court found that Blakely has no relevance to this double jeopardy analysis and that the legislative intent to impose multiple punishments is crystal clear. Tessema, at 492-93.

Because the legislative intent is unambiguous, there is no need to engage in a Blockburger analysis. Nguyen and Tessema are clearly controlling law on this issue. There is no legal or factual basis on which to decide this case differently, so Evans's argument should be rejected.

- b. Double Jeopardy Is Not Violated Where A Single Weapon Is The Basis For Multiple Enhancements.

Evans next argues that because he used only one firearm in his assault on five people, double jeopardy was violated when five

enhancements were imposed. This argument has also been resolved by well-established case law.

State v. Esparza, 135 Wn. App. 54, 143 P.3d 612, *review denied*, 161 Wn.2d 1004 (2007), is directly on point.⁹ In that case, Beaver (Esparza's co-defendant) was convicted of Attempted Robbery in the First Degree and Assault in the Second Degree, with firearm enhancements on each count. Esparza, 135 Wn. App. at 58. This Court rejected Esparza's claim that multiple enhancements imposed for the use of a single firearm violated double jeopardy, noting that "this court has entertained this argument before on several occasions and it has been soundly rejected." Id. at 67. In State v. Husted, 118 Wn. App. 92, 93-94, 74 P.3d 672 (2003), the defendant was convicted of both rape and burglary, with a deadly weapon enhancement attached to each count because he was armed with a knife. This Court held after a thorough statutory analysis that the deadly weapon enhancement statute (formerly RCW 9.94A.510) "unambiguously shows legislative intent to impose two enhancements based on a single

⁹ Appellate counsel herein neither cites this case nor attempts to distinguish it, despite the fact that counsel was appellate counsel for Mr. Beaver in Esparza as well.

act of possessing a weapon, where there are two offenses eligible for an enhancement.” Husted, 118 Wn. App. at 95.

Evans’s case is indistinguishable from Esparza and Husted. There is no legal or factual basis on which to rule differently from established law. Evans’s argument should be soundly rejected because there is no double jeopardy violation.

D. CONCLUSION

For all the foregoing reasons, the State respectfully requests the Court to affirm Evans’s sentence.

DATED this 24th day of July, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver R. Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. FRANK LEE EVANS III, Cause No. 62078-9-I, in the Court of Appeals, Division I, for the State of Washington.

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

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