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No. 65208-7-I

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION ONE

King County No. 05-1-03922-8 SEA

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STATE OF WASHINGTON,

Respondent,

v.

BAYANI JOHN MANDANAS,

Appellant.

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APPELLANT'S REPLY BRIEF

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## **I. INTRODUCTION**

On September 17, 2010, Respondent filed its Responsive Brief. *See* Brief of Respondent (“BOR”). This brief is filed by way of reply to the arguments contained in Respondent’s Brief.

## **II. DISCUSSION**

### **B. This Court is Not Precluded From Reaching this Constitutional Issue.**

On remand, the trial court refused to reach the merits of Bayani John Mandanas’ double jeopardy argument based upon the judge’s belief that this Court had already ruled on these matters. *See* 3/26/10 RP 3-5. In reality, Mr. Mandanas did attempt to raise this issue during his initial appeal. But neither this Court nor the Washington Supreme Court has ruled on this particular question.

Respondent now appears to concede, albeit silently, that the trial court erred when it concluded that this Court had already ruled upon Mr. Mandanas’ double jeopardy arguments on remand. *See* BOR at 4-5. But Respondent would ask this Court not to reach the issue because it had not been properly raised during the first appeal. This argument is unpersuasive for numerous reasons.

First, and perhaps most importantly, Washington’s courts have a duty and power to correct an illegal or erroneous sentence upon its

discovery. The Washington Supreme Court has often explained that a resentencing proceeding is required to correct invalid sentences. *See, e.g., Brooks v. Rhay*, 92 Wn.2d 876, 602 P.2d 356 (1979); *State v. Pringle*, 83 Wn.2d 188, 517 P.2d 192 (1973); *Dill v. Cranor*, 39 Wn.2d 444, 235 P.2d 1006 (1951). *See also State v. Loux*, 69 Wn.2d 855, 420 P.2d 693 (1966), *cert. denied*, 386 U.S. 997 (1967); *State ex rel. Sharf v. Municipal Court*, 56 Wn.2d 589, 354 P.2d 692 (1960); *State v. Williams*, 51 Wn.2d 182, 316 P.2d 913 (1957); *McNutt v. Delmore* 47 Wn.2d 563, 288 P.2d 848 (1955), *cert. denied*, 350 U.S. 1002 (1956). In fact, these cases provide that a sentencing court always has authority to correct an illegal or erroneous sentence. *See, e.g., In re Pers. Restraint of Call*, 144 Wn.2d 315, 28 P.3d 709 (2001); *In re Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002); *State v. Smissaert*, 103 Wn.2d 636, 694 P.2d 654 (1985).

Second, Mr. Mandanas did attempt to raise the double jeopardy claim in conjunction with the same criminal conduct argument that was presented in his initial sentencing and appeal. Although this Court did not address the precise issue that is now raised on this appeal, it is noteworthy that the trial court believed that this issue had previously been raised and resolved in the initial round of proceedings.

Third, Respondent seems to forget that this Appellant prevailed on his initial appeal and that the case was remanded back for a new

sentencing hearing as to all counts of conviction. There is no question that Mr. Mandanas properly raised this issue during that new sentencing proceeding and that the trial court was mistaken in its refusal to reach this issue. The trial court then imposed a new judgment. *See* 3/16/10 RP; CP 8-12. Mr. Mandanas has filed a proper appeal from this judgment and this Court is certainly not precluded from reaching this important constitutional question.

Respondent's reliance upon *State v. Suave*, 100 Wn.2d 84, 87, 666 P.2d 894 (1983), is misplaced. There, the Court noted that "[t]he trial court may exercise independent judgment as to decisions to which error was *not* assigned in the prior review . . . ." *Suave*, 100 Wn.2d at 183 n.2 (*quoting* comment to RAP 2.5(c)(1)). The Court's observations in *Suave* clearly do not apply to this case. This is not a case where the trial court exercised independent judgment and "declined" to reach this legal issue as Respondent might suggest. *See* BOR at 5. On the contrary, the State did not make any similar argument in the trial court and the judge did not consider RAP 2.5 or exercise any independent judgment.<sup>1</sup> Presumably relying upon the law of the case doctrine, the trial judge did not reach this issue because he felt that he could not rule upon an issue that had already

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<sup>1</sup> During the trial court proceedings on remand, the prosecutor stood by silently – and did not offer any correction of comments – when the judge informed the parties that he believed this Court had already ruled upon the issue.

been ruled upon by this Court. Review should not be denied based on such a “Catch 22” situation.<sup>2</sup>

**B. Double Jeopardy Bars Imposition of Separate Sentences for Two Offenses, and Increased Punishment, Where the Convictions are Based upon the Very Same Acts and the Very Same Offense Conduct**

The double jeopardy clause protects against “multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction.” *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (citing *In re Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). See also *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995) (double jeopardy may be implicated when multiple convictions arise out of the same act or conduct); *State v. Maxfield*, 125 Wn.2d 378, 868 P.2d 123 (1994).<sup>3</sup>

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<sup>2</sup> Moreover, the *Suave* court has made clear that Petitioner would be authorized to file a personal restraint case to raise this very same issue. See *Suave*, 100 Wn.2d at 86. Here, there is no just reason for this Court to refuse to consider this legal issue – an issue which Mr. Mandanas has been attempting to raise for several years – and force him to file a new proceeding simply because there has been some confusion as to whether this precise issue had been raised and resolved during the first appeal.

<sup>3</sup> To permit such a practice allows the State multiple bites at the apple by labeling one crime by different names and upholding any and all resulting convictions. And the State, “with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the

Respondent is correct in arguing that, generally speaking, offenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other. *See* BOR at 6-9 (*citing Blockburger* cases). “Washington courts, however, have occasionally found a violation of double jeopardy despite a determination that the offenses involved clearly contained different legal elements.” *State v. Womac*, 160 Wn.2d 643, 651, 160 P.3d 40 (2007) (*citing State v. Schwab*, 98 Wn.App. 179, 184-85, 988 P.2d 1045 (1999)); *State v. Johnson*, 92 Wn.2d 671, 679-80, 600 P.2d 1249 (1979); *State v. Potter*, 31 Wn.App. 883, 887-88 (1982); *In re Pers. Restraint of Burchfield*, 111 Wn.App. 892, 899, 46 P.3d 840 (2002)) (emphasis in original).

In *State v. Gohl*, 109 Wn.App. 817, 821, 37 P.3d 293 (2001), for example, this Court held that convictions for both assault and attempted murder violated double jeopardy even though incarceration was imposed for attempted murder only. The court concluded double jeopardy was implicated because attempted first degree murder and first degree assault convictions are the “same in law and in fact.” 109 Wn.App. at 822. Accordingly, the court vacated the assault conviction. *See id.*

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possibility that even though innocent he may be found guilty.” *Green v. United States*, 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

Similarly, in *State v. Read*, 100 Wn.App. 776, 998 P.2d 897 (2000), Division Three found convictions for second degree murder and first degree assault violated double jeopardy and the court vacated the assault conviction. The *Read* court determined the offenses were legally “the same” since proof of second degree intentional murder necessarily also proves first degree assault. *See id.* at 791-92. The court found the offenses were the same “*in fact*” because the offenses were based on the same act directed toward the same victim. *See id.* at 791. This determination was made *despite* the fact that the sentencing court did not “expressly find that the two crimes were the ‘same criminal conduct.’” *Id.* at 793 n.7.

As noted by the *Womac* Court, these principles are usually described as the “same evidence rule.” 160 Wn.2d at 652. The same evidence rule controls “unless there is a clear indication that the legislature did not intend to impose multiple punishment.” *Gohl*, 109 Wn.App. at 821. Convictions, in themselves, are considered punishments for double jeopardy purposes. Thus, the Washington Supreme Court has also held that “double jeopardy may be violated when a defendant receives multiple convictions for a single offense (regardless of whether concurrent sentences are imposed).” *See Womac*, 160 Wn.2d at 651 (*citing Calle*, 125

Wn.2d. at 775). Double jeopardy is very clearly violated when a defendant receives multiple sentences for a single offense.

Relying almost exclusively on *Calle*, the State now argues that the two offenses – assault and felony harassment – have different elements so they can never be considered the same “in law.” *See* BOR at 8-9. But this argument does not account for “the same evidence test” and the decisions in cases like *Womac*, *Gohl*, *Read*, and *Potter*. The State has chosen not to mention any of these cases and, instead, mistakenly claims: “With each charged crime having a different element not contained in the other (in this case multiple elements), the two offenses fail the same ‘in law’ prong of the ‘same evidence’ test.” BOR at 8.

In *Read*, the court concluded that double jeopardy may be implicated even where the two offenses do not involve the same criminal conduct. Here, where it is undisputed that the offenses do involve the same act and the “same criminal conduct,” it is unfair and unjust to impose duplicative punishment. These offenses are legally the same and Mr. Mandanas should only have been punished for the assault charge.

### **III. CONCLUSION**

For all of these reasons, and in the interests of justice, this Court should conclude that the substantive offenses – assault and felony harassment – are “same criminal conduct” and that double jeopardy

precludes sentencing on these two offenses. Thus, Mr. Mandanas should be sentenced only on the greater offense. This Court should reverse Mr. Mandanas' sentence and remand for resentencing on Count 1 only.

DATED this 27<sup>th</sup> day of October, 2010.

Respectfully submitted,

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By:

  
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**PROOF OF SERVICE**

Todd Maybrown swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 27<sup>th</sup> day of October, 2010, I deposited for mailing, postage prepaid, first class, one true copy of Appellant's Reply Brief directed to attorney for Respondent:

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