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No. 66079-9-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Hung Van Nguyen,

Appellant.

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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

King County Superior Court Cause No. 96-1-02657-0

The Honorable Judge Michael Hayden

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490

Olympia, WA 98507

(360) 339-4870

FAX: (866) 499-7475

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ASSIGNMENTS OF ERROR

1. The trial court erred by summarily denying Mr. Nguyen's CrR 7.8 Motion, instead of either holding a hearing on the merits or transferring it to the Court of Appeals as a Personal Restraint Petition.
2. The trial court erred by failing to consider Mr. Nguyen's request for an exceptional sentence.
3. The trial court erred by imposing three consecutive deadly weapon enhancements.
4. The imposition of multiple consecutive deadly weapon enhancements violated Mr. Nguyen's right to not to be twice placed in jeopardy for the same offense.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under CrR 7.8, a trial court may either refer a motion to the Court of Appeals for treatment as a Personal Restraint Petition or a show cause hearing. In this case, the court instead summarily denied Mr. Nguyen's CrR 7.8 motion. Did the trial court violate CrR 7.8 by summarily denying Mr. Nguyen's Motion for Relief from Judgment?
2. A sentencing court's failure to consider an exceptional sentence requires reversal. Here, the trial court failed to consider Mr. Nguyen's request for an exceptional sentence. Must the sentence be vacated and the case remanded for a new sentencing hearing?
3. An accused person may not receive multiple punishments for the same offense. In this case, the trial court imposed three consecutive deadly weapon enhancements based on Mr. Nguyen's possession of a single deadly weapon. Did the imposition of three consecutive deadly weapon enhancements violate Mr. Nguyen's right to be free from double jeopardy under the Fifth and Fourteenth Amendments and Wash. Const. Article I, Section 9?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In 1997, Hung Van Nguyen was convicted of three counts of Assault in the First Degree. CP 35. He failed to appear for sentencing, which delayed entry of the original Judgment and Sentence until September of 2004. CP 12.

The sentencing court imposed consecutive sentences and consecutive firearm enhancements on each count. This was done despite the fact that Mr. Nguyen's jury had found only that he was armed with a deadly weapon. CP 13, 15. Mr. Nguyen appealed, and the Court of Appeals affirmed his conviction but vacated the firearm enhancements. CP 22.

A Petition for Review to the Supreme Court was stayed pending the Court's decision in *State v. Recuenco*, 163 Wash.2d 428, 180 P.3d 1276 (2008). After *Recuenco* was decided, the stay was lifted. Mr. Nguyen's Petition was denied, and the case was remanded to the superior court for resentencing. CP 21.

On September 15, 2010—one week prior to resentencing—Mr. Nguyen filed a document captioned “Motion for Resentencing After Appeal is Final and for Relief Under CrR 7.4, CrR 7.5 & CrR 7.8”, which

included four attached exhibits (hereafter “Motion.”)¹ Supp. CP. In addition to requesting relief from the judgment, Mr. Nguyen’s written motion asked the court to exercise its discretion to impose an exceptional sentence below the standard sentence by running his prison terms and enhancements concurrently.² Motion, p. 6, Supp. CP.

A hearing was held on September 22, 2010. RP (9/22/10). At the hearing, Mr. Nguyen argued (1) that the Court of Appeals decision did not authorize or require the court to impose deadly weapon enhancements in place of the vacated firearm enhancements, (2) that any deadly weapon enhancements should be concurrent rather than consecutive, and (3) that the court should hold an evidentiary hearing regarding his CrR 7.8 motion.³ RP (9/22/10) 6-18.

¹ Mr. Nguyen had previously filed other post-conviction motions, each of which was transferred to the Court of Appeals for consideration as a Personal Restraint Petition. Those Petitions were voluntarily withdrawn by Mr. Nguyen. See Certificate of Finality (No. 65301-6-1); Certificate of Finality (No. 66084-5-1); Certificate of Finality (No. 60050-8-1) Supp. CP.

² Along with his motion, Mr. Nguyen filed a supporting declaration, outlining the facts on which his motion was based. See Declaration of Hung Nguyen Regarding Defense Counsel’s Failure to Provide Effective Assistance of Counsel, Supp. CP.

³ On this last point, the prosecution argued that the court should transfer the motion to the Court of Appeals as a Personal Restraint Petition. RP (9/22/10) 8-9.

The court imposed a prison term of 312 months confinement, followed by three consecutive 24-month deadly weapon enhancements, for a total of 386 months in prison. RP (9/22/10) 17; CP 38.

The court refused to hold an evidentiary hearing on Mr. Nguyen's Motion for Relief, ruling that the motion was "too late."⁴ RP (9/22/10) 12. The judge suggested that Mr. Nguyen could raise any outstanding issues in a Personal Restraint Petition.⁵ RP (9/22/11) 11-12.

Mr. Nguyen timely appealed.⁶ CP 43.

⁴ The judge was apparently unaware that Mr. Nguyen's direct appeal had been stayed pending the Supreme Court's decision in *Recuenco*. See RP (9/22/11) 5, 10.

⁵ The judge referenced the prior motions, which had been transferred to the Court of Appeals, and indicated that he would sign another order transferring the current motion; however, he did not do so. RP (9/22/10) 12.

⁶ Inexplicably, a copy of the September 14, 2010 order transferring Mr. Nguyen's prior CrR 7.8 motion to the Court of Appeals as a Personal Restraint Petition was resubmitted by the clerk to the Court of Appeals, along with copies of Mr. Nguyen's Motion and Declaration. Order On Transfer ("Copy to Court of Appeals Sep 30 2010"), Supp. CP. The Court of Appeals did not open a second PRP file based on the second copy of this order. It is possible that the clerk and/or the court believed this duplicate submission would suffice to transfer Mr. Nguyen's September 15, 2010 Motion.

ARGUMENT

I. THE TRIAL COURT LACKED AUTHORITY TO SUMMARILY DENY MR. NGUYEN'S CrR 7.8 MOTION.

A. Standard of Review

The interpretation of a court rule is an issue of law, reviewed *de novo*. *State v. Sims*, ___ Wash.2d ___, ___, ___ P.3d ___ (2011).

B. The trial judge was required to order a show cause hearing or transfer the motion to the Court of Appeals.

CrR 7.8 sets forth the procedure for seeking relief following entry of a judgment and sentence. It provides (in relevant part) as follows:

(c) Procedure on Vacation of Judgment.

(1) *Motion*. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) *Transfer to Court of Appeals*. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(3) *Order to Show Cause*. If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

CrR 7.8.

Under the plain language of the rule, the court does not have the authority to summarily deny a CrR 7.8 motion; instead, the court must either transfer the motion to the Court of Appeals or enter a show cause order. *State v. Smith*, 144 Wash.App. 860, 184 P.3d 666 (2008). Because the trial court's decision could impact future collateral proceedings, the proper remedy for a failure to follow CrR 7.8(c) is vacation of the court's order and remand. *Id.*

In this case, the trial court summarily denied Mr. Nguyen's CrR 7.8 motion. RP (9/22/11) 12. If the motion was truly "too late," as the trial judge concluded, the only permissible option was to transfer the motion to the Court of Appeals pursuant to CrR 7.8(c)(2). The trial court was not authorized to summarily deny Mr. Nguyen's motion.⁷ CrR 7.8(c); *Smith, supra*. Accordingly, the case must be remanded to allow the trial court to properly exercise its authority under CrR 7.8(c). *Id.*

II. THE SENTENCING COURT ERRED BY REFUSING TO CONSIDER MR. NGUYEN'S REQUEST FOR AN EXCEPTIONAL SENTENCE.

The failure to consider a request for an exceptional sentence is reversible error. *State v. Grayson*, 154 Wash.2d 333, 342, 111 P.3d 1183

⁷ It is possible that the trial judge intended to transfer the motion to the court of appeals: he indicated that he would sign an order of transfer, and the clerk resubmitted an order he had signed September 14, 2010 (the day before Mr. Nguyen filed his current motion). RP (9/22/10) 12; Order On Transfer ("Copy to Court of Appeals Sep 30 2010"), Supp. CP.

(2005). Although “no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *Id* (emphasis in original). A sentencing judge has discretion to impose concurrent sentences, even where the offender has been convicted of multiple serious violent offenses. *In re Mulholland*, 161 Wash.2d 322, 328, 166 P.3d 677 (2007).

In this case, Mr. Nguyen asked the court to consider imposing an exceptional sentence. Motion, p. 6, Supp. CP. He properly called the court’s attention to *Mulholland*, a case decided after his original sentencing hearing. Motion, p. 6, Supp. CP. The sentencing court did not mention Mr. Nguyen’s request for an exceptional sentence, seek argument on the appropriate term, or otherwise indicate that it was aware of the request. *See* RP (9/22/11) *generally*.

This failure to consider the request for an exceptional sentence requires reversal. *Grayson*, at 342. Accordingly, the sentence must be vacated and the case remanded for a new sentencing hearing. *Id*.

III. THE IMPOSITION OF THREE CONSECUTIVE DEADLY WEAPON ENHANCEMENTS VIOLATED MR. NGUYEN'S DOUBLE JEOPARDY RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). The proper interpretation and application of the double jeopardy clause is a question of law, reviewed *de novo*. *In re Francis*, 170 Wash.2d 517, 523, 242 P.3d 866 (2010).

B. An offender may not receive multiple punishments for the same offense unless authorized by the legislature.

The Fifth Amendment⁸ provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. A similar prohibition is set forth in the Washington Constitution. Wash. Const. Article I, Section 9. Double jeopardy protects against multiple punishments for the same offense. *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). The double jeopardy clause is offended whenever the imposition of multiple

⁸ The Fifth Amendment’s double jeopardy clause applies in state court trials through action of the Fourteenth Amendment’s due process clause. *Monge v. California*, 524 U.S. 721, 728, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998).

sentences results in greater punishment than that intended by the legislature. *Id.*, at 366.

A court evaluating multiple *convictions* based on a single act must determine whether those convictions are for the same offense. *Francis*, at 523. Because the legislature has the power to define offenses, this turns on whether the legislature intended two offenses to be separate. *Id.* A court must first “consider any express or implicit representations of legislative intent.” *Id.* Absent such express or implicit representations of intent, the analysis moves to (1) the *Blockburger* test, (2) the merger doctrine (if applicable), and (3) the “independent purpose or effect” test. *Id.* (citing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). These considerations inform but do not compel the outcome; the underlying inquiry is still whether the legislature intended the offenses to be the same or separate. *Id.*

There is no principled basis to apply a different test when a single act gives rise to multiple punishments in the form of sentence enhancements. *See, e.g., Hunter, supra.*

- C. The three enhancements imposed in this case violate double jeopardy.

The three enhancements imposed in this case were based on former RCW 9.94A.310 (4) (1996). That statute provided (in relevant part) as follows:

The following additional times shall be added to the presumptive sentence for felony crimes...if the offender or an accomplice was armed with a deadly weapon...and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime....

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

(e) Notwithstanding any other provision of law, any and all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provisions.

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

(g) If the presumptive sentence under this section exceeds the statutory maximum for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender as defined in RCW 9.94A.030.

Former RCW 9.94A.310 (4) (1996).

Applying the test outlined in *Francis, supra*, the statute requires the imposition of only one enhancement when a person commits multiple

simultaneous or near-simultaneous offenses while armed with a deadly weapon. *Francis*, at 523. Former RCW 9.94A.310 (4) does not include any express or implicit representation regarding the imposition of multiple enhancements based on possession of a single weapon.⁹ Because of this, it is necessary to apply the *Blockburger* test and the “independent purpose or effect” test.¹⁰ *Id.*

Under *Blockburger*, “offenses are not the same if *each* offense requires proof of a fact the other does not.” *Francis*, at 525 n. 2 (emphasis in original). Here, none of the three enhancements required proof of a fact the others did not. Instead, all three enhancements were based on proof of a single fact—that Mr. Nguyen was “armed with a deadly weapon” when the three simultaneous or near-simultaneous assaults were committed. Former RCW 9.94A.310(4). The three enhancements were the same in law and in fact; accordingly, under *Blockburger*, their imposition violates double jeopardy. *Blockburger*, *supra*.

⁹ The statute *does* contemplate that multiple enhancements may be imposed on a single offender; however, it does not explicitly or implicitly state that such enhancements may be based on possession of a weapon during the simultaneous or near-simultaneous commission of multiple offenses. Former RCW 9.94A.310 (4).

¹⁰ The merger test does not apply in this case, because one enhancement is not a lesser included offense of another enhancement; all three are identical and concurrent. *See, e.g., Francis*, at 525.

The “independent purpose or effect” test does not undermine this result. The test provides “a well established exception that may operate to allow two convictions even when they formally appear to be the same crime under other tests.” *State v. Freeman*, 153 Wash.2d 765, 779, 108 P.3d 753 (2005). Under the independent purpose or effect test, two offenses may be separate in fact when each creates an injury that is separate and distinct from (and not merely incidental to) the other offense. *Id.* For example, when a robbery victim is struck after completion of the robbery, the offender may be punished for both the assault and the robbery because the separate intent to assault and the gratuitous injury to the victim did nothing to forward the robbery. *Freeman*, at 779. Such is not the case here: the fact that Mr. Nguyen was armed with a deadly weapon did not, by itself, give rise to three separate and distinct injuries.¹¹

The three enhancements were the same in law and fact. Because of this, double jeopardy requires that two of them be vacated. *Francis*, *supra*. The case must be remanded to the sentencing court for a new sentencing hearing. *Id.*

¹¹ By contrast, separate and distinct harm did occur when Mr. Nguyen committed first-degree assault against three different victims, as charged in the underlying offenses.

D. The Court should reexamine its decision in *Husted*.

Division I has long held that multiple sentence enhancements may be imposed when an offender commits multiple crimes while armed with a deadly weapon.¹² *State v. Husted*, 118 Wash.App. 92, 94-95, 74 P.3d 672 (2003).¹³ According to the *Husted* court, the enhancement statute “unambiguously shows legislative intent to impose two enhancements based on a single act of possessing a weapon, where there are two offenses eligible for an enhancement.” *Husted*, at 95 (addressing former RCW 9.94A.510 (2003)).

This is incorrect. The statutory language quoted in *Husted* does no more than recognize that multiple enhancements may be imposed during one sentencing proceeding:

“If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement....

...

¹² The Washington Supreme Court has expressly reserved ruling on this issue. *State v. Mandanas*, 168 Wash.2d 84, 90, 228 P.3d 13 (2010). Neither Division II nor Division III has addressed the argument.

¹³ See also *State v. Elmi*, 138 Wash.App. 306, 322, 156 P.3d 281 (2007) (citing *Husted*); *State v. Esparza*, 135 Wash.App. 54, 67 n. 24, 143 P.3d 612 (2006) (citing *Husted*); *State v. Ward*, 125 Wash.App. 243, 252, 104 P.3d 670 (2004) (citing *Husted*), overruled on other grounds by *State v. Grier*, 171 Wash.2d 17, 246 P.3d 1260 (2011).

Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, *including other firearm or deadly weapon enhancements*, for all offenses sentenced under this chapter.”

Husted, at 94-95 (emphasis in original) (quoting former RCW 9.94A.510 (2003)).¹⁴ Thus, for example, a person convicted of multiple burglaries at several different locations can expect to have multiple enhancements imposed if s/he was armed at the time of each offense.

The statutory language does *not* unambiguously require multiple enhancements when an armed person commits more than one crime at a single time and place. Nothing in the statute reflects a legislative intent to impose multiple enhancements based on possession of a single weapon during multiple simultaneous or near-simultaneous crimes.

The *Husted* Court also relied on *State v. Claborn*, 95 Wash.2d 629, 628 P.2d 467 (1981). *Husted*, at 95. But the Supreme Court’s decision in *Claborn* is inapposite.

First, the two offenses at issue in that case occurred during different time “segments,” and proof that the defendant was armed during one segment did not prove that he was armed in a second segment.

¹⁴ The second quoted paragraph of former RCW 9.94A.510 (2003) is different than former RCW 9.94A.310 (1996) which applies in this case. The latter did not specify that the reference to other sentencing provisions included “other firearm or deadly weapon enhancements.” This strengthens Mr. Nguyen’s argument, since the *Husted* court apparently relied on that language to reach its conclusion.

Claborn, at 637. Here, by contrast, Mr. Nguyen’s three offenses occurred simultaneously when he fired multiple shots at the occupants of Bounsom Manivanh’s vehicle. CP 2.

Second, under the statutory scheme in effect when *Claborn* was decided, deadly weapon enhancements did not add time to the defendant’s sentence; instead, they “merely limit[ed] the discretion of the trial court and the Board of Prison Terms & Paroles in the setting of minimum sentences.” *Id.* Here, by contrast, the court imposed a total of 72 months for the three enhancements. CP 36, 38.

Third, the defendant’s actual term of confinement in *Claborn* would have been the same whether he received a single enhancement or more than one (under the statute in effect at the time). This is so because the enhancements merely limited the parole board’s discretion to release the defendant early from his concurrent prison terms. *Id.*, at 637 n. 7. Here, by contrast, the imposition of multiple enhancements made a difference to Mr. Nguyen’s actual term of confinement. A single enhancement would have resulted in 24 months in prison. This is 48 months less than the 72 months actually imposed. CP 36, 38. Thus, unlike the defendant in *Claborn*, Mr. Nguyen did receive multiple punishments for being armed with a deadly weapon.

Finally, the *Husted* Court failed to determine whether the enhancements were the same in law and in fact. *Husted*, at 94-95. Having concluded that the legislative intent was unambiguous, the *Husted* Court did not even attempt to analyze the enhancements under *Blockburger*. Had the Court undertaken a *Blockburger* analysis, it would have concluded that the multiple enhancements were the same in law and in fact.

For all these reasons, the Court should reexamine the decision in *Husted*.

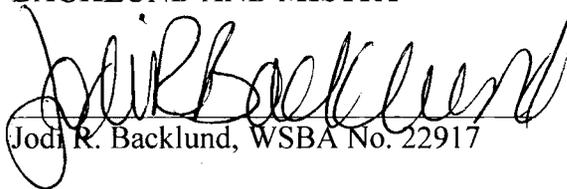
CONCLUSION

The trial court's summary denial of Mr. Nguyen's CrR 7.8 motion must be reversed, and the case remanded to the trial court.

In addition, the sentence must be vacated, and the case remanded for consideration of his request for an exceptional sentence. Upon resentencing, the court may impose only one deadly weapon enhancement.

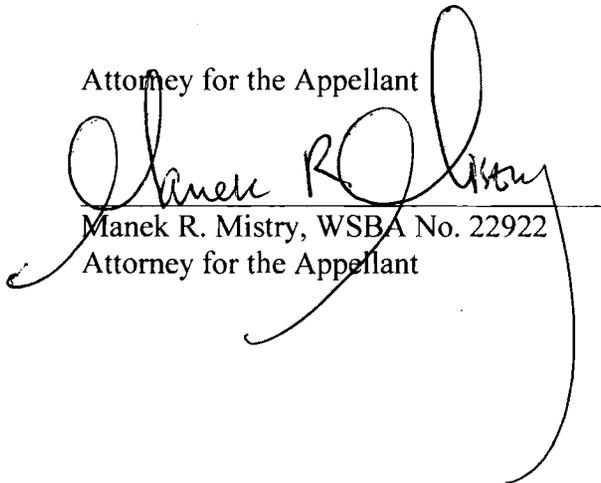
Respectfully submitted on June 6, 2011.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917

Attorney for the Appellant

A large, stylized handwritten signature in black ink, which appears to read "Manek R. Mistry". The signature is written over a horizontal line and extends significantly above and below the line.

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Hung Van Nguyen, DOC #748016
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

and to:

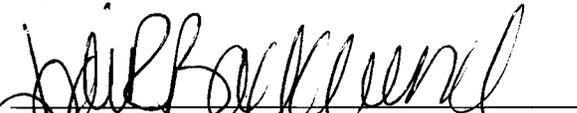
King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

And that I sent the original and one copy to the Court of Appeals, Division I, for filing;

All postage prepaid, on June 6, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 6, 2011.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant