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Court of Appeals
Division I
State of Washington

72582-3

No. 72582-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In re the Personal
Restraint of:

VINH Q. TRAN,
Petitioner.

PETITIONER'S REPLY BRIEF

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A. **ARGUMENT**

1. The convictions for robbery and assault in Counts 5 and 7 violate the Fifth Amendment prohibition on double jeopardy, requiring vacation of the assault conviction and resentencing.

Pursuant to RCW 10.73.100(3), a claim of a double jeopardy violation is exempt from the one-year time limit on collateral attack of a conviction.

Prosecutors may not “divide a defendant's conduct into segments in order to obtain multiple convictions.” *State v. Jackman*, 156 Wn.2d 736, 749, 132 P.3d 136 (2006). Generally an “assault and robbery stemming from a single violent act are the same for double jeopardy purposes and that the conviction for assault must be vacated at sentencing.” *State v. Freeman*, 153 Wn.2d 765, 774, 108 P.3d 753 (2005); *see also, In re the Personal Restraint of Francis*, 170 Wn.2d 517, 525, 242 P.3d 866 (2010) (vacating second-degree assault conviction under double jeopardy clause because it merged with first-degree attempted robbery conviction).

The assault at issue was part and parcel to the robbery, sharing the singular intent of obtaining as much of Ms. Giang’s property as possible. That the assault did not actually result in the disclosure of additional property does not alter that fact. Indeed, had Ms. Giang

provided additional valuable the State could not have argued that constituted a second robbery as it would have still plainly been a part of a single strong-armed robbery. The assault conviction should be vacated, and the case remanded for resentencing. *Francis*, 170 Wn.2d at 531.

2. The court improperly included Mr. Tran’s juvenile offense in his offender score.

Because a miscalculated offender score renders a judgment facially invalid the one-year time limit in RCW 10.73.090 does not apply.

The State has conceded the trial court improperly included Mr. Tran’s juvenile offense in his offender score. “A sentence, which was improperly calculated using previously washed out juvenile offenses, is invalid on its face.” *In re the Persona Restraint of LaChapelle*, 153 Wn. 2d 1, 6, 100 P.3d 805 (2004) (citing *In re the Personal Restraint of Goodwin*, 146 Wn.2d 861, 865–67, 50 P.3d 618 (2002)). *Goodwin* explained:

This is because a sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. Moreover, a sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.

146 Wn.2d at 868 (Internal quotations, brackets, ellipses and citations omitted) (citing *In re the Personal Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997)).

In its answer, the State nonetheless claims Mr. Tran cannot show his judgment is facially invalid. Answer 9-10. To do so, however, the State, simply ignores the above cited authorities. It is clear Mr. Tran's offender score was miscalculated. It is equally clear, a miscalculated offender score results in a facially invalid judgment. Thus, this claim is not time-barred. *Goodwin*, 146 Wn.2d at 868.

As set forth in Mr. Tran's supplemental brief, even if the the Court determined this issue is time-barred, the Court could dismiss the claim as a stand-alone claim in the petition. *In re the Personal Restraint of Wilson*, 169 Wn. App. 379, 395, 279 P.3d 990 (2012). *Wilson* held:

In a personal restraint petition filed after the one-year time-bar, where one or more of the grounds asserted for relief falls within the exceptions in RCW 10.73.100 and one or more does not, the petition is "mixed" and the issues sought to be raised under an exception listed in RCW 10.73.100 must be dismissed.

Id.

B. CONCLUSION

For the reasons above, and as set forth in his petition and supplemental brief, this Court should grant Mr. Tran's petition vacate

his assault conviction and remand the matter for resentencing with direction to the trial court to resentence Mr. Tran without inclusion of the 1995 juvenile offense in the court's offender score calculation.

Respectfully submitted this 15th day of March, 2016.

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