

NO. 45656-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JASON DELACRUZ,

Appellant.

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

The Honorable Jerry T. Costello, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR.....	1
	Issues pertaining to assignments of error.....	1
B.	STATEMENT OF THE CASE.....	1
C.	ARGUMENT.....	3
	1. THE SENTENCING COURT FAILED TO STRICTLY COMPLY WITH THE SPECIFIC LIMITATIONS OF THE APPELLATE COURT’S MANDATE.	3
	2. DELACRUZ ADOPTS AND INCORPORATES THE ARGUMENTS MADE BY HERNANDEZ IN THIS JOINED APPEAL.	5
D.	CONCLUSION.....	5

TABLE OF AUTHORITIES

Washington Cases

<u>In re Marriage of McCausland</u> , 129 Wn.App. 390, 118 P.3d 944 (2005), <u>rev'd on other grounds</u> , 159 Wn.2d 607, 152 P.3d 1013 (2007).....	4
<u>In re Wilson's Estate</u> , 53 Wn.2d 762, 337 P.2d 56 (1959).....	4
<u>State v. Barberio</u> , 121 Wn.2d 48, 846 P.2d 519 (1993).....	4
<u>State v. Kilgore</u> , 167 Wn.2d 28, 216 P.3d 393 (2009).....	3, 4
<u>State v. Schwab</u> , 134 Wn. App. 635, 141 P.3d 658 (2006), <u>aff'd</u> , 162 Wn.2d 664, 185 P.3d 1151 (2008).....	4

Statutes

RCW 9.94A.589(1)(c)	2
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Rules

RAP 10.1.....	1, 5
RAP 2.5(c)(1).....	4

A. ASSIGNMENTS OF ERROR

1. The sentencing court failed to strictly comply with the specific limitations of the appellate court's mandate.

2. Pursuant to RAP 10.1, appellant adopts and incorporates the assignments of error set forth in the co-appellant's Opening Brief.

Issues pertaining to assignments of error

1. Where the appellate court remanded with specific instructions to vacate an unlawful conviction and resentence solely with respect to that action, did the sentencing court exceed this mandate by resentencing on all counts based on an issue not raised in the previous appeal?

2. Pursuant to RAP 10.1, appellant adopts and incorporates the issues set forth in co-appellant's Opening Brief.

B. STATEMENT OF THE CASE

In March 2011, appellant Jason Delacruz was sentenced on the following offenses:

- Count 1—first degree burglary
- Count 4—first degree theft
- Count 5—theft of a firearm
- Count 8—residential burglary
- Count 9—second degree theft
- Count 11—residential burglary
- Count 12—theft of a firearm
- Count 13—possession of a stolen firearm

Count 14—first degree theft
Count 16—first degree trafficking in stolen property
Count 17—first degree unlawful possession of a firearm

CP 15-16. The court ran the sentences on counts 12, 13, and 17 consecutively to each other and all other counts concurrently. CP 20. The total sentence imposed was 300 months. CP 19.

On appeal Delacruz and his codefendants argued that trial counsel were ineffective at sentencing for failing to ask the court to vacate their convictions for possession of a stolen firearm, since they had been convicted of theft of a firearm for the same property. The State conceded error, and this Court accepted the concession, stating “we vacate the convictions for possession of a stolen firearm because they merge with the convictions for firearm theft....We remand for resentencing regarding those counts....” CP 119. In the concluding paragraph of the opinion, this Court reiterated, “We affirm, but remand for vacation of the defendants’ convictions for possession of stolen firearms.” CP 126.

On remand, the State argued for the first time that count 5 should run consecutively to counts 12 and 17, relying on RCW 9.94A.589(1)(c). RP 6-7. Defense counsel noted that the State had not cross appealed the original sentence, and the Court of Appeals did not address that issue. Thus, the question was whether the unaddressed error could be corrected on remand. RP 9. To answer that question, the court needed to look at the

purpose for which the case was remanded. RP 4. Counsel argued that the trial court was not required to resentence based on the Court of Appeals' opinion, and the court should refuse to do so because the State had not appealed the original sentence. RP 16-17.

The State argued that the Court of Appeals remanded for resentencing, and the entire sentence was before the court. RP 17. It recommended slightly different terms so that the total sentence, without the vacated conviction but running count 5 consecutively, would remain 300 months. RP 18.

The sentencing court interpreted the Court of Appeals' opinion as remanding for resentencing as a whole, rather than just vacation of the possession of a stolen firearm conviction. It stated that it was exercising its discretion to resentence. RP 19. It adopted the State's recommendation, running counts 5, 12, and 17 consecutively, and imposing a total confinement of 300 months. RP 32-33; CP 65.

C. ARGUMENT

1. THE SENTENCING COURT FAILED TO STRICTLY COMPLY WITH THE SPECIFIC LIMITATIONS OF THE APPELLATE COURT'S MANDATE.

A trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate. State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009); see also In re Wilson's Estate, 53 Wn.2d 762,

764, 337 P.2d 56 (1959) (trial court may consider no issue other than the one for the determination of which the case was remanded). The appellate court's mandate is binding on the superior court and must be strictly followed. In re Marriage of McCausland, 129 Wn.App. 390, 399, 118 P.3d 944 (2005), rev'd on other grounds, 159 Wn.2d 607, 152 P.3d 1013 (2007).

When the appellate court issues an open ended mandate on remand, the trial court has discretion to revisit an issue that was not the subject of the earlier appeal. Kilgore, 167 Wn.2d at 38 (citing State v. Barberio, 121 Wn.2d 48, 51, 846 P.2d 519 (1993); RAP 2.5(c)(1)); see also State v. Schwab, 134 Wn. App. 635, 645, 141 P.3d 658 (2006) (where appellate court remands "for further proceedings" or instructs trial court to enter judgment "in any lawful manner" consistent with opinion, court has authority to decide any issue necessary to resolve case on remand), aff'd, 162 Wn.2d 664, 185 P.3d 1151 (2008). The trial court has no discretion to exceed specific limitations set forth by the appellate court, however. See Kilgore, 167 Wn.2d at 42.

In this case, the lower court interpreted this Court's mandate as open ended, stating it was exercising its discretion to resentence Delacruz on all counts. This interpretation ignores the Court's specific instruction regarding remand.

This Court remanded Delacruz's case with specific directions to the superior court to vacate the conviction for possession of a stolen firearm. Resentencing was directed solely with respect to removing the unauthorized conviction. Nothing in the remand instructions authorized resentencing on the remaining convictions. In changing the sentence as to those convictions, the sentencing court exceeded the scope of the appellate court mandate, and the case must be remanded for reinstatement of the original sentence, with the possession of a stolen firearm conviction vacated, in accordance with the earlier mandate.

2. DELACRUZ ADOPTS AND INCORPORATES THE ARGUMENTS MADE BY HERNANDEZ IN THIS JOINED APPEAL.

Pursuant to RAP 10.1, Delacruz adopts and incorporates the arguments set forth in Hernandez's Opening Brief.

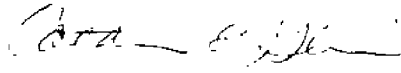
D. CONCLUSION

For the reasons discussed above, this court should remand for deletion of the substituted consecutive sentence.

DATED June 23, 2014.

Respectfully submitted,

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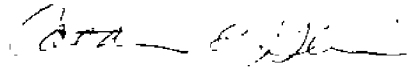
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Catherine E. Glinski
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