

No. 66335-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JESS RICHARD SMITH,

Appellant.

2011 OCT 14 PM 6:09  
COURT OF APPEALS  
JESS RICHARD SMITH  
1100 5TH AVENUE  
SEATTLE, WA 98101

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT MISAPPLIED CrR 7.8(c)(2) BY FAILING TO ADDRESS THE MERITS OF MR. SMITH'S MOTION

The State acknowledges Mr. Smith's CrR 7.8 motion was timely. SRB at 6. Nonetheless, the State contends the trial court properly transferred the motion to the Court of Appeals for consideration as a PRP because Mr. Smith has not made a substantial showing he is entitled to relief and the issues presented do not require a factual hearing. SRB at 6. But regardless of whether Mr. Smith has made a substantial showing *on appeal* that he is entitled to relief, the *trial court* was required to make that determination. The court misapplied the rule because it summarily transferred the motion to this Court without determining whether Mr. Smith made a substantial showing he was entitled to relief.

As argued in the opening brief, CrR 7.8(c)(2) requires the trial court to retain a timely CrR 7.8 motion if the court determines the "defendant has made a substantial showing that he or she is entitled to relief" or resolution of the motion will require a factual hearing. State v. Smith, 144 Wn. App. 860, 863-64, 184 P.3d 666 (2008); CrR 7.8(c)(2). "Only when these prerequisites are absent

may the superior court transfer a *timely* petition to this court for consideration as a personal restraint petition." *Id.*

In other words, the court must address the merits of the motion in order to determine whether the petitioner has made a substantial showing he is entitled to relief. Because the trial court did not address the merits of Mr. Smith's motion, the court misapplied CrR 7.8.

2. THE RECORD SHOWS IT WAS THE  
STATE—NOT MR. SMITH—WHO MOVED TO  
VACATE THE JUDGMENT

The State contends there is no evidence in the record to show it was the State who moved to withdraw the guilty plea. SRB at 7. To the contrary, the record shows the State moved *ex parte* to vacate the judgment and file an amended information even before Mr. Smith was represented by counsel.

As discussed in the opening brief, this Court issued an opinion on January 31, 2005, which held that Mr. Smith was "entitled to withdraw his plea" because he "pleaded guilty to a nonexistent crime." CP 39. The mandate was issued on March 28, 2005. Sub #59.

Only a few days later, on April 5, 2005, the State, *ex parte*, filed "Motion and Order Permitting Filing of a Third Amended

Information." CP 91-92. That same day, without a hearing, the court signed an order granting the motion. Id. Defense counsel's signature does not appear anywhere on the document. Id. The motion and order do not indicate that Mr. Smith was given notice of the State's motion. Id.

Two days later, on April 7, 2005, the court signed "Order Vacating Judgment and Sentence re: Murder in the Second Degree." CP 93. The order was presented by the prosecuting attorney. Id. The document contains no indication that either Mr. Smith or defense counsel was given notice of the presentation of the order. Id. Again, no hearing was held.

Defense counsel did not file a notice of appearance until four days later, on April 11, 2005. Sub #62.

Thus, the record shows it was the State—not Mr. Smith—who moved to vacate the judgment. It was the State—not Mr. Smith—who moved to file an amended information charging Mr. Smith with the greater offense of first degree murder. CP 94-95. Unrepresented by counsel and without notice of the State's motions, Mr. Smith was given little chance to object.

Mr. Smith did object at a hearing in September 2006, at which he argued the amended information violated his

constitutional right to be free from double jeopardy. CP 46-47. He complained the State was not authorized to file an amended information, and the court was not authorized to vacate his conviction, because he had never moved to withdraw his plea. CP 46. The court denied the motion, reasoning that the Supreme Court's decisions in Andress and Hinton rendered the guilty plea "void." CP 47.

But as discussed in the opening brief, Andress and Hinton rendered Mr. Smith's guilty plea merely "voidable," not "void." State v. Hall, 162 Wn.2d 901, 908-09, 177 P.3d 680 (2008). Because Mr. Smith did not move to withdraw his guilty plea, his original judgment was still valid. Thus, his subsequent prosecution and conviction for first degree murder violated his constitutional right to be free from double jeopardy.

3. THE STATE WAS PRECLUDED FROM  
FILING A GREATER CHARGE ON REMAND  
BECAUSE THE CONVICTION WAS  
REVERSED ON THE BASIS OF A  
DEFECTIVE INFORMATION

The State contends the trial court did not apply the incorrect remedy for a conviction based on a defective information. That is because, according to the State, "Smith's conviction was not reversed because the State failed to charge all essential elements

of the crime of felony murder based on assault in the second degree." SRB at 12.

The State is incorrect. Washington courts have consistently characterized Andress errors as "trial errors" resulting from an invalid charge. In State v. Gamble, the Washington Supreme Court explained "all of the defendants were charged with and convicted of a presumptively valid offense that was, however, a *nonexistent offense*." State v. Gamble, 168 Wn.2d 161, 172, 225 P.3d 973 (2010) (emphasis added). In Personal Restraint of Hinton, the court similarly explained the defendant was "convicted of a *nonexistent crime*." In re Pers. Restraint of Hinton, 152 Wn.2d 853, 857, 100 P.3d 801 (2004) (emphasis added). "One of the elements of second degree felony murder is the predicate felony" but "[n]o statute established a crime of second degree felony murder based upon assault at the time the petitioners committed the acts for which they were convicted." Id. Therefore, a conviction for felony murder "resting on assault as the underlying felony is not a conviction of a crime at all." Id.

This Court has similarly characterized Andress errors as resulting from an invalid charge. In State v. Wright, the Court reiterated that, "[f]ollowing Andress, second degree felony murder

predicated on assault is a 'nonexistent crime.'" State v. Wright, 165 Wn.2d 783, 793, 203 P.3d 1027 (2009) (quoting Hinton, 152 Wn.2d at 857). Because the State proceeded under the "wrong statute," the charge was "invalid." Id. at 794-95. Thus, "the defendants' convictions were reversed due to the invalidity of the charge, not insufficient evidence," and they could therefore be "retried for the same offense." Id. at 796.

Likewise, in State v. DeRosia, this Court explained that pursuant to Andress, "the information here misstated the elements of second degree felony murder by impermissibly predicating the murder on an assault." State v. DeRosia, 124 Wn. App. 138, 147, 100 P.3d 331 (2004). Therefore, the defendant's article I, section 22 right to notice of the charge was violated. Id. at 150-52. The Court held "[t]he remedy for a conviction based on a defective information is dismissal without prejudice to the State refiling the information." Id. at 153 (quoting In re Pers. Restraint of Thompson, 141 Wn.2d 712, 725, 10 P.3d 380 (2000) (quoting State v. Vangerpen, 125 Wn.2d 782, 793, 888 P.2d 1177 (1995))).

As this Court recognized in DeRosia, it is well established that when an information "charg[es] no crime," it is constitutionally invalid. E.g., Vangerpen, 125 Wn.2d at 795; Thompson, 141

Wn.2d at 725. The remedy is to dismiss the charge without prejudice to the right of the State to recharge and retry the offense for which the defendant was convicted or for any lesser included offense or a crime of a lesser degree. Vangerpen, 125 Wn.2d at 791; Thompson, 141 Wn.2d at 722.

When a conviction is reversed due to an invalid charging document, the mandatory joinder rule, CrR 4.3.1(b)(3), generally precludes the State from re-filing an information that includes a new related charge based on the same conduct which could have been joined in the original information. State v. Dallas, 126 Wn.2d 324, 329-30, 892 P.2d 1082 (1995); State v. Anderson, 96 Wn.2d 739, 741-42, 638 P.2d 1205 (1982). An exception exists for lesser included offenses. Dallas, 126 Wn.2d at 229-30; Anderson, 126 Wn.2d at 742. That is, the "defendant may be retried for the convicted offense and any lesser included offenses," but "may not, however, be retried on an offense of a higher degree." Anderson, 96 Wn.2d at 742.

In Gamble, the Supreme Court carved out an exception to the mandatory joinder rule for Andress cases. In Gamble, a collection of consolidated cases, each defendant was convicted of second degree felony murder with assault as the predicate felony.

Gamble, 168 Wn.2d at 167. The convictions were either vacated pursuant to Andress or, after reversal, retrial on the felony murder charge was precluded by Andress. Id. Each defendant was tried on new charges, including second degree intentional murder, homicide by abuse, and manslaughter. Id. The Supreme Court held "[t]he circumstances of Andress and its effect on numerous existing second degree felony murder convictions are out of the ordinary, not within the control of the State, and extraneous to the action of the court." Id. at 170. The "extraordinary nature" of the circumstances was shown by the fact that in several cases the defendants had been charged only with second degree felony murder based on assault. Id. If the mandatory joinder rule were to apply and bar any additional homicide charges, "these defendants would *never* have any viable homicide charges brought against them." Id. Thus, "[t]he decision in Andress and its impact on all second degree felony murder convictions based on assault entered over more than 25 years constitute 'extraordinary circumstances' for purposes of CrR 4.3.1(b)(3)" and an exception to the mandatory joinder rule applies. Id. at 170-71.

But Gamble did *not* hold the State may re-file *more serious charges* following the dismissal of an information based on Andress

error. As noted, in Gamble, most of the defendants were tried on new charges that were either of the same seriousness as second degree felony murder, or on lesser charges. See Gamble, 168 Wn.2d at 167. In one case, the defendant was retried on the more serious charge of homicide by abuse and received a longer sentence than he originally received. Id. at 187. But the court upheld the conviction on that charge only because "[g]iven the severity of the allegations, homicide by abuse was the only reasonable charge." Id.

The same cannot be said in this case. Here, the State re-filed an information charging Mr. Smith in count one with the greater crime of first degree felony murder and in count two with second degree intentional murder. CP 94-95. The jury found him guilty of first degree murder as charged in count one and guilty of the lesser included crime of manslaughter in the first degree for count two.<sup>1</sup> CP 96-97.

Thus, first degree manslaughter was a "reasonable charge." Gamble, 168 Wn.2d at 187. There was no reason not to apply the usual remedy for a charging document violation: dismissal without prejudice to the State's ability to re-file the same charge or a charge

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<sup>1</sup> The first degree manslaughter conviction was subsequently vacated on appeal on the basis of double jeopardy. CP 11.

for a lesser included or inferior degree offense. Vangerpen, 125 Wn.2d at 791; Thompson, 141 Wn.2d at 722. Failure to apply the usual remedy was error.

B. CONCLUSION

For the reasons set forth above and in the opening brief, the trial court erred in transferring Mr. Smith's CrR 7.8 motion to the Court of Appeals for consideration as a PRP without addressing the merits of the motion. Second, Mr. Smith's constitutional right to be free from double jeopardy was violated when he was convicted twice in successive prosecutions for the same offense. Finally, the trial court applied the wrong remedy for the charging document violation when it permitted the State to re-file a charge of first degree murder.

Respectfully submitted this 14th day of October 2011.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
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	)	
JESS SMITH,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> ANN MARIE SUMMERS, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> JESS SMITH 739951 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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2011 OCT 14 PM 9:09  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF OCTOBER, 2011.

X \_\_\_\_\_  
*[Handwritten Signature]*

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