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COURT OF APPEALS

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STATE OF WASHINGTON
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NO. 34224-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK KIRKWOOD,

Appellant.

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

The Honorable Linda Lee, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. FREEMAN IS CONTROLLING AUTHORITY ON THE ISSUE OF WHETHER MR. KIRKWOOD CAN BE SEPARATELY PUNISHED FOR ASSAULT AND ROBBERY AND THE TRIAL COURT ERRED IN NOT FOLLOWING FREEMAN.

Derrick Kirkwood received sentences totalling 316 months because the jury found that he held three people in the living room of their house for less than five minutes at gunpoint while an accomplice searched the house unsuccessfully looking for drugs to take. RP 146-147, 151, 154, 167, 172-177, 221-222, 251, 254-256. The jury did not find that he injured anyone; they acquitted him of the one counts of assault involving an injury. Under these circumstances, his assault convictions should merge with the attempted robbery conviction because the Legislature did not intend the "totally disproportionate" punishment arising from separate convictions.

In Ladner v. United States, 358 U.S. 169, 79 S.Ct. 209, 3 L. Ed. 199 (1958), the United States Supreme Court held that "punishments totally disproportionate to the act of assault could be

imposed" if separate punishments for assault could be imposed where several people were put in fear by having a gun pointed at them: "Thus, under the meaning for which the Government contends, one who shoots and seriously wounds an officer would commit one offense punishable by 20 years' imprisonment, but if he points a gun at five officers, putting all of them in apprehension of harm, he would commit five offenses punishable by 50 years' imprisonment, even though he does not fire the gun and no officer actually suffers injury." Ladner, 358 U.S. at 177.

Here, Mr. Kirkwood is serving a sentence commensurate with the top of the standard range for first degree assault with an offender score of 9, under a situation described as "totally disproportionate" in Ladner.

The Washington Supreme Court cited Ladner in the case of State v. Tvedt, 153 Wn.2d 705, 708, 716 n.4, 107 P.3d 728 (2005), in holding that "a single taking can result [only] in a conviction on one count of robbery, regardless of the number of persons present."

Then, in State v. Freeman, 153 Wn.2d 765, 779, 108 P.3d 753 (2005), the Court addressed the proliferation of counts in a different way, holding that second degree assault convictions cannot be separately punished from a robbery conviction where the assaults facilitated the robbery and the assaults had no independent purpose or effect. In reaching this holding, in Freeman, the Washington Supreme Court rejected the Blockerburger double jeopardy test or the merger test as a necessary prerequisite to finding the assaults and the robbery to be the same. Freeman, at 777.

The decision in Freeman clarifies and likely limits the holding in State v. Beals, 100 Wn. App. 189, 193-194, 997 P.2d 941, review denied, 141 Wn.2d 1006 (2000), the case relied on by this Court in its previous decision. Beals cannot be read to hold that attempted robbery can never merge with an assault; to so hold would make a strict Blockburger or merger test controlling where Freeman holds they are merely aids to statutory construction. Freeman, 772-773, 777. Beals held that the assault in that

case had an independent purpose and effect from the robbery and was not "merely . . . displaying a deadly weapon" to accomplish the attempted crime. Beals, at 194.

Thus, contrary to the assertion of respondent, Mr. Kirkwood can and did readily distinguish his case from Beals. See Brief of Respondent (BOR) at 16-17. Contrary to respondent's argument, the Court in Freeman expressly rejected that "separate elements" analysis as conclusive on the issue of whether conduct can be punished by separate convictions. Freeman, at 772. Contrary to respondent's argument, the mere display of the weapon here is precisely the situation the court in Beals contrasted with the situation there.

The trial court erred in not following Freeman, controlling authority on the issue, at resentencing. Under Freeman, Mr. Kirkwood should not have been punished separately for the assaults. His sentence should be reversed and remanded for resentencing without the assault convictions.

Mr. Kirkwood raised the issue at resentencing

because Freeman was decided in 2005 after the decision by this Court in October 2004, and constitutes a change in the law.

2. THE STATE PROPERLY CONCEDES THAT MR. KIRKWOOD'S OFFENDER SCORE WAS MISCALCULATED, BUT INCORRECTLY CONCLUDES THAT THE MISCALCULATION DOES NOT AFFECT THE BURGLARY CONVICTION.

The state correctly concedes that Mr. Kirkwood's assault convictions are the same course of conduct with his robbery conviction. BOR 11. That was the holding of this Court. BOR 11. The state then argues that the burglary anti-merger statute nonetheless operates to permit the assaults to count separately in calculating the offender score for the burglary conviction. BOR 11. This is error based on a misinterpretation of State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999).

First, the law on using crimes which were found to be the same criminal conduct as offender score is clear and unambiguous. RCW 9.94A.589 provides that "if the court enters a finding that some of all of the current offenses encompass the same criminal conduct then those current offenses shall be counted

as one crime." RCW 9.94A.525(5)(a)(i) provides that "prior offenses which were found, under RCW 9.94A.589(1)(a) to encompass the same criminal conduct, shall be counted as one offense."

In Tili the issue was whether an assault which merged with a rape conviction merged with a burglary conviction. The court concluded that it did not. Tili, 139 Wn.2d at 126. The issue was not a same criminal conduct issue. When a separate conviction is entered and a sentence imposed, that separate conviction and sentence represents a separate punishment for a crime. The calculation of the offender score merely determines the standard range for a crime. Tili should not be held to vary the clear and unambiguous statutory requirement that crimes which are determined to be the same criminal conduct count as only one offense in calculating the offender score.

If the assault convictions are not dismissed, Mr. Kirkwood's standard range should be recalculated for all convictions counting the robbery and assault as the same criminal conduct.

3. THE TRIAL COURT SHOULD HAVE CONSIDERED NOT APPLYING THE BURGLARY ANTI-MERGER STATUTE.

The state concedes that the trial court never considered whether to exercise its discretion not to apply the burglary anti-merger statute on the record. BOR 13-14. Although the issue was briefed, the absence of any reference to it suggests that the court did not consider or exercise discretion not to apply the statute.

4. THE TRIAL COURT ERRED IN IMPOSING FIREARM ENHANCEMENTS.

Appellant's argument is that the Legislature failed to enact a procedure by which a firearm enhancement could be submitted to the jury. That argument is set out in his opening brief at pages 17-22.

5. THE TRIAL COURT SHOULD HAVE CONSIDERED THE FIREARM CONVICTION TO BE THE SAME CRIMINAL CONDUCT WITH THE ASSAULTS.

Under the analysis of the Washington Supreme Court in State v. Haddock, 141 Wn.2d 103, 111, 3 P.3d 733 (1999), Eloise Ultican, Carol Coolidge and Michael Hassenger were the specific members of the general public who were the victims of both the

assaults and the unlawful possession of a firearm. Accordingly, since the act of possessing the firearm and using it to accomplish the assault was the same act at the same time and place, the possession of a firearm was the same criminal conduct with the assaults.

Mr. Kirkwood is entitled to raise this issue because he is entitled to a correct calculation of his offender score.

E. CONCLUSION

Appellant respectfully submits that his judgment and sentence should be reversed and his case remanded for resentencing.

DATED this 31st day of July, 2006.

Respectfully submitted,



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Certificate of Mailing

I, Rita J. Griffith, certify that on July 31, 2006, I deposited in the United States Mail, copies of the document to which this certification is attached, as well as appendices, addressed to:

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