

NO. 35673-2-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

GARY CRUMPTON,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION II
JAN 11 2011
TACOMA, WA

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Richard D. Hicks, Judge

Cause No. 00-1-01991-6

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Crumpton's motion to modify his judgment and sentence where the two counts of kidnapping (Counts II and III) merged into the robbery count (Count I) and this court's prior ruling did not constitute the "law of the case" on this issue.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying Crumpton's motion to modify his judgment and sentence where the two counts of kidnapping (Counts II and III) merged into the robbery count (Count I) and this court's prior ruling did not constitute the "law of the case" on this issue? [Assignment of Error No. 1].

C. STATEMENT OF THE CASE

Gary Crumpton (Crumpton) was charged by information filed in Thurston County Superior Court with one count of robbery in the first degree (Count I), two counts of kidnapping in the first degree (Counts II and III), and one count of burglary in the first degree (Count IV). [CP 2-3]. All four charges included a deadly weapon sentence enhancement allegation. [CP 2-3].

On January 16, 2001, Crumpton entered a statement of defendant on plea of guilty to all four counts sans the deadly weapon sentence enhancement. [CP 5-10]. The court accepted Crumpton's pleas of guilty to all four counts and engaged in colloquy with Crumpton in which Crumpton told the court that he had robbed a bakery and had walked the two women he was accused of kidnapping to another part of the store in

order to obtain more money from the store. [1-16-01 RP 12-15]. The court sentenced Crumpton to 129-months on Count I, 149-months on Count II, 51-months on Count III, and 87-months on Count IV all sentences running concurrently except for the sentences on Counts II and III for a total sentence of 200-months . [CP 11, 12, 13, 14, 15, 16-24; 1-16-01 RP 21-23]. Crumpton did file a direct appeal.

In 2005, this court filed an order dismissing petition [Supp. CP 44-47], denying Crumpton's personal restraint petition (PRP) holding that his convictions for robbery and two counts of kidnapping did not violate double jeopardy applying only the "same in fact and same in law" standard and holding that, therefore, his petition was not timely.

On November 15, 2006, Crumpton filed a motion to modify his judgment and sentence in Thurston County Superior Court alleging that in light of the State Supreme Court's decision in State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006), which did not disturb this court's decision in State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), that his convictions for robbery and two counts of kidnapping merged. [CP 25-30, 31-36]. The State responded by filing a memorandum in opposition to Crumpton's motion arguing that this court's decision on Crumpton's PRP constituted the "law of the case." [Supp. CP 48-58].

On December 1, 2006, the matter came before the Honorable Richard D. Hicks for decision. [12-01-06 RP 3]. The court agreed with the State and entered the following order denying Crumpton's motion to modify judgment and sentence:

THIS MATTER having come on for hearing before the above-entitled Court pursuant to the motion of the defendant, GARY CRUMPTON, to modify the Judgment and Sentence in the above cause, and the Court having reviewed the defendant's motion, and the Plaintiff's memorandum in response, hereby

FINDS that the defendant's motion has previously been considered by the Court of Appeals in the form of a personal restraint petition and denied. Therefore, that decision of the Court of Appeals being binding on this court, the defendant has failed to set forth any grounds justifying relief in this case, and pursuant to CrR 7.8(c)(2), the Court hereby:

ORDERS that the defendant's motion is denied.

[CP 37].

Timely notices of appeal were filed on December 12, 2006. [CP 38-40]. This appeal follows.

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN DENYING CRUMPTON’S MOTION TO MODIFY HIS JUDGEMENT AND SENTENCE WHERE THE TWO KIDNAPPING COUNTS (COUNTS II AND III) MERGED INTO THE ROBBERY COUNT (COUNT I) AND THIS COURT’S PRIOR RULING DID NOT CONSTITUTE ‘THE LAW OF THE CASE’ ON THIS ISSUE.

Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are concurrent. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. Id., at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses “clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment.” In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (*citing* State v. Calle, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishments as it will, “the role

of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Here, neither the robbery in the first degree nor the kidnapping in the first statutes contain specific language authorizing separate punishments for the same conduct. RCW 9A.56.200; RCW 9A.40.020. The offenses at issue here are thus not automatically immune from double jeopardy analysis. In re Burchfield, 111 Wn. App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” *Id.* The statute under which Crumpton was convicted of robbery in the first degree requires that property be taken from a person while armed with a deadly weapon. RCW 9A.56.200. The kidnapping in the first degree statute, as charged here, requires the prosecution to prove that a person was abducted. RCW 9A.40.020. The robbery in the first degree statute, as charged herein, requires the taking of property from a person, whereas the kidnapping in the first degree statute contains no such requirement. The two offenses contain different elements and, therefore, are not established by the “same evidence.” Thus the prohibition against double jeopardy is not violated here by applying the same evidence test as noted by this court in denying Crumpton’s PRP. [Supp. CP 44-47].

The “same evidence” test, however, is not always dispositive. In re Burchfield, 111 Wn. App. at 897. An appellate court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id. This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). “Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” Id. The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. State v. Calle, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, *which is separate and distinct from and not merely incidental to the crime of which it forms the element.* [Emphasis Added]. State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). This is the test that this court failed to address in considering Crumpton’s PRP and was the question presented to the trial court in his motion to modify his judgment and sentence, which the trial court also failed

to address instead relying on the doctrine of the “law of the case” to deny Crumpton’s motion.

Here, during the robbery of the bakery, Crumpton moved the two employees present during the robbery from the front of the store to the back office in order to make sure he had obtained all the money from the establishment without any form of restraint other than was necessary to facilitate the robbery. [1-16-01 RP 12-15]. This court should construe this as evidence that the first crime (robbery in the first degree) had not yet come to an end before the second and third crimes (two counts of kidnapping in the first degree) began, then the kidnappings *were incidental to, a part of, or coexistent with the robbery in the first degree*, with the result that the second and third convictions (kidnapping in the first degree) will not stand under the reasoning in State v. Johnson, *supra*.

The Washington Supreme Court has observed that “[t]he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.” State v. Adel, 136 Wn.2d 629, 635, 965 P.2d 1072 (1998). Accordingly, if this court determines that the kidnappings in the first degree (Counts II and III) “w[ere] incidental to, a part of, or coexistent” with the robbery in the first degree (Count I), then Crumpton’s kidnapping

convictions (Counts II and III) cannot be established and must, therefore, be reversed.

Support for this argument is found in this court's case of State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004) and the State Supreme Court decision in the same case. State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006). In Korum, this court stated, considering the sufficiency of the evidence and finding it lacking for the kidnapping convictions but not the robbery convictions, that:

Korum argues that we should reverse his kidnapping convictions because there was insufficient evidence of restraint in that "all of the kidnapping counts were merely 'incidental' to the robberies." Appellant's Br. At 52. In support, he cites State v. Green, in which the Supreme Court held that there was insufficient evidence of kidnapping because the restraint and movement of the victim was merely "incidental" to and not "an integral part of the and [was] independent of the underlying homicide." 94 Wn.2d 216, 227, 616 P.2d 628 (1980) ("While movement of the victim occurred, the mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping.") We agree with Korum that Green requires dismissal of the kidnapping charges here because they were incidental to the robberies.

...

As our Supreme Court has explained in an analogous robbery case,

Once the money had been obtained by force, the robbery was completed. Any incidental abduction or restraint occurring during this short period of time would merge into the robbery as a matter of law. State v. Johnson, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979). “[T]he mere incidental restraint and movement of a victim which might occur during the course of a [crime] are not, standing alone, indicia of a true kidnapping.” State v. Green, 94 Wn.2d 216, 227, 616 P.2d 628 (1980).

State v. Korum, 120 Wn. App. at 702-703, 705.

This holding was not disturbed by the State Supreme Court. State v. Korum, 157 Wn.2d at 623-625. The State Supreme Court merely noted that the issue of whether these crimes should be reinstated because they did not in fact merge for double jeopardy purposes had not been properly presented by the State to the court. Id. Nor can Crumpton's argument be disregarded based on the State Supreme Court holding in State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005). In Louis, the State Supreme Court denied the defendant's claim that his kidnapping conviction merged with his robbery conviction. However, a careful review of that case indicates the wisdom of the State Supreme Court's holding in that the defendant in Louis during the robbery moved the victims to another room, locked them in that room, and restrained them with duct tape. These acts were not incidental restraint and movement of the victims in order to facilitate the robbery. None of these facts were present in Crumpton's case, thus, the double jeopardy question regarding merger was and is still viable in the instant case. This question, merger, has not been previously addressed by this court as evidenced by its ruling denying Crumpton's prior PRP and cannot be dismissed merely by resorting to the doctrine of the "law of the case" as the trial court did in denying Crumpton's motion to modify his judgment and sentence.

The “law of the case” doctrine generally “refers to ‘the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand’” or to “the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case.” Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992). As applied here, this doctrine did not preclude the trial court from properly addressing Crumpton’s motion to modify his judgment and sentence as this court has not addressed the merger issue, nor does it preclude this court from doing the same now.

Finally, this matter is not precluded from review as being untimely under RCW 10.73.090. As noted by this court in denying Crumpton’s prior PRP an exception to the time limits of collateral attack on a judgment and sentence include a violation of double jeopardy. RCW 10.73.100. Crumpton, who is still in custody pursuant to the sentences for the instant convictions, filed a PRP raising double jeopardy issues, which he was entitled to raise under the exception set forth in RCW 10.73.100, that this court did not fully address. Crumpton filed the motion to modify his judgment and sentence at issue on November 15, 2006—the basis of the current appeal—within a year of the filing of this court’s certificate of finality entered on April 28, 2006 [Supp. CP 57], and within a year of the

State Supreme Court filing on August 17, 2006, of its decision in State v. Korum, supra. Given these facts, this court cannot dismiss his appeal based on a procedural ground that it was not timely. Nor can this matter be dismissed as a subsequent collateral attack as this court never fully addressed the issue presented by Crumpton's original PRP.

E. CONCLUSION

Based on the above, Crumpton respectfully requests this court to find that his convictions for kidnapping in Counts II and III merged into his conviction for robbery in Count I.

DATED this 4th day of June 2007.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 4th day of June 2007, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 4th day of June 2007.

Patricia A. Pethick
Patricia A. Pethick

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STATE OF WASHINGTON
BY DEPUTY