

NO. 35673-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

GARY CRUMPTON

Appellant.



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

The Honorable Paula Casey, Judge

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BRIEF OF RESPONDENT

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## A. STATEMENT OF THE ISSUE

Whether the judgement and sentence should have been modified to merge defendant's convictions for kidnapping (Counts II and III) with his conviction for robbery (Count I)

Appellant's Assignment of Error:

" 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. STATEMENT OF THE CASE

On December 15, 2000, the Thurston County Prosecutor's Office charged Gary Crumpton with Count I, Robbery in the First Degree, Count II, Kidnapping in the First Degree, Count III, Kidnapping in the First Degree, and Count IV, Burglary in the First Degree. All counts included the deadly weapon enhancement. [CP 2-3]

On January 16, 2001, Crumpton, represented by counsel, entered guilty pleas to all four charged counts pursuant to a plea bargain with the prosecutor. The court sentenced the defendant to 129 months on Count I, First Degree robbery; to 149 months on Count II, First Degree kidnapping; to 51 months on Count III, First Degree kidnapping; to 87 months on Count IV, First Degree

Burglary. The kidnapping counts were ordered to run consecutively for a total of 200 months. The robbery and burglary counts were ordered to run concurrently with the kidnapping counts. The total sentence was therefore 200 months. [CP 5-10]. All four sentences were at the bottom of the standard ranges, respectively: Count I, 129-171 months; Count II, 149-198 months; Count III, 51-68 months; Count IV, 87-116 months. [CP 11-24], Judgment and Sentence]. Had they all been at the top of the standard range and all ordered to run consecutively, the total sentence would have been 553 months. Had the deadly weapon enhancements on all charges, 60 months each for a total of 240 months, not been dropped pursuant to the plea bargain, Crumpton would have faced a total possible sentence of 993 months after trial.

On March 30, 2005, Crumpton, pro se, filed a Personal Restraint Petition (PRP) with this court which was assigned case No. 33243-4-II, citing for authority *inter alia* State v Korum, 120 Wn. App.686, 86 P.3<sup>rd</sup> 13 (2004) and State v Green, 94 Wn.2d 216, 616 P.2d 628 (1980). On July 12, 2005, Crumpton, again pro se, filed a Motion to Stay based on the pending case of State v Louis, Supreme Court No. 75151-0. The stay was granted on July 21, 2005.

On November 5, 2005, the chief judge of this court signed an order dismissing defendant's PRP, explicitly ruling that Korum and Green *supra*, did not support his argument. Of particular significance is the order's comment, after extensive discussion, about the new Supreme Court case which was the reason for the granting of the stay, State v Louis, 155 Wn.2d 563, 120 P.3d 936 (2005). [Supp. CP 44-47]: "That decision issued October 6, 2005, *and directly refutes petitioner's claim.*" (emphasis added). The refuted claim was that charging two counts of kidnapping along with a count of robbery based on the evidence available in the prosecutor's file, made available to defendant through discovery, subjected him to double jeopardy.

On November 22, 2005, Crumpton, pro se, filed a Motion for Discretionary Review in the State Supreme Court. Citing Louis, *supra*, the Supreme Court Commissioner signed an order on January 11, 2006, under Supreme Court No. 77968-6 denying review of this Court's decision.

Mr. Crumpton demonstrates no error meriting this court's review. Where, as here, the legislature has not expressly prohibited punishing two different offenses arising out of the same course of conduct, courts, in determining whether double jeopardy prohibits punishing both crimes, look to whether the offenses are the "same" in law and in fact. State v.

Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).”  
First degree robbery and first degree kidnapping are not the same in law. State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005) after completing the robbery, Mr. Crumpton committed two acts of kidnapping. The crimes were not factually the same.” (Appendix 1);

On February 7, 2006, Crumpton, pro se, filed a Motion to Modify Commissioner’s Ruling, which was denied on April 4, 2006. (Appendix 2)

On November 15, 2006, Crumpton, pro se, filed with the Superior Court in Thurston County a Motion to Modify Judgment and Sentence, based on the then new Supreme Court decision in State v Korum, 157 Wn.2d 614, 141 P.3d 13 (2006). [CP 25-36]

On December 1, 2006, the trial court denied Crumpton’s motion. [CP 37]. This appeal followed.

### C. ARGUMENT

1. Defendant’s convictions for two counts of First Degree Kidnapping, Counts II and III, did not merge with his conviction for First Degree Robbery, Count I, because they were based on different laws and different facts. The Judgement and Sentence should not be modified.

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1 The documents in the appendices are being offered for the court’s information and convenience.

The factual evidence in the prosecutor's file which supported the four separate charges is summarized in this Court's Order Dismissing Petition [Supp. CP 44-47], a summary which Crumpton neither questions nor supplements in this appeal. He does not contend the prosecutor lacked sufficient evidence to charge him with First Degree robbery. He does not contend that there was insufficient evidence to charge him with two counts of First Degree kidnapping. He does not even question his First Degree burglary conviction. His contention is that the separate kidnapping charges should be retroactively *deemed* merged with the robbery charge. It is important to note that the evidence in question is not evidence actually presented to a jury, but available evidence provided by the police existing in the prosecutor's file with which he was presumptively familiar through discovery. Knowing what the prosecutor had to offer a jury, he considered what the prosecutor offered him, calculated his odds and chose to enter guilty pleas to all four counts in the Information. This plea bargain was precisely the indivisible package deal very recently honored again by our State Supreme Court.

The State's position is supported by our previous holdings where we have held indivisible plea bargains involving multiple charges are found where pleas

were made at the same time, described in one document, and accepted in a single proceeding. State v. Turley, 149 Wn.2d 395, 398, 69 P.3d 338 (2003); see also State v. Ermels, 156 Wn.2d 528,541, 131 P.3d 299 (2006); State v Bisson, 156 Wn.2d 507,519, 130 P.3d 820 (2006).

In re. Pers. Restraint of Shale, 160 Wn.2d 489, 493, 158 P.3d 588 (2007).

Crumpton discusses this plea bargain at pages 2 and 3 of his Motion and Memorandum to Modify Judgment and Sentence, noting that prior to the plea he discussed with his counsel his concerns about whether his actions constituted even a single kidnapping, much less two, and mentioning another incentive to his plea, the dropping of charges against his accomplice. [CP 25-36]. The clear conclusion to be drawn is that he was well aware then of the issue he argues now. He weighed his odds with his lawyer's help and freely made the choice he now regrets. It is respectfully submitted that this case illustrates the prudence and wisdom of the scrupulously detailed guilty plea protocol.

Significantly, defendant notes in his Motion and Memorandum that the Supreme Court's Korum decision "did not disturb the holding of the court of appeals". He does this immediately after arguing that this court's Korum decision is

authority for his proposition that, “Even if the kidnappings in this case did occur, they should have ‘at the least’ merged with the robbery.” (Defendant’s Motion and Memorandum to Modify Judgment and Sentence [CP 25-36], at pg.5 of memorandum). The *non sequitur* is clear. This court ruled that its own decision in Korum did not support defendant’s argument. After its own Korum decision, our Supreme Court agreed. Defendant acknowledges this, but still argues to the contrary.

Obviously the trial court was bound by decisions of the Court of Appeals. When the decisions involve the very same issues in the very same case they clearly become the “law of the case”. State v Harrison. 148 Wn.2d 550, 61 P.3d 1104 (2003); State v Strauss, 119 Wn.2d 401, 832 P.2d 78 (1992). The record before Judge Hicks on the Motion to Modify could not have been clearer; his decision to deny the motion was the obvious one.

With assistance of counsel defendant weighed his options, including the right to preserve his potential double jeopardy argument for trial and appeal. Instead, he accepted the prosecutor’s offer and proceeded with the lengthy process required by the court rules to assure the court that he was freely and voluntarily pleading guilty to all counts with full understanding of the

plea bargain and full appreciation of all the consequences of a guilty plea. It is difficult to imagine a clearer example of waiver of the right to be heard but now arguing what he consciously chose not to argue then. This court, after reviewing defendant's Personal Restraint Petition and the State's response which included the transcripts of witness interviews, was clearly convinced that the kidnapping and robbery charges were distinct both legally and factually. Citing the very cases cited by defendant, it held there simply was no double jeopardy. The Supreme Court concurred.

Defendant's argument here should be viewed more as a motion to this court to reconsider its own earlier ruling than as an appeal from a clearly directed trial court ruling. But why it should even consider reconsidering he does not explain either by citing new authority or by offering new argument.

The double jeopardy argument is based on a claim of multiple punishment. However, as our Supreme Court recently pointed out in State v Daniels, 160 Wn.2d 256, 156 P.3d 905 (2007) , the protection offered by the fifth amendment to the U.S Constitution and by article I, section 9 of the Washington Constitution is against multiple punishment for the *same* offense. Further, the double jeopardy clause is inapplicable when the

evidence to convict on each separate charge is sufficient. Citing as authority on the *same offense* issue State v Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995), this court recently addressed double jeopardy as follows.

The same element test, commonly referred to as the Blockberger test, examines whether each offense contains an element not contained in the other. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

See also State v. Gamble, 137 Wn. App. 892, 155 P.3d 962 (2007).

The argument that a kidnapping conviction should be dismissed because the evidence in the record does not support it cannot be made here. What is argued is a far different proposition; that the kidnapping charges, although clearly supported by the evidence in the record, should be dismissed because they somehow and mysteriously merged with a robbery that preceded, them. This is the core of defendant's argument. He does not claim insufficient available evidence to support his guilty pleas to kidnapping, and in the face of this Court's holdings confirmed by our Supreme Court's, he can no longer claim this evidence was not

distinct factually and legally from evidence supporting his guilty plea to robbery. Having lost that argument, he now raises what he calls a new one which he claims *this* court failed to address before. (Appellant's brief pg. 7) In effect, he argues that double jeopardy really did exist because the kidnapping and robbery counts, even though factually and legally separate, should be *deemed* merged. For this novel theory no controlling authority is cited.

Crumpton does not even claim his guilty pleas were not made knowingly and voluntarily with assistance of counsel. What he asks, in effect, is that just the kidnapping pleas, but not the others, be vacated. Unlike the plea to felony murder predicated on assault vacated in In Re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), because it was a plea to a crime that never existed, defendant's pleas were to kidnapping charges clearly valid on their face, and he admittedly was aware when he entered them of the very argument he makes now. In effect he made an Alford plea. "It is the nature of an Alford plea that the defendant denies his guilt, but chooses a plea bargain rather than a trial. Subsequent regret for this decision is insufficient to mandate withdrawal of the plea." State v Norval, 35 Wn.App. 775, 784, 669 P.2d 1264 (1983).

As stated above, this plea bargain was precisely the indivisible package deal our Supreme Court has repeatedly honored. It is respectfully submitted that In re. Personal Restraint of Shale, *supra* is dispositive of this case.

Several of the previously cited cases make it clear that if it does so explicitly or by implication the legislature may impose multiple punishments for the same conduct. The constitutional concern is that a defendant not be punished more severely than the legislature intended. This concern is not present when a defendant represented by counsel negotiates a plea. It is a fair inference that, if defendant or his attorney believed he could not be convicted of all counts including firearm enhancements at trial, he would not have entered into this agreement. He is simply not in the same position as a person convicted at trial.

Our legislature clearly has the authority to define separate and distinct crimes with different punishments. In the case of kidnapping and robbery it has clearly chosen to do so and our Supreme Court has clearly ratified that choice. "We concluded that First Degree kidnapping does not merge into First Degree robbery because proof of kidnapping is not necessary to prove robbery."

State v Louis *supra*, citing State v Vladovic, 99 Wn.2d 413, 66 P.2d 853 (1983).

Supreme Court Commissioner Crooks saw that choice clearly applicable to this case (Appendix 1), citing Louis which explicitly rejected the invitation to overrule Vladovic and adopt the “kidnapping merger” rule proposed by appellant. The court summarily affirmed him. (Appendix 2) The concept of mandatory *merger* of punishment under certain circumstances, as opposed to discretionary concurrent sentences, appears nowhere in our statutes. Nor does any case cited by defendant support this novel theory. The prosecutor properly chose to file separate counts. Crumpton consulted with counsel and, presumably very cautiously, accepted the bargain offered. He elected to plead guilty to all counts, including those whose validity he may have questioned then but chose not to argue at the time. The court, having followed the scrupulous protocol required, accepted the pleas and imposed a sentence. One final note: Even had defendant given the trial court an opportunity to rule on his merger argument and even had the trial court agreed, he still would have faced a maximum range sentence of 171 months on the First Degree robbery charge (Count I), plus a maximum range sentence of 116 months on the First

Degree burglary degree charge (Count IV), with a 60 month firearm enhancement on both for a total of 407 months. Pursuant to plea bargaining, he actually received only 200 months including the two First Degree kidnapping counts. Facing four consecutive firearm enhancements on top of four counts running consecutively, he bargained himself out of a potential 993 month sentence, a very good deal indeed.

#### D. Conclusion

The Trial Court's' denial of Defendant's Motion to Modify Sentence should be affirmed.

Respectfully submitted this 5<sup>th</sup> of September, 2007.

*for* Carol Lauferne #19229  
George Oscar Darkenwald WSBA No. 3342  
Attorney for Respondent

## **APPENDIX “1”**

**THE SUPREME COURT OF WASHINGTON**

FILED  
SUPREME COURT  
STATE OF WASHINGTON

2006 JAN 11 P 2:23

BY C.J. MERRITT

CLERK

In re the Personal Restraint  
Petition of

GARY CRUMPTON,

Petitioner.

NO. 77968-6

RULING DENYING REVIEW

Gary Crumpton was convicted in 2001 of first degree robbery, two counts of first degree kidnapping, and first degree burglary. Mr. Crumpton filed a personal restraint petition in Division Two of the Court of Appeals in April 2005, arguing that his robbery and kidnapping convictions violated double jeopardy principles. *See* RCW 10.73.100(3) (double jeopardy claim exempt from one-year time limit on collateral attack). Finding this claim clearly meritless, the Chief Judge of the Court of Appeals dismissed the petition. Mr. Crumpton now seeks this court's discretionary review. RAP 16.14(c); RAP 13.5.

Mr. Crumpton demonstrates no error meriting this court's review. Where, as here, the legislature has not expressly prohibited punishing two different offenses arising out of the same course of conduct, courts, in determining whether double jeopardy prohibits punishing both crimes, look to whether the offenses are the "same" in law and in fact. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

First degree robbery and first degree kidnapping are not the same in law. *State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005).

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Nor in this instance are the crimes the same in fact. Mr. Crumpton stole money from a cash register after pointing a knife at the sales clerk. With that act, he completed the robbery. He then took the sales clerk at knife point to a back room, where the store manager was on the phone. Pointing the knife at the manager, Mr. Crumpton demanded more money. When the manager convinced Mr. Crumpton that there was no more money, Mr. Crumpton asked where a door in the room led. The manager responded that it led outside. Mr. Crumpton told her to show him. The manager then thought about fleeing, but Mr. Crumpton placed the knife in her back, grasped her hair, and led her to the door. He then forced her back inside as he fled. Thus, after completing the robbery, Mr. Crumpton committed two acts of kidnapping. The crimes were not factually the same. *See Louis*, 155 Wn.2d at 570 (robbery and kidnapping not factually the same when defendant robbed jewelry store and forced owners into bathroom and bound and gagged them).

Contrary to Mr. Crumpton's argument, *Louis* is not factually distinguishable simply because the defendant there bound and gagged the victims and confined them to a bathroom. As did the defendant in *Louis*, Mr. Crumpton completed the act of robbery and then kidnapped two people by restraining them with the threatened use of deadly force. That the kidnappings may have "facilitated" the robbery does not render the crimes the "same" for double jeopardy purposes. *Louis*, at 570.

The motion for discretionary review is denied.

  
COMMISSIONER

January 11, 2006

## **APPENDIX "2"**

# THE SUPREME COURT OF WASHINGTON

In re Personal Restraint Petition of  
GARY CRUMPTON,  
Petitioner.

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NO. 77968-6

## ORDER

C/A NO. 33243-4-II

Department I of the Court, composed of Chief Justice Alexander and Justices C. Johnson, Sanders, Chambers and Fairhurst (Justice Owens sat for Justice Fairhurst), considered this matter at its April 4, 2006, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 4<sup>th</sup> day of April, 2006.

For the Court

Henry L. Alexander  
CHIEF JUSTICE

FILED  
CLERK OF SUPERIOR COURT  
2006 APR -4 P 1:16  
BY: C. M. DORRITT  
CLERK

6/1/16

