

Original

No. 36185-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRUCE WAYNE OSGOOD,

Appellant.

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STATE OF WASHINGTON
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STATE OF WASHINGTON
BY *[Signature]* DEPUTY

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

The Honorable Thomas J. Felnagle

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ARGUMENT 1

THE CONVICTIONS FOR MANUFACTURING
METHAMPHETAMINE AND POSSESSION OF
PSEUDOEPHEDRINE WITH INTENT TO
MANUFACTURE VIOLATE DOUBLE JEOPARDY 1

B. CONCLUSION..... 5

TABLE OF AUTHORITIES

FEDERAL CASES

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76
L.Ed.2d 306 (1932)..... 2, 3

United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d
556 (1993) 3, 4

WASHINGTON CASES

State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005)..... 1, 2

A. ARGUMENT

THE CONVICTIONS FOR MANUFACTURING
METHAMPHETAMINE AND POSSESSION OF
PSEUDOEPHEDRINE WITH INTENT TO
MANUFACTURE VIOLATE DOUBLE JEOPARDY

Mr. Osgood contended that the trial court's entry of the two convictions, one for possession of methamphetamine with intent to manufacture and one for manufacture of methamphetamine, violated double jeopardy. In its response brief, the State contended Mr. Osgood's argument was incorrect because the two offenses contain elements the other does not. Brief of Respondent at 10-12. The State's argument should be rejected as it runs contrary to the decisions of the United States and Washington Supreme Courts as previously argued in the Brief of Appellant.

To determine legislative intent, this Court must first apply the "same evidence" test to determine whether the offenses "are identical both in fact and in law." *State v. Freeman*, 153 Wn.2d 765, 776, 108 P.3d 753 (2005). The same evidence test involves an examination of the elements of each offense and is similar to the rule set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) ("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”). In evaluating whether two offenses contain the same elements, this Court must consider the elements of the offenses “*as charged and proved, not merely as the level of an abstract articulation of the elements.*” (Emphasis added.) *Freeman*, 153 Wn.2d at 779.

The State’s argument is contrary to the decision in *Freeman* as it considers the two offenses not as charged and proven but in the abstract. Whether there are multiple ways of committing possession of methamphetamine without manufacturing methamphetamine is not the test. As charged and proven in this case, the State proved that Mr. Osgood was manufacturing methamphetamine at his trailer using the red phosphorus method and that traces of pseudoephedrine as well were found in some of the materials alleged to have been used in the manufacture. 3/1/07RP 104-07, 110-15, 131. The red phosphorus method of manufacturing requires the extraction of pseudoephedrine from cold tablets as part of the manufacturing process. 3/5/07RP 20-35. Obviously one cannot make methamphetamine using the red phosphorus method without possessing pseudoephedrine, a

necessary ingredient. Thus, Mr. Osgood was convicted of manufacturing methamphetamine using a method which required pseudoephedrine, thus both convictions being based upon the same evidence.

The decision in *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), is extremely relevant to the instant matter and provides this Court with the proper test to apply in finding the convictions for the two offenses violate double jeopardy. The importance of *Dixon* is its application of the test enunciated in *Blockburger, supra*, to the facts of *Dixon*. While there were a myriad of ways of violating the contempt provision of the defendant's release in *Dixon*, the government chose to base it on the defendant's arrest for possession of narcotics with intent to distribute. *Dixon*, 509 U.S. 691-92. The Supreme Court had no problem finding the defendant's subsequent conviction for the drug offense violated double jeopardy, finding the drug conviction did not include any element not already contained in the contempt prosecution. *Id* at 698-700. Thus the two offenses, contempt and possession of narcotics, were the same in law and fact under the *Blockburger* test. *Id*. Under the State's analysis here, the two offenses, contempt and possession of narcotics, could never be the

same in law and fact, and argument which is directly contrary to *Dixon*.

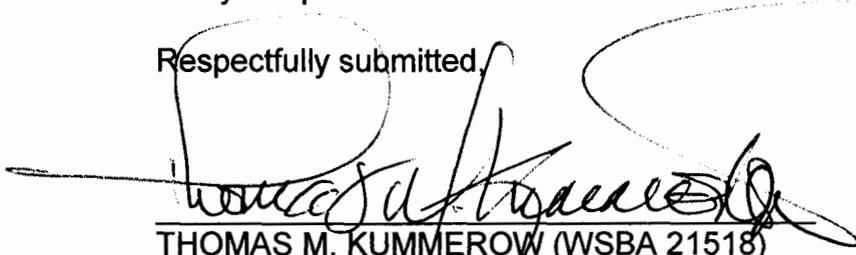
The same rationale applies here. Although there are many ways of manufacturing methamphetamine, two of which were discussed at trial, the State proved Mr. Osgood was manufacturing methamphetamine using a method which required pseudoephedrine as a necessary ingredient. Thus, once the State proved the elements of the manufacturing of methamphetamine using the red phosphorus method, there were no additional facts necessary to be proven for the possession of pseudoephedrine with intent to manufacture. The two offenses as charged and proven here were the same in law and fact under the *Blockburger* test as stated in *Dixon*. Mr. Osgood's convictions for manufacturing methamphetamine and possession of pseudoephedrine violated double jeopardy.

B. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant and the instant brief, Mr. Osgood submits this Court must reverse his sentence and remand for resentencing.

DATED this 8th day of April 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

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