

COURT OF APPEALS
DIVISION II

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NO. 37827-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID SANCHEZ RAMOS,

Appellant.

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

The Honorable Brian Tollefson, Judge

REPLY BRIEF

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A. ARGUMENT IN REPLY

1. SANCHEZ RAMOS'S DOUBLE JEOPARDY CLAIM SURVIVES HIS GUILTY PLEA.

Last year, the Washington Supreme Court held that a conviction in violation of double jeopardy must be vacated, despite an indivisible plea agreement. State v. Knight, 162 Wn.2d 806, 808, 174 P.3d 1167 (2008). Since the Knight decision, however, the divisions of the Court of Appeals have split as to the scope of that decision. See State v. Martin, 149 Wn. App. 689, 205 P.3d 931 (2009) (Division One noting disagreement with Division Two's decision in State v. Amos, 147 Wn. App. 217, 233, 195 P.3d 564 (2008)). In Amos, Division Two held that a double jeopardy claim survives a plea bargain only when that double jeopardy claim is based on a unit of prosecution argument, as happened to be the case in Knight. 147 Wn. App. at 226-27. In Martin, Division One held that the scope of the Knight decision was broad and should not be so limited. 149 Wn. App. at 696-98. Sanchez Ramos urges this Court to follow Division One because the Martin court has the better of the argument based on the text of the Knight opinion.

Writing for a unanimous court, Justice Sanders held in Knight that “vacating a conviction is the proper remedy when the conviction violates double jeopardy, even when entered pursuant to an indivisible plea agreement.” Knight, 162 Wn.2d at 808. As noted in Martin, Knight also

states the issue broadly, mirroring the broad language of the holding, ““The single question facing the court is whether a conviction entered subsequent to a plea agreement can be vacated when that conviction violates double jeopardy.”” Martin, 149 Wn. App. at 696 (quoting Knight, 162 Wn.2d at 811). The Knight court did not limit this holding to double jeopardy claims based on the unit of prosecution.

The Amos court’s distinction between unit of prosecution double jeopardy claims and same offense double jeopardy claims is a distinction without a difference. The Knight court specifically relied on the prong of double jeopardy that protects against “multiple punishments for the same offense.” Knight, 162 Wn.2d at 810. The Knight court used the phrase “unit of prosecution” only once, in quoting the Brief of Appellant. Id. at 809. The court’s references in Knight to the power to hale the defendant into the court are references to celebrated cases in which the power to charge was assumed coextensive with the power to obtain a conviction. Martin, 149 Wn. App. at 696-97 (citing Menna v. New York, 423 U.S. 61, 62, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975); Blackledge v. Perry, 417 U.S. 21, 30, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); United States v. Broce, 488 U.S. 563, 576-77, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989)). The Amos court’s focus on the propriety of the charges is inapposite because the Knight court noted that it is the convictions that violate double jeopardy. Knight, 162 Wn.2d at 813.

The Amos court also reasoned that a broad reading of Knight would permit defendants to manipulate the system by bargaining for a conviction and then challenging it. 147 Wn. App. at 227. But this concern can be easily addressed by including an express waiver of double jeopardy in plea agreements. Martin, 149 Wn. App. at 697 n.32. As in Knight, the State opted not to include such an express waiver here. CP 28, 30.

2. SANCHEZ RAMOS MAY NOT BE TWICE CONVICTED MERELY BECAUSE AN ACCOMPLICE ENGAGED IN SEPARATE CONDUCT THAT ALSO CONTRIBUTED TO NELSON'S DEATH.

The State argues Sanchez Ramos's co-defendant Owens engaged in separate conduct (pistol whipping) leading to Nelson's death, and it was this separate conduct that Sanchez Ramos is guilty of assisting. Brief of Respondent at 12. But this argument actually supports Sanchez Ramos's double jeopardy claim. If he had personally participated in both the pistol whipping and the shooting, he could not be convicted of murder twice. A second conviction for the lesser offense of rendering criminal assistance to the pistol whipping violates double jeopardy in precisely the same way.

The State's argument regarding Martin is beside the point. In that case, dual convictions for an anticipatory and completed offense based on the same act violated double jeopardy. Martin, 149 Wn. App. at 700-01. This holding does not mean that other pairs of closely intertwined offenses

do not also violate double jeopardy. Indeed, dual liability as accomplice and principal is analogous to dual liability for anticipatory and completed offenses. The two pairs of offenses are similarly based on the same underlying conduct. Just as Martin could not be convicted of both assaulting D.S. and trying to assault her sexually, Sanchez Ramos cannot be convicted both of killing Nelson and helping Owens kill him.

Sanchez Ramos does not argue that he could not be convicted of rendering criminal assistance to the crime of another. But when it would violate double jeopardy for him to be convicted of committing the offense as a principal, imposing punishment for aiding that offense after the fact also violates double jeopardy.

B. CONCLUSION

For the forgoing reasons and the reasons stated in the Brief of Appellant, this Court should vacate Sanchez Ramos's conviction for rendering criminal assistance and remand the other two charges for resentencing based on the resulting offender score of two.

DATED this 15th day of July, 2009.

Respectfully submitted,
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)	
Respondent,)	
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vs.)	COA NO. 37827-2-II
)	
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)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF JULY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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PIERCE COUNTY PROSECUTING ATTORNEY

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JULY 2009.

x 