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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN THOMAS EGGLESTON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Stephanie Arend

No. 95-1-04883-0

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the sentencing court abused its discretion when it ordered the sentence imposed in 2008 for Counts I and II to be served consecutively to pre-existing sentences on Counts III-VI which had been imposed in 1997.

B. STATEMENT OF THE CASE.

The facts and procedure in this case are probably familiar to the Court. They are laid out in two prior decisions by this Court, 108 Wn. App. 1011 (2001) (#22085-7-II and 23499-8-II); and 129 Wn. App. 418, 118 P.3d 959 (2005) (#22915-1-II); and one by the Supreme Court, 164 Wn.2d 61, 187 P.3d 233 (2008).

On October 16, 1995, the defendant, Brian Eggleston murdered Pierce County Deputy Sheriff John Bananloa when PCSD was serving a search warrant at the defendant's home. During the service of the warrant, the defendant also assaulted Deputy Warren Dogeagle. The search warrant was based on a PSCD investigation into drug trafficking involving the defendant. CP 45-53, 59-60<sup>1</sup>; *State v. Eggleston*, 129 Wn. App. 418, 422-423, 118 P.3d 959 (2005).

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<sup>1</sup> CP numbers above 44 are estimates, pending official numeration by the Clerk's Office.

From the events that occurred during the service of the search warrant and the drug investigation, the defendant was charged with: Count I, aggravated murder in the first degree; Count II, assault in the first degree; Count III, unlawful delivery of a controlled substance; Count IV, unlawful possession of a controlled substance with intent to deliver; Count V, unlawful delivery of a controlled substance; and Count VI, unlawful possession of a controlled substance. CP 45-47.

Defendant's first trial was in 1997, presided over by Judge Wm. Thomas McPhee. CP 60-71. The jury in the first trial convicted defendant of five felonies: first degree assault, two counts of unlawful delivery of a controlled substance, one count of unlawful possession of a controlled substance with intent to deliver, and one count of unlawful possession of a controlled substance. CP 60-71. A mistrial was declared on the charge of first degree murder when the jury could not reach a verdict as to that charge.

Judge McPhee sentenced the defendant to 57 months on Count III, 48 months on Count IV, 57 months on Count V, and 3 months on Count VI. Judge McPhee also imposed firearm and school-zone sentencing enhancements. CP 60-61.

Defendant's second trial, in 1998, was presided over by Judge Leonard W. Kruse. CP 72. Aggravated murder in the first degree, and the

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has designated several additional documents as Clerk's Papers.

lesser included offense of second degree murder, was the only charge in the second trial. The jury convicted the defendant of second degree murder. The State sought an exceptional sentence after the defendant's second trial. Judge Kruse imposed a standard range sentence, but ordered that it be served consecutively to the sentences previously imposed in June, 1997. CP 72-82.

Defendant's 1998 murder in the second degree conviction, as well as the 1997 assault in the first degree conviction, was reversed by the Court of Appeals. *State v. Eggleston*, 108 Wn. App. 1011 (2001) (#22085-7-II and 23499-8-II); CP 83-144..

Defendant's third trial, in 2002, was presided over by Judge Stephanie Arend. *Eggleston*, 129 Wn. App. at 418. The defendant was again convicted of murder in the second degree, and assault in the first degree. Again the State sought an exceptional sentence above the standard range. Judge Arend imposed an exceptional sentence. CP 145-161. She also resentenced the defendant on Counts III-VI, which raised the defendant's offender score on Counts III-V to 9. *Id.*

The Court of Appeals affirmed the murder and assault convictions but reversed the exceptional sentence in 129 Wn. App. 418, 118 P.3d 959 (2005). The court also reversed the re-sentencing of Counts III-VI, holding that the trial court had no authority to resentence counts that had never been reversed, and were, therefore, final. *Id.*, slip. op. at 60.

The Supreme Court next considered the case on the issues of double jeopardy and collateral estoppel regarding the aggravating factor whether the defendant knew that Dep. Bananola was a law enforcement officer. The Supreme Court affirmed the Court of Appeals. The case was remanded for resentencing. *State v. Eggleston*, 164 Wn.2d 61, 187 P.3d 232 (2008).

October 24, 2008, the case was before Judge Arend for resentencing as ordered by the Court of Appeals. After reading and considering the Court of Appeals decision and the arguments of the parties, Judge Arend sentenced the defendant on Counts I and II, the murder and assault, to 219 months on Count I, and 123 months on Count II. She also imposed 60 month firearm sentencing enhancements on each count. She ordered that the assault sentence be served consecutive to the murder sentence and those sentences be served consecutive to Counts III-VI, the drug convictions sentenced in 1997. CP 14-25. Per the order of the Court of Appeals, Judge Arend also reinstated the sentences on Counts III-VI, originally imposed by Judge McPhee in 1997. CP 162-173; RP 5.

C. ARGUMENT.

1. THE TRIAL COURT LAWFULLY ORDERED THAT THE DEFENDANT'S SENTENCE ON COUNTS I AND II BE SERVED CONSECUTIVELY TO A PRE-EXISTING SENTENCE ON COUNTS III-VI.

RCW 9.94A.589 (formerly 400)<sup>2</sup> states:

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

RCW 9.94A.589(3) applies when (1) a person who is "not under sentence of a felony" (2) commits a felony and (3) before sentencing (4) is sentenced for a different felony. *State v. Shilling*, 77 Wn. App. 166, 175, 889 P.2d 948 (1995).

When faced with an unambiguous statute, the court derives the legislature's intent from the plain language alone. The language of RCW 9.94A.589(3) is clear and unambiguous. *State v. Champion*, 134 Wn. App. 483, 487, 140 P.3d 633 (2006). A sentencing court has complete

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<sup>2</sup> When the defendant was originally sentenced in 1997, this statute was codified as RCW 9.94A.400. RCW 9.94A.525 was codified as .360. Because the statutory language has not changed, the statutes will be referred to by their current section numbers.

discretion to impose a consecutive sentence under RCW 9.94A.589(3).

*Id.*; *State v. King*, 149 Wn. App. 96, 101, 202 P.3d 351 (2009).

Applying .589(3) to the present case; at the time of the murder and assault in Counts I and II, the defendant was not under sentence of a felony. Before he was sentenced in 2008 for Counts I and II, he had been sentenced in 1997 for Counts III-VI. Under the plain meaning of the statute, Judge Arend, as the later sentencing court, had the discretion to order the sentences to run consecutively.

- a. Counts III-VI are “prior convictions”, not “other current offenses” under RCW 9.94A.525(1).

RCW 9.94A.525(1) states:

1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed “other current offenses” within the meaning of RCW 9.94A.589.

According to the statute, “prior conviction” and “other current offense” are determined when the conviction being used for the calculation of offender score occurred. The statute is not conditioned upon, make exception, or provision for the conviction being in a different cause number, is unrelated, or is charged in the same cause number.

Under .525(1), it does not matter what order the convictions come in. A “new” or recent conviction can become criminal history for an older case because of delays or interruptions such as caused by an appeal. *State v. Clark*, 123 Wn. App. 515, 94 P.3d 335 (2004).

It is possible for multiple counts in one cause to be severed for various reasons. A defendant may wish to sever counts for any number of reasons: to avoid possibly prejudicing his case by the number or severity of counts; where an element of one of the crimes charged includes proof of a prior conviction (e.g. unlawful possession of a firearm, or failure to register as a sex offender); or another existing charge (e.g. bail jumping); or where there are inconsistent defenses. If a defendant is tried, convicted, and sentenced separately on a number of charges, he runs the risk that the count sentenced earlier becomes a “prior conviction” under .525(1). He also risks a consecutive sentence on the latter sentence under RCW 9.94A.589(3).

Here, Judge Arend sentenced the defendant on Counts I and II in 2008. Judge McPhee had sentenced the defendant on Counts III-VI in 1997. Paragraph 2.2 of the 2008 Judgment and Sentence lists Counts III-VI as criminal history. CP 17. Those counts are not “other current offenses.”

In the 2008 sentencing for Counts I and II, Counts III-VI are “prior convictions” under RCW 9.94A.525(1) because they existed “before the date of sentencing for the offense for which the offender score is being computed,” i.e. the murder and assault convictions. The convictions and sentences for Counts III-VI were entered and existed since 1997.

In comparison, “other current offenses” are “convictions entered or sentenced on the same date as the conviction for which the offender score is being computed.” RCW 9.94A.525(1). Judge Arend was not sentencing or entering the convictions for Counts III-VI on the same date as the sentencing for Counts I and II.

In the unpublished Section V of its 2005 opinion in this case, this Court extensively examined whether the drug convictions were final in 1997. Slip Op. #29915-1-II, at 56-61. This Court discussed the difference between a “prior conviction” and “other current offense” as the terms applied to this case. This Court concluded that the murder conviction was not an “other current offense” for the drug counts because when the sentence on the drug counts was valid and final in 1997, there was no murder conviction. Therefore, the sentencing court could not “add” the murder conviction to the offender score at a later sentencing proceeding. The determination of whether the counts are “prior criminal history” or “other current offenses” is the law of the case. *State v. Worl*, 129 Wn.2d

416, 425, 918 P.2d 905 (1996); *State v. Roy*, 147 Wn. App. 309, 314, 195 P.3d 967 (2008).

*State v. Rasmussen*, 109 Wn. App. 279, 34 P.3d 1235 (2001) and *State v. Smith*, 74 Wn. App. 844, 875 P.2d 1249 (1994), cited by the defendant, are procedurally different than the present case. Both illustrate how separate cause numbers sentenced at the same time are “other current offenses.”

Rasmussen committed various felonies over a period of time. He was sentenced for all three cause numbers at the same time, so the crimes were all “other current” offenses for calculating the offender score.

Likewise, Smith had been charged with several felonies. He pleaded guilty at two separate hearings, but was sentenced for all counts at one hearing. Again, the counts were “other current” offenses for calculating the offender score. In *Rasmussen* and *Smith*, there was only one sentencing hearing for the defendants.

The circumstances in *State v. Moore*, 63 Wn. App. 466, 820 P.2d 59 (1991) are similar, but with a different result. Defendant Evans (whose case was consolidated with Moore’s) had been convicted of two counts of burglary in 1987. He failed to appear for sentencing and warrants were issued. In 1990, he was convicted of assault in an unrelated cause number. Sentencing on the 1987 and 1990 convictions were held on the same day

before the same judge. The court imposed sentences on each, but ordered the assault sentence be served consecutively under RCW 9.94A.400(3).

Even though the offenses were sentenced on the same date, the Court of Appeals affirmed the consecutive sentences. The Court found that the trial court “merely completed the overdue task of sentencing Evans for the 1987 burglary convictions.” *Id.*, at 470. The Court apparently concluded that there was an exception to the “same date” element of “other current offenses” because Evans had failed to appear for sentencing in 1987.

If a consecutive sentence is valid under the circumstances in *Moore*, the consecutive sentence in the present case is certainly valid. Unlike the facts and procedure in *Moore*, who had only pleaded guilty before the interruption in his case, the defendant in the present case had been found guilty and sentenced for the drug counts in 1997 before the subsequent sentencing on the other counts. The drug sentences in this case were valid and pre-existing when he was sentenced for murder and assault in 2008. The State does not argue that the defendant here has manipulated the proceedings, nor should it need to. The Court’s decision in the present case should rest on the plain meaning of the statutes involved.

The inescapable conclusion from this Court's earlier opinion in the present case is that the drug counts are "prior convictions" and not "other current offenses" for calculating the offender score for Counts I and II in 2008. Because the drug counts were valid and final in 1997, they were not and could not be sentenced or entered at the same time that Counts I and II were being sentenced in 2008. Therefore, Judge Arend was the subsequent sentencing judge under RCW 9.94A.589(3) and had the discretion to order the murder and assault sentences to be served consecutive to the drug counts.

- b. Judge Arend did not re-sentence the defendant for Counts III-VI on October 24, 2008.

Judge Arend made clear on the record that she was not re-sentencing the defendant on Counts III-VI, but only reinstating the 1997 sentence, per the direction of the Court of Appeals. RP5-6. She followed the Court's decision even despite the fact that the offender score incorrectly included the Count II assault in the criminal history and offender score. RP 5-6, CP 62.

Judge Arend was required to follow the directive of the Court of Appeals. A superior court must comply with the directive of a higher appellate court. *Harp v. American Surety Co.*, 50 Wn.2d 365, 368, 311

P.2d 988 (1957). When an appellate court renders a decision in a particular case, its holding is “binding on the superior court, and must be strictly followed.” *Id.*

When Judge Arend resentenced the defendant for Counts I and II in 2008, the record reflects that for the sentencing, the victims had the opportunity to be heard (RP 30, 34), the defendant was given the opportunity to allocate (RP 38), and legal financial obligations were discussed (RP 39).

Further demonstrating that the court was not sentencing for Counts III-VI, there was no such activity regarding those counts. If Judge Arend had been conducting a sentencing hearing regarding Counts III-VI, she would have been required to give the victims and the defendant the opportunity to address the court. RCW 9.94A.500(1); *In Re Personal Restraint of Echevarria*, 141 Wn.2d 323, 6 P.3d 573 (2000). The court specifically followed the orders of this Court to only reinstate the sentence imposed in 1997.

There was no resentencing for Counts III-VI because the sentences for those counts were never reversed. They were affirmed on appeal twice. In 2001, the Court of Appeals affirmed the Counts III-VI convictions and sentences in the unpublished decision; *State v. Eggleston*, 108 Wn. App. 1011 (2001); consolidated cases #22085-7-II and 23499-8-

II. CP 83-144. Again in 2005, this Court noted that the Count III-VI convictions and sentences were valid. *State v. Eggleston*, 129 Wn. App. 418, 118 P.3d 959 (2005) and slip op. at 56-61.

- c. The trial court did not abuse its discretion in ordering the sentences in Counts I and II to be served consecutive to Counts III-VI.

The decision of a court to order a sentence to be served consecutively is discretionary and should be reviewed for an abuse of discretion. See *King*, 149 Wn. App. at 101; *Champion*, 134 Wn. App. at 487. To be an abuse of discretion, the trial court's decision as to the length of the sentence "must be shown to be clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken." *State v. Ritchie*, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995).

Here, the defendant has been sentenced by three different judges under this same cause number. Judge Kruse and Judge Arend have both sentenced the defendant for Counts I and II, the murder and assault counts. Judge Kruse did so in 1998; Judge Arend in 2005 and 2008. In the 2005 sentence, Judge Arend imposed an exceptional above the standard range: 339 months for the murder, high end on all other counts; 582 months total. In the 1998 and 2008 sentences, the judges treated Counts III-VI, the drug

counts, as prior convictions. When doing so, both ordered that the murder sentence be served consecutively to the sentence imposed in 1997 on Counts III-VI.

It is understandable that two different judges, ten years apart, would both order that the murder sentence be served consecutive to the previously imposed drug sentences. The facts in this case are egregious. The defendant murdered a deputy sheriff who was serving a lawful search warrant at the defendant's residence. The defendant shot Dep. Bananola several times; three times in the head, once at point-blank range. CP 51. In addition, the defendant shot at Dep. Dogeagle, who was also serving the search warrant.

Ordering that the murder and assault sentences be served consecutive to the previously imposed sentences on the drug counts was not an abuse of discretion.

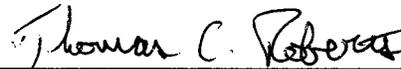
D. CONCLUSION.

RCW 9.94A.589(3) authorized Judge Arend to order the murder and assault sentences consecutive to the drug sentences. She did not abuse

her discretion in doing so. The State respectfully requests that the 2008 sentence in this case be affirmed.

DATED: July 27, 2009

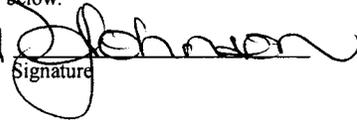
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Date Signature

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