

No. 39166-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TED JENSEN,

Appellant.

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STATE OF WASHINGTON
BY
DEPUTY

COURT OF APPEALS
DIVISION II

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

The Honorable Stephen Warning
The Honorable James Warne

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The defendant did not validly waive his constitutional right to legal counsel.

2. The defendant's constitutional right to reasonable access to state-provided resources as a pro se defendant was violated by the Cowlitz County Jail.

3. The trial court abused its discretion in failing to grant Mr. Jensen's motion for a continuance of the resentencing hearing.

4. The trial court abused its discretion and violated Mr. Jensen's due process rights by failing to rule on the defendant's post-conviction motion challenging the court's finding that he was on community custody at the time of the commission of the current offenses.

5. The trial court erred by imposing deadly weapon enhancements on offenses which were deemed to be the "same criminal conduct."

6. The trial court erroneously sentenced the defendant to a deadly weapon enhancement attached to his conviction for assault with a deadly weapon, in violation of his protection against double jeopardy.

7. The trial court erroneously sentenced the defendant to multiple consecutive deadly weapon enhancements based on the defendant having been armed with a single deadly weapon during the commission of the offenses, in violation of his protection against double jeopardy.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. During a colloquy held to determine the validity of Mr. Jensen's request for waiver of the right to counsel, the trial court misinformed the defendant with regard to the resources he was entitled to be provided by the Cowlitz County Jail as a pro se defendant, telling him that the fact that he was representing himself did not entitle him to legal resources through the Jail.

Subsequently, throughout Mr. Jensen's several hearings held to address resentencing, during which the court also allowed Mr. Jensen to raise a post-conviction motion on the issue of community custody, the defendant was forced to submit handwritten motions and was unable to properly file copies of judgment and sentence documents supporting his contention that he had not been on community custody at the time of the current offenses. Should this Court reverse the defendant's sentence, and remand the case for a

new sentencing hearing?

2. Was the defendant's right to reasonable access to state-provided resources allowing him to prepare a meaningful pro se defense violated by the Jail's failure to provide basic resources necessary for him to properly prepare for his resentencing hearing and post-conviction motion?

3. Did the trial court abuse its discretion in failing to grant the defendant's motion for a continuance of the resentencing hearing, where the defendant had been denied access to reasonable resources for preparation of his defense?

4. Did the trial court abuse its discretion and violate due process by failing to rule on the defendant's post-trial motion challenging the court's finding that he was on community custody, where the defendant placed the issue before the court and provided, although he did not file, prior judgment and sentence documents supporting that challenge?

5. Did the trial court err and exceed its statutory authority by imposing deadly weapon enhancements on offenses which were deemed to be the "same criminal conduct?"

6. Did the trial court err in sentencing the defendant to a

deadly weapon enhancement attached to his conviction for assault with a deadly weapon, in violation of his protection against double jeopardy?

7. Did the trial court err in sentencing the defendant to multiple consecutive deadly weapon enhancements based on the defendant having been armed with a single deadly weapon during the commission of the offenses, in violation of his protection against double jeopardy?

C. STATEMENT OF THE CASE

Appellant Ted Jensen's present appeal is from resentencing proceedings in Cowlitz County Superior Court over the course of several hearings held from March 25, 2009 to April 10, 2009. See RP 1-40. In 2008, Mr. Jensen originally appealed his convictions for first degree assault with a deadly weapon, felony harassment with a deadly weapon, and first degree vehicle prowling with a deadly weapon, for which the Superior Court had imposed a total of 240 months incarceration, including three deadly weapon enhancements. State v. Jensen, 144 Wn. App. 1017, 2008 WL

1875945 (April 29, 2008) (unpublished decision).¹

The State of Washington cross-appealed, contending that the trial court erroneously calculated Mr. Jensen's offender score. In its cross-appeal, the State had argued that the trial court erroneously failed to include one point for community placement when calculating Mr. Jensen's offender score, basing its argument on the case of State v. Jones, 159 Wn.2d 231, 234, 149 P.3d 636 (2006), cert. denied, 549 U.S. 1354, 127 S.Ct. 2066, 167 L.Ed.2d 790 (2007).²

This Court of Appeals affirmed Jensen's convictions, but vacated his sentence and remanded for resentencing, holding that

¹The appellant cites this Court's unpublished decision in Jensen merely to acquaint the Court with the pertinent procedural history preceding the present second appeal. See GR 14.1(a) (formerly RAP 10.4(h)) ("A party may not cite as an authority an unpublished opinion of the Court of Appeals"); State v. Golden, 112 Wn. App. 68, 47 P.3d 587, review denied, 148 Wn.2d 1005, 60 P.3d 1212 (2002) (RAP 12.4(h) not violated where counsel did not cite unpublished decision as precedential authority).

²In State v. Jones, the Washington Supreme Court held that the issue whether a defendant committed a current offense while on community placement need not be determined by a jury:

[T]he community placement determination - an examination strictly limited to a review and interpretation of documents (such as the prior judgment and sentence) that are part of the judicial record created by a prior conviction - is an issue of law that is properly entrusted to the sentencing court and falls within the prior conviction exception.

State v. Jones, 159 Wn.2d at 234.

the record established that Jensen was on community custody at the time he committed the offenses. State v. Jensen, 2008 WL 1875945 (Slip Op., at p. 11). Describing the proceedings previously held in the trial court, this Court stated:

Here, the trial court found that Jensen was on community custody at the time he committed the offenses for which he was being sentenced. But the trial court also stated that under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), it believed that the community custody had to be pleaded and proved to a jury. The court concluded that community custody was not pleaded and proved to a jury and, therefore, it did not add an extra point to Jensen's offender score.

(Emphasis added.) State v. Jensen, supra, at p. 11.

On March 25, 2009, before the Honorable Stephen Warning, Mr. Jensen expressed a desire to represent himself at the resentencing hearing, which was to be held before the original sentencing court, the Honorable James Warne. RP 1-2. In addition, the defendant indicated that he disputed the contention that he had been on community custody at the time of the current offenses, and stated to the court and counsel that he had prepared a motion asking the court to review documentation that would attest to this fact, but which had not been available at the time of his original trial. RP 1-2. The court told Mr. Jensen, "All right. You

can file whatever motions you choose.” RP 2.

The trial court engaged Mr. Jensen in a colloquy to determine whether he should be permitted to proceed pro se. The court determined that Mr. Jensen understood the nature of the proceedings, during which the State would be seeking sentences based on an additional point added to his offender score for being on community placement. RP 7.³ The court also questioned Mr. Jensen as to whether he understood the disadvantages of self-representation, including the fact that he would be responsible for making objections and legal arguments, and the fact that presentation of his own testimony would be required to follow an interrogatory format. RP 4, 6. Additionally, the trial court told Mr. Jensen that

the fact that you are representing yourself doesn't entitle you to additional services through the Jail. So you may be hampered by the fact that you are in custody.

RP 4. The trial court granted Mr. Jensen's request to represent himself, deeming him to have executed a valid waiver of his right to

³The court clarified that it was inquiring of Mr. Jensen whether he understood that this was the State's contention regarding the sole scope of the proceeding, as opposed to whether he agreed that the hearing was limited to that issue. RP 7-8.

counsel. RP 8. The matter was set before Judge Warne. RP 8.

On March 27, 2009, the deputy prosecutor asked Judge Warne to conduct a pro se colloquy with the defendant again, representing to the court that she believed the prior colloquy to have been incomplete. RP 11. Judge Warne questioned Mr. Jensen, inquiring about his prior experience representing himself, and his general education and any special education he had in legal matters. In particular, the court inquired whether the defendant understood the standard ranges and maximum possible terms of incarceration on the offenses to be sentenced. RP 12-16. However, the court did not address or correct the prior court's affirmative misadvisement of the defendant with regard to his right to reasonable resources to prepare his defense.

Judge Warne also deemed Mr. Jensen to have validly waived his right to counsel. RP 19. The court also appointed stand-by counsel. RP 19, 21.

On April 10, 2009, the final hearing held on resentencing, Mr. Jensen stated that he was in possession of judgment and sentence documents indicating that he had not been on community custody at the time of his current offenses, because he had

previously been released after serving a maximum term on one prior crime as to which no community custody or placement was ordered, and the current offenses were committed subsequent to the termination of a one-year period of community custody on another prior offense. RP 30. Mr. Jensen provided these documents to his stand-by counsel, who indicated that he would provide them to the prosecutor. RP 31. However, Mr. Jensen apparently did not file originals or copies of the documents, or provide copies to the court. In a handwritten motion submitted on this same date, Mr. Jensen had asked the court for a continuance of the sentencing hearing, “[d]ue to limitations imposed by conditions of his confinement [and] lack of access to basics needed for proper/adequate preparation of materials for court.” CP 138.

The trial court ruled, “I’m going to deny your motion for a continuance.” RP 33. The court did not address or rule on the defendant’s motion regarding the issue of his community custody status at the time of the current offenses. After receiving a statement in allocution from Mr. Jensen, the court sentenced him to a total of 279 months incarceration, a sentence that represented a standard range term on the most serious offense of first degree

assault, ordered to be served concurrently with the base sentences for harassment and vehicle prowling, but including three deadly weapon enhancements of 48, 12 and 12 months, served consecutively to the sentence for assault and consecutively to each other. CP 141-51; RP 37-38.

Mr. Jensen timely appealed. CP 36.

D. ARGUMENT

1. **MR. JENSEN DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL, BECAUSE THE TRIAL COURT AFFIRMATIVELY MISADVISED HIM WITH REGARD TO THE RESOURCES THE COWLITZ COUNTY JAIL WOULD BE REQUIRED TO PROVIDE TO HIM AS A PRO SE DEFENDANT.**

a. **The right to counsel is a bedrock guarantee that may only be waived by a criminal defendant who clearly understands the burdens of self-representation and knowingly waives the assistance of counsel in an unequivocal fashion.**

The constitutions, federal and state, guarantee a criminal defendant both (1) the right to representation by a competent attorney at all stages of a criminal proceeding, as well as (2) the ancillary right to waive legal counsel and represent oneself. U.S. Const. Amend. 6; U.S. Const. Amend. 14; Wash. Const. Art. I, §

22; Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Hahn, 106 Wn.2d 885, 889, 726 P.2d 25 (1986); State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001).

With respect to the ancillary right of waiver of counsel, a valid and effective waiver of the right to the assistance of counsel must unequivocally demonstrate that the accused knowingly, intelligently, and voluntarily waives the assistance of counsel. Faretta, 422 U.S. at 835. The validity of a waiver is measured by the defendant's understanding at the time he waives his right to counsel, and an incomplete waiver is not rescued by the defendant's subsequent garnering of sufficient knowledge to represent himself. United States v. Mohawk, 20 F.3d 1480, 1484 (9th Cir. 1994). A trial court must "indulge in every real presumption against waiver" of counsel. Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); Hahn, 106 Wn.2d at 896.

The knowledge and intelligent understanding that the pro se defendant must possess when validly waiving counsel includes "(1) the nature of the charges; (2) the possible penalties; and (3) the disadvantages of self-representation." State v. Woods, 143 Wn.2d

561, 588, 23 P.3d 1046 (2001). Here, the trial court engaged Mr. Jensen in a pro se colloquy that addressed the nature of the resentencing proceeding, and the increased sentence he was facing, and some of the disadvantages of self-representation by a non-attorney. RP 2-7, 19-21.

However, Mr. Jensen was affirmatively misadvised with regard to the resources required to be proved to a defendant representing himself while in Jail. This affirmative misadvisement affected Mr. Jensen's full understanding of the complexities of self-representation. The court's mandatory warning of the disadvantages of self-representation for a person seeking to waive counsel must delve into the details of pro se representation. An "abstract" reference to the difficulties attendant to self-representation does not impart the critical information necessary to a valid waiver of counsel. United States v. Erskine, 355 F.3d 1161, 1168 (9th Cir. 2004). Instead, the court must at least describe "the pitfalls" of not having counsel with some specificity. United States v. Hayes, 231 F.3d 1132, 1138 (9th Cir. 2000). It goes without saying that affirmative misadvisement as to the "pitfalls" of self-representation renders the defendants waiver involuntary, and

inadequate.

Here, the defendant waived counsel involuntarily, because the court told Mr. Jensen that he would not have access to resources from the Jail. This was incorrect. Mr. Jensen's right to prepare a defense included a right to reasonable resources necessary to do so. Milton v. Morris, 767 F.2d 1443, 1445 (9th Cir. 1985); State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). This right includes access to law books, witnesses, and other tools reasonably necessary to prepare his defense. Milton, 767 F.2d at 1446. Specifically, the Jail in which the defendant is incarcerated during trial must provide these resources. State v. Silva, 107 Wn. App. 605, 618, P.3d 729 (2001) (interpreting U.S. Const. Amend. 6; U.S. Const. Amend. 14; and Wash. Const. Art. I, § 22). The defendant's waiver of counsel in this case was rendered unknowing and involuntary because of the trial court's affirmative misadvisement. "A waiver of counsel must be knowing, voluntary, and intelligent, as with any waiver of constitutional rights." Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984).

b. The inadequate waiver of counsel is structural error requiring reversal. In the present case, it appears that the trial court's misadvisement of the defendant had material consequences in his ability to effectively advocate for himself at the resentencing hearing. Mr. Jensen provided certain documents, critical to his argument on the community custody issue, to his stand-by counsel at the April 10 resentencing hearing. RP 31. However, he apparently did not file originals or copies of the documents, or provide copies to the court. Mr. Jensen had in fact asked the court for a continuance of the sentencing hearing, submitting a handwritten pleading stating that the Jail had provided him no "access to basics needed for proper/adequate preparation of materials for court." CP 138. Mr. Jensen specifically stated that he had been unable to access "writing materials, access to copies, [and] time required to secure records [and] documents." CPP 138.

It is unclear whether the defendant was attesting to a refusal of the Jail to provide these resources on his request, or was referring to his belief, imparted by the trial court during the earlier pro se colloquy, that he was not entitled to these resources in the first place. In any event, harmless error analysis is inapplicable

where the deprivation of the right to counsel, by virtue of an inadequate pro se colloquy, is at issue Silva, 108 Wn. App. at 542. Because the record indicates an inadequate waiver of the right to counsel in Mr. Jensen's case, reversal and remand for a new hearing are required. Silva, 108 Wn. App. at 542.

2. MR. JENSEN WAS DENIED HIS RIGHT TO PREPARE A DEFENSE BY VIRTUE OF THE COWLITZ COUNTY JAIL'S FAILURE TO PROVIDE HIM WITH REASONABLE RESOURCES.

An accused person has the constitutional right to prepare and make his defense. Faretta, 422 U.S. at 819; State v. Silva, 107 Wn. App. at 618; U.S. Const. Amend. 6; U.S. Const. Amend. 14; Wash. Const. Art. I, § 22. Denying a pro se defendant access to basic legal materials or otherwise unreasonably interfering with the preparation of his defense violates the defendant's rights to due process, self-representation and a fair trial. See United States v. Trapnell, 638 F.2d 1016, 1029 (7th Cir. 1980); United States v. Bynum, 566 F.2d 914, 918 (5th Cir.), cert. denied, 439 U.S. 840 (1978); Silva, 107 Wn. App. at 620-21. In fact, the Washington Constitution more broadly protects an accused's right to meaningful self-representation than does the federal constitution. Silva, 107

Wn. App. at 620-21. The court in Silva held that the state constitution's right of self-representation affords a pre-trial detainee "a right of reasonable access to state provided resources that will enable him to prepare a meaningful pro se defense." Id. at 622.

The present case demonstrates that Mr. Jensen was not provided with even the most basic legal resources that would have allowed him to adequately prepare his defense at the resentencing hearing. This court's infringement on his right to prepare his defense is not amenable to harmless error analysis. State v. McDonald, 96 Wn. App. 311, 317-18, 979 P.2d 857 (1999), affirmed, 143 Wn.2d 506 (2001) (harmless error can never apply to those "constitutional rights so basic to a fair trial."). The restrictions Mr. Jensen attested to in his handwritten pleadings was entirely unreasonable and certainly, no valid underpinning in security concerns or efficiency demands was proffered by the State, or the Jail, that would justify this denial of resources. The denial of Mr. Jensen's ability to meaningfully prepare his defense violated his rights under the Sixth Amendment and the more protective requirements of Article I, section 22, and require reversal. Silva 107 Wn. App. at 622.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR A CONTINUANCE OF THE RESENTENCING HEARING.

This Court reviews a trial court's decision denying a defendant's motion to continue for abuse of discretion. State v. Hurd, 127 Wn.2d 592, 594, 902 P.2d 651 (1995). This standard applies to the denial of a motion to postpone sentencing for an abuse of discretion. State v. Roberts, 77 Wn. App. 678, 685, 894 P.2d 1340 (1995). Furthermore, a trial court's discretion is abused if the court fails to adequately inquire as to the grounds for the motion and therefore fails to balance the interests at stake. State v. Cunningham, 96 Wn.2d 31, 36, 633 P.2d 886 (1981) (concurring opinion of Utter, J.).

In the present case, the trial court abused its discretion in failing to grant the defendant's motion for a continuance of the resentencing hearing, where the defendant had been denied access to reasonable resources for preparation of his defense. Mr. Jensen complained of this fact to the trial court in a handwritten submission. However, the court failed to consider this fact. As a result of the failure to provide resources, Mr. Jensen was unable to

properly file the judgment and sentence documents that supported his contentions, thereby suffering prejudice, both from the denial of resources, and the refusal of the court to grant the continuance requested.

4. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED DUE PROCESS BY FAILING TO RULE ON THE DEFENDANT'S POST-CONVICTION MOTION ON THE ISSUE OF COMMUNITY CUSTODY.

The trial court in Mr. Jensen's case, by virtue of rulings in several instances, granted the defendant leave to raise a post-conviction motion to address the issue of the point the State sought to add to his offender scores on ground that he was on community custody at the time of the current offenses. Both Judge Warning and Judge Warne below granted the defendant's request that his contentions pertaining to the issue of proof of the community custody point should be addressed. On March 25, 2009, Mr. Jensen moved to supplement the record with documentation showing that he was not on community custody, including a handwritten submission seeking to admit this documentation and an explanation why it had not been produced at trial. RP 2; CP 90-92. The court stated, "You can file whatever motions you choose."

RP 2. It was clear at the hearings before both Judges Warning and Warne that it was the defendant's desire to litigate these issues, and therefore to expand the scope of the hearing to include matters beyond the mere formality of a resentencing to add the point to his offender score that the State envisioned. RP 7-8, 17. Although Judge Warne at one point stated it was skeptical as to whether Mr. Jensen should be permitted to raise these issues, the court never retracted its ruling that these issues were in fact before the court. RP 26.

In full effect, therefore, the court granted the defendant leave to file a CrR 7.8 motion pursuant to which Mr. Jensen would be allowed, in these post-trial proceedings, to address the issue of the trial court's prior finding that he was on community custody.⁴

⁴Criminal Rule 7.8, entitled "Relief from Judgment or Order," entitles a defendant to consideration of a timely filed motion seeking relief from or modification of a judgment of criminal conviction. Such motion may be granted on ground of:

- (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:
- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
 - (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
 - (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
 - (4) The judgment is void; or

However, the trial court simply failed to address, or issue a ruling, on the defendant's motion. The court did not give any consideration to Mr. Jensen's handwritten motion regarding the issue of community custody. CP 90-92. There is no reason why such a ruling would have been inappropriate, where the defendant raised it several times over the course of his resentencing hearings.⁵

The trial court's failure to rule on the defendant's community custody issue was an abuse of discretion. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989); State v. Pettitt, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980) (both stating that a failure to exercise discretion is an abuse of discretion). In addition, Mr. Jensen contends that the trial court's failure to issue a ruling violated his right to be heard on the motion. U.S. Const. Amends. 5, 14.

(5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b). Mr. Jensen was entitled to bring such a motion, State v. Hall, 162 Wn.2d 901, 177 P.3d 680 (2008), and the trial court's language cannot be construed as anything other than a ruling expanding the scope of the resentencing hearing to allow the defendant to litigate the issue raised.

⁵Because Mr. Jensen's judgment and sentence documents appear to have been placed before the court and provided to the deputy prosecuting attorney, Mr. Jensen is filing a RAP 9.9 to supplement the trial court record. See RP 31.

5. WHEN MULTIPLE OFFENSES ARE THE "SAME CRIMINAL CONDUCT," THEY COUNT AS A SINGLE SENTENCE AND CANNOT BE THE BASIS FOR SEPARATE FIREARM ENHANCEMENTS.

Mr. Jensen's three offenses were deemed by the trial court to be the "same criminal conduct" at sentencing, a position the State had conceded as early as Mr. Jensen's prior sentencing. CP 142, CP 11-35. Despite this finding, the court on April 10, 2009, imposing consecutive weapon enhancements on the crimes deemed to be one offense, and thereby imposed punishment for offenses that did not count in Mr. Jensen's offender score. The erroneously entered deadly weapon enhancements must be vacated.

Sentencing authority derives strictly from statute, subject to the constitutional rights to due process, a jury trial, and prohibition against cruel and unusual punishment. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986).

Under the Sentencing Reform Act ("SRA"), the court must impose sentence based on its calculation of an offender's standard sentence range under the framework mandated by the

legislature. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999); RCW 9.94A.505(2)(a)(i). When two or more current offenses constitute the "same criminal conduct," they "count as one crime" for purposes of sentencing. State v. Taylor, 90 Wn. App. 312, 321, 950 P.2d 1218 (2002); RCW 9.94A.589(1)(a).

By imposing punishment for two of Mr. Jensen's three offenses even though they did not count in the offender score, the court subverted the letter and intent of its same criminal conduct finding. Deadly weapon sentencing enhancements are predicated on RCW 9.94A.533(4), which directs a sentencing court to add a certain period of time to the standard range sentence when a person "is being sentenced" to an eligible offense.

Principles of statutory construction require courts to presume the legislative body did not use any nonessential words and to rely upon the plain meaning of the words in the statute. State v. Delgado, 148 Wn.2d 723, 729, 63 P.3d 792 (2003); State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002). The trial court is required to give meaning to every word in a statute if possible. Beaver, 148 Wn.2d at 343. When the Legislature uses different words in the same statute, courts recognize the

legislature intended a different meaning. Id.

Because RCW 9.94A.533(4) authorizes the imposition of a deadly weapon enhancement only when an individual "is being sentenced" for an eligible offense, the statute does not apply when a person is not being sentenced. When two convictions encompass the "same criminal conduct," these convictions must be counted as one crime and the defendant only receives a sentence for one offense. RCW 9.94A.589(1)(a). Similarly, RCW 9.94A.533 says that enhancements are mandatory only for offenses "sentenced under this chapter." Therefore, when a person is not sentenced for an offense that is the same criminal conduct as another offense, the enhancement is not mandatory.

This interpretation is sensible. While the prosecution may charge multiple offenses stemming from the same act, a person may not be punished for the same crime more than one time. The prosecution may split an incident into each individual act, such as each blow struck in an assault while holding a weapon, and it could seek an enhancement on each charge. However, although the court would impose a single, concurrent sentence for the multiple, sequential blows upon a single person, the court

should not also impose numerous, consecutive enhancements for what is essentially one incident, with one intent, and one victim. It harmonizes the "same criminal conduct" provision and the firearm enhancement provision of the SRA to read these related sentencing statutes together.

At a minimum, the joint construction of these statutes exposes an ambiguity in the imposition of firearm enhancements for multiple offenses when the offenses are supposed to count only as one crime under "same criminal conduct" law. The rule of lenity therefore requires this statutory ambiguity be resolved in favor of Mr. Jensen. In re Charles, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998). The rule of lenity, as well as a fair and plain interpretation of the statutes cited, require that Mr. Jensen not receive deadly weapon enhancements on the offenses which were deemed to be the same criminal conduct as his assault offense.

6. THE IMPOSITION OF ADDITIONAL INCARCERATION FOR A DEADLY WEAPON ENHANCEMENT IN CONJUNCTION WITH MR. JENSEN'S PRISON SENTENCE FOR THE ASSAULT CONVICTION VIOLATED HIS DOUBLE JEOPARDY RIGHTS.

Mr. Jensen was sentenced to standard range terms totaling 279 months incarceration, a sentence that represented a standard range term on the most serious offense of first degree assault, ordered to be served concurrently with the base sentences for harassment and vehicle prowling, but including three deadly weapon enhancements of 48, 12 and 12 months, served consecutively to the sentence for assault and consecutively to each other. CP 141-51; RP 37-38. The first degree assault conviction was procured under the alternative means of committing the crime that the defendant assaulted the complainant with a deadly weapon, i.e., a knife. CP 1, CP 141 (RCW 9A.36.011(1)(a)). The offenses were deemed to be the "same criminal conduct" at sentencing, a position the State had conceded at the time of Mr. Jensen's prior sentencing. CP 142, CP 11-35.

Because Mr. Jensen was convicted of the assault as

assault with a deadly weapon pursuant to RCW 9A.36.011(1)(a), while also being convicted of a deadly weapon enhancement on the assault count, Mr. Jensen contends that he was twice convicted and – more constitutionally significant – duplicatively punished for the presence and use of a deadly weapon. This sentencing violated the constitutional prohibition against double jeopardy, and the deadly weapon enhancement must therefore be vacated.

The double jeopardy clause of the Fifth Amendment to the federal constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. Amend. 5; Wash. Const. Art. 1, § 9. The Fifth Amendment’s double jeopardy protection is applicable to the several States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The Washington courts interpret Article 1, § 9’s double jeopardy provision coextensively with the United States Supreme Court’s reading of the double jeopardy clause of the Fifth Amendment. State v.

Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

RCW 9.94A.533(4) provides for additional time to be added to an offender's standard range if the offender or an accomplice was "armed with a deadly weapon" during commission of the crime. But Legislative intent reveals no clear or express plan that in the particular case of first degree assault as charged and convicted in the present case, that a duplicative deadly weapon enhancement should also be imposed. A case set for decision by the Washington Supreme Court in the Fall of 2009 will decide this issue:

Whether double jeopardy principles were violated in a second degree assault prosecution when the defendant's use of a weapon was both an element of the charge and the basis for imposing a deadly weapon sentence enhancement.

State v. Aguirre, 165 Wn.2d 1036, 205 P.3d 131 (granting review March 31, 2009) (Supreme Court No. 82226-3).

7. THE MULTIPLE CONSECUTIVE SENTENCE ENHANCEMENTS IMPOSED BY THE COURT ON THE BASIS OF THE JURY'S FINDINGS THAT MR. JENSEN USED A SINGLE WEAPON IN THE MULTIPLE COUNTS VIOLATE DOUBLE JEOPARDY.

In addition to the double jeopardy violations inhering in the attachment of enhancements to the crimes of first degree assault with a deadly weapon, the imposition of multiple weapon enhancements for Mr. Jensen's possession of a single knife during the crimes also violated his double jeopardy protections. U.S. Const. Amend. 5; Wash. Const. Art. 1, § 9. Based on a single act, Mr. Jensen's possession of a knife in the course of the incident, the trial court imposed three separate enhancements, which were ordered to be served consecutively to each other and to the underlying convictions as well. CP 141-51; RP 37-38. See State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999).

Where, as here, a single act yields multiple punishments, double jeopardy principals are offended unless the Legislature has expressed its intent for such a result. Whalen v. United States, 445 U.S. 684, 689, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)

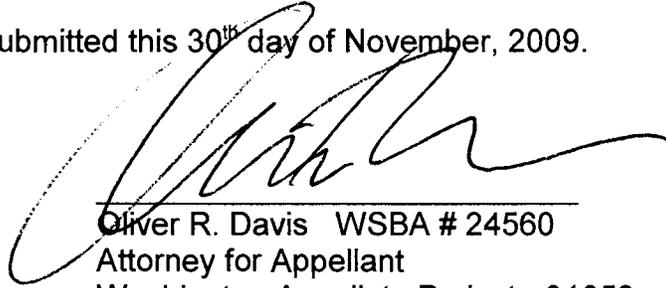
Nowhere in its language does the deadly weapon enhancement statute, RCW 9.94A.533(4), provide for the imposition of a separate weapon enhancement for each of multiple current offenses where a single act of weapon possession has occurred during the incidents. Admittedly, the weapon enhancement statute sets forth the procedure to be followed where multiple enhancements are imposed. Id. But this is not the same as directing that multiple punishments be imposed based on the possession of a single weapon. The weapon enhancement statute certainly does not provide that the circumstances in this case warrant the imposition of multiple enhancements. In these circumstances, the “rule of lenity” requires the conclusion that the Legislature did not intend the stacking of enhancements for a single weapon. See Whalen, 445 U.S. at 694.

Because there is not a clear expression of Legislative intent for multiple punishment in these circumstances, double jeopardy does not permit the imposition of multiple deadly weapon enhancements on the defendant’s convictions.

E. CONCLUSION.

Based on the foregoing, the appellant Ted Jensen respectfully requests that this Court reverse the trial court's judgment and sentence.

Respectfully submitted this 30th day of November, 2009.

A handwritten signature in black ink, appearing to read "O. R. Davis", is written over a horizontal line. The signature is fluid and cursive.

Oliver R. Davis WSBA # 24560
Attorney for Appellant
Washington Appellate Project - 91052

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 39166-0-II
v.)	
)	
TED JENSEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] TED JENSEN 903680 COYOTE RIDGE CC PO BOX 769 CONNELL, WA 99326	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF NOVEMBER, 2009.

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