

NO. 39172-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARK BRANDON VENIS,

Appellant.

CD OCT 26 11:19:32
STATE OF WASHINGTON
BY [Signature]

COURT OF APPEALS
DIVISION TWO

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

The Honorable Stephen Warning, Judge
The Honorable James J. Stonier, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1396
Longview, WA 98632
(360) 425-8155

P.M. 10-22-09

Table of Contents

Table of Contents	i
Table of Authorities	ii
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT	6
1. DEFENSE COUNSEL’S FAILURE TO ENTER INTO A STIPULATION TO PREVENT 10 PRIOR FELONY CONVICTIONS FROM COMING INTO EVIDENCE DENIED MR. VENIS EFFECTIVE TRIAL COUNSEL.	6
2. THE FIREARM ENHANCEMENT FOR ASSAULT COMMITTED WITH A FIREARM VIOLATES DOUBLE JEOPARDY.	12
(i) The double jeopardy provisions of the federal and state constitutions protect criminal defendants from multiple punishments for the same offense.	13
(ii) The legislative intent must be reexamined after Blakely..	14
(iii) Mr. Venis’ assault conviction is the same in fact and in law as the accompanying firearm enhancement.	19
(iv) The conviction for both assault and the firearm enhancement violate Mr. Venis’ constitutional right to be free from double jeopardy and the firearm enhancement must be vacated. .	22
3. THE 10 YEAR NO CONTACT ORDER IMPROPERLY EXCEEDED THE STATUTORY MAXIMUM PENALTY ON 4 OF MR. VENIS’ CONVICTIONS.	22
E. CONCLUSION.....	23

Table of Authorities

Federal Cases

<u>Adams v. United States ex rel. McCann</u> , 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 2d 268 (1942)	7
<u>Alabama v. Smith</u> , 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)	14
<u>Benton v. Maryland</u> , 395 U.S. 784, 89 S Ct. 2056, 23 L.Ed.2d 707 (1969)	13
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	16, 17, 18, 19
<u>Blockburger v. United States</u> , 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).....	19, 20
<u>Jones v. United States</u> , 526 U.S. 227, 119 S.Ct. 1215, 153 L.Ed.2d 311 (1999).....	17
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 726, 89 S.Ct. 2072 , 23 L.Ed.2d 656 (1969).....	14
<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 18 (2002) 17, 18	
<u>Roe v. Flores-Ortega</u> , 528 U.S. 470, 120 S. Ct 1029, 145 L. Ed. 2d 985 (2000).....	8
<u>Sattazahn v. Pennsylvania</u> , 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).....	17
<u>State v. Armendariz</u> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	22, 23
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	7, 8
<u>United States v. Cronin</u> , 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).....	6, 7
<u>United States v. Dixon</u> , 509 U.S. 688, 113 S. Ct. 2849, 125 L.Ed.2d 556 (1993).....	19, 20
<u>Wiggins v. Smith</u> , 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).....	8

State Cases

Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)..... 15

State v. Bobic, 140 Wn.2d 250, 996 P.2d 610 (2000) 14

State v. Cienfuegos, 144 Wn.2d 222, 25 P.3d 1011 (2001)..... 9

State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003) 16

State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005)..... 14, 15

State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995)..... 13, 14, 20

State v. Gohl, 109 Wn.App. 817, 37 P.3d 293 (2001), review denied, 146 Wn.2d 1012 (2002). 20, 22

State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996)..... 7, 8

State v. Hermann, 138 Wn.App. 596, 158 P.3d 96 (2007) 10

State v. Kelley, 146 Wn.App. 370, 189 P.3d 853 (2008) 22

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1998) 8

State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053 (2008) 22

State v. Silva, 106 Wn. App. 586, 24 P.3d 477 (2001)..... 10

State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003) 8

Statutes

RCW 9.41.010..... 15, 21

RCW 9.94A.533..... 15, 16, 19, 21

RCW 9A.36.021..... 21

Constitutional Provisions

U.S. Const. Amend 6 7

U.S. Const. Amend. 5 13

U.S. Const. Amend. VI 7, 18, 19

Wash. Const. Art 1 § 9..... 13

Wash. Const. Art I, § 22..... 7

Other Authorities

Hard Time for Armed Crime Act of 1995 (Initiative 195) 16

Jacqueline E. Ross, “Damned Under Many Headings: The Problem of
Multiple Punishment,” 29 Am. J. Crim. Law 245 (2002)..... 19

Laws of 1995, ch. 129 § 1 (Findings and Intent) 16

Timothy Crone, “Double Jeopardy, Post Blakely,” 41 Am. Crim. L. Rev.
1373 (2004) 18

A. ASSIGNMENTS OF ERROR

1. Defense counsel's failure to accept the prosecutor's offer to stipulate that Mr. Venis merely had a "prior serious offense conviction" and a "prior felony conviction" as proof on two counts of unlawful possession of a firearm denied Mr. Venis effective trial counsel.
2. Mr. Venis' second degree assault sentence violates double jeopardy because it includes a firearm enhancement in addition to the conviction for second degree assault based on the use of a firearm.
3. The trial court exceeded its sentencing authority when it imposed a no contact order that exceeded the statutory maximum for four of Mr. Venis' convictions.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. First degree unlawful possession of a firearm requires proof that an accused has a prior conviction for a "serious offense." Second degree unlawful possession of a firearm requires proof that an accused has a prior felony conviction. To avoid the prejudicial admission of 10 prior felonies, the prosecutor offered to stipulate that Mr. Venis merely had a "prior serious offense conviction" and a "prior felony conviction." Defense counsel refused to accept the stipulation. The court admitted into evidence sentencing documents supporting all 10 prior felony convictions. Was this a reasonable tactical choice by defense counsel? Could Mr. Venis have been other than prejudiced by the jury knowing specific details about his extensive criminal history?
2. The double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple punishments for the same offense. Mr. Venis was convicted of second degree assault and the jury made a separate finding that he was armed with a firearm at the

time of the assault. Was Mr. Venis punished twice for the same conduct in violation of his constitutional rights?

3. The length of a no contact order cannot exceed the statutory maximum for the charged offense. Upon sentencing Mr. Venis, the trial court ordered that Mr. Venis have no contact with Monique Barnes for 10 years even though one of his convictions was a class C felony and three of the convictions were gross misdemeanors. Did the trial court exceed its sentencing authority when entering the 10 year no contact order

C. STATEMENT OF THE CASE

Mark Venis admitted having assaulted his girlfriend, Monique Barnes, outside of her car at an intersection in Longview. 3B RP at 542. He admitted having violated a no contact order that was entered after he was arrested for the assault in the intersection. 3B RP at 544-45. In fact, he violated the no contact order twice: once by calling Ms. Barnes and once by sending her a letter. 3B RP at 544-45. But Mr. Venis denies the balance of the charges leveled against him by the State and testified as such to the Cowlitz County jury that heard his case. 3B RP at 537-56.

Mr. Venis and Monique Barnes dated from August to November 2008. 3A RP at 310; 3B RP at 506. Ms. Barnes characterized their relationship as violent. 3A RP at 310. The relationship ended when Mr. Venis was locked up in the Cowlitz County Jail for the fourth degree assault against Ms. Barnes in the intersection. 3A RP at 351.

While Mr. Venis was in custody, Ms. Barnes told the police there had been another incident a few days earlier. 3A RP at 353. According to Ms. Barnes, around October 28, she and Mr. Venis were driving to Cathlamet to visit his parents. 3A RP at 311-12. She was driving Mr. Venis' Chevrolet Blazer. 3A RP at 311-12. Mr. Venis was smoking methamphetamine. 3A RP at 318-19. She was not smoking methamphetamine because she would not drive under the influence of methamphetamine. 3A RP at 318-19. They argued. 3A RP at 312. Mr. Venis was agitated. 3A RP at 312. Mr. Venis took a handgun out from the inside of the Blazer's door. 3A RP at 313. He held the gun in his lap and played with it. 3A RP at 314-15. He pulled the magazine in and out of the gun. 3A RP at 314-15. He put the barrel of the gun against Ms. Barnes' cheek and told her he would "blow her f____n¹ head off" if she lied to him. 3A RP at 320. He had the gun against her cheek for maybe a minute. 3A RP at 320-322. She testified the gun against her cheek terrified her and she thought Mr. Venis might indeed blow her head off. 3A RP at 311, 322. Mr. Venis put the gun back in the Blazer door. 3A RP at 322-23. They had a pleasant day visiting Mr. Venis' parents. 3A RP at 325-27. Their relationship continued as if nothing happened. 3A RP at 327.

¹ The actual word is transcribed in the verbatim record.

After Mr. Venis went to jail for assaulting Ms. Barnes in the intersection, Ms. Barnes said that she grew increasingly concerned about the gun and knew that it was in Mr. Venis' truck. 3A RP at 347-48. Within hours of Mr. Venis being booked, he was being released and called Ms. Barnes to tell her of his pending release. 3A RP at 345-36. Ms. Barnes testified that she removed the gun from the truck and gave it to her mother, Ruby Barnes, for safekeeping. 3A RP at 348-49; 3B RP at 516. Mrs. Ruby Barnes saw the gun previously on October 28 when her granddaughter brought her Mr. Venis' "hoody" sweatshirt. 3B RP at 507. The gun was in the pocket of the "hoody". 3B RP at 507-09.

In addition to the fourth degree assault charge from the incident in the intersection, and the two misdemeanor no contact violations for the phone call and the letter, the State also charged Mr. Venis with second degree assault, felony harassment, and unlawful possession of a firearm in the first and second degree. CP 1-4. Those more serious charges arose from the incident that only Ms. Barnes said occurred on the drive to Cathlamet. CP 1-4. Firearm enhancements were also added to the second degree assault and the felony harassment charge. CP 1-4. The first and second degree unlawful possession of a firearm charges were for the same gun, the gun said to have come from the Blazer door. CP 1-4.

At the jury trial, the prosecutor agreed to enter into a stipulation to support a portion of the unlawful firearm possession charge. 2B RP at 262. Rather than parade Mr. Venis' lengthy criminal history before the jury, the prosecutor offered to stipulate that Mr. Venis simply had a serious felony conviction and a felony conviction. 2B RP at 262. Defense counsel refused the stipulation offer because Mr. Venis did not want to agree with it. 2B RP at 257-58. In lieu of the stipulation, a retired Cowlitz County Sheriff's Deputy who is a and fingerprint expert testified that the fingerprints for 10 juvenile and adult felony convictions were all Mr. Venis' fingerprints. 2B RP at 241-255. (See Supplemental Designation of Clerk's Papers, Exhibits 5-13.) Defense counsel did not even cross examine the witness. 2B RP at 255. All of Mr. Venis' juvenile adjudications of guilty and adult judgment and sentences were admitted as exhibits and given to the jury during deliberations. (See Supplemental Designation of Clerk's Papers, Exhibits 5-13.)

The jury found Mr. Venis guilty as charged to include the two firearm enhancements. CP 58-71. By a special verdict, the jury also found Mr. Venis acted with deliberate cruelty to Monique Barnes in committing the second degree assault. CP 65-66.

At sentencing, the court concluded that the jury's deliberate cruelty finding, Mr. Venis' high offender score score, and unscored misdemeanors

each established a separate basis for an exceptional sentence and each basis would, standing alone, support an exceptional sentence. CP 103-104. The court found that the second degree assault and the felony harassment were the same criminal conduct. CP 96. To avoid double jeopardy, the court did not sentence Mr. Venis on the second degree unlawful possession of a firearm. 5 RP at 675; CP 97. The court formulated an exceptional sentence by ordering the second degree assault and the first degree unlawful possession of a firearm be served consecutively. CP 100.

Mr. Venis is serving a 204 month sentence with one year concurrent sentences on each of his three misdemeanors. CP 100. Mr. Venis appeals. CP 110. Mr. Venis maintains that he is not guilty of any of the felony charges. On appeal, he asks that his felony convictions be reversed.²

D. ARGUMENT

1. DEFENSE COUNSEL'S FAILURE TO ENTER INTO A STIPULATION TO PREVENT 10 PRIOR FELONY CONVICTIONS FROM COMING INTO EVIDENCE DENIED MR. VENIS EFFECTIVE TRIAL COUNSEL.

A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S.

² Mr. Venis may ask for an expanded remedy in his Statement of Additional Grounds for Review.

Ct. 2039, 80 L. Ed. 2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. Amend 6³; Wash. Const. Art I, § 22⁴. “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to afford defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S. Ct. 236, 87 L.Ed.2d 268 (1942)).

An accused’s right to be represented by counsel is a fundamental component to our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel’s performance was deficient, and (2) that the deficient performance prejudices the defense. Strickland, 466

³ The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

⁴ Article I, § 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel”

U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct 1029, 145 L.Ed.2d 985 (2000); see also, Wiggins v. Smith, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”) (quoting Strickland, 466 U.S. at 688). While an attorney’s decisions are treated with deference, his acts must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel’s inadequate performance, the result would have been different, prejudice is established and reversal is required. Hendrickson, 129 Wn.2d at 78. The defendant must demonstrate grounds to conclude a reasonable probability of a different outcome exists, but need not show the attorney’s conduct altered the result of the case. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

(i) Defense counsel’s failure to stipulate to Mr. Venis’s prior convictions resulted in prejudicial error.

No effective defense attorney would fail to stipulate that his client had a prior serious felony conviction and as well as a conviction for a unnamed felony offense if it meant that the names and existence of 10 felonies would not come into evidence. Yet, that is what defense counsel did in Mr. Venis' case. Because the State charged Mr. Venis with first and second degree unlawful possession of a firearm, the State was obliged to prove that Mr. Venis had a requisite serious felony conviction and a general felony conviction. To prevent the jury from being upset by Mr. Venis' 10 prior felony convictions, the prosecutor offered to stipulate to generic language to prove the underlying felonies:

MS. SHAFFER:⁵ Your Honor, I have always been completely willing and have always been asking the defense to stipulate to the fact that he has prior serious offense conviction (sic) and prior felony convictions. They are not willing to stipulate so the State is required to prove the convictions. To do so, the only way we can do it is through fingerprints evidence with these judgment and sentences.

2B RP at 262.

Inexplicably, defense counsel would not enter into the stipulation because Mr. Venis would not sign the stipulation. 2B RP at 257-58. But the decision to enter into the stipulation was a decision for defense counsel to make. Matters that go to trial strategy are left to the sound discretion of trial counsel. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011

⁵ Ms. Shaffer is the prosecutor.

(2001) (if a concession is a matter of trial strategy or tactics, it does not constitute deficient performance.). For example, in State v. Silva, defense counsel conceded in closing argument that that the defendant was guilty of forgery and attempting to elude a pursuing police vehicle. State v. Silva, 106 Wn. App. 586, 596, 24 P.3d 477 (2001). On appeal, Defendant Silva argued that the concession was an unauthorized guilty plea and that defense counsel was deficient. In its opinion, the court recognized that conceding guilt to the jury can be a sound trial tactic when the evidence of guilt is overwhelming. Silva, 106 Wn.App. at 596. Such an approach may actually help the defendant gain credibility with the jury when a more serious charge is at stake. Id. at 599. See also State v. Hermann, 138 Wn.App. 596, 158 P.3d 96 (2007) (defense counsel conceded guilt to a second degree theft in closing when evidence was overwhelming and in an effort to persuade the jury not to find guilt on the more serious first degree theft charge).

Under the facts of Mr. Venis' case, failure to stipulate was, at best, a loss of a tactical advantage and, at worst, an evidentiary disaster. For three very good reasons, defense counsel should have readily admitted that Mr. Venis had unnamed convictions for a serious offense and a felony offense. First, it would have given defense counsel a perfect opportunity to argue that because Mr. Venis knew he could not legally possess a gun,

he did not have a gun, and both Monique Barnes and her mother, Ruby Barnes, were lying when they testified that Mr. Venis did have a gun.

Second, defense counsel knew that Mr. Venis had many convictions. Prior to trial, defense counsel received the fingerprint card, the certificates of adjudication, and the judgment and sentences that proved Mr. Venis had the convictions the State listed on the Information to support the unlawful possession charges. Defense counsel knew that a retired 25-year veteran of the Cowlitz County Sheriff's Office, a long time local fingerprint expert who had testified many times as both a defense and prosecution expert, would – and did - testify that: (1) Mr. Venis had 10 felony convictions; (2) all of the convictions were Cowlitz County convictions (in other words, from the juror's backyard); and (3) that Mr. Venis' was seemingly an unrepentant criminal as his crimes spread over a 16 year period. (See Supplemental Designation of Clerk's Papers, Exhibits 5-13.)

Third, Mr. Venis could not get a fair trial when the jury heard the unnecessary specifics of Mr. Venis' criminal history. An average person, as jurors are intended to be, certainly could have concluded, after listening to the parade of Mr. Venis' convictions, that Mr. Venis was:

- A thief (burglary in the second degree, taking a motor vehicle without owner's permission, burglary in the second

degree; residential burglary, possession of stolen property in the second degree, forgery, forgery);

- A drug addict (violation of the uniform controlled substances act); and
- A violent person (intimidating a public servant, felony harassment).

(See Supplemental Designation of Clerk's Papers, Exhibits 5-13.)

In short, the jury could have reasonably concluded that because Mr. Venis was a bad man, he must be guilty of these charges too even though the assault and harassment charges were really his word against Monique Barnes' word.

There was no tactical reason for refusing to accept the prosecutor's stipulation that the jury be told nothing more than Mr. Venis had a serious felony conviction and a felony conviction. And Mr. Venis incurred prejudice because of it. He is entitled to a new trial with effective representation.

2. THE FIREARM ENHANCEMENT FOR ASSAULT COMMITTED WITH A FIREARM VIOLATES DOUBLE JEOPARDY.

Mr. Venis was convicted of second degree assault based on the use of a firearm and his sentence was enhanced because of the firearm use.

Thus, Mr. Venis was punished for the assault with a firearm and his sentence was further increased because of the firearm. Mr. Venis was thereby twice convicted and punished for using a firearm in the assault in violation of the prohibition against double jeopardy found in the federal and state constitutions. Consequently, Mr. Venis' firearm enhancement must be vacated.

(i) The double jeopardy provisions of the federal and state constitutions protect criminal defendants from multiple punishments for the same offense.

The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life and 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 states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S Ct. 2056, 23 L.Ed.2d 707 (1969). Washington gives its double jeopardy provision the same interpretation as the United States Supreme Court gives to the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Double jeopardy is a constitutional issue that may be raised for the first

time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000). Review is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)); Gocken, 127 Wn.2d at 100. While the state may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. Freeman, 153 Wn.2d at 770-71.

(ii) The legislative intent must be reexamined after Blakely.

The Legislature has the power to define offenses and set punishments within the boundaries of the constitution. Freeman, 153 Wn.2d at 771; State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Thus, the first step in deciding if punishment violates the double jeopardy clause is to determine what punishment is authorized by the Legislature.

Freeman, 153 Wn.2d at 771. Courts assume the punishment intended by the Legislature does not violate double jeopardy. Id.; Albernaz v. United States, 450 U.S. 333, 340, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981) (reasoning Congress is predominately a body of lawyers and presumed to know the law). Thus, to determine if the Legislature intended multiple punishment for the violation of separate statutes, courts begin with the language of the statutes. Freeman, 153 Wn.2d at 771-72.

RCW 9.94A.533 provides for additional time to be added to an offender's standard range if the offender was armed with a firearm:

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. . . .

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection. . . .

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.

RCW 9.94A.533.

The statute, part of the Hard Time for Armed Crime Act of 1995 (Initiative 195), was designated to provide increased penalties for criminals using or carrying guns, to “stigmatize” the use of weapons, and to hold individual judges accountable for their sentencing on serious crimes. Laws of 1995, ch. 129 § 1 (Findings and Intent). It provides that all firearm enhancements are mandatory and must be served consecutively to any base sentences and to any other enhancements. RCW 9.94A.533(3)(e); State v. DeSantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003).

The language of the statute demonstrates that voters intended a longer standard sentencing range, and therefore greater punishment, for those who participate in crimes where a principal or an accomplice is armed with a firearm. But the statute creates a specific exception for those crimes where possession or using a firearm is a necessary element of the crime, such as drive-by shooting or unlawful possession of a firearm, demonstrating some sensitivity to double jeopardy concerns. RCW 9.94A.533(3)(f). The voters apparently did not consider the problem of redundant punishment created when a firearm enhancement is added to a crime and using a firearm is the way the offense was committed.

Significantly, the Hard Time for Armed Crime Act was passed before Blakely, and other United States Supreme Court cases made it clear that the fact that exposes a person to increased punishment is an element

of an offense. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 604-05, 122 S.Ct. 2428, 153 L.Ed.2d 18 (2002); Apprendi v. New Jersey, 530 U.S. 466, 476-77, n.19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Jones v. United States, 526 U.S. 227, 243, 119 S.Ct. 1215, 153 L.Ed.2d 311 (1999) (Stevens, J., concurring). Those cases have made it clear that the relevant determination is not what label the fact has been given by the Legislature or its placement in the criminal or sentencing code, but rather the effect it has on the maximum sentence to which the person is exposed. Apprendi, 530 U.S. at 494; Ring, 536 U.S. at 602. The concept was succinctly stated in Ring:

If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and the aggravating factor together constitute an aggravated crime. The aggravated fact is an element of the aggravated crime.

536 U.S. at 605.

This concept was reiterated when the United States Supreme Court considered whether double jeopardy principles were violated by seeking the death penalty on retrial after appeal where the first jury was unable to reach a unanimous verdict on whether to impose life or death. Sattazahn

v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).

Justice Scalia⁶ explained the holding of Ring and its significance:

[W]e held that aggravating circumstances that make a defendant eligible for the death penalty “operate as ‘the functional equivalent of an element of a greater offense.’” That is to say, for purposes of the Sixth Amendment’s jury trial guarantee, the underlying offense of “murder” is a distinct, lesser included offense of “murder plus one or more aggravating circumstances.”

537 U.S. at 111 (internal citations omitted.) The Court went on to find “no principled reason to distinguish” what constitutes an offense for purposes of the Sixth Amendment and for purposes of double jeopardy. Ring, 537 U.S. at 111.

The need to reexamine the court’s deferral to the Legislature in double jeopardy jurisprudence in light of Blakely has already been noted by legal scholars. Timothy Crone, “Double Jeopardy, Post Blakely,” 41 Am. Crim. L. Rev. 1373 (2004). The problems of “redundant” counting of conduct under the Federal Sentencing Guidelines, for example, was thoroughly examined by one commentator, who called for a reorientation of double jeopardy analysis to protect defendants from unfairly consecutive sentences. Jacqueline E. Ross, “Damned Under Many

⁶ Justice Scalia wrote the opinion for the five-member majority. Justice O’Conner, given her resolute opposition to the rule articulated in Apprendi, dissented from Part III of Justice Scalia’s opinion. 537 U.S. at 117. Four justices dissented because they believed that the State was barred from seeking the death penalty at the second trial. Id. at 118-19. The dissenters specifically relied on Ring for the proposition that aggravating factors in death penalty cases are the equivalent of elements. Id. at 126 n.6 (Ginsburg, J., dissenting). Thus, a majority of the justices agree with Part III of Scalia’s opinion.

Headings: The Problem of Multiple Punishment,” 29 Am. J. Crim. Law 245, 318-326 (2002).

The voters and the Legislature were unaware that the firearm enhancements it created were an element of a higher offense because it increased the offender’s maximum sentence. See Blakely, 124 S.Ct. at 2537-38; State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005)⁷ (violation of Sixth Amendment rights to due process and jury trial to sentence defendant to firearm enhancement when jury verdict supported only deadly weapon enhancement). Because a firearm enhancement acts like an element of a higher crime, the initiative simply adds a redundant element of use of a firearm for crimes where use of a firearm was already an element, a result that voters would not have intended. See RCW 9.94A.533(3)(f).

(iii) Mr. Venis’ assault conviction is the same in fact and in law as the accompanying firearm enhancement.

When it is not clear if double punishments are authorized by statute, courts utilize the Blockburger, or “same elements” test to determine if two convictions violate double jeopardy. United States v.

⁷ The Supreme Court overruled Recuenco’s holding that Blakely errors cannot be harmless error, but not the application of Appendi and Blakely to firearm enhancements. Washington v. Recuenco, 548 U.S. 212, 126, S.Ct. 2546, 165 L.Ed.2d 466 (2006).

Dixon, 509 U.S. 688, 697, 113 S. Ct. 2849, 125 L.Ed.2d 556 (1993); Gocken, 127 Wn.2d at 101-02. 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. Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932); Dixon, 113 S.Ct. at 2856. This is similar to Washington's "same elements" test for double jeopardy. Calle, 25 Wn.2d at 777. The test requires the court to look to the statutory offenses to determine if each crime, as charged, has elements that differ from the other. State v. Gohl, 109 Wn.App. 817, 821, 37 P.3d 293 (2001), review denied, 146 Wn.2d 1012 (2002).

Mr. Venis' assault conviction was the same in fact and in law as his accompanying firearm enhancement. Factually, each involves the same criminal act as well as the same victim. Moreover, nothing else established the firearm enhancement which simply required Mr. Venis to commit the assault with a firearm.

Legally, the assault conviction is the same in law as the firearm enhancement. The second degree assault statute, as it pertains to the charge, read;

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

...

(c) Assaults another with a deadly weapon.

RCW 9A.36.021(1)(c). The jury was similarly instructed:

To convict the defendant of the crime of assault in the second degree, as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about October 28, 2009, the defendant assaulted Monique Barnes with a deadly weapon; and
- (2) That this act occurred in the State of Washington.

CP 22 (Instruction 8).

The jury found Mr. Venis was armed with a firearm during the commission of the second degree assault and RCW 9.94A.533(3) requires the sentencing court to add additional time to an offender's standard range score "if the offender ... was armed with a firearm as defined in RCW 9.41.010." But the assault could not have been committed as alleged without Mr. Venis being armed with a firearm.

Mr. Venis was given an additional 36 months in prison for the firearm enhancement. The effect was to essentially sentence him for assaulting others with a firearm while armed with a firearm, and was thus convicted and punished twice for the use of a weapon. The addition of a firearm enhancement to Mr. Venis' conviction placed him twice in jeopardy for use of a gun and violated the state and federal constitutions.

(iv) The conviction for both assault and the firearm enhancement violate Mr. Venis' constitutional right to be free from double jeopardy and the firearm enhancement must be vacated.

Mr. Venis was punished twice – once for the second degree assault committed with a firearm and again for being armed with a firearm while committing the same assault. Because both punishments are based upon the same facts and law, they violate the double jeopardy provisions of the federal and state constitutions. The firearm enhancement must be vacated and this case remanded for resentencing. Gohl, 109 Wn.App. at 824.⁸

3. THE 10 YEAR NO CONTACT ORDER IMPROPERLY EXCEEDED THE STATUTORY MAXIMUM PENALTY ON 4 OF MR. VENIS' CONVICTIONS.

At sentencing, the court imposed a 10 year domestic violence no contact order prohibiting Mr. Venis from contact with Monique Barnes. The 10 year no contact order specified that it applied to all of Mr. Venis' charges. CP 93-94. But Mr. Venis was convicted of only 2 crimes, both class B felonies, for which a 10 year order is allowed. No contact orders cannot exceed the statutory maximum for the underlying offense. State v.

⁸ Both Division I and Division II of this court have previously rejected this challenge to the deadly weapon enhancements. See State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053 (2008) (Divisions I); State v. Kelley, 146 Wn.App. 370, 189 P.3d 853 (2008) (Division II). However, the state Supreme Court has accepted review in Kelley on this issue (see 82111-9.) Oral argument is set for October 29, 2009.

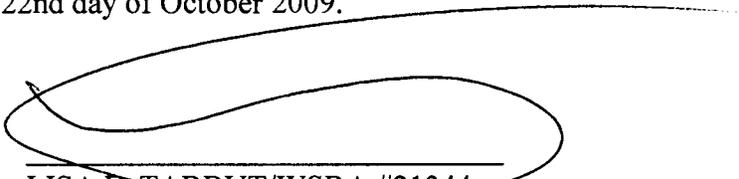
Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007). Mr. Venis' remaining four convictions are for a class C felony and three gross misdemeanors. The class C felony has a statutory maximum of 5 years and the gross misdemeanors a statutory maximum of two years.

Mr. Venis must be remanded for clarification of the no contact order.

E. CONCLUSION

Mr. Venis is entitled to a new trial. Mr. Venis was denied effective assistance of counsel when his trial attorney did not stipulate that Mr. Venis had a serious felony conviction and a felony conviction in lieu of admission of his extensive criminal history. Alternatively, if no new trial is granted, the firearm enhancement on the second degree assault should be vacated as violating double jeopardy. Finally, the case should be remanded to clarify the length of time and the charges to which the no contact order applies.

Respectfully submitted this 22nd day of October 2009.



LISA E. TABBUT/WSBA #21344
Attorney for Appellant

CERTIFICATE OF MAILING

State of Washington, Respondent, v. Mark Brandon Venis, Appellant
Court of Appeals No. 39172-4-II

I certify that I mailed a copy of Appellant's Brief to:

Mark Venis/DOC #791293
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

and to:

Susan I. Baur
Cowlitz County Prosecuting Attorney
312 S.W. 1st Ave.
Kelso, WA 98626

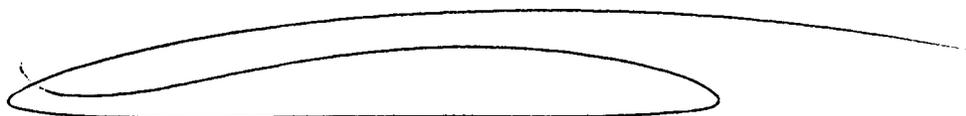
COURT OF APPEALS
DIVISION II
09 OCT 26 PM 12:32
STATE OF WASHINGTON
BY _____
DEPUTY CLERK

And that I also mailed the original and one copy to the Court of Appeals, Division II.

All postage prepaid, as required, on October 22, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE
OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on October 22, 2009.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Appellant