

FILED

JUN 01 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 28543-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ERNEST JAMES SORRELL,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
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A. ASSIGNMENTS OF ERROR

1. Ernest Sorrell's convictions for third degree child molestation and second degree incest, based on the same acts of sexual contact, violated the Double Jeopardy Clauses of the state and federal constitutions.

2. The trial court exceeded its authority in sentencing Mr. Sorrell to a term of community custody that exceeded the statutory maximum sentence for the crimes.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Sorrell's two convictions for third degree child molestation arose from the very same acts of sexual contact that underlay his two convictions for second degree incest. As charged and prosecuted, proof of the child molestation charges necessarily proved the charges of incest. Are the offenses the same such that convictions for both violate the prohibition against double jeopardy?

2. A sentencing court may not impose a term of community custody that exceeds the statutory maximum sentence. If the term of community custody, when combined with the standard range sentence imposed, exceeds the statutory maximum, the court must reduce the term of community custody. Did the trial court exceed its authority in imposing a term of community custody that, when

combined with the standard range sentence imposed, exceeded the five-year statutory maximum sentence?

C. STATEMENT OF THE CASE

Ernest Sorrell was charged in Grant County with two counts of third degree child molestation (RCW 9A.44.089) and two counts of second degree incest (RCW 9A.64.020(2)). CP 118-20. Counts 1 (child molestation) and 2 (incest) arose from a single act of alleged sexual contact between Mr. Sorrell and his fourteen-year-old daughter, which occurred sometime between June 1 and September 1, 2006. Id. Counts 3 (child molestation) and 4 (incest) arose from a single, separate, act of alleged sexual contact between Mr. Sorrell and his daughter, which occurred sometime between June 1 and October 1, 2006. Id.

At trial, Mr. Sorrell's daughter, A.S., testified about only two alleged acts of sexual contact occurring in Grant County. According to A.S., sometime during the summer of 2006, she went camping alone with her father. 5/15/09RP 103-04. While she was lying in her sleeping bag in the tent, her father, who had an erection, got on top of her and simulated sex with her by "rubbing his part and my part together." 5/15/09RP 107. They were both fully clothed at the time. 5/15/09RP 107.

The other incident, according to A.S., occurred one to two months later. 5/15/09RP 109. On that occasion, she and her father were on a fishing trip alone. 5/15/09RP 109. As the two were hiking out of the area, Mr. Sorrell approached her and held her in a tight hug. 5/15/09RP 111. He had an erection and moved his hips, rubbing his penis on her as though he were "having sex over the top of clothes." 5/15/09RP 120.

In closing argument, the prosecutor informed the jury that Counts 1 and 2 were based on a single act of alleged sexual contact, which occurred during the "camping trip." 5/15/09RP 84. The prosecutor further informed the jury that Counts 3 and 4 were based on a single, separate, alleged act of sexual contact, which occurred during the "fishing trip." 5/15/09RP 84.

The jury found Mr. Sorrell guilty of all four counts as charged. CP 134-37.

The trial court entered judgment on all four counts. CP 141. The court ruled that "Count 2 encompasses with Count 1," and "Count 4 encompasses with Count 3," and therefore did not include Counts 2 and 4 in the offender score. CP 143.

The court imposed a standard-range sentence of 60 months confinement for counts 1 and 3, to be served concurrently. CP 145.

That was equivalent to the statutory maximum sentence for the crime. RCW 9A.20.021; RCW 9A.44.089(2). On top of the term of confinement, the court imposed 36 to 48 months of community custody for each count. CP 146.

D. ARGUMENT

1. CHARGING AND PROSECUTING MR. SORRELL FOR CHILD MOLESTATION AND INCEST BASED UPON A SINGLE ACT OF SEXUAL CONTACT RESULTED IN A DOUBLE JEOPARDY VIOLATION

- a. The constitutional prohibition against double jeopardy prohibits multiple convictions for the same offense. The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article 1, section 9 of the Washington Constitution protect a criminal defendant from multiple convictions and punishments for the same offense.¹ Ball v. United States, 470 U.S. 856, 861, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). The fact of conviction alone, even without the imposition of sentence, constitutes punishment for purposes of a double jeopardy analysis. State v. Gohl, 109 Wn. App. 817, 822, 37 P.3d 293 (2001) (citing

¹ The Fifth Amendment provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." This clause applies 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). Similarly, article 1, section 9 of

Ball, 470 U.S. at 865; In re Pers. Restraint of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000)).

A double jeopardy violation is reviewed de novo. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

b. As charged and prosecuted, two convictions violate the prohibition against double jeopardy where the evidence required to support a conviction upon one of them is sufficient to warrant a conviction on the other. Where a defendant is charged with violating two separate statutory provisions for a single act, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed.2d 306 (1932); In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Where the relevant statutes do not expressly disclose legislative intent, courts apply the test variously known as the Blockburger test, the "same elements" test, or the "same evidence" test. Orange, 152 Wn.2d at 816. Under this test, courts must determine "whether each provision requires proof of a fact which the other does not." Blockburger, 284 U.S. at 304. This test cannot be applied by a

the Washington Constitution states that "no person shall be. . . twice put in jeopardy for the same offense."

mere abstract comparison of the statutory elements, but must focus on the offenses as they were charged and prosecuted in the particular case. Whalen v. United States, 445 U.S. 684, 694, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); Orange, 152 Wn.2d at 818-19.

Expressed in a slightly different way, two convictions violate the prohibition against double jeopardy, absent clear legislative intent to the contrary, if they are "identical both in fact and in law." Orange, 152 Wn.2d at 816 (quoting State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)). Under Reiff, offenses are the same in fact and in law if "the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other." Id. Orange noted that the test employed in Reiff is "indistinguishable from the Blockburger test." 152 Wn.2d at 816.

The United States Supreme Court is the "ultimate interpreter" of the United States Constitution. Baker v. Carr, 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008). The Court's interpretation of the Fifth Amendment's prohibition against double jeopardy makes clear that it is irrelevant whether third degree child molestation could be established without also proving second degree incest in another scenario. Whalen, 445 U.S. at 694; Harris

v. Oklahoma, 433 U.S. 682, 682-83, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) (convictions for felony murder with the predicate crime of robbery and for robbery violated the Double Jeopardy Clause even though the felony murder statute on its face did not require proof of robbery).

Similarly, it is also irrelevant that the two crimes in question have different statutory elements. United States v. Dixon, 509 U.S. 688, 712, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (a conviction for criminal contempt barred a subsequent prosecution for a drug offense); Illinois v. Vitale, 447 U.S. 410, 420-21, 100 S.Ct. 2267, 65 L.Ed.2d 228 (1980); Brown v. Ohio, 432 U.S. 161, 164, 97 S.Ct. 2221, 53 L.Ed.2d 187(1977) ("separate statutory crimes need not be identical either in constituent elements or in actual proof in order to be the same within the meaning of the constitutional prohibition").

Following federal interpretation of the Fifth Amendment, the Washington Supreme Court determined in Orange that courts must "look at the facts used to prove the statutory elements" rather than limit the analysis to a comparison of generic statutory language. 152 Wn.2d at 819. In Orange, since "the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault," conviction for

both offenses was prohibited. Id. at 820. Similarly, in Hughes, convictions for rape and child rape based on the same act of intercourse violated the prohibition against double jeopardy, even though "the elements of the crimes facially differ." 166 Wn.2d at 682-84.

Unfortunately, some Washington decisions have failed to conduct a double jeopardy analysis by focusing on the offenses as they were charged and prosecuted. Other Washington decisions have misstated the test articulated by the United States Supreme Court. See State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) and State v. Vladovic, 99 Wn.2d 413, 423-24, 662 P.2d 853 (1983) (concluding a double jeopardy violation does not occur if there is an element in each offense not included in the other and proof of one does not necessarily prove the other); State v. Freeman, 153 Wn.2d 765, 773-79, 108 P.3d 753 (2005) (utilizing a four-part test to determine whether two crimes violate double jeopardy violations).

Under the United States Constitution, a determination that the Legislature intended to allow for separate convictions and punishments must be based upon an express statement of legislative intent. Whalen, 445 U.S. at 691-92. If there is doubt as

to legislative intent, the rule of lenity requires the interpretation most favorable to the defendant. Id. at 694. Individual states may afford more, but not less, protection than the United States Constitution. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). Washington cases that allow courts to make assumptions about legislative intent in the absence of the Legislature's express statement of intent are in direct conflict with United States Supreme Court case law. See Freeman, 153 Wn.2d at 771-780; Calle, 125 Wn.2d at 777-82.

c. Mr. Sorrell's convictions for third degree child molestation and second degree incest, as charged and prosecuted, are the same in law and fact and violate the Double Jeopardy Clause. Here, the two child molestation offenses are the same "in fact" as the two incest offenses.² The evidence offered by the State to prove the molestation charges consisted of A.S.'s testimony about the "camping trip" incident and the "fishing trip" incident. 5/15/09RP 103-04, 107, 109-11, 120. The same evidence was

² The two child molestation charges alleged that on the particular dates in question, Mr. Sorrell "being at least forty-eight (48) months older than A.A.S., had sexual contact with A.A.S., who was at least fourteen (14) years old but less than sixteen (16) years old, and not married to the defendant." CP 118-19. The two incest charges alleged that on the same dates as the molestation offenses, Mr. Sorrell "engaged in sexual contact with a person the defendant knew to be related to the defendant, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or halfblood, to-wit: A.A.S., who was the defendant's daughter." CP 119-20.

used to establish the charges of incest. Counts 2 and 4 not only arose from the same incident dates, they were both based on the very same alleged acts of sexual contact as Counts 1 and 3, respectively. Id. Therefore, the exact same evidence, A.S.'s testimony regarding the "camping trip" and "fishing trip" incidents, supports the convictions.

The two child molestation convictions are also the same in law as the two incest convictions. The appropriate inquiry focuses on whether the evidence to prove third degree child molestation, as charged and prosecuted, also proved the crime of second degree incest, as charged and prosecuted. Orange, 152 Wn.2d at 818. Both charges required the State to prove Mr. Sorrell had "sexual contact" with A.S.³ Proof of sexual contact between Mr. Sorrell and

³ The crime of third degree child molestation occurs when a person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

RCW 9A.44.089(1). Similarly, the crime of second degree incest occurs when a person

engages in sexual contact with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

A.S. during the charging period, when A.S. was fourteen years old, proved all of the elements of both third degree child molestation and second degree incest. RCW 9A.44.089(1); RCW 9A.64.020(2)(a) Since proof of the child molestation charges also proved the incest charges, the offenses are the same "in law" and Mr. Sorrell's convictions violate the prohibition against double jeopardy. Orange, 152 Wn.2d at 820.

d. The proper remedy is vacation of the convictions for incest. Where two convictions violate the prohibition against double jeopardy, the remedy is to vacate the lesser conviction and remand for resentencing on the remaining conviction. State v. League, 167 Wn.2d 671, 672, 223 P.3d 493 (2009). Accordingly, the convictions in Count 2 and 4 for incest must be vacated.

2. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING A TERM OF COMMUNITY CUSTODY THAT, TOGETHER WITH THE STANDARD RANGE SENTENCE IMPOSED, EXCEEDED THE STATUTORY MAXIMUM SENTENCE

"A trial court only possesses the power to impose sentences provided by law." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

RCW 9A.64.020(2)(a). "Sexual contact" has the same meaning for both crimes. RCW 9A.64.020(3)(b).

When imposing a sentence for a felony conviction, a trial court "may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5). The term of community custody "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." RCW 9.94A.701(8).

RCW 9.94A.701(8), which took effect July 26, 2009, applies to Mr. Sorrell's sentence. See Laws 2009, ch. 375, § 20 ("This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after July 26, 2009.").

The Sentencing Reform Act provided for a three-year term of community custody for Mr. Sorrell's two convictions for third degree child molestation. RCW 9.94A.42(a)(i); RCW 9.94A.701(1)(a). But the statutory maximum sentence for the crime is five years. RCW 9A.20.021; RCW 9A.44.089(2). The trial court imposed a standard

range term of confinement of 60 months, which is equal to the statutory maximum sentence. CP 145. Therefore, the court was not authorized to impose any term of community custody. RCW 9.94A.505(5)' RCW 9.94A.701(8).

Because the sentence exceeded the statutory maximum, the sentence must be reversed and Mr. Sorrell must be resentenced.

E. CONCLUSION

Mr. Sorrell's two convictions for third degree child molestation were the same in fact and law as the two convictions for second degree incest. Therefore, the incest convictions must be vacated. In addition, because the sentence exceeded the statutory maximum, it must be reversed and Mr. Sorrell must be resentenced.

Respectfully submitted this 28th day of May 2010.


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DIVISION THREE**

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RESPONDENT,)	
)	NO. 28543-0-III
v.)	
)	
ERNEST SORRELL,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF MAY, 2010, 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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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF MAY, 2010.

X _____ 