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BY C. J. HERRITT
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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:	}	<u>NO. 78254-7</u>
	}	
COLE W. SHALE,	}	REPLY TO THE RESPONSE OF MOTION
	}	FOR DISCRETIONARY REVIEW
Petitioner.	}	

I. IDENTITY

Petitioner, Cole W. Shale respectfully submits this reply to the supplemental response ordered by the Court April 5, 2006.

II. STATEMENT OF CASE

On November 16, 2004 Cole Shale pleaded guilty to 12 Spokane County Superior cases, charged under 7 separate cause numbers. The trial court calculated offender scores of 9+ for all the crimes and subsequently imposed standard range terms. The petitioner then filed multiple motions in Superior Court to modify or vacate his sentences, claiming double jeopardy violation and an error in the calculation of his offender scores. The

Superior Court transferred the motions to Division Three of the Court of Appeals as personal restraint petitions. The petitions were subsequently dismissed, and now the petitioner seeks the discretionary review of this court pursuant to RAP 16.14(c), and RAP 13.5.

III. ARGUMENT

The State's initial response is in concurrence with the petitioner's argument as to the number of victims in cause number 04-1-02816-8. To spare the court the monotony of arguing the same thing repeatedly, the "two or more" language set forth by Legislature unambiguously defines the unit of prosecution. A person could not be guilty of multiple counts of unlawful possession of payment instruments at the same time, involving the same victim.

The State next, alleges that the petitioner agreed to an offender score of "9". It is clear in the report of proceedings 14-15 the petitioner agreed only that using "all current offenses" as separate points a score of 9 could be derived. In State v. Anderson 92 Wn.App. 54, 62 960 P.2d 975 (1998) the court treated the trial court's calculation of the offender score as an implicit determination that Anderson's offenses did not constitute the same criminal conduct. This determination was reviewed for abuse of discretion. If a trial court arbitrarily counts the convictions

separately, it has abused its discretion or misapplied the law State v. Haddock 141 Wn.2d 103, 110, P.3d 733 (2000). The Anderson Court further states that it has become a well established "common law" rule that a party may challenge a sentence for the first time on appeal on the basis that it is contrary to law (citing State v. Paine 69 Wn.App. 873, 884, 850, P.2d 1369 (1993)). This rule tends to bring sentences into conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand only because counsel did not object in the trial court Paine at 884. The petitioners failure to raise the issue of "same criminal conduct" in the trial court does not preclude review of that issue State v. Anderson 92 Wn.App. at 61.

The State then misapplies its analysis depending on State v. Turley 149 Wn.2d 395, 400, 69 P.3d 338 (2003). This case is easy to distinguish simply on the fact that these cases were not described in a single document rather, the report of proceedings, and the multiple Judgement and Sentences shows a purposeful division of charges, which stemmed from one incidental arrest on July 2, 2004, with the sole intent to engage in point pyramiding and cumulative punishment against a defendant that had **NO** prior criminal history.

In reply to the response of question (2) the State asserts the charged crime was lowered, but the underlying factual basis had remained the same. The petitioner has shown in a previous brief

(initial reply attachment A) that the factual basis was changed to read: **FIRST DEGREE POSSESSION OF STOLEN PROPERTY (other than a firearm)**, and count one lists both firearms possessed. The transcript will also, show that the only thing the petitioner stipulated to, in order to effectuate this plea, was an aggregate value of \$3000 (RP pg.11).

Next, the state takes advantage of an obvious, accidental misprint of cause numbers, by saying the court was misinformed as to the charge in that cause. Then continues on, only to make a completely farce and unnecessary statement, "it is difficult to see how a second degree burglary and two possession of stolen property charges could be subject to a unit of prosecution analysis". In the Commissioner's ruling, it was made clear in several references, to the three charges of first degree possession of stolen property under cause numbers 04-1-02713-7, and 04-1-02873-7 what was being asked (Comm. ruling pg. 1, 2, 4,).

In reply to the response of question (3), the State contends that because one firearm was found in the bed of the pickup and one was found in the cab portion, that they were not in the same place for the same criminal conduct purposes. Although, the petitioner feels this argument is without merit, there was no case law available, on point. The Court's have ruled on more than one occasion, that firearms found in separate rooms, or even outside a residence satisfied the "same place" requirement of the "same criminal conduct" State v. Haddock 141 Wn.2d 103, P.3d 733

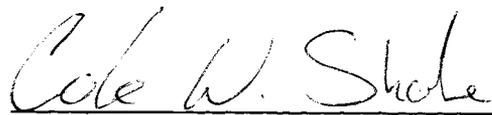
State v. Simmionson 91 Wn.App. 874, 960, 0.2d 955.

Finally, the State asserts that the petition should be dismissed because the defendant "did not ask for specific enforcement" Although, the petitioner failed to use the exact language, he did request, on several occasions, the vacation of improper charges and a ruling to remand for resentencing, with the same criminal conduct analysis applied. Which is specific performance in its self. If the exact language is necessary, then in light of State v. Turley 149 Wn.2d 395, 402, 69 P.3d 338 (2003) and many others the like, when it becomes necessary to correct a manifest injustice, the defendant may choose either specific performance, or withdrawal of plea.

IV. CONCLUSION

The petitioner would request specific performance of the plea agreements, with a ruling to vacate the charges that violate unit of prosecution, and a remand for resentencing with the "same criminal conduct analysis applied.

Respectfully submitted, this 18 day of May, 2006


Petitioner, Cole W. Shale