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STATE OF WASHINGTON
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Sup. Ct. No. _____
COA No. 23698-6-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ALYSSA KNIGHT,

Defendant/Respondent.

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In the Office of the Clerk of Court
Washington Court of Appeals, Division Three
By _____

PETITION FOR REVIEW

STEVEN J. TUCKER
Prosecuting Attorney
Spokane County

Andrew J. Metts
Deputy Prosecuting Attorney

Attorneys for Petitioner

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. IDENTITY OF PARTY

Petitioner, State of Washington, was the plaintiff in the trial court and the respondent in the Court of Appeals.

II. STATEMENT OF RELIEF SOUGHT

Petitioner asks this Court to grant review, reverse the Court of Appeals and reinstate the conviction.

III. ISSUES PRESENTED

A. DID THE COURT OF APPEALS MISINTERPRET
STATE V. BOBIC?

B. ARE PLEA BARGAINS INDIVISIBLE?

IV. STATEMENT OF THE CASE

The following facts are derived from the co-defendant's opinion in *State v. Williams*, 131 Wn. App. 488, 128 P.3d 98 (2006). Ms. Knight, the defendant in this case was friends with the co-conspirators involved in this case. The defendant met the victim who supposedly was carrying money, jewelry and drugs. *Id.* at 492. The group of co-conspirators decided to do a "lick" on the victim. A "lick" is a synonym for a robbery. *Id.* at 492.

At various times and locations, the group of co-conspirators laid nebulous plans to rob the victim, Arren Cole. On Wednesday, September

24, 2003, the group, along with Mr. Cole was at a nightclub in Post Falls, Idaho. Plans were made to rob the victim that evening and the defendant rode back to Spokane in the victim's car, with the goal of determining whether the victim was armed. *Id.* at 492.

The planned robbery was aborted when the defendant reported to the other co-conspirators that the victim might be armed. *Williams, supra* at 492.

On Thursday, the group again planned to rob the victim. The defendant met the victim in a downtown Spokane tavern. The one of the co-conspirators, Dione Williams, was also in the tavern. The defendant surreptitiously reported to Mr. Williams that the victim was carrying a quantity of money and jewelry. *Williams, supra* at 492. The defendant accompanied the victim to his hotel room and later lured the victim down to an alley on the pretext of waiting for her ride. *Id.* at 492.

The other co-conspirators arrived in a car. Mr. Williams got out of the car and the defendant got into the car. Using a gun, Mr. Williams attempted to rob the victim. The victim ran away and Mr. Williams chased him, shooting the victim in the back. *Williams, supra* at 493.

The defendant pled guilty on May 3, 2004 to conspiracy to commit second degree robbery, conspiracy to commit first degree burglary and

murder in the second degree. CP 13-20. The defendant was sentenced on all three counts. CP 61-73.

The Court of Appeals held in *State v. Knight*, 134 Wn. App. 103, -- P.3d -- (2006), that the conspiracy to commit first degree burglary was “subsumed” in the conspiracy to commit second degree robbery. *Id.* at 11. The Court of Appeals reversed the conviction for conspiracy to commit first degree burglary and sent the case back for resentencing. *Id.* A motion for reconsideration was denied on August 17, 2006.

The State filed this Petition for Review.

V. ARGUMENT

A. THE RATIONALE OF THE COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF THIS COURT.

The decision of the Court of Appeals in this case is in conflict with the case of *State v. Bobic*, 140 Wn.2d 250, 996 P.2d 610 (2000). Because the decision of the Court of Appeals is in conflict with decisions of this Court, review is proper under RAP 13.4(b)(1).

The rationale used by the Court of Appeals to dismiss the conspiracy to commit first degree burglary is faulty and in conflict with *Bobic, supra*. The court dismissed one of the conspiracy pleas based on the same logic that the Court of Appeals used in *State v. Williams, supra*, (currently before this

Court in State's Petition for Review, number 78397-7), a case involving one of the co-defendants. The focus in conspiracy cases is upon the agreements, more so than the particular crime being agreed upon. "...[T]he appropriate focus in Washington is on the conspiratorial agreement, not the specific criminal object or objects." *State v. Bobic*, 140 Wn.2d at 265. The reasoning of the Court of Appeals in *Williams* was that double jeopardy principles applied to a series of conspiracies to rob the victim. The Court of Appeals made no distinctions between a conspiracy to rob the victim on Tuesday from a conspiracy to rob the victim (using different techniques) on different days/times. The Court of Appeals looked only to the final act of robbery in which the victim was murdered and deemed that all conspiracies led to that point. Under the theories used by the Court of Appeals, a person could enter 10 conspiracies to rob a victim and be convicted only for the last conspiracy to rob. The Court of Appeals misinterpreted *Bobic*.

If the logic of *Williams* is accepted, all agreements between the co-conspirators become one crime, no matter how many different crimes are planned, so long as the crimes are not carried out. Essentially, the *Williams* court ignored the fact that the conspiracies to rob the victim were separate entities, designed by the co-conspirators to occur on specific days.

There was no logic in lumping all the conspiracies in this case together. There are distinct differences amongst the various conspiracies.

One set of discussions amongst the co-conspirators was to have culminated with a robbery on Wednesday night. Some of the co-conspirators followed the defendant and the victim from Post Falls to Spokane in preparation for the robbery. Because the defendant thought the victim had a gun, the robbery was called off. This was a completed, attempted second degree robbery. All the discussions to this point were to complete the robbery on Wednesday evening.

There was no evidence that there was a contemplation by the co-conspirators that they would continue to try to rob the victim until a robbery was completed. This sort of fixity of purpose can be assumed, but there was no mention of an intention of the parties to continue until successful. The goal was to act on a certain evening, using nebulous and shifting techniques. The techniques, although amorphous, were clearly aimed at completing each robbery on a particular evening. There is no logic in "rolling into one" all the different conspiracies contemplated by the defendant and the co-conspirators.

The plans to rob the victim on Friday night were not formed until after the aborted robbery attempt on Wednesday. While it true that Washington law focuses on the conspiracy itself rather than the object of the conspiracy, the object cannot be ignored entirely. If the conspiracies leading up to the aborted Wednesday attempt are properly accorded to that attempt,

and the conspiratorial agreements regarding the first degree burglary are properly accorded to its projected object, then there is no blending of the various conspiracies. Once the Wednesday robbery attempt was aborted, *new* conspiratorial agreements were completed by the co-conspirators to rob the victim on Friday night and while the methods were similar to the Wednesday robbery attempt, they were not the same conspiracy.

The conspiracy in Count II was a separate entity from the remaining counts and the goal of the conspiracy in Count II was different from the other counts.

B. THE REMEDY IMPOSED BY THE COURT OF APPEALS IS NOT AN AVAILABLE REMEDY.

As a remedy in this case, the Court of Appeals reversed only one count and remanded the case for resentencing. Plea bargains are a type of contract between the State and the defendant. *State v. Hardesty*, 129 Wn.2d 303, 318, 915 P.2d 1080 (1996). Such contracts cannot be enforced in a piecemeal fashion. “We hold that a trial court must treat a plea agreement as indivisible when pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding.” *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). *See also State v. Ermels*, 156 Wn.2d 528, 540, -- P.3d -- (2006). “In light of the *bright-line rule* stated in *Turley*, we hold that, if Bisson initially elects the

remedy of withdrawal of the plea agreement, the remedy is restricted to the withdrawal of his plea in its entirety.” *State v. Bisson*, 156 Wn.2d 507, 130 P.3d 820 (2006). (emphasis added).

“Absent objective indications to the contrary in the agreement itself, we will not look behind the agreement to attempt to determine divisibility. Such a determination, after the fact, would not serve¹ the plea negotiation process.” *Turley, supra* at 400. There are no such “objective indications” present in this case.

The Court of Appeals decision in this case cannot stand. It is contrary to this Court’s decisions in *Turley* and *Ermels*. It is also unfair to the State and a clear disincentive for the State to enter into plea bargains. The State negotiated a plea bargain with the defendant. Now, the Court of Appeals has chiseled away at the plea bargain so that the defendant receives a more favorable sentence and the State receives *nothing* in exchange for this reduction. This situation is not plea bargaining, it is the Court of Appeals enforcing a less advantageous plea bargain on the State.

Removing one count from a group of counts is *not* one of the remedies available to the defendant. The defendant could have withdrawn the pleas *en toto* or have left the pleas and sentencing as they were.

¹ That is exactly what the Court of Appeals has done in this case: chilled plea negotiations. As a rhetorical question, why would the State spend time and effort crafting a plea bargain, only to have the Court of Appeals pick the bargain apart and enforce a plea bargain to which the State did not agree.

The State entered into the plea bargain in good faith. The State gave up several charges that are more serious in order to reach the agreement as it stood. As the Supreme Court has stated, plea bargains cannot be disassembled, piecemeal. A plea bargain is an "all or nothing" situation. The State respectfully requests that this Court either enforce the *entire* plea bargain or rescind the *entire* plea bargain.

Review is appropriate under RAP 13.4(b)(1) as the Court of Appeals violated the bright-line rule put forth in *Turley, supra*.

VI. CONCLUSION

For the reasons stated above, Petitioner asks this Court to grant review, reverse the Court of Appeals and either affirm all three counts or reverse all three counts of the plea bargain.

Dated this 27 day of September, 2006.

STEVEN J. TUCKER
Prosecuting Attorney


Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Petitioner



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Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 23698-6-III
Title of Case: State of Washington v: Alyssa C. Knight
File Date: 07/18/2006

SOURCE OF APPEAL

Appeal from Superior Court of Spokane County
Docket No: 03-1-03448-8
Judgment or order under review
Date filed: 12/15/2004
Judge signing: Hon. Jerome J Leveque

JUDGES

Authored by John A. Schultheis
Concurring: Teresa C. Kulik
Dennis J. Sweeney

COUNSEL OF RECORD

Counsel for Appellant(s)
Eric Broman
Nielsen Broman & Koch PLLC
1908 E Madison St
Seattle, WA 98122-2842

Eric J. Nielsen
Nielsen Broman & Koch PLLC
1908 E Madison St
Seattle, WA 98122-2842

Counsel for Respondent(s)
Kevin Michael Korsmo
Attorney at Law
1100 W Mallon Ave
Spokane, WA 99260-2043

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,) No. 23698-6-III
)
Respondent,)
)
) Division Three
)
v.)

ALYSSA C. KNIGHT,

Appellant.

)
) PUBLISHED OPINION
)
)

SCHULTHEIS, J. -- Alyssa Knight pleaded guilty to second degree murder (RCW 9A.32.050), conspiracy to commit first degree burglary (RCW 9A.52.020, 9A.28.040), and conspiracy to commit second degree robbery (RCW 9A.56.210, 9A.28.040). At sentencing, the court applied the violent offense doubling provision of the Sentencing Reform Act of 1981 (SRA) (RCW 9.94A.525(8)) to count the conviction for conspiracy to commit second degree robbery as two points on the offender score.

On appeal, Ms. Knight contends conspiracy to commit second degree robbery is not a violent offense pursuant to the SRA's definitional statute, RCW 9.94A.030(45). She argues that the definitional statute controls, although the doubling provision provides that felony anticipatory offenses such as criminal conspiracies must be scored the same as completed offenses. RCW 9.94A.525(4). We disagree. However, we conclude that the record supports only one conspiracy conviction. Accordingly, we reverse the conviction for conspiracy to commit first degree burglary and remand for resentencing.

Facts

Early in the morning on September 26, 2003, police responded to a reported shooting on Division Street in Spokane. Officers found Arren Cole dead from a gunshot wound to his lower back. Evidence led the police to Ms. Knight. Eventually she confessed that Mr. Cole was shot during a robbery planned by Ms. Knight and two men. According to the plan, Ms. Knight struck up a friendship with Mr. Cole, had sex with him at his hotel, and then lured him into an alley, where he was robbed and shot by Ms. Knight's confederates.

Ms. Knight pleaded guilty to conspiracy to commit second degree burglary, conspiracy to commit first degree burglary, and second degree murder while armed with a firearm. She had no prior felonies in her criminal history.

At sentencing, the court used an offender score of four to compute Ms. Knight's standard sentence range. Each conspiracy conviction was treated as a serious violent offense and as another current offense pursuant to RCW 9.94A.525(1), (4), and (8). Consequently each conspiracy conviction counted two points. RCW 9.94A.525(4), (8). The resulting standard range for the second degree murder conviction with a 60-month firearm enhancement was 225 to 325 months. The court imposed 285 months of incarceration.¹

Offender Score

Ms. Knight first contends the trial court erred in computing her offender score. She argues that conspiracy to commit second degree robbery is not specifically included in the definition of a violent offense and therefore is not subject to the SRA's doubling provision. Although this issue was not raised at sentencing, a challenge to the offender score may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). We review the calculation of an offender score de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

The SRA doubling provision, RCW 9.94A.525(8), provides that if the present conviction is for a violent offense not covered elsewhere in the statute, each prior adult and juvenile violent felony conviction counts as two points. Convictions entered or sentenced on the same date as the current offense are counted the same as prior offenses. RCW 9.94A.525(1), .589(1)(a). 'Violent offense' is defined in the general definitional statute as '{a}ny of the following felonies,' including '{c}riminal solicitation of or criminal conspiracy to commit a class A felony,' and robbery in the second degree. RCW 9.94A.030(45).

Robbery in the second degree is a class B felony. RCW 9A.56.210(2).

Accordingly, conspiracy to commit second degree robbery is not a violent offense under the definitional provision of the SRA. RCW 9.94A.030(45). However, the offender score statute specifically provides that prior convictions for felony anticipatory offenses are scored as completed crimes. RCW 9.94A.525(4), (6). Ms. Knight contends the offender score statute conflicts with the definitional statute, which should override the offender score provisions due to principles of statutory construction and the rule of lenity.

Similar arguments were raised in *State v. Becker*, 59 Wn. App. 848, 801 P.2d 1015 (1990). In *Becker*, the sentencing court counted a prior conviction for attempted second degree robbery as two points pursuant to former RCW 9.94A.360 (1990), recodified as RCW 9.94A.525. Mr. Becker argued on appeal that the attempted robbery was not subject to the doubling provision because it was not defined as a violent offense. *Id.* at 850. Noting that apparent conflicts in statutes should be reconciled so that each is given effect, *Becker* concluded that the definitional statute and the doubling provision could be harmonized by reading the plain language of each statute:

The apparent conflict in the sections is based on the assumption that the attempted robbery can only receive two points if it is a 'violent offense.' Contrary to *Becker's* contention, the offense does not receive two points because it is a violent offense, but rather, it receives two points because the completed crime of robbery in the second degree would receive two points and the attempted robbery is to be treated as a completed crime. According to the plain language of {former} RCW 9.94A.360(5) the attempt must be treated the same as the completed crime. Such a reading of the two sections gives effect to each section and does not distort the language of the sections.

Id. at 852. The same reasoning applies in this case.

Our objective in construing statutes is to determine legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). A statute's plain meaning is considered an expression of that intent. *Id.* If, after examining the ordinary meaning of the statute's language as well as its context in the statutory scheme, there is more than one reasonable interpretation, we will treat the statute as ambiguous. *Id.* at 600-01. When truly ambiguous, the statute will be interpreted in favor of the defendant pursuant to the rule of lenity. *Id.* at 601.

As discussed in *Becker*, counting an anticipatory crime of second degree robbery as two points is consistent with the statutory scheme. 59 Wn. App. at 852-53. The more specific inclusion of attempted (or conspiracy to commit) robbery in the second degree as a completed serious violent offense prevails over the more general and older definitional provision. *Id.* at 853. This conclusion is consistent with the legislative history of the doubling provision of RCW 9.94A.525. *Id.* at 853-54. The plain language of the provisions supports no other reasonable interpretation.

Finally, *Becker* noted that if we were to accept the defendant's argument that the definition in RCW 9.94A.030 controlled, then RCW 9.94A.525(4)2 would be rendered meaningless or superfluous. *Id.* at 854. 'To give a meaningful interpretation to the SRA as a whole, {RCW 9.94A.525(4)} must supersede the general definition of violent offense.' *Id.*

For the reasons outlined in *Becker*, and consistent with RCW 9.94A.525(4), we conclude that the conspiracy to commit second degree robbery must be treated the same as the completed crime. The trial court properly applied the doubling provision to count this conviction as two points on the offender score.

Double Jeopardy

Ms. Knight next contends in supplemental briefing that the conspiracy

to commit first degree burglary should be vacated on grounds of double jeopardy. Citing this court's recent decision in *State v. Williams*, 131 Wn. App. 488, 128 P.3d 98 (2006), petition for review filed (Wash. Mar. 8, 2006) (No. 78397-7), she argues that the facts support only one conviction for criminal conspiracy: the conspiracy to rob Mr. Cole. Although Ms. Knight pleaded guilty to both conspiracy to commit second degree robbery and conspiracy to commit first degree burglary, she did not waive her right to claim double jeopardy on appeal. *State v. Cox*, 109 Wn. App. 779, 782, 37 P.3d 1240 (2002).

The state and federal constitutions guarantee that no person will be twice put in jeopardy for the same offense. U.S. Const. amend V; Const. art. I, sec. 9; *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). When a defendant is charged multiple times for violations of a single statute, we must determine what unit of prosecution the legislature intended as the punishable act under that statute. *Id.* at 261. Double jeopardy protects the defendant from multiple convictions under the same statute for committing just one unit of the crime. *Id.* at 261-62.

Criminal conspiracy is defined by statute as an agreement to carry out a criminal scheme, along with a substantial step toward carrying out that agreement. RCW 9A.28.040(1); *Bobic*, 140 Wn.2d at 262; *Williams*, 131 Wn. App. at 496. As noted in *Williams*, the punishable criminal conduct is the plan, not whatever statutory violations the coconspirators considered in the course of devising the plan. *Williams*, 131 Wn. App. at 496. *Bobic* explains further:

'Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.'

140 Wn.2d at 264-65 (quoting *Braverman v. United States*, 317 U.S. 49, 53, 63 S. Ct. 99, 87 L. Ed. 2d 23 (1942)).

Here, as in *Williams*, Ms. Knight was a coconspirator in the robbery of Mr. Cole. She, Dione Williams, and another man developed a scheme to rob Mr. Cole and took substantial steps toward achieving that goal. '{A}ny number of acts in the days preceding the climax here could be labeled the substantial step that completed the crime of conspiracy.' *Williams*, 131 Wn. App. at 497. Although the plans changed day to day on the methods to be employed in robbing Mr. Cole, these plans all served the single criminal conspiracy.

As in *Williams*, the record here supports only one conspiracy conviction: the conspiracy to commit second degree robbery (first degree robbery in *Williams*). The police reports that were referenced in Ms. Knight's guilty plea describe an earlier plan to enter Mr. Cole's hotel room with the intent to rob (the basis for the count of conspiracy to commit first degree burglary), but this plan was subsumed in the overall scheme that comprised the single criminal conspiracy.

Accordingly, the conviction for conspiracy to commit first degree burglary is reversed and the case remanded for resentencing.

Schultheis, J.

WE CONCUR:

Sweeney, C.J.

Kulik, J.

1 Ms. Knight's original counsel appointed on appeal filed an Anders brief (*Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493

(1967)) and a motion to withdraw. By order filed on October 17, 2005, the commissioner of court granted the motion to withdraw but ordered appointment of new counsel to brief the issues of the offender score and the sentencing range.

2 Former RCW 9.94A.360(5).

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