NO. 79262-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DALE L. SCHWAB,

Petitioner.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

The facts are set out in the Court of Appeals opinion.

II. SUPPLEMENTAL ARGUMENT

A. IN DECIDING A PERSONAL RESTRAINT PETITION, THE COURT OF APPEALS CAN EITHER MODIFY ITS PRIOR JUDGMENT OR DELEGATE THAT AUTHORITY TO THE TRIAL COURT.

The defendant argues that the Court of Appeals lacked the authority to modify its decision on direct appeal. That argument ignores the fundamental nature of the current proceeding. This is a personal restraint petition proceeding. Personal restraint petitions are an exception to the rules on finality of judgments.

This proceeding began with the defendant's motion to vacate his conviction. 1 CP 45-53. That motion was transferred to the Court of Appeals for consideration as a personal restraint petition. In responding to the petition, the State raised an issue concerning the scope of relief. It argued that relief should be limited to vacating the murder conviction, but that the manslaughter conviction should be reinstated. 1 CP 36.

The Court of Appeals has options in deciding a personal restraint petition. It can decide the matter itself, or it can transfer the petition to a superior court for a determination on the merits or for a reference hearing. RAP 16.11(b). Here, the Court of Appeals

applied this second option. It "remand[ed] the matter to the Snohomish County Superior Court for further lawful proceedings consistent with Andress and Hinton." 1 CP 24, citing In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002); and In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

When a case is transferred for a determination on the merits, "the superior court shall enter findings of fact and conclusions of law and an order deciding the petition." RAP 16.12. Such action is, of course, subject to any qualifications imposed by the appellate court's order. Here, the order provided two qualifications: (1) the "second degree felony murder conviction must be vacated" and (2) the proceedings must be "consistent with Andress and Hinton." 1 CP 24. Within these qualifications, the Superior Court had the power under RAP 16.12 to "decide[e] the petition." In doing so, the Superior Court had all of the authority that the Court of Appeals had possessed.

Personal restraint petition proceedings constitute an exception to the rules governing finality of judgments. See Shumway v. Payne, 136 Wn.2d 383, 399, 964 P.2d 349 (1998). When a conviction has been affirmed on appeal, a personal restraint petition can raise new grounds to attack that conviction.

Even grounds that were rejected on direct appeal can be raised again, if the petitioner shows that the interests of justice require re-litigation of those grounds. In re Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004). Thus, notwithstanding RAP 12.7, a personal restraint petition gives an appellate court the power to modify its decisions on direct appeal.

The petitioner insists that he wants application of the "law of the case" and of the Court of Appeals' mandate on the direct appeal. The "law of the case" was that the defendant was guilty of second degree murder. The mandate affirmed his conviction on that count. State v. Schwab, 98 Wn. App. 179, 190, 988 P.2d 1045 (1999). The State would be entirely content with maintaining that decision in effect.

The defendant, however, does not want this. He only wants "half the law of the case." He wants to maintain the favorable portion of the appellate ruling, which vacated his manslaughter conviction. At the same time, he wants to overturn the unfavorable portion that affirmed his murder conviction – even though that affirmance was the sole reason for vacating the manslaughter conviction.

In a different context, this court has held that vacation of one portion of a judgment allows alteration of other "indivisible" portions. Brooks v. Rhay, 92 Wn.2d 876, 877, 602 P.2d 356 (1979). The same rule should be applied here. A party who challenges a prior judgment should not be allowed to "have his cake and eat it too." If the judgment is not separable, it must stand or fall as a whole. By challenging the Court of Appeals prior judgment, the defendant gave the court power to reconsider all indivisible portions of that judgment. The Court of Appeals transferred that power to the Superior Court, as authorized by RAP 16.11(b) and 16.12. The Superior Court properly exercised that authority on remand.

B. WHEN A DEFENDANT SUCCESSFULLY CHALLENGES A JUDGMENT, DOUBLE JEOPARDY PRINCIPLES DO NOT PREVENT THE STATE FROM RE-OPENING OTHER PORTIONS OF THAT JUDGMENT.

The petition for review raises only issues concerning "law of the case" and the power of an appellate court to modify its prior decision. Petition for Review at 1-2. In the Court of Appeals, the defendant also raised arguments concerning Double Jeopardy. Appellant's Opening Brief at 11-13. Those arguments are not repeated in the petition for review. Consequently, Double Jeopardy issues are not now before this court for consideration. RAP

13.7(b); State v. Korum, 157 Wn.2d 614, 624-25 ¶ 11, 141 P.3d 13 (2006).

This court has, however, recently rendered a decision containing a dictum bearing on the present case. State v. Womac, ___ Wn.2d ___, 160 P.3d 40 (2007). That dictum was based on double jeopardy principles. Analysis of those principles is therefore necessary to resolve the "law of the case" issues that are before the court.

In Womac, the defendant was convicted of homicide by abuse, second degree felony murder, and first degree assault of a child. Because of double jeopardy concerns, the trial court imposed sentence for only homicide by abuse. The Court of Appeals directed the trial court to "conditionally dismiss" the other two counts. This court held that the convictions themselves constituted "punishment" for double jeopardy purposes. Id. ¶¶ 25-28. Consequently, to avoid double jeopardy, the two convictions had to be vacated, not merely "conditionally dismissed." Id. ¶ 29-34. The State agrees with this requirement, which was followed in the present case.

In so holding, the court made the following remarks:

As [the defendant's] counsel correctly asserts, it is unjust

> to find a double jeopardy violation and hold these convictions in a safe for a rainy day, in the event that the homicide by abuse gets reversed, then they can sort of raise from the dead like Jesus on the third day and bite my client, and he can be sentenced on convictions that the court already ruled violated double jeopardy.
>
> To permit such a practice allows the State multiple bites at the apple by labeling one crime by three different names and upholding any and all resulting convictions. And the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. ¶¶ 14-15 (citations omitted).

In Womac, the defendant had not successfully challenged his conviction for homicide by abuse. The court was therefore not presented with any issue involving the consequences of such a challenge. The statement quoted above did not relate to an issue before the court, and it was not necessary to decide the case. Such a statement constitutes an *obiter dictum*, which need not be followed. Grundy v. Thurston County, 155 Wn.2d 1, 9-10 ¶ 23, 117 P.3d 1089 (2005).

The dictum in Womac should now be repudiated. It fails to take into account a critical distinction: between proceedings

initiated by the State and those initiated by the defendant. A defendant has a legitimate interest in the finality of a criminal conviction. So long as the conviction remains in effect, the State normally cannot seek an additional conviction. On the other hand, if the *defendant* successfully challenges the conviction, he gives up the benefits as well as the burdens. The State then does get "another bite at the apple." "The Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." United States v. Scott, 437 U.S. 82, 99, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978).

This principle has been recognized in several contexts. One of them involves trials in which the jury fails to reach a verdict on the charged offense but convicts the defendant of a lesser offense. That State cannot, on its own initiative, obtain a new trial on the original charge. State v. Linton, 156 Wn.2d 777, 789-92, 132 P.3d 127 (2006) (Sanders, J., concurring). If the defendant successfully challenges the conviction, a different rule applies. In that situation, the State can re-try the defendant on the greater charge. State v. Ervin, 158 Wn.2d 746, 757-59 ¶¶ 18-21, 147 P.3d 567 (2006). (The court unanimously adopted the rationale of Justice Sanders's

Linton concurrence. Ervin, 158 Wn.2d at 758-59 ¶ 21.) "The double jeopardy clause imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside." Id. at 757-58 ¶ 18, quoting North Carolina v. Pearce, 395 U.S. 711, 720, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

A second context involves challenges to sentences. "[T]he defendant acquires a legitimate expectation of finality in a sentence, substantially or fully served, unless the defendant was on notice the sentence might be modified." State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996). If, however, the defendant successfully challenges the sentence, he can be re-sentenced on all counts – even ones that he did not challenge. State v. Larson, 56 Wn. App. 323, 332-33, 783 P.2d 1093 (1989), review denied, 114 Wn.2d 1015 (1990).

> Any expectation of finality in a sentence is wholly absent where the defendant requests that his prior sentence be nullified. The defendant has, by his own hand, defeated his expectation of finality.

Ward v. Williams, 240 F.3d 1238 (10th Cir. 2001).

The situation in the present case is analogous. The defendant was not placed in a "continuing state of anxiety and

insecurity" by any act of the State. He was convicted of second degree murder. After the original appeal, the manslaughter conviction was vacated. The State made no effort to alter these judgments. His convictions and sentences were final – as long as he wanted them to be.

When the defendant filed a motion to vacate the judgment, he destroyed his own expectation of finality. By doing so, he took the risk that other portions of the appellate decision would be re-opened. He received a large benefit, having his sentence reduced from 240 to 194 months. 1 CP 3-15, 70-79. The benefit that he received was simply not as large as he hoped for.

The Court of Appeals has restored the defendant "to the same position he would have been in if the error – charging and convicting him of felony murder – had not occurred." State v. Schwab, 134 Wn. App. 635, 643 ¶ 17, 141 P.3d 658 (2006). The court simply refused to give him the windfall of having *both* convictions nullified. Id. at 664 ¶ 20. If the Andress decision had been available at the time of the original appeal, the Court of Appeals would never have vacated the manslaughter conviction. The defendant should not be allowed to accomplish in two steps something that he could never have done in one.

By successfully moving to vacate his murder conviction, the defendant destroyed his expectation of finality in that judgment. The Court of Appeals was then entitled to re-examine all portions of its judgment that indivisible from the challenged portion. In doing so, it violated neither court rules nor the policies underlying the Double Jeopardy Clause.

III. CONCLUSION

For these reasons, as well as those set out in the respondent's previous brief, the judgment and sentence should be affirmed.

Respectfully submitted on August 16, 2007.

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