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COURT OF APPEALS
DIVISION II

NO.

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STATE OF WASHINGTON

BY CA
DEPUTY

**THE SUPREME COURT
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER,

v.

COREY IRISH, RESPONDENT

FILED
AUG 29 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
CA

Court of Appeals Cause No. 40853-8
Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 07-1-02193-2

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

The State of Washington, respondent below, asks this Court to accept review of the Court of Appeals, Division II decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION.

The State of Washington now seeks review of the unpublished opinion, filed on May 25, 2011, in *State v. Irish*, COA No. 40853-8-II. See Appendix A¹. The State respectfully requests that this court review the Court of Appeals' decision vacating defendant's sentence and remanding the case back for resentencing to address whether defendant's prior 1998 convictions were a single "course of conduct" such that they could violate double jeopardy. The 1998 convictions are not the subject of the instant case and the Court of Appeals ruling allows defendant to collaterally attack his previous convictions under the instant case. Review is appropriate under RAP 13.4(b)(1) and (4).

¹ The State filed a motion for reconsideration which was denied by the Court of Appeals on July 27, 2011.

C. ISSUE PRESENTED FOR REVIEW.

1. Should this Court grant review where the Court of Appeals decision grants relief under RAP 2.5 without requiring defendant to show manifest error and where the decision is in conflict with current case law, including *State v. Ammons*, as the decision allows defendant to collaterally attack a previous conviction under the instant case?

D. STATEMENT OF THE CASE.

The State charged defendant, Corey Irish, on April 24, 2007, with one count of robbery in the first degree, three counts of assault in the second degree, one count of unlawful possession of a controlled substance with intent to deliver, one count of unlawful possession of a firearm in the first degree and one count of possession of a stolen firearm. CP 1-4. The robbery, assault and controlled substance charges all were charged with a firearm enhancement. CP 1-4. The State amended the charges on March 10, 2008, to dismiss the possession of a stolen firearm charge and reduce the possession charge to attempted unlawful possession of a controlled substance with intent to deliver. CP 5-8.

After being found guilty at trial, defendant was sentenced on April 4, 2008. CP 9-21. The parties agreed that the assault in count three

(against victim Garibay) merged with the robbery in count one.² CP 22-46. Defendant's offender score was determined to be a 9+ on the robbery and two assault counts. CP 9-21. His offender score was determined to be an 8 on the unlawful possession of a controlled substance charge and the unlawful possession of a firearm. CP 9-21. Defendant was sentenced to the high end of 171 months, with all the counts to run concurrent, plus 150 months of flat time for the firearm enhancements, for a total of 321 months. CP 9-21.

Defendant filed a direct appeal. CP 22-46. Defendant argued that 1) the trial court erred in failing to vacate his conviction for unlawful possession of a controlled substance when he obtained the controlled substance during the first degree robbery, 2) that there was insufficient evidence to find him guilty of two counts of assault in the second degree, and 3) that his sentence for unlawful possession of a firearm exceeded the standard range. CP 22-46. Defendant also filed a Statement of Additional Grounds in which he argued that 1) the assault and unlawful possession of a controlled substance convictions merged with robbery and also violated double jeopardy, 2) that his due process rights were violated, 3) that the

² As the substantive facts of this case are not relevant to the issue on appeal, the State had omitted them. They are, however, laid out in this Court's previous opinion which is at CP 22-46.

firearm enhancement violated equal protection, and 4) that his prior convictions were the same criminal conduct and should be counted as one conviction in his offender score. CP 22-46. This Court affirmed the majority of defendant's convictions, vacated the unlawful possession of a controlled substance conviction and remanded for resentencing based on the vacated conviction and the fact that the court erred in the length of sentence for the unlawful possession of a firearm charge. CP 22-46.

Defendant also filed a personal restraint petition on May 3, 2010. *See* 40665-9-II. Defendant argued that his convictions for first degree robbery and assault violated double jeopardy and that the firearm statute violated equal protection. *Id.* On November 24, 2010, the Court of Appeals dismissed defendant's petition as frivolous. *Id.*

On June 6, 2010, the trial court held a sentencing hearing. The State and defense counsel agreed that the same criminal conduct argument had already been decided by this Court. RP 2. Defendant did not raise any kind of claim of double jeopardy. Instead, defendant, pro se, indicated that he did not believe there was proof that he committed his prior offenses. RP 5. The court sentenced defendant to the high end of the standard range on all counts with the counts to run concurrent for a total of 171 months. RP 5, CP 47-60. With enhancements, defendant's sentence totaled 303 months. CP 47-60.

Defendant filed a timely notice of appeal. RP 5-6, CP 61-75. On May 25, 2011, the Court of Appeals issued its opinion vacating defendant's judgment and sentence and remanding back to the trial court for the trial court to address whether defendant's 1998 convictions, from a previous case, were a single course of conduct for double jeopardy purposes. Appendix A. The State filed a motion to reconsider which was denied on July 27, 2011.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THIS COURT SHOULD GRANT REVIEW AS THE COURT OF APPEALS APPLIED RAP 2.5 INCORRECTLY WHEN IT DID NOT REQUIRE DEFENDANT TO SHOW MANIFEST ERROR AND THE DECISION IS IN CONFLICT WITH CURRENT CASE LAW INCLUDING *STATE V. AMMONS* AS THE DECISION ALLOWS DEFENDANT TO COLLATERALLY ATTACK A PREVIOUS CONVICTION UNDER THE INSTANT CASE.

A trial court's judgment is presumed to be correct and should be sustained absent an affirmative showing of error. *Smith v. Shannon*, 100 Wn.2d 26, 35, 666 P.2d 351 (1993); *State v. Michaels*, 60 Wn.2d 638, 641, 374 P.2d 989 (1962).

RAP 12.4 allows a party to seek reconsideration of a decision terminating review. RAP 12.4(a). The motion should "state with

particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended.” RAP 12.4(c).

In the Court of Appeals opinion at page 2, the court notes RAP 2.5(c)(1) which states, “If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.” However, the court does not note that for defendant to raise the present issues for the first time on appeal, he must demonstrate a manifest error affecting a constitutional right. RAP 2.5(a); *see State v. Elmore*, 154 Wn. App. 885, 897, 228 P.2d 760 (2010). “Manifest error” requires a showing of actual and identifiable prejudice to the defendant’s constitutional rights at trial. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

The Court of Appeals erred in finding that defendant could obtain relief under RAP 2.5. Defendant failed to demonstrate actual prejudice and cannot show manifest error. Defendant also failed to show where in the record he preserved the claim he now raises on appeal. Finally, this court’s decision allows defendant to collaterally attack his 1998 convictions under the instant case which is contrary to case law. This State respectfully asks this Court to accept review and reverse the Court of Appeals decision.

- a. The Court of Appeals erred in granting relief when no prejudicial error has been demonstrated.

While a criminal defendant may raise a constitutional error for the first time on appeal, the error must be manifest. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant has the burden to make the required showing of “identify[ing] a constitutional error and show[ing] how, in the context of the trial, the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *McFarland*, 127 Wn.2d at 333 (emphasis added); *State v. Gregory*, 158 Wn.2d 759, 839, 147 P.3d 1201 (2006); *State v. McNeal*, 145 Wn.2d 352, 357, 37 P.3d 280 (2002); *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). Significantly, “[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *McFarland*, 127 Wn.2d at 333.

Furthermore, it is a longstanding, and nearly universal, rule of appellate procedure that a criminal defendant cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him. *State v. Robinson*, 24 Wn.2d 909, 928, 167 P.2d 986 (1946); *State v. Hazzard*, 75 Wash. 5, 134 Pac. 514 (1913); 24 C. J. S. 837, Criminal Law,

§ 1887. Only prejudicial error requires reversal. *State v. Gaines*, 144 Wash. 446, 258 Pac. 508 (1927); *State v. Levy*, 8 Wn.2d 630, 113 P. 2d 306 (1941).

An appellant bears the burden of complying with the rules of appellate procedure and perfecting his record on appeal so the reviewing court has before it all the evidence relevant to deciding the issues before it; the court may decline to reach the merits of an issue if this burden is not met. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999); *Rhinevault v. Rhinevault*, 91 Wn. App. 688, 692, 959 P.2d 687 (1998).

In the instant case, the Court of Appeals assumed defendant had shown prejudicial error but did not require defendant to actually prove prejudicial error. The opinion seems to hold the absence of the first resentencing hearing against the State. See Appendix A at page 2, footnote 1. The record before the court does not show that defendant preserved the issue he raised in this appeal. The only indication that defendant was challenging that his prior convictions were the same course of conduct was from a recitation by the State of why the resentencing hearing had been set over. RP 2. However, despite the State's use of the term, "same course of conduct" both the State and the trial court reviewed the Court of Appeals opinion on the first direct appeal and determined that defendant's issue with his prior convictions had been addressed. RP 2.

Defendant did not contest or object to this understanding. RP 3.

Defendant did not make a record of why his convictions are the same course of conduct or why they violate double jeopardy. At the resentencing hearing that is transcribed and before the court, the defense never asserts that there is an issue with the same course of conduct, and there is absolutely no indication that defendant was making a double jeopardy claim. The record shows no indication of actual prejudice since the record does not contain any arguments related to double jeopardy issues.

The exact nature of defendant's challenge is not known since the first resentencing hearing was not made part of the record by defendant. The absence of the transcript of the first resentencing hearing cannot be held against the State. It is not the State's responsibility or obligation to preserve defendant's issues related to sentencing for appeal. Any lack of the record necessary to evaluate whether the trial court erred in this case and whether such error was prejudicial to defendant must be held against defendant and not the State. Any finding of actual prejudice is based only on assumptions and not on a showing of actual prejudice. The Court of Appeals erred by finding the error manifest where there is no evidence that defendant preserved the issue, no evidence that defendant made any

arguments about double jeopardy in the trial court and where defendant failed to provide the transcript of the first resentencing for this court.

- b. It is impossible to find from the record that defendant preserved the issue he raises in this appeal at the trial court level.

The Court of Appeals erred in finding that defendant had preserved the issue he claims on appeal in the trial court below. As noted above, defendant did not include the transcript of his first resentencing hearing. The record before the court is the prosecutor's and trial court's recounting of what defendant had raised previously. Both the trial court and the State felt that defendant had raised the same issue that had already been decided by the Court of Appeals in his first direct appeal. The State could have misstated defendant's claim in calling it a challenge as to the same course of conduct. *See* RP 2. The fact that defendant does not challenge the State's or the trial court's resolution of the issue tends to support the conclusion that the State misspoke, and defendant really had raised an issue as to the same criminal conduct argument he had already raised previously. Any omission from the record has to be interpreted against defendant and not the State as argued above.

In addition, no where in the record of the resentencing is any double jeopardy claim raised by defendant or his attorney at any time.

Defendant was represented by an attorney, so any motion he may have made pro se was not properly before the trial court. “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, . . .” Const. art. 1, section 22 (amend. 10) [emphasis added]. “[T]here is no constitutional right, either state or federal, to ‘hybrid representation,’ through which an accused may serve as co-counsel with his or her attorney.” *State v. Romero*, 95 Wn. App. 323, 326, 975 P.2d 564, review denied, 138 Wn.2d 1020, 989 P.2d 1139 (1999). In state courts as well as federal courts, the great weight of judicial authority is that there is no right to be represented by counsel and to simultaneously actively conduct one’s own defense. *State v. Hightower*, 36 Wn. App. 536, 541, 676 P.2d 1016 (1984) (citations omitted). That is particularly true in the State of Washington where the rights are granted in the disjunctive. *Id.* “The right to self-representation in a criminal matter . . . is an all-or-nothing process.” *Romero*, 95 Wn. App. at 326. Even if defendant had raised a double jeopardy claim, it was not properly before the trial court since it was not adopted by his counsel. Defendant does not have a right to hybrid representation and any pro se motion was not properly before the trial court.

Finally, the record before the court shows that defendant’s issue was with the sufficiency of his prior convictions. Neither defendant nor

his defense attorney ever objected to the trial court's conclusion that defendant's issue as to the same criminal conduct had already been addressed by the Court of Appeals. So it is reasonable based on the record provided that defendant did not intend to raise a double jeopardy claim, and indeed, never formally preserved such an issue for appeal. Further, while defendant cannot bring a pro se motion, the information he himself relayed to the trial court does not support his argument on appeal that he raised a double jeopardy claim. Defendant told the court that he didn't think there was evidence of assault in his prior convictions. RP 5. Defendant claimed there was no factual basis that he assaulted people. RP 5. Defendant's statement is not clear as to what case he is addressing. Defendant references the Court of Appeals decision on his first direct appeal and says that the Court of Appeals, "brought it up but I didn't get to state any case law saying what I was saying." RP 5. If defendant was referring to the sufficiency of the evidence related to the assault charges in this case, then that clearly was addressed by the Court of Appeals in his first direct appeal. CP 22-46. As defendant filed both a Statement of Additional Grounds and a PRP, it's difficult to understand how he was not allowed to present case law since he had two opportunities to do so. However, if defendant is contesting the factual basis for his previous assaults that were committed in 1998 on a separate cause number, that was neither before the trial court nor is it before this Court now. A challenge to the sufficiency of his prior offenses would have had to have been made

under that cause number, not the current case. Even if counsel had adopted defendant's argument, there is nothing to preserve as the Court of Appeals already addressed the sufficiency of the assault charges under this cause number, and sufficiency of the evidence of another case had to be raised under that cause number. The Court of Appeals erred in finding that defendant had preserved the issue for appeal.

- c. The Court of Appeals erred in finding that defendant could collaterally attack his 1998 convictions under the current case.

The prosecution does not have the affirmative burden of proving the constitutional validity of a prior conviction before it can be used in a sentencing proceeding. *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719 (1986). The court stressed the policy reasons behind this rule:

To require the State to prove the constitutional validity of prior convictions before they could be used would turn the sentencing proceeding into an appellate review of all prior convictions. The defendant has no right to contest a prior conviction at a subsequent sentencing. To allow an attack at that point would unduly and unjustifiably overburden the sentencing court. The defendant has available, more appropriate arenas for the determination of the constitutional validity of a prior conviction. The defendant must use established avenues of challenge provided for post-conviction relief. A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.

Ammons, 105 Wn.2d at 188. The court in *Ammons* reasoned that a defendant has no right to contest a prior conviction at a subsequent

sentencing. *Id.* at 188. The court held that a defendant seeking to invalidate a prior conviction must use established avenues of challenge provided for post conviction relief in the state or federal court where the judgment was entered and, if he is successful, he can then be resentenced without the unconstitutional conviction being considered. *Id.*

To be constitutionally invalid on its face a conviction must show constitutional infirmities on its face, without further elaboration.

Ammons, 105 Wn.2d at 188; *State v. Gimarelli*, 105 Wn. App. 370, 20 P.3d 430, 433 (2001). The face of the conviction can include a plea agreement, but does not include items such as jury instructions. *In re Thompson*, 141 Wn.2d 712, 718, 10 P.3d 380 (2000).

In its opinion on May 25, 2011, the Court of Appeals remanded this case back to the Superior Court to make a finding on whether defendant's previous 1998 convictions constituted double jeopardy. Such a finding is not proper under this case. As the case law above shows, defendant has to collaterally attack his 1998 conviction under the 1998 case. Requiring a defendant to collaterally attack his prior convictions in the court where the conviction was entered promotes consistency in how all future sentencing courts will treat the conviction. When a challenge is made in the court where the conviction was entered, the superior court clerk's file will reflect the determination made by the original trial court. Similarly, if an appellate court grants relief on a personal restraint petition, a copy of the order will be filed in the superior court clerk's file pertaining

to that conviction. Anyone examining the court file will be able to determine the constitutionality of the conviction. In contrast, challenges raised in sentencing courts will be reflected in the superior court file pertaining to the new conviction rather than the court file pertaining to the prior conviction. This procedure invites inconsistent treatment each time the prior conviction is raised as criminal history in various sentencing courts.

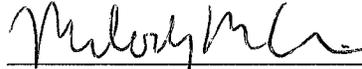
The Court of Appeals ruling is a departure from accepted case law and requires the State to prove that a prior conviction is constitutional. It also allows defendant to collaterally attack a previous case under the current case. The Court of Appeals ruling in this case also allows for an inconsistent result in regards to defendant's previous convictions as the trial court's ruling in this case would only be reflected in the current case and not in the 1998 case. The case law shows that defendant has to pursue the proper remedies to attack his 1998 cases under that case. The proper remedy for the issue raised for the first time in this appeal is not properly brought under this case. The State asks this Court to accept review of the decision below.

F. CONCLUSION.

For the foregoing reasons, the State respectfully asks this Court to accept review of the decision below.

DATED: August 16, 2011

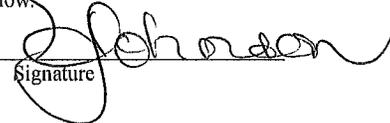
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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APPENDIX "A"

Unpublished Opinion

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STATE OF WASHINGTON

BY _____
REPLY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

COREY JEROME IRISH,
Appellant.

No. 40853-8-II

UNPUBLISHED OPINION

VAN DEREN, J. — In 2008, a jury found Corey Irish guilty of one count of first degree robbery, two counts of second degree assault, one count of unlawful possession of a controlled substance, and one count of unlawful possession of a firearm. He appealed. We vacated the conviction for unlawful possession of a controlled substance, affirmed the remaining convictions, and “remand[ed] for resentencing with a newly calculated offender score.” Clerk’s Papers at 46. As part of that appeal, we held that the trial court did not abuse its discretion in refusing to treat Irish’s 1998 convictions for second degree assault and first degree robbery, all committed the same day, as same criminal conduct under former RCW 9.94.400(1)(1) (1996), *recodified as* RCW 9.94A.589(1)(a) (LAWS OF 2001, ch. 10, § 6).

Irish's resentencing was delayed because he "rais[ed the] issue about whether his prior convictions of robbery and assaults consisted of the same course of conduct."¹ Report of Proceedings (RP) at 2. The State asserted that we had addressed this issue in our prior opinion and it was moot. RP at 2. The trial court stated, "I believe it's been addressed by the Court of Appeals," and asked Irish's attorney if he wished to respond to the State's argument and the trial court's understanding. RP at 2. Irish's attorney replied, "I have nothing to respond, Your Honor, to that." RP at 3. The court imposed high end sentences for all counts, plus consecutive sentence enhancements, for a total sentence of 303 months. Irish again appeals.²

Irish argues that the trial court misinterpreted our remand order refusing to allow him to argue that, while we previously considered whether his 1998 convictions were "same criminal conduct" under former RCW 9.94A.400(1)(a), we did not consider whether those convictions arose out of a single "course of conduct" such that consideration and resentencing on each crime separately could violate double jeopardy. *State v. Leyda*, 157 Wn.2d 335, 342-43, 138 P.3d 610 (2006); *State v. Tvedt*, 153 Wn.2d 705, 710-11, 107 P.3d 728 (2005). The State responds that Irish did not raise the double jeopardy issue at his first sentencing or in his first appeal and, thus cannot raise it now.

RAP 2.5(c)(1) provides that "[i]f a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case." The issue of whether prior convictions should be treated as

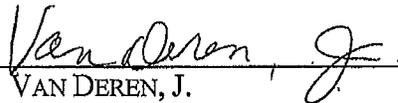
¹ The transcript of the first resentencing hearing is not contained in the record before us.

² A commissioner of this court initially considered Irish's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

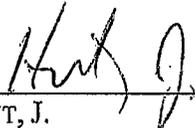
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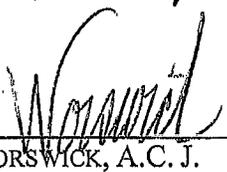
“same criminal conduct” under former RCW 9.94A.400(1)(a) is not the same issue as whether those prior convictions constituted a single “course of conduct” such that multiple convictions and subsequent sentences would violate double jeopardy. Irish raised the latter issue, albeit briefly, at his resentencing. We hold that the trial court erred in concluding that we had held that Irish’s prior convictions were not a single “course of conduct” for double jeopardy purposes. Thus, we vacate Irish’s sentence and remand to the trial court to address whether Irish’s 1998 convictions were a single “course of conduct” such that multiple convictions arising from the single cause of conduct would violate double jeopardy before again sentencing him.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


VAN DEREN, J.

We concur:


HUNT, J.


WORSWICK, A.C.J.