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SUPREME COURT OF THE
STATE OF WASHINGTON


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IN RE THE PERSONAL RESTRAINT PETITION OF:

FONOTAGA F. TILI, PETITIONER

Appeal from the Court of Appeals

No. 43148-3

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO SUPREME COURT REVIEW.

1. Must this petition be dismissed because consideration of the issue it raises is barred by the law of the case doctrine and RAP 16.4(c) and petitioner has failed to make the necessary showing for relitigation of an issue previously determined against him?

2. Must this petition be dismissed because to grant petitioner relief would contravene this court's jurisprudence on the burglary anti-merger statute and petitioner has made no showing that this court's decisions were incorrect and harmful?

B. STATEMENT OF THE CASE.

Petitioner, Fonotaga Tili, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 97-1-03819-9. Appendix A to the State's response. Petitioner was found guilty by a jury trial of three counts of first degree rape, one count of burglary in the first degree, and one count of assault in the second degree. *Id.* This is the third time this case has come before the Supreme Court, but the first time it has been here on collateral review.

At Tili's first sentencing hearing the trial court found that the three rapes were separate and distinct acts, imposed standard range sentences on all counts, ran the three serious violent rape sentences consecutively, but

ran the sentences for the assault and burglary concurrent with one of the rape convictions for a total period of confinement of 417 months.

Appendix B to the State's response. On appeal petitioner challenged his three rape convictions arguing that they violated double jeopardy (unit of prosecution), or that they at least were the same criminal conduct under the Sentencing Reform Act, and that his conviction for assault violated double jeopardy in that it should merge with his rape convictions.

Appendix B to the State's response; *see also State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999) ("*Tili I*"). This Court found that his three rape convictions did not violate double jeopardy as the unit of prosecution was one count per act of sexual intercourse, and the jury had found three distinct acts of sexual intercourse. *Tili I*, at 112-18. It did, however, find that the trial court should have treated the three acts of intercourse as the same criminal conduct. *Tili I*, at 124-25. With regards to petitioner's claim that his assault conviction should merge with his rape convictions, the State conceded that under the facts of the case and the charging language used, that the assault did merge with the rapes, but contended that the assault could remain on the judgment because it did not merge with the burglary due to the operation of the burglary anti-merger statute. *Tili I*, at 125-26. The Supreme Court agreed but noted that the assault conviction should not be counted when calculating offender score on the rapes, but

could be counted when calculating for the burglary. *Id.* The matter was remanded for a new sentencing hearing. *Tili I*, at 128.

On remand, the trial court again imposed a sentence of 417 months –this time as an exceptional sentence. Appendix A. The petitioner again appealed arguing that collateral estoppel precluded imposition of an exceptional sentence and the case again ended up in this Court. Appendix C to the State's response, *see also State v. Tili*, 148 Wn.2d 350, 60 P.3d 1192 (2003) ("*Tili II*"). This Court noted that while the judgment listed incorrect offender scores and standard ranges, that the sentencing court did have the correct information before it and its calculations of the standard ranges were consistent with the directive in the prior opinion and mandate. *Tili II*, at 359-60. It rejected petitioner's argument that collateral estoppel precluded imposition of an exceptional sentence and affirmed the sentence. *Tili II*, at 367-76. The mandate issued on February 3, 2003. Appendix C to the State's response.

In March 2012, petitioner filed an untimely first personal restraint petition arguing that his assault conviction violated double jeopardy as it should merge with his other convictions. The Acting Chief Judge of Division II dismissed the petition finding that the issue petitioner raised had been determined against him in the first direct appeal and that he had not shown any significant change in the law that was material to his

sentence so as to justify reconsideration of the issue. Petitioner successfully sought review of this order dismissing his petition in this court.

C. ARGUMENT.

1. THE COURT OF APPEALS CORRECTLY DISMISSED THE PETITION BECAUSE THE LAW OF THE CASE DOCTRINE AND RAP 16.4(c) PRECLUDE RECONSIDERATION IN A COLLATERAL ATTACK OF A CLAIM REJECTED ON DIRECT REVIEW WHEN PETITIONER FAILS TO SHOW A SIGNIFICANT CHANGE IN THE LAW MATERIAL TO HIS CONVICTION OR SENTENCE.

The law of the case doctrine binds the parties, the trial court, and subsequent appellate courts to the holdings of an appellate court in a prior appeal until such holdings are authoritatively overruled. *Humphrey Indus., Ltd. v. Clay Street Assocs., LLC*, 176 Wn.2d 662, 669, 295 P.3d 231 (2013) (quoting *Greene v. Rothschild*, 68 Wn.2d 1, 10, 414 P.2d 1013 (1966)). The doctrine is applied in order "to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts." *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (quoting 5 Am.Jur.2d *Appellate Review* § 605 (1995) (footnote omitted); *see also*

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) (doctrine serves to promote the finality and efficiency of the judicial process by precluding "agitation of settled issues").

While an appellate court retains some discretion on whether to apply the doctrine in a subsequent appeal under RAP 2.5(c)(2)¹, no such provision exists in the rules of appellate procedure governing personal restraint petitions. *See* RAP Title 16.

Case law pertaining to personal restraint petitions is clear that a collateral attack by personal restraint petition "should not simply be a reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant." *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999); *In re Personal Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). A petitioner is prohibited from renewing an issue that was

¹ Which states:

The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

raised and rejected on direct appeal unless the interests of justice require relitigation of that issue. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 670-671, 101 P.3d 1 (2004); see also *Gentry*, 137 Wn.2d at 388; RAP 16.4(c)(4)². An issue is considered raised and rejected on direct appeal if the same ground presented in the petition was determined adversely to the petitioner on appeal, and the prior determination was on the merits. *In re Personal Restraint of Taylor*, 105 Wn.2d 683, 687, 717 P.2d 755 (1986). A petitioner can meet his burden of showing the interests of justice are served by reexamining an issue by showing there has been an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001). A significant change in the law occurs “where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue...” *In re Personal Restraint of Greening*, 141 Wn.2d 687, 697, 9 P.3d 206 (2000). An appellate decision that settles a point of law without overturning prior precedent does not

² Which provides:

There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard.

represent a “significant change in the law,” nor does an opinion that simply applies settled law to new facts. *See Greening*, 141 Wn.2d at 696. Moreover, the change in the law must be material to petitioner’s case. *In re Personal Restraint of Jeffries*, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). Even if a petitioner can show a significant change in the law that is material to his conviction or sentence, he is also required to show that “sufficient reasons exist to require retroactive application of the changed legal standard” before being entitled to collateral relief. RAP 16.4(c)(4).

In the case now before the court, Tili argued in his direct appeal that the inclusion of the assault in the second degree conviction on his judgment in conjunction with his convictions for first degree rape violated double jeopardy or the merger doctrine. *State v. Tili*, 139 Wn.2d 107, 125, 985 P.2d 365 (1999). In the direct appeal, the State conceded the assault merged with the rape under that facts of that case, but argued that the assault could still appear on the judgment because the burglary anti-merger statute, found in RCW 9A.52.050, allowed for both the assault and the rapes to be punished when sentencing on the burglary, citing *State v. Collicot*, 118 Wn.2d 649, 827 P.2d 263 (1992) as support. This court held that under the burglary anti-merger statute “there is no merger of the assault and burglary convictions, the assault may be used in calculating the offender score for the burglary conviction only, and not for the rape

charges.” *Tili*, 139 Wn.2d at 126. This was consistent with *Collicot*, which held that the burglary anti-merger statute allowed a sentencing court to impose punishment on conviction for burglary in the first degree, rape in the first degree, and kidnapping in the first degree, even though, in the absence of the burglary conviction the rape and kidnapping would merge. 118 Wn.2d at 657-58; see also *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999) (holding that the principle announced in *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979), cert. dismissed, 446 U.S. 948, 100 S. Ct. 2179, 64 L. Ed. 2d 819 (1980), merging convictions for first-degree kidnapping and first-degree assault into a conviction for first-degree rape, does not control when the burglary anti-merger statute is applicable.) When the mandate issued on petitioner’s direct review, this holding became the law of the case.

So when Tili alleged in his untimely personal restraint petition that his assault in the second degree conviction merged with his rape in the first degree convictions and that he was entitled to have the assault conviction removed from his judgment, he raised the identical issue that had been previously determined against him in his direct appeal. Petitioner acknowledged this fact, but asserted that the decisions in *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007) and *In re Personal Restraint of Francis*, 170 Wn.2d 517, 242 P.3d 866 (2010) represented

significant changes in the law³ material to his sentence.⁴ Petitioner contended that these new cases required the removal of the assault conviction from his judgment. Petition at pp. 3-8. Petitioner offered no argument as to why these decisions should be applied retroactively to his conviction as required by RAP 16.4(c)(4).

The acting chief judge of the Court of Appeals found that the issue raised in the petition had already been reviewed and rejected by this court in Tili's direct appeal. Order Dismissing Petition at p. 1, citing, *State v. Tili*, 139 Wn.2d 107, 125-126 (1999). It was clear that the chief judge had found the previous decision had been on the merits of the merger claim:

In *Tili*, our Supreme Court accepted the State's concession that Tili's assault and rape convictions merged but did not vacate his assault conviction, holding the assault conviction “may be used to calculate the offender score for his burglary conviction only, and not for the rape charges.” *Tili*, 139 Wn.2d at 126. In reaching its holding, our

³ The State does not agree that *Womac* and *Francis* represent “significant changes in the law” even apart from their lack of materiality to Tili's sentence because of impact of the burglary anti-merger statute, discussed *infra*. In 1995, this court, relying on *Ball v. United States*, 470 U.S. 856, 864–65, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985), recognized that the fact of conviction alone could have negative impact on a defendant regardless of the sentence imposed when it overruled a line of cases that followed the “concurrent sentencing rule,” which created a bar to consideration of improper multiple punishment claims if the sentences were served concurrently. *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995). *Calle* represented a significant change in the law. The decision in *Womac*, relied upon *Calle* and *Ball*, and did not overrule any prior decisions of the court. Similarly, the decision in *Francis* relied on prior decisions of this court and did not overrule any existing precedent. Thus, neither *Womac* nor *Francis* qualify as significant changes in the law.

⁴ He also asserted that that these decisions rendered his judgment “invalid on its face” so that he his untimely petition was not time-barred. As there is an exception to the time bar in RCW 10.73.100(3) for claims that a conviction is barred by double jeopardy there is arguably a statutory exception applicable to the claim raised in his untimely petition.

supreme court relied upon application of the burglary anti-merger statute, RCW 9A.52.050.

Order Dismissing Petition at p.2 (footnote omitted). The chief judge found that neither *Womac*⁵ nor *Francis*⁶, represented a significant change in the law that was material to petitioner's case because neither of those cases “involved a burglary conviction and the operation of the burglary anti-merger statute, and thus did not affect our Supreme Court's holding in Tili's direct appeal” *Id.*

The court below correctly ruled that neither of the cases cited by petitioner were material to his conviction as neither undermined the legal basis this court used previously to reject petitioner's claim. Petitioner did not meet either of the criteria in RAP 16.4(c)(4) which would justify this court re-examining a claim that had been rejected on direct appeal: 1) there was no showing of a significant change in the law material to his conviction; and 2) no showing of sufficient reasons to apply a changed legal standard retroactively. The court below properly dismissed a petition that raised a single issue which was barred from consideration by the law of the case doctrine, RAP 16.4(c)(4), and several decisions of this court.

⁵ The convictions at issue in *Womac* were homicide by abuse, second degree felony murder, and first degree assault all relating to the death of the defendant's four month-old son. 160 Wn.2d at 647.

⁶ The convictions at issue in *Francis* were first degree attempted robbery and second degree assault of the same victim where the assault was the force used to elevate the attempted robbery to first degree. 170 Wn. 2d at 521.

Petitioner offered no argument in his motion for discretionary review that articulated how the court below erred in its analysis or which undermined the legal reasoning of the Court of Appeals. Instead, petitioner continued to focus on the part of the opinion in the direct appeal that accepted the State's concession as to the merger of the assault into the rapes, but ignored the portion of the opinion that held - under the burglary anti-merger statute - the assault could be punished separately. As this court stated in *State v. Sweet*, the plain language of RCW 9A.52.050 shows that the legislature intended that crimes committed during a burglary do not merge when the defendant is convicted of both. 138 Wn.2d at 478. Under the burglary anti-merger statute, petitioner's assault conviction can be punished separately from his burglary, which means that the conviction is not vacated and will appear on the judgment. As will be discussed more fully below, petitioner has offered no argument that this court prior decisions on the anti-merger statute and its application are incorrect or harmful.

Instead of addressing the legal reasoning used by the Court of Appeals, petitioner raised a new argument in his motion for discretionary review. Petitioner argued that the error in his judgment was that the court imposed a sentence on the assault and that the opinion in the direct appeal did not authorize imposition of a sentence on the assault. *See* motion for

discretionary review at p.4. As discussed above, the burglary antimerger statute allows for the separate punishment of both the burglary and the assault. *Sweet*, 138 Wn.2d at 478-79. Moreover, petitioner is incorrect as to the content of the opinion. In the closing paragraph, the court stated: “Tili’s current criminal history for his second-degree assault conviction should include the first-degree burglary conviction, but not the rape conviction.” 139 Wn.2d at 128. It would be unnecessary for the court to address an offender score for the assault conviction if it was not expecting a sentence to be entered on the assault. While the judgment in Tili’s case lists the wrong offender score and standard range for the assault on page three, the findings of fact on the exceptional sentence correctly indicate that the standard range on the assault was 12+-14 months, *see* Exhibit 2 to the petition. This range corresponds with an offender score of two, which is consistent with petitioner receiving two points for his other current violent offense of burglary in the first degree when being sentenced on the assault. The sentence imposed on the assault, 14 months, is within that standard range. Petitioner can show no error in the fact that his assault conviction was listed on the judgment or that he received a sentence upon it as it was authorized by this court in the direct appeal and there has been no intervening change in the law that would justify a reexamination of this issue. As the issue raised in his petition is procedurally barred by the law

of the case doctrine, RAP 16.4(c)(4), and several decisions of this court, the Chief Judge of the Court of Appeals properly dismissed it. That ruling should be affirmed.

2. PETITIONER SEEKS RELIEF THAT REQUIRES THIS COURT TO EITHER IGNORE OR OVERTURN ITS JURISPRUDENCE ON THE BURGLARY ANTI-MERGER STATUTE, RCW 9A.52.050, BUT HE HAS NOT SHOWN THESE DECISIONS TO BE EITHER INCORRECT OR HARMFUL.

Criminal defendants regularly claim a violation of the double jeopardy clause when they feel that they have been subjected to multiple punishments for a single act. While the federal and state constitutions both provide protections from being punished twice for the same crime, *see* U.S. Const. amend. V; Wash. Const. art. I, § 9, it is perhaps more accurate to state that our constitutions protect against the imposition of multiple punishments for the same crime absent a contrary “clearly expressed legislative intent” that multiple punishments are permitted. *Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) (where “a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the “same” conduct under *Blockburger*, a court's task of statutory construction is at an end” and the prosecutor may seek and the trial court impose cumulative

punishment); *State v. Freeman*, 153 Wn.2d 765, 770–71, 108 P.3d 753 (2005); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

The Washington Legislature enacted RCW 9A.52.050, commonly called the “burglary anti-merger statute.” It provides:

Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.

This provision has been the law in Washington for over a hundred years as it was first enacted in 1909. Laws of 1909, ch. 249, §329 (*see former* RCW 9.19.040). It is not referenced in an appellate opinion until 1979. *See State v. Johnson*, 92 Wn.2d 671, 679-80, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948, 100 S.Ct. 2179, 64 L.Ed.2d 819 (1980), *overruled on other grounds by, State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999). The first record of an appellate court using the anti-merger statute as “an express statement that the legislature intended to punish separately any other crime committed during the course of a burglary” and reject a defendant’s argument that his convictions for rape and first degree burglary should merge was in *State v. Hoyt*, 29 Wn. App. 372, 628 P.2d 515 (1981). This court first used the statute to keep a first degree rape conviction and first degree burglary conviction from merging in *State v. Bonds*, 98 Wn.2d 1, 15-16, 653 P.2d 1024 (1982). This court relied upon

it in *State v. Collicot*, 118 Wn.2d 649, 657-58, 827 P.2d 263 (1992) and *State v. Lessley*, 118 Wn.2d 773, 779-82 827 P.2d 996 (1992), to conclude that a defendant could be charged and punished separately for burglary and the crimes committed during the burglary, even if they involved the same criminal conduct as defined by the Sentencing Reform Act. Finally in *State v. Sweet* this court expressly construed the statute:

The plain language of RCW 9A.52.050 expresses the intent of the Legislature that “any other crime” committed in the commission of a burglary would not merge with the offense of first-degree burglary when a defendant is convicted of both.

Sweet, 138 Wn.2d at 478. Once the Supreme Court has determined the meaning of a state statute, that is what the statute has meant since its enactment. *In re Personal Restraint of Vandervlugt*, 120 Wn.2d 427, 436, 842 P.2d 950 (1992). This court has never shown any inclination to back away from this holding in *Sweet*.

Moreover, the Legislature is deemed to acquiesce in the statutory interpretation of the court if no change is made for a substantial time after a decision construing a statute. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789, 719 P.2d 531 (1986). The Legislature has not amended the burglary anti-merger statute in light of *Sweet*. “If the legislature does not register its disapproval of a court opinion, at some point that silence itself is evidence of legislative

approval.” *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 181, 149 P.3d 616 (2006).

Petitioner's requested relief would require this court to depart from its prior decisions construing the burglary anti-merger doctrine.

“The doctrine of stare decisis ‘requires a clear showing that an established rule is incorrect and harmful before it is abandoned.’” *Riehl v.*

Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Petitioner has made no effort to show that this court's jurisprudence on the burglary anti-merger statute is either incorrect or harmful.

D. CONCLUSION.

It is now fourteen years past the date that this court first ruled that petitioner's second degree assault conviction could remain on his judgment and be used in the calculation of his offender score on the first degree burglary and well as be separately punished. When the mandate issued in the direct appeal, that holding became the “law of the case.” There are many longstanding procedural barriers to this court considering petitioner's collateral attack and petitioner has overcome *none* of them. These barriers exist to protect the finality of judgment and to prevent endless relitigation of the same issue. The Court of Appeals correctly

recognized that petitioner had not overcome these procedural hurdles and dismissed the petition. That order should be affirmed.

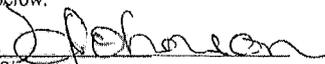
DATED: November 15, 2013

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US-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.

11/14/13 
Date Signature

OFFICE RECEPTIONIST, CLERK

From: Heather Johnson <hjohns2@co.pierce.wa.us>
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Subject: In re the PRP of: Fonotage Tili--88073-5
Attachments: Untitled.PDF - Adobe Acrobat Pro.pdf

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Attached is the Supplemental Brief of Respondent