

No. 95734-7

No. 75458-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

RONALD RICHARD BROWN,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

**1. Requesting and imposing a sentence on the remaining counts that is higher than what Brown originally received for those counts, raises a presumption of vindictiveness.**

The State's request for a sentence that was equivalent to what Brown originally received raises a presumption of vindictiveness. The State could have but chose not to retry Brown on the two kidnapping charges that were reversed for instructional error. By requesting a sentence that was equivalent to what Brown originally received, the State effectively sought to relieve itself of the burden of re-proving the kidnapping charges to a jury under proper instructions. This situation creates a danger of prosecutorial self-vindication.

The court's decision to impose a sentence on the remaining counts that was greater than what Brown originally received on those counts also raises a presumption of vindictiveness. Two convictions for second degree assault were vacated and two convictions for first degree kidnapping were reversed and not re-tried. The court's decision to impose an exceptional sentence on the remaining counts, resulting in a higher sentence for those counts than what Brown initially received, was not consistent with its original sentencing intent.

Contrary to the State's argument, Washington courts have not adopted the "total aggregate" approach when assessing vindictiveness claims in multi-count cases where some counts are dismissed following an appeal. In State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003), the supreme court did not reverse Tili's three rape convictions but held they constituted the same criminal conduct for purposes of sentencing. Similarly, in State v. Larson, 56 Wn. App. 323, 783 P.2d 1093 (1989), the court of appeals did not reverse Larson's convictions but held the sentencing court had erred in ordering consecutive sentences.

Thus, in neither case were any of the counts dismissed following an appeal. The criminal charges remained the same. The new sentences reflected the courts' original sentencing intent. Tili, 148 Wn.2d at 357, 362-63; Larson, 56 Wn. App. at 328. It was not presumptively vindictive to impose a sentence that was equal to, or less than, the total sentence the defendant originally received.

But in a multi-count case where some counts are dismissed following a successful appeal, it is presumptively vindictive to impose a sentence on the remaining counts that is greater than what the defendant originally received for those counts. Even if the total aggregate sentence is the same, or less, the sentence for the remaining

counts is greater than what the court originally imposed. Unless the circumstances demonstrate otherwise, it is not consistent with the court's original sentencing intent. Enhancing the sentence on the remaining counts after some counts have been dismissed following a successful appeal violates the spirit of Pearce<sup>1</sup> and should not be permitted.

The “modified aggregate” approach is more suited to this situation than the “total aggregate” approach. Under the “modified aggregate” approach, when a reviewing court assesses a sentence imposed at resentencing in a multi-count case after some counts have been dismissed following an appeal, the court first disregards the sentence originally imposed on the dismissed counts and then compares the total remaining sentence with the sentence imposed at resentencing. United States v. Monaco, 702 F.2d 860, 885 (11th Cir. 1983); United States v. Markus, 603 F.2d 409, 413 (2d Cir. 1979). If the second sentence is greater than the valid aggregate sentence originally received, this raises a presumption of vindictiveness. If the presumption is not rebutted, the sentence violates constitutional due process. Monaco, 702 F.2d at 885.

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<sup>1</sup> North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

Applying the “modified aggregate” approach in a multi-count case where some counts are dismissed following an appeal avoids the risk of judicial self-vindication and vindictiveness that may naturally arise. Jonathan D. Youngwood, Comment: The presumption of judicial vindictiveness in multi-count resentencing, 60 U. Chi. L. Rev. 725, 750-52 (Spring 1993). The “total aggregate” approach advocated by the State, on the other hand, permits judicial self-vindication by allowing a judge to reaffirm his or her initial sentence. Id.

The principal problem is not, as the State contends, that allowing a court to impose, or the State to request, the same sentence after some counts are dismissed following a successful appeal might chill the right to appeal. The problem is that this situation creates a “potential for vindictiveness.” Blackledge v. Perry, 417 U.S. 21, 28-29, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974). The purpose of the Pearce rule is to counteract the natural possibility that the judge, or the prosecutor, will have a personal stake in the prior sentence and a motivation to engage in self-vindication. Chaffin v. Stynchcombe, 412 U.S. 17, 27, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

Applying the “modified aggregate” approach when a court resentences a defendant after some counts are dismissed following a

successful appeal best protects a defendant against judicial and prosecutorial vindictiveness and self-vindication and best effectuates the purposes of the Pearce rule.

**2. The court was barred by collateral estoppel from imposing an exceptional sentence at the second sentencing because it already considered and rejected an exceptional sentence at the first sentencing.**

The State's overly-technical approach to the doctrine of collateral estoppel is not supported by the case law. "Collateral estoppel in criminal cases is 'not to be applied with a hypertechnical and archaic approach . . . but with realism and rationality.'" State v. Eggleston, 129 Wn. App. 418, 427, 118 P.3d 959 (2005) (quoting Ashe v. Swenson, 397 U.S. 437, 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970))."

In deciding whether collateral estoppel bars a court from imposing an exceptional sentence on remand, the question is not simply whether the court (or the jury) already made the necessary findings of fact. Collateral estoppel precludes a judge from imposing an exceptional sentence on remand following an appeal if the judge already determined at the first sentencing that an exceptional sentence was not warranted on those same grounds. State v. Collicott, 118

Wn.2d 649, 663-67, 827 P.2d 263 (1992) [Collicott II]. “After considering these issues at the first sentencing and having determined that no exceptional sentence would be imposed, the trial court is estopped from now imposing an exceptional sentence based on a repeat assertion by the State of [the same grounds].” Id. at 661.

In other words, the “issue” for purposes of a collateral estoppel analysis is whether the court already decided that an exceptional sentence is not warranted based on a particular aggravator. The “issue” is not whether the court (or a jury) already made a finding that the aggravator is supported by the evidence.

A court may not impose an exceptional sentence on remand, if it already rejected an exceptional sentence on that same ground, simply because there has been a change in the standard sentence range. In Collicott, for instance, the trial court initially determined that the three convictions arose out of the same criminal conduct and imposed a standard range sentence. State v. Collicott, 112 Wn.2d 399, 401, 771 P.2d 1137 (1989) [Collicott I]. The court expressly declined to impose an exceptional sentence. Collicott II, 118 Wn.2d at 653. On appeal, the supreme court affirmed the same criminal conduct determination but remanded for recalculation of the offender score. Collicott I, 112

Wn.2d at 412. On remand, the court included an additional burglary conviction in the offender score, which had been entered in the interim. Collicott II, 118 Wn.2d at 653. At resentencing, the trial court decided to impose an exceptional sentence. Id. at 653-54. This was barred by collateral estoppel because the court had already decided *not* to impose an exceptional sentence. “For purposes of a collateral estoppel analysis, there was an identity of issues between Collicott’s first and second sentencing,” even though the standard sentence range had changed. Tili, 148 Wn.2d at 364. The imposition of an exceptional sentence was not consistent with the court’s original sentencing intent.

Similarly, here, there was an identity of issues between the first and second sentencings for purposes of a collateral estoppel analysis. Although the standard sentence range had changed, that was because four of the charges were dismissed. The sentencing context had not changed in a way that would now justify an exceptional sentence, where the trial court had originally declined to impose one.

By contrast, in Tili, the sentencing context *had* changed for purposes of a collateral estoppel analysis. On appeal, the supreme court affirmed the three rape convictions but determined they were the same criminal conduct and should count as only one point in the

offender score. Tili, 148 Wn.2d at 362-63. Thus, the standard range sentence was now significantly reduced but the charges remained the same. In that situation, the trial court was permitted to impose an exceptional sentence in order to effectuate its original sentencing intent. Tili, 148 Wn.2d at 357, 362-63.

Here, as in Colicott, the sentencing context had not changed for purposes of a collateral estoppel analysis. At the first sentencing, the court stated it did not believe an exceptional sentence was warranted because Brown had offered assistance to the Munsons during the incident. 3/12/13RP 21. Obviously, this circumstance did not change between the first and the second sentencing.

At the second sentencing, contrary to the State's representations, the court did not state that it no longer believed a standard range sentence was appropriate due to the reduction in the standard sentence range. See SRB at 17-18. Instead, the court said it no longer believed that the original sentence it had imposed, which the State requested it re-impose, was "appropriate." 6/21/16RP 34-35. That was because one of Brown's alleged accomplices, Frohs, had pled guilty and received a sentence that was significantly lower than the sentence Brown originally received. Id. The court explained,

I'm taking into account Mr. Frohs's plea that he entered and the time that he got. I think it's appropriate for me to do that. And in relation to what your original sentence was compared to what Mr. Frohs got, if I follow the original sentence I think it's too far out of the lines of being reasonable.

Id.

In sum, the sentencing context had changed only in a way that made an exceptional sentence less appropriate. For purposes of a collateral estoppel analysis, the "issues" were the same and had already been decided. The court was precluded by collateral estoppel from imposing an exceptional sentence on remand because it had already considered, and rejected, an exceptional sentence at the first sentencing. Imposing an exceptional sentence was not consistent with the court's original sentencing intent.

Finally, although only four justices signed the lead opinion in Collicott II, the Washington Supreme Court has never overruled it. The court has never stated that it should not be followed because the concurring opinion had a narrower holding. As explained in the opening brief, the court has continued to cite Collicott II and taken pains to distinguish it from other cases such as Tili. Collicott II remains good law and should be followed.

**3. The State did not prove the facts necessary to calculate the offender score.**

Brown may challenge his offender score in this appeal. A defendant “may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding” State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009).

Here, following Brown’s first appeal, his case was remanded for an entirely new sentencing proceeding. CP 88. He may raise new issues related to his sentence.

The cases cited by the State do not apply because in those cases, the defendants attempted to raise non-sentencing issues for the first time in their second appeals. SRB at 19-20 (citing State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983) (search and seizure issue); State v. Fort, 190 Wn. App. 202, 228-29, 360 P.3d 820 (2015), review denied, 185 Wn.2d 1011 (2016) (open court issue)).

The evidence provided by the State to prove the misdemeanor convictions does not satisfy constitutional due process. Although the rules of evidence are relaxed during sentencing hearings, the hearing must comply with constitutional due process. State v. Cross, 156 Wn. App. 568, 587, 234 P.3d 288 (2010). The State’s evidence must have

some minimal indicium of reliability. Id. (citing State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009)).

Here, the State presented only a statement by a witness who was not present at the hearing. The witness claimed he had obtained information about Brown's criminal history from various databases. In other words, the State's evidence consisted of hearsay within hearsay.

Hearsay within hearsay does not satisfy the requirements of constitutional due process at a sentencing hearing. See State v. Pollard, 66 Wn. App. 779, 785-86, 834 P.2d 51 (1992); State v. Kisor, 68 Wn. App. 610, 613-14, 844 P.2d 1038 (1993).

Brown must receive a new sentencing hearing.

**4. Several conditions of community custody must be vacated.**

The State contends the community custody condition requiring Brown to "stay out of drug areas as defined by your supervising Community Corrections Officer" need not be crime-related. SRB at 23. Because the condition impacts the constitutional right to travel, it must be narrowly tailored to serve a compelling governmental interest. The condition does not meet that test in this case because it has no relation to the crime.

The right to travel and move about freely is protected by the Constitution. Shapiro v. Thompson, 394 U.S. 618, 629-30, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), overruled in part on other grounds by Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); State v. Schimelpfenig, 128 Wn. App. 224, 226-27, 115 P.3d 338 (2005). The constitutional right to travel includes the right to travel within a state. Schimelpfenig, 128 Wn. App. at 226 (citing Thompson, 394 U.S. at 630-31).

Sentencing conditions that restrict the right to travel are subject to strict scrutiny and must be narrowly tailored to serve a compelling governmental interest. Schimelpfenig, 128 Wn. App. at 228. The condition must be stricken if it is “too broad for its stated purpose.” Id. at 230. To determine whether a specific geographic restriction impermissibly infringes on a defendant’s right to travel, a sentencing court should consider the following nonexclusive factors: (1) whether the restriction is related to protecting the safety of the victim or witness of the underlying offense; (2) whether the restriction is punitive and unrelated to rehabilitation; (3) whether the restriction is unduly severe and restrictive because the defendant resides or is employed in the area from which he is banished; (4) whether the

defendant may petition the court to temporarily lift the restriction if necessary; and (5) whether less restrictive means are available to satisfy the State's compelling interest. Id. at 228-29.

Here, the State has asserted no compelling purpose for the condition requiring Brown to stay out of "drug areas." It is not crime-related or necessary to protect any witnesses or victims. It is not related to rehabilitation. It appears to have no legitimate purpose related to the crime.

Because the condition is unconstitutionally vague and unduly burdens the constitutional right to travel, it should be stricken.

#### B. CONCLUSION

For the reasons provided above and in the opening brief, Brown must be resentenced within the standard range. Several conditions of community custody must be stricken. The State must present reliable evidence to prove its allegations regarding the offender score.

Respectfully submitted this 2nd day of August, 2017.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 75458-1-I
	)	
RONALD BROWN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2<sup>ND</sup> DAY OF AUGUST, 2017, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 2<sup>ND</sup> DAY OF AUGUST, 2017.



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