

FILED
Dec 07, 2012
Court of Appeals
Division III
State of Washington

NO. 30466-3-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JOE ANTHONY MATA,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF,

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ARGUMENT

I. UPF 1°

The State's analysis of Joe Anthony Mata's double-jeopardy argument is flawed. The State attempts to create a factual difference where none exists.

RCW 9.41.040(1)(a) states, in part:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person **owns, has in his or her possession, or has in his or her control any firearm** after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense

(Emphasis supplied.)

There was never any question that Mr. Mata did not own the gun. The gun was purchased by Christina Barrientes.

The statute does not distinguish between either actual possession or constructive possession. The State's attempt to argue that Mr. Mata may have constructively possessed the gun in Pierce County; but actually possessed the gun in Yakima County, has no bearing on the issue of dou-

ble-jeopardy. Possession is possession, whether it is actual or constructive.

The State concedes that Mr. Mata was charged with the same “crime” in both Pierce County and Yakima County. The gun was the same gun. (*See*: Respondent’s brief at 2).

The offenses, as charged in the respective counties, are dependent upon the same elements. The State’s brief does not respond to the venue issue as it pertains to the double-jeopardy argument. Therefore, the State should be deemed to have conceded that portion of the argument.

Additionally, the State does not make any attempt to distinguish *State v. Lopez*, 79 Wn. App. 755, 761-63, 904 P.2d 1179 (1995). As contended in his original brief, Mr. Mata asserts that the *Lopez* case controls.

The State’s constructive possession argument is pure speculation. There is no citation to the record to support the argument. RAP 10.3(a)(6) precludes consideration of the State’s argument on double-jeopardy.

Finally, as to this issue, the recent case of *State v. Embry*, slip opinion 40984-4-I (October 30, 2012) should be considered in light of the State’s argument. Even though it is a sufficiency of the evidence case involving unlawful possession of a firearm, it is supportive of Mr. Mata’s position.

II. CrR 2.1(d)

The State's brief proceeds on an untenable premise with regard to the final amendment of the Information. The State contends that Mr. Mata was fully aware of all elements of the offense from the filing of the original Information.

The State's argument fails. The State proceeded to trial on the Second Amended Information; not the Third Amended Information. Thus, Mr. Mata was not informed of all of the essential elements of the offense as it was presented to the jury.

Again, the State fails to address the controlling authority: *State v. Laramie*, 141 Wn. App. 332, 343-44, 169 P.3d 859 (2007).

The State's brief primarily addresses whether or not the firearm was operational.

Also, Mr. Mata is not challenging credibility of any witness. Thus, the State's credibility argument is inapposite.

The State ignores that portion of CrR 2.1(d) which states that any amendment must not prejudice "substantial rights of the defendant."

The Sixth Amendment to the United States Constitution and Const. art. I, § 22 require that a criminal defendant be fully informed of each and every element of the offense for which he/she is charged. Allowing the

amendment in this case is trial by surprise. Trial by surprise is inherently prejudicial.

III. SENTENCING

Mr. Mata concedes that the State is correct in its analysis that his two (2) first degree robbery convictions do not constitute serious violent offenses. Thus, his offender score was not miscalculated as contended in the original brief.

Nevertheless, an issue still exists dependent upon the determination of the double-jeopardy question involving Mr. Mata's UPF 1^o conviction. If double-jeopardy applies, then Mr. Mata's offender score is reduced and resentencing will be required.

In connection with any resentencing the issue of consecutive sentences remains.

The State fails to address *State v. Roberts*, 76 Wn. App. 290, 292-93, 884 P.2d 628 (1994), *review denied*, 126 Wn.2d 1018, 894 P.2d 564.

The *Roberts* case clearly indicates that an individual on community supervision is "under sentence of felony." This takes Mr. Mata's case outside the language of RCW 9.94A.589(3). Since the statute does not apply under the facts and circumstances of Mr. Mata's case, the trial court had no authority to impose a consecutive sentence.

“Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.” RCW 9.94A.589(1)(a).

RCW 9.94A.535 deals with departures from the sentencing guidelines. It provides, in part:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. **Facts supporting aggravating sentences ... shall be determined pursuant to the provisions of RCW 9.94A.537.**

(Emphasis supplied.)

RCW 9.94A.537 deals with aggravating circumstances and sentences above the standard range. It requires that the State provide notice of its intent to seek an exceptional sentence.

Although sentencing courts generally enjoy discretion in tailoring sentences, for the most part that discretion does not extend to deciding whether to apply sentences concurrently or consecutively **[C]onsecutive sentences can be imposed only as an exceptional sentence under RCW 9.94A.535.**
...

RCW 9.94A.589 ... does demonstrate the legislature’s presumption in favor of concurrent sentences as well as the **general lack of discretion judges have in deciding whether to apply sentences concurrently or consecutively.**

...

... [T]he statutory language and context seemed to weigh in favor of intending concurrent sentences. ... [L]egislative intent gleaned elsewhere in the statute does not conclusively resolve the issue. ... Under the rule of lenity, where a statute is ambiguous, we must interpret it in favor of the defendant.

State v. Jacobs, 154 Wn.2d 596, 602-03, 115 P.3d 281 (2005). (Emphasis supplied.)

The State did not request consecutive exceptional sentences.

The Findings of Fact and Conclusions of Law supporting the exceptional sentence do not address the issue of consecutive sentences. (CP 760)

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

RCW 9.94A.535.

Mr. Mata otherwise relies upon the argument contained in his original brief in support of the issues raised.

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DATED this 7th day of December, 2012.

Respectfully submitted,

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DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	YAKIMA COUNTY
Plaintiff,)	NO. 09 1 01475 8
Respondent,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
JOE ANTHONY MATA,)	
)	
Defendant,)	
Appellant.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on this 7th day of December, 2012, I caused a true and correct copy of the *APPELLANT'S REPLY BRIEF* to be served on:

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