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	No. 40853-8-II UNPUBLISHED OPINION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 "same criminal conduct" under former RCW 9.94A.400(1)(a) is not the same issue as whether

[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.

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.