IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRIAN THOMAS EGGLESTON, Appellant.	No. 38461-2-II UNPUBLISHED OPINION

Houghton, J. — Brian Eggleston appeals the trial court's imposition of murder and assault conviction sentences, raising various arguments based on trial court error. We vacate the 2008 assault conviction sentence and remand for the trial court to reinstate Eggleston's 2003 assault conviction sentence with instructions on resentencing the 2008 murder conviction sentence.

FACTS

During an October 16, 1995, drug raid on his house, Eggleston shot at multiple law enforcement officers, killing one of them. *State v. Eggleston*, 129 Wn. App. 418, 422-23, 118 P.3d 959 (2005) (published in part) (*Eggleston* II). Officers arrested Eggleston and recovered "drugs, drug paraphernalia and cash." *Eggleston* II, 129 Wn. App. at 423. The State charged Eggleston with first degree aggravated murder, first degree assault, and four drug counts. *Eggleston* II, 129 Wn. App. at 424.

In Eggleston's first trial, the jury convicted him of the assault and drug charges but could

not "reach a verdict on the first degree aggravated murder charge." *State v. Eggleston*, 164 Wn.2d 61, 66, 187 P.3d 233 (2008) (*Eggleston* III). On June 13, 1997, the trial court sentenced him on the assault and drug convictions. *Eggleston* III, 164 Wn.2d at 66.

At the second trial on the murder charge, the jury acquitted Eggleston of first degree murder but convicted him of second degree murder. *Eggleston* III, 164 Wn.2d at 67. On appeal, we reversed his second degree murder and assault convictions and affirmed his drug conviction sentence. *State v. Eggleston*, noted at 108 Wn. App. 1011, slip op. at *1 (*Eggleston* I).

Before Eggleston's third trial, the State filed an information charging him with second degree murder and first degree assault. *Eggleston* III, 164 Wn.2d at 67. The jury convicted him of both charges. *Eggleston* III, 164 Wn.2d at 68-69.

On January 9, 2003, the trial court sentenced Eggleston on his new second degree murder and first degree assault convictions. The trial court ordered the murder and assault convictions to run consecutively to each other but concurrent with the drug conviction sentence. Although we had already affirmed the drug conviction sentence, the trial court resentenced him on his earlier drug convictions. Finding reasons for an exceptional sentence, it imposed a 20-year exceptional sentence on the second degree murder conviction.

In his second appeal, we affirmed the murder and assault convictions from the third trial. *Eggleston* II, 129 Wn. App. at 438. We also affirmed the 2003 assault conviction sentence. *Eggleston* II, 129 Wn. App. at 438. But we vacated the 2003 exceptional sentence on the murder conviction and remanded for resentencing on it.[1] *Eggleston* II, 129 Wn. App. at 438.

[1] The State conceded that the exceptional sentence violated *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). *Eggleston* III, 164 Wn.2d at 75.

We also vacated the drug conviction sentence imposed during the 2003 resentencing and, because we had already affirmed it, we reinstated the 1997 drug conviction sentence. *Eggleston* II, 129 Wn. App. at 425, 438. In reinstating the 1997 sentence, we specifically commented that we "did not vacate the judgment and sentence for the drug convictions." *Eggleston* II, 129 Wn. App. (unpublished portion) at ¶ 157. And we emphasized that "[a]lthough the SRA[2] required the third sentencing court to treat these convictions as part of Eggleston's history in sentencing him for murder and assault, the court lacked authority to resentence him on the previously obtained drug convictions to include the murder conviction in the drug crime offender scores." *Eggleston* II, 129 Wn. App. (unpublished portion) at ¶ 169.

Our Supreme Court granted review. It affirmed the conviction for second degree assault, rejecting Eggleston's argument that the Fifth Amendment to the United States Constitution barred his "retrial on the aggravating factor that he knew [the assault victim] was a law enforcement officer." *Eggleston* III, 164 Wn.2d at 70.

The court also noted that the State did not impermissibly relitigate "the fact of whether Eggleston knew the victim was a law enforcement officer" because the "jury's answer in the special verdict was unnecessary, irrelevant, and in violation of the court's instructions." *Eggleston* III, 164 Wn.2d at 72, 73. The court further held that "collateral estoppel did not bar introduction of evidence in the third trial that Eggleston knew [the assault victim] was a law enforcement officer." *Eggleston* III, 164 Wn.2d at 75.

Our Supreme Court also refused to reach Eggleston's argument that the State must

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[2] Sentencing Reform Act of 1981, ch. 9.94A. RCW.

resentence him within the standard range, reasoning that intervening pertinent amendments to the SRA[3] "do not act retrospectively and if they did the amendments were impermissibly ex post facto." *Eggleston* III, 164 Wn.2d at 76. In doing so, it explained that "[a]lthough the Court of Appeals remanded for resentencing, we can only speculate about whether the State will request an exceptional sentence under the new statute. Accordingly, we decline to decide issues relating to former RCW 9.94A.537 because these issues are not ripe." *Eggleston* III, 164 Wn.2d at 77.

On remand, the trial court properly reinstated Eggleston's 1997 drug conviction sentence. It then resentenced him on both the murder and assault convictions, despite our having already affirmed the 2003 assault conviction sentence. The trial court imposed a consecutive sentence for the assault and murder convictions,[4] citing former RCW 9.94A-.400(1)(b) (1995)[5] (*recodified as* RCW 9.94A.589, Laws of 2001, ch. 10, § 6). The trial court[6] then ran this new sentence consecutively to the 1997 drug conviction sentence, citing former RCW 9.94A.400(3)[7] as

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[3] The legislature enacted amendments in response to *Blakely*. Laws of 2007, ch. 205.

[4] Eggleston does not contest the imposition of a consecutive sentence on these convictions.

[5] Former RCW 9.94A.400(1)(b) states:

> Whenever a person is convicted of two or more serious violent offenses, as defined in RCW 9.94A.030, arising from separate and distinct criminal conduct, the sentence range for the offense with the highest seriousness level under RCW 9.94A.320 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the sentence range for other serious violent offenses shall be determined by using an offender score of zero. The sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

[6] We note that three different judges have sentenced Eggleston.

[7] Former RCW 9.94A.400(3) states:

authority. The State did not seek and the trial court did not impose an exceptional sentence.

Eggleston appeals the sentence imposed after his third trial.

ANALYSIS

We begin our analysis by summarizing Eggleston's conviction and sentence history at the trial court and on review.[8]

1997 Sentence:	First degree assault and four drug counts, all concurrent.
First Appeal:	First degree assault sentence vacated.
	Four drug count sentences not vacated.
2003 Sentence:	Second degree murder, consecutive to first degree assault.
	Both concurrent with four drug counts.
Second Appeal:	Second degree murder sentence vacated.
	First degree assault sentence affirmed.
2008 Sentence:	Second degree murder, consecutive to first degree assault.
	Both consecutive to four drug counts.

Assault Conviction Resentencing

Eggleston first contends that the trial court erred in applying former RCW 9.94A.400(3).[9] He asserts that regardless of past piecemeal sentencing, all six convictions are current offenses[10]

> Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

[8] We do not refer to our Supreme Court's opinion because it reviewed only our holdings on Eggleston's double jeopardy and exceptional sentence arguments.

[9] Eggleston and the State did not initially address the trial court's decision to resentence his assault conviction, even though we explicitly affirmed his assault conviction sentence in *Eggleston* II. We ordered the parties to file supplemental briefing "addressing whether the trial court had authority to resentence the first degree assault conviction given that we previously affirmed the January 9, 2003, assault conviction sentence and how former RCW 9.94A.400(3) may apply."

for sentencing purposes and former RCW 9.94A.400(3) does not apply. He seeks reversal of the 2008 sentence and remand for resentencing on all six convictions.

Eggleston also argues that the assault conviction sentence must run consecutively to the murder conviction sentence while the murder and assault conviction sentences must run concurrently with the drug conviction sentence. He supports his argument by noting that on remand for resentencing, his offender score for the murder would rise to seven points, resulting in a standard range of 216 to 288[11] months if the convictions are not counted as current offenses. He contends that resentencing the murder conviction illustrates the absurdity of applying former RCW 9.94A.400(3) to resentencing on appeal: If sentenced all at once, the maximum sentence is 480 months' confinement;[12] but if he is resentenced on the murder conviction and the trial court

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[10] We decline to revisit our decision in *Eggleston* II that the SRA requires the trial court to consider earlier convictions "as part of Eggleston's history in sentencing him." *Eggleston* II, 129 Wn. App. (unpublished portion) at ¶ 169.

[11] *See* former RCW 9.94A.310(1995).

[12] This sentence is the total of 123 months' confinement for the assault conviction, which runs consecutively to 219 months' confinement for the murder conviction, and the sentences for these counts run concurrently with 92 months' confinement for the drug counts that have a school zone enhancement. The firearm enhancements add 138 months' confinement, for a total confinement of 480 months.

applies former RCW 9.94A.400(3), the maximum sentence is 549[13] months' confinement.[14]

We are responsible for correcting erroneous sentences. *State v. Toney*, 149 Wn. App. 787, 794, 205 P.3d 944 (2009). Here, in resentencing on the assault conviction, the trial court violated the law of the case doctrine.

The law of the case doctrine refers to the binding effect that an appellate court's decision has on a trial court's proceedings on remand. *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003). It also refers to the principle that appellate courts generally do not re-determine the rules of law announced or implicitly used to reach an earlier decision. *Harrison*, 148 Wn.2d at 562. We apply this "doctrine 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.' " *Harrison*, 148 Wn.2d at 562 (quoting 5 Am. Jur. 2d Appellate Review § 605 (1995)).

In *Eggleston* II, we affirmed Eggleston's 2003 assault conviction sentence. 129 Wn. App. at 438. Nevertheless, on October 24, 2008, the trial court resentenced him on the assault conviction while resentencing on the murder conviction. *Eggleston* II, 129 Wn. App. at 438.

The law of the case doctrine requires that we, at a minimum, ensure that the trial court

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[13] This total includes 288 months' confinement for the murder conviction running consecutively to the 123 months' confinement for the assault conviction but concurrently with 81 months' confinement for the drug convictions that have a school zone enhancement, and 138 months' confinement for the firearm enhancements added.

[14] The State counters that even if the trial court erred in resentencing on the assault conviction, the trial court had authority and discretion under former RCW 9.94A.400(3) to impose a sentence on the murder conviction to run consecutively to the 1997 drug conviction sentence. As noted elsewhere, we disagree.

abides by our decisions. Thus, we vacate the 2008 assault conviction sentence and remand with instructions to reinstate the 2003 assault conviction sentence.[15]

Consecutive Sentences Without an Exceptional Sentence

Eggleston next contends that the trial court erred when it ordered his murder and assault convictions to run consecutively to his drug conviction sentence without imposing an exceptional sentence. He argues that at sentencing, the trial court resentenced him on all his crimes or—because of the procedural posture of the case—should be viewed as having done so, thus the trial court must adhere to exceptional sentence requirements under RCW 9.94A.537. He further supports his argument by asserting that his sentences were not final because the judgments had not become final.[16] Finally, he argues that because the State did not seek and the trial court did not impose an exceptional sentence below, one cannot be imposed on remand.

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[15] We do not remand for resentencing on all counts because it is not consistent with our opinions in *Eggleston* I and *Eggleston* II. We did not vacate the drug conviction sentence and remand for resentencing in *Eggleston* I, which was why we vacated the drug conviction sentence in *Eggleston* II. *Eggleston* II, 129 Wn. App. (unpublished portion) at ¶¶ 157, 169.

[16] Eggleston cites *In re Personal Restraint of Skylstad*, 160 Wn.2d 944, 162 P.3d 413 (2007), for the proposition that a sentence is not final until the judgment is final, arguing that the trial court constructively sentenced all of the convictions at the same time so former RCW 9.94A.400(3) does not apply. We note that *Skylstad* addressed the issue of when a sentence is final for purposes of collateral review. 160 Wn.2d at 948-52. Even if one sentence is vacated and the entire case is not yet final for purposes of collateral review, an appellate court's mandate may make an earlier sentence final and unavailable for resentencing after an appeal. *State v. Kilgore*, 167 Wn.2d 28, 36 n.5, 37, 42, 43 n.16, 216 P.3d 393 (2009); *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), *overruled in part on other grounds by State v. Sampson*, 82 Wn.2d 663, 665, 513 P.2d 60 (1973). Our mandate in *Eggleston* I did exactly that for the 1997 drug conviction sentence, and our mandate in *Eggleston* II did the same for the 2003 assault conviction sentence.

We review a sentencing court's decision to impose consecutive sentences under former RCW 9.94A.400(3) for abuse of discretion. *State v. Mathers*, 77 Wn. App. 487, 494, 891 P.2d 738 (1995); *see In re Pers. Restraint of Long*, 117 Wn.2d 292, 305, 815 P.2d 257 (1991). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). But we review the application of a statute de novo as a question of law. *State v. Ayala*, 108 Wn. App. 480, 484, 31 P.3d 58 (2001).

Under the version of the SRA in effect at the time of Eggleston's crimes,

> [s]ubject to subsections (1)[17] and (2)[18] of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

Former RCW 9.94A.400(3).

The Sentencing Guidelines Commission's manual[19] describes former RCW 9.94A.400(3) as covering a situation "where at the time the defendant is sentenced on a present conviction, he or she has not yet completed a sentence for another felony conviction" and, because "the latter crime was committed at a point before the offender was sentenced for the previous crime, the presumption is toward a concurrent sentence but the court can decide to order a consecutive

[17] Former RCW 9.94A.400(1)(a) applies when a defendant is "sentenced for two or more current offenses."

[18] Former RCW 9.94A.400(2) applies when the defendant commits a felony while under sentence for a different felony.

[19] We consider this manual as merely persuasive authority.

sentence." Wash. Sentencing Guidelines Comm'n Adult Sentencing Manual, at II-85 (1995). The manual also explains former RCW 9.94A.400(3)'s relevance:

> Subsection (3) will often be relevant where the defendant has been charged in multiple informations or has committed a series of crimes across court jurisdictions (crimes in more than one county, more than one state, or crimes for which he or she has been sentenced under both state and federal jurisdictions) and where the defendant will be sentenced by more than one judge. The purpose of this subsection is to allow the judge some flexibility within the guidelines in order to minimize the incidental factors of geographical boundaries and jurisdictions.

Sentencing Guidelines, *supra*, at II-85.[20]

Another early interpretation of former RCW 9.94A.400(3) supports the Commission's commentary:

> There remains the situation of a defendant who was not under sentence at the time the new crime was committed but who was sentenced for another crime during the time between the commission of the new crime and the time sentence is to be imposed for it. Where multiple independent charges are pending against a defendant in the same jurisdiction it is common, although not required, for all sentences to be imposed at the same time, thus bringing into operation the general provision requiring that each conviction be used in determining the offender score for the other. Where, however, charges are pending in more than one jurisdiction, there is no provision for consolidating them all in one sentencing proceeding. . . . No criteria govern this discretionary decision [to order that the sentences be served consecutively], and no findings need be made to justify its exercise.

David Boerner, Sentencing in Washington § 6.21, at 6-32 (1985) (footnote omitted). The only significant change to former RCW 9.94A.400(3) in intervening years was the legislature's reversal of the presumption of consecutive sentences to a presumption of concurrent sentences. *See* Laws of 1986, ch. 257, § 28.

Former RCW 9.94A.400(3) "applies when (1) a person who is 'not under sentence of a

[20] There is no substantial difference between this commentary and the Commission's original commentary. *See* David Boerner, Sentencing in Washington, Appendix I, at I-30 (1985).

felony' (2) commits a felony and (3) before sentencing (4) is sentenced for a different felony." *State v. Shilling*, 77 Wn. App. 166, 175, 889 P.2d 948 (1995) (quoting former RCW 9.94A-.400(3)). Essentially, a sentencing court has discretion only under former RCW 9.94A.400(3) where subsections (1) and (2) do not apply. *See State v. Huntley*, 45 Wn. App. 658, 661, 726 P.2d 1254 (1986).

Washington courts have applied former RCW 9.94A.400(3) where another jurisdiction sentenced the defendant between the commission of the crime and sentencing. *Mathers*, 77 Wn. App. at 494; *Long*, 117 Wn.2d at 305-06; *State v. Kern*, 55 Wn. App. 803, 803-04, 806, 780 P.2d 916 (1989); *State v. Linderman*, 54 Wn. App. 137, 138, 140, 772 P.2d 1025 (1989). We have also applied subsection (3) where a trial court in a single jurisdiction sentenced a defendant on different days for crimes committed on different days. *State v. Champion*, 134 Wn. App. 483, 487-88, 140 P.3d 633 (2006); *see also State v. King*, 149 Wn. App. 96, 99-100, 202 P.3d 351, *review denied*, 166 Wn.2d 1026 (2009); *State v. Jones*, 137 Wn. App. 119, 124-26, 151 P.3d 1056 (2007); *State v. Stark*, 48 Wn. App. 245, 255, 738 P.2d 684 (1987). Ordinarily, former RCW 9.94A.400(3) does not apply when a defendant is sentenced on a single day for convictions entered on separate days, but we have carved out an exception when the court "merely completed the overdue task of sentencing" because the defendant "absconded to avoid sentencing." *State v. Moore*, 63 Wn. App. 466, 469, 470, 820 P.2d 59 (1991); *accord State v. Smith*, 74 Wn. App. 844, 853-54, 875 P.2d 1249 (1994).

Early commentary and later application demonstrate that former RCW 9.94A.400(3) applies where independent crimes, separated in time, are charged separately. An unusual and

particular appellate posture such as that here does not, alone, mean that subsection (3) applies in a later proceeding where subsection (3) would not have applied in an earlier proceeding. We hold that subsection (3) does not apply in these unique circumstances where appellate decisions lead to staggered sentencing for crimes connected to the same arrest, first charged in the same information and initially tried on the same day. Instead, former RCW 9.94A.400(1) applies to Eggleston's sentences.

In summary, we affirm the 2008 murder conviction sentence, vacate the 2008 assault conviction sentence, and remand for the trial court to reinstate the 2003 assault conviction sentence, with the 2003 assault conviction sentence running concurrent with the 1997 drug conviction sentence. We also remand with instructions for the trial court to resentence on the 2008 murder conviction sentence to run consecutively[21] with the 2003 assault conviction sentence but concurrently[22] with the 1997 drug conviction sentence. Finally, because the trial court previously exercised its discretion and chose not to impose an exceptional sentence under RCW 9.94A.535, it may not impose an exceptional sentence on remand.

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.

Houghton, J.

We concur:

[21] Under former RCW 9.94A.400(1)(a), the assault conviction sentence and the murder conviction sentences must run concurrently with the drug conviction sentences.

[22] Under former RCW 9.94A.400(1)(b), the murder conviction sentence must run consecutively to the assault conviction sentence.

Armstrong, J.

Penoyar, A.C.J.