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Division I
State of Washington

Supreme Court No.: 90796-0
Court of Appeals No.: 70254-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN CHARLES THOMPSON,

Petitioner.

PETITION FOR REVIEW

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STATE OF WASHINGTON
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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

John Thompson requests this Court grant review pursuant to RAP 13.4(b)(1) and (4) of the decision of the Court of Appeals, Division One, in *State v. Thompson*, No. 70254-8-I, filed August 18, 2014. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. In *State v. Kilgore*, 167 Wn.2d 28, 38-39, 216 P.3d 393 (2009) this Court reaffirmed its holding in *State v. Barbiero*, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993), that the trial court's exercise of discretion on remand restores the pendency of a case and the decision may be the subject of a later appeal. On remand for "resentencing," Mr. Thompson's resentencing court affirmed that it "is finding that the defendant was armed with a firearm, hence the 60-month enhancement." Despite this record, the Court of Appeals held the resentencing court did not make a finding that a firearm was used when it imposed a 60-month enhancement. Should this Court grant review to resolve this conflict with *Kilgore* and *Barbiero* and to set forth the proper interpretation of the lower court's action on remand in the substantial public interest? RAP 13.4(b)(1) and (4).

2. Whether the Court should grant review to clarify the propriety of review under RAP 2.5(c) and RAP 1.2(a) of Mr. Thompson's claim that he should have been granted a new trial for an erroneous accomplice liability instruction, which described liability for being accomplice to "a crime" rather than "the crime charged"? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Mr. Thompson was convicted by a jury of first degree murder and unlawful possession of a firearm, for which he was sentenced in 1998 by the Honorable Ricardo Martinez. CP 7-12; CP 37 (verdict form). By special verdict, the jury was asked to determine whether Mr. Thompson was armed with a deadly weapon at the time of commission of murder in the first degree (count I). CP 38 (special verdict form). The jury answered affirmatively that Mr. Thompson was armed with a deadly weapon. *Id.* The jury was not asked to specify the type of deadly weapon, and no special verdict regarding a firearm was provided. The trial court made its own finding in 1998 that the deadly weapon was a firearm and imposed a 60-month firearm enhancement. CP 8.

Mr. Thompson filed a direct appeal, in which he raised issues related to the trial but not sentencing. *State v. Thompson*, Nos. 42158-1-I, 42619-2-I, 1999 WL 730912, 97 Wn. App. 1038 (1999).¹ The conviction was affirmed and the mandate issued in 2000. *Id.*; CP 14.

In January 2011, Mr. Thompson filed a personal restraint petition, arguing his judgment and sentence was invalid on its face because the sentence imposed exceeded the standard range, even considering the 60-month enhancement, and there had been no basis for an exceptional sentence. CP 15. The State conceded the judgment and sentence was invalid on its face, but argued the error stemmed from the listing of an offender score different from what the sentencing court had found. *Id.* Further, the State conceded the proper offender score was lower than that imposed. CP 15-16. The Court of Appeals “accept[ed] the State’s concession, . . . and remand[ed] for resentencing.” CP 16.²

¹ Mr. Thompson was tried with a co-defendant, Aaron Faletogo, and their direct appeals were consolidated. *See Thompson*, 1999 WL 730912, at *1. This unpublished decision is cited only to show the procedural history of this case.

² The Court denied the remainder of Mr. Thompson’s petition, finding that on collateral review, the rule announced in *State v. Williams-Walker* does not apply retroactively to the judicial finding that Mr. Thompson was armed with a firearm. CP 16-17.

The Honorable Dean S. Lum presided over Mr. Thompson's resentencing. 3/29/13 RP 1.³ A resentencing hearing was held, at which Mr. Thompson argued for an exceptional sentence below the standard range based on (a) case law interpreting the state and federal constitutions to allow for only a 12-month enhancement on a deadly weapon jury finding and (b) Mr. Thompson's efforts to reform. CP 39-54 (Thompson's presentence report and motion for exceptional downward sentence); 3/29/13 RP 21-22. Mr. Thompson also moved pro se to have the 60-month firearm enhancement stricken based on the intervening decisions of *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and *State v. Williams-Walker*, 167 Wn.2d 889, 895-86, 225 P.3d 913 (2010), which prohibit a sentencing judge from imposing an enhancement for a firearm where the special jury verdict found a deadly weapon without specifying the type. CP 19. The State argued Mr. Thompson should be sentenced to the high end of the correct sentencing range, as Judge Martinez had

³ The March 29, 2013 resentencing hearing is the only date transcribed for this appeal, and is referred to by date. Upon Mr. Thompson's request, the Court of Appeals transferred the verbatim report of proceedings from his prior direct appeal to this matter, but Mr. Thompson has not cited to those transcripts herein.

imposed on the original but improper sentencing range. 3/29/13 RP 20-21.

On resentencing, Judge Lum sentenced Mr. Thompson to the middle of the standard range, departing from Judge Martinez's initial imposition of the high end of the range. 3/29/13 26-27; CP 8-9, 15, 28, 30. Judge Lum found anew the factual predicate for a 60-month firearm enhancement despite the jury's deadly weapon finding. 3/29/13 RP 31; CP 28, 30. When counsel sought to clarify the record, the court made its finding clear:

Mr. Yip [prosecutor]: Finally, Your Honor, just so the record is clear, the standard range for the underlying offense of murder in the first degree is 281 to 374 months. I've indicated that the Court is ordering 350 months plus the 60-month sentencing enhancement, which brings our total to 410 months.

The Court: Yes, correct.

...

Ms. Gaisford [counsel for Mr. Thompson]: And, again Your Honor, under special verdict, you're finding – the jury returned a verdict of while armed with a deadly weapon, and the prosecutor's checked while armed with a firearm.

Mr. Yip: Your Honor, the reason it's checked armed with a firearm is the Court is finding that the defendant was armed with a firearm, hence the 60-month enhancement. That's why the J&S reflects firearm.

The Court: Thank you. Your objection is noted, counsel [for Mr. Thompson].

3/29/13 RP 30-31 (emphasis added). Mr. Thompson appealed following the resentencing, arguing the *Williams-Walker* rule applied to his resentencing because the Court of Appeals mandate broadly allowed the trial court to reconsider the deadly weapon enhancement and the record shows the trial court in fact made its own “finding that [Mr. Thompson] was armed with a firearm.” CP 35-36. The Court of Appeals affirmed the judgment and sentence. Slip Op.

D. ARGUMENT

- 1. The Court should grant review because the Court of Appeals opinion holds that a trial court ‘finding’ on resentencing should not be treated as new judicial factfinding that can be reviewed on appeal, in contravention of *Kilgore* and *Barbiero*.**

At a broad resentencing hearing, the court confirmed that it was “finding that the defendant was armed with a firearm” and therefore imposing a 60-month enhancement. The Court of Appeals held that the resentencing court’s action “did not constitute a new finding by the court” and declined to review the constitutionality of the firearm enhancement found by the court. Because the Court of Appeals opinion conflicts with *Kilgore* and *Barbiero* and because it betrays the

only logical interpretation of what occurred at resentencing, this Court should grant review.

- a. This Court has held that a trial court's exercise of discretion on remand for resentencing may be the subject of a later appeal, restoring the pendency of the case.

Upon granting Mr. Thompson's personal restraint petition to correct a sentencing error, the Court of Appeals remanded Mr. Thompson's case for resentencing. CP 16. The court ruled, "We accept the State's concession, grant the petition in part, and remand for resentencing." *Id.* The mandate did not limit the sentencing court's authority upon remand. CP 13-17; *see State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). Absent explicit limitation, authority on remand is broad. *Kilgore*, 167 Wn.2d at 42 (trial court's authority on remand is limited by scope of appellate court's mandate and includes broad discretion where mandate is open-ended); *State v. Ramos*, 171 Wn.2d 46, 48-49, 246 P.3d 811 (2011) (distinguishing broader remand for "resentencing" from remand involving "only a ministerial correction and no exercise of discretion"); *Godefroy v. Reilly*, 140 Wash. 650, 657, 250 P. 59 (1926).

If the Court of Appeals intends to limit remand to consideration of a single issue, "it will give instructions to that effect, in unmistakable

language.” *Godefroy*, 140 Wash. at 657. For instance, the mandate might set forth “remand . . . for resentencing without community custody.” *In re Postsentence Review of Leach*, 161 Wn.2d 180, 189, 163 P.3d 782 (2007); *see also State v. Eilts*, 94 Wn.2d 489, 496, 617 P.2d 993 (1980) (explicitly limiting scope of mandate by stating “the cause is remanded for modification of the restitution order consistent with this opinion”). In *Leach*, the court’s specificity was also clear from the statement that “The error is grounds for reversing only the erroneous portion of the sentence imposed.” 161 Wn.2d at 189. Likewise, in *State v. Rowland*, the appellate court specified, “We affirm the exceptional sentence and remand to correct the offender score and standard range consistent with this opinion.” 160 Wn. App. 316, 334, 249 P.3d 635 (2011).

Our appellate courts know how to limit authority on remand. *E.g.*, *Godefroy*, 140 Wash. at 657. In fact, here, it limited remand to “resentencing.” CP 16; *accord* CP 17 (“Granted in part and remanded for resentencing.”). However, unlike *Leach*, *Eilts* or *Rowland*, the mandate for Mr. Thompson’s personal restraint petition did not limit the trial court’s authority on resentencing. CP 16. The Court stated simply that remand was “for resentencing.” *Id.*

This Court's case law sets forth that if the resentencing court declines to exercise independent discretion within the scope of a remand, the decisions the lower court makes are not subject to review on direct appeal under the criminal procedure rules in effect at the time of resentencing. The Court addressed this issue in *Kilgore*. On direct appeal, Mr. Kilgore won reversal of two of seven counts. 167 Wn.2d at 33-34. The State declined to retry Mr. Kilgore on the reversed counts and the trial court refused to resentence Kilgore, signing instead a motion and order correcting the original judgment and sentence by striking the two counts and correcting the offender score (a change that had no effect on Kilgore's presumptive sentencing range). *Id.* at 34, 41-42. Mr. Kilgore sought review of his sentence through a direct appeal, seeking application of *Blakely* to invalidate an exceptional sentence. *Id.* at 34-35. The Court held that on remand the trial court simply corrected the original judgment and sentence; it did not revisit the exceptional sentence, although it had discretion to do so. *Id.* at 41. "Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question." *Id.* at 37 (quoting *State v. Barbiero*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993)). The Court denied Mr. Kilgore's appeal

because “unless the trial court erred or abused its discretion in declining to resentence Kilgore on remand . . . , no appealable issues remained.” *Id.* at 41.

In the earlier case of *Barbiero*, on which *Kilgore* is largely based, this Court again held that the trial court did not exercise its independent judgment on remand where it “made only corrective changes” in an amended judgment and sentence. 121 Wn.2d at 51. There, the resentencing court specifically declined to revisit the sentence for count I. *Id.* at 51-52. The resentencing court only corrected the judgment and sentence as it pertained to a separate, reversed count. *Id.* Thus the sentence on count I was not subject to a new direct appeal. This Court noted in its decision that review of count I was particularly inappropriate because Mr. Barbiero’s challenge to that sentence could have been raised in his initial direct appeal, but it was not. *Id.* at 52.

The converse rule from these cases should be that if a sentencing court exercises independent discretion on a particular issue on remand, that issue can be raised in a direct appeal from resentencing. The Court should grant review in this case to state and apply that holding.

- b. The Court of Appeals failed to follow this doctrine in holding Mr. Thompson's resentencing court did not enter a new finding when it confirmed that it was making a finding.

The Court of Appeals parted with the lessons of *Kilgore* and *Barbiero* by holding Mr. Thompson's resentencing court did not exercise its discretion. The court's opinion holds that the resentencing court's affirmation that it was "finding that the defendant was armed with a firearm, hence the 60-month enhancement" was not in fact a finding. Slip Op. at 10. Therefore, the Court of Appeals declined to apply new criminal procedural rules to Mr. Thompson's appeal.

In *Kilgore* this Court found no exercise of independent judgment because the resentencing court entered only a motion and order correcting the original judgment and sentencing in a manner that had no effect on the standard range Mr. Kilgore challenged on appeal. 167 Wn.2d at 34, 41-42. In *Barbiero*, the resentencing court did not exercise independent judgment as to count I when the resentencing court specifically declined to revisit the sentence for count I. 121 Wn.2d at 51-52.

Unlike *Kilgore* and *Barbiero*, Mr. Thompson's resentencing court entered anew a finding on the firearm enhancement that Mr. Thompson challenges on direct appeal. Under the holdings of those

cases, Mr. Thompson should be entitled to direct appeal of the finding. The Court of Appeals holding that the resentencing court's finding is not a "finding" cannot be squared with logic of this Court's decisions. The Court should grant review because it has not reviewed a case of judicial factfinding that presents the converse of *Kilgore* and *Barbiero* and the opinion below evades the holding of those cases. This Court should also grant review in the public interest because the Court of Appeals illogically held the resentencing court meant the exact opposite of what it said.

- c. The resentencing court violated Mr. Thompson's right to a jury trial by imposing a firearm enhancement based on a jury's deadly weapon special verdict.

Upon review, the judicial finding of a firearm in 2013 is unconstitutional. A sentencing court cannot substitute its judgment for that of the jury by imposing a sentence based upon a fact not found by the jury, even if it is supported by the evidence presented at trial. *State v. Williams-Walker*, 167 Wn.2d 888-90, 225 P.3d 913 (2010). If the court substitutes its own factfinding for that of the jury, the error cannot be harmless, as it is never harmless for the court to sentence the defendant for a crime not found by the jury. *Id.* at 899-900; *State v.*

Recuenco, 163 Wn.2d 428, 440, 442, 180 P.3d 1276 (2008) (*Recuenco III*).

This rule is grounded in the constitution. Due process requires the jury find beyond a reasonable doubt any fact that increases the defendant's potential punishment. U.S. Const. amends. VI, XIV; *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 2155, 2156, 186 L. Ed. 2d 314 (2013); *Blakely*, 542 U.S. at 303-04; *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). This principle applies to every fact that increases the maximum penalty faced by the accused. *Blakely*, 542 U.S. at 303; *Ring v. Arizona*, 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *Apprendi*, 530 U.S. at 482-83. Washington's Constitution also protects these due process rights and provides even greater protections for jury trials than does the federal constitution. Const. art. I §§ 21, 22; *Williams-Walker*, 167 Wn.2d at 895-86; *Recuenco III*, 163 Wn.2d at 440 (*Recuenco III*).

In *Recuenco III*, the defendant was convicted of second degree assault, and the jury found by a special verdict form that he was armed with a deadly weapon. 163 Wn.2d at 431-32. The sentencing court, however, imposed a 36-month enhancement for committing a crime with a firearm rather than the 12-month enhancement authorized by the

jury's deadly weapon finding. *Id.* The *Recuenco III* Court held that the trial court lacked authority to sentence Recuenco for the additional two years that corresponded to the firearm enhancement in the absence of a jury finding that the defendant was armed with a firearm. *Id.* at 440. The Court reasoned, "The error in this case occurred when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. The trial court simply exceeded its authority in imposing a sentence not authorized by the charges." *Id.* at 442 (emphasis added).

Similarly, in *Williams-Walker*, this Court remanded for resentencing where the trial court imposed a 60-month firearm enhancement but the jury's special verdict finding was limited to a deadly weapon. 167 Wn.2d at 892-93, 901. The Court noted that different statutory provisions govern enhancements for a firearm than for a deadly weapon, and different jury findings must authorize each enhancement. *Id.* at 897 (citing former RCW 9.94A.510 (2001), now codified at RCW 9.94A.533). Thus, "[w]here a jury finds by special verdict that a defendant used a 'deadly weapon' in committing the crime (even if that weapon was a firearm), this finding signals the trial judge that only a two-year 'deadly weapon' enhancement is authorized,

not the more severe five-year firearm enhancement.” *Id.* at 898. Put simply, “[w]hen the jury makes a finding on the lesser enhancement, the sentencing judge is bound by the jury’s determination.” *Id.*

This Court further held that the constitutional violation could not be harmless. *Williams-Walker*, 167 Wn.2d at 901. “[T]he sentencing judge can know which (if any) enhancement applies only by looking to the jury’s special findings. Where the jury makes such a finding, the sentencing judge is bound by that finding. Where the judge exceeds that authority, error occurs that can never be harmless.” *Id.* at 901-02. Because the juries in each case on review had returned a deadly weapon special verdict, the sentencing courts committed constitutional error by imposing a firearm enhancement. *Id.* The Court remanded each case for resentencing. *Id.* at 902; *see generally In re Pers. Restraint of Eastmond*, 173 Wn.2d 632, 635-38, 272 P.3d 188 (2012) (discussing evolution of case law).

Assuming appellate review lies, the case at bar is indistinguishable from *Williams-Walker*. The jury was provided a special verdict form that asked whether “John Thompson [was] armed with a deadly weapon at the time of the commission of the crime of murder in the first degree as charged in Count I?” CP 38 (special

verdict form). The jury answered “yes.” *Id.* A 24-month deadly weapon enhancement was the only enhancement the jury’s special verdict finding authorized the sentencing court to impose. *Id.*; *Williams-Walker*, 167 Wn.2d at 901-02. The sentencing enhancement must be vacated and the matter remand for resentencing consistent with the jury’s findings. *See Williams-Walker*, 167 Wn.2d at 902.

2. The Court should grant review to determine the propriety of the Court of Appeals decision denying review, under RAP 2.5(c) and RAP 1.2(a), of an erroneous accomplice liability instruction.

Because Mr. Thompson’s case is again before an appellate court, on direct review of his resentencing, RAP 2.5(c) authorizes the appellate court to exercise its discretion to review a decision previously imposed by the trial court but not previously reviewed or that was reviewed by the Court of Appeals but should be reexamined under the law at the time of the later review. RAP 1.2(a) provides that the Rules of Appellate Procedure “will be liberally interpreted to promote justice.”

In his Statement of Additional Grounds, Mr. Thompson asked the Court of Appeals to review the following issue: Mr. Thompson’s jury was instructed on accomplice liability. They were told they could convict Mr. Thompson if he was an accomplice to “a crime.” St. of

Add'l Grounds at 2-3; CP 18-22. Since Mr. Thompson's trial, this Court has held that the State must prove an accomplice was complicit in "the charged crime," not simply any crime. *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 509-13, 14 P.3d 713 (2000). If the Court applies this rule to Mr. Thompson's case, he should be afforded a new trial. He presented this argument to the Court of Appeals, and the court declined to review it. Slip Op. at 10-11. This Court should grant review to apply *Roberts* and *Cronin* and reverse for a new trial.

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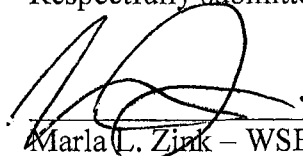
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E. CONCLUSION

The Court should grant review because the illogical holding below that a trial court finding is not a finding contravenes *Kilgore* and *Barbiero* and holding that a trial court's actions will be interpreted by its plain words is in the public interest. This Court should also grant review and hold that Rules of Appellate Procedure 1.2(a) and 2.5(c) direct appellate review of unlawful accomplice liability instructions.

DATED this 17th day of September, 2014.

Respectfully submitted,



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Attorney for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 70254-8-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
JOHN CHARLES THOMPSON,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>August 18, 2014</u>
)	

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2014 AUG 18 AM 10:20

Cox, J. – John Charles Thompson challenges his judgment and sentence, arguing that the court lacked authority to impose a firearm enhancement where the jury found that Thompson was armed with a deadly weapon. The sentencing court expressly declined to exercise independent judgment as to the enhancement on remand. So there is no basis for Thompson to challenge that aspect of the judgment and sentence.

In his statement of additional grounds, Thompson claims that we should exercise our discretion to address a new argument on appeal concerning the accomplice liability instruction at his 1998 trial. We decline to reach this issue and affirm.

In 1998, a jury convicted Thompson of murder in the first degree and unlawful possession of a firearm in the first degree. By special verdict, the jury answered affirmatively that Thompson was armed with a deadly weapon. Notwithstanding that verdict, the trial court imposed a 60-month firearm enhancement on the murder conviction.

Thompson appealed, claiming errors related to the trial but not to sentencing.¹ In an unpublished opinion, this court affirmed his convictions.² Subsequently, the supreme court denied his petition for review.³

In January 2011, Thompson filed a personal restraint petition challenging his sentence.⁴ First, Thompson claimed that his judgment and sentence was invalid on its face because the sentencing court exceeded its authority by imposing a sentence above the standard range.⁵ Second, he claimed that his 60-month firearm enhancement was invalid under State v. Williams-Walker. The reason was that the jury found by special verdict that Thompson was armed with a deadly weapon, not a firearm.⁶ Under that case, a sentencing court cannot impose a firearm enhancement when the jury merely finds the defendant was armed with a deadly weapon.⁷ In such a case, the harmless error doctrine does not apply.⁸

¹ See State v. Thompson, noted at 97 Wn. App. 1038, 1999 WL 730912.

² Id.

³ State v. Thompson, 140 Wn.2d 1009, 999 P.2d 1263 (2000).

⁴ In re Pers. Restraint of Thompson, noted at 170 Wn. App. 1043, 2012 WL 4335446 at *1.

⁵ Id.

⁶ Id. at *2 (citing State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010)).

⁷ Williams-Walker, 167 Wn.2d at 898.

⁸ Id. at 902.

In response to Thompson's petition, the State conceded that the judgment and sentence was invalid on its face because Thompson's offender score on the murder conviction was incorrect.⁹ This court accepted the State's concession about the offender score, but it rejected Thompson's argument about the firearm enhancement.¹⁰ This court noted that the rule articulated in Williams-Walker was not retroactive and that "Thompson's sentence became final before [that case] was decided."¹¹ Further, this court stated that Thompson had not demonstrated actual prejudice.¹² Accordingly, it denied his claim for relief regarding the firearm enhancement and remanded for resentencing.¹³

In March 2013, Thompson, acting pro se, moved for relief from judgment pursuant to CrR 7.8, arguing in part that the jury was given a prejudicial and erroneous accomplice liability instruction.

Later that month, the case proceeded to resentencing before a different judge than the one imposing the original sentence. At the hearing, the State asked the court to impose the high end of the range, as the original sentencing judge had, plus the original 60-month firearm enhancement. Defense counsel argued for the low end of the standard range and asked the court to impose an exceptional sentence downward.

⁹ In re Thompson, 2012 WL 4335446, at *1.

¹⁰ Id. at *2.

¹¹ Id.

¹² Id.

¹³ Id.

At the conclusion of the hearing, the judge stated that it was not "legally appropriate" to change the firearm enhancement. Additionally, he declined to grant Thompson's request for an exceptional sentence downward. The judge then considered several factors to determine the appropriate sentence within the newly calculated range. The corrected standard range was 341 months to 434 months for the murder charge, and 31 months to 41 months for the unlawful possession charge. The court sentenced Thompson to 410 months and 41 months, respectively, time to run concurrently.

The court also denied Thompson's CrR 7.8 motion.

Thompson appeals.

SENTENCING ENHANCEMENT

Thompson argues that the sentencing court lacked authority to impose a 60-month enhancement for a firearm where the jury found that Thompson was armed with a deadly weapon, not a firearm. He contends that the propriety of this enhancement is properly before this court because the sentencing court "exercised discretion and found a firearm enhancement." We disagree.

The trial court's discretion on remand is limited by the scope of the appellate court's mandate.¹⁴ "[W]hen, on remand, a trial court has the choice to review and resentence a defendant under a new judgment and sentence or to

¹⁴ State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009).

simply correct and amend the original judgment and sentence, that choice itself is not an exercise of independent judgment by the trial court.”¹⁵

“Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.”¹⁶ “[I]f the trial court simply corrects the original judgment and sentence, it is the original judgment and sentence entered by the original trial court that controls the defendant’s conviction and term of incarceration.”¹⁷

“Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed.”¹⁸ Thus, “[W]here one portion of a sentence is found to be erroneous, it does not undermine that part of the sentence that is otherwise valid.”¹⁹ “An appellate court may remand for resentencing for an erroneous offender score but leave the otherwise valid exceptional sentence intact.”²⁰

¹⁵ Id. at 40.

¹⁶ Id. at 37 (quoting State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993)).

¹⁷ Id. at 40-41.

¹⁸ State v. Rowland, 160 Wn. App. 316, 326, 249 P.3d 635 (2011) (quoting In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 877, 50 P.3d 618 (2002)).

¹⁹ Id. at 328.

²⁰ Id.

The cases State v. Kilgore²¹ and State v. Rowland²² are instructive.

In Kilgore, the supreme court concluded that, because the trial court on remand chose not to exercise its discretion, Mark Patrick Kilgore's case remained final, and the trial court did not abuse its discretion when it declined to invalidate Kilgore's exceptional sentence.²³ It noted that the trial court "made clear that in correcting the judgment and sentence to reflect the reversed counts, it was not reconsidering the exceptional sentence imposed on each of the remaining counts."²⁴

Similarly, in Rowland, this court granted Michael Rowland's personal restraint petition challenging his offender score and remanded for resentencing.²⁵ "[T]he resentencing court reconsidered only the erroneous offender score, while declining to exercise its discretion to consider the exceptional sentence."²⁶ Thus, this court concluded that "while the finality of Rowland's standard range sentence was disturbed by our remand for resentencing following his successful PRP, his exceptional sentence was not."²⁷

²¹ 167 Wn.2d 28, 216 P.3d 393 (2009).

²² 160 Wn. App. 316, 249 P.3d 635 (2011).

²³ Kilgore, 167 Wn.2d at 44.

²⁴ Id. at 41.

²⁵ Rowland, 160 Wn. App. at 320.

²⁶ Id. at 328.

²⁷ Id. at 329.

Here, as in these cases, the court made it abundantly clear on remand that it was not reconsidering Thompson's entire sentence. At the outset, it stated:

And it is undisputed that the jury in fact did make certain findings beyond a reasonable doubt. **And what we are here for is not a complete resentencing, but a resentencing to fix the specific error that was made by the original sentencing judge.**
... **This is not a complete redo.**^[28]

The court also expressly stated that it could not legally reconsider the firearm enhancement. Rather, it indicated that it only had discretion to sentence Thompson within the corrected standard range:

So there is—there was a legal argument regarding the Court changing the enhancement. **But I don't think that is legally appropriate.** Because I think as [defense counsel] has to concede, as she properly has to given [sic] the reading of case law, there is no retroactivity in terms of that particular legal issue.

So the Court will find that the correct standard range of count number one is 341 months to 434 months. And the correct standard range for count number two is 31 months to 41 months. Now, that is the standard range. **And the Court has discretion to sentence a defendant within the standard range.**^[29]

After considering several factors, including Thompson's efforts while he has been in custody, as well as the seriousness of the crime, it chose not to sentence Thompson at the high end of the range like the original sentencing court. Instead it sentenced Thompson closer to the middle of the corrected range.

²⁸ Report of Proceedings (Mar. 29, 2013) at 24 (emphasis added).

²⁹ Id. at 25 (emphasis added).

At the conclusion of the hearing, the court once again reiterated that it did not consider the other portions of Thompson's sentence, and it was merely correcting the earlier error:

The other conditions of the original sentence will remain in effect as really, we are here to correct the offender score and the sentencing range, and therefore the sentence that arises therefrom. Counsel, we will need a corrected judgment and sentence.^[30]

This record is crystal clear that the sentencing court did not exercise its discretion regarding Thompson's entire sentence. It did not reconsider the firearm enhancement.

We also note that Thompson's counsel did not ask the court to revisit the enhancement. In arguing for the exceptional sentence downward, she correctly stated:

Williams-Walker at this point has been held not retroactive. So we can't go back and correct what in retrospect appears to be a wrong to [Thompson] when his jury returned that very verdict. It wasn't the law at that time. And we so recognize that. But we think this Court can sentence him to the low end and make that adjustment down.^[31]

This court had already considered and rejected this claim for relief.³² In his personal restraint petition, Thompson argued that his firearm enhancement was invalid under Williams-Walker.³³ This court noted that the Williams-Walker

³⁰ Id. at 28 (emphasis added).

³¹ Id. at 13.

³² In re Thompson, 2012 WL 4335446 at *2.

³³ Id.

rule is not retroactive and stated, "Because we do not presume prejudice and Thompson has not demonstrated actual prejudice, ***we deny his claim for relief regarding the enhancement.***"³⁴

Thompson argues that his case is distinguishable from Kilgore and Rowland. He points out that in Kilgore, the trial court "simply corrected the original judgment and sentence," and in Rowland, the trial court simply substituted the high end of one standard range for that of another. He argues that his case is different because the court "changed [his] standard range sentence by sentencing to the middle of the range on his corrected offender score—the original sentencing court had imposed the high-end of the range."³⁵ He also argues the resentencing court "considered (and rejected)" his argument for an exceptional sentence below the standard range.³⁶

But the facts that the court exercised discretion when it sentenced Thompson to a lesser sentence within the standard range and denied his request for an exceptional sentence down, do not distinguish this case in any material way from Kilgore or Rowland. As previously stated, "Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on ***such issue*** does it become an appealable question."³⁷ As in Kilgore and Rowland,

³⁴ Id. at *2 (emphasis added).

³⁵ Appellant's Opening Brief at 14.

³⁶ Id. at 15.

³⁷ Kilgore, 167 Wn.2d at 37 (emphasis added) (quoting Barberio, 121 Wn.2d at 50).

the resentencing court here expressly declined to exercise its discretion to consider the enhancement.

Thompson next argues that the mandate was open ended, and the resentencing court “reconsidered [his] entire sentence, entering a new judgment and sentence.”³⁸ This does not comport with a plain reading of this record. This record is crystal clear that it was *not* reviewing Thompson’s entire sentence.

Finally, Thompson argues that the sentencing court “made its own finding” that Thompson was armed with a firearm. He points to the following portion of the transcript, “the Court is finding that the defendant was armed with a firearm, hence the 60-month enhancement. That’s why the J&S reflects firearm.”³⁹ But this statement was made by the prosecutor, to reflect that he had checked the box that the finding was with a firearm and not with a deadly weapon. It did not constitute a new finding by the court.

In sum, the propriety of the firearm enhancement is not properly before this court.

STATEMENT OF ADDITIONAL GROUNDS

In his statement of additional grounds, Thompson argues that he “should have been afforded a new trial for the erroneous instruction” for accomplice

³⁸ Appellant’s Opening Brief at 14; see also Appellant’s Reply Brief at 2-4.

³⁹ Id. at 12 (quoting Report of Proceedings (Mar. 29, 2013) at 31).

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liability.⁴⁰ He asserts that he can raise this issue under RAP 2.5(c) and RAP 1.2(a).⁴¹ He is mistaken.

RAP 2.5(c) is permissive, both with respect to prior trial court action and prior appellate court action. Here, Thompson has had the benefit of two prior reviews by this court and prior opportunities to raise this issue then. He failed to do so. Accordingly, we decline to exercise our discretion to address this new issue.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Vander A.G.

Leach, J.

⁴⁰ Appellant's Statement of Additional Grounds at 2.

⁴¹ Id.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70254-8-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: September 17, 2014