

NO. 70254-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN CHARLES THOMPSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN S. LUM

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COURT OF APPEALS  
STATE OF WASHINGTON  
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**BRIEF OF RESPONDENT**

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A. ISSUE PRESENTED

When a defendant is sentenced based on an erroneous offender score, the appellate court may remand for resentencing on the correct standard range while leaving the remaining valid portions of the sentence intact. In this case, the court of appeals issued a mandate following Thompson's Personal Restrain Petition, ordering the trial court to resentence Thompson within the correct standard range on a lower offender score, and dismissing his claim that a 60-month firearm enhancement was invalid. The sentencing court sentenced Thompson to the middle of the range and reimposed the 60-month firearm enhancement without revisiting the underlying finding. Did the sentencing court act within the scope of the mandate and declined to exercise independent judgment as to the enhancement?

B. STATEMENT OF THE CASE

In January of 1998, a jury convicted Thompson of first-degree murder while armed with a firearm and first-degree unlawful possession of a firearm. CP 7-12; CP 37. Using a special verdict form, the jury found that Thompson committed the murder while armed with a deadly weapon. CP 38.

On April 29, 1998, the Honorable Ricardo Martinez, now a Federal District Court Judge, sentenced Thompson to the high end of the standard range on each count, 388 months for first-degree murder and 41 months for first-degree unlawful possession of a firearm, to run concurrently. CP 7-12. The court also imposed a 60-month firearm enhancement on the first-degree murder conviction, for a total confinement of 448 months. CP 7-12.

Thompson filed a direct appeal claiming errors in the trial, but not challenging his sentence. In an unpublished opinion, this Court affirmed his convictions. State v. Thompson, 1999 WL 730912, 97 Wn. App. 1038 (1999). Subsequently, the Supreme Court denied his petition for review. State v. Thompson, 140 Wn.2d 1009 (2000). In January of 2011, eleven years later, Thompson filed a Personal Restraint Petition (PRP) challenging his sentence. CP 14. Thompson raised two issues: he first argued 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; and second, he argued his 60-month enhancement was invalid under State v. Williams-Walker<sup>1</sup> because

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<sup>1</sup> State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010) (holding that the imposition of a firearm enhancement when the jury found by special verdict a deadly weapon without specifying the type is never harmless error).

the jury found by special verdict that he was armed with a deadly weapon, and not a firearm. CP 14-17.

The State conceded that the judgment and sentence was invalid on its face because of a miscalculation in Thompson's offender score. CP 14-17. This Court accepted the State's concession, and rejected Thompson's claim that his 60-month firearm enhancement was invalid. CP 14-17. This Court held that, because Thompson's sentence became final before Williams-Walker was decided, and the rule is not retroactive to cases that were not pending on direct appeal at the time it was decided, the rule did not apply to Thompson. CP 14-17. This Court also found that Thompson had not demonstrated actual prejudice. Thus, this Court denied Thompson's claim for relief with respect to the enhancement and remanded the case for resentencing based on Thompson's correct offender score. CP 14-17.

On March 29, 2013, Thompson was resentenced by the Honorable Dean Lum. RP 1-33.<sup>2</sup> At the hearing, the State asked the sentencing court to impose the high end of the range, as Judge Martinez had, plus the original 60-month firearm enhancement. RP 6-8. Thompson's defense counsel asked the court to impose

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<sup>2</sup> RP refers to the verbatim report of the resentencing hearing held on March 29, 2013.

an exceptional sentence downward. RP 9. Counsel urged the sentencing court to take into consideration the changes in the law since the time when Thompson was sentenced. RP 9. Specifically, counsel made reference to the changes in accomplice liability and the special verdict requirements. RP 9. Although acknowledging that Washington courts have ruled that Williams-Walker is not retroactive, defense counsel urged the court to take that into consideration and impose a lower sentence. RP 10, 13-14.

Judge Lum made it clear from the start that he would not revisit the jury's findings. RP 24. Judge Lum stated, "We are not here for a complete resentencing but to fix the specific error that was made by the original sentencing judge." RP 24. Judge Lum went on to say that he would impose the appropriate sentence within the correct standard range and would not change the enhancement because it was "not legally appropriate." RP 25. Judge Lum imposed a sentence within Thompson's standard range, 350 months, plus the 60-month firearm enhancement for a total confinement of 410 months. CP 27-34; RP 27, 30. The new judgment and sentence reflected the 60-month enhancement stemming from the previous firearm finding. CP 27-34.



C. ARGUMENT

Thompson contends that on remand for resentencing the court exercised independent judgment as to his entire sentence. Thus, he argues the imposition of the 60-month firearm enhancement, where the jury's special verdict supported only a 24-month deadly weapon enhancement, is subject to the Williams-Walker rule, under which the imposition of a firearm enhancement without a jury finding can never be harmless. His argument should be rejected because the sentencing court addressed only Thompson's sentence within the correct standard range and did not revisit the enhancement. Thus, the Williams-Walker rule is not applicable.

Following a remand, the sentencing court's discretion is limited by the scope of the appellate court's mandate. State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). If a trial court exercises no independent judgment on remand, there is no issue to review on appeal because the original judgment and sentence remains final and intact. Id. at 40. Likewise, where one portion of a sentence is found to be erroneous, that erroneous portion does not undermine the otherwise valid part of the sentence. State v. Rowland, 160 Wn. App. 316, 328, 249 P.3d 635, aff'd, 174 Wn.2d

150 (2012); State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993) (no issue to review on appeal where resentencing court sentenced defendant to the same exceptional sentence despite his reduced offender score). In other words, if a remand for resentencing occurs due to an erroneous offender score, the trial court may resentence on the correct offender score while leaving the remaining valid portions of the sentence intact. Rowland, 160 Wn. App. at 328.

If the sentencing court simply corrects the judgment and sentence, then the court does not exercise independent judgment. Kilgore, 167 Wn.2d at 40-41. The only way in which Thompson can successfully argue that the Williams-Walker rule applies is if he demonstrates that the sentencing judge exercised independent judgment and exceeded the scope of this Court's mandate by addressing the firearm enhancement anew. Given that the sentencing court did not do that, Thompson argues that this appeal arrives in a "different posture" because Thompson's entire sentence was not final at the time of resentencing. Thompson's claim is inaccurate because although the new sentencing judge had the discretion to impose a sentence within the correct standard range, the sentence on the enhancement was final.

Rowland is instructive. Rowland was convicted in 1991 of first degree murder and taking a motor vehicle without permission. Rowland, 160 Wn. App. at 319. The trial court imposed an exceptional sentence of 180 months. Id. At the time of Rowland's original sentence, the law allowed the trial court to impose an exceptional sentence based on judicial fact-finding. Id. at 320. Rowland appealed his judgment and sentence, and the court of appeals affirmed in all respects, issuing a mandate on June 26, 1995. Id. at 319. In January of 2007, Rowland filed a PRP challenging his offender score. The State conceded error and this Court remanded the case for resentencing with the correct offender score, issuing its mandate in May of 2009. Id. at 319-21. At the resentencing hearing, the trial court sentenced Rowland within the correct standard range and reimposed the 180-month exceptional sentence. Id. at 321-22. Rowland appealed, arguing that the resentencing court erred in imposing the exceptional sentence based solely on judicial fact-finding, contrary to Blakely.<sup>3</sup> Id. at 322.

This Court found that the resentencing court did not exercise independent judgment or discretion when it substituted the high end of one standard range for that of another, and reimposed the

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<sup>3</sup> Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

original exceptional sentence. Id. at 329. The court reasoned that, while the finality of Rowland's standard range sentence was disturbed by the court's remand for resentencing following a successful PRP, his exceptional sentence was not. Id. On review, the Supreme Court affirmed the sentence also concluding that the trial court had not disturbed the factual findings supporting Rowland's exceptional sentence. State v. Rowland, 174 Wn.2d 150, 154, 272 P.3d 242 (2012). Simply stated, his exceptional sentence was final and intact despite the change in his standard range.

This case is indistinguishable from Rowland. Thompson's 60-month enhancement was final at the time of resentencing. When this Court remanded the case, it did so because the trial court had applied an inaccurate offender score. CP 14-17. This Court unequivocally denied Thompson's claim that the enhancement was invalid leaving that aspect of the sentence intact. Thompson's claim that his entire sentence was not final and that the mandate does not limit the sentencing court's authority upon remand is thus contrary to controlling authority. Upon issuance of the mandate of the appellate court the decision made is effective and binding on the parties to the review and governs all subsequent

proceedings. RAP 12.2. After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court. RAP 12.2. Issues that were raised and affirmed on appeal are the “law of the case.” State v. Harrison, 148 Wn.2d 550, 560-61, 61 P.3d 1104 (2003). Therefore, the sentencing court was bound by this Court’s ruling that the firearm enhancement was properly imposed.

The issue of finality on just one portion of a sentence was also addressed in Kilgore. In that case, a jury convicted Kilgore of three counts of rape of a child and four counts of child molestation. The trial court imposed an exceptional sentence of 560 months for each count, to be served concurrently. Kilgore, 167 Wn.2d at 32. Kilgore appealed but did not challenge his exceptional sentence. Id. at 34. On direct appeal, the court reversed two counts and sent the case back for retrial. The State elected not to retry the reversed counts. Id. at 32. After the mandate was issued affirming five of the counts, but before Kilgore was resentenced, the United States Supreme Court issued the Blakely decision. Id. at 34-35. At Kilgore’s resentencing, he argued to the trial court that he had to be

resentenced in accordance with Blakely. The trial court denied his request, correcting his offender score and reimposing the exceptional sentence on the five affirmed counts. Id. at 34-35.

Kilgore appealed his resentencing, arguing that his case was not final for purposes of retroactivity and that the trial court erred when on remand it refused to resentence him under the requirements of Blakely. Id. at 33. In holding that the trial court did not err in reimposing the exceptional sentence, the Washington Supreme Court ruled that the fact that the trial court had discretion to reexamine Kilgore's sentence is not sufficient to revive his right to appeal on the portions of the sentence that were final, explaining that finality occurs whenever the availability of appeal has been exhausted. Id. at 43-44.

This case is no different from Kilgore. The fact that the sentencing court had discretion to determine what sentence to impose within the new, reduced standard range does not render Thompson's entire sentence not final. Thompson had already exhausted all of his available appeals on the enhancement issue. Thus, finality on his enhancement had already occurred.

Thompson suggests that the sentencing court exceeded the scope of this Court's mandate by exercising independent judgment

on the entire sentence because: the court imposed the middle of the range rather than the high end of the range as the original court had done; the court considered, and rejected, Thompson's request for an exceptional sentence; and the court made a finding anew that Thompson was armed with a firearm. His argument misstates the record.

First, the fact that the court sentenced Thompson to the middle of the range rather than the high end of the range does not mean that the court reconsidered the entire sentence. The court has discretion to resentence on remand within the limitations of the appellate court's mandate. Kilgore, 167 Wn.2d at 42. This means that the resentencing court had discretion to sentence Thompson to any time of confinement within the correct standard range. There is no authority to suggest that on remand for resentencing on a corrected offender score, the court must follow the previous sentencing decision to impose either the low end or the high end of the range.

Second, consideration of an exceptional sentence did not disturb the enhancement portion of the sentence. Defense counsel asked the sentencing court to impose an exceptional sentence down in order to circumvent this Court's ruling that Thompson's

60-month enhancement was valid. Defense urged the court to impose an exceptional sentence down in order to make up for the changes in the law, while acknowledging that Washington courts have ruled retroactivity is not applicable, explicitly referencing the Williams-Walker rule. RP 10, 13-14. Pursuant to RAP 2.5(c)(1) the trial court has discretion on remand to revisit issues that were not the subject of an earlier appeal. Barberio, 121 Wn.2d at 51. Thus, Judge Lum could have granted an exceptional sentence down, if he had the legal basis to do so, because that had never been an issue of earlier appeals. If he had done so, he would have created a new appealable issue, but only as to the imposition of the exceptional sentence. As Rowland and Kilgore establish, the enhancement would have remained intact. Nonetheless, Judge Lum made it clear he was only going to correct the mistake. He stated that there was no legal basis for the court to impose an exceptional sentence down, and he would simply sentence the defendant within the corrected standard range to fix the specific error. RP 26-27.

Lastly, the court did not make a finding anew that Thompson was armed with a firearm. Judge Lum specifically said, "We are not here for a complete resentencing but to fix the specific error that was made by the original sentencing judge." RP 24. The court



made it very clear the sentencing was not a “complete redo” but rather an appropriate sentencing within the correct standard range. RP 24-25. The court explicitly indicated that it would impose the appropriate sentence within the correct standard range and would not change the enhancement because it was “not legally appropriate.” RP 25. The court pointed out that defense counsel had to concede, as she had properly done, that there was no retroactivity with respect to that issue. RP 25. Although the court was not making its own finding, it had to check a box on the judgment and sentence in order to explain the additional 60 months for the enhancement; otherwise, the judgment and sentence would have been erroneous. The colloquy between the parties when the prosecutor noted that he had checked the box that the finding was with a firearm and not with a deadly weapon, was only to reflect the accurate amount of time for the enhancement, and did not constitute a new finding by the court. Judge Lum was firm about leaving the enhancement intact. To argue that he made the firearm finding anew is contrary to the entire record.

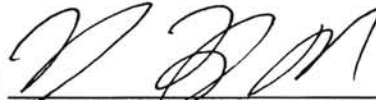
D. CONCLUSION

The sentencing court did not exercise independent judgment deviating from this Court's mandate when it resentenced Thompson within the correct standard range on his lower offender score. Therefore, the State respectfully asks this Court to affirm the judgment and sentence.

DATED this 14<sup>th</sup> day of January, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla L. Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JOHN CHARLES THOMPSON, Cause No. 70254-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Bora Ly  
Done in Seattle, Washington

Date

