

62928-0

62928-0

No. 62928-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES HORTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

SUPPLEMENTAL RESPONSE BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 APR -5 PM 4:52

TABLE OF CONTENTS

A. ARGUMENT 1
B. CONCLUSION 3

TABLE OF AUTHORITIES

Washington Constitution

Const. Art. I, § 22 1

Washington Supreme Court Cases

Auburn v. Brooke, 119 Wn.2d 623, 836 P.2d 212 (1992) 1
State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009) 1, 2
State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008)
(Recuenco III) 2

Statutes

RCW 9.94A.537 1, 2

A. ARGUMENT

The State's analysis is flawed in one critical respect; the State chooses to analyze the question under the Sixth Amendment rather than under the Washington Constitution. The essential elements rule, however, is based upon Article I, § 22 of the Washington Constitution. Auburn v. Brooke, 119 Wn.2d 623, 627-628, 836 P.2d 212 (1992). Thus, the State never properly begins the analysis, and the State's analysis of the recent decision in State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009) simply repeats this error.

Beyond this, the State continues to ignore the plain language of RCW 9.94A.537 which requires notice of aggravating factors and does not differentiate between aggravating factors submitted to jury and those found by a judge. The State seems to assume the statute requires nothing more or less than the what is constitutionally required. But Powell makes clear the statutory requirements exist separately from the constitutional requirement and are not coextensive. "Thus, even in the absence of the constitutional provisions, the statute requires pretrial notice in all cases where the State seeks to present aggravating circumstances." Powell at 697 (Owens, J., dissenting). The

concurring opinion of Justice Stephens, disagreed that “pretrial notice” was required in Mr. Powell’s case but agreed that was the rule going forward. Powell, 167 Wn.2d at 690 (Stephens, J., concurring). Regardless of what the Sixth Amendment requires the statute requires something more. The State’s analysis, both in its original response and its supplemental brief, never moves beyond the Sixth Amendment. Certainly there is nothing in Powell to support the State’s imagined limitation on RCW 9.94A.537(1), and in fact the opposite is true.

Whether or not the State must prove the recidivist aggravator to the jury is neither here nor there. First, the plain language of RCW 9.94A.537(1) does not limit its application to those facts proved to a jury. Second, in applying the application of the “essential elements” rule to aggravators and enhancements Recuenco III simply states it includes a facts necessary for punishment. Recuenco III, 163 Wn.2d at 435. Third, nothing in Powell alters these two prior points. Because it continues to analyze the issue this case solely under the Sixth Amendment, rather than under the state constitution or even the language of RCW 9.94A.537(1), the State’s supplemental brief continues to

miss the thrust of Mr. Horton's argument and continues to ignore the requirements of the statute.

B. CONCLUSION

The State's failure to provide formal notice requires reversal of Mr. Horton's sentence.

Respectfully submitted this 5th day of April, 2010.

A handwritten signature in black ink, appearing to read 'Gregory C. Link', is written over a horizontal line.

GREGORY C. LINK – 25228
Washington Appellate Project – 91052
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62928-0-I
v.)	
)	
JAMES HORTON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL RESPONSE BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DONNA WISE, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
APPELLATE UNIT	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[
SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF APRIL, 2010.

X _____ 

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 APR -5 PM 4:52

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710