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No. 64892-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CAMANO GAHAGAN,

Appellant.

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

The Honorable Ellen J. Fair

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. GAHAGAN MAY CHALLENGE THE SENTENCING ENHANCEMENTS FOR THE FIRST TIME ON APPEAL

In his opening brief, Camano Gahagan argued that this Court must vacate his two firearm enhancements because the trial court erred in instructing the jury that it must be unanimous in order to reach a “no” verdict on the special verdict forms for the firearm enhancements. Br. of App. at 7-10 (citing State v. Goldberg, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003); State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010)). The State first responds by arguing that Mr. Gahagan may not raise this issue for the first time on appeal under RAP 2.5(a)(3). Br. of Resp. at 8.

a. Gahagan may challenge the instructional error because it is a manifest error involving a constitutional right. An error may be raised for the first time on appeal if it is a manifest error involving a constitutional right. RAP 2.5(a)(3); State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000). An error is manifest if it had “practical and identifiable consequences in the trial of the case.” Id. (citing State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). Extensive authority supports the proposition that instructional error of the nature alleged here is of

sufficient magnitude to be raised for the first time on appeal. Id.
(citing State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968));
State v. Scott, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988);
Martinez v. Borg, 937 F.2d 422, 423 (9th Cir. 1991).

In Bashaw, the Washington Supreme Court addressed the same error as in this case without analyzing whether the instructional error was a manifest constitutional error. 169 Wn.2d at 145-48. Because the defendant in that case did not make an exception to the challenged instruction, and the Court *did* engage in a constitutional harmless error analysis, the Court must have deemed the instructional error to be a manifest constitutional error. Bashaw, 169 Wn.2d at 147-48.

The instructional error in this case is exactly the same as that in Bashaw. The trial court's instruction requiring the jurors to be unanimous in order to reach a "no" answer may have caused "jurors with reservations [to] not hold to their positions" or "not raise additional questions that would lead to a different result." Bashaw, 169 Wn.2d at 147-48. This had "practical and identifiable consequences" on Mr. Gahagan's trial because it prevented the jury from rendering a non-unanimous "no" answer on the special

verdict forms. Therefore, this Court may consider this error for the first time on appeal under RAP 2.5(a)(3).

b. A defendant may challenge a sentencing error for the first time on appeal. Further, contrary to the State's position, in the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999) (citing State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996) (imposition of a criminal penalty not in compliance with sentencing statutes may be addressed for the first time on appeal); In re Personal Restraint Petition of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) ("sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional"); State v. Loux, 69 Wn.2d 855, 858, 420 P.2d 693 (1966) (appellate court "has the power and duty to correct the error upon its discovery" even where the parties not only failed to object but agreed with the sentencing judge), State v. Roche, 75 Wn.App. 500, 513, 878 P.2d 497 (1994) ("challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); State v. Paine, 69 Wn.App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has

“established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal”); State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996) (permitting the State to bring a motion to amend an erroneous sentence nearly two years after sentencing under CrR 7.8); State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (improperly calculated standard range is legal error subject to review)). See also In re Connick, 144 Wn.2d 442, 468, 28 P.3d 729 (2001) (“defects in the calculation of sentencing range cannot be waived or stipulated away.”); State v. Nitsch, 100 Wn.App. 512, 519, 997 P.2d 1000 (2000).

Because the firearm enhancement statute required the trial court to impose an additional three-year sentence for each of the jury’s “yes” answers on the special verdict forms in this case, the instructional error was also a sentencing error. RCW 9.94A.533. This Court should review Gahagan’s challenge for the same reason Washington Courts have reviewed similar sentencing errors for the first time on appeal: appellate review of sentencing errors “tends to bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a

proper objection in the trial court.” Ford, 137 Wn.2d at 478 (citing Paine, 69 Wn.2d at 884).

To deny review of all cases presenting the same error as that in Bashaw because the defendant’s trial attorney failed to raise the proper objection would cause the kind of arbitrary variation in sentences that the Court sought to avoid in Ford and Paine. Because the error here resulted from the court’s use of a pattern jury instruction, which was inevitably used in many cases prior to Bashaw, numerous cases will present this same issue for the first time on appeal.¹ This Court should follow Bashaw and correct the sentencing errors caused by the incorrect pattern jury instruction, and reject the State’s request to deny review of all challenges stemming from Bashaw.

¹ WPIC 160.00 provides:

You will also be given *[a special verdict form][special verdict forms]* [for the crime of _____] [for the crime[s] charged in count[s] _____]. If you find the defendant not guilty *[of this crime][of these crimes]* [of _____], do not use the special verdict form[s]. If you find the defendant guilty *[of this crime][of these crimes]* [of (insert name of crime)], you will then use the special verdict form[s] and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form[s]. In order to answer the special verdict form[s] "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

2. THE INFORMANTS' TIP LACKED SUFFICIENT RELIABILITY TO JUSTIFY A TERRY STOP

In his opening brief, Mr. Gahagan argued that the vehicle stop violated his rights under Article I, section 7 because the tip by two unreliable informants who immediately disappeared from the scene was not sufficient to establish reasonable suspicion to conduct a Terry stop. Br. of App. at 10-20. The State responds that the store clerks and store customer who relayed the information from the two unreliable informants to the police establish were reliable because they were citizen informants who observed the two alleged witnesses of a crime in an emotional state. Br. of Resp. at 18-19. However, this misses the point that the two informants who actually claimed that a crime occurred were unreliable because they disappeared from the scene as soon as the store clerks called the police, they did not provide any of the store clerks with their names or contact information, and they avoided police contact for several days. RP 94, 132, 178.

The State further argues that this case is like State v. Randall, 73 Wn.App. 225, 868 P.2d 207 (1994) because there was

a report of violence and a rapidly developing situation.² However, as discussed extensively in Mr. Gahagan's opening brief, the Randall Court's approach improperly utilized the totality-of-circumstances test rather than the two-prong test requiring proof that both (1) the *informant* is reliable, and (2) the informant's *tip* is reliable. Br. of App. at 12-17 (citing State v. Jackson, 102 Wn.2d 432, 435-36, 688 P.2d 136 (1984)). This Court should return to return to the proper two-prong test under Jackson and State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) because that approach more adequately reflects the greater protections provided by Article I, section 7. Under that analysis, as in State v. Vandover, 63 Wn. App. 754, 760, 822 P.2d 784 (1992), the presence of potential danger does not in itself justify a Terry stop without evidence that both the informant and the informant's tip are reliable. Because the informants here were completely unreliable, the police did not have reasonable suspicion to stop Gahagan, and all fruits of the stop must be suppressed.

² The State seems to be referring to the facts in Randall, but mistakenly refers to State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994). Br. of Resp. at 19.

B. CONCLUSION

For the above reasons, Mr. Gahagan respectfully requests this Court to reverse his convictions for Second Degree Assault with a Firearm and Attempted First Degree Robbery with a Firearm. Alternatively, he requests that this Court reverse the two firearm enhancements.

Further, this Court should reject the State's request for a retrial on the sentencing enhancements because this would be a waste of judicial resources, as Mr. Gahagan is already serving a significant sentence for the robbery and assault convictions. See Bashaw, 169 Wn.2d at 146-47 (court declined to order a new trial on sentencing enhancements because, "[w]here, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.")

DATED this 1st day of December 2010.

Respectfully submitted,



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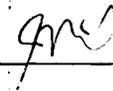
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