

NO. 70254-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN CHARLES THOMPSON,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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Marla L. Zink  
Attorney for Appellant

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



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A. SUMMARY OF ARGUMENT

On remand for resentencing based on John Charles Thompson's successful personal restraint petition, the sentencing court exercised independent judgment. The court imposed a 60-month firearm enhancement where the jury's special verdict form supported only a 24-month deadly weapon enhancement. The issue is ripe for review and the enhancement should be vacated as judicial fact-finding not subject to harmless error review.

B. ASSIGNMENT OF ERROR

Mr. Thompson's constitutional rights under the Sixth and Fourteenth Amendments and Article 1, sections 3, 21, and 22 were violated by the imposition of a sentencing enhancement not found beyond a reasonable doubt by a jury.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where a trial court exercises its independent judgment on remand, the decisions resulting from that exercise of judgment are reviewable on direct appeal. If a jury returns a deadly weapon special verdict, the court is bound by the state and federal constitutions only to impose a deadly weapon enhancement. The court cannot make its own finding that the deadly weapon used was a firearm and then impose a

firearm enhancement. Did the trial court improperly exercise its independent judgment on remand for resentencing by finding Mr. Thompson was armed with a firearm and imposing a firearm enhancement where the jury returned a deadly weapon special verdict form?

D. STATEMENT OF THE CASE

Mr. Thompson was convicted by a jury of murder in the first degree 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 that the deadly weapon was a firearm and imposed a 60-month firearm enhancement. CP 8 (imposing 60-month enhancement).

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).<sup>1</sup> 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. This Court “accept[ed] the State’s concession, . . . and remand[ed] for resentencing.” CP 16.<sup>2</sup>

The Honorable Dean S. Lum presided over Mr. Thompson’s resentencing. 3/29/13 RP 1.<sup>3</sup> A full sentencing hearing was held, at which Mr. Thompson argued for an exceptional sentence below the

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<sup>1</sup> Mr. Thompson was tried with a co-defendant, Aaron Faletogo, and their direct appeals were consolidated. *See Thompson*, 1999 WL 730912, at \*1.

<sup>2</sup> 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.

<sup>3</sup> 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 case, but Mr. Thompson has not cited to those transcripts herein.

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 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 absolutely 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 appeals following the resentencing. CP 35-36.

E. ARGUMENT

**The court lacked authority to impose a 60-month sentencing enhancement for a firearm where the jury found Mr. Thompson was armed with a deadly weapon, not a firearm.**

1. The firearm enhancement, as imposed here, is unconstitutional because it was found by a judge, not a jury.

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 v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *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; *State v. Williams-Walker*, 167 Wn.2d 889, 895-86, 225 P.3d 913 (2010); *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (*Recuenco III*). Under the

Washington Constitution, the sentencing court is bound by the jury's factual determinations. *Williams-Walker*, 167 Wn.2d at 897. The court cannot substitute its judgment by imposing a sentence based upon a fact not found by the jury, even if it is supported by the evidence presented at trial. *Id.* at 888-90. When the court does so, 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; *Recuenco III*, 163 Wn.2d at 442.

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 found 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*, our Supreme 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.* The Court further reasoned it was irrelevant to the constitutional analysis what facts inhered in the guilty verdicts as well as what the State charged:

For purposes of sentence enhancement, the sentencing court is bound by special verdict findings, regardless of

the findings implicit in the underlying guilty verdict. Where a firearm is used in the commission of a crime, the only way to determine which enhancement is authorized is to look at the jury's special findings. A sentence enhancement must not only be alleged, it also must be authorized by the jury in the form of a special verdict.

167 Wn.2d at 900 (emphasis added).

The *Williams-Walker* Court further held that harmless error analysis does not apply to this sentencing error. 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).

The case at bar is indistinguishable. 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. This Court should vacate the sentencing enhancement and remand for resentencing consistent with the jury’s findings. *See Williams-Walker*, 167 Wn.2d at 902.

2. The propriety of the firearm enhancement is properly before this Court on direct review of Mr. Thompson’s resentencing, during which the sentencing court exercised discretion and found a firearm enhancement.

*Williams-Walker* announced a new rule of criminal procedure: imposition of a firearm sentence enhancement where a jury has not found use of firearm can never be harmless. *Eastmond*, 173 Wn.2d at 634, 641-42. Because this has been deemed a new rule of criminal procedure, this Court will not apply the rule if the sentence was final prior to that decision. *Id.* Mr. Thompson’s appeal arrives in a different posture that requires this Court to apply the *Williams-Walker* rule to Mr. Thompson’s sentence.

In *Eastmond*, the petitioner’s sentence had become final when the Court of Appeals issued its mandate on November 16, 2007. 173

Wn.2d at 639. Mr. Eastmond argued in a collateral attack that his sentence was unconstitutional under *Blakely*, for example, because the jury finding authorized only a deadly weapon enhancement but the sentencing court imposed the lengthier firearm enhancement. *Id.* at 639. Because the *Blakely* error was constitutional, it would be applied to the petitioner's case on collateral review. *Id.* However, the petitioner was not entitled to the procedural rule announced in *Williams-Walker* because his sentence was final when that rule was announced. *Id.* at 639-40. That petitioner would have to demonstrate actual prejudice from the constitutional error in enhancements. *Id.* at 641.

Here, however, Mr. Thompson's sentence is not final. Upon granting Mr. Thompson's personal restraint petition, this Court remanded Mr. Thompson's case for resentencing. CP 16. Quite simply, this Court ruled, "We accept the State's concession, grant the petition in part, and remand for resentencing." *Id.* The mandate does 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) (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”).

The sentencing court below exercised its discretion when it resentenced Mr. Thompson at a full sentencing hearing on March 29, 2013. At the hearing, it was noted “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.” 3/29/13 RP 31 (emphasis added). The 2013 court found a firearm enhancement not supported by the jury’s deadly weapon special verdict. *Compare* CP 38 (special verdict form finding a deadly weapon) *with* CP 28, 30 (2013 judgment and sentence finds and imposes firearm enhancement); 3/29/13 RP 31. On direct review of Mr. Thompson’s 2013 resentencing, the 2010 procedural rule from *Williams-Walker* must be applied.

The trial court’s exercise of independent judgment on remand distinguishes this case from *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009). On direct appeal, Mr. Kilgore won reversal of two of seven counts. *Id.* 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

sentencing by striking the two counts and correcting the offender score (a change that had no affect 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. Our Supreme 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)) (emphasis added). The Court denied 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.

Likewise, this case is unlike *State v. Rowland*, 160 Wn. App. 316, 249 P.3d 635 (2011). There, Mr. Rowland was convicted in 1991, which was affirmed on direct appeal and a mandate issued in 1995. 160 Wn. App. at 319. In a 2007 personal restraint petition, this Court accepted the State’s concession that Mr. Rowland’s offender score was miscalculated. *Id.* at 319-20. On remand for resentencing, the court

did not reconsider the exceptional sentence imposed as part of the original 1991 sentence, despite Mr. Rowland’s argument that *Blakely* nullified it as judicial fact-finding. *Id.* at 319-21. The court further sentenced Mr. Rowland to the high end of the new standard range compelled by the revised offender score; he had been sentenced to the high end of the range in 1991, and the court would not reconsider that upon resentencing. *Id.* at 321-22. On direct appeal from resentencing, this Court found that like in *Kilgore*, the trial court on remand simply corrected the judgment and sentence, which is not an appealable act of independent judgment. 160 Wn. App. at 324-25, 328-29.

As distinguished from *Kilgore* and *Rowland*, Mr. Thompson’s resentencing court exercised independent judgment on remand—it reconsidered Mr. Thompson’s entire sentence, entering a new judgment and sentence. *See* CP 7-12, 27-34. First, the court changed Mr. Thompson’s 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. 3/29/13 RP 26-27; CP 28, 30 (imposing 350 months on a standard range of 281 to 374 months); *see* CP 8, 9 (1998 judgment and sentence). The court did not simply “substitute[] the high end of one standard range for that of another.”

*Rowland*, 160 Wn. App. at 329. Next, unlike *Rowland*, Judge Lum considered (and rejected) Mr. Thompson's argument for an exceptional sentence. *Compare id.* at 328 (sentencing court declined to exercise discretion to consider exceptional sentence) *with* 3/29/13 RP 25-26 (considering but rejecting motion for exceptional sentence down). Mr. Thompson's sentencing court also made its own finding that Mr. Thompson was armed with a firearm, despite the jury's special verdict, which only found a deadly weapon. 3/29/13 RP 31. Because the sentencing court took the opportunity provided by this Court's remand for resentencing and reconsidered the sentence in its entirety, including specifically the enhancement, the issue is ripe for review in this direct appeal. *See Kilgore*, 167 Wn.2d at 37.

#### F. CONCLUSION

By imposing an unauthorized enhancement, the sentencing court violated Mr. Thompson's constitutional right to have a jury find any fact that increases punishment. This Court should vacate the firearm enhancement and remand for resentencing consistent with the jury's deadly weapon finding.

DATED this 20th day of November, 2013.

Respectfully submitted,



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Marla L. Zink – WSBA 39042  
Washington Appellate Project  
Attorney for Appellant

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DIVISION ONE**

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	)	
Respondent,	)	
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v.	)	NO. 70254-8-I
	)	
JOHN THOMPSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **OPENING 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] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] JOHN THOMPSON	(X)	U.S. MAIL
990054	( )	HAND DELIVERY
WASHINGTON CORRECTIONS CENTER	( )	_____
PO BOX 900		
SHELTON, WA 98584		

**SIGNED** IN SEATTLE, WASHINGTON THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2013.

X \_\_\_\_\_ 

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