

70407-9

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No. 70407-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DONALD EARL PITCHFORD,

Appellant.

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2014 JAN 27 PM 1:33  
COURT OF APPEALS DIVISION  
STATE OF WASHINGTON

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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MAUREEN M. CYR  
Attorney for Appellant

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

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A. ASSIGNMENT OF ERROR

The court erred in imposing a double deadly weapon enhancement.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The deadly weapon enhancement statute provides that, when an offender is sentenced for a deadly weapon enhancement and was previously sentenced for a deadly weapon enhancement after July 23, 1995, the current sentencing court must double the amount of the enhancement. Here, Donald Pitchford was previously sentenced for a deadly weapon enhancement in 1984. The current sentencing court relied on that prior enhancement to double the enhancement for the current offense. Did the court violate the statute where the prior enhancement was imposed *prior* to July 23, 1995?

C. STATEMENT OF THE CASE

Mr. Pitchford was romantically involved with Elaine Smallwood for about one year. 3/12/13RP 75; 3/14/13RP 37. On June 21, 2011, they were living together in Ms. Smallwood's apartment in Seattle with Ms. Smallwood's 11-year-old daughter Ah'Mariyah. 3/12/13RP 76-77. That night, Ms. Smallwood awoke at around 3 a.m. and went to the kitchen to get a drink from the refrigerator. 3/12/13RP

90. Mr. Pitchford was sitting at the kitchen table holding a knife that he was using to prepare a cigarette containing the medical marijuana he took for his bone disease. 3/12/13RP 90; 3/14/13RP 41-43. Ms. Smallwood said that when she went back to the bedroom and sat on the bed, Mr. Pitchford came into the bedroom and hit her in the throat. 3/12/13RP 91. She fell onto the floor and Mr. Pitchford got on top of her and stabbed her in the shoulder with the knife. 3/12/13RP 91. Ah'Mariyah, who had been sleeping in the bed, woke up and told Mr. Pitchford to get off of her mother. 3/12/13RP 131. When Mr. Pitchford got up and went to the bathroom, Ms. Smallwood and Ah'Mariyah ran to a neighbor's house and called the police. 3/12/13RP 133-34.

Mr. Pitchford did not remember stabbing Ms. Smallwood. 3/14/13RP 45. He had a seizure disorder and had run out of his medication soon before the incident. 3/14/13RP 37, 41. He might have blacked out as a result of a seizure. 3/14/13RP 60.

Mr. Pitchford was charged with second degree assault with a deadly weapon enhancement.<sup>1</sup> CP 1-2; RCW 9A.36.021(1)(a), (c);

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<sup>1</sup> Mr. Pitchford was also charged with one count of second degree assault by strangulation and one count of felony harassment. CP 2-3; RCW 9A.36.021(1)(g); RCW 9A.46.021(1), (2). At the close of the evidence, the court granted the defense motion to dismiss the strangulation

RCW 9.94A.533(4); RCW 9.94A.825. The State also alleged, as an aggravating factor, that Mr. Pitchford committed the offense “within sight or sound of the victim’s or the offender’s minor child under the age of eighteen years.” CP 1-2; RCW 9.94A.535(3)(h)(ii). The jury found him guilty as charged of second degree assault and of being armed with a deadly weapon. CP 149, 153. The jury also answered “yes” on the special verdict form regarding the aggravating factor. CP 151-52.

At sentencing, the State argued the court must double the deadly weapon enhancement because Mr. Pitchford previously received a deadly weapon enhancement in 1984 when he was convicted of first degree robbery. 5/10/13RP 4; CP 206-16. Defense counsel objected, arguing the prior enhancement did not fall under the doubling provision of the current statute. 5/10/13RP 4-5. The court overruled the objection. 5/10/13RP 5. The court doubled the deadly weapon enhancement, imposing a total of 24 months. 5/10/13RP 17-18; CP 197. The court also found the jury’s finding on the aggravator justified an exceptional sentence of an additional 12 months above the standard range. 5/10/13RP 17-18; CP 197, 199.

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charge due to lack of evidence. CP 48. The jury acquitted Mr. Pitchford of the felony harassment charge. CP 154.

E. ARGUMENT

THE COURT EXCEEDED ITS STATUTORY  
AUTHORITY IN DOUBLING THE DEADLY  
WEAPON ENHANCEMENT

A trial court may impose a sentence only as authorized by statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

In applying the sentencing statute, the Court's objective is to determine the Legislature's intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). "The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face," the Court "give[s] effect to that plain meaning." Id. (quotation marks and citation omitted). The interpretation and application of the statute is a question of law reviewed *de novo*. Id.

The deadly weapon enhancement statute provides that, if an offender being sentenced for a class B felony<sup>2</sup> was armed with a deadly weapon other than a firearm, an additional one year must be added to the sentence. RCW 9.94A.533(4)(b). In addition, if "the offender has been previously sentenced for any deadly weapon enhancements after

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<sup>2</sup> Second degree assault is a class B felony. RCW 9A.36.021(2)(a).

July 23, 1995, . . . all deadly weapon enhancements . . . shall be twice the amount of the enhancement listed.” RCW 9.94A.533(4)(d).<sup>3</sup>

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<sup>3</sup> RCW 9.94A.533(4), the deadly weapon enhancement statute that applies to deadly weapons other than firearms, provides in full:

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Six months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

The meaning of this statutory provision is plain on its face. The statute authorizes the sentencing court to double the deadly weapon enhancement only if “the offender has been previously sentenced for any deadly weapon enhancements after July 23, 1995.” Id.

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(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) of this section, or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(3);

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

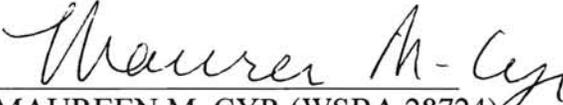
Here, in doubling the enhancement, the court relied on Mr. Pitchford's prior deadly weapon enhancement that he received in 1984, well before the July 23, 1995, statutory cut-off date. 5/10/13RP 4; CP 206-16. The statute provided no authority for the court to double the current deadly weapon enhancement based on a prior deadly weapon enhancement imposed back in 1984. The sentence is therefore erroneous.

When a court imposes an unlawful sentence, the remedy is to vacate the erroneous portion of the sentence. In re Pers. Restraint of West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002). The double deadly weapon enhancement must be vacated.

F. CONCLUSION

The court exceeded its statutory authority in imposing a double deadly weapon enhancement. The erroneous portion of the sentence must be vacated.

Respectfully submitted this 24th day of January, 2014.

  
MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project - 91052  
Attorneys for Appellant

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DONALD PITCHFORD,	)	
	)	
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24<sup>TH</sup> DAY OF JANUARY, 2014, 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> DONALD PITCHFORD 904998 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	<input checked="" type="checkbox"/> ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF JANUARY, 2014.

X \_\_\_\_\_ 

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