

FILED
Oct 14, 2015
Court of Appeals
Division I
State of Washington

NO. 72804-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY NGUYEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DAVID SEAVER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. ISSUE PRESENTED.....	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	3
1. NGUYEN WAS PROPERLY SENTENCED BASED ON FACTS PLED BY THE STATE AND PROVED TO THE JURY BEYOND A REASONABLE DOUBT.....	3
D. CONCLUSION	6

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) 3, 4

Apprendi v. United States, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... 4

Washington State:

State v. Romero, 95 Wn. App. 323, 975 P.2d 564 (1999) 3

State v. Thompson, 169 Wn. App. 436, 290 P.3d 996 (2012) 3

Statutes

Washington State:

RCW 9.94A.533 4, 5

RCW 9A.28.020(3)(b) 5

RCW 9A.52.020(2) 5

RCW 9A.56.200(2) 5

A. ISSUE PRESENTED

Whether the trial court properly imposed consecutive firearm enhancements, as required under the Sentencing Reform Act, where the State alleged and the jury was asked to determine that the defendant was armed with a firearm when he committed the crimes of burglary and attempted robbery/

B. STATEMENT OF THE CASE

The appellant, Zachary Nguyen, found guilty by jury verdict on August 21, 2012, of one count each of first-degree burglary, second-degree assault, and attempted first-degree robbery. CP 16. In addition, the jury returned special verdicts finding that Nguyen was armed with a firearm at the time he committed each of the substantive offenses. CP 19.

On April 28, 2014, this Court, in an unpublished opinion, accepted the State's concession that Nguyen's conviction for assault merged with his conviction for attempted robbery, and remanded Nguyen's case to the trial court for resentencing. CP 25-34. This Court affirmed Nguyen's convictions in all other regards. CP 34.

At Nguyen's resentencing hearing on December 5, 2014, Nguyen was represented by counsel Gary Davis. 12/5/2014 RP 2.

Davis submitted a presentence report to the trial court in which he advocated for a sentence at the low end of the standard range for his client's burglary and attempted robbery convictions, along with consecutive firearm enhancements of 60 and 36 months for the respective substantive offenses. CP 35-36.

Nguyen filed a *pro se* "Defendant's Resentencing Memorandum" with the King County Superior Court, as well. CP 47-50. In his "memorandum," Nguyen asserted the same constitutional claims that his appellate counsel has presented to this Court. CP 48-50. At the resentencing hearing, Nguyen, during his allocution, referred to the document he filed with the superior court; however, the trial court did not rule on Nguyen's *pro se* memorandum, instead asking his counsel if he had any authority that would justify departing from the plain language of the state's criminal code as to the consecutive nature of firearm enhancements. 12/5/2014 RP 15. Nguyen's attorney stated that he was unaware of any controlling case law. 12/5/2014 RP 15.

The trial court resentenced Nguyen to a term of 67 months for each substantive offense, to run concurrently, followed by consecutive firearm enhancements of 60 and 36 months. CP 40.

C. **ARGUMENT**

1. **NGUYEN WAS PROPERLY SENTENCED BASED ON FACTS PLED BY THE STATE AND PROVED TO THE JURY BEYOND A REASONABLE DOUBT.**

For purposes of resolving this appeal, the State will disregard the fact that Nguyen failed to preserve the issue he raises to this Court, insofar as he is challenging the trial court's decision as to a *pro se* memorandum that Nguyen, represented by experienced counsel, was not entitled to file,¹ and on which the trial court did not expressly rule.² The State will further assume, *arguendo*, that the decision of the United States Supreme Court in Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), in which the Supreme Court held that any fact that increases a defendant's mandatory minimum sentence for a substantive crime must be found by a jury, has some relevance to the instant matter, which did not involve a mandatory minimum sentence for a substantive offense.

The State engages in these assumptions because, even accepting their dubious reasoning, it is clear that Nguyen was

¹ A defendant has no federal and state constitutional right to "hybrid representation" at trial. State v. Romero, 95 Wn. App. 323, 326, 975 P.2d 564 (1999).

² A trial court is under no obligation to rule on motions submitted *pro se* by a defendant who has the services of an attorney. State v. Thompson, 169 Wn. App. 436, 494, 290 P.3d 996 (2012).

properly sentenced. Alleyne and its predecessor, Apprendi v. United States, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), stand for the proposition that facts which allow, by operation of sentencing statute, for the escalation of the duration of a defendant's imprisonment must be properly alleged by the State and proved beyond a reasonable doubt by the finder of fact. Apprendi, 530 U.S. at 483 n.10.

Here, the statute that allows for such upward adjustment is RCW 9.94A.533, which authorizes enhancements of five years for any class A felony, and three years for any class B felony, if the offender was armed with a firearm during his commission of those felonies. RCW 9.94A.533 (3)(a), (b). This statute further provides that "all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm...enhancements, for all offenses sentenced under this chapter." RCW 9.94A.533(3)(e).

Accordingly, in order for Nguyen to be sentenced to consecutive five- and three-year enhancements for his burglary and

attempted robbery convictions,³ the State was obligated to plead and ask the jury to find proved beyond a reasonable doubt that Nguyen was armed with a firearm during the commission of his crimes. The State did so here, and the jury rendered the relevant decisions. CP 13-14; Supp. CP __ (sub no. 56, Court's Instructions to Jury, filed Aug. 22, 2012); Supp. CP __ (sub no. 61, Special Verdict Form A, filed Aug. 22, 2012); Supp. CP __ (sub no. 62, Special Verdict Form B, filed Aug. 22, 2012).

Thus, the jury made the constitutionally necessary findings to trigger the application of RCW 9.94A.533(3) to Nguyen's sentences. Nguyen offers no pertinent authority to cause this Court to doubt the trial court's resentencing,⁴ nor does he even suggest any additional questions that the jury should have been required to answer. His argument should be rejected.

³ Burglary in the first degree is a class A felony. RCW 9A.52.020(2). Attempted first-degree robbery is a class B felony. RCW 9A.28.020(3)(b); RCW 9A.56.200(2).

⁴ Nguyen's reliance on the Supreme Court's granting of a writ of certiorari in United States v. Johnson, 515 F. App'x 183 (3d Cir. 2013) cert. granted, judgment vacated, 134 S. Ct. 1538, 188 L. Ed. 2d 553 (2014), is difficult to understand, in that no final decision has yet been made in that case, which the Supreme Court remanded to the Third Circuit. Moreover, it is unclear from the Supreme Court's ruling what specific consideration was owed in Johnson's case, which involved imposition of consecutive sentences for multiple federal crimes, and any suggestion that the Supreme Court's ruling bears relevance to the instant appeal is blind guesswork.

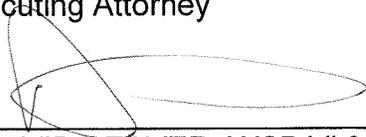
D. CONCLUSION

The trial court properly resentenced Nguyen based on the general and special verdicts rendered by the jury that heard his case. His judgment and sentence should be affirmed.

DATED this 14th day of October, 2015.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: 

DAVID SEAVER, WSBA# 30390
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Oliver Davis, the attorney for the appellant, Zachary Nguyen, containing a copy of the Respondent's Brief, in State v. Nguyen, Cause No. 72804-1-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.



Name
Done in Seattle, Washington

10-14-15
Date