

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

VAN VETH,

Appellant.

FILED
COURT OF APPEALS
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BRIEF OF APPELLANT

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

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STATE OF WASHINGTON
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A. SUMMARY OF ARGUMENT

Appellant, Van Veth, contends the trial court exceeded its statutory authority when it imposed a firearm enhancement in his case, and thus contends the court should have granted his motion to vacate the judgment.

B. ASSIGNMENT OF ERROR

The court exceeded its authority at sentencing when it imposed a firearm enhancement in the absence of statutory authority.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

The Supreme Court held in State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), that: (1) a judicial finding of fact to support a firearm enhancement violated the Sixth and Fourteenth Amendments; and (2) no statutory authority exists to permit a jury to return a special verdict on such an enhancement. Where, in Mr. Veth's case, the jury was permitted to return a special verdict on such an enhancement, did the trial court exceed its statutory authority in imposing a firearm enhancement?

D. STATEMENT OF CASE

In 1997, a jury convicted Mr. Veth of attempted first degree murder. CP 10. The trial court charged the jury with answering

the question of whether Mr. Veth was armed with a firearm in the commission of the attempted murder. Supp. CP __, Sub No. 64 (Instructions 31, 32); Supp. CP __, Sub No. 68 (Special Verdict Form E-1). The jury answered "yes" on the special verdict. Supp. CP __, Sub No. 68 (Special Verdict Form E-1) .

Following the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Washington Supreme Court issued its opinion in Recuenco that: (1) a judicial finding of fact to support a firearm enhancement violated the Sixth and Fourteenth Amendments; and (2) no statutory authority existed to permit a jury to return a special verdict on such an enhancement. Relying on both Blakely and Recuenco, Mr. Veth filed a motion pursuant to CrR 7.8 to vacate the judgment in which he contended the trial court improperly imposed a firearm enhancement. CP 68-121. The trial court dismissed the motion concluding "Blakely v. Washington cannot be applied retroactively." CP 122. The trial court's order did not address Recuenco.

E. ARGUMENT

1. THE SENTENCING COURT EXCEEDED ITS
AUTHORITY IN IMPOSING A FIREARM
ENHANCEMENT.

RCW 9.94A.602 provides:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused . . . was armed with a deadly weapon at the time of the commission of the crime, . . . the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant . . . was armed with a deadly weapon at the time of the commission of the crime.

. . . The following instruments are included in the term deadly weapon: . . . pistol, revolver, or any other firearm

RCW 9.94A.602 establishes a procedure by which a deadly weapon enhancement is pled and proven to a jury, satisfying the defendant's constitutional right to a jury trial.

Another portion of the Sentencing Reform Act (SRA) outlines the punishment associated with a deadly weapon special verdict finding. In pertinent part, RCW 9.94A.533(4) provides that additional time "shall" be added to the standard sentence if the offender was armed with a deadly weapon other than a firearm during the offense – two years for a class A felony, one year for a

class B felony, and six months for a class C felony.¹ RCW 9.94A.533(3) purports to establish the additional punishment to be imposed where an offender was armed with a firearm as defined in RCW 9.41.010 – five years for a class A felony, three years for a class B felony, and eighteen months for a class C felony. These enhancements are not insignificant – where the defendant has previously been sentenced for a deadly weapon enhancement, the enhancements listed above are doubled for the current offense. RCW 9.94A.533(3)(d), (4)(d).

Unlike the statutory procedure in place for a deadly weapon enhancement, there is no corresponding statutory procedure in place for a firearm enhancement. In 1995, the Legislature enacted, without amendment, Initiative 159, the “Hard Time for Armed Crime” ballot initiative intended to increase sentences for armed crime. State v. Brown, 139 Wn.2d 20, 25, 983 P.2d 608 (1999) (citing Laws 1995, ch. 129; In re Charles, 135 Wn.2d 239, 246, 955 P.2d 798 (1998); Washington Sentencing Guidelines Comm’n, Adult Sentencing Guidelines Manual, cmt. at II-67 (1997)). This new law sought to increase the punishment for armed crimes. Charles, 135 Wn.2d at 246. It also sought to differentiate between

¹ RCW 9.94A.533 has replaced former RCW 9.94A.510, but the pertinent terms remain the same.

crimes committed with a firearm and those committed with some other deadly weapon. Id.; see also RCW 9.94A.533.

While the purpose of Initiative 159 was to increase punishment for armed crimes, the Legislature's failure to create a statutory procedure by which a jury could find a firearm special verdict precludes the imposition of the firearm enhancements prescribed in RCW 9.94A.533(3). See RCW 9.94A.602 (outlining procedure for deadly weapon special verdict). RCW 9.94A.602 provides a lawful avenue for the jury to make a finding as to whether the defendant was armed with a deadly weapon at the time of the offense, providing the defendant with due process of law, including notice and a jury finding. RCW 9.94A.533(4), in turn, provides that "if the offender . . . was armed with a deadly weapon other than a firearm," additional time shall be added to his sentence. RCW 9.94A.533(3), which purports to add even more time to an offender who "was armed with a firearm" at the time of the offense, however, is not rooted in a statutory procedure permitting the jury to enter a special verdict form, such as that set forth in RCW 9.94A.602.

Following Blakely, which largely undermined Washington's exceptional sentence provisions, the Washington Supreme Court recognized

Where the legislature has not created a procedure for juries to find aggravating factors and has, instead, explicitly provided for judges to do so, we refuse to imply such a procedure on remand.

...
To create such a procedure out of whole cloth would be to usurp the power of the legislature.

State v. Hughes, 154 Wn.2d 118, 151, 110 P.3d 192 (2005). The Court's recognition of the limits on its authority follows its precedent which

"has consistently held that the fixing of legal punishments for criminal offenses is a legislative function." State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). "[I]t is the function of the legislature and not of the judiciary to alter the sentencing process." State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975).

Hughes, 154 Wn.2d at 149.

The Court echoed this conclusion in Recuenco, decided the same day as Hughes. Under Blakely, the Court reversed Mr. Recuenco's firearm enhancement, since the jury was never asked to, nor did it find Mr. Recuenco was armed with a firearm at the time of the offense. Recuenco, 154 Wn.2d at 162. But rather than simply remand the matter to allow the question to be submitted to

the jury, the Court further concluded the question could never be submitted to the jury. The Court said:

Because we held in Hughes that we would not imply a procedure by which a jury can find sentencing enhancements on remand, we remand for resentencing based solely on the deadly weapon enhancement which is supported by the jury's special verdict.

Recuenco, 154 Wn.2d at 164. In concluding that the options on remand were limited solely to the imposition of the lesser enhancement, Recuenco recognized that, unlike the lesser deadly weapon enhancement, there is no statutory authority to submit a firearm enhancement to a jury. If there were statutory authority for a firearm enhancement there was no need to imply one and thus no need for the Court to cite to Hughes in declining to do so.

Unlike the provisions of RCW 9.94A.602 pertaining to a deadly weapon enhancement, there is no provision in Washington law for submitting the firearm question to the jury.² Thus, as Recuenco recognized, the only authority which existed was to impose the lesser deadly weapon enhancement.

² It is axiomatic that even in the absence of statutory authority to submit the question to a jury the trial judge cannot make the finding herself as Recuenco held that procedure violates the Sixth and Fourteenth Amendments to the United States Constitution. Recuenco, 154 Wn.2d 162-63.

The imposition of the greater enhancement in Mr. Veth's case exceeded the Court's authority.

2. BECAUSE OF THE SUPREME COURT'S CONSTRUCTION OF THE RELEVANT STATUTES THERE IS NO QUESTION OF RETROACTIVITY

Mr. Veth relied on Recuenco as well as Blakely in his motion. CP 68-121. The court's ruling, however, fails to address the impact of Recuenco independent of Blakely. CP 122. As demonstrated above, Recuenco did more than merely strike down a judicial finding in support of a firearm enhancement. The trial court's failure to address Recuenco does not bar consideration of that issue on appeal.

Moreover, in light of Recuenco and its construction of the firearm and deadly weapon provisions of the SRA, "retroactivity" is not an issue at all.

It is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it. In other words, there is no "retroactive" effect of a court's construction of a statute; rather, once the court has determined the meaning, that is what the statute has meant since its enactment.

In re Vandervlugt, 120 Wn.2d 427, 436, 842 P.2d 950 (1992); see also, State v. Moen, 129 Wn.2d 535, 538, 919 P.2d 69 (1996).

Recuenco concluded that permitting a trial judge to find the facts necessary to impose the firearm enhancement violated the Sixth and Fourteenth Amendments. Recuenco, 154 Wn.2d 162-63. Having struck down the procedure which appellate courts had grafted onto the statutes, the Court next recognized there was no statutory provision permitting the submission of the firearm enhancement to the jury. Id. at 164. The Supreme Court considered the provisions RCW 9.94A.533 and RCW 9.94A.602 and determined they do not allow the submission of the firearm question to a jury. Once the Court construed the statutes in that manner that is what the statutes have always meant. Vandervlugt, 120 Wn.2d at 436. As such, the statute did not permit submission of the firearm enhancement to the jury in 1997 and retroactivity is simply not an issue. Id.

3. MR. VETH'S MOTION WAS NOT TIME BARRED

RCW 10.73.090(1) provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

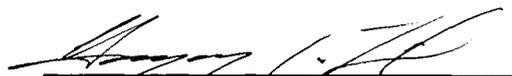
Where a court exceeds the authority given it by the relevant sentencing statutes, the resulting sentence is invalid on its face and the provisions of RCW 10.73.090 do not apply. In re the Personal Restraint Petition of Goodwin, 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002); Id. at 869 (citing In re the Personal Restraint Petition of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980)).

Recuenco held the Sixth and Fourteenth Amendments do not allow trial judge to find the facts necessary to impose the firearm enhancement. Recuenco, 154 Wn.2d 162-63. The Court further concluded there was no statutory procedure by which the finding could be made by the jury. By imposing the firearm enhancement in this case the court exceeded its statutory authority, and Mr. Veth's judgment is invalid on its face. Because Mr. Veth's judgment is facially invalid the time limit does not apply to his case. RCW 10.73.090(1).

F. CONCLUSION

Because the trial court imposed a sentence in excess of its statutory authority, this Court should reverse the trial court's ruling denying Mr. Veth's motion to vacate judgment.

Respectfully submitted this 17th day of May, 2006.



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