

NO. 34426-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD DAVIS,

Appellant.

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
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DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 02-1-00861-3

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED August 2, 2006, Port Orchard, WA

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## **I. COUNTERSTATEMENT OF THE ISSUES**

Whether the trial court properly imposed deadly weapons enhancements where Davis was placed on notice that the State would be seeking the enhancement, where the jury found that he used a deadly weapon during the commission of the crimes, and where he specifically asked for that remedy when he petitioned the Supreme Court to vacate his firearm enhancements?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Ronald Davis was charged by information filed in Kitsap County Superior Court with first-degree burglary with a deadly weapon, three counts of second-degree assault with a deadly weapon, assault of a child with a deadly weapon, and first-degree unlawful possession of a firearm. CP 89. Each count bore an additional special allegation that Davis was armed with a firearm.

The jury found Davis guilty as charged as to the substantive offenses. The special verdict form, however, referred to the use of a “deadly weapon” rather than a “firearm.” CP 141. The trial court nonetheless imposed firearm enhancements for Counts I-IV. CP 21.

Davis appealed, and his conviction and sentence were affirmed, this

Court's opinion appearing under the name of his codefendant. *See State v. Orndorff*, 122 Wn. App. 781, 95 P.3d 406 (2004), *review denied*, 154 Wn.2d 1010 (2005).

Davis thereafter filed a personal restraint petition in the Supreme Court, alleging that the trial court's imposition of firearm enhancements based upon a verdict finding only the use of a deadly weapon violated his Sixth Amendment rights.<sup>1</sup> Davis alleged that he should be resentenced with only a deadly weapons enhancement. Based on the then-existing and controlling precedent, the State conceded error, and the Supreme Court remanded for resentencing. The trial court resentenced Davis accordingly. CP 63. He now appeals.

## **B. FACTS**

The facts of the offenses are set forth in this Court's direct appeal opinion. *See Orndorff*, 122 Wn. App. at 783-85:

On June 27, 2002, 13-year-old E.N. and his older half-brother, B.K., were spending the evening with E.N.'s father, Kenneth Nordby. E.N. and B.K. were downstairs playing a video game in the living room; Nordby and Lorina Coble were upstairs visiting with friends.

When B.K. answered a knock at the front door, two men pushed past him, causing him to fall to the floor. The smaller man wore a black leather jacket and carried a pistol. The taller man carried a rifle. B.K. screamed because the smaller man had "a pistol right in [his] face." III Report of

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<sup>1</sup> The State has filed a motion requesting that the documents filed in the personal restraint proceeding be transferred to this Court and made a part of the record herein.

Proceedings (RP) at 263. E.N. also saw the smaller man point the pistol at B.K. The taller man with the rifle wore a Levi-style jacket and pants and had a "star-spangled banner" bandanna. III RP at 288.

When Nordby heard B.K. scream, he started down the stairs. As he descended, Nordby saw a man with an "American flag" bandanna around his face coming up the stairs carrying a .22 rifle. III RP at 168-69. Nordby jumped down the stairs, grabbed the rifle, and struggled with the man. Nordby heard someone screaming that they were going to kill him and he felt a pistol against his neck. After unsuccessfully wrestling with the two men, Nordby lay face down on the floor as the men commanded. The taller man asked where Coble was and then hit Nordby in the head with the rifle butt, causing profuse bleeding. At some point, the taller man pulled the bandanna down from his face and Nordby recognized him as Shawn Orndorff, who had been to his house in the past to sell him musical equipment. Later, in court, Nordby identified Davis as the smaller man with the pistol.

From the living room, E.N. saw Davis point his pistol at Nordby and heard Orndorff say "[y]ou know what we want, give it now." III RP at 289. Orndorff moved the rifle up and down and E.N. then saw blood coming from Nordby's head. After ordering E.N. and B.K. to lie on the ground, Orndorff told E.N. "[d]on't worry, no reason to get hurt." III RP at 302-04. Orndorff and Davis left after 911 dispatch returned Coble's aborted call.

Law enforcement officers located Davis in a church parking lot. With the help of his K-9 police dog, a deputy sheriff found Orndorff hiding in the woods near the church. A vehicle search yielded a semi-automatic pistol, ammunition for the pistol and a .22 caliber rifle, and an American flag-style bandanna. The officers never found a rifle. After police brought them to the church, Nordby, B.K., and E.N. \*785 identified Orndorff and Davis as the men who had entered their home.

According to Orndorff, he and Davis drove to the home so he could talk with Nordby. When he knocked on the door, a young boy opened the door and stepped aside to let them in. Nordby then attacked Orndorff, injuring his head in

the altercation. Orndorff left the house once police had been summoned; hiding in the woods because of an outstanding arrest warrant.

The State charged Orndorff and Davis with one count of first degree burglary, three counts of second degree assault, and one count of second degree child assault, each with a firearm allegation, and second degree unlawful possession of a firearm. Each charge also carried an accomplice allegation. The State also charged Davis with first degree unlawful possession of a firearm. The court later dismissed the count charging assault against Coble and the accomplice allegation for Orndorff's unlawful possession of a firearm charge. The jury convicted Orndorff and Davis of first degree burglary, second degree assault, and second degree child assault and found that they were armed with firearms during the crimes. The jury also convicted Orndorff and Davis of second and first degree unlawful possession of a firearm, respectively.

### III. ARGUMENT

**THE TRIAL COURT PROPERLY IMPOSED DEADLY WEAPONS ENHANCEMENTS WHERE DAVIS WAS PLACED ON NOTICE THAT THE STATE WOULD BE SEEKING THE ENHANCEMENT, WHERE THE JURY FOUND THAT HE USED A DEADLY WEAPON DURING THE COMMISSION OF THE CRIMES, AND WHERE HE SPECIFICALLY ASKED FOR THAT REMEDY WHEN HE PETITIONED THE SUPREME COURT TO VACATE HIS FIREARM ENHANCEMENTS.**

Davis argues that the trial court erred in imposing deadly-weapons enhancements on resentencing him after his firearm enhancements were vacated pursuant to *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), *reversed sub nom. Washington v. Recuenco*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2546, \_\_\_ L. Ed. 2d \_\_\_ (2006). The Court should decline to consider this claim

because he received the precise relief he requested in the personal restraint petition he filed in the Supreme Court. Moreover, the claim is substantively without merit because under the liberal standards governing post-verdict challenges to the charging document, he was clearly on notice that a deadly weapons enhancement could be imposed.

1. ***Davis specifically requested that his case be remanded for imposition of deadly weapon enhancements and may not now claim the trial court erred in doing just that..***

Davis now claims that he trial court was without authority to impose deadly weapon enhancements upon his resentencing. He should be precluded from raising this claim by the doctrines of judicial estoppel and invited error.

Davis argued in his Supreme Court personal restraint petition that the firearm enhancements the trial court imposed violated *State v. Recuenco*. He specifically requested the remedy of imposition of deadly weapons enhancements:

For the reasons above, Mr. Davis requests this Court grant his petition and vacate his 168 months worth of firearm sentence enhancements. This cas[e] should be remanded for resentencing with only 60 months in deadly weapon enhancements.

Brief in Support of Personal Restraint Petition, at 5. Based on this request the State conceded that Davis should be resentenced. PRP Brief of Respondent, at 5. Davis was resentenced accordingly, and the Supreme Court dismissed his petition as moot. Ruling Terminating Review.

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. *Bartley-Williams v. Kendall*, \_\_\_ Wn. App: \_\_\_, ¶ 6, 2006 WL 1976965 (July 17, 2006). The “essence of judicial estoppel” is that: (1) the party to be estopped must be asserting a position that is inconsistent with an earlier position; (2) the party seeking estoppel must have relied on and been misled by the other party’s first position; and (3) it must appear unjust to permit the estopped party to change positions. *Save Columbia CU Committee v. Columbia Community Credit Union*, \_\_\_ Wn. App. \_\_\_, ¶ 23, 2006 WL 2053479 (July 25, 2006).

Here, all three elements of judicial estoppel are met. Davis previously specifically sought the remedy of being resentenced with deadly weapon enhancements. The State conceded error in the Supreme Court based on the remedy Davis sought, and would not have done so had Davis then claimed that the trial court was without authority to impose the enhancements on resentencing. Finally, it would appear unjust to allow Davis to appeal, at expense to both the public defense system and the prosecutor’s office, from the sentence he specifically requested. Davis’ request was pointed out below when he attempted to make the present argument at the resentencing. RP 8. Davis should be precluded from changing his previous position, and his claims should be rejected.

Alternatively, the doctrine of invited error prevents parties from benefiting from an error they caused regardless of whether it was done intentionally or unintentionally. *See Recuenco*, 154 Wn.2d at 163. Here, Davis specifically asked the Supreme Court to grant the relief he received. He now asks this Court to reverse that relief. Because any purported error was invited, his claims should be rejected.

2. ***Liberally construing the charging document, Davis was on notice that a deadly-weapon enhancement could be imposed, and he fails to show actual prejudice.***

Davis' allegation that he was denied adequate notice of deadly weapons enhancement is also substantively without merit. Under *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991), when a charging document is first challenged "after verdict or on appeal" for failing to provide adequate notice, Washington courts apply a liberal standard of review in favor of the validity of charging document. *Kjorsvik*, 117 Wn.2d at 105-06.

This standard of review applies a two-pronged test. The first question is whether there is at least some language in the information giving notice of the allegedly missing element. The first prong of the test looks to the face of the charging document itself. *Kjorsvik*, 117 Wn.2d at 106. To answer this question, the Court looks to whether the allegedly missing element appears in any form, or by fair construction can be found in the information. *Kjorsvik*, 117 Wn.2d at

If the language in the information is vague, the second prong requires the defendant to show that actual prejudice resulted. This part of the test may look beyond the face of the charging document to determine if the accused actually received notice of the charges he or she must have been prepared to defend against. It is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges. *Kjorsvik*, 117 Wn.2d at 106.

Here, the information alleged as follows:

#### COUNT I

##### **Special Allegation—Armed With Firearm**

AND FURTHERMORE, at the time of the commission of the crime, the Defendant or an accomplice was armed with a firearm; contrary to the Revised Code of Washington 9.94A.125.

CP 90. Special allegations in the same form were also alleged as to the Counts II through IV. CP 91-94.

RCW 9.94A.125, which has been recodified as RCW 9.94A.602, *see* RCW ch. 9.94A, Comparative Table, defines deadly weapon for sentencing enhancement purposes:

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: ... any pistol, revolver, or any other firearm.

The information thus cited the applicable statute and the specific deadly weapon it was alleging Davis employed.

Further, each special allegation referred to the specific count to which it pertained. In the primary charging for each Count I through IV it was also alleged that the crime was committed "with a deadly weapon." CP 89-93. It cannot be said the element fails to appear in any form, or by fair construction in the information.

Davis' contention that he was not advised that his sentence could be enhanced if the jury found he was armed with a knife or various other implements is a red herring. No other deadly weapon was referred to or entered into evidence at trial other than the guns used by Davis and his accomplice Orndorff. Because the jury's verdict could only have been based on a firearm, Davis was clearly advised of the charge of which he was found guilty.

Nor can Davis show prejudice. In addition to there being no evidence at trial of any deadly weapon other than a gun, there is no evidence any such other weapon appeared anywhere in the discovery.

Further, the State filed the proposed verdict form that was used at trial at the original commencement of trial on October 7, 2006. State's supp. CP (Plaintiff's proposed jury instructions filed 10/7/02). Due to an issue during

voir dire, the first trial ended in a mistrial. State's supp. CP (Clerk's Minutes 10/7/02 - 10/9/02, at 9). Trial was reset and did not recommence until a week later, on October 16, 2002. State's supp. CP (Clerk's Minutes 10/16/02 - 10/25/02). Thus in addition to the obvious fact that the firearms were the only deadly weapons involved, Davis had specific notice nine days before his seven-day trial began that the State would be asking the jury to find that he used a deadly weapon.

Liberally construing the information, as this Court must, it simply cannot be concluded that Davis did not have adequate notice that he could be subject to a sentence enhancement for using a deadly weapon during the commission of the offense.

Davis nevertheless asserts that the more liberal standard should not apply because he had no incentive to object to the charging document until the State sought to impose the deadly weapons enhancement. Davis' contention that the more liberal post-verdict standard of delineated in *Kjorsvik* does not apply is belied by the holding in that case:

A different standard of review should be applied when no challenge to the charging document has been raised *at or before trial because otherwise the defendant has no incentive to timely make such a challenge, since it might only result in an amendment or a dismissal potentially followed by a refiling of the charge.* Applying a more liberal construction on appeal discourages what Professor LaFave has described as "sandbagging." He explains this as a potential defense practice wherein the defendant recognizes a defect in the

charging document but foregoes raising it before trial when a successful objection would usually result only in an amendment of the pleading.

*Kjorsvik*, 117 Wn.2d at 103 (footnotes omitted). The triggering event for liberal construction, thus is not the sentencing consequences of the charge, as Davis would have it, but when “the State’s opportunity to amend the information has been lost.” *State v. Mendoza-Solorio*, 108 Wn. App. 823, 830, 33 P.3d 411 (2001); *accord*, *State v. Phillips*, 98 Wn. App. 936, 940-43, 991 P.2d 1195 (2000).

Thus, even if this issue were properly before the court, it would be without merit. The trial court’s resentencing of Davis should be upheld.

**IV. CONCLUSION**

For the foregoing reasons, Davis's conviction and sentence should be affirmed.

DATED August 2, 2006.

Respectfully submitted,

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