

IN THE COURT OF APPEALS
DIVISION II

FILED
COURT OF APPEALS
DIVISION II
08 JUN 10 AM 10:44
STATE OF WASHINGTON
BY DEAN

In re the Personal Restraint of:
JOSHUA DEAN SCOTT,
Petitioner.

SUPPLEMENTAL BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION

By:
Suzanne Lee Elliott
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A. ASSIGNMENTS OF ERROR

State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005) requires that the firearm enhancements imposed in this case be reversed, and *State v. Recuenco*, - Wash. 2nd – 180 P.3d 1276 (2008) held that such an error can never be harmless.

Issues Pertaining to the Assignments of Error

Where the information charged Scott with a deadly weapon or a firearm enhancement and where the jury was instructed that the State had to prove that Scott was armed with a “deadly weapon,” and where the jury made a “deadly weapon finding”, do the *Recuenco* decisions forbid the sentencing judge from imposing the lengthier firearm enhancement?

B. STATEMENT OF THE CASE

The facts of this case are set out in Scott’s Personal Restraint Petition filed April 10, 2006.

C. SUPPLEMENTAL ARGUMENT

Until 2005, sentencing judges made the determination about whether the defendant was armed with a deadly weapon or a firearm. At the time Scott was sentenced, trial judges were permitted to impose the lengthier firearm enhancements even when juries found only the presence

of deadly weapons. *See e.g., State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319, *review denied*, 136 Wn.2d 1028, 972 P.2d 465 (1998); *State v. Rai*, 97 Wn. App. 307, 983 P.2d 712 (1999); *State v. Olney*, 97 Wn. App. 913, 987 P.2d 662 (1999). Then came the fundamental change in sentencing practice when the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Following the *Blakely* decision, the Washington State Supreme Court's limited the imposition of any weapons enhancement to the actual type of enhancement charged or defined in the jury instructions. *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005)(Recuenco I) In *Recuenco I*, the Washington State Supreme Court held that where a jury did not explicitly find beyond a reasonable doubt that the defendant was armed with a firearm, the court was limited to the deadly weapon enhancements.

It is true that such an error can be harmless under the federal constitution. *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). But our State Supreme Court concluded that under Washington law, harmless error analysis does not apply in these circumstances. Thus, it affirmed. *Recuenco I*, and remanded to the trial court. *State v. Recuenco*, - Wash. 2nd -, 180 P.3d 1276 (2008)(Recuenco II).

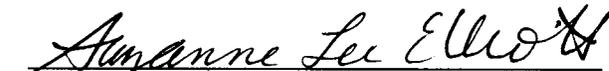
This case is nearly identical to the *Recuenco II* facts. Like the information in *Recuenco II*, the notice of the charged offense clearly stated that the State was relying on the deadly weapon enhancement. The Information referenced RCW 9.94A.310 generally. And rather than instructing the jury that a “weapon is a device from which a projectile may be fired by an explosive such as gunpowder,” WPIC 2.10.01, the jury was instructed that “a pistol, revolver, or any other firearm is a deadly weapon whether loaded or not.” See Instruction 22, in Appendix D of the State’s Response to the Personal Restraint Petition filed September 29, 2006. And the jury specifically found only “deadly weapon” special verdicts.

Because this case is identical to the facts in the *Recuenco* decisions, the sentencing judge was limited to imposing only a deadly weapon enhancement for all three counts in this case.

D. CONCLUSION

This Court should reverse and remand Mr. Scott’s case for resentencing.

Respectfully submitted this 9th day of June 2008.

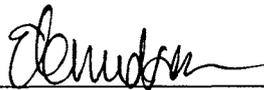

Suzanne Lee Elliott
WSBA 12634

Certification of Service by Mail

I declare under penalty of perjury that on June 9, 2008, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

Ms. Michelle Hyer
Prosecuting Attorney
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Emily Knudsen, Legal Assistant

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DIVISION II
08 JUN 10 AM 10:44
STATE OF WASHINGTON
BY _____
DEPUTY

APPENDIX 1

No. 05-83

IN THE
Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

**On Writ of Certiorari to the
Supreme Court of the State of Washington**

JOINT APPENDIX

NORM MALENG
King County Prosecuting Attorney

JAMES M. WHISMAN *
Senior Deputy Prosecuting Attorney

BRIAN M. McDONALD
Senior Deputy Prosecuting Attorney

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516 Third Avenue
Seattle, Washington 98104
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**PETITION FOR WRIT OF CERTIORARI FILED JULY 13, 2005
CERTIORARI GRANTED OCTOBER 17, 2005**

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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

—————
No. 99-1-07833-7 SEA

STATE OF WASHINGTON,

Plaintiff,

v.

ARTURO R. RECUENCO,

Defendant.

—————
RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/22/99	Original Information filed
12/23/99	Second Amended Information filed
1/10/00	Jury trial commenced
1/18/00	Third Amended Information filed
1/25/00	Court's instructions to the jury and verdict of jury finding defendant guilty as charged
2/24/00	Judgment and sentence of the court
2/29/00	Defendant's notice of appeal filed
7/28/03	Opinion of the Court of Appeals of Washington
4/14/05	Opinion of the Supreme Court of Washington

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 99-1-07833-7 SEA

THE STATE OF WASHINGTON,
Plaintiff,

v.

ARTURO R. RECUENCO,
Defendant.

INFORMATION

Filed September 22, 1999

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ARTURO R. RECUENCO of the crime of **Assault in the Second Degree**, committed as follows:

That the defendant ARTURO R. RECUENCO in King County, Washington on or about September 18, 1999, did intentionally assault Amy Recuenco with a deadly weapon, to-wit: a handgun;

Contrary to RCW 9A.36.021(1)(c), and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: _____ //s//
Kristin J. Chandler, WSBA #22684
Deputy Prosecuting Attorney

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

THIRD AMENDED INFORMATION

Filed January 18, 2000

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ARTURO R. RECUENCO of the crime of **Assault in the Second Degree**, committed as follows:

That the defendant ARTURO R. RECUENCO in King County, Washington on or about September 18, 1999, did intentionally assault Amy Recuenco with a deadly weapon, to-wit: a handgun;

Contrary to RCW 9A.36.021(1)(c), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant ARTURO R. RECUENCO at said time of being armed with a deadly weapon, to-wit: a handgun, under the authority of RCW 9.94A.125 and 9.94A.310.

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse ARTURO R. RECUENCO of the crime of **Interfering with Domestic Violence Reporting**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant ARTURO R. RECUENCO in King County, Washington on or about September 18, 1999, having committed a crime of domestic violence as defined by RCW 10.99.020, did intentionally prevent or attempt to prevent Amy Recuenco, the victim of that crime and a witness to that crime, from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official;

Contrary to RCW 9A.36.150, and against the peace and dignity of the State of Washington.

COUNT III

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse ARTURO R. RECUENCO of the crime of **Malicious Mischief in the Third Degree**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant ARTURO R. RECUENCO in King County, Washington on or about September 18, 1999, did knowingly and maliciously cause physical damage to a kitchen stove, the property of Amy Recuenco;

Contrary to RCW 9A.48.090, and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: //s//
Jared C. Kimball, WSBA #25999
Deputy Prosecuting Attorney

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

STATE'S TRIAL MEMORANDUM

Filed January 10, 2000

I. CHARGE

The defendant is charged with one count of Assault in the Second Degree-Domestic Violence, with a Deadly Weapon Enhancement (handgun), one count of Interfering with Domestic Violence Reporting, and one count of Malicious Mischief in the Third Degree.

* * *

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY
[Captions Omitted In Printing]

DEFENDANT'S PROPOSED JURY INSTRUCTIONS
(WITH CITATIONS)

Filed January 12, 2000

* * *

INSTRUCTION NO.

You will also be furnished with a special verdict form. If you find the defendant not guilty of Assault in the Second Degree do not use the special verdict form. If you find the defendant guilty of Assault in the Second Degree, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

* * *

SPECIAL VERDICT FORM

We, the jury, return a special verdict by answering as follows:

Was the ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?

ANSWER: _____ (Yes or No)

PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

COURT'S INSTRUCTIONS TO THE JURY

Filed January 25, 2000

* * *

No. 8

To convict the defendant of the crime of assault in the second degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 18th of September, 1999, the defendant intentionally assaulted Amy Recuenco with a deadly weapon; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty as to Count I.

* * *

No. 9

The term "deadly weapon" includes any firearm, whether loaded or not.

* * *

No. 18

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree as alleged in Count I.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

No. 19

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreperson. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and verdict forms.

You must fill in the blank provided in the verdict forms the words "not guilty" or the word "guilty", according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The foreperson will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

INSTRUCTION NO. 20

You will also be furnished with a special verdict form. If you find the defendant not guilty of Assault in the Second Degree do not use the special verdict form. If you find the defendant guilty of Assault in the Second Degree, you will then use the special verdict form and fill in the blank with the

answer “yes” or “no” according to the decision you reach. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer “no”.

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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

VERDICT FORM A

Filed January 25, 2000

We, the jury, find the defendant ARTURO R. RECUCENCO [Guilty] (write in Not Guilty or Guilty) of the crime of Assault in the Second Degree as charged in Count I.

//s//

PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

VERDICT FORM B

Filed January 25, 2000

We, the jury, find the defendant ARTURO R. RECUCENCO Guilty (write in Not Guilty or Guilty) of the crime of interfering with Domestic Violence Reporting as charged in Count II.

//s//

PRESIDING JUROR

12

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

VERDICT FORM C

Filed January 25, 2000

We, the jury, find the defendant ARTURO R. RECUNCO [Guilty] (write in Not Guilty or Guilty) of the crime of Malicious Mischief in the Third Degree as charged in Count III.

 //s//
PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

SPECIAL VERDICT FORM

Filed January 25, 2000

We, the jury, return a special verdict by answering as follows:

Was the defendant ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?

ANSWER: _____ [YES] _____ (Yes or No)

 //s//
PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

JUDGMENT AND SENTENCE (Count I)

Filed March 2, 2000

I. HEARING

1.1 The defendant, the defendant's lawyer, Richard Pope, and the deputy prosecuting attorney were present at the sentencing hearing conducted today.

* * *

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

2.1 **CURRENT OFFENSE(S)**: The defendant was found guilty on (date): 01-25-2000 by jury verdict of:

Count No.: I Crime: ASSAULT IN THE 2ND DEGREE

RCW 9A.36.021 1 C Crime Code: 01021

(a) Date of Crime: 09-18-1999 Incident No. ____.

* * *

SPECIAL VERDICT or FINDING(S):

(b) [] A special verdict/finding for being armed with a **Firearm** was rendered on Count(s) _____.

(c) [X] A special verdict/finding for being armed with a **Deadly Weapon** other than a firearm was rendered on Count(s) I

* * *

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard RangeEnh	ancement	Total Standard Range	Maximum Term
Count I	0	IV			3 TO 9 MONTHS DEADLY WEAPON 36 MONTHS 39-45 MONTHS	10 YRS AND/OR \$20,000

* * *

4.4 CONFINEMENT ONE YEAR OR LESS: Defendant shall serve a term of total confinement in the King County Jail or if applicable under RCW 9.94A.190(3) in the Department of Corrections as follows, commencing: [] immediately; [] (Date): _____ by no later than _____m.
 ___ [39]___ months/days on count ___ I ___;

* * *

Date: 2/24/00

_____/s//_____
 JUDGE
 Print Name: LAU

* * *