

No. 35455-I-II

IN THE COURT OF APPEALS, DIVISION II

IN RE THE PERSONAL RESTRAINT PETITIONS OF
CHRISTOPHER DELGADO AND ERNESTO MEZA
Petitioners.

SUPPLEMENTAL BRIEF IN SUPPORT OF
PERSONAL RESTRIANT PETITIONS

FILED
COURT OF APPEALS
DIVISION II
08 JUN 27 AM 10:43
STATE OF WASHINGTON
BY  DEPUTY

Ms. Suzanne Lee Elliott
WSBA12634
1300Hoge Building
705 Second Ave.
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE..... 1

C. SUPPLEMENTAL ARGUMENT..... 1

D. CONCLUSION..... 3

TABLE OF AUTHORITIES

Cases

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403
(2004)..... 2

State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, *review denied*, 136
Wn.2d 1028, 972 P.2d 465 (1998)..... 2

State v. Olney, 97 Wn. App. 913, 987 P.2d 662 (1999)..... 2

State v. Rai, 97 Wn. App. 307, 983 P.2d 712 (1999)..... 2

State v. Recuenco, - Wash. 2nd – 180 P.3d 1276 (2008) 1

State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005) 1

State v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)2

Other Authorities

WPIC 2.10.01..... 3

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 Meza and Delgado with a deadly weapon enhancement and where the jury was instructed that the State had to prove that Meza and Delgado were armed with a “deadly weapon,” do the *Recuenco* decisions forbid the sentencing judge from imposing the lengthier firearm enhancements?

B. STATEMENT OF THE CASE

The facts of this case are set out in Meza and Delgado’s Personal Restraint Petitions previously filed in this Court.

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 Meza and Delgado were 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. See Appendix C and D to the State's Response to PRP. The Informations stated that the defendants were "armed with a deadly weapon." 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 32, in Appendix B of the State's Response to the Personal Restraint Petition.

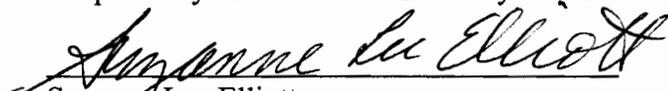
It is true that the final verdict forms referenced a "firearm enhancement" but those forms cannot change the fact that the charge and jury instructions referenced a "deadly weapon" enhancement. And, as noted above, no firearm definition was given.

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 any count in these cases.

D. CONCLUSION

This Court should reverse and remand Mr. Meza and Mr. Delgado's cases for resentencing.

Respectfully submitted this 26th day of June 2008.


Suzanne Lee Elliott
WSBA 12634

Certification of Service by Mail

I declare under penalty of perjury that on June 26, 2008, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

Mr. James Powers
Thurston County Prosecutor's Office
2000 Lakeridge Dr. S.W.
Olympia WA 98502-6001

And to:

Mr. Ernest Meza #859678
McNeil Island Corrections Center
PO Box 88-1000
Steilacoom, WA 98388

And to:

Mr. Christopher Delgado #796293
Prairie Correctional Facility
PO Box 500
Appleton, Minnesota 56208

FILED
COURT OF APPEALS
DIVISION II
AM 10:43
08 JUN 27
STATE OF WASHINGTON
DEPUTY



Emily Knudsen, Legal Assistant