

35767-4
NO. 35764-4-H

FILED
STATE
BY 

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

STATE OF WASHINGTON

Respondent

v.

LOWELL MALCOLM WHARTON

Appellant

THE HONORABLE JUDGE BARBARA D. JOHNSON (SUPPRESSION)
AND THE HONORABLE JUDGE ROGER A. BENNETT (TRIAL)
JUDGES OF THE SUPERIOR COURT
OF CLARK COUNTY, STATE OF WASHINGTON

REPLY BRIEF OF APPELLANT/CROSS-RESPONDANT

JAMES J. SOWDER
WSBA# 9072
Attorney for Appellant
1600 Daniels Street
P. O. Box 27
Vancouver, WA 98666-0027
(360) 695-4792

TABLE OF CONTENTS

A. STATEMENT OF THE CASE 1

B. RESPONSE TO CROSS APPEAL BY THE STATE OF
WASHINGTON ON THE ISSUE THE TRIAL COURT DID NOT
HAVE AUTHORITY TO STRIKE A FIREARM ENHANCEMENT
FINDING BY THE JURY 1

C. CONCLUSION 3

AUTHORITIES

TABLE OF CASES

State v. Workman 90 Wn.2d 443 (1978) 3

TABLE OF STATUTES

RCW 5.17 34

RCW 9A.2.020 34

RCW 9.94A.510 34

RCW 9.94A.517 34, 35

RCW 9.94A.518 34

RCW 9.94A.518, Table 4 34

RCW 9.94A.530 33

RCW 9.94A.533 33, 34, 35

RCW 9.94A.533(3) 34

RCW 9.94A.533 (f) 35

RCW 9.94A.602 35

A. STATEMENT OF THE CASE

Appellant /cross respondant submits the statement of the case he filed in his original brief.

B. RESPONSE TO CROSS APPEAL BY THE STATE OF WASHINGTON ON THE ISSUE THE TRIAL COURT DID NOT HAVE AUTHORITY TO STRIKE A FIREARM ENHANCEMENT FINDING BY THE JURY

The reply to this cross appeal is also contained at Page 14 of the Respondant's brief.

Appellant/ cross respondant had filed a response to it as a cross motion on the calculation of offender score contained on Page 33 of Appellant's brief. That section incorporated by reference, Appellant's reply states as follows:

Appellant's presumptive standard range with no prior felony convictions is 0-6 months. He was found guilty of Possession of a Controlled Substance by the jury but not guilty of Possession of Paraphernalia. The statutory sentence is 5 years and it is a Class C felony.

RCW 9.94A.530 provides the intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard range. The additional time for each deadly weapon finding is specified by RCW 9.94A.533 shall be added to the entire standard range.

The standard sentencing range is defined at RCW 9.94A.510. RCW 9.94A.517 is in reference to the drug offense sentencing grid. RCW

9.94A.518 makes all deadly weapon findings a Level 3 offense. This elevates Appellant from a Level 1 offense (PCS).

RCW 9.94A.533 provides for adjustments to the standard range. It provides this section shall apply to the standard range as determined by RCW 9.94A.510 and RCW 9.94A.517.

RCW 9.94A.533 (3) is applicable to firearm enhancements. It provides the following additional time shall be added to the standard range to determine subsection two. Based on the felony crime of conviction as classified under RCW 9A.2.020. It adds five years to a Class A felony, three years to a Class B and eighteen months to a Class C felony.

In subsection D if the standard range exceeds the statutory maximum sentence of the offense, the standard statutory maximum offense shall be the presumptive range. If the additional firearm enhancement increases the sentence so it exceeds the statutory maximum for the offense the portion of the sentence representing the enhancement may not be reduced.

As a result by RCW 9.94A.533 as a Class C felony with a standard range of 0-6 months, 18 months should be added to each end of the 0-6 month standard range, for a standard range of 18-24 months.

Respondent will argue the Appellant's offender score is based on RCW 5.17 and is 51-68 months. Based on RCW 9.94A.518, Table 4 it describes at seriousness level 3, any offense under Chapter 69.50 RCW with a deadly weapon special verdict under RCW 9.94A.602. These sections are in conflict. If the standard range to be added to as suggested by RCW 9.94A.533 is the

Table in RCW 9.94A.517 then the state would have the court add 18 months to the standard range of 51-68 months at each end for a total of 69-86 months. It would exceed the Appellant's statutory maximum of 60 months.

This is counting the deadly weapon enhancement twice, once by adding the 18 months and once by increasing the seriousness level. It punishes the Appellant twice on the same facts and violates his right to be free of double jeopardy and multiple punishments for the same event. As protected by the State and Federal Constitutions. Legislature recognized the danger of double punishment in subsection RCW 9.94A.533 (f). An exception to the firearm enhancement occurs when the firearm is an element of the crime.

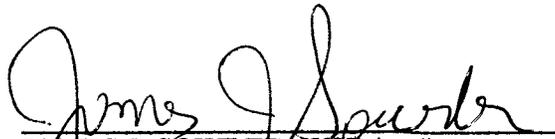
Legislature recognized State v. Workman 90 Wn.2d 443 (1978) prohibits double counting of an element of the offense with the purpose of proving existence of the crime and then using it to enhance the sentence without specific legislative intent to allow.

In resolving the discrepancy the rule of lenity should apply to give Appellant a standard range of 18-24 months. The trial court did not err in applying State v. Workman principals and did not add the firearm enhancement to the 51-68 month range.

C. CONCLUSION

The trial court was authorized to apply the principles in State v. Workman, 90 Wn.2d 443 (1978) and the rule in limine and not add the firearm enhancement to a 51-68 month range.

DATED this 3 day of December, 2007



JAMES J. SOWDER, WSBA, #9072
Attorney for Appellant

FILED
BY: *E*

**IN THE COURT OF APPEALS
DIVISION II**

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 LOWELL MALCOLM WHARTON,)
)
 Appellant.)

NO. 35767-4-II

DECLARATION OF MAILING

I, JAMES J. SOWDER, certify and declare under penalty of perjury under the laws of the State of Washington, on the 4 day of December, 2007, I personally mailed the REPLY BRIEF of APPELLANT/CROSS RESPONDANT to David Ponzoha, Clerk, Court of Appeals; hand delivered a copy of same to the office of Criminal Deputy Prosecuting Attorney for Kasey T. Vu; and mailed a copy to Appellant, Lowell Malcolm Wharton at the below listed addresses.

Mr. Kasey T. Vu
Deputy Prosecuting Attorney
1200 Franklin St
Vancouver, WA 98660

Mr. Lowell Malcolm Wharton
P.O. Box 518
White Salmon, WA 98672

Mr. David Ponzoha
Clerk of the Court of Appeals
Division II, Suite 500
949 Market Street
Tacoma, WA 98402

DATED this 4 day of December, 2007

James J. Sowder

JAMES J. SOWDER WSBA #9072
Attorney for Appellant

DECLARATION OF MAILING