

ORIGINAL

NO. 36442-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LEON G. TONEY,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 MAY 30 PM 1:55
STATE OF WASHINGTON
BY DEBRA

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The state's main argument is that *State v. Kilgore*, 141 Wn.App. 817, 172 P.3d 373 (2007), bars this Court from reviewing the sentencing issues raised in Mr. Toney's reinstated appeal from resentencing, because the court in *Kilgore* did not review the sentencing issues raised in that defendant's appeal from resentencing. The decision in *Kilgore*, however, was based on the fact that the Superior Court in that case exercised its discretion against conducting a full resentencing hearing – and since that exercise of discretion was reasonable, there was nothing to review. The Superior Court in Mr. Toney's case, however, did just the opposite. It conducted a full resentencing hearing, heard from all parties, exercised its discretion, and imposed a different sentence than it had before. The *Kilgore* bar is therefore inapplicable here. Instead, the rule governing the scope of this Court's review is RAP 2.5(a)(3), permitting review of constitutional errors raised for the first time on review. Section II.

The first error is that the “statutory maximum” to which Mr. Toney could be sentenced is the top of the standard range, under Former RCW 9.94A.120(13) and its cross-reference to RCW 9A.20.021(1). The court's sentence – when one combines imprisonment with community supervision – exceeds that. Section III.

The second error is the fact that Mr. Toney was given consecutive sentences for the crimes of assault with a firearm, plus a firearm enhancement, and burglary with a firearm, plus a firearm enhancement. Following *State v. Recuenco*, ___ Wn.2d ___, 180 P.3d 1276 (2008), it is now clear that the firearm “enhancement” is essentially the same as an element of a crime. That makes the firearm enhancement a lesser included offense of the greater crimes of assault with a firearm, and burglary with a firearm; the bar against double jeopardy prohibits consecutive sentences for such greater and lesser offenses. Section IV.

With regard to our final argument, the *Recuenco* decision also addressed whether there was a statutory procedure in place for imposition of not just a deadly weapon, but also a firearm enhancement, in Washington’s statutes. It ruled that the answer was yes. Section V.

II. KILGORE BARS APPELLATE REVIEW ONLY WHERE THE RESENTENCING COURT DECLINED TO CONDUCT A FULL RESENTENCING; THE RESENTENCING COURT HERE DID JUST THE OPPOSITE, SO THE KILGORE BAR IS INAPPLICABLE

The state’s main argument is that *State v. Kilgore*, 141 Wn.App. 817, 172 P.3d 373, bars this Court from reviewing the sentencing issues raised in Mr. Toney’s reinstated appeal from resentencing, because the court in *Kilgore* did not review the sentencing issues raised in that

defendant's appeal from resentencing.

But the plurality decision in *Kilgore* was not a blanket rule against addressing appellate issues after a second sentencing. It was much narrower than that. *Kilgore* was a case in which two of seven convictions were reversed; the reversal did not affect the standard range or presumptive sentence (absent departures above or below the range); the remand order from this Court was open ended and did not require the court to resentence; and the Superior Court exercised its discretion by declining to resentence. On appeal following that resentencing, this Court held only that the Superior Court did not abuse its discretion in making that decision.

In Mr. Toney's case, in contrast, this Court drastically changed his sentence on the first appeal by ruling that his firearm enhancements must run concurrently rather than consecutively. So Mr. Toney's was not a case where the appellate court victory was a victory for the defendant in name only, having no effect on the sentence. Instead, the appellate court's first decision on this case had a big effect on the sentence. To the extent the Superior Court had discretion not to resentence in any other way, the Superior Court in Mr. Toney's case actually chose the opposite course of action: it specifically decided that it would reconsider all sentencing arguments, give both parties a chance to present their positions, and gave

Mr. Toney a chance to allocute; the Superior Court judge thereafter reviewed the facts of the case and imposed sentence anew.

This is clear from the fact that at the resentencing hearing, defense counsel argued that under *State v. Broadaway*, 133 Wn.2d 118, 942 P.3d 363 (1997) and *In re Petition of Habbitt*, 96 Wn.2d 500, 636 P.2d 1098 (1981), “those cases do stand for that proposition that we’re pretty much going to do a resentencing, and in that regard, I know that Mr. Toney wishes to ask the court for imposition of a low end of the standard range.”¹ 9/29/00 VRP:6. The judge agreed that it would be a full resentencing; referring back to defense counsel’s comment that the court could reconsider the entire sentence, even “the imposition of a standard range sentence,” the court stated: “I don’t think you have to argue that. I’ve sort of approached this as if that’s what we were doing all along,” VRP:6.

The judge therefore heard from both lawyers and from the defendant himself on allocution. The judge then began sentencing by indicating that he remembered Mr. Toney’s case, and “Mr. Toney sort of is a problem for the court in some ways. On the one hand, he’s obviously

¹ Defense counsel was correct; *Broadaway* cited *Habbitt* with approval for its holding: “where the trial court improperly applied firearm findings to enhance first degree robbery convictions, remand for resentencing, rather than simply striking firearm enhancements, is the appropriate remedy.” *State v. Broadaway*, 133 Wn.2d 118, 136.

an intelligent young man. He both writes and speaks well. He and I have, in fact, had several letters go back and forth.” 9/29/00 VRP:12. The judge even reiterated that he was familiar with the facts of Mr. Toney’s case, as they came out at trial: “On the other hand, he has been convicted of several major of offenses, and in fact, I believe he is guilty of this offense just as the jury believed that he was guilty of this offense, at least from the facts we have heard.” *Id.*

The state therefore errs in stating that *Kilgore* bars this Court from reviewing the Superior Court’s decision against conducting a full resentencing. Actually, the Superior Court did just the opposite – it exercised its discretion in favor of conducting a full resentencing for Mr. Toney. *Kilgore*’s preclusion of review where the Court declines to conduct a full resentencing is therefore completely inapplicable here.

Instead, the rule of *State v. Davenport*, 140 Wn. App. 925, 167 P.3d 1221 (2007), must apply here. Under *Davenport*, when a defendant is returned for resentencing, and it is a resentencing at which the trial court exercises its discretion to make more than ministerial decisions, the defendant has a right to be present and the court has a right to conduct a full resentencing. In fact, the court can even consider issues that were not raised earlier. “At the resentencing hearing, the trial court had the discretion to consider issues *Davenport* did not raise at his initial

sentencing or in his first appeal.” *Davenport*, 140 Wn. App. 925, 932 (citing *State v. Barbiero*, 121 Wn.2d 48, 51, 846 P.2d 519 (1993) and *State v. Suave*, 33 Wn. App. 181, 183 n.2, 652 P.2d 967 (1982), *aff’d*, 100 Wn.2d 84 (1983)).

That conclusion is compelled with even greater force in this case, where none of the arguments raised on this appeal could have been raised before – since the critical decisions upon which they rely were not yet on the books. Mr. Toney was charged in 1996, and the first Judgment was entered on September 29, 2000. Sentencing occurred on August 28, 1997. Then came the first appeal. On May 7, 1999, the Court of Appeals reversed a portion of the sentence, ruling that the firearm enhancements had to run concurrently rather than consecutively.²

All of this predates *Apprendi*,³ *Blakely*,⁴ *Booker*,⁵ and *Recuenco*. *Apprendi* was decided in June of 2000; *Blakely* was decided in 2004; *Booker* was decided in 2005; and the remand in *Recuenco* was just

² *State v. Toney*, No. 22392-9-II, 1999 Wash. App. LEXIS 822 (May 7, 1999), *review denied*, 139 Wn.2d 1027 (2000).

³ *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

⁴ *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

⁵ *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

decided a few weeks ago. Yet those cases – or, more accurately, *Blakely* itself which for the first time applied *Apprendi*'s protections to Washington's sentencing scheme – form the basis for Mr. Toney's double jeopardy and *Zavala-Reynoso*⁶ claims.

As the motion to permit late filing of the notice of appeal explained, Mr. Toney was convicted of assault with a firearm, plus a firearm enhancement, and also burglary with a firearm plus a firearm enhancement. Assault as charged in this case – with a firearm – already had use of a firearm as an element, even before addition of the firearm enhancement. The same is true of the burglary of which Mr. Toney was convicted: it already had use of a firearm as an element, even before addition of the firearm enhancement.

We acknowledged that the Washington courts have consistently rejected double jeopardy challenges to charging both a substantive crime having use of a deadly weapon or firearm as an element, as well as a deadly weapon or firearm enhancement. We explained, however, that the state appellate courts had always reasoned that the underlying, substantive, statute was considered a crime containing the element of unlawful use of a weapon, while the enhancement statute was a matter in enhancement of

⁶ *State v. Zavala-Reynoso*, 127 Wn. App. 119, 110 P.3d 827 (2005).

penalty – not a crime and not an element. After the 2000 resentencing, meaning after *Apprendi* had finally been decided, was the first time that Mr. Toney could have argued that that logic – distinguishing between elements and enhancements – had to be reevaluated in light of *Apprendi*, *Blakely*, and *Booker*. In those cases, the Supreme Court made clear that any fact that increases the maximum penalty that may be imposed upon a criminal defendant is akin to an element of the crime, in that it must be proven to the jury beyond a reasonable doubt.

So *Kilgore* does not bar review.

The only legitimate question about the scope of review is the fact that these issues were not raised at the resentencing hearing, and are raised for the first time on appeal. That, however, is a question that is answered by RAP 2.5(a)(3), permitting review of manifest constitutional errors raised for the first time on appeal. Since *Blakely*, *Booker*, *Apprendi*, and *Recuenco* are undoubtedly cases establishing rules based on the constitutional rights to jury trial and the due process right to proof beyond a reasonable doubt, they fit neatly within the scope of RAP 2.5(a)(3) review. Indeed, whenever the Washington appellate courts have been presented with claims that the defendant was deprived of the protection of the right to proof beyond a reasonable doubt – on an element concerning

the defendant's intent, as in this accompanying note,⁷ or on an element concerning the defendant's acts, as in this accompanying note⁸ – the courts have ruled that the issue might be reviewed for the first time on appeal.

III. THE STATE FAILS TO RESPOND TO THE STATUTORY ARGUMENT THAT “STATUTORY MAXIMUM” MEANS THE HIGH END OF THE STANDARD RANGE UNDER FORMER RCW 9.94A.120(13) AND ITS CROSS-REFERENCE TO RCW 9A.20.021(1)

⁷ *State v. Deal*, 128 Wn.2d 693, 911 P.2d 996 (1996). *See also State v. Byrd*, 72 Wn. App. 774 (1994), *aff'd* 125 Wn.2d 707, 887 P.2d 396 (1995) (reversing assault conviction due to failure to instruct jury properly on intent element, even though this basis for reversal was raised for the first time on appeal, citing RAP 2.5(a)(3); the failure to give the instruction on the state's burden of proving this element of the charged crime “prejudicially relieve[d] the state of its burden of proof or prejudicially deprive[d] the defendant of the benefit of having the jury pass upon a significant and disputed issue” and impacted the defendant's right to a fair trial, 72 Wn. App. 774, 782-83).

⁸ *See, e.g., State v. Stark*, 48 Wn. App. 245, 251 n.4, 738 P.2d 684 (1987) (“in a multiple acts case where the issue is raised for the first time on appeal, the court held ‘a defective verdict which deprives the defendant of his fundamental constitutional right to a jury trial may be raised for the first time on appeal’”); *State v. Gitchel*, 41 Wn. App. 820, 821-22, 706 P.2d 1091 (1985) (in a multiple incidents case in which the defendant failed to raise the issue of a jury unanimity at trial, the court held “the right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury, and the issue may be raised for the first time on appeal”). *Cf. State v. Green*, 94 Wn.2d 216, 231, 616 P.2d 628 (1980) (in an alternative means case where the charge was aggravated murder in the first degree, and the error was failure to instruct the jury as to unanimity on whether the death occurred in furtherance of rape or kidnapping, the court held that the error may be raised for the first time on appeal because “the giving or failure to give an instruction invades a fundamental right of the accused, such as the right to a jury trial. Constitution Article I, Section 21.”).

The state's first response to the *Zavala-Reynoso* argument is that there is no additional factfinding required to impose community custody, so it can be imposed even if it exceeds the standard sentence range. Response, p. 8. It returns to this theme throughout: community custody is totally different from the "sentence" and hence the *Blakely/Apprendi* restraints on jury factfinding beyond a reasonable doubt do not apply to it.

The basic rule that we are starting with, though, is not the *Blakely/Apprendi* rule requiring certain factfinding before community custody can be imposed. It is the *Zavala-Reynoso* rule stating that the combined sentence cannot exceed the maximum sentence for the crime. We then turned to the statutes defining "maximum" or "statutory maximum." We found that the applicable sentencing statute controlling sentencing in Mr. Toney's case provided, "a court may not impose a sentence providing for a term of confinement or community supervision or community placement which exceeds the *statutory maximum for the crime as provided in chapter 9A.20 RCW.*" Former RCW 9.94A.120(13) (1998) (emphasis added). The referenced RCW 9A.20 states in part: "*Unless a different maximum sentence for a classified felony is specifically established by a statute of this state*, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment” RCW 9A.20.021(1) (emphasis added). And “a different maximum sentence” is “specifically established by a statute of this state” for both first-degree assault and first-degree burglary. As the *Blakely* Court explained, the Washington Sentencing Guidelines are statutory and they do establish a different and lower statutory maximum for each of the crimes that they list. It is the statutory maximum in the SRA Guidelines table: for first-degree assault in Mr. Toney’s case, that was 75 months; for first-degree burglary it was 216 months.

The state did not respond to this statutory interpretation argument. The state did not respond to the conclusion it compels, that is, that the statutory maximum even for *Zavala-Reynoso* purposes is the high end of the standard range. It did not respond to the argument that even if this conclusion were not clearly compelled by the language of RCW 9A.20.021 incorporating the SRA standard ranges by reference, it was compelled by the rule of lenity – as well as the statutory construction principle of constitutional avoidance.

Under all of these authorities – to which the state did not respond – Mr. Toney’s sentence exceeds – or arguably exceeds – the *Blakely*-statutory maximum for first-degree assault and burglary. The remedy for

this error is re-sentencing.

IV. THE STATE ARGUES THAT THE LEGISLATURE ALONE DETERMINES WHAT PUNISHMENTS CAN BE IMPOSED WITHOUT JUDICIAL REVIEW OF DOUBLE JEOPARDY IMPLICATIONS. THE SUPREME COURT, HOWEVER, DISAGREES, ESPECIALLY WHERE A FIREARM ELEMENT AND FIREARM ENHANCEMENT ARE AT ISSUE

With regard to the double jeopardy argument, the state's Response simply reiterates the obvious, that is, that Washington courts have rejected this argument (that imposition of a conviction based on firearm use plus an "enhancement" based on the same use violates double jeopardy clause protections) in the past. Response, pp. 11-12. We acknowledged this in the Opening Brief. Opening Brief, pp. 22-23 & n.9.

The state also cites to a post-*Blakely* decision from another Division, *State v. Nguyen*, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006), *petition for review pending*, coming to the same conclusion – a decision that we initially disclosed in the Opening Brief. Opening Brief, p. 25.

This Court, however, has not yet decided whether *Apprendi* or *Blakely* compel re-evaluation of these conclusions, and the state says nothing to the contrary in its Response.

It argues, instead, that under the double jeopardy clause, the state can punish the same acts twice as long as the legislature says so – without any inquiry into whether federal constitutional protections are violated.

Response, pp. 15-17.

This is incorrect. Whether the application of state law violated a defendant's double jeopardy rights is a question of federal law. *Boyd v. Mechum*, 77 F.3d 60, 65 (2d Cir.), *cert. denied*, 519 U.S. 838 (1996) (whether application of state law violated defendant's federal due process rights is question of federal law; "while we may choose to look to state law to determine whether or not a criminal court has sufficient jurisdiction for jeopardy to attach, a state-law conclusion that the court had no 'personal jurisdiction' over the defendant is not binding upon us in the double jeopardy context"). *Accord Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir. 1991) (federal constitutional right's application cannot turn on vagueries of state procedural definitions). Hence, the state legislature cannot be the final arbiter of that federal question – the court has a duty to resolve it.

For example, in *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d (1978), the Supreme Court conducted a searching review of a statute with firearm use as an element plus an additional firearm sentencing enhancement. It ruled that application of double sentence enhancements – for firearms – was impermissible. The question in that case arose under a federal statute; the defendant had been convicted of bank robbery in violation of 18 U.S.C. § 2113(a) and the issue was whether his sentence could be increased by both § 2113(d), which provides an additional sentence

when the robbery is committed “by the use of a dangerous weapon or device,” and also by 18 U.S.C. § 924(c), which provides that “whoever uses a firearm to commit any felony” shall receive an enhanced sentence. In that case as in this case, the trial court imposed a consecutive sentence for the enhancement.

The Supreme Court reversed. It ruled that double punishments could not be applied. It based this decision in part on the rule that ambiguity in whether the legislature intended multiple punishments must be resolved in favor of the defendant. It also based its decision in part on the fact that a specific penalty statute must take precedence over a general penalty statute even when the more general one was enacted later. *Id.*, 435 U.S. 6, 15. Thus, only the one penalty enhancement could be applied.

The Supreme Court further recognized the double jeopardy problem potentially posed by application of the double enhancements. Under the principle of constitutional avoidance,⁹ however, it ruled that principles of statutory construction made resolution of that double jeopardy question unnecessary. Similarly, in *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 69 L.Ed.2d 381 (1980), following *Simpson*, the Supreme Court ruled

⁹ The general rule of constitutional avoidance compels resolution of issues on non-constitutional grounds when possible. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985).

that 18 U.S.C. § 924(c) – a federal firearm enhancement statute – cannot be applied to a criminal defendant who uses a firearm during the course of a felony that is proscribed by a statute which itself authorizes imposition of an enhanced penalty if a deadly weapon is used. Thus, under binding Supreme Court precedent, the courts must give searching review to firearm enhancement statutes as to whether they violate double jeopardy clause protections – even though the legislature has enacted those statutes.

Decisions following *Simpson* and *Busic* recognize the double jeopardy underpinnings of those holdings. *United States v. Centeno-Torres*, 50 F.3d 84, 85 (1st Cir.), *cert. denied*, 516 U.S. 878 (1995) (“The district court relied heavily on the Supreme Court’s Double Jeopardy analysis in *Simpson* ... and *Busic*”); *Grimes v. United States*, 607 F.2d 6, 11 (2d Cir. 1979) (“Quite plainly, this raises significant double jeopardy problems,” citing *Simpson*).

Plainly, following *Simpson*, the courts have a duty to decide whether imposition of a firearm enhancement, on a statute with firearm use as an element, violates double jeopardy – the legislature’s adoption of a statute allowing that, alone, does not resolve the question.

When resolving that question, this Court must now consider the Washington Supreme Court’s decision on remand in *State v. Recuenco*, ___ Wn.2d ___, 180 P.3d 1276 (2008). In that case, the Court explicitly ruled

that, “When the term ‘sentence enhancement’ describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an ‘element’ of a greater offense than the one covered by the jury’s guilty verdict.” *Recuenco*, 180 P.3d at 1279 (citing *Apprendi*).

This effectively overturns the reasoning of all the pre-*Blakely* cases which had ruled that there is no double jeopardy problem with double-charging a crime with a firearm as an element along with a firearm enhancement. As we noted in the Opening Brief, those decisions were all based on the notion that the firearm enhancement was not an element and hence was not subject to the double jeopardy rules to which an element would be subject.

Now we know that it is “the equivalent of an element.” *Recuenco*, 180 P.3d at 1279. The element-enhancement distinction no longer saves this double punishment from a double jeopardy challenge.

Instead, it is now clear that the firearm enhancement or “element” is essentially a lesser included offense of the assault and burglary crimes having firearm use as an element – because the former (use of a firearm) is necessarily included in the latter (assault with a firearm and burglary with a firearm). In this situation, the controlling rule is that the double jeopardy clause bars conviction of both the greater and lesser offense for the same incident. *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d

1054 (1977); *In re Nielsen*, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889). This would seem to end the discussion; the firearm “enhancement” or element/crime cannot be punished separately from the assault and burglary crimes, of which it is a lesser included offense. *United States v. Jose*, 425 F.3d 1237, 1241 (9th Cir. 2005), *cert. denied*, 547 U.S. 1060 (2006) (“Thus, a lesser included offense, which by definition ‘requires no proof beyond that which is required for conviction of the greater,’ is the ‘same’ for purposes of double jeopardy as any greater offense in which it inheres. *Brown [v. Ohio]*, 432 U.S. 168, 97 S.Ct. 2221[, 531 L.Ed.2d 187 (1977)].”).

V. THE RECENT *RECUENCO* DECISION APPLIES TO THE ARGUMENT ABOUT WHETHER WASHINGTON HAS A PROCEDURE FOR IMPOSING THE FIREARM ENHANCEMENT

We bring to this Court’s attention the following portion of the recent decision, on remand, in *State v. Recuenco*, ___ Wn.2d ___, 180 P.3d 1276, 1281-82: “We disagree with Recuenco’s argument that the legislature has ‘fail[ed] to create a statutory procedure by which a jury could find a firearm special verdict preclud[ing] the imposition of the firearm enhancements prescribed in [former] RCW 9.94A.310(3).”

//

VI. CONCLUSION

For the foregoing reasons, the sentence should be vacated and the case remanded for full resentencing.

DATED: May 29, 2008

Respectfully submitted,



Sheryl Gordon McCloud, WSBA No. 16709
Attorney for Appellant, Leon G. Toney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of May, 2008, a copy of the foregoing REPLY BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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Sheryl Gordon McCloud