

No. 40403-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

SHAWNY LEE BERTRAND,

Appellant.

10 DEC 28 PM 4:19
STATE OF WASHINGTON
BY DEPUTY
COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Richard L. Brosey

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ARGUMENT 1

 1. THE IMPOSITION OF AN INVALID SENTENCE ENHANCEMENT PURSUANT TO *STATE v. BASHAW* MUST RESULT IN THE ENHANCEMENT BEING STRICKEN..... 1

 a. The error can be raised for the first time on appeal..... 1

 b. Under *Bashaw*, the error can never be harmless.. 3

 c. The remedy is reversal of the firearm enhancement and remand for dismissal of the enhancement..... 3

 2. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED MS BERTRAND'S RIGHT TO EQUAL PROTECTION IN IMPOSING COURT COSTS AND ATTORNEY'S FEES IN LIGHT OF HER INABILITY TO PAY..... 4

B. CONCLUSION..... 6

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Baldwin, 63 Wn.App. 303, 818 P.2d 1116 (1991) 5

State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) i, 1, 3

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)..... 2

State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003) 2

State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) 2, 4

State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004)..... 2

State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913
(2010) 2, 3, 4

STATUTES

RCW 9.94A.753 5

A. ARGUMENT

1. THE IMPOSITION OF AN INVALID SENTENCE ENHANCEMENT PURSUANT TO *STATE v. BASHAW* MUST RESULT IN THE ENHANCEMENT BEING STRICKEN

Initially, the State contends that no error occurred at all since the jury was instructed that if it had a reasonable doubt it was their duty to answer the special verdict “no.” Brief of Respondent at 3-4.

But, the State ignores the beginning of the special verdict instruction:

If you find the defendant not guilty of Delivery of a Controlled Substance, do not use the special verdict form. If you find the defendant guilty, you will complete the special verdict. *Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.*

CP 33 (emphasis added).

Thus the jury was instructed that whether it answered “yes” or “no,” the jury had to be unanimous. This was error under *State v. Bashaw* because the jury did not have to be unanimous to answer “no.” 169 Wn.2d 133, 146, 234 P.3d 195 (2010).

a. The error can be raised for the first time on appeal.

While the State is correct that Ms. Bertrand did not object to Court’s Instruction 13, neither did the defendants in either *State v. Goldberg* or in *Bashaw*. Nevertheless, the Supreme Court

addressed the issue and vacated the special finding and the enhanced sentence based upon the improper instruction. *Bashaw*, 169 Wn.2d at 146-47; *State v. Goldberg*, 149 Wn.2d 888, 892-94, 72 P.3d 1083 (2003). As a consequence, Mr. Bertrand may raise this issue for the first time on appeal.

More to the point, the error occurred not in the use of the invalid instruction but when the trial court imposed the sentence enhancement based upon an invalid special verdict. A sentence enhancement must be authorized by a valid jury special verdict. *State v. Williams-Walker*, 167 Wn.2d 889, 900, 225 P.3d 913 (2010). Error occurs when the trial court imposes a sentence enhancement not authorized by a valid jury verdict. See *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (the error in imposing a firearm enhancement where the jury found only a deadly weapon occurred during sentencing, not in the jury's determination of guilt).

"[I]llegal or erroneous sentences may be challenged for the first time on appeal," regardless of whether defense counsel registered a proper objection before the trial court. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004), quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Thus, contrary to the

State's argument, Ms. Bertrand may raise this issue for the first time on appeal because it involves the imposition of an invalid sentence.

b. Under *Bashaw*, the error can never be harmless.

In *Bashaw*, the same instruction at issue here was used. The Supreme Court refused to apply harmless error:

This argument misses the point. The error here was the *procedure* by which unanimity would be inappropriately achieved.

...

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction . . . We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Id. at 147-48 (emphasis added).

The same analysis applies here. The same instruction was used here as was utilized in *Bashaw*, thus this Court is foreclosed from applying a harmless error analysis.

c. The remedy is reversal of the firearm enhancement and remand for dismissal of the enhancement. Ms. Bertrand submits the remedy is dismissal of the firearm enhancement. The Supreme Court in *Williams-Walker, supra*, held that a firearm enhancement is not an element of the offense but a

sentencing factor, and the remedy for an improper firearm enhancement finding by the jury is to reverse the sentence and strike the enhancement. 167 Wn.2d at 899-902.

Here, the trial court's error in imposing the firearm enhancement without a *valid* special verdict to support it occurred when the trial court imposed the sentence for the enhancement. See *Recuenco*, 163 Wn.2d at 440. Thus, the remedy for an improper special verdict is to strike the enhancement, not remand for a new trial. *Williams-Walker*, 167 Wn.2d at 899-900; *Recuenco*, 163 Wn.2d at 441-42.

2. THE TRIAL COURT EXCEEDED ITS
STAUTORY AUTHORITY AND VIOLATED MS
BERTRAND'S RIGHT TO EQUAL
PROTECTION IN IMPOSING COURT COSTS
AND ATTORNEY'S FEES IN LIGHT OF HER
INABILITY TO PAY

The State contends the fees were properly authorized and imposed, and the issue is not yet ripe because the State has not enforced the judgment on the fees. The State misapprehends or misunderstands Ms. Bertrand's argument. Ms. Bertrand's argument is directed at the trial court's finding of a present and future ability to pay where the evidence before it plainly indicated she had neither.

The court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. *State v. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116 (1991). While the trial court is not required to make express findings as to the ability to pay, the court here did. The court checked the box next to the portion speaking to the defendant's ability to pay. CP 38. As a result, the court here found:

The court has considered the total amount owing, the defendant's past, present, and future ability to pay financial legal obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:

That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 38. While the court was not *required* to make an on-the-record finding of an ability to pay, since the court *did* make an express finding, that finding is before this Court reviewed whether that finding was clearly erroneous. Thus the issue is not whether the court *could* impose the costs and fees, the issue is whether the court's *finding* that Ms. Bertrand had the ability to pay was clearly erroneous.

Evidence adduced at trial showed Ms. Bertrand had been evicted from her home for failing to pay rent. RP 110-11. She had a limited fixed income. RP 62-63. At the time of her arraignment, it was determined Ms. Bertrand was indigent, unable to contribute to her defense, and as a result, was appointed an attorney to represent her. Further, Ms. Bertrand suffered from a medical disability, which was the basis for her to obtain and possess Oxycodone and severely limited her ability to remedy her disability. RP 114.

Nevertheless, at sentencing, contrary to the evidence before it regarding Ms. Bertrand's indigency, the court imposed costs and fees totaling \$4334, and ordered her to make minimum payments of \$25 per month to begin upon her completion of her 36 month sentence. But, in light of this overwhelming evidence that Ms. Bertrand had no ability to pay these costs nor would she have the ability to pay in the future, the court's "finding" was clearly erroneous.

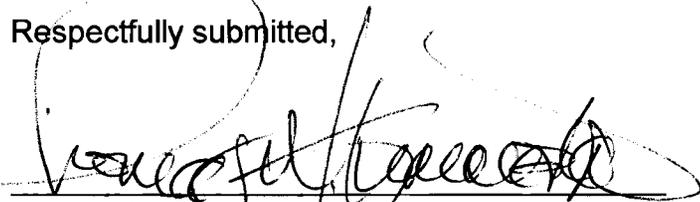
B. CONCLUSION

For the reasons stated, Ms. Bertrand submits this Court should strike the school bus route stop enhancement and remand for resentencing, as well as reverse the trial court's imposition of

costs and fees and remand for a determination of the trial court to
waive the costs and fees in light of Ms. Bertrand's inability to pay.

DATED this 27th day of December 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', written over a horizontal line.

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DIVISION TWO**

STATE OF WASHINGTON,)	
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Respondent,)	
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SHAWNY BERTRAND,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF DECEMBER, 2010.

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