

No. 41994-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

David Lander,

Appellant.

Thurston County Superior Court
Cause Nos. 09-1-341-0, 09-1-00342-8
The Honorable Judge Gary Tabor

Appellant's Reply Brief

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ARGUMENT

I. THE SENTENCING JUDGE WAS NOT EMPOWERED TO IMPOSE FIREARM ENHANCEMENTS BECAUSE THE INFORMATION CHARGED DEADLY WEAPON ENHANCEMENTS AND THE COURT INSTRUCTED THE JURY ON DEADLY WEAPON ENHANCEMENTS.

The court may not impose a firearm enhancement when the state has charged a deadly weapon enhancement. *In re Personal Restraint of Delgado*, 149 Wash.App. 223, 234, 204 P.3d 936 (2009). To do so would result in conviction and sentencing for an uncharged enhancement, without prior notice to the accused person. *Id.*, at 234-235.

In this case, the Information charged deadly weapon enhancements and the instructions related to a deadly weapon special verdict. CP 26-27, 69, 70. Under *Delgado*, the imposition of firearm enhancements violated Mr. Lander's right to due process and his constitutional right to a jury trial. *Id.* It is irrelevant that the specific deadly weapon charged happened to be a firearm, for the reasons outlined in *Delgado* and in *State v. Recuenco*, 163 Wash.2d 428, 180 P.3d 1276 (2008).

Nor is the Information's citation to RCW 9.94A.533(3) sufficient to charge a firearm enhancement rather than a deadly weapon enhancement. Citing a statute is not sufficient to give notice to an accused person, even if reading the statute would answer the person's questions. *See State v. Naillieux*, 158 Wash.App. 630, 645, 241 P.3d 1280 (2010)

(“[c]iting the correct statute...is not enough”); *see also State v. Brown*, 169 Wash.2d 195, 198, 234 P.3d 212 (2010) (“[M]ere reference to a statute does not sufficiently allege the essential elements.”)

Respondent relies on *dicta* from a Division I case to suggest that citation to the firearm enhancement statute can change a deadly weapon allegation into a firearm allegation. Brief of Respondent, pp. 11-12 (citing *In re Personal Restraint of Rivera*, 152 Wash.App. 794, 218 P.3d 638 (2009). But the court’s *dicta* in *Rivera* fails to address *Naillieux*, *Brown*, and the other cases holding that the Information’s citation to a statute cannot alter the crime charged. The Court should not follow the *Rivera* court’s *dicta*, and should reject Respondent’s attempt to distinguish *Delgado* on this basis. *See* Brief of Respondent, p. 9-10.

The remainder of Respondent’s argument hinges on the use of the word “firearm” in the special verdict forms. According to Respondent, whenever a special verdict form uses the word firearm, a firearm enhancement may be imposed: “the jury verdict controls the enhancement the sentencing court can give.” Brief of Respondent, p. 13.

This is incorrect. The court was not empowered to impose a firearm enhancement here despite the use of the word “firearm” in the special verdict forms. CP 69, 70. This is because Mr. Lander was charged with being armed with a deadly weapon (which happened to be a firearm),

and because the jury was instructed to consider whether or not Mr. Lander was armed with a deadly weapon. CP 62. Respondent's argument regarding the primacy of the verdict form is misplaced. Brief of Respondent, p. 12 (citing *State v. Williams-Walker*, 167 Wash.2d 889, 225 P.3d 913 (2010)).

Accordingly, Mr. Lander's firearm enhancements must be vacated.

Id.

II. THE FIREARM ENHANCEMENTS ARE PROPERLY BEFORE THE COURT IN THIS APPEAL.

A. Errors in sentencing can be raised at any time.

An appellate court has the power and the duty to correct an erroneous or illegal sentence whenever it is discovered. *State v. Ford*, 137 Wash.2d 472, 477-478, 973 P.2d 452 (1999) (citing *State v. Loux*, 69 Wash.2d 855, 858, 420 P.2d 693 (1966), *overruled in part on other grounds by State v. Moen*, 129 Wash.2d 535, 919 P.2d 69 (1996)). This is an exception to the general rule limiting the scope of review. *See* RAP 2.5. The exception applies even when the claimed error is not jurisdictional or constitutional. *Ford*, at 477-478.

Because Mr. Lander challenges an illegal or erroneous sentence, the issue may be reviewed for the first time in this proceeding, even though it was not addressed in the trial court or in his first appeal. *Id.*

Respondent's argument to the contrary is without merit. *See* Brief of Respondent, pp. 3-7.

B. Mr. Lander is constitutionally entitled to appeal the trial court's judgment and sentence.

A criminal defendant has a state constitutional right to appeal. Wash. Const. Article I, Section 22; *City of Seattle v. Klein*, 161 Wash.2d 554, 166 P.3d 1149 (2007). This constitutional right should not be diminished merely because a litigant successfully prosecuted an earlier appeal. In this case, Mr. Lander successfully appealed from his original judgment and sentence; this successful appeal should not bar him from arguing that his firearm enhancements were imposed in violation of his constitutional rights.

Furthermore, "[t]he right to appeal is not waived unless the State proves that the appellant made a *voluntary, knowing, and intelligent waiver.*" *Klein*, at 561 (emphasis in original). The prosecutor has made no effort to prove that Mr. Lander knowingly, intelligently, and voluntarily waived his right to appeal the erroneous imposition of firearm enhancements. *See* Brief of Respondent, *generally*. Nor can a waiver be found in the record. *See* RP, *generally*; CP, *generally*.

Finally, although there is a legitimate need for judicial economy in appellate cases, this need cannot overcome a criminal defendant's

constitutional right to appeal. In addition, although it would have been preferable for him to raise the issue in his first appeal, at this point, judicial economy favors resolving the issue in the current proceeding. Should the Court refuse to review the errors raised by Mr. Lander, the parties will return to court on another occasion to litigate the issue as a separate Personal Restraint Petition.

The Court of Appeals should consider Mr. Lander's arguments on their merits. Respondent's argument to the contrary is without merit. *See* Brief of Respondent, pp. 3-7.

C. The "law of the case" doctrine does not prohibit review.

Mr. Lander should be able to litigate the constitutionality of the firearm enhancements imposed by the trial court. Respondent makes veiled reference to the "law of the case" doctrine. *See* Brief of Respondent, pp. 3-7 (citing RAP 2.5(c)). The doctrine does not bar argument under the circumstances of this case.

First, the law of the case doctrine does not apply, because the prior appellate decision did not explicitly or implicitly address the issues raised in the current proceeding. *See, e.g., State v. Trask*, 98 Wash.App. 690, 695, 990 P.2d 976 (2000).

Second, the Court has the power under RAP 2.5(c) (captioned "Law of the Case Doctrine Restricted") to review a trial court decision,

even if the appellant failed to dispute a similar decision in an earlier appeal. The rule provides that “the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.” RAP 2.5(c)(1). This rule authorizes the Court to hear Mr. Lander’s argument, even if it were otherwise barred by the law of the case doctrine.

Third, the law of the case doctrine is “highly discretionary,” and is not an absolute bar to litigation. *Trask*, at 695. Even if the law of the case doctrine applied to the issues here, the Court could—and should—exercise discretion to review the arguments and decide the case on its merits. *Id.*

Fourth, the Court has discretion to accept review of any issue. RAP 2.5(a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

For all these reasons, Respondent’s contention that “Lander may not appeal the firearm enhancements” is incorrect. Brief of Respondent, pp. 3. The Court should evaluate the merits of the issue.

CONCLUSION

For the foregoing reasons, Mr. Lander's firearm enhancements must be vacated.

Respectfully submitted on September 20, 2011.

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CERTIFICATE OF MAILING

I certify that on September 20, 2011:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 20, 2011.



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Transmittal Letter

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