

No. 42338-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Donshae Coleman,

Appellant.

Thurston County Superior Court Cause No. 08-1-00634-8

The Honorable Judge Christine A. Pomeroy

Appellant's Reply Brief

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ARGUMENT

I. MR. COLEMAN’S FIREARM ENHANCEMENT WAS IMPOSED IN VIOLATION OF THE SUPREME COURT’S *BASHAW* DECISION.

Jury instructions in a criminal case must make clear that the jury need not be unanimous to return a “no” answer on a special verdict form. *State v. Bashaw*, 169 Wash.2d 133, 148, 234 P.3d 195 (2010). The instructions in this case did not make this manifestly apparent to the average juror; thus, the firearm enhancement was imposed in violation of *Bashaw*. See Appellant’s Opening Brief, at p. 3-7.

Respondent neither disputes the error nor argues that it was harmless. Brief of Respondent, pp. 2-15. Respondent’s failure to argue these issues may be treated as a concession. See *In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009).

Instead, Respondent suggests (1) that Mr. Coleman waived the argument by failing to raise it at his trial or in his first appeal, and (2) that the issue was not revived after remand because the trial judge did not exercise independent judgment at the resentencing hearing. Brief of Respondent, pp. 8-13. Respondent is incorrect on both counts.

First, Mr. Coleman could not raise the issue at trial because he was convicted and sentenced in April of 2009, before *Bashaw* was decided.

Likewise, all of the briefing in his first appeal was completed in 2009, before the Supreme Court issued its decision in *Bashaw*.

Mr. Coleman's case is not yet final, because his sentence was vacated and the case is still on direct appeal from the resentencing hearing. See *In re Skylstad*, 160 Wash.2d 944, 946, 162 P.3d 413 (2007) ("A judgment cannot be final until the conviction and the sentence are both final.") Because the conviction and sentence are not both final, Mr. Coleman's case is still pending; accordingly, *Bashaw* can be applied to correct the error in Mr. Coleman's case.

Second, the trial court *did* exercise independent judgment by imposing a new sentence at the resentencing hearing. The Court of Appeals "remanded" Mr. Coleman's case "for resentencing." CP 94. It did not remand the case for correction of the judgment and sentence; nor did it simply permit the lower court to amend the judgment and sentence. CP 94. The resentencing on remand was therefore "an entirely new sentencing proceeding." *State v. McNeal*, 142 Wash. App. 777, 787 n. 13, 175 P.3d 1139 (2008).

Because the sentencing court imposed a new sentence, all aspects of that sentence are available for review on appeal. This includes any manifest errors affecting Mr. Coleman's right, such as the imposition of a firearm enhancement in violation of *Blakely*, as argued in Appellant's

Opening Brief. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)).

II. BECAUSE THE DECISION IN *BASHAW* IS OF CONSTITUTIONAL DIMENSION, THE COURT SHOULD REEXAMINE ITS RECENT DECISION IN *GRIMES*.

Respondent does not argue that *Bashaw* errors are nonconstitutional. See Brief of Respondent, *generally*. However, Division II has recently joined Division III and one panel of Division I in holding that *Bashaw* errors cannot be raised for the first time on review under RAP 2.5(a)(3).¹ *State v. Grimes*, 165 Wash.App. 172, 267 P.3d 454 (2011) (citing *State v. Nunez*, 160 Wash.App. 150, 248 P.3d 103 (2011), *State v. Ryan*, 160 Wash.App. 944, 252 P.3d 895 (2011), and *State v. Morgan*, 163 Wash.App. 341, 261 P.3d 167 (2011)).

Grimes and its predecessors all address *Bashaw* errors under the due process clause; none of these cases analyze *Bashaw* errors in terms of jury coercion and the constitutional right to a jury trial. See, e.g., *Grimes, generally*.²

¹ Even if the error did not affect a constitutional right, the court should exercise its discretion and review the argument on its merits. RAP 2.5(a); *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

² For preservation of error purposes, Mr. Coleman maintains that the error in his case also violates due process. *Ryan, supra*.

Instructions requiring jurors to deliberate to unanimity are coercive, in violation of the constitutional right to a jury trial.³ *See, e.g., State v. Jones*, 97 Wash.2d 159, 641 P.2d 708 (1982); U.S. Const. Amend. VI and XIV; Wash. Const. Article I, Sections 21, and 22. By requiring the jury to deliberate to unanimity, the erroneous instructions coerce a verdict by automatically rejecting any split verdict, and mechanically directing jurors to continue deliberating. Proper instructions allow jurors to deliver a “no” verdict before they reach unanimity. The erroneous instructions forbid a legitimate but nonunanimous “no” verdict, and the jury coerced into returning a unanimous verdict. This violates the constitutional right to a jury trial under the Sixth Amendment and Article I, Sections 21 and 22. *Jones, supra*.

CONCLUSION

Mr. Coleman’s firearm enhancement must be vacated and the case remanded for resentencing without the enhancement.

³ In *Bashaw* and its predecessor—*Goldberg*-- the Supreme Court found it unnecessary to reach the issue of jury coercion. *See Bashaw*, at 146 (citing *State v. Goldberg*, 149 Wash.2d 888, 72 P.3d 1083 (2003)).

Respectfully submitted on February 14, 2012.

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply 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 February 14, 2012.



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February 14, 2012 - 10:06 AM

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