

FILED
Court of Appeals
Division II
State of Washington
7/29/2020 4:24 PM

No. 50608-4-II

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

In re Personal Restraint Petition of:

AUSTIN MOORES-NELSON,

Petitioner.

SUPPLEMENTAL REPLY BRIEF OF PETITIONER

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A. ARGUMENT IN REPLY

1. The unlawful firearm enhancement on the animal cruelty conviction renders Mr. Nelson's guilty plea involuntary. Because Mr. Nelson establishes prejudice, he is entitled to withdraw his plea.

a. *The State's argument that firearm enhancements apply to "unranked offenses" has been consistently rejected by this Court. This Court should follow its well reasoned precedent.*

This Court has repeatedly held that firearm enhancements do not apply to "unranked" offenses. State v. Soto, 177 Wn. App. 706, 714-15, 309 P.3d 596 (2013); State v. Vazquez, 200 Wn. App. 220, 225-28, 402 P.3d 276 (2017), review denied, 189 Wn.2d 1040, 409 P.3d 1070 (2018).¹ The State agrees that Mr. Nelson's conviction for animal cruelty is an unranked offense. Nevertheless, the State argues that the firearm enhancement on that conviction is lawful. In advancing this argument, the State acknowledges the precedent holding otherwise, but argues these cases were wrongly decided.

This Court should reject the State's arguments and abide by its precedent. "The various panels of the Court of Appeals strive not to be in conflict with each other because, like all courts, we respect the doctrine of

¹ This Court has applied this rule in several unpublished cases. State v. Hayes, noted at 10 Wn. App. 2d 1021, 2019 WL 4447622, at *7-8 (2019); Matter of Edmondson, noted at 9 Wn. App. 2d 1065, 2019 WL 3231015, at *1 (2019); State v. Castro, noted at 195 Wn. App. 1056, 2016 WL 4537866, at *5-6 (2017); State v. Hull, 185 Wn. App. 1005, 2014 WL 7231496, at *4 (2015). These cases are cited as persuasive authority. GR 14.1(a).

stare decisis.” Grisby v. Herzog, 190 Wn. App. 786, 807, 362 P.3d 763 (2015). To be sure, this Court is free to disagree with its precedent. In re Pers. Restraint of Arnold, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018). But uniformity and consistency remain core values. Id. at 151-52. And while not strictly binding, previous decisions by this Court are entitled to “respectful consideration.” Id. at 154.

The holdings in Soto and Vasquez are based on the plain language of RCW 9.94A.533(1). Soto, 177 Wn. App. at 714-15; Vazquez, 200 Wn. App. at 226. That statute, which states that “[t]he provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517,” limits the scope of the firearm enhancements. Soto, 177 Wn. App. at 714-15; Vazquez, 200 Wn. App. at 226. Because the punishment of an unranked offense is not governed by the standard range sentencing tables set out in either RCW 9.94A.510 or 9.94A.517, the firearm enhancement provision set out in RCW 9.94A.533(3) does not apply to unranked offenses. Soto, 177 Wn. App. at 714-15; Vazquez, 200 Wn. App. at 226-27.

Here, the State has not advanced a compelling argument on why this Court should depart from Soto and Vasquez. Rather, the State simply repeats the arguments that this Court rejected in Soto and Vazquez.

For example, like in Soto, the State points to RCW 9.94A.533(3)(f) in support of its argument that firearm enhancements apply to “all felony crimes” except for the enumerated list of firearm related offenses set out in that subsection. Soto, 177 Wn. App. at 712-13. But by giving subsection (1) of the statute its plain meaning, this Court did not render this or other references in the statute to “all felonies” meaningless. Rather, these references “are rationally understood to extend the sentencing enhancement to all felonies falling within the scope of the statute as defined by subsection (1).” Id. at 714-15.

Like in Vasquez, the State relies on a legislative statement of intent to support its contention that firearm enhancements apply to unranked felony offenses. 200 Wn. at App. at 227. As this court explained, the cited statement of purpose is not contrary to Soto because the statement of intent contained “qualified language” recognizing that the firearm enhancements would not apply to every felony offense. Id. at 227-28. Moreover, a “declaration of intent cannot ‘trump the plain language of the statute.’” State v. Granath, 190 Wn.2d 548, 556, 415 P.3d 1179 (2018) (quoting State v. Reis, 183 Wn.2d 197, 212, 351 P.3d 127 (2015)).

This Court has correctly determined that the statutory scheme unambiguously authorizes firearm enhancements only for felony offenses that are ranked. Soto, 177 Wn. App. at 714; Vazquez, 200 Wn. App. at

226. Even if the statutory scheme were ambiguous, the rule of lenity, which requires ambiguous criminal statutes be interpreted in the defendant's favor, would require the same conclusion. State v. Weatherwax, 188 Wn.2d 139, 155-56, 392 P.3d 1054 (2017).

Further, it is worth recognizing that legislature has not acted to overturn Soto or Vazquez. This indicates the legislature has implicitly assented to this Court's determination. City of Fed. Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). Where the legislature determines the appellate court has misinterpreted its intent, the legislature has not hesitated to correct it, particularly in the area of criminal law. See, e.g., Laws of 2003, ch. 3, § 1 (disagreeing with Supreme Court's interpretation of the felony murder statute in In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002)).

This Court in Soto and Vazquez correctly held that firearm enhancements do not apply to unranked felony offenses. This Court should adhere to those decisions and reject the State's invitation to depart from these holdings.

b. Mr. Nelson's guilty plea is involuntary. Because he establishes prejudice, he is entitled to withdraw his plea.

As an "unranked offense," the firearm enhancement on Mr. Nelson's conviction for animal cruelty is illegal. This renders Mr.

Nelson's guilty plea involuntary because Mr. Nelson was misinformed about the consequences of his plea. State v. Buckman, 190 Wn.2d 51, 59-60, 409 P.3d 193 (2018); Supp. Br. of Pet. at 11.

Without citation to authority and ignoring our Supreme Court's decision in Buckman, the State cursorily asserts the misinformation about the length of the sentence and the applicability of a firearm enhancement does not render the plea involuntary. State's Response at 9. The State's contention flies in the face precedent. Buckman, 190 Wn.2d 59-60. As this Court is bound by Supreme Court precedent that is contrary to the State's position, the State's position must be rejected. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

The issue of prejudice is a separate question. Buckman, 190 Wn.2d at 60. Where it is objectively reasonable to conclude that a rational person would not have pleaded guilty if the person knew of the error, prejudice is established from an involuntary plea. Id. at 66-67, 70-71.

As Mr. Nelson argues, he establishes prejudice from the misinformation that rendered his plea involuntary because he received additional punishment as a result. Supp. Br. of Pet. at 12-13. His sentence was increased by a year and half. A rational person in Mr. Nelson's position would not have pleaded guilty to the charges if he knew that his sentence would necessarily be unlawfully increased by a year and half as a

consequence. This is because a rational person does not plead guilty to charges that are illegal and *necessarily* increases one's sentence by a year and half.

The State has no rejoinder. The lack of argument by the State is an implied concession. State v. E.A.J., 116 Wn. App. 777, 789, 67 P.3d 518 (2003). This Court should accept the concession and hold that Mr. Nelson establishes prejudice from the involuntariness of his plea. This Court should grant Mr. Nelson's petition and order that he be permitted to withdraw his plea.

2. In entering the guilty plea, Mr. Nelson was deprived of his right to the effective assistance of counsel. The deprivation entitles him to withdraw his plea.

Mr. Nelson was constitutionally entitled to the effective assistance of counsel during plea bargaining. Lafler v. Cooper, 566 U.S. 156, 162, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); State v. A.N.J., 168 Wn.2d 91, 110-11, 225 P.3d 956 (2010); Supp. Br. of Pet. at 14-15.

Mr. Nelson was deprived of this right in two ways. First, trial counsel incorrectly permitted Mr. Nelson to plead guilty to an inapplicable firearm enhancement that increased Mr. Nelson's sentence by a year and half. Second, trial counsel incorrectly advised Mr. Nelson during plea bargaining that he was facing a minimum sentence of 47 and half years under the current charges. In fact, the range of punishment was about 32

years to 41 years. Supp. Br. of Pet. at 17. This made the subsequent plea offer to offenses carrying a range of 35 to 42 years seem like a true bargain. But in reality, it was *worse* than what his attorney told him he faced previously.

Concerning the misadvice on the firearm enhancement on the animal cruelty charge, the State argues Mr. Nelson's argument "is not valid" because Soto and Vazquez were wrongly decided. And therefore "it follows that defense counsel's performance as to those claims was not deficient, nor did such performance prejudice petitioner." State's Response at 13.

Even assuming Soto and Vazquez were wrongfully decided (which they were not), those decisions existed at time of the guilty plea and were binding upon the trial court. Unlike this Court, the trial court had no discretion to not follow this Court's precedent. Mark DeForrest, In the Groove or in A Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level, 48 Gonz. L. Rev. 455, 461 (2013). Trial counsel's failure to research the existing law was plainly deficient performance. State v. Estes, 188 Wn.2d 450, 459-60, 395 P.3d 1045 (2017).

As for prejudice, it was prejudicial because it (1) resulted in misadvice to Mr. Nelson on the range of punishment he faced if he

pleaded guilty; and (2) resulted in Mr. Nelson entering an involuntary plea that unlawfully increased Mr. Nelson's sentence by 18 months.

There is a reasonable probability that but for counsel's deficient performance, trial counsel would have negotiated a plea bargain that did not include the illegal firearm enhancement. See Estes, 188 Wn.2d at 466. To return Mr. Nelson to the position he was in previously, he should have the opportunity to accept or refuse a plea offer without the illegal firearm enhancement. State v. Drath, 7 Wn. App. 2d 255, 270-71, 431 P.3d 1098 (2018).

Mr. Nelson's second claim of ineffective assistance, which concerns the misadvice from his attorney that he faced a minimum sentence of 47 and half years under the charges, also entitles him to withdrawal of his plea. Without citation to authority, the State asserts that if a defendant is ultimately advised on the correct range of punishment under the accepted plea offer, it does not matter if the defendant was misadvised previously on the range of punishment on the current charges. In other words, it would not be ineffective assistance for defense counsel to (incorrectly) tell Mr. Nelson he faced the death penalty under the current charges, so long as he correctly told Mr. Nelson the proper range of punishment under the offer to plea guilty to amended charges. The State's argument is not sensible and is contrary precedent. See A.N.J., 168

Wn.2d at 119-20 (misinformation from defense counsel entitled defendant to withdraw plea). It should be rejected. This Court should hold that it was deficient performance for defense counsel to advise Mr. Nelson he faced a minimum sentence of 47 and half years under the current charges when this calculation was in gross error.

The State misunderstands Mr. Nelson's argument. State's Response at 13-14. The problem is not that the prosecution amended the charges to add an additional charge. The problem is that Mr. Nelson was incorrectly informed that the unamended charges carried a minimum sentence that was significantly higher than under the deal to plead guilty to the amended charges. An unsophisticated layperson, like Mr. Nelson, would not understand the anomaly. He would accept his attorney's (false) representation that this plea offer carried a significantly lower sentence than the one under the current charges. This is part of the reason why the accused are afforded a lawyer so they can translate and explain the law.

As for prejudice, Mr. Nelson has proffered evidence that he would not have pleaded guilty but for trial counsel's deficient performance. For example, he has attached a declaration stating that but for the misinformation from his trial attorney on his sentence being 47 and half years under the charges, he would not have accepted the later plea deal and pleaded guilty. Supp. Br. of Pet. at 21. The State is simply incorrect in

asserting that Mr. Nelson “does not attach any affidavits or declarations in support of his ineffective-assistance-of-counsel arguments.” State’s Response at 13. Because the State has not offered competing evidence, this Court is left with Mr. Nelson’s evidence. This evidence establishes that Mr. Nelson was prejudiced by his counsel’s deficient performance. There is a reasonable probability the misinformation made Mr. Nelson believe he was getting a true bargain, when in fact he was not. This Court should accordingly order that Mr. Nelson be permitted to withdraw his plea. Supp. Br. of Pet. at 21.

3. Alternatively, or if Mr. Nelson chooses to not withdraw his plea, the firearm enhancement on the animal cruelty conviction must be stricken.

If Mr. Nelson chooses to not withdraw his plea, the firearm enhancement on the animal cruelty conviction remains unlawful. The Court should instruct that if Mr. Nelson does not withdraw his plea, the firearm enhancement on that conviction is to be stricken. Additionally, if Mr. Nelson is not afforded his requested relief of withdrawing his plea, the firearm enhancement on the animal cruelty conviction should be ordered stricken.

4. Mr. Nelson was deprived of his due process right to be sentenced by an unbiased judge in a neutral tribunal. A new sentencing hearing is required.

Due process entitled Mr. Nelson to be sentenced by unbiased judge in a neutral tribunal. State v. Solis-Diaz, 187 Wn.2d 535, 539, 387 P.3d 703 (2017). Due process requires the absence of an unconstitutional “risk of bias.” Rippo v. Baker, ___ U.S. ___, 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017); In re Dependency of A.N.G., 12 Wn. App. 789, 793, 459 P.3d 1099 (2020).

Here, Mr. Nelson was sentenced for crimes committed against Ms. Ryan, an employee of the Pierce County District Court. The Pierce County District Court, where Ms. Ryan had worked, was in the same building as the Pierce County Superior Court where Mr. Nelson was sentenced. Moreover, the trial judge received victim impact statements from many court employees who worked in the same building as the judge. While the judge disavowed knowing Ms. Ryan, he did not disavow knowing the persons who submitted victim impact statements. Supp. Br. at 23-24.

These circumstances created an unconstitutional risk of bias. Rippo, 137 S. Ct. at 907. Ordinary people do not make the fine distinctions between superior courts and district courts, particularly when they are in the same building. Banowsky v. Guy Backstrom, DC, 193 Wn.2d 724, 744, 445 P.3d 543 (2019). Therefore, notwithstanding that

Ms. Ryan and the other court employees worked for the district court, a reasonable objective observer would conclude that these district court employees would have a relationship with the superior court judge who was sentencing Mr. Nelson. See In re Dependency of A.E.T.H., 9 Wn. App. 2d 502, 517, 446 P.3d 667 (2019); State v. Daigle, 241 So. 3d 999, 1000 (La. 2018). Consequently, absent a knowing, intelligent, and voluntary waiver by Mr. Nelson of his right to a tribunal free of an unconstitutional risk of bias, due process required the judge to recuse himself. A.N.G., 12 Wn. App. at 796-97.

Contrary to the State's contention, the record does not show that the judge never worked with the district court employees who submitted victim impact statements. In fact, given that the judge disregarded knowing Ms. Ryan, it is reasonable to infer that the judge know the other distract court employees because he did not disavow knowing them.

The State misunderstands Mr. Nelson's argument to mean that "no judge could preside over a trial involving a court staff member as a victim or witness." State's Response at 16. If Mr. Nelson had been sentenced by a visiting judge, who had no connection to the employees of who worked in the building housing the Pierce County Superior and District Courts, then there may not have been an unconstitutional risk of bias. And if Mr. Nelson had been sentenced in a county outside of Pierce County by a

judge with no connection to the Pierce county courts, there would have been no unconstitutional risk of bias. There are no absurd or strained results from Mr. Nelson's position.

Mr. Nelson's due process right to an unbiased sentencing hearing was violated. This Court should order a new sentencing hearing before a different judge in a county other than Pierce. Supp. Br. of Pet. at 27.

B. CONCLUSION

Due process principles and the right to effective assistance of counsel entitle Mr. Nelson to withdraw his guilty plea. If he chooses to not withdraw his guilty plea, or the Court does not order this relief, the unlawful firearm enhancement on the animal cruelty conviction should be stricken. Due process also entitles Mr. Nelson to a new sentencing hearing because there was an unconstitutional risk of bias in the tribunal that sentenced him. His personal restraint petition should be granted.

Respectfully submitted this 29th day of July, 2020.



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WASHINGTON APPELLATE PROJECT

July 29, 2020 - 4:24 PM

Transmittal Information

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