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Court of Appeals
Division III
State of Washington
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NO. 36570-1-III

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

CHARLES WALTER WEBER,

Defendant/Appellant.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The court's perfunctory dismissal of Charles Walter Weber's CrR 7.8(b) motion deprived him of the opportunity to effectively argue that his life without possibility of parole sentence (LWOP) should be reversed due to a post-sentence vacation of one of the prior strike offenses.

2. Mr. Weber's constitutional right to due process under the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3 was violated when the State failed to provide notice that an LWOP would be sought at the time of sentencing.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Does the post-sentence vacation of an underlying strike offense negate a LWOP sentence and require an evidentiary hearing to determine whether or not a basis continues to exist for the imposition of a LWOP?

2. Is the State required to provide notice to an offender that it will seek a sentence of LWOP at the time of the filing of the Information, and, if so, does the failure to give notice amount to a violation of the offender's due process rights?

STATEMENT OF THE CASE

Charles Walter Weber was convicted of second degree assault pursuant to a Judgment and Sentence entered on April 15, 2005. (CP 45)

Mr. Weber was sentenced to LWOP based upon two (2) prior strike offenses. Those two (2) offenses were second degree assault and attempted second degree murder. (CP 5; CP 15)

The sentencing court in King County Cause Number 03-1-05510-3 vacated a first degree assault conviction on the basis that it constituted double jeopardy with a second degree murder conviction. Both Mr. Weber and the State appealed that Judgment and Sentence.

Mr. Weber's appeal concerned his offender score based upon prior juvenile adjudications, prosecutorial misconduct, ineffective assistance of counsel, a violation of his Fourth Amendment rights, and instructional error. *See: State v. Weber*, 127 Wn. App. 879, 881, 112 P.3d 1287 (2005).

The State's cross-appeal challenged the sentencing court's determination that attempted second degree murder was a more serious offense as opposed to first degree assault. Even though the first degree assault conviction carried a longer standard range, the sentencing court vacated it. *See: State v. Weber, supra*, 881-82.

The *Weber* Court determined at 888:

The sentence is the true indicator of the consequences for the offender and of the interests of justice. The most serious offense is the offense with the most serious consequence for the offender. The only way to consistently vacate the less serious offense is to look to the sentence to be imposed under the two offenses. We therefore hold that to remedy a double

jeopardy violation presented when two convictions punish the same offense, the court must vacate the crime carrying the lesser sentence.

As a result of the ruling Mr. Weber was resentenced under King County Cause Number 03-1-05510-3 on March 27, 2007. Pursuant to the Court of Appeals ruling the attempted second degree murder was vacated and the first degree assault was reinstated. (CP 122-23)

In the interim Mr. Weber was convicted under the current cause number of second degree assault pursuant to an Information filed on November 16, 2004. The Information did not contain any notice that that the State would seek LWOP. (CP 3)

Mr. Weber filed a CrR 7.8 motion on July 10, 2018 challenging the LWOP sentence. On August 6th he requested appointment of counsel since he is indigent. (CP 71; CP 104)

As far as Mr. Weber has been able to determine no Amended Judgment and Sentence was ever entered in the current case following the Amended Judgment and Sentence in King County Cause Number 03-1-05510-3.

The Court never appointed counsel to represent Mr. Weber in connection with his CrR 7.8 motion. The Court had the opportunity to do so when multiple continuances were entered (7/23/18 RP 1, ll. 20-21; 8/6/18 RP 3, ll. 15-19; 8/20/18 RP 6, ll. 6-7; 9/4/18 RP 8, ll. 12-20; 10/1/18 RP 9, ll. 20-21)

The Court issued a letter denying Mr. Weber's motions on September 19, 2018. (CP 359)

The order denying Mr. Weber's motions was entered on October 15, 2018. (CP 393)

Mr. Weber filed an objection to using the amended King County Judgment and Sentence to support the State's claim that two strike offenses still authorized his LWOP sentence. (CP 360)

In addition Mr. Weber filed a motion for reconsideration on September 27, 2018 based upon the denial letter. (CP 363)

On November 6, 2018 Mr. Weber filed another CrR 7.8 motion based upon lack of notice in connection with the August 6, 2018, September 4, 2018 and October 15, 2018 hearings. (CP 409)

The Court again denied his motions by an order entered on January 7, 2019. (CP 427)

Mr. Weber filed his Notice of Appeal on January 15, 2019 and an Order of Indigency was entered on January 29, 2019. (CP 429; CP 441)

SUMMARY OF ARGUMENT

Mr. Weber properly pursued a challenge to his LWOP sentence. His CrR 7.8 motion identifies the issue involved. The Court's perfunctory denial of the motion, in the absence of an evidentiary hearing, precluded Mr. Weber from appearing to effectively present an argument in support of the motion.

Moreover, Mr. Weber's constitutional right to due process was undermined by a lack of notice concerning the State's intent to originally seek a LWOP sentence.

Mr. Weber is entitled to be resentenced, under the current state of the facts and circumstances of his case, to a sentence other than LWOP.

ARGUMENT

I. VACATED CONVICTION

When a conviction is vacated it results in the verdict being set aside. The King County Court, in 2003, vacated Mr. Weber's first degree assault conviction on double jeopardy grounds.

Following an appeal an Amended Judgment and Sentence was entered in 2007. The first degree assault conviction was reinstated. The attempted second degree murder conviction was vacated.

The State took no action with regard to Mr. Weber's second degree assault conviction in Walla Walla County. The second degree assault conviction was based upon two (2) prior strike offenses which included the attempted second degree murder. Mr. Weber contends that when the attempted second degree murder conviction was vacated he only had one (1) strike offense.

Vacate means "1. To nullify or cancel; make void; invalidate < when the court vacated the judgment >." BLACK'S LAW DICTIONARY (9th ed.)

CrR 7.8(b) provides, in part:

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order;
- (2) ...;
- (3) ...;
- (4) **The judgment is void;** or
- (5) Any other reason justifying relief from the operation of the judgment.

....

(Emphasis supplied.)

Mr. Weber, proceeding *pro se*, made every effort to have an evidentiary hearing scheduled so that he could appropriately argue his motion. No such hearing was ever provided to Mr. Weber.

RCW 9.94A.525(1) states, in part: “A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed”

On April 15, 2005 two (2) prior strike offenses existed when Mr. Weber was sentenced. They included second degree assault and attempted second degree murder.

The subsequent reversal and vacation of the attempted second degree murder conviction occurred when King County entered its Amended Judgment and Sentence on March 27, 2007. That Judgment and Sentence reinstated a first degree assault conviction which had previously been vacated on double jeopardy grounds. It did not exist at the time of Mr. Weber’s sentencing on April 15, 2005.

In *State v. Gomez-Cervantes*, 169 Wn. App. 428, 432, 282 P.3d 98 (2012) it was determined that

(f)ederal law indicates when a conviction is vacated for rehabilitative reasons, the conviction remains valid for immigration purposes. . . . A conviction is vacated for rehabilitative reasons when it is vacated pursuant to a state law providing a means for the trial court to enable the defendant to avoid certain effects from the conviction. . . . [A] vacation is procedurally different than a dismissal.

Even though the *Gomez-Cervantes* case involved a question of immigration consequences, and Mr. Weber’s case does not involve rehabilitative reasons, it is appropriate to recognize the fact that a vacation is not the same as a dismissal.

Nevertheless, when a conviction is vacated by a court on double jeopardy grounds it no longer exists.

... [T]he act of “an appeal does not suspend or negate ... collateral estoppel aspects of a judgment entered after trial in the superior courts.” But collateral estoppel can be defeated by later rulings on appeal. [Citations omitted.] ... [H]is entire sentence was reversed, or vacated, since “reverse” and “vacate” have the same definition and effect in this context - the finality of the judgment is destroyed. Accordingly, Harrison’s prior sentence ceased to be a final judgment on the merits, and collateral estoppel does not apply.

State v. Harrison, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003).

King County reversed and/or vacated the attempted second degree murder conviction which was one of the prior strike offenses allowing the Walla Walla court to impose a LWOP sentence. The fact that another strike offense was reinstated after it had previously been vacated does not cure the defect in the Walla Walla County Judgment and Sentence.

The State bears the burden of proving by a preponderance of the evidence the existence of prior convictions, whether used for determining an offender score or as predicate strike offenses for purposes of the POAA.

Personal Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005).

When Mr. Weber was sentenced on April 15, 2005 the State established, by a preponderance of the evidence, the existence of two (2) prior strike offenses. Through no fault of its own, one of those strike offenses was subsequently vacated. Thus, the vacation precludes its use in Mr. Weber’s current LWOP sentence. *See*: RCW 9.94A.525, *supra*.

Mr. Weber asserts that his position gains further support from *Personal Restraint of Carrier*, 173 Wn.2d 791, 272 P.3d 209 (2012) and *State w. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007).

The *Carrier* case dealt with the difference between a conviction that had been dismissed and one that had been vacated. The Court, citing Professor Boerner, noted:

Professor Boerner has also explained that “it is clear that while a **vacated conviction** may form the basis for a determination of guilt in a subsequent prosecution, it **may not be used to determine the appropriate punishment for that or any other subsequent offense.**”

... [W]e can distill the following principles as to the meaning of the “later criminal prosecution” exception: (1) a vacated conviction ... may not be used as criminal history - *i.e.*, to determine the appropriate *punishments* for that or any other subsequent offense

The only question left open is whether, like the “later criminal prosecution” exception ..., the “subsequent prosecution” exception ... prohibits using dismissed convictions as criminal history. We believe it does.

Personal Restraint of Carrier, supra, 816-17. (Emphasis supplied.)

The *Womac* Court considered the difference between charges and convictions as set out in *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995).

After considering the *Calle* decision the *Womac* Court stated at 659:

Womac correctly argues a court has no authority to “take a verdict on another charge ..., find that it violates double jeopardy ..., not sentence the defendant ... on it [,] and just ... hold it in abeyance for a later time period.” 7 VRP at 1074.

The *Womac* Court went on to hold at 660:

Womac’s convictions *were* in fact reduced to judgment. Accordingly, we direct the trial court to vacate Counts II and III. [Citations omitted.]. (Remedy for double jeopardy violation is to vacate one of the underlying convictions).

Since the Walla Walla court did not seek to amend Mr. Weber's Judgment and Sentence following the King County Court's amendment, it should be precluded from doing so at this time. The first degree assault conviction should not be applied retroactively as a strike offense when it did not exist at the time of the April 15, 2004 Judgment and Sentence.

II. NOTICE

“‘The POAA’ is essentially a sentence enhancement statute which is based on the past criminal history of a defendant.” *Personal Restraint of Carrier, supra*, 817, citing *State v. Thorne*, 129 Wn.2d 736, 779, 921 P.2d 514 (1996).

The Information in Mr. Weber's case did not provide any notice to him concerning the potential for a LWOP sentence. Mr. Weber asserts he was entitled to that notice under the due process clauses of the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3.

RCW 9.94A.537(1) provides:

At any time prior to trial or entry of the guilty plea, if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(Emphasis supplied.)

Even though a POAA does not constitute aggravating circumstances, it is an enhancement. Mr. Weber contends that notice is required in a POAA proceeding the same as notice is required for aggravating circumstances. Any difference is without a distinction.

Notice is required if the State seeks an enhanced sentence. As announced in *State v. Theroff*, 91 Wn.2d 385, 392, 622 P.2d 1240 (1980):

A separate notice of intention to seek an enhanced penalty ... was served and filed with the first information. This was not done with the amended information. ... In *State v. Cosner*, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975), Justice Hamilton writing for the court said:

The appellate courts of this state have held that when the State seeks to rely upon either RCW 9.41.025 or RCW 9.95.040 (firearm and/or deadly weapons enhancements), or both, due process of law requires that the information contains specific allegations to that effect, thus putting the accused person upon notice that enhanced consequences will flow with a conviction. Failure of the State to so allege precludes reliance upon the statutes by the trial court

We do not propose to recede from these holdings. Rather, we again emphasize the necessity of prosecuting attorneys uniformly adhering to the announced rule. Preferably, compliance should take the form of pleading by statutory language and citation of the statute or statutes upon which they are proceeding, *i.e.*, firearms and/or deadly weapons.

(Citations omitted.)

We adopt the above language in this case. It is the rule in this state - clear and easy to follow. When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information.

CONCLUSION

Mr. Weber has been denied his constitutional right to due process based not only on the lack of notice that the State would seek a LWOP sentence; but also upon the perfunctory way the court mishandled his CrR 7.8 motion.

Mr. Weber is entitled to have a determination made either by the trial court or the Court of Appeals that his LWOP sentence is void due to the vacation of one of the underlying strike offenses.

DATED this 6th day of May, 2019.

Respectfully submitted,

s/ Dennis W. Morgan

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NO. 36570-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	WALLA WALLA COUNTY
Plaintiff,)	NO. 04 1 00534 2
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
CHARLES WALTER WEBER,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 6th day of May, 2019, I caused a true and correct copy of the *BRIEF OF APPELLANT* to be served on:

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