

No. 61835-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE: PERSONAL RESTRAINT OF SALVADOR RIVERA
STATE OF WASHINGTON,
Respondent,
v.
SALVADOR RIVERA,
Petitioner.

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FILED
COURT OF APPEALS DIVISION 1
STATE OF WASHINGTON

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

PETITIONER'S REPLY BRIEF

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A. ARGUMENT.

1. THE JUDGMENT AND SENTENCE IS INVALID ON ITS FACE

The Judgment and Sentence repeatedly refers to a sentencing enhancement for a “deadly weapon.” Page one of the Judgment and Sentence states Rivera was convicted of committing an offense “while armed with a deadly weapon”; page two states the authority for the sentence imposed as the “deadly weapon clause”; page four orders confinement “for deadly weapon”; and on page eight, the warrant of commitment states that the court has ordered Rivera to be punished, including “60 months for deadly weapon.” Judgment and Sentence (copy attached to Petitioner’s Supplemental Brief as Appendix A).

Incongruously, the prosecution insists that the sentencing document plainly imposes a “firearm sentencing enhancement.” The only support it cites for this proposition on the Judgment and Sentence is that page one of the sentencing document cites “RCW 9.94A.310(3)(a)a.” Of course, there was no such statutory subsection as “RCW 9.94A.310(3)(a)a.” The prosecution conveniently puts only “RCW 9.94A.310(3)(a)” in bold and omits highlighting the final “a,” as it asserts this final “a” is irrelevant.

Response Brief, at 7. Yet the citation to a nonexistent statutory subsection does not plainly, clearly, and unambiguously proclaim Rivera's sentence is properly imposed for a firearm sentencing enhancement, particularly where the remainder of the sentencing document refers only to a "deadly weapon clause."

As set forth in the personal restraint petition filed by Rivera and the supplemental brief filed by counsel, when the four corners of the judgment and sentence cast doubt on the validity of a sentence imposed, the sentence is invalid on its face. See State v. Ross, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004). The Judgment and Sentence repeats at least three times that the 60-month added to Rivera's sentence is based on a "deadly weapon." Id. However, the statute authorizes only a 24-month enhancement for possession of a "deadly weapon." RCW 9.94A.533; former RCW 9.94A.310 (1998) (former version of statute is essentially same as current version for purposes relevant herein).

A sentence that is not authorized by law is invalid on its face. In re Pers. Restraint of Tobin, 165 Wn.2d 172, 176, 196 P.3d 670 (2008). Here, the special verdict form asked only whether Rivera was armed with "a **deadly weapon**" and the jury answered "yes." Petitioner's Supp. Brief, App. C (emphasis added). The

information asserted Rivera was armed with “a deadly weapon.” Petitioner’s Supp. Brief, App. B. While it classified the deadly weapon as “to wit: a handgun,” the prosecution is neither required nor presumed to be seeking the most onerous punishment and its reference to a handgun does not automatically provide notice that it seeks the more onerous firearm sentencing enhancement. State v. Recuenco, 163 Wn.2d 428, 436, 180 P.3d 1276 (2008) (Recuenco III).

In Recuenco, the information similarly charged the defendant with committing a crime while armed “with a deadly weapon, to-wit: a handgun.” 163 Wn.2d at 431; Petitioner’s Supp. Brief, App. B. Like the case at bar, the jury was not instructed on the definition of a “firearm” under RCW 9.41.010, which is an essential element of a firearm enhancement. RCW 9.94A.533(3); former RCW 9.94A.310(3). 163 Wn.2d at 431. And identically to the case at bar, the special verdict form merely asked whether the defendant was “armed with a deadly weapon at the time of the commission of the crime.” 163 Wn.2d at 431; Petitioner’s Supp. Brief, App. C.

In Recuenco III, the Supreme Court relied on well-established law requiring that the prosecution must charge all

elements of the offense, and found that a firearm sentencing enhancement has not been properly charged and proven when the charging document, instructions, and verdict form do not unambiguously demonstrate a properly noticed conviction for a firearm enhancement. Recuenco III, 163 Wn.2d at 431, 442.

Rivera's charging document and verdict form are predicated on the same prosecutorial notice and instructions as in Recuenco III. The judgment and sentence reflects an enhanced penalty under the "deadly weapon clause" and the court lacked authority to order a 60-month term for a deadly weapon punishment.

2. THE PROSECUTION MISREPRESENTS THE CONTROLLING CASE LAW BY FOCUSING ON AN IRRELEVANT RETROACTIVITY ANALYSIS

The prosecution's insistence that the case requires a retroactivity analysis is misplaced and misleading. The Supreme Court decision in Recuenco III is based on long-standing legal principles and does not require resort to any claim of retroactivity.

To the extent that the prosecution clings to overturned legal precedent and construes Recuenco III as overruling other cases, it must be viewed as a significant change in the law that cannot be ignored. An intervening opinion that effectively overturns a prior

appellate decision determinative of a material issue constitutes a “significant change in the law” and exempts procedural bars. In re Pers. Restraint of Greening, 141 Wn.2d 687, 697, 9 P.3d 206 (2000).

More significantly, numerous recent cases have relied on Recuenco III without resort to the retroactivity contortions the prosecution demands. In In re Pers. Restraint of Delgado, 149 Wn.App. 223, 227, 204 P.3d 939 (2009), the court found Recuenco III “controlled” the decision that firearm enhancements imposed in 2000 based on a charging document that did not expressly inform and require the jury to find that the State proved the elements of a firearm sentencing enhancement. Likewise in State v. Brainard, 148 Wn.App. 93, 104, 180 P.3d 460 (2009), the court relied on Recuenco III to reverse a firearm sentencing enhancement when the jury was not instructed on the legal definition of a firearm as required for the enhancement. When the jury returns a verdict on the deadly weapon enhancement, the court lacks authority to impose a firearm enhancement. Id.; see also State v. Williams, 147 Wn.App. 479, 481, 195 P.3d 578 (2009) (“Here, as in Recuenco [III], the jury found that the defendant was armed with a deadly weapon, rather than a firearm. Accordingly, we again

conclude that the sentencing judge was without authority to impose firearm enhancements.”).

As further example, in In re Pers. Restraint of Scott, 149 Wn.App. 213, 220, 202 P.3d 985 (2009), in a 2000 trial, the jury was instructed on deadly weapon enhancements and returned verdicts finding the defendant armed with a deadly weapon. The Scott Court noted that a number of cases, overruled by Recuenco, allowed a trial court to enter a finding that the defendant was armed with a firearm and impose an enhanced sentence on that basis. Id. at 221.¹ But in Scott, as in the instant case, the judge did not enter a finding the defendant was armed with a firearm as defined by RCW 9.41.010. Rather, the court entered a judgment based on the jury’s verdict, yet the jury’s verdict did not reflect a finding that it found the defendant was so armed, and the charging document did not plainly allege a firearm sentencing enhancement. Id. at 221-22. The Scott Court did not rest its analysis on the Sixth Amendment but rather on the plain state-based doctrinal underpinnings

¹ Citing *inter alia*, State v. Meggyesy, 90 Wn.App. 693, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), aff’d 163 Wn.2d 428 (2008); State v. Rai, 97 Wn.App. 307, 310-11, 983 P.2d 712 (1999), abrogated by Recuenco, 154 Wn.2d 156, 110 P.3d 188; State v. Olney, 97 Wn.App. 913, 987 P.2d 662 (1999), abrogated by Recuenco, 154 Wn.2d 156, 110 P.3d 188).

explained in Recuenco III and preexisting that case. Id. at 221 n.4. Scott's case was final before Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004), but the court overturned firearm enhancement because unauthorized by jury's verdict based on reasoning of Recuenco III.

As in Scott, Rivera's judgment and sentence imposes a term neither authorized by the jury's verdict nor based on a correct and accurate finding as to the jury's finding. And it does not reflect a finding by the court that Rivera was armed with a firearm, but rather is based on the jury's verdict. Petitioner's Supp. Brief, App. A. The Judgment and Sentence repeatedly asserts Rivera was armed with a deadly weapon but imposes the wrong term of confinement for a deadly weapon. Id.

In Recuenco I, the court observed that a jury's special verdict finding the defendant was armed with a deadly weapon does not support a firearm enhancement, even if the weapon used was a firearm, because "[t]he jury was not asked to, and therefore did not, return a special verdict that Recuenco committed the assault while armed with a firearm." State v. Recuenco, 154 Wn.2d

156, 160, 110 P.3d 188 (2005) (“Recuenco I”), rev’d on other grounds, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

In Recuenco III, the Washington Supreme Court put aside the jurisprudence used in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2328, 147 L.Ed.2d 435 (2000), and Blakely, but found that under Washington law, “the harmless error doctrine simply does not apply” in these circumstances. 163 Wn.2d at 441.

Recuenco III also correctly observed that the increased firearm sentencing enhancement emanates from a different statutory basis than the deadly weapon enhancement. 163 Wn.2d at 438. The statute governing the imposition of the various enhancements have specific elements that must be proven to the jury and upon which proper notice must be given.

Here, the jury was not instructed to find Rivera was armed with a firearm as defined in RCW 9.41.010, an essential element of the firearm sentencing enhancement under RCW 9.94A.533(3) and former RCW 9.94A.310(3). RCW 9.41.010 defines a firearm as “a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” Instead, the jury was asked to find only that Rivera was armed with a “deadly weapon” which includes a loaded or unloaded firearm. As discussed in Recuenco III, this

distinction is not meaningless or superfluous. 163 Wn.2d at 435-36, 439. The court's imposition of a 60-month term of confinement for a "deadly weapon" as found by the jury is unauthorized and requires reversal of the improperly entered enhancement. Scott, 149 Wn.App. at 222.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Petitioner's Opening Brief and Supplemental Brief, Mr. Rivera respectfully requests this Court reverse the improperly ordered sentencing enhancement.

DATED this 17th day of June 2009.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

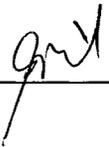
IN RE THE PERSONAL RESTRAINT PETITION OF)		
)	
SALVADOR RIVERA,)	COA NO. 61835-1-I
)	
)	
PETITIONER.)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17^H DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF PETITIONER** 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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STAFFORD CREEK CORRECTIONS CENTER
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() | U.S. MAIL
HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON, THIS 17TH DAY OF JUNE, 2009.

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