

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2009 APR 15 AM 8:02
BY JB CARPENTER
CLERK

Sup. Ct. No. 82951-9
COA No. ~~36587-1-II~~
34686-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:

JOSHUA DEAN SCOTT,

Petitioner.

ANSWER TO THE STATE'S PETITION FOR REVIEW

By:

Suzanne Lee Elliott
Attorney for Petitioner
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

A. REASONS WHY THIS COURT SHOULD DENY REVIEW...
..... 1

1. STATE V. RECUENCO, 154 WN.2D 156, 110 P.3D 188
(2005) REQUIRES THAT THE FIREARM
ENHANCEMENTS IMPOSED IN THIS CASE BE
REVERSED. 1

2. THERE IS NO CONFLICT BETWEEN THE COURT OF
APPEALS DECISION IN THIS CASE AND STATE V.
EVANS, 154 WASH. 2ND 438, 114 P.3RD 627 (2005). 1

B. CONCLUSION 4

TABLE OF AUTHORITIES

Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	2
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	2
<i>State v. Evans</i> , 154 Wn.2d 438, 114 P.3d 627 (2005)	2, 3
<i>State v. Recuenco</i> , 154 Wn.2d 156, 110 P.3d 188 (2005)	1, 2
<i>State v. Recuenco</i> , 163 Wash. 2nd 428, 180 P.3d 1276 (2008)	1

Statutes

RCW 9.94A.125	3
---------------------	---

A. REASONS WHY THIS COURT SHOULD DENY REVIEW

The Court of Appeals correctly decided this case. In this case, the jury properly answered the question put to it: Was Scott armed with a deadly weapon when he committed two counts of first degree robbery and one count of possession of stolen property? The judge erred when she imposed a sentence that was not in conformity with the jury's verdict.

1. *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005) requires that the firearm enhancements imposed in this case be reversed.

In *Recuenco*, the Washington State Supreme Court held that where a jury has not specifically found the defendant was armed with a firearm, the trial judge may not impose the lengthier enhancement. This is true even when, as here, the jury did find that the defendant was armed with a deadly weapon.

2. *There is no conflict between the Court of Appeals decision in this case and State v. Evans*, 154 Wash. 2nd 438, 114 P.3rd 627 (2005).

Although the *Recuenco*¹ line of cases cited in the State's petition was based upon the holdings in *Blakely v. Washington*, 542 U.S. 296, 124

¹ *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005) and *State v. Recuenco*, 163 Wash. 2nd 428, 180 P.3d 1276 (2008).

S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the facts of this case and the operation of RCW RCW 9.94A.125 make the decision in *Recuenco* “substantive” rather than procedural.

In *State v. Evans*, 154 Wn.2d 438, 446-47, 114 P.3d 627 (2005), the Washington State Supreme Court held that the decision in *Blakely* was one of criminal “procedure,” not of “substance.” But in *Evans*, the petitioners were sentenced based upon factors never submitted to the jury for consideration. In *Evans*, the Petitioners argued that the *Blakely* decision was substantive because it changed the notion of what factors must be treated as elements of the crime in Washington. Prior to *Blakely*, the State was required to plead and prove to a jury beyond a reasonable doubt only those factors listed under the statutory definition of the crime charged. Petitioners argued that *Blakely* had elevated exceptional sentencing factors to elements of the crime. The Supreme Court rejected that argument but stated:

We find petitioner’s arguments unavailing at this time. We do not, of course, reach whether sentencing factors may be elements in other contexts.

Evans, 154 Wn.2d at 447 n.

Weapons enhancements are precisely the “context” where the concepts in *Blakely* and *Recuenco* are “substantive” rather than

“procedural” and must be applied retroactively. RCW 9.94A.125, the enhancement statute at issue, provides that:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

Unlike other sentencing enhancements, the Washington statutes have always required a jury determination in regard to weapons enhancements. Thus, this particular enhancement has always been more akin to an element of the offense than the exceptional sentence factors at issue in *Evans*. The identity of the fact-finder has always been the jury and the Government has always been required to prove the presence of the enhancement beyond a reasonable doubt. Questions relating to “elements” are substantive, not procedural issues.

Thus, in its opinion the Court of Appeals correctly found that the judgment and sentence in this case was invalid on its face. The jury found only that Scott was armed with a deadly weapon. Thus, the judgment improperly imposed a firearm enhancement. The Court’s decision is not a “retroactive” application of *Blakely*. Rather it is a proper holding that the

judgment does not reflect the findings made by the jury at the close of trial.

B. CONCLUSION

This Court should deny review.

Respectfully submitted this 13th day of April, 2009.



Suzanne Lee Elliott
WSBA 12634

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 APR 15 AM 8:03

CERTIFICATE OF SERVICE

RONALD N. CARPENTER

I hereby certify that on the dated listed below, I served by United States Mail one copy of the foregoing personal restraint petition and accompanying appendix on the following:

Mr. Joshua Dean Scott #788119
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, Washington 98520

Pierce County Prosecutor's Office
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402

4/13/09
Date

Suzanne Lee Elliott
Suzanne Lee Elliott