

83826-7

No.
— Wn.App. —, 214 P.3d 919 (2009)
Court of Appeals No 60365-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL SIMMS,

Petitioner.

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COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4 Petitioner, Daniel Simms, asks this Court to accept review of the published decision of the Court of Appeals in State v. Simms, ___ Wn.App. ___, 214 P.3d 919 (2009).

B. OPINION BELOW

In State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (Recuenco III) this court concluded the essential-elements rule requires the State allege in the Information every fact necessary to impose an enhancement. Despite this Court's conclusion in Recuenco III, the Court of Appeals concluded there was no error in the State's failure to allege in the Information that Mr. Simms was previously convicted of an offense with a deadly weapon special verdict, even though that fact was necessary to double the total length of the mandatory enhancements in this case from 11 years to 22 years.

The Court of Appeals concluded further that no double jeopardy violation occurred despite the fact that as a matter of law and fact, Mr. Simms could not be subject to the doubling of the firearm enhancement in the present case without also being convicted of first degree unlawful possession of a firearm.

C. ISSUES PRESENTED

1. The essential-elements rule requires an Information include all facts necessary to prove an offense including enhancements. The Information alleged Mr. Simms committed the present offense while armed with a firearm but did not allege he had previously received a firearm enhancement. Where that fact of the prior enhancement is a fact necessary to impose the present enhancement, is the essential-elements rule violated when the court doubled the firearm enhancements in the present case pursuant to RCW 9.94A.533(3)(d) based upon the court's finding that Mr. Simms had previously received a firearm enhancement?

2. Is the conclusion of the Court of Appeals that the essential-elements rule does not apply to facts supporting enhancements contrary to this Court's decision in Recuenco III, and does that opinion present a substantial question under the United States and Washington Constitutions?

3. The double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple punishments for the same offense; offenses which are the same in law and fact. As a matter of law and fact Mr. Simms could not be subject to the doubling provisions of RCW 9.94A.533(3)(d) with also being convicted of unlawful possession of a firearm in the first degree. Do the conviction and

enhancement violate the Double Jeopardy Clause of the Fifth Amendment?

4. Does the opinion of the Court of Appeals that weapon enhancements can never violate the double jeopardy provisions of the United States and Washington Constitutions present a substantial question under the United States and Washington Constitutions?

5. The opinion of the Court of Appeals applies no constitutional protections to the fact that Mr. Simms was previously convicted of an offense with a deadly weapon enhancement where that fact adds 11 mandatory years to his sentence for which he cannot earn good time. However, the Court of Appeals treats the same recidivist fact as an element of the offense of unlawful possession of a firearm where it merely elevates that offense from a Class C to Class B felony and elevates the applicable standard range from 51 to 60 months to 87 to 116 months.¹ Where there is no rational basis to treat his same fact differently in the two scenarios, does the opinion of the Court of Appeals violate Mr. Simms's right to the equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution?

¹ In fact because the court imposed the low-end of the range, 87 months, the impact of the additional element was at most the addition of 27 months possible confinement.

D. SUMMARY OF THE CASE

Police were called to a house in North Seattle because of a fight involving a gun. When they arrived, they found two men standing over Mr. Simms and saw a large framing hammer on the floor next to Mr. Simms's head. 6/27/06 RP 79-80. Mr. Simms had suffered injuries to his head and was taken by ambulance to Harborview. 6/27/06 RP 80; 6/27/06 RP 89, 93; EX 22 and 23.

Mr. Simms told the officers that those at the house had tried to rob him and had hit him repeatedly with a hammer. 6/26/06 RP 19, 21-22

The residents of the house testified, however, that Mr. Simms had arrived with an unidentified woman to visit John Jacobs. 6/28/06 RP 35. According to Mr. Jacobs, after 15 to 20 minutes of friendly conversation Mr. Simms inexplicably drew a gun and demanded Mr. Jacobs's money. Id. at 35-37. According to Mr. Jacobs he and a friend, Ronald Cogswell, wrestled the gun from Mr. Simms. Id. After they wrestled Mr. Simms to the ground, Mr. Jacobs struck Mr. Simms in the head repeatedly with a dumbbell. 6/27/06 RP 29, 6/28/06 RP 44.

The State charged Mr. Simms with one count of first-degree robbery, two counts of second-degree assault, and one count of first-degree unlawful possession of a firearm. CP 1-3. With respect to the firearm possession count the Information alleged Mr. Simms "...

previously having been convicted . . . of the crime of Assault in the Second Degree . . . did knowingly have in his possession, or have in his control, a handgun, a firearm.” CP 3. But the Information made no mention of the prior enhancement in its allegations supporting the three present firearm enhancements.

Following a colloquy the court permitted Mr. Simms to waive his right to counsel and to represent himself at trial. 6/16/06 RP 2-8.

In addition to the above described testimony, the State submitted a certified copy of Mr. Simms’s prior conviction of second degree assault with a firearm enhancement. Ex. 27. A jury convicted him as charged. CP 56-62.

At sentencing the court determined that because Mr. Simms had previously been sentenced with a firearm enhancement, the enhancement in this case doubled pursuant to RCW 9.94A.533(3)(d), resulting in 11 additional years of mandatory time. CP 114, 7/27/06 RP 3.

E. ARGUMENT

1. THE OPINION OF THE COURT OF APPEALS IS CONTRARY TO RECUENCO III AND PRESENTS A SUBSTANTIAL CONSTITUTIONAL ISSUE BY CONCLUDING THE INFORMATION NEED NOT ALLEGE ALL FACTS NECESSARY TO SUPPORT THE FIREARM ENHANCEMENTS IN THIS CASE

The essential-elements rule requires a charging document allege facts supporting every element of the offense and identify the crime charged. Recuenco III, 163 Wn.2d at 434 (citing State v. Leach, 113 Wn.2d 678, 689, 782 P.2d 552 (1989)). “‘Elements’ are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime.” Recuenco III, 163 Wn.2d at 434 (citing State v. Johnstone, 96 Wn.App. 839, 844, 982 P.2d 119 (1999)). This rule applies to enhancements as well as substantive offenses. Recuenco III, 163 Wn.2d at 434.

Thus, with respect to an enhancement the rule requires the information allege the specific enhancement which applies and what type of weapon was implied, i.e. whether the defendant was armed with a “deadly weapon” or more specifically a “firearm.” This is because of the increase in confinement which results from the firearm as opposed to deadly weapon verdict. See, Recuenco III, 163 Wn.2d at 436. To establish the enhancement imposed in this case, the State was required to establish

Mr. Simms was armed with a firearm in the present case and that he had previously been convicted of an offense involving a weapon enhancement. RCW 9.94A.533(3)(d).² Just as the distinction between a “deadly weapon” and a “firearm” resulted in an increase in confinement time, a firearm enhancement where a defendant has previously been convicted of an offense with a firearm enhancement leads to a dramatic increase in confinement: double the base-level enhancement. Id. As Recuenco III concluded, the facts necessary to support that increase are subject to the essential-elements rule and must be alleged in the Information. Those facts were omitted from the Information in this case.

The published opinion of the Court of Appeals concludes, however, that despite the fact that the existence of the prior enhancement added eleven years to Mr. Simms’s sentence, this fact is not subject to the essential-elements rule, because it is a recidivist fact. Opinion at 9-10.

First the conclusion that the State need not allege the prior enhancement because it is merely a recidivist fact and not an element is irrelevant and is contrary to Recuenco III. The cases cited by the Court of Appeals concern the Sixth Amendment right to a jury trial. See, Opinion

² Mr. Simms does not claim the State failed to prove the enhancement beyond a reasonable doubt as the jury received a certified copy of the judgment and sentence of Mr. Simms’s prior second degree assault conviction which indicated a finding that he was armed with a firearm in the commission of that offense. Ex 27.

at 9. The essential elements rule does not arise from the jury-trial right, but rather

. . . is grounded in almost identical language in the state and federal constitutions. Const. art. I, § 22 (amend. 10); U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation”). It is also rooted in due process doctrines concerning notice. U.S. Const. amends. 5, 14. See Leach at 694-95.

State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). Indeed, Recuenco III makes clear its ruling is not based on a jury-trial error. 163 Wn.2d at 436 (“No error occurred in the jury’s findings.”) Thus, the court’s reliance upon caselaw examining the right to a jury determination is of little use to the analysis. The essential-elements rule does not apply merely to elements but to enhancements as well.

Second, the rule requires not just the inclusion of the elements in the Information, but inclusion of the “facts” supporting the elements. Because the rule applies to enhancements it thus requires the information allege the facts necessary to support the enhancement.

Third, the opinion fails to appreciate the fact that the State alleged precisely the same recidivist fact with respect to the firearm possession charge. CP 3. The State thereby demonstrated it has no difficulty alleging recidivist facts in a charging document, or even proving those facts to a jury. There is no basis to treat that same recidivist fact differently merely

because it may be termed an element in one scenario and an enhancement in another. This is particularly true where the fact operates in precisely the same fashion in both instances, i.e., it merely increase the length of sentence which may be imposed. In fact, its impact on the enhancement, the addition of 11 mandatory years of confinement for which good time is unavailable, is more onerous than its impact upon the possession charge, elevating the offense from a Class C to a Class B felony with an actual increase in the standard range of 27 months. It defies logic to apply the full panoply of constitutional protections to the lesser of these increases in punishment while affording no constitutional significance to the greater impact.

The opinion of the Court of Appeals is contrary to Recuenco III. To the extent a prior offense exception will apply to the essential elements rule there is nothing in Recuenco III or any other decision of this Court addressing the essential elements rule which adopts such an exception. By crafting a previously unrecognized exception to this constitutionally mandated rule, the opinion raises substantial constitutional issues. This Court should accept review under RAP 13.4 of the published opinion of the Court of Appeals.

2. THE OPINION OF THE COURT OF APPEALS PRESENTS A SUBSTANTIAL CONSTITUTIONAL ISSUE BY CONCLUDING NO DOUBLE JEOPARDY VIOLATION OCCURS EVEN WHERE THE RECIDIVIST ELEMENT OF FIRST DEGREE UNLAWFUL POSSESSION OF A FIREARM AND THE ENHANCEMENT ARE THE SAME IN LAW IN FACT

Mr. Simms was charged and convicted of possessing a firearm after having previously been convicted of second degree assault with a firearm enhancement. CP 3, 62; Ex. 27. Mr. Simms was charged and found to have been armed with a firearm in the commission of the assault and the robbery. CP 1-2; 56-58. As a matter of law and fact, Mr. Simms could not be subject to the doubling of the firearm enhancement in the present case without being a felon in possession of a gun and thus guilty of unlawful possession of a firearm. Therefore, the Double Jeopardy provision of the Fifth Amendment, as incorporated by the Fourteenth Amendment was violated.

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Accordingly, where two statutory provisions proscribe the “same offense” they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.

Whalen v. United States, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).

Failing to appreciate that the Blockburger test is merely a means of determining legislative intent, the Court of Appeals faults Mr. Simms for “ignoring legislative intent” and turning to the Blockburger test. Opinion at 14. But “[w]hen the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court’s rulings.” State v. Radcliffe, 164 Wash.2d 900, 906 194 P.3d 250 (2008) (citing In re Habeas Corpus of Scruggs, 70 Wn.2d 755, 760, 425 P.2d 364 (1967)). Absent a clear expression of legislative intent permitting multiple punishments, courts must apply the Blockburger test to determine whether the legislature intended the multiple punishments imposed.

Silence is not a “clear indication of contrary legislative intent” necessary to overcome the presumption against multiple punishments. Whalen, 445 U.S. at 691-92. RCW 9.94A.533 and RCW 9.41.040 are silent as to the Legislature’s intent.

But even assuming there were a clear statement of legislative intent in either RCW 9.41.010 or RCW 9.94A.533, nowhere in its opinion does the Court of Appeals actually analyze the language of two statutes. Instead, the court simply cites to other cases addressing other provisions of the firearm enhancement statute, as well as other statutes, and from that concludes the Legislature plainly intended to authorize the multiple punishments in this case. Opinion at 13. It stands to reason that if the legislative intent were so plainly stated, the relevant statutory language should be readily identifiable. But the opinion is unable to identify that plain statement. To be clear, not one of the cases cited by the Court of Appeals addresses the interplay of RCW 9.41.010 or RCW 9.94A.533 at issue here. Thus, there is neither a clear statement of legislative intent nor has there ever been a judicial determination that such an intent has been expressed.

Finally, the opinion seems to suggest that double jeopardy protections do not apply to sentence enhancements. Opinion at 13 (citing *inter alia* State v. Nguyen, 139 Wn.App. 863, 866, 142 P.3d 1117 (2006)). First, two cases currently pending before this Court each involve double jeopardy challenges involving enhancements. State v. Kelley, 82111-9; State v. Aquirre, 82226-3. Second, there is no constitutionally significant distinction between elements and enhancements. Washington v.

Recuenco, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)

(Recuenco II) (citing, Apprendi v. New Jersey, 530 U.S. 466, 478, 120 S.

Ct. 2348, 147 L. Ed. 2d 435 (2000)). The Supreme Court has said:

we can think of no principled reason to distinguish,
between what constitutes an offense for the purposes of the
Sixth Amendment’s jury-trial guarantee and constitutes and
‘offence’ for purposes of the Fifth Amendment’s Double
Jeopardy Clause.

Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d

588 (2003) (Plurality decision).³ Thus, the Court of Appeals erroneously
distinguishes between enhancements and elements.

RCW 9.94A.533(3)(d) requires the doubling of an enhancement

If the offender is being sentenced for any firearm
enhancements . . . and the offender has previously been
sentenced for any deadly weapon enhancements

The application of this statute requires two things (1) that a jury found the
defendant committed the present offense while in possession of a firearm,
and (2) he was previously convicted of a felony involving firearm

³ This portion of Sattazahn was only joined by four justices, as Justice O’Connor, consistent with her prior dissents in Apprendi and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), refused to join in this section of the opinion. See 537 U.S. at 117 (O’Connor, J., concurring in part and concurring in the judgment). It is nonetheless undoubtedly an accurate statement of the law in light of Apprendi and Ring, as the four-justice dissent in Sattazahn, although disagreeing with the majority’s refusal to find a jury’s inability to reach a unanimous verdict on whether to impose the death penalty was the equivalent of an acquittal, specifically relied on Ring for the point that aggravating factors in death penalty cases are elements of the offense. Sattazahn, 537 U.S. at 126 n.6 (Ginsburg, J., dissenting). Thus eight justice agreed that double jeopardy protections apply to “aggravators” and “enhancements” they merely disagreed in the outcome of that analysis.

enhancement. Because a prior conviction with deadly weapon enhancement is a “serious offense” under RCW 9.41.010, there are no circumstances in which a person could be subject to the doubling provisions of RCW 9.94A.533(3)(d) without also being guilty of unlawfully possessing a firearm. A person facing the doubling provision because of a prior firearm enhancement will by definition have a prior “serious offense” pursuant to RCW 9.41.010 and will necessarily have been found to be in possession of a gun at the time of the current offense. Thus, proof of the enhancement does not require proof of an additional fact and the imposition of both violates double jeopardy. Blockburger, 284 U.S. at 304.

3. BY DRAWING AN ARTIFICIAL AND IRRATIONAL DISTINCTION BETWEEN “ELEMENTS” AND “ENHANCEMENTS” THE OPINION OF THE COURT OF APPEALS RAISES A SUBSTANTIAL CONSTITUTIONAL ISSUES REGARDING THE EQUAL PROTECTION CLAUSE

In his initial brief to the Court of Appeals, Mr. Simms pointed to the fact the State alleged the prior recidivist fact with respect to the unlawful possession charge but failed to allege precisely the same recidivist fact with respect to the enhancements on the other three counts. Brief of Appellant at 7-8. Mr. Simms argued

The State can offer no rational explanation as to why it should be vested with the choice of when prior offenses will be considered an element and when it will not. There is certainly no rational explanation as to why in a single case the State should be permitted to make two divergent decisions on the very same prior offense.

Brief of Appellant at 8. Nonetheless, the Court of Appeals draws such a distinction.

After Mr. Sims completed his briefing in the Court of Appeals, this Court issued its decision in State v. Roswell in which it held that where a prior conviction “alters the crime that may be charged,” the prior conviction “is an essential element that must be proved beyond a reasonable doubt.” 165 Wn.2d 186, 192, 196 P.3d 705 (2008).

Because Roswell was not decided until after the briefing was completed below, and because prior to Roswell Mr. Simms had no reason to believe the Court of Appeals would apply two different constitutional standards to precisely the same fact, he had no reason to address the Equal Protection violation that results from the Court of Appeals decisions. Such a claim did not become ripe until the Court of Appeals issued its decision.

While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of “much confusion,” Roswell concluded that because the recidivist fact in that case

elevated the offense from a misdemeanor to a felony it “actually alters the crime that may be charged,” and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. Id. While Roswell correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which Roswell termed “sentencing factors,” is neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact the Supreme Court has said “merely using the label ‘sentence enhancement’ to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently.” Appendi, 530 U.S. at 476; see also, Recuenco II, 548 U.S. at 220. Beyond that, the distinction Roswell draws does not accurately reflect the impact of the recidivist fact in either Roswell or the cases the Court attempts to distinguish.

In Roswell the Court considered the crime of communication with a minor for immoral purposes. Id. at 191. The Court found that in the context of this and related offenses,⁴ proof of a prior conviction functions as an “elevating element,” i.e., elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a

⁴ Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196 (discussing State v. Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

felony. Id. at 191-92. Thus, Roswell found it significant that the fact altered the maximum possible penalty from one year to five. See, RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross misdemeanor unless the person has a prior conviction in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). In each of these circumstances, the “elements” of the substantive crime remain the same, save for the prior conviction “element.” A recidivist fact which potentially alters the maximum permissible punishment from one year to five, as in Roswell, or from five years to ten, as with Mr. Simms’s firearm possession count, in is in no way different from a recidivist element which alters the actual punishment by requiring the imposition of a mandatory 11 years.

There is no rational basis for classifying the punishment for recidivist criminals as an ‘element’ in the first two circumstances but not the third. There is no rational basis to require the recidivist elements in the first two circumstances comport with constitutional limitations, such as the essential elements rule or double jeopardy limitations, but to exclude the third circumstance entirely. This irrational classification applied by the Court of Appeals in Mr. Simms’s case and Roswell, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. Thorne, 129 Wn.2d at 771. This Court has held that “recidivist criminals are not a semi-suspect class,” and therefore where an equal protection challenge is raised, the court will apply a “rational basis” test. Id.

Roswell concluded the recidivist fact in that case was an element because it defined the very illegality, reasoning “if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes.” (Italics in original.) 165 Wn.2d at 192. But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has prior sex conviction or not the prior offense merely alters the maximum punishment to which the person is subject. Id. So too, the possession of a firearm after conviction of a

felony is a crime regardless of whether that prior offense is serious felony. And, the use of a gun in the commission of crime is unlawful regardless of whether a person was previously found to have done so. In each instance the unlawful nature of the act is unchanged by the prior offense, instead it merely elevates the punishment. In the first two instances it is treated as an element while in the third it is not.

In the absence of any rational basis, the opinion of the Court of Appeals applies a different constitutional standard to the same fact by concluding in one case it is an element but in another it is merely and enhancement. That different treatment presents a substantial constitutional question which merits review under RAP 13.4

F. CONCLUSION

Pursuant to RAP 13.4 this Court should accept review of the opinion of the Court of Appeals

Respectfully submitted this 27th day of October, 2009.



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

RECEIVED

STATE OF WASHINGTON,)
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 Respondent,)
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 v.)
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 DANIEL J. SIMMS,)
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 Appellant.)
_____)

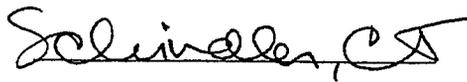
No. 60365-5-OCT - 9 2009
Washington Appellate Project
ORDER DENYING MOTION
TO RECONSIDER

Appellant Daniel Simms filed a motion for reconsideration of the opinion filed August 24, 2009. A majority of the panel have determined this motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 8th day of October 2008.

FOR THE PANEL:



Presiding Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 OCT - 8 PM 4: 57

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL J. SIMMS,

Appellant.

No. 60365-5-I

PUBLISHED OPINION

FILED: August 24, 2009

Schindler, C.J. — A jury convicted Daniel J. Simms of one count of robbery in the first degree, two counts of assault in the second degree, and unlawful possession of a firearm in the first degree. The jury found that Simms was armed with a firearm when he committed the crime of robbery in the first degree and the two assaults. As mandated by RCW 9.94A.533(3)(d), the court doubled the length of confinement of the firearm enhancements based on Simms's prior felony conviction of assault in the second degree with a firearm enhancement. Citing State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (Recuenco III), Simms asserts that in order to double the length of confinement for the firearm sentencing enhancements, the State should have alleged in the information that he had a prior assault conviction with a firearm enhancement. Simms contends that because the doubling provision of the firearm

enhancement statute is an essential element, the court violated his constitutional rights by failing to allege and prove the court previously imposed a firearm sentencing enhancement. As a separate and alternative ground to reverse doubling the length of the term for the firearm enhancements, Simms argues that his conviction for unlawful possession of a firearm in the first degree, based on his prior felony assault conviction, and doubling the firearm enhancements, based on the same prior conviction, violates double jeopardy. Simms also claims that he is entitled to a new trial because the court abused its discretion in excluding his statements to the police. We hold that the State is not required to plead or prove beyond a reasonable doubt the fact of a prior firearm enhancement for purposes of doubling the term for a firearm sentencing enhancement under RCW 9A.94.533(3)(d). Based on clear and unambiguous legislative intent, we also conclude that imposition of the firearm sentencing enhancements under RCW 9.94.533(3)(d) does not violate double jeopardy. And because the court did not abuse its discretion by excluding Simms's hearsay statements, we affirm.

FACTS

In April 2006, the State charged Simms with robbery in the first degree while armed with a firearm, Count I, two counts of assault in the second degree while armed with a firearm, Count II and Count III, and unlawful possession of a firearm in the first degree, Count IV.

In Count I, the information alleged that on February 18, 2006, Simms unlawfully

and with the intent to commit theft, injured John Jacobs by forcefully taking money from him while armed with a deadly weapon. The information also specifically alleged that because Simms was armed with a handgun, he was subject to a firearm sentencing enhancement under RCW 9.94A.533.¹

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant Daniel J. Simms aka Terry Jay Weeks at said time of being armed with a handgun, a firearm, as defined in RCW 9.41.010, under the authority of RCW 9.94A.510(3).

In Counts II and III, the State alleged that on February 18, Simms also assaulted Ron Cogswell and Grace Astad with a deadly weapon. The information again specifically alleged that Simms was armed with a handgun and subject to the firearm enhancement statute. In Count IV, the State alleged that Simms committed the crime of unlawful possession of a firearm in the first degree based on his previous conviction "of the crime of Assault in the Second Degree, "a serious offense" and Simms "knowingly did own, have in his possession, or have in his control, a handgun, a firearm as defined in RCW 9.41.010."

After an extensive colloquy, the trial court granted Simms's request to represent himself. However, the court appointed standby counsel to assist Simms throughout the trial.

The State presented the testimony of a number of witnesses at trial, including

¹ The information cites RCW 9.94A.510(3). RCW 9.94A.510(3) was recodified as RCW 9.94A.533 in 2003.

Jacobs, Cogswell, and the police officers. In order to establish the crime of unlawful possession of a firearm in the first degree, the State introduced a certified copy of Simms's 2000 judgment and sentence for assault in the second degree while armed with a firearm.

Simms took no exceptions to the jury instructions. As to Count I, the court instructed the jury that a person commits the crime of robbery in the first degree if armed with a deadly weapon during the commission of the crime. The instructions as to Count II and Count III, state that a person commits the crime of assault in the second degree when he assaults another with a deadly weapon. The definition of "deadly weapon" includes a firearm. As to the charge of unlawful possession of a firearm in the first degree, in Count IV, the court instructed the jury that the State had to prove beyond a reasonable doubt that "the defendant knowingly had a firearm in his possession or control" during the commission of the crimes of robbery and the two assaults and that "the defendant had previously been convicted of Assault in the Second Degree, which is a serious offense" The special verdict forms for robbery in the first degree and the two counts of assault, instructed the jury, "The State must prove beyond a reasonable doubt that the defendant was armed with a firearm

....."

The jury found Simms guilty on all four counts as charged. In the special verdict forms, the jury found that Simms was armed with a firearm at the time of the

commission of robbery in the first degree and the two counts of assault in the second degree.

With an offender score of 14, the court imposed a low-end standard range sentence of 129 months for robbery in the first degree and a low-end concurrent sentence for the two counts of assault in the second degree and unlawful possession of a firearm. Because Simms had previously been convicted of assault in the second degree with a firearm enhancement, the court doubled the mandatory 60 month firearm enhancement for the robbery conviction and the mandatory 36 month firearm enhancement for each of the two assaults as required by RCW 9.94A.533(3)(d), resulting in a firearm enhancement of 120 months for the robbery conviction and 72 months for each the assault convictions, for a total of 264 months.

ANALYSIS

Simms challenges the court's decision to double the length of confinement for the firearm enhancements under RCW 9.94A.533(3)(d).² Simms argues that because the term of confinement for a firearm enhancement under RCW 9.94A.533(3)(d) is an essential element, the State must allege and prove beyond a reasonable doubt that he had previously been sentenced for a firearm enhancement. In the alternative, Simms argues that his conviction of unlawful possession of a firearm in the first

² Because the information alleged and the jury found that Simms was armed with a firearm during the commission of the crimes of robbery in the first degree and the two counts of assault in the second degree, there is no dispute that Simms was subject to mandatory consecutive terms of confinement for the firearm enhancements for those crimes under RCW 9.94A.533(3). His appeal only challenges the doubling provision of the firearm enhancement statute, RCW 9.94A.533(3)(d).

degree and imposition of a firearm enhancement under RCW 9.94A.533(3)(d) violates double jeopardy. Because his arguments are of constitutional magnitude, he can raise these arguments for the first time on appeal and our review is de novo. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

The Firearm Enhancement Statute

RCW 9.94A.533, "Adjustments to Standard Sentences," was enacted without amendment as part of the "Hard Time for Armed Crime" Initiative, Laws of 1995, ch. 129, §1 (Initiative Measure No. 159 (I-159)). The purpose of I-159 was to require additional punishment for crimes committed with a firearm or other deadly weapon, to "punish armed offenders more harshly to discourage the use of firearms" because "[a]rmed criminals pose an increasing and major threat to public safety and can turn any crime into serious injury or death." Laws of 1995, ch. 129 § 1(1)(a); State v. Berrier, 110 Wn. App. 639, 649-50, 41 P.3d 1198 (2002).

Under RCW 9.94A.533(3), if the jury finds that the defendant was armed with a firearm during the commission of a felony as defined by the statute, the court must impose a consecutive term for the firearm enhancement. Firearm enhancements are mandatory, must be served in total confinement, and run consecutively to all other sentencing provisions. RCW 9.94A.533(3) provides in pertinent part:

The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony

crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection

Under RCW 9.94A.533(3)(d), if the defendant has been previously sentenced for a deadly weapon enhancement, the mandatory length of the term for the firearm enhancement “shall be twice the amount of the enhancement.” RCW 9.94A.533(3)(d) provides in pertinent part:

If the offender is being sentenced for any firearm enhancements . . . and the offender has previously been sentenced for any deadly weapon enhancements . . . all firearm enhancements under this subsection shall be twice the amount of the enhancement listed . . .

The statute also exempts certain crimes from firearm enhancement where “the possession or use of a firearm is a necessary element of the underlying crime itself.”

Barrier, 110 Wn. App. at 650. RCW 9.94A.533(f) provides in pertinent part:

The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony

It is undisputed that the State did not allege in the charging document or prove to the jury beyond a reasonable doubt that Simms was subject to the firearm enhancement doubling provision of RCW 9.94A.533(3)(d). Simms contends that the failure to allege that he had been previously sentenced for a firearm enhancement and was subject to the mandatory doubling provision of RCW 9.94A.533(3)(d) violated the essential elements rule. Simms cites Recuenco III to argue that in order to double the term of confinement for a firearm enhancement under RCW 9.94A.533(3)(d), the State must allege and prove beyond a reasonable doubt that he had previously been sentenced for a firearm enhancement.

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). The essential elements rule requires the State to identify the crime charged and allege facts supporting every element of the offense in the charging document. Recuenco III, 163 Wn.2d at 434.³ “Elements’ are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime.” Recuenco III, 163 Wn.2d at 434. Facts that can result in an increased penalty for the charged crime are the functional equivalent of an element and the State must set forth

³ “In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation” U.S. Const. amend. IV. “In all criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him” Wash. Const., art. I, § 22 (amend. 10); Recuenco III, 163 Wn.2d at 436 n.7.

in the charging documents the intent to seek an enhanced penalty. Recuenco III, 163 Wn.2d at 440; Apprendi v. New Jersey, 530 U.S. 466, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In Recuenco III, the court held that in order to impose a firearm enhancement under RCW 9.94A.533(3), the State must prove beyond a reasonable doubt that the offender was armed with a firearm during the commission of the crime charged. Recuenco III, 163 Wn.2d at 434.

But there is no constitutional requirement to give notice or prove beyond a reasonable doubt an enhanced sentencing penalty based on a prior conviction. In Apprendi, the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490.⁴ In Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); the Supreme Court clarified Apprendi and held that the statutory maximum under Apprendi “is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Blakely, 542 U.S. at 303. In reiterating the Apprendi rule, the Court specifically noted that a jury must determine any fact “[o]ther than the fact of a prior conviction.” Blakely, 542 U.S. at 301.

In applying Apprendi, our supreme court also held that there is no

⁴ Emphasis added.

constitutional requirement to give notice or prove beyond a reasonable doubt a prior conviction for purposes of a sentencing enhancement. State v. Crawford, 159 Wn.2d 86, 147 P.3d 1288 (2006); State v. Smith, 150 Wn.2d 135, 141-43, 75 P.3d 934 (2003). In rejecting the argument that it was fundamentally unfair to not notify a defendant that based on prior convictions, the defendant may be subject to a mandatory sentence of life without the possibility of parole, the court explained,

[T]hese cases simply illustrate the rule that prosecutors must set forth their intent to seek enhanced penalties for the underlying crime in the information and are not applicable where, as here, a defendant faces potential sentencing consequences because of convictions for prior crimes . . . the United States Supreme Court and this court have repeatedly rejected the argument that pretrial notice of enhanced penalties for recidivism is constitutionally required.

Crawford, 159 Wn.2d at 94-95.⁵

Simms's reliance on Recuenco III to argue that the information violated the essential element rule by failing to allege that he was previously sentenced for a firearm enhancement and subject to RCW 9.94A.533(3)(d) is misplaced. In Recuenco III, the information alleged that the defendant assaulted his spouse with a deadly weapon and the jury returned a special verdict finding that Recuenco was armed with a deadly weapon. Recuenco III, 163 Wn.2d at 432. The supreme court held that the defendant was entitled to have the jury determine "if he is guilty of the crime and the

⁵ According to the court "All a sentencing court needs to do is find that the prior conviction exists . . . No additional safeguards are required because a certified copy of a prior judgment and sentence is highly reliable evidence." In re Personal Restraint of Lavery, 154 Wn.2d 249, 256-57, 111 P.2d 837 (2005).

sentencing enhancement charged.” Because the jury did not find the defendant was armed with a firearm during the commission of the charged offense, the court concluded the sentencing court erred by imposing a firearm enhancement.

Recuenco, 163 Wn.2d at 439.

By contrast here, there is no dispute that the State alleged and the jury found that Simms was armed with a firearm during the commission of the crimes of robbery in the first degree and the two counts of assault in the second degree. Because the statutory requirement to double the length of the sentence for the firearm enhancements under RCW 9.94A.533(3)(d) was based on the undisputed prior conviction for assault with a firearm enhancement, we hold that the State did not violate the essential elements rule by failing to allege or prove the prior conviction beyond a reasonable doubt.

Double Jeopardy

As a separate and alternative ground to reverse and vacate the length of confinement for the firearm enhancements, Simms contends that his conviction for unlawful possession of a firearm in the first degree, based on his prior conviction for assault in the second degree with a firearm enhancement, and doubling the term for the firearm enhancements under RCW 9.94A.533(3)(d), based on the same prior assault conviction, violates double jeopardy.

For purpose of the double jeopardy analysis, the dispositive question is whether the legislature intended to punish unlawful possession of a firearm in the first

degree in violation of RCW 9.41.040(1)(a) and require the court to double the term for a firearm enhancement under RCW 9.94A.533(3)(d) based on a prior conviction of assault with a firearm enhancement.

Whether the imposition of punishment for violation of RCW 9.41.040(1)(a) and doubling of the length of the firearm enhancements under RCW 9.94A.533(3)(d) violates double jeopardy is a question of law that we review de novo. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

The double jeopardy clause of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution protect a defendant against multiple punishments for the same offense. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). The Fifth Amendment states in pertinent part, “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb” U.S. Const. amend. V. The Washington Constitutions also guarantees that “[n]o person shall . . . be twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9. Because the double jeopardy clauses of the federal and state constitutions are identical in substance and purpose, we interpret them the same way. In re Pers. Restraint of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000).

State v. Freeman, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005), sets forth the framework for the double jeopardy analysis. Freeman requires us to first look to whether there is either express or implicit legislative intent authorizing cumulative punishment. Subject to constitutional restraints, the legislature has the power to

define crimes and assign punishment. Calle, 125 Wn.2d at 775. If the intent is clear and the legislature authorizes “cumulative punishments” under two different statutes, “then double jeopardy is not offended” and the court’s double jeopardy analysis is at an end.” Freeman, 153 Wn.2d at 771.

Based on clear legislative intent, Washington courts have repeatedly held that the imposition of weapon enhancements do not violate double jeopardy. State v. Claborn, 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981); State v. Nguyen, 139 Wn. App. 863, 866, 142 P.3d 1117 (2006); accord, State v. Tessema, 139 Wn. App. 483, 493, 162 P.3d 420 (2007) rev. denied, 163 Wn.2d 1018, 108 P.3d 1292 (2008). In Claborn, the court held that because sentencing enhancements are not “offenses,” double jeopardy is not implicated. Claborn, 95 Wn.2d at 637. In Nguyen, the defendant argued that a firearm enhancement was analogous to an element of a higher crime and that it created “unintended redundant punishment.” Nguyen, 134 Wn. App. at 867. We rejected the defendant’s argument and held that double jeopardy was not violated because the legislative intent in adopting the firearm enhancement statute and in mandating additional punishment for the use of a firearm is “unmistakable.” Nguyen, 134 Wn. App. at 868.

First, unless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent. The intent underlying the mandatory firearm enhancement is unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies. The exemptions defeat Nguyen's argument that the present situation is unintended. Where possession of the firearm is itself the crime, the enhancement is unnecessary to the statutory purpose. . . . Any ‘redundancy’ in

mandating enhanced sentences for other offenses involving use of a firearm is intentional.

Nguyen, 134 Wn. App. at 868

Ignoring legislative intent, Simms begins with the second step of the double jeopardy analysis, the “same elements” test under Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).⁶ But the Blockburger same elements test is a rule of statutory construction that only applies if legislative intent is not clear. Because the legislative intent to punish unlawful possession of a firearm and double the mandatory firearm enhancement is clear and “unmistakable,” we need not engage in the same elements analysis under Blockburger.

We conclude that Simms’s conviction for unlawful possession of a firearm and the doubling mandatory firearm enhancement under RCW 9.94A.533(3)(d) do not violate double jeopardy.⁷

Hearsay Testimony

Simms claims that under the rule of completeness, the trial court abused its discretion by excluding statements Simms made at the hospital to Officer Kowalchyk.

⁶ If each crime contains an element the other does not, we presume the crimes are not the same for purposes of double jeopardy. Blockburger, 284 U.S. at 340; Calle, 125 Wn.2d at 777.

⁷ We note, however, that the factual premise of Simms’s double jeopardy argument is incorrect. His conviction for unlawful possession of a firearm was based on his prior conviction for a serious offense without regard to the firearm enhancement. The court instructed the jury that in order to convict Simms of unlawful possession of a firearm in the first degree, the State had to prove beyond a reasonable doubt that “the defendant had previously been convicted of Assault in the Second Degree, which is a serious offense . . .” Doubling the term for the firearm enhancements under RCW 9.94A.533(3)(d) was unrelated to the elements of unlawful possession of a firearm in the first degree. Doubling the term for the firearm enhancements was based on the jury finding that Simms was armed with a firearm during the commission of the crimes of robbery in the first degree and assault in the second degree and that he had a prior felony conviction with a firearm enhancement.

Apparently, Simms wanted to admit Officer Kowalchyk's testimony from a pretrial hearing. In the CrR 3.5 hearing Officer Kowalchyk testified that Simms told him "These guys robbed me. They hit me with a hammer."

We review the court's decisions regarding admission of evidence for abuse of discretion. State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001). Under the rule of completeness, if a party introduces a statement, an adverse party may require the party to introduce any other part "which ought in fairness to be considered contemporaneously with it." ER 106; Larry, 108 Wn. App. at 910. However, "the trial judge need only admit the remaining portions of the statement which are needed to clarify or explain the portion already received." Larry, 108 Wn. App. at 910.

At trial, Officer Kowalchyk testified that after being placed in the ambulance, Simms told him that his name was Terry Weeks and he did not have any identification because he was from the sovereign state of Alaska. Officer Kowalchyk said that he did not speak to Simms again until about half an hour later at the hospital. On cross examination, Simms asked Officer Kowalchyk about the statements that Simms made to him at the hospital:

[SIMMS]: . . . Do you remember the statement that I allegedly made?

[KOWALCHYK]: Yes, I do.

[SIMMS]: What was that?

MR. GROSS: Objection, self-serving hearsay, your honor.

THE COURT: Sustained.

MR. SIMMS: He testifies to the name, but he can't testify to the truth?

THE COURT: If you have an objection, you need to address it to me.

MR. SIMMS: That's it.

Simms did not explain to the trial court how the statements Officer Kowalchyk made pretrial related to the Officer's trial testimony that Simms told him that his name was Terry Weeks and that he was from the sovereign state of Alaska. On this record, the court did not abuse its discretion in sustaining the objection to the admission of hearsay testimony.

Statement of Additional Grounds

In his statement of additional grounds for review, Simms asserts that the court breached a contractual relationship with him by not allowing Simms to repay his legal and financial obligations by serving time in prison. Simms also contends that because he crossed out the first page of the judgment and sentence and wrote "UCC § 3-501," the judgment and sentence is void. We reject these arguments as without merit.

Simms also filed "pro se Petition to Dismiss/Fire Counsel and Proceed in Propria Persona." The Sixth Amendment right to represent oneself at trial does not extend to an appeal. See Myers v. Johnson, 76 F.3d 1330, 1333-34 (5th Cir. 1996); United States v. Gillis, 773 F.2d 549, 559 (4th Cir. 1985). An incarcerated criminal also has no right to personally appear for or make oral arguments on appeal. Myers,

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76 F.3d at 1333-34.

We affirm.

Schwartz, CT

WE CONCUR:

Becker, J.

Ajda, J.

DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the **Petition for Review to the Supreme Court of the State of Washington** filed under **Court of Appeals No. 60365-5-I** to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for respondent **Dennis McCurdy - King County Prosecuting Attorney**, **appellant** and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.

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MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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