

NO. 83826-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL J. SIMMS AKA TERRY JAY WEEKS,

Appellant.

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SUPREME COURT
STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Does the constitution require that the State allege in an Information that a defendant has a prior conviction (or convictions) with a firearm enhancement, when the amount of confinement time a defendant will receive upon the current conviction with a firearm enhancement is based upon the number of such prior convictions?

B. STATEMENT OF THE CASE

The defendant, Daniel Simms, was charged in Count I with first-degree robbery with a firearm enhancement, in Count II with second-degree assault with a firearm enhancement, in Count III with second-degree assault with a firearm enhancement, and in Count IV with unlawful possession of a firearm in the first degree. CP 1-3. Counts I, II and III each involved a separate victim. A jury found Simms guilty as charged. CP 56-62.

Simms' offender score was 14 on all but his unlawful possession of a firearm conviction. CP 114. Among Simms' prior convictions is a 2000 second-degree assault conviction that

included a firearm enhancement. CP 94-102; Exhibit 27.¹ This prior conviction with a firearm enhancement was used to calculate the amount of time to be imposed for each of Simms' firearm enhancements. CP 114. Because Simms had a prior conviction with a firearm enhancement, the punishment required to be imposed for his current conviction with a firearm enhancement was increased. See RCW 9.94A.510(3).

Simms received a low-end standard range sentence of 129 months on his robbery conviction, the greatest offense, with lesser concurrent sentences for his other convictions. The sentencing court also imposed consecutive firearm enhancements as required, for a total sentence of 393 months. CP 113-22; see also CP 94-102, 152-66 (for a detailed account of Simms' scoring and sentence ranges).

Simms appealed his conviction and sentence and lost on all accounts. See State v. Simms, 151 Wn. App. 677, 214 P.3d 919 (2009). Simms filed a petition with this Court raising a number of issues. On March 3, 2010, this Court accepted review on the

¹ The judgment and sentence was introduced at trial as Exhibit 27. As an element of the first-degree unlawful possession of a firearm charge, the State was required to prove beyond a reasonable doubt the existence of the prior conviction. See RCW 9.41.040(1).

notice issue only, specifically: whether the State was required to allege in the Information that Simms had previously been convicted of a crime with a firearm enhancement because his prior conviction increased the amount of punishment imposed for his subsequent conviction with a firearm enhancement.

C. ARGUMENT

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT SIMMS' PRIOR CONVICTION WITH A FIREARM ENHANCEMENT BE ALLEGED IN THE INFORMATION.

Simms claims that there is a constitutional requirement that the State allege in an Information recidivist facts. Specifically, Simms alleges that the State was constitutionally required to allege in the Information that he had a prior conviction with a firearm enhancement because his prior conviction with a firearm enhancement was ultimately used in determining the amount of confinement imposed for his current convictions.² This is incorrect. There is no such constitutional requirement, and Simms' contention is in conflict with a multitude of prior decisions of this Court.

² It should be noted that Simms does not argue that he did not have actual notice of the punishment he faced, that he was not provided the opportunity to contest that he has a prior conviction, nor that the State did not prove he had a prior qualifying conviction. Rather, Simms' argument is limited to his contention that the State was required to allege that he had a prior conviction in the Information.

a. The Charging Documents And Conviction.

As to Count I, the Information provided to Simms alleged as follows:

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse DANIEL J. SIMMS AKA TERRY JAY WEEKS of the crime of Robbery in the First Degree, committed as follows:

That the defendant DANIEL J. SIMMS AKA TERRY JAY WEEKS in King County, Washington on or about February 18, 2006, did unlawfully and with intent to commit theft take personal property of another, to-wit: U.S. currency, from the person and in the presence of John Jacobs, against his will, by the use or threatened use of immediate force, violence and fear of injury to such person or his property and to the person or property of another, and in the commission of and in immediate flight therefrom the defendant was armed with a deadly weapon, to-wit: a firearm, and displayed what appeared to be a firearm, to-wit: a handgun;

Contrary to RCW 9A.56.200(1)(a)(i) and 9A.56.190, and against the peace and dignity of the State of Washington.

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).³

³ RCW 9.94A.510(3) has since been recodified at RCW 9.94A.533(3).

CP 1.⁴ Simms never raised any notice type objection to the Information.

In regards to the firearm enhancements, the jury was instructed as follows:⁵

You will also be given special verdict forms E, F and G for the crimes charged in count I, II and III. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no."

CP 88-89. This instruction substantially mirrors Washington Pattern Jury Instruction Criminal (WPIC) 160.00.

As to count I, the jury was provided a special verdict form that read as follows:

We, the jury, return a special verdict by answering as follows:

⁴ Counts II and III used the same language to allege the firearm enhancements attached to each count of second-degree assault perpetrated by Simms. CP 2.

⁵ Although Simms raises a notice issue only, the State includes the following facts to demonstrate that the procedures used in this case met all due process requirements.

Was the defendant DANIEL J. SIMMS AKA TERRY JAY WEEKS, armed with a firearm at the time of the commission of the crime in Count I?

Answer: _____
(Yes or No)

CP 42.⁶ This instruction mirrors WPIC 190.02.

b. The Sentencing Statute.

RCW 9.94A.533, titled "Adjustments to standard sentences," is part of the Sentencing Reform Act of 1981 (hereinafter the SRA). In pertinent part, the statute provides that additional time shall be added to a defendant's standard range sentence for certain felony crimes if the offender was armed with a deadly weapon or a firearm. The length of confinement depends upon whether the underlying offense is a class A, B or C felony, and whether the offender has a prior conviction for a deadly weapon or firearm enhancement. Specifically, and as pertinent here, the statute provides as follows:

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

.....

⁶ The special verdict forms for counts II and III used the same language. CP 43-44.

(3) 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. . . .:

(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;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed.

RCW 9.94A.533(1), (3).

c. The Practice And Procedure Used Here Meets All Constitutional Requirements.

Simms relies on the "essential elements" rule for his argument that his prior conviction with a firearm enhancement was required to be pled in the Information. Simms' reliance on the essential elements rule is misguided.

The essential elements rule requires that an Information contain all the essential elements of a crime. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008); State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). "Elements" are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime. Recuenco, 163 Wn.2d at 434-35. An element is "essential" if its "specification is necessary to establish the very illegality of the behavior." State v. Yates, 161 Wn.2d 714, 757, 168 P.3d 359 (2007) (internal citations omitted).

The essential elements rule "is based on Const. art. I, § 22 (amend. 10)⁷ and on the Sixth Amendment⁸." City of Auburn v. Brooke, 119 Wn.2d 623, 627-28, 836 P.2d 212 (1992). The rule is intended to afford notice to an accused of the nature and cause of the accusation against him. Kjorsvik, 117 Wn.2d at 97; State v. Cosner, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975).

It is true that a sentencing enhancement, such as a deadly weapon or firearm allegation, must be included in the Information. Recuenco, 163 Wn.2d at 434-35. Specifically, in charging a firearm enhancement, the State must plead (and prove to a jury beyond a reasonable doubt) that the offender was armed with a firearm during the commission of the underlying offense. Id. "Preferably,

⁷ In pertinent part, art. I, § 22 provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusations against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

⁸ The Sixth Amendment provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

compliance should take the form of pleading by statutory language and citation of the statute or statutes upon which they are proceeding." Cosner, 85 Wn.2d at 51. That was done in this case.

The Information specifically accused Simms "at said time [the commission of the underlying offense] of being armed with a handgun." CP 1-2. The Information also contained the statutory citations relied upon; specifically, RCW 9.41.010, the definition of a firearm, and RCW 9.94A.510(3) (since recodified at RCW 9.94A.533(3)), the firearm enhancement statute. CP 1-2. In convicting Simms, the jury instructions required the jury to find "beyond a reasonable doubt" that at the time Simms committed the robbery and assaults, he was "armed with a firearm." CP 90.

The amount of punishment allowable upon a jury finding that an offender was armed with a firearm is based upon whether the offender has a prior conviction with a firearm enhancement and the class level of the current offense. RCW 9.94A.533(3). Neither the class level of the current offense, nor the fact of a prior conviction, need be pled in the Information and proven to a jury beyond a reasonable doubt. These determinations are no different than determining a defendant's offender score and standard range, or whether a conviction is an offender's third strike. The question of

whether a defendant has a prior conviction for sentencing purposes is a pure recidivist factor that is properly the domain of the sentencing court.

In Almendarez-Torres v. United States, the United States Supreme Court rejected the argument that recidivist factors must be charged in an indictment, proven to a jury, or proven beyond a reasonable doubt. 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

[P]etitioner claims that the Constitution requires Congress to treat recidivism as an element of the offense-irrespective of Congress' contrary intent. Moreover, petitioner says, that requirement carries with it three subsidiary requirements that the Constitution mandates in respect to ordinary, legislatively intended, elements of crimes. The indictment must state the "element." The Government must prove that "element" to a jury. And the Government must prove the "element" beyond a reasonable doubt. We cannot find sufficient support, however, in our precedents or elsewhere, for petitioner's claim.

Almendarez-Torres, 523 U.S. at 239. This Court has been in accord. See State v. Crawford, 159 Wn.2d 86, 147 P.3d 1288 (2006); State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003), cert. denied, 124 S. Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799, cert. denied, 535 U.S. 996 (2001); State v. Manussier,

129 Wn.2d 652, 685, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997).

Later, in Apprendi v. New Jersey, the Supreme Court was very specific in stating 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.” 530 U.S. 466, 489-90, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The Court’s subsequent decision in Blakely v. Washington,⁹ reaffirmed the holding of Apprendi.

This case requires us to apply the rule we expressed in Apprendi v. New Jersey. “Other 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.”

Blakely, 124 S. Ct. at 2536.

Despite citing to Apprendi in briefing to the Court of Appeals, Simms now attempts to argue that he is not relying on this line of cases. Rather, he claims the essential elements rule he relies on is

⁹ 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

based on other constitutional principles and requires that recidivist facts be alleged in an Information. See Petition for Review 7-8. This assertion is incorrect and not supported by case law. The essential elements rule is based on the right to a jury trial under art. I, § 22 and the Sixth Amendment, the purpose of the rule being "to give notice of the nature and cause of an accusation against the accused so that a defense can be prepared." State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995); Brooke, 119 Wn.2d at 627-29.¹⁰ Further, this Court has ruled on more than one occasion that constitutional due process does not require recidivist facts be alleged in an Information.

For example, in State v. Thorne, this Court rejected the claim that a person subject to his "3rd strike" under the Persistent Offender Accountability Act (POAA) needed to be charged with

¹⁰ Recently, this Court again affirmed this principle. In State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009), a majority of the justices of this Court (the four justice dissent and two person concurring opinion) held that under Blakely and Apprendi, exceptional sentence aggravating circumstances, i.e., facts that must be proved to a jury beyond a reasonable doubt--must be charged in the Information.

such in the Information charging the underlying offense.¹¹ State v. Thorne, 129 Wn.2d 736, 777-84, 921 P.2d 514 (1996).¹² This Court specifically discussed the essential elements rule but noted that the POAA does not define an offense; rather, the statute dictates the amount of punishment to be imposed "based on the past criminal history of a defendant." Thorne, 129 Wn.2d at 779. Thus, this Court held, "no 'charging document' is required with regard to the Persistent Offender Accountability Act because no crime is being charged; rather, a sentence is being imposed [based on the defendant's criminal history]." Id.

Still, Thorne argued, like the defendant here, that using his criminal history "is like an element," and thus it must be included in

¹¹ The persistent offender provisions are currently codified at RCW 9.94A.570 as part of the SRA. The statute's application is conceptually indistinguishable from the firearm enhancement provisions. In both situations, the amount of confinement time imposed is based on proof to the sentencing court that the defendant has a certain prior conviction or convictions. See Thorne, at 782-83 (noting that the provisions of the POAA act just like the scoring provisions of the SRA). Thus, Simms' argument would apply equally to the persistent offender provisions. In fact, because the entire SRA sentencing grid is based on whether a person has a prior conviction and the number of prior convictions, under Simms' argument, every single sentence imposed under current practice for every single felony offense would be subject to constitutional challenge because the prior offense(s) are not alleged in the Information.

¹² See also State v. Nass, 76 Wn.2d 368, 456 P.2d 347 (1969) (finding it would actually be harmful to require prior offenses to be charged in the Information).

the Information.¹³ This Court rejected Thorne's argument, noting, as did the United States Supreme Court in Apprendi et al., that "[a] defendant's criminal history is a factor which has traditionally been considered by sentencing courts," that criminal history is not like an element and need not be included in the Information. Thorne, at 780. "[F]ormal charging," this Court stated, "is not constitutionally mandated." Thorne, at 781. Simms has neither distinguished Thorne, nor shown that it is "incorrect and harmful." See In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970) (the doctrine of stare decisis dictates that this Court will not change a rule of law absent a showing that the established rule is clearly wrong and harmful).

Just a few years ago, this Court reaffirmed this line of cases, stating:

The United States Supreme Court and this court have repeatedly rejected the argument that pretrial notice of enhanced penalties for recidivism is constitutionally required.

¹³ The difference here is that Simms seems to concede, in rejecting the Court of Appeals' reliance on the Sixth Amendment, that the prior conviction need not be proven to a jury or proven beyond a reasonable doubt. In other words, Simms seems to argue there is some type of new essential element, an element that must be included in the Information despite the fact that the element need not be proven to a jury beyond a reasonable doubt.

Crawford, 159 Wn.2d at 93-94 (citing Oyles v. Boles, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962) (finding due process does not require notice of habitual offender status in regards to the underlying charge)).¹⁴

Even when the State seeks the death penalty, this Court has found that there is no constitutional requirement that this fact be included in the Information.

While we require formal notice to the accused by information of the criminal charges to satisfy the Sixth Amendment and art. I, § 22, we do not extend such constitutional notice to the penalty exacted for conviction of the crime. Due process in sentencing requires only adequate notice of the possibility of the death penalty.

State v. Clark, 129 Wn.2d 805, 811, 920 P.2d 187 (1996).¹⁵

Finally, Simms argues that a prior conviction for punishment purposes is no different than a prior conviction necessary for

¹⁴ Crawford proceeded to trial for robbery in the first degree believing his standard range was 57 to 75 months confinement. In reality, he was subject to a life sentence under the persistent offender accountability act. While the dissent in Crawford would have found Crawford's trial counsel ineffective for not investigating prior to trial Crawford's criminal history, the dissent did not question the holding that the constitution does not require pretrial notice of the potential penalty faced upon conviction. See Crawford, 159 Wn.2d at 103-08.

¹⁵ In briefing below, Simms asserts that to find against him would mean he has no constitutional protections. This is not true. Simms possesses all the constitutional due process rights as any other offender, notice and an opportunity to be heard. See Clark, 129 Wn.2d at 811. The only thing Simms does not possess, again like all other offenders, is a right to have the potential penalty upon conviction spelled out in the actual Information.

proving the crime of unlawful possession of a firearm. This assertion, not supported by any authority, lacks merit.

Under the unlawful possession of a firearm statute, proof that an offender has a prior conviction is a statutory element that must be proved in order for the offense to have been committed. See RCW 9.41.040. If an offender does not have a prior conviction, he or she is not guilty of the offense--the prior offense is necessary to "establish the very illegality of the behavior." See Yates, 161 Wn.2d at 757. To determine the amount of punishment that can be imposed upon a conviction, the court still must turn to the sentencing reform act and calculate the offender's standard range based on the number of prior convictions.

In contrast, a firearm enhancement must be imposed if the jury finds the offender was armed with a firearm at the time of the commission of the underlying crime. This finding does not require proof that the offender has a prior conviction for an offense with a firearm enhancement. Simms' argument to the contrary simply ignores this distinction and the case law on recidivist factors.

The amount of confinement or punishment imposed for every felony offense is at least in part determined by considering in some fashion an offender's criminal history. Prior convictions can

affect an offender's potential sentence in many ways and to a substantial degree. Prior convictions can take a conviction for first-degree murder from a low of 240 months to a high of 548 months, an addition of over 25 years. See RCW 9.94A.510; RCW 9.94A.515. A one-year sentence for theft of a firearm with no prior convictions can be increased by 90 additional months based solely on the number of prior convictions an offender has. Id. In some cases, a prior "violent offense" counts double, and "serious violent offenses" and "sex offenses" triple, quickly driving up an offender score and the amount of punishment. See RCW 9.94A.525(8), (9) and (17). In drug cases, persons with certain prior drug convictions can have their maximum possible punishment double. See RCW 69.50.408(1). A sentence enhancement for sexual motivation can double if an offender has a like prior conviction. See RCW 9.94A.533(8)(iv). And under the exceptional sentence provisions, unscored misdemeanors or multiple current convictions treated as prior convictions for scoring purposes that receive no additional punishment can be used to impose a sentence up to the statutory maximum for the offense. See RCW 9.94A.535(2)(b) and (2)(c). The potential punishment in each case--as is true for every single

case sentenced under the SRA--is dependent on the existence, type and number of prior convictions.

The use of prior convictions for punishment purposes as cited above is indistinguishable from the use of Simms' prior conviction here. To accept Simms' argument would mean that all individuals sentenced under the SRA should have been sentenced with an offender score of zero because the prior convictions were not alleged in the Information. This proposition is not supported by the case law. This Court has affirmed that the procedures provided for counting prior convictions under the SRA meet constitutional requirements.

The legislature has the authority to set such sentencing procedures. We will not mandate greater procedural protections than those required by statute unless those requirements violate a constitutional guaranty. Thus, we will not require pretrial notice of possible sentencing under the POAA unless the lack of notice allowed under the statute violated the defendant's right to procedural due process.

Crawford, 159 Wn.2d at 93-94 (citing State v. Ammons, 105 Wn.2d 175, 713 P.2d 719 (1986)). There is no requirement that prior convictions used to determine the amount of punishment to impose upon a conviction be alleged in the Information.

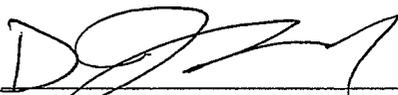
D. **CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's sentence.

DATED this 6 day of May, 2010.

Respectfully submitted,

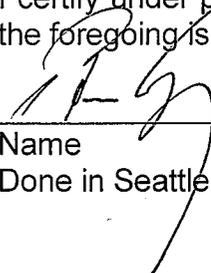
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. SIMMS, Cause No. 83826-7, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

05/07/10

Date