

No. 95374-1

NO. 74733-9-1

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

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STATE OF WASHINGTON,

Respondent,

v.

ARTHUR THOMAS,

Appellant.

FILED  
Dec 14, 2016  
Court of Appeals  
Division I  
State of Washington

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

The Honorable Jeffrey M. Ramsdell, Judge  
The Honorable Hollis Hill, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court lacked authority to empanel a jury to retry the appellant solely on a firearm allegation.

Issue Pertaining to Assignment of Error

The jury at the appellant's first trial left blank a special verdict form as to a firearm sentence enhancement. Following a second trial addressing only the firearm allegation, the jury found the appellant was armed with a firearm during commission of the crime. The court then sentenced him on the underlying crime as well as the firearm enhancement.

Where, however, the superior court lacked authority to empanel a jury to retry the appellant solely on the firearm allegation, should the firearm sentence enhancement be vacated?

B. STATEMENT OF THE CASE<sup>1</sup>

The State charged Arthur Thomas with the first degree assault of Bruce Golphenee under two alternative theories. CP 35-37; see RCW 9A.36.011(1)(a) (assaults another with a firearm, any deadly weapon, or by any force or means likely to produce great bodily harm or death); RCW 9A.36.011(1)(c) (assaults another and inflicts great bodily harm).

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<sup>1</sup> This brief refers to the verbatim reports as follows: 1RP – 12/1 and 12/2/15; 2RP – 12/3/15; 3RP – 12/7/15; 4RP – 12/8/15; 5RP – 12/9/15; 6RP – 12/10/15; 7RP – 1/15/16; and 8RP – 10/29 and 11/6/15 (first trial verdicts and hearing between trials). Volumes 1 - 7 are consecutively paginated.

The State also alleged that Thomas was armed with a firearm during the commission of the crime. CP 35; RCW 9.94A.533(3) (providing for additional term of incarceration if accused person was armed with a firearm, as that term is defined in RCW 9.41.010).

The allegation was based on a July 2014 shooting outside a Bank of America located in Seattle's Central District. See 2RP 50-51, 56 (trial on firearm enhancement). Thomas punched Golphenee, a bank security guard, and reached for his gun. 2RP 60-61; 3RP 225. The men then struggled for control of the gun. 2RP 61; 3RP 227. In the process, Golphenee was shot twice, and he also sustained other injuries.<sup>2</sup> 2RP 61-62; 4RP 381. Once Thomas gained control of the gun, however, he shot himself in the face. 2RP 62-63. Both men survived the ordeal. 3RP 248, 250.

A jury could not agree on the first degree assault charge but convicted Thomas of the lesser degree crime of second degree assault. CP 91, 107, 109-10; 8RP 1-20; see RCW 9A.36.021(1)(a) (reckless infliction of substantial bodily harm). The trial court instructed the jury to leave the special verdict form blank if it could not reach a unanimous verdict on the firearm allegation. CP 95. The jury left the form blank. CP 111; 8RP 19.

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<sup>2</sup> For example, Golphenee's ankle was fractured in the struggle. 4RP 278, 280.

Rather than proceeding to sentencing on second degree assault, the State moved for the court to hold a second trial on the firearm enhancement alone. 8RP 29-30. Thomas's objected, but the objection was overruled. 8RP 29-43.

Following a seven-day jury trial re-litigating the details of the underlying incident,<sup>3</sup> the jury answered "yes" to the firearm special verdict. CP 123.

The court sentenced Thomas to 42 months of incarceration, including a 36-month firearm sentence enhancement. CP 144-51.

Thomas timely appeals. CP 166.

C. ARGUMENT

1. THE TRIAL COURT LACKED AUTHORITY TO EMPANEL A JURY TO RETRY THOMAS SOLELY ON A FIREARM ALLEGATION.

The trial court had no authority to empanel a jury to retry the appellant solely on a firearm allegation. As a result, Thomas's 36-month firearm sentence enhancement must be vacated.

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<sup>3</sup> The original trial, in comparison, lasted 10 days. Supp. CP \_\_\_\_ (sub no. 105A, October 2015 trial minutes).

- a. Under *Pillatos*, the trial court lacked authority to empanel a sentencing jury to consider the firearm enhancement, and the sentence must be vacated.

Trial courts lack inherent authority to empanel sentencing juries. *State v. Pillatos*, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007).

*Pillatos* was decided following the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004). In *Blakely*, the Court held that Washington's system for imposing exceptional sentences violated the Sixth Amendment, and that aggravating factors justifying such sentences must be proved to the trier of fact beyond a reasonable doubt. *Id.*

In response to *Blakely*, the legislature enacted former RCW 9.94A.537 (Laws of 2005, ch. 68, §1), known as the "*Blakely* fix," to bring chapter 9.94A RCW, the Sentencing Reform Act (SRA), into compliance with *Blakely*. The *Blakely* fix authorized trial courts to empanel juries to consider aggravating factors listed in RCW 9.94A.535(3) supporting exceptional sentences. Thereafter, in *Pillatos*, 159 Wn.2d 459, the Washington Supreme Court upheld the *Blakely* fix.

But, in doing so, the Court reiterated its previous holdings that trial courts do not have inherent authority to empanel sentencing juries. *Pillatos*, 159 Wn.2d 469-70 (citing *State v. Hughes*, 154 Wn.2d 118, 151-52, 110 P.3d 192 (2005), abrogated on other grounds by *Washington v. Recuenco*,

548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); State v. Martin, 94 Wn.2d 1, 8, 614 P.2d 164 (1980)).<sup>4</sup> The Hughes court, for example, had stated that “[t]his court will not create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure . . . . To create such a procedure out of whole cloth would be to usurp the power of the legislature.” Hughes, 154 Wn.2d at 515-52. In Martin, in the Supreme Court refused to imply a “special sentencing provision” that would allow the death penalty to apply to those who pleaded guilty, in the absence of any statutory provision allowing a jury to be empaneled following such a guilty plea. 94 Wn.2d at 7-8.

Although Pillatos upheld the Blakely fix, that legislation contains no provision related to firearm enhancements under RCW 9.94A.533. Thus, under Pillatos and the authority cited therein, the trial court lacked authority to empanel a sentencing jury in Thomas’s case. As a result, the firearm enhancement in this case must be reversed. Pillatos, 159 Wn.2d at 466, 480-81.

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<sup>4</sup> The Supreme Court held that, moreover, the Blakely fix statute applied only to cases pending trial before its effective date. Pillatos, 159 Wn.2d at 470-74. In response to this portion of Pillatos, the legislature again amended the SRA, expressly authorizing courts to empanel juries to decide aggravating factors “in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.” Laws of 2007, ch. 205, §1 (statement of legislative intent).

- b. This Court should reject any argument that subsequent case law authorized the trial court to empanel a jury to consider the firearm enhancement.

Thomas anticipates the State will argue that subsequent cases authorize a freestanding jury trial on a firearm enhancement. Yet such an argument should be rejected. Pillatos has not been overruled in this respect and remains the controlling authority. See Agostini v. Felton, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (if a higher court's precedent has direct application, yet appears to rest on reasoning rejected in some other line of cases, the lower courts should follow the case that directly controls).

In the court below, for example, the State relied on this Court's decision in State v. Reyes-Brooks to argue that Thomas could be retried on the firearm enhancement. 165 Wn. App. 193, 202-07, 267 P.3d 465 (2011), review granted, cause remanded, 175 Wn.2d 1020, 289 P.3d 625 (2012); see Supp. CP \_\_\_\_ (sub no. 130, State's Motion to Continue Sentencing). Thomas anticipates the State will rely on that case in this Court as well.

But Reyes-Brooks does not support the State's argument for two reasons. First, the case was overruled following the Supreme Court's overruling of itself in the Bashaw-Nuñez line of cases. Second, the statute that Reyes-Brooks relies on to hold jury empanelment is permitted—the Blakely fix statute itself—is patently inapplicable here.

In Reyes-Brooks, this Court reversed of a firearm enhancement based on a purported error under the Supreme Court's decision in State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) (holding that unanimity not required on special verdict as to sentence enhancement, and that giving jury special verdict instruction stating to the contrary constituted error), overruled by State v. Nuñez, 174 Wn.2d 707, 285 P.3d 21 (2012).

This Court determined, however, that following vacation of the enhancement on remand, a jury could be empaneled to again consider the enhancement. Reyes-Brooks, 165 Wn. App. at 206. According to the opinion, RCW 9.94A.537 supplied the authority to do so. Reyes-Brooks, 165 Wn. App. at 206. After the Pillatos decision, this Court noted, the legislature amended RCW 9.94A.537 to allow trial courts to impanel juries for resentencing in cases that had previously been decided. The amended statute provides that

[i]n any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

RCW 9.94A.537(2). This Court determined that the broad language of this provision encompassed firearm enhancements under RCW 9.94A.533 as well as the aggravating circumstances listed in RCW 9.94A.535(3). Reyes-

Brooks, 165 Wn. App. at 206.<sup>5</sup> But see State v. McNeal, 156 Wn. App. 340, 353, 231 P.3d 1266 (2010) (Division Two case stating that “[t]he plain language of RCW 9.94A.537(2) . . . authorizes a resentencing court to impanel a jury *only* when the alleged aggravating circumstance is listed in RCW 9.94A.535(3).”). Moreover, another panel of this Court considering a Bashaw challenge held to the contrary, observing that RCW 9.94A.537 explicitly responded to Blakely and “reveal[ed] nothing about the legislature’s intent concerning retrial in these circumstances.” State v. Ryan, 160 Wn. App. 944, 950, 252 P.3d 895 (2011), rev’d sub nom. State v. Nuñez, 174 Wn.2d 707, 285 P.3d 21 (2012).

In any event, Reyes-Brooks was, nevertheless, reversed by the Supreme Court following that Court’s reversal of Bashaw in Nuñez, 174 Wn.2d 707. On remand from the state Supreme Court, this Court simply affirmed Reyes-Brooks’s sentence. State v. Reyes-Brooks, noted at 171 Wn. App. 1028 (2012) (unpublished opinion).

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<sup>5</sup> This Court also pointed out that under RCW 9.94A.537(4) a jury other than the one impaneled for the original trial may consider an aggravating circumstance at resentencing: “Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing[.]” Reyes-Brooks, 165 Wn. App. at 205.

Thus, one panel of this Court (in contrast to another panel) fashioned a remedy for a scenario that can no longer occur. As a result, that portion of Reyes-Brooks discussing the appropriate remedy for Bashaw error is no longer good law. See State v. McCollum, 17 Wn.2d 85, 148, 141 P.2d 613 (1943) (reversal by higher court invalidates rule set forth in lower court opinion).

But in any event, a close reading of the Blakely fix statute reveals that, even under the extremely broad reading adopted in Reyes-Brooks, the statute still would not permit jury empanelment in this case.

The meaning of a clear and unambiguous statute is derived from its plain language alone. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), cert. denied, 534 U.S. 1130 (2002). Courts must assume the legislature means exactly what it says. State v. Delgado, 148 Wn.2d 723, 727, 63 P. 3d 792 (2003) (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)).

Putting aside the question of the statute's applicability to RCW 9.94A.533 sentence enhancements, by its plain language, RCW 9.94A.537 still does not apply here. RCW 9.94A.537 applies to cases "where an exceptional sentence above the standard range *was imposed* and where a new sentencing hearing is required." RCW 9.94A.537(2) (emphasis added). Unlike a situation following a Bashaw error, the jury deadlocked

in this case, so no exceptional sentence was ever imposed. Thus, the statute plainly does not apply. Even if it is still good law, Reyes-Brooks is therefore of no assistance to the State.

Below, the State also relied on State v. Thomas, 166 Wn.2d 380, 208 P.3d 1107 (2009) (Thomas II) to support its argument that empanelment was permitted to consider the firearm enhancement. see Supp. CP \_\_\_\_ (sub no. 130, supra). But, as in the case of the Reyes-Brooks opinion, Thomas II did not overrule the general rule set forth in Pillatos. Thus, Thomas II did not supply the trial court the authority to empanel a jury in this case

As a preliminary matter, review of that case's procedural history is required. In State v. Thomas (Thomas I), the Supreme Court reversed Covell Thomas's death penalty sentence due to instructional error on the RCW 10.95.020<sup>6</sup> aggravating factors. 150 Wn.2d 821, 876, 83 P.3d 970 (2004). The Court remanded for "a new trial on the aggravating factors or resentencing in accordance with this opinion." Id. The trial court empaneled a jury, which found four aggravating factors under RCW 10.95.020. The trial court then sentenced Thomas to life in prison without the possibility of parole. Thomas II, 166 Wn.2d at 385.

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<sup>6</sup> RCW 10.95.020 lists aggravating factors through which the State may obtain an enhanced sentence for defendants found guilty of first degree murder.

Covell Thomas again appealed his sentence, arguing that the trial court had no power to empanel a jury because chapter 10.95 RCW provided no mechanism for empanelment of a jury solely to consider the existence of aggravating factors. Thomas II, 166 Wn.2d at 392. Thomas relied in part on Hughes, 154 Wn.2d 118, a case relied on by Pillatos, to argue the court lacked such authority. The Thomas II Court disagreed, however, noting that Hughes dealt with aggravating factors under the SRA and therefore did not control the outcome. Thomas II, 166 Wn.2d at 392-93.

Here, however, the State sought empanelment of the jury to impose a SRA firearm enhancement. As a result, Hughes and Pillatos control. For this reason as well, the firearm enhancement must be vacated.

2. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL

As a final matter, if Thomas does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. This Court has ample discretion to deny the State's request for costs. For example, RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn2d 827, 834, 344 P.3d (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id.

The existing record establishes that any award of appellate costs would be unwarranted in this case. Thomas owes over \$100,000 in restitution. Supp. CP \_\_\_\_ (sub no. 176, Order Setting Restitution). As is obvious from the underlying incident and from a Western State Hospital evaluation, Thomas suffers from mental health issues, and these are likely to seriously undermine his ability to earn money. See, e.g., CP 24-33 (forensic mental health report).

In addition, the trial court found Thomas to be indigent and found that he could not contribute anything to the costs of appellate review. CP 159-60 (Order of Indigency); see also CP 163-65 (declaration of defendant, stating that Thomas has no assets and no income). Indigence is presumed to continue throughout the appeal. State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (citing RAP 15.2(f)), review denied, 85 Wn.2d 1034 (2016).

In summary, in the event that Thomas does not substantially prevail on appeal, this Court should not assess appellate costs against him.

Provided that this Court believes there is insufficient information in the record to make such a determination, however, this Court should remand for the superior court, a fact-finding court, to consider the matter.

D. CONCLUSION

The trial court lacked authority to empanel a jury to try the appellant solely on a firearm allegation. This Court should vacate the resulting sentence enhancement. In any event, any request for appellate costs should be denied.

DATED this 14<sup>TH</sup> day of December, 2016.

Respectfully submitted,

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