

65002-5

65002-5

No. 65002-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN MATTHEW BACANI,

Appellant.

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

The Honorable Douglass A. North

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT 1

IMPOSITION OF THE SENTENCE FOR THE
DEADLY WEAPON ENHANCEMENT WAS THE
PRODUCT OF AN IMPROPER JURY VERDICT AND
MUST BE STRICKEN 1

B. CONCLUSION..... 3

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).....	2
State v. Nunez, ___ Wn.App. ___, 2011 WL 505335 (Div. 3, February 15, 2011)	2
State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008)	1, 2
State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004).....	2
State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010).....	1

A. ARGUMENT

IMPOSITION OF THE SENTENCE FOR THE
DEADLY WEAPON ENHANCEMENT WAS THE
PRODUCT OF AN IMPROPER JURY VERDICT AND
MUST BE STRICKEN

Justin Bacani submitted that the trial court's imposition of the sentence for the deadly weapon enhancement was illegal as it was the product of an improper jury verdict. A sentence enhancement must be authorized by a valid jury special verdict. *State v. Williams-Walker*, 167 Wn.2d 889, 900, 225 P.3d 913 (2010). Error occurs when the trial court imposes a sentence enhancement not authorized by a valid jury verdict. See *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (the error in imposing a firearm enhancement where the jury found only a deadly weapon occurred during sentencing, not in the jury's determination of guilt). The remedy for an improper special verdict is to strike the enhancement, not remand for a new trial. *Williams-Walker*, 167 Wn.2d at 899-900; *Recuenco*, 163 Wn.2d at 441-42.

The State counters that Mr. Bacani cannot raise this issue for the first time on appeal because he did not object below, and the error is not a manifest constitutional error. Brief of Respondent at 5-9. But, "illegal or erroneous sentences may be challenged for

the first time on appeal,” regardless of whether defense counsel registered a proper objection before the trial court. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004), quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). The error here occurred not in the use of the invalid instruction, as the State argues, but when the trial court imposed the sentence enhancement based upon an invalid special verdict.¹ Thus, the issue is properly before this Court.

The State also contends that any error regarding the special verdict instruction was harmless. Brief of Respondent at 9-10. The decision in *Bashaw* specifically precludes such an analysis.

In *Bashaw*, the same instruction at issue here was used.

The Supreme Court refused to apply harmless error:

This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved.

...
The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction . . . We cannot say with any confidence what might have occurred

¹ Division Three recently ruled *Bashaw* error was not a manifest constitutional error, thus the defendant could not raise it for the first time on appeal. *State v. Nunez*, ___ Wn.App. ___, 2011 WL 505335 (Div. 3, February 15, 2011). *Nunez* is incorrect in its analysis because it fails to comprehend that the issue is the imposition of an illegal sentence which can be raised at anytime.

had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Id. at 147-48 (emphasis added).

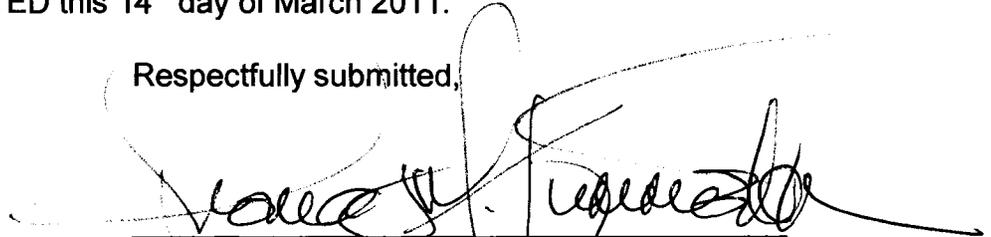
The same analysis applies here. The same instruction was used here as was utilized in *Bashaw*, thus this Court is foreclosed from applying a harmless error analysis.²

B. CONCLUSION

The trial court imposed an illegal sentence when it sentenced Mr. Bacani to additional time for the deadly weapon enhancement. For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. Bacani requests that this Court reverse the additional sentence for the enhancement and strike the enhanced sentence.

DATED this 14th day of March 2011.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

² The State's final argument regarding legislative intent is an attack on the underpinnings of *Bashaw*. Since *Bashaw* is a decision of the Supreme Court which this Court cannot overturn, the State's argument is better saved for the Supreme Court.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65002-5-I
v.)	
)	
JUSTIN BACANI,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> BRIDGETTE EILEEN MARYMAN, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> JUSTIN BACANI 804802 WSP 1313 N 13 TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF MARCH, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710