

70254-8

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NO. 70254-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN CHARLES THOMPSON,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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Marla L. Zink  
Attorney for Appellant

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

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A. SUMMARY OF REPLY

Because the trial court exercised independent judgment on resentencing to find John Thompson was armed with a firearm, this Court should hold the 60-month enhancement must be vacated as judicial fact-finding that contravenes the jury's deadly weapon special verdict.

B. ARGUMENT IN REPLY

**While exercising its discretion to consider the enhancement on remand, the court lacked authority to impose a 60-month sentencing enhancement for a firearm where the special jury verdict found generically a deadly weapon, not a firearm.**

When this Court granted Mr. Thompson's personal restraint petition, in part, it remanded for resentencing. CP 17 ("Granted in part and remanded for resentencing."). The mandate did not limit the trial court's authority at resentencing by specifying an individual portion of the sentence to be reconsidered or remanding only for a ministerial correction. *See id.*; *see also* CP 16 ("We . . . grant the petition in part, and remand for resentencing."). This Court's mandate was open-ended.

Although the trial court could have only reconsidered Mr. Thompson's standard range sentence in light of the correct offender

score, it did more. It exercised discretion and entered a finding that Mr. Thompson was armed with a firearm, a fact not supported by the jury's deadly weapon special verdict. 3/21/12 RP 31; CP 28, 30. Because the court so found, Mr. Thompson is entitled to review of that finding. *State v. Kilgore*, 167 Wn.2d 28, 37, 216 P.3d 393 (2009). The finding is unconstitutional in light of *Williams-Walker*<sup>1</sup> because it was found by the judge not the jury. The error warrants automatic vacation of the enhancement. *See Williams-Walker*, 167 Wn.2d at 902.

The State attempts to persuade the Court to deny review of the issue by declining to refer to portions of the record. Notably, the State fails to quote either from this Court's mandate or from the trial court's finding at resentencing. *See, e.g.*, Resp. Br. at 13 (arguing as to what court did at resentencing without citation to or quoting from court's finding at 3/29/12 RP 31 that court "is finding" defendant was armed with firearm); Resp. Br. at 4 (ignoring court's "finding" on firearm enhancement); Resp. Br. at 2 (ignoring and not quoting from Court's mandate, which simply states "remand for resentencing" at CP 16, 17).

First, this Court's mandate was open-ended. *Kilgore*, 167 Wn.2dat 42. Absent explicit limitation, authority on remand is broad.

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<sup>1</sup> *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010).

*Godefroy v. Reilly*, 140 Wash. 650, 657, 250 P. 59 (1926). This Court ruled, “We accept the State’s concession, grant the petition in part, and remand for resentencing.” CP 16. It is clear the resentencing court’s authority was broad at least as far as resentencing was concerned, because if this Court intends to limit remand to consideration of a single issue, “it will give instructions to that effect, in unmistakable language.” *Godefroy*, 140 Wash. at 657. For instance, the mandate might set forth “remand . . . for resentencing without community custody.” *In re Postsentence Review of Leach*, 161 Wn.2d 180, 189, 163 P.3d 782 (2007); see also *State v. Eilts*, 94 Wn.2d 489, 496, 617 P.2d 993 (1980) (explicitly limiting scope of mandate by stating “the cause is remanded for modification of the restitution order consistent with this opinion”). In *Leach*, the court’s specificity was also clear from the statement that “The error is grounds for reversing only the erroneous portion of the sentence imposed.” 161 Wn.2d at 189. Likewise, in *State v. Rowland*, this Court specified, “We affirm the exceptional sentence and remand to correct the offender score and standard range consistent with this opinion.” 160 Wn. App. 316, 334, 249 P.3d 635 (2011).

This Court can, and knows how to, limit authority on remand. *E.g., Godefroy*, 140 Wash. at 657. In fact, here, it limited remand to “resentencing.” CP 16; *accord* CP 17 (“Granted in part and remanded for resentencing.”). However, unlike *Leach, Eilts* or *Rowland*, this Court’s mandate from Mr. Thompson’s personal restraint petition did not specifically further limit the trial court’s authority on resentencing. CP 16. The Court stated simply that remand was “for resentencing.” *Id.* The State is incorrect that finding anew the enhancement “exceed the scope of this Court’s mandate.” Resp. Br. at 6. Because the mandate was open-ended, the trial court had broad discretion on remand. *Kilgore*, 167 Wn.2d at 42.<sup>2</sup>

Moreover, the “law of the case” doctrine has no application here. Resp. Br. at 9. Law of the case means that “once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.” *Worden v. Smith*, \_\_\_ Wn. App. \_\_\_, 314 P.3d 1125, 1132 (2013) (quoting *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)). When this Court ruled that Mr. Thompson could not rely on *Williams-Walker* in his collateral

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<sup>2</sup> See also *State v. Graham*, \_\_\_ Wn. App. \_\_\_, 314 P.3d 1148, 1152 (2013) (considering on appeal an issue ruled on at resentencing where resentencing court exercised independent judgment even though issue was beyond the “specifically limited” basis for remand from Division Three).

attack, the posture was just that—a collateral attack. CP 16-17. Specific procedures and standards applied to that personal restraint petition. *See, e.g., id.* (new rule of *Williams-Walker* not applicable to collateral attack; actual prejudice must be shown). However, upon remand for resentencing, the judgment and sentence was no longer final. And review to this Court is now a direct appeal from resentencing, not a collateral attack. Thus, this Court’s holding on the personal restraint petition is not “law of the case” as to direct review here. *See* Resp. Br. at 9 (citing *State v. Harrison*, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003), which holds that collateral estoppel precludes relitigation only if issue in prior adjudication is identical to issue currently presented for review and only if barring relitigation will not work an injustice).

The State’s failure to review the trial court’s enhancement finding is also fatal. The resentencing court made clear—with the help of the prosecutor—that “the Court is finding that the defendant was armed with a firearm.” 3/29/12 RP 31. Thus, although the court was not required to exercise its independent judgment on remand, it chose to do so and entered a finding on the enhancement. *Compare Kilgore*, 167 Wn.2d at 37, 41 (court only corrected offender score on remand);

*Rowland*, 160 Wn. App. at 319-21, 324-25, 328-29 (court did not reconsider exceptional sentence); Resp. Br. at 6 (noting “the trial court may resentence on the correct offender score while leaving the remaining valid portions of the sentence intact” (emphasis added)) *with* 3/29/12 RP 31 (finding a firearm enhancement not supported by jury’s special verdict).<sup>3</sup> As set forth in Mr. Thompson’s opening brief, that exercise of independent judgment sets this case apart from *Rowland* and *Kilgore*. Compare Op. Br. at 12-15 *with* Resp. Br. at 7-8 (discussing *Rowland*), 9-10 (discussing *Kilgore*).

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<sup>3</sup> The State accurately asserts that the court stated it would not revisit the jury’s verdict. Resp. Br. at 4; 3/29/12 RP 24. But the court did not revisit the verdict, it revisited Judge Martinez’s finding, which went beyond the jury’s verdict. Compare CP 38 (special verdict form) *with* CP 8 (Martinez’s judicial fact-finding results in imposition of 60-month firearm enhancement); 3/21/12 RP 31 (finding firearm enhancement anew); CP 28, 30 (2012 judgment and sentence).

C. CONCLUSION

This Court should vacate the firearm enhancement, which was imposed by the judge at resentencing, and remand for resentencing consistent with the jury's deadly weapon finding and *Williams-Walker*, 167 Wn.2d at 902.

DATED this 12th day of February, 2014.

Respectfully submitted,



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Marla L. Zink – WSBA 39042  
Washington Appellate Project  
Attorney for Appellant

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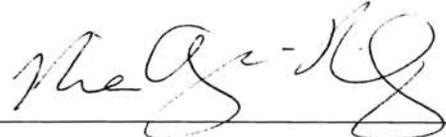
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I, NINA ARRANZA RILEY, STATE THAT ON THE 13<sup>TH</sup> DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2014.

x 

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