

FILED
July 28, 2015
Court of Appeals
Division I
State of Washington

COA No. 72804-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY NGUYEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Bruce E. Heller

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
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WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENT OF ERROR

The sentencing court violated Mr. Nguyen's Sixth Amendment rights under Blakely v. Washington and Alleyne v. United States when it imposed firearm enhancements to be run consecutively.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. A criminal defendant may not be given a longer or additional term of imprisonment unless the jury verdict represents a specific factual finding authorizing that increase in punishment. Therefore, the consecutive running of sentences for firearm enhancements is an element of the ultimate crime that must be charged and proved beyond a reasonable doubt

When the sentencing court denied Mr. Nguyen's written motion and argument at sentencing to be sentenced only on a single enhancement, did the court violate the Sixth Amendment?

2. Is the Washington statute upon which the sentencing court relied to impose consecutive enhancements, RCW 9.94A.533, incompatible with Alleyne?

C. STATEMENT OF THE CASE

1. **Factual framework.** Zachary Nguyen proceeded, with counsel, to a new sentencing hearing on charges of

burglary and robbery after this Court of Appeals held that an additional conviction emanating from his original jury trial, for assault, could not withstand his appellate challenge under double jeopardy and the merger doctrine. CP 2534 (unpublished Court of Appeals decision in No. 69543-6-I, April 28, 2014).

2. Prayer for relief pro se. Mr. Nguyen had sought to clarify, by pro se motion and memorandum prior to sentencing, that the hearing should be deemed a new sentencing hearing under State v. Davenport, 140 Wn. App. 925, 167 P.3d 1221 (2007), review denied, 163 Wn.2d 1041 (2008). Supp. CP ____ (Sub # 108) (Defendant's re-sentencing memo, filed Dec. 5, 2014).

The sentencing court accepted Mr. Nguyen's motion and memorandum and entertained the question raised regarding the enhancements. 12/5/14 Report of Proceedings at pp. 7-9; see Davenport, 140 Wn. App. at 932 (citing, *inter alia*, State v. Barberio, 121 Wn.2d 48, 51, 846 P.2d 519 (1993); see also State v. Sauve, 33 Wn. App. 181, 183 n. 2, 652 P.2d 967 (1982), affirmed, 100 Wn.2d 84 (1983)).

3. Sentencing and denial of defendant's Sixth

Amendment argument. Determining that the Sentencing Reform Act authorized, and no principle of law prohibited, the consecutive running of enhancements, the court ordered that Mr. Nguyen serve punishment for the offenses that included consecutive enhancements. 12/5/14RP at pp. 15-16; see CP 37-44 (Judgment and sentence).

Mr. Nguyen timely filed a notice of appeal. CP 45-46.

D. ARGUMENT

THE CONSECUTIVE RUNNING OF MR. NGUYEN'S FIREARM ENHANCEMENTS REPRESENTED ADDITIONAL PUNISHMENT REQUIRING THAT AN AUTHORIZING FACT BE PLEAD AND PROVED TO A JURY.

The case of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), establishes that a defendant cannot be sentenced on the basis of a fact that was neither admitted by him by plea or valid stipulation, or plead in the charging information¹ and proved beyond a reasonable doubt to a jury. U.S.

¹Although the charging information included an individual firearm allegation attached to each count, the document contained no additional allegation of fact upon which a sentencing court might later increase Mr. Nguyen's punishment in the form of consecutive running of the enhancements. CP 1-2.

Const. amend. 6,² U.S. Const. amend. 14; Blakely v. Washington, 124 S. Ct. at 2541 (citing Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

Subsequently, in Alleyne v. United States, — U.S. —, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013), the Supreme Court held that any fact increasing the mandatory minimum sentence for a crime is an “element” of that crime, not a sentencing factor, and therefore, the “element” must be submitted to the jury for determination. The analysis of Alleyne springs from Apprendi, 530 U.S. at 490, where the Court held the Sixth Amendment requires any fact that increases the penalty for a crime beyond the prescribed statutory maximum sentence, other than the fact of a prior conviction, must be submitted to the jury and proved beyond a reasonable doubt. See United States v. Mack, 729 F.3d 594, 606-

² The Sixth Amendment to the United States Constitution protects a criminal defendant’s jury trial right by dint of the following language:

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 defence.

07 (6th Cir. 2013), cert. denied, 134 S. Ct. 1338, 188 L. Ed. 2d 345 (2014).³

Similar principles, applied to Mr. Nguyen's case, result in a rule that automatic consecutive running of firearm enhancements must be predicated on the pleading of, and then proof to a jury, of an authorizing fact. For example, in Johnson v. United States, the Supreme Court vacated a judgment and remanded in consideration of Alleyne:

Opinion

On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of Alleyne v. United States, 570 U.S. — (2013).

Johnson v. United States, 134 S.Ct. 1538, 188 L.Ed.2d 553, 82 USLW 3549 (March 24, 2014). The ruling vacated the judgment in the case of United States v. Johnson, 515 Fed. Appx. 183 (Third Cir. 2013), wherein Johnson argued that the federal district court erred in sentencing him to mandatory consecutive terms on multiple

³ The Alleyne decision overruled Harris v. United States, 536 U.S. 545, 568, 122 S.Ct. 2406, 2420, 153 L.Ed.2d 524 (2002), in which the Court had held that the rule announced in Apprendi did not apply to facts that increase a defendant's mandatory minimum sentence.

firearm counts. Johnson, 515 Fed. Appx. Similarly, Mr. Nguyen's consecutive enhancements must be vacated under Alleyne and his Sixth Amendment rights.

Further, Washington statutory provisions authorizing consecutive punishment without requiring proof to a jury of an additional fact authorizing consecutive running, must fall to the Sixth Amendment. Thus, where RCW 9.94A.533⁴ makes

⁴ The statute at issue 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. 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 an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, 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[.]

consecutive running mandatory, such running is akin to the mandatory minimums addressed in Alleyne and therefore violates the right to a jury trial. Alleyne v. United States, supra, 133 S.Ct. at 2155.

E. CONCLUSION

Based on the foregoing, Mr. Nguyen asks that this Court vacate his sentence and remand for appropriate proceedings.

DATED this 28TH day of July, 2015.

Respectfully submitted,

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

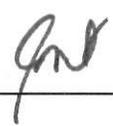
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 72804-1-I
v.)	
)	
ZACHARY NGUYEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JULY, 2015, I CAUSED THE ORIGINAL **OPENING 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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