SUPREME COURT NO. 93605-6

NO. 73333-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARCO BAILON WENCES,

Petitioner.

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

The Honorable Richard J. Thorpe, Judge
The Honorable George F. Appel, Judge

PETITION FOR REVIEW

JENNIFER WINKLER
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

Page

A. IDENTITY OF PETITIONER

Petitioner Marco Bailon Wences asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Marco Bailon Wences, filed July 25, 2016 ("Opinion" or "Op."), attached as this petition's Appendix A. A motion for reconsideration was denied on August 10, 2016. Appendix B.

C. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals fail to apply the general rule that a new rule of criminal procedure applies to cases still on direct review, and employ a rationale to reject Wences's claim that is novel in Washington and in conflict with other opinions of this Court?

D. STATEMENT OF THE CASE[1]

The State charged Wences with possession of a controlled substance, methamphetamine, with intent to manufacture or deliver. CP 88-89; former RCW 69.50.401(a)(1)(ii)(1998). The State also alleged that Wences was armed with a firearm at the time of commission of the crime.

[1] This petition refers to the verbatim reports as follows: 1RP – 7/2/04; Supp. RP – 2/22/04 (proceedings before jury selection); 2RP – 2/22/04 (proceedings after jury selection); 3RP –2/23/05; 4RP – 4/8/05; 5RP – 2/9/15; 6RP – 2/10/15; and 7RP – 3/23/15.

CP 88; former RCW 9.94A.602 (2001) (recodified as RCW 9.94A.825 by Laws 2009, ch. 28, § 41).[2] The charge stemmed from a September 12, 2003 traffic stop of Wences and subsequent search. CP 86-87.

A jury convicted Wences as charged as to the underlying offense. CP 31. As to the enhancement, the jury was instructed that "[f]or purposes of a special verdict, the State must prove beyond a reasonable doubt that [Wences] was armed with a deadly weapon at the time of

---

[2] Current RCW 9.94A.825, which retains the same language as its predecessor, states:

> In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.
>
> For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

commission of the crime." CP 50; 11 Wash. Prac., Pattern Jury Instr. Crim. 2.07.02 (3d Ed. 2008). The special verdict form asked jurors if Wences was "armed with a deadly weapon at the time of commission of the crime." The jury answered "[y]es." CP 30.

Wences did not appear for his initial sentencing hearing in 2004. 4RP 2-4. He was ultimately sentenced in 2015. 7RP 2-9. The court sentenced Wences to 100 months of confinement, including a 36-month firearm enhancement and a 64-month standard range base sentence. CP 19-20; former RCW 9.94A.510(3)(b) (2001) (three-year firearm enhancement for class B felonies and crimes with maximum sentence of 10 years) (recodified as RCW 9.94A.533 by Laws of 2002, ch. 290, § 11).

On appeal, Wences argued that the jury's verdict authorized only a deadly weapon enhancement. Therefore, the sentencing court violated Wences's right to a jury trial by sentencing him to a term corresponding to a firearm enhancement. Brief of Appellant at 19-21 (citing State v. Williams-Walker, 167 Wn.2d 889, 895, 225 P.3d 913 (2010)).

In a July 25, 2016 opinion, Division One of the Court of Appeals rejected Wences's sentencing argument on grounds raised sua sponte by the Court.[3] The Court appeared to agree as to the substance of the rule set

[3] The State did not raise the rationale ultimately relied on by the Court of Appeals, Brief of Respondent at 13-17, so Wences had no opportunity to

forth in Williams-Walker, but stated that because Wences did not appear for his original sentencing hearing, he should be sentenced based on the law in effect at the time of the original sentencing date. Op. at 7. Appearing to reject the general rule that a new rule for the conduct of criminal prosecutions applies retroactively to all cases still on direct review, the Court cited a factually inapposite Washington case and two Oregon cases relying on a doctrine that Washington courts have not adopted. Op. at 7 n. 26. Relying on only these authorities, the Court rejected Wences's claim. Op. at 6-8.

Wences filed a motion for reconsideration. The Court, however, denied the motion for reconsideration. Appendix B.

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1) AND (4) BECAUSE THE CASE PRESENTS A NOVEL ISSUE OF SUBSTANTIAL PUBLIC INTEREST AND THE COURT OF APPEALS' OPINION CONFLICTS WITH AUTHORITY FROM THIS COURT.

Rejecting the general rule that a new rule of criminal procedure applies to cases still on direct review, the Court of Appeals employed a rationale that is novel in Washington and appears to conflict with other opinions of this Court. This Court should, therefore, grant review under

---

brief it. Cf. State v. Aho, 137 Wn.2d 736, 741, 975 P.2d 512 (1999) (court may address issue raised sua sponte, but, consistent with RAP 12.1(b), "general rule" is that court will request additional briefing).

RAP 13.4(b)(1) and (4), reverse the Court of Appeals, and remand the case for resentencing under the law that applied to Wences's case at the time of his sentencing hearing.

1. Wences is entitled to relief under the law.

The general rule is as follows: In Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), the Supreme Court declared that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review . . . with no exception for cases in which the new rule constitutes a 'clear break' with the past." Without exception, this is the rule followed by Washington courts. E.g. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992).

Wences's case was still pending on direct review at the time he raised this claim on appeal. Thus, the Court of Appeals was obliged to apply the rule set forth in Williams-Walker, 167 Wn.2d at 895 (court's disregard of the sentence enhancement authorized by the special verdict violates the right of the accused to a jury trial). Thus, as in Williams-Walker, the jury's verdict in this case authorized a deadly weapon enhancement only. CP 30. Thus, the jury's verdict authorized a single year, not a three year, enhancement, in addition the 64-month base sentence that Wences is currently serving.

The Court of Appeals relied on three cases to deny Wences relief. Yet none of the three cases supplied the Court of Appeals with the authority to deviate from the general rule. The first case, the sole Washington case relied on by the Court, is factually and legally distinguishable. The two Oregon cases rely upon a doctrine that Washington courts do not follow. Although Washington courts apply a related doctrine, that doctrine does not bar relief in this case. Moreover, based on the facts of the Oregon cases, the rationale set forth in those cases is inapplicable to Wences's case.

2. *State v. Moore* is factually and legally inapplicable.

The first case Division One relies on is State v. Moore, 63 Wn. App. 466, 470-71, 820 P.2d 59 (1991). Op. at 7 n. 26. But, as a careful review of that case makes clear, the superior court in that case had statutory authority to impose the sentence challenged on appeal. Thus, the Court of Appeals correctly affirmed the sentence. No such statutory authority permitted the illegal sentence in this case.

In Moore, the Court of Appeals was asked to decide if former RCW 9.94A.400(1)(a), or rather if former RCW 9.94A.400(3),[4] governed defendant Evans's sentencing proceedings. 63 Wn. App. at 468. Evans

[4] Those provisions are currently codified in substantially similar form under RCW 9.94A.589. Laws of 2001, ch. 10, § 6.

had failed to appear for sentencing for two 1987 felony convictions. Three years later, he appeared before the same court for sentencing on those 1987 convictions, plus an unrelated 1990 assault conviction. Id. at 467-68.

The pertinent subsections of RCW 9.94A.400 are as follows:

> (1)(a) Except as provided in (b) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score[.] . . . . Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.120 and 9.94A.390(2)(e) or any other provision of RCW 9.94A.390.
> . . .
> . . . . .
> (3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was *not under sentence of a felony*, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced *unless the court pronouncing the current sentence expressly orders that they be served consecutively.*

Former RCW 9.94A.400(1)(a) and (3) (emphasis added).

The Court of Appeals held that former RCW 9.94A.400(3) applied because Evans committed the 1990 assault before he was "under sentence" for the two 1987 felony convictions. The sentencing court ruled that the sentence for the assault conviction would run consecutively to the

sentences for the burglary convictions, consistent with its discretion under .400(3). Moore, 63 Wn. App. at 469. "In effect, the trial court merely completed the overdue task of sentencing Evans for the 1987 burglary convictions and then proceeded to sentence Evans for the 1990 assault conviction." Id. Significantly, a trial court has unfettered discretion to impose a consecutive sentence under former RCW 9.94A.400(3); all that is required is that the judge expressly order it. In re Long, 117 Wn.2d 292, 302, 815 P.2d 257 (1991) (discussed at Moore, 63 Wn. App. at 470 n. 2).

In summary, a careful review makes clear that, in Moore, the superior court had statutory authority, and within that authority unfettered discretion, to impose the sentence challenged on appeal. No such authority permitted the unlawful sentence in this case.

3. The doctrine relied by the Oregon courts to deny relief has not been adopted in Washington, and the rationale for the rule set forth in those cases does not apply in this case.

The rationale for each of the Oregon courts' application of the former fugitive doctrine is absent in this case. The requested relief does not require a new trial or sentencing hearing, but rather a simple correction of the judgment and sentence. But more significantly, Washington does not recognize the former fugitive doctrine, instead recognizing a related doctrine that does not preclude relief in this case.

As the sole additional authorities for denying relief, the Court of Appeals also cited two Oregon cases, State v. Sills, 260 Or. App. 384, 388-89, 317 P.3d 307 (2013) and State v. Ristick, 204 Or. App. 626, 628-29, 131 P.3d 762 (2006). Op. at 7 n. 26.

Those cases, which apply Oregon's "former fugitive" doctrine, are inapplicable for two reasons. As a close analysis of the former fugitive doctrine reveals, the underlying factual rationale for application of the doctrine does not apply in the present case. More significantly, however, Washington courts have never applied the doctrine, instead applying a related doctrine that does not bar relief in Wences's case.

As explained in Sills, under the former fugitive doctrine as applied in Oregon, an appellate court has inherent judicial authority to dismiss a criminal defendant's appeal if the defendant's former fugitive status significantly interfered with the operation of the appellate process. Sills, 260 Or. App. at 388-89 (citing State v. Lundahl, 130 Or. App. 385, 390, 882 P.2d 644 (1994)).

In Lundahl, Oregon had adopted the doctrine, relying on the United States Supreme Court's decision in Ortega-Rodriguez v. United States, 507 U.S. 234, 113 S. Ct. 1199, 122 L. Ed. 2d 581 (1993).[5] The

[5] Ortega-Rodriguez itself also fails to support the result reached by the Court of Appeals in this case. In Ortega-Rodriguez, the United States

Lundahl court concluded that the defendant's lengthy escape significantly interfered with the appellate process, warranting outright dismissal of his appeal. 130 Or. App. at 390. The rationale underlying adoption of the doctrine was that it would be unfair to grant the defendant a retrial, the remedy he sought on appeal. The passage of time would work to the defendant's advantage on retrial based on "the amount of time that had passed since trial, the age of the victim, the availability of witnesses, how the jury would react to the testimony of the victim now that she was older, and the effect of the passage of time on the witnesses' memories of the events." Id.

The Sills court, applying the doctrine from Lundahl, rejected Sills's claim on nearly identical grounds. Sills was sentenced 10 years

---

Supreme Court addressed whether a rule allowing *automatic* dismissal of appeals taken by former fugitives was appropriate. 507 U.S. at 242-43. The Supreme Court held it was *inappropriate*, explaining

> the justifications we have advanced for allowing appellate courts to dismiss pending fugitive appeals all assume some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response. These justifications are necessarily attenuated when . . . a defendant's fugitive status at no time coincides with his appeal.

Id. at 244 (footnote omitted). But, although an automatic dismissal was not appropriate, the Supreme Court did state that appellate courts retained some authority to dismiss an appeal due to prior fugitive status, provided there is a rationale for such. Id.

after his conviction for first degree sexual abuse and public indecency. The victim was 13 at the time of the initial trial. Sills, 260 Or. App. at 386. Similar to the Lundahl court, Sills concluded

> a new trial would pose significant obstacles in regard to the witnesses [the state] had called in the first trial. Although the state was able to locate the two victims for the sentencing hearing . . . , and presumably would be able to find them again, the state had called a total of 21 witnesses at the original trial. Even if the state could find all of those witnesses—now 13 years later—the testimony of those witnesses has likely been affected by the protracted delay caused by defendant. Additionally, as in Lundahl, if a new trial were granted, the jury may react differently to the testimony of the now older victims than they would have to the testimony of 14-year-olds.

Sills, 260 Or. App. at 392-93.

Ristick is the other Oregon case relied on by the Court of Appeals in this case. Op. at 7 n. 26. In Ristick, also relying on the former fugitive doctrine, the Oregon court held the doctrine applied where a defendant sought resentencing rather than a new trial. 204 Or. App. at 628-29. Yet the Oregon's court's qualms with granting resentencing mirrored the issues in Lundahl and Sills, given that resentencing required a hearing before a jury and witnesses.

Ristick was convicted of two counts of aggravated theft in 1995, but before he could be sentenced, he fled and remained a fugitive for over seven years. He was sentenced in 2004. He appealed. The court

determined that the former fugitive doctrine applied and warranted dismissal of the appeal. Ristick, 204 Or. App. at 630. In reaching that conclusion, the court explained that a number of the same issues inherent in a delayed trial would apply to the resentencing hearing. For example, the sentencing court would be required to empanel a jury to establish the enhancement facts. Id. at 631. Based on the passage of 10 years, the state would face difficulty in locating witnesses and in presenting the testimony of the victim, then 90 years old and suffering from dementia. Id. From those circumstances, the court concluded that "the condition of the evidence, worsened by [the] defendant's long flight from the jurisdiction, would limit the state's ability to support a recommendation of upward departure and the resentencing court's ability to exercise the full range of tools at its disposal to impose an appropriate sentence." Id.

The rationale for each of the Oregon courts' application of the former fugitive doctrine is absent in this case. The requested relief does not require a new trial or sentencing hearing, but rather a simple correction of the judgment and sentence.

More significantly, however, Washington does not recognize the former fugitive doctrine. In Washington, rather, a convicted person who flees the court's jurisdiction *while his appeal is pending* waives his right to pursue the appeal. State v. Johnson, 105 Wn.2d 92, 97, 711 P.2d 1017

(1986); State v. Handy, 27 Wash. 469, 67 P. 1094 (1902). This rule, sometimes called the "fugitive from justice doctrine," has two bases: first, flight renders the appeal moot insofar as the appellate court's judgment may not be given effect; and second, "having scorned the court's authority over him, the fugitive is deemed 'disentitled' to appellate action." State v. Ortiz, 113 Wn.2d 32, 34, 774 P.2d 1229 (1989). Compare State v. Schrader, 135 Wash. 650, 660, 238 P. 617 (1925) (refusing to dismiss appeal where defendant, who had either escaped or been discharged from state mental hospital, had returned to jurisdiction of State before sentence was pronounced and initial steps of appeal were taken) with State v. Mosley, 84 Wn.2d 608, 609, 528 P.2d 986 (1974) ("In criminal cases the rule is well settled that where the defendant flees from the jurisdiction pending the appeal, he thereby waives his right to prosecute the appeal, unless within a time fixed he returns and surrenders himself into the custody of the proper officer or gives bail for his appearance.").

As a careful analysis of the foregoing cases demonstrates, the Oregon courts' rationale for employing the Ortega-Rodriguez "former fugitive doctrine" is absent in this case. In addition, the Court of Appeals relied on a doctrine that Washington courts have never employed and which conflicts with Washington law.

In summary, under the law that applied at the time of Wences's sentencing, the jury's verdict authorized only a deadly weapon enhancement. Moreover, under Washington rather than Oregon law, Wences did not forfeit his appeal. This Court should, therefore, grant Wences's petition, reverse the Court of Appeals, and remand for resentencing consistent with applicable law.

F. CONCLUSION

This Court should accept review under RAP 13.4(b)(1) and (4), reverse the Court of Appeals, and remand for resentencing consistent with the law that applied at the time of the sentencing hearing.

DATED this 2nd day of September, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER WINKLER, WSBA No. 35220
Office ID No. 91051

Attorneys for Petitioner

APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. MARCO BAILON WENCES, Appellant.	)	No. 73333-8-I UNPUBLISHED OPINION FILED: July 25, 2016

VERELLEN, C.J. — Marco Wences appeals his conviction for possession of methamphetamine with intent to manufacture or deliver. He contends the court erred in failing to suppress all of his statements to police and in imposing a firearm enhancement as part of his sentence. Because Wences has not carried his burden of demonstrating a basis to raise his new suppression argument for the first time on appeal and because he may not benefit from prospective changes in the law governing enhancements that occurred during a decade-long sentencing delay caused by his flight, we affirm.

FACTS

Based on evidence obtained in a search of Wences' car and a subsequent interrogation, the State charged him with possession of methamphetamine with intent to manufacture or deliver. The information alleged that Wences was armed with a firearm when he committed the offense.

Prior to trial, Wences moved to suppress his statements to police. At the suppression hearing, Officer Bruce Bosman testified that he obtained a warrant to search Wences and his Toyota Corolla after a confidential informant indicated Wences was selling methamphetamine.

On September 9, 2003, Officer Bosman spotted the Toyota and pulled it over. He informed Wences, the driver, of the search warrant. He advised him of his rights to remain silent and to an attorney and then commenced questioning. When Officer Bosman asked if there was a gun in the car, Wences said there was, but claimed it was not his.

After this initial questioning, Officer Bosman detained Wences in his patrol car and searched the Toyota. He found methamphetamine, a firearm, and a substantial amount of cash. Officer Bosman then arrested Wences and read him complete Miranda[1] warnings, including a warning that anything he said could be used against him in court. Officer Bosman proceeded to ask Wences additional questions, and Wences made additional incriminating statements.

In the suppression hearing, Wences testified that Officer Bosman gave him full Miranda warnings, including a warning that anything he said could be used against him in court, before each period of questioning. He claimed, however, that he requested an attorney and did not answer any questions. Neither party mentioned the then-recent decision in regarding improper two-step interrogations,[2] nor did Wences argue that Officer Bosman had used an improper two-step interrogation.

---

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1996).

[2] Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

The court granted the motion to suppress in part, ruling that Wences' "initial statements . . . made prior to being advised of . . . full constitutional rights" were not admissible.[3] The court also ruled, however, that Wences' subsequent statements "made after advisement of constitutional rights" were voluntary and admissible.[4] The court expressly found Wences' claim that he requested an attorney "not credible."[5]

After trial, the court gave the jury a special verdict form asking whether Wences was "armed with a deadly weapon at the time of commission of the crime."[6] The court instructed the jury that, for purposes of the special verdict, the State had to prove "that the defendant was armed with a *deadly weapon* at the time of the commission of the crime" and that "[a] pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.[7] The jury answered "yes" to the special verdict question and convicted Wences as charged.

Wences did not appear for his initial sentencing in 2004 and was not sentenced until 2015. The court imposed 100 months of confinement, including a 36-month firearm enhancement.[8] Wences appeals.

---

[3] Clerk's Papers at 54.

[4] Id.

[5] Id. at 53.

[6] Id. at 30.

[7] Id. at 50 (emphasis added).

[8] See former RCW 9.94A.510(3)(b) (2001) (recodified as RCW 9.94A.533 by LAWS OF 2002, ch. 290, § 11 (three-year firearm enhancement for class B felonies and crimes with maximum sentence of 10 years)).

DECISION

For the first time on appeal, Wences contends his post-Miranda statements should have been suppressed as the product of an impermissible two-step interrogation under Missouri v. Seibert.[9] Under Seibert, courts must suppress post-Miranda statements if police *deliberately* attempted to undermine Miranda warnings by using a two-step process in which initial unwarned statements were used to obtain post-warning statements.[10] We do not reach Wences' Seibert claim because he fails to carry his burden of demonstrating a valid basis to raise it for the first time on appeal.

"As a general rule, appellate courts will not consider issues raised for the first time on appeal."[11] An appellant waives a suppression issue if he or she failed to move for suppression on the same basis below.[12] Wences concedes he did not assert any argument under Seibert below. He argues, however, that the issue involves manifest constitutional error that may be raised for the first time on appeal under RAP 2.5(a)(3). We disagree.

To establish manifest constitutional error, a defendant must demonstrate constitutional error and "show how the alleged error actually affected [his] rights at

---

[9] 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

[10] State v. Rhoden, 189 Wn. App. 193, 199-203, 256 P.3d 242 (2015).

[11] State v. McFarland, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995); RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court.").

[12] State v. Garbaccio, 151 Wn. App. 716, 731, 214 P.3d 168 (2009) ("Because [the defendant's] present contention was not raised in his suppression motion, and because he did not seek a ruling on this issue from the trial court, we will not consider it for the first time on appeal.").

trial."[13] "It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review."[14] When a suppression issue is raised for the first time on appeal, however, the record may be insufficient to show actual prejudice because neither the defendant nor the State had the incentive or opportunity to develop the factual record before the trial court.[15]

Here, the State contends Wences cannot establish manifest constitutional error because his failure to raise his Seibert argument below leaves this court with an insufficient record to determine whether the interrogating officer *deliberately* employed an improper interrogation. The State notes that

> [i]n deciding whether an improper two-part interrogation took place, the court is to take into consideration subjective evidence, such as an officer's testimony. [State v.] Hickman, 157 Wn. App. [767,] at 775[,] 238 P.3d 1240 (2010)]. Because the issue was not raised below, the testimony of the officer as to his reason for giving the partial warnings is not available. Furthermore, the defendant testified that he was advised of more rights than the officer remembered giving him. The court did not enter findings with regard to the defendant's testimony. Had the court been alerted to the issue at the trial level, it could and likely would have entered findings specific to that issue.[16]

Wences chose not to respond to the State's argument, resting instead on a conclusory statement in his opening brief that "the record is adequate."[17] This is insufficient.

---

[13] State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007).

[14] Id. at 927 (citing McFarland, 127 Wn.2d at 333).

[15] See McFarland, 127 Wn.2d at 333.

[16] Br. of Resp't at 9.

[17] Appellant's Br. at 10.

It is the appellant's burden to establish the grounds for reviewing an issue for the first time on appeal.[18] Considering that the test for whether a two-step interrogation occurred involves consideration of all objective *and subjective* evidence bearing on the interrogating officer's intent,[19] and given the absence of any testimony from the interrogating officer on that point, there is not an adequate record to analyze Wences' two-step interrogation theory. Wences fails to carry his burden of demonstrating manifest constitutional error.[20]

Citing State v. Williams–Walker,[21] Wences next contends the court erred in imposing a three-year firearm sentence enhancement because the jury's special verdict only found that he was armed with a "deadly weapon." If the decision in Williams-Walker and its predecessor, State v. Recuenco,[22] applied to this case, Wences' argument would have merit. The courts in those cases held that a sentencing court is authorized to impose only the specific enhancement found by the

---

[18] State v. Grimes, 165 Wn. App. 172, 185-86, 267 P.3d 454 (2011).

[19] State v. Hickman, 157 Wn. App. 767, 775, 238 P.3d 1240 (2010).

[20] Although we do not reach the merits of Wences' argument under Seibert, we note that when, as here, post-warning statements follow statements made after attempted but incomplete warnings, there is little reason to believe that police deliberately tried to undermine Miranda. As one court noted in addressing facts similar to those presented here, "Because giving any warnings undermines the effectiveness of the 'question first' tactic, the fact that some warnings were given *strongly evidences* that the tactic was not being used." United States v. Street, 472 F.3d 1298, 1314 (11th Cir. 2006) (emphasis added); see also Hill v. Thaler, 484 Fed. App'x. 888, 890 (5th Cir. 2012) ("any argument that the officer employed a deliberate strategy is undermined by the fact that a partial reading of Miranda rights was given."); Fed. R. App. P. 32.1(a) (permitting citation to unpublished federal decisions issued in 2007 or later). It is undisputed that Officer Bosman informed Wences of his rights to remain silent and to an attorney before the initial questioning.

[21] 167 Wn.2d 889, 897-98, 225 P.3d 913 (2010).

[22] 163 Wn.2d 428, 180 P.3d 1276 (2008).

jury.[23] Accordingly, a jury determination that the defendant was armed with a deadly weapon does not authorize a court to impose a firearm enhancement, and imposition of the latter is not subject to harmless error analysis.[24] But Williams-Walker and Recuenco are not retroactive and therefore do not apply to judgments and sentences that were final when they were decided in 2008 and 2010.[25] While Wences' judgment and sentence was not final until 2015, it would have been final prior to both Recuenco and Williams-Walker but for Wences' flight and the consequent 11-year delay of his sentencing. A defendant should not benefit from changes in the law that apply to him solely because he absconded and delayed his sentencing.[26]

---

[23] Williams-Walker, 167 Wn.2d at 898-99.

[24] Id. at 898-901.

[25] In re Pers. Restraint of Netherton, 177 Wn.2d 798, 802, 306 P.3d 918 (2013).

[26] See State v. Moore, 63 Wn. App. 466, 470-71, 820 P.2d 59 (1991) (rejecting defendant's argument that all of his sentences should have run concurrently because he absconded to avoid sentencing on some of the offenses and "[b]y doing so, he prevented those sentences from being entered when they normally would have been. . . . To order the [sentences] to run concurrently . . . would in effect reward [the defendant]" for absconding); State v. Sills, 260 Or. App. 384, 388-94, 317 P.3d 307, 309-12 (2013) ("we find it significant that . . . one of defendant's challenges to his conviction would be affected—indeed benefited—by case law that has developed since he absconded. . . . Absent defendant's flight from Oregon, he would have been sentenced in 2000, and any appeal relating to that judgment would have been governed by the law as it existed at that time. In all likelihood, an appeal at that time would have resulted in a different outcome on defendant's first assignment of error . . . . Under those circumstances, we conclude that defendant's lengthy escape from justice significantly interfered with the appellate process and forfeits his appeal."); State v. Ristick, 204 Or. App. 626, 631, 131 P.3d 762 (2006) (dismissing appeal of defendant who fled before sentencing because the challenge to his sentence rested on a case decided during his flight and entertaining the argument "would allow defendant to benefit from flouting the judicial process and leave others undeterred from doing the same").

Because the jury's deadly weapon finding was sufficient to authorize Wences' firearm enhancement under the laws in effect at the time of his conviction (prior to Recuenco and Williams-Walker)[27] and because Wences cannot benefit from subsequent changes in the law, the court did not err in imposing the firearm enhancement.

The conviction and sentence are affirmed.

WE CONCUR:

[27] In re Pers. Restraint of Jackson, 175 Wn.2d 155, 163-64, 283 P.3d 1089 (2012).

APPENDIX B

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

STATE OF WASHINGTON, Respondent, v. MARCO BAILON WENCES, Appellant.	)	No. 73333-8-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant has filed a motion for reconsideration of the court's opinion entered July 25, 2016. After consideration of the motion, the panel has determined that it should be denied.

Now therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Done this 10th day of August, 2016.

FOR THE PANEL:

Verellen, C.J.

NIELSEN, BROMAN & KOCH, PLLC

September 02, 2016 - 12:21 PM

Transmittal Letter

Document Uploaded: 733338-Petition for Review.pdf

Case Name: Marco Wences
Court of Appeals Case Number: 73333-8

Party Respresented:

Is this a Personal Restraint Petition? ◯ Yes ◉ No

Trial Court County: Snohomish - Superior Court # ____

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ◯ Other: _____

Comments:

Copy sent to : Marco Wences 381882 Coyote Ridge Corrections Center PO Box 769
Connell, WA 99326

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

Diane.Kremenich@co.snohomish.wa.us
mrozzano@co.snohomish.wa.us
winklerj@nwattorney.net