NO. 95692-8

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ILANDERS HUTTON,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington State:

Statutes

Washington State:

Rules and Regulations

Washington State:

A IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Hutton, No. 75548-0-I, filed January 29, 2018 (unpublished).

C. ADDITIONAL ISSUE PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks cross-review of the following additional issue the State raised in the Court of Appeals, which was not reached by that court:

1. Hutton challenged the voluntariness of his plea based in part on the trial court's misinforming Hutton that he was not a felony firearm offender (and as a result the court did not have the authority to require him to register). The Court of Appeals rejected that claim, holding inter alia that the possibility of a firearm offender registration requirement was a collateral consequence of the plea. As an alternative ground to affirm, the State renews its argument that if the registration requirement applicable to a felony firearm offense is punitive and is a direct consequence of a guilty plea, registration was inapplicable to Hutton because the facts necessary

to establish that this was a felony firearm offense were not properly proven pursuant to Blakely v. Washington.[1]

D. STATEMENT OF THE CASE

Defendant Christopher Hutton was charged with premeditated first degree murder with a firearm enhancement for the killing of Jaebrione Gary between June 11 and June 12, 2015. CP 1-2; RCW 9.94A.533(3); RCW 9A.32.030(1)(a). Hutton also was charged with unlawful possession of a firearm in the first degree on the same dates. CP 1-2; RCW 9.41.040(1).

The Honorable James Cayce presided over a jury trial that began on April 5, 2016. 4/5/16RP 3. After three days of testimony, Hutton asked to negotiate a possible plea bargain. CP 65-66; 4/25/16RP 369; 4/28/16RP 691. The State made an offer the next morning and later that day Hutton pled guilty to premeditated murder in the first degree. CP 28-41, 47, 66; 4/28/16RP 690. As part of the plea agreement, the State agreed to dismiss the firearm enhancement and the charge of unlawful possession of a firearm. CP 47; 4/28/16RP 681. The court concluded that Hutton's guilty

[1] 542 U.S. 296, 302-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

plea was knowing, voluntary, and intelligent, and accepted the plea. 4/28/16RP 693.

Before sentencing, Hutton told his lawyer that he wanted to withdraw his guilty plea. CP 59. A motion to withdraw the guilty plea was filed June 15, 2016. CP 58-59. After the State filed its response to the motion, Hutton decided not to try to withdraw his guilty plea. CP 65-89, 94.

On July 22, 2016, the trial court sentenced Hutton to the high end of the presumptive sentence range, 416 months of confinement. CP 101-09; 7/22/16RP 713. The parties had made an agreed recommendation of that term, and the court agreed it was appropriate for the "brutal and senseless murder" that Hutton had committed. 7/22/16RP 713.

The Court of Appeals affirmed the conviction in a unanimous unpublished opinion. State v. Hutton, 75548-0-I (Wash. Ct. App. Jan. 29, 2018) (unpublished). Hutton filed a motion for reconsideration; it was denied February 27, 2018.

The relevant substantive facts are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 4-6.

E. ARGUMENT

The State's briefing at the Court of Appeals adequately responds to the issues raised by Hutton in his petition for review.

If review is accepted, the State seeks cross-review of an alternative argument it raised in the Court of Appeals but that the court's decision did not address. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review, and believes that review by this Court is unnecessary. However, if this Court grants review, in the interests of justice and full consideration of the issues, this Court also should grant review of the alternative argument raised by the State in the Court of Appeals. RAP 1.2(a); RAP 13.7(b). That argument is summarized below and set forth more fully in the briefing in the Court of Appeals.

1. IF THE REGISTRATION REQUIREMENT IS PUNITIVE, AS HUTTON CLAIMS, HE WAS CORRECTLY INFORMED THAT IT DID NOT APPLY.

Hutton claims that his guilty plea was involuntary because the trial court had the discretion to impose a requirement that he register as a felony firearm offender, but Hutton was informed that

he could not be required to register as a felony firearm offender. The State agrees that Hutton was informed that his crime was not a felony firearm offense to which a registration requirement might be applied,[2] but Hutton's argument that this advice rendered his plea involuntary should be rejected.

As the Court of Appeals held, the possibility of a registration requirement was a collateral consequence of the guilty plea, and Hutton has not shown that the possibility of registration was material to his decision to plead guilty, so the guilty plea should be upheld. Hutton, slip op. at 3-8. In the alternative, if the registration requirement is punitive, as Hutton claims, he was correctly informed that it did not apply because the facts necessary to its imposition had not been proven to a jury, as would be required by Blakely v. Washington, 542 U.S. 296, 302-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Under RCW 9.41.330, persons convicted of a felony firearm offense may be required to comply with the registration requirements set out in RCW 9.94A.333. The former version of

[2] CP 33-34 (plea form); 4/28/16RP 691 (Hutton initialed paragraphs that did not apply).

RCW 9.41.330 that would be applicable to Hutton[3] provides:

> (1) On or after July 28, 2013 whenever a defendant in this state is convicted of a felony firearm offense or found not guilty by reason of insanity of any felony firearm offense, the court must consider whether to impose a requirement that the person comply with the registration requirements of RCW 9.41.333 and may, in its discretion, impose such a requirement.
>
> (2) In determining whether to require the person to register, the court shall consider all relevant factors including, but not limited to:
>
> (a) The person's criminal history;
> (b) Whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and
> (c) Evidence of the person's propensity for violence that would likely endanger persons.

Former RCW 9.94A.330; 2013 Wash. Laws ch. 231, § 3. "Felony firearm offense" is statutorily defined as including any felony "if the offender was armed with a firearm in the commission of the offense." RCW 9.41.010(8).

Hutton's conviction constitutes a felony firearm offense only if he was armed with a firearm in the commission of the offense. RCW 9.41.010(8)(e). The Sixth Amendment requires that any fact that increases the penalty for a crime beyond the prescribed

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[3] The statute was amended in 2016, with an effective date of June 9, 2016. 2016 Wash. Laws ch. 94, § 1. Hutton entered his guilty plea on April 28, 2016. CP 41. Under RCW 9.94A.030(9), that was the date of his conviction. Because the amended version applies when a defendant is convicted on or after June 9, 2016, it would not apply to Hutton.

statutory maximum[4] must be proved to a jury, beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

The facts that establish that this crime was a felony firearm offense were not components of the guilty plea in this case. The elements of premeditated murder do not include use of a firearm, requiring only that "[w]ith a premeditated intent to cause the death of another person, [a person] causes the death of such person or of a third person." RCW 9A.32.030(1)(a). The factual statement in the guilty plea also did not refer to a firearm. CP 40. So the facts necessary to impose registration were not proven.

Hutton argued in the Court of Appeals that no impermissible judicial fact-finding was required to establish that this was a felony firearm offense because he "stipulated to facts establishing he was armed with a firearm in the commission of this offense," citing State v. Ermels, 156 Wn.2d 528, 531, 131 P.3d 299 (2006). However, in Ermels, the defendant explicitly stipulated that there was a legal basis for an exceptional sentence upward and that there was sufficient evidence for the court to impose an exceptional sentence.

[4] For purposes of that rule, the statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. Blakely, 542 U.S. at 303-04.

156 Wn.2d at 534. The court in Ermels noted that a jury need not find the additional facts "if appropriate waivers are procured" from the defendant. Id. at 537 (quoting Blakely, 542 U.S. at 310).

Hutton could not have knowingly waived his right to have a jury determine whether this crime was a felony firearm offense, because he was informed that this was *not* a felony firearm offense. He did not receive any notice that the State was seeking a firearm offense finding or that he had a right to a jury determination of the relevant facts. Nor is there any indication that he waived his right to a jury and stipulated to judicial fact-finding.

Moreover, a stipulation that facts may be considered at sentencing is not the equivalent of stipulating that the facts are sufficient to support a legal conclusion. State v. Hagar, 158 Wn.2d 369, 374, 144 P.3d 298 (2006); State v. Suleiman, 158 Wn.2d 280, 284, 143 P.3d 795 (2006). The defendant in Suleiman entered a plea agreement with the same term included in Hutton's plea agreement – that the facts in the certification for determination of probable cause were real and material facts for the purposes of sentencing. CP 47; Suleiman, 158 Wn.2d at 283. The Supreme Court held that because Suleiman did not agree that the facts formed a legal basis for an exceptional sentence, that stipulation

did not satisfy the due process requirements of Blakely. Suleiman, 158 Wn.2d at 292.

Thus, if the registration requirement is punitive, as Hutton claims, he was correctly informed that it did not apply and that advice did not render his guilty plea involuntary.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the issue identified in Sections C and E, supra.

DATED this 27th day of April, 2018.

Respectfully submitted,

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KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

April 27, 2018 - 10:32 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95692-8
Appellate Court Case Title:	State of Washington v. Christopher Hutton
Superior Court Case Number:	15-1-03745-1

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