

NO. 34240-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

VAN VETH,

Appellant.

BRIEF OF APPELLANT (REPLY)

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

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STATE OF WASHINGTON
BY  DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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A. ARGUMENT

1. THE SENTENCING COURT EXCEEDED ITS AUTHORITY IN IMPOSING A FIREARM ENHANCEMENT.

Appellant, Van Veth, contends the trial court exceeded its statutory authority when it imposed a firearm enhancement in his case, and thus contends the court should have granted his motion to vacate the judgment.

The Supreme Court held in State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005)¹, that: (1) a judicial finding of fact to support a firearm enhancement violated the Sixth and Fourteenth Amendments; and (2) no statutory authority exists to permit a jury to return a special verdict on such an enhancement. Recuenco held:

Because we held in [State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)] that we would not imply a procedure by which a jury can find sentencing enhancements on remand, we remand for resentencing based solely on the deadly weapon enhancement which is supported by the jury's special verdict.

¹ The United States Supreme Court overruled Recuenco to the extent the Washington Court found that as a matter of federal law the denial of a the right to a jury determination of an element of an offense. Washington v. Recuenco, U.S. ___, 126 S.Ct. 478, 163 L.Ed. 362 (2006). The Court expressly refused to reach the question of whether under Washington law any procedure existed to permit the submission of the firearm question to a jury.

Recuenco, 154 Wn.2d at 164. Based upon this plain holding that no procedure exists to submit the firearm question to the jury, Mr. Veth has argued his sentence is erroneous and in excess of the trial court's authority.

The State, in response, disagrees with the Washington Supreme Court's holding in Recuenco. The State argues that when Recuenco concluded there was not procedure by which to submit the firearm question to a jury on remand it was not concluding there was no procedure to allow submission of the question at the initial trial. The State argues further that RCW 9.94A.602 provides the authority to submit a firearm enhancement special verdict to the jury.

To accept the State's first argument, this Court would have to conclude that one procedure exists for an initial trial and a second procedure exists for case remanded from appellate courts. Yet the State fails to identify any authority for such a shadow procedure. Thus, there is either authority to submit the question to a jury or there is not.

The State maintains RCW 9.94A.602 is the source of this authority. Brief of Respondent at Of course, if this were true, Recuenco was incorrect when it held no such authority existed. But

setting aside, the binding effect of Supreme Court precedent on this Court, the State's argument ignores the plain language of RCW 9.94A.602 as well as the pre-Recuenco construction of the statutes pertaining to the firearm and deadly weapon enhancements.

RCW 9.94A.602 provides:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused . . . was armed with a deadly weapon at the time of the commission of the crime, . . . the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant . . . was armed with a deadly weapon at the time of the commission of the crime.

. . . The following instruments are included in the term deadly weapon: . . . pistol, revolver, or any other firearm

RCW 9.94A.602 establishes a procedure by which a deadly weapon enhancement is pled and proven to a jury, satisfying the defendant's constitutional right to a jury trial.

Again, if RCW 9.94.602 actually provides authority to submit the question to a jury, the Washington Supreme Court was wrong in Recuenco to conclude that nothing permitted the submission of the question on remand. Beyond this, however, prior to Recuenco, the relevant statutes were interpreted as expressly reserving the finding for a judicial determination. In State v. Meggyesy the court concluded that the jury could be instructed on the lesser deadly

weapon enhancement and the trial court in its discretion could make a finding that the deadly weapon was indeed a firearm. 90 Wn.App. 693, 707-10, 958 P.2d 319 (1998), review denied, 136 Wn.2d 1028 (1998). In State v. Rai, the court went further to conclude the unambiguous language of former RCW 9.94A.310(3), recodified as RCW 9.94A.533(3) reserved the trial judge, not the jury, the ability to determine the evidence establishes the deadly weapon was a firearm, and required the judicial imposition of such a sentence. 97 Wn.App 307, 311-12, 983 P.2d 712 (1999).² Recuenco, did not alter this construction of the statute, it merely found it violated the Sixth Amendment.

Further, the plain language of RCW 9.94A.602 undercuts the State's contention that it applies to firearm enhancements. RCW 9.94A.602 provides:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused . . . was armed with a deadly weapon at the time of the commission of the crime, . . . the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant . . . was armed with a deadly weapon at the time of the commission of the crime.

² Even in the absence of statutory authority to submit the question to a jury the trial judge cannot make the finding herself as Recuenco held that procedure violates the Sixth and Fourteenth Amendments to the United States Constitution. Recuenco, 154 Wn.2d 162-63 (overturning *inter alia* Meggysy and Rai).

Where a term is unambiguous, its meaning must be taken from its plain language. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (citing Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991)). The only special verdict form contemplated by RCW 9.94A.602 is for a deadly weapon enhancement. This is readily explained by the fact that RCW 9.94A.602 was enacted well before the 1995 enactment of the firearm enhancement, and has not been amended to the incorporate the newer enactment. As there was no firearm enhancement at the time of its enactment, the statute plainly did not contemplate any special verdict form other than for a deadly weapon. Indeed, as illustrated by Meggysesy and Rai, the pre-Blakely construction of this statute in no way contemplated submission of a firearm enhancement to a the jury.

Unlike the provisions of RCW 9.94A.602 pertaining to a deadly weapon enhancement, there is no provision in Washington law for submitting the firearm question to the jury. Thus, as Recuenco recognized, the only authority which existed was to impose the lesser deadly weapon enhancement. The imposition of

the greater enhancement in Mr. Veth's case exceeded the Court's authority.

2. MR. VETH'S PRESENT APPEAL IS NOT PROCEDURALLY BARRED AND HE IS ENTITLED TO THE APPOINTMENT OF COUNSEL

a. Mr. Veth's appeal is not barred by RCW

10.73.140. The State notes Mr. Veth previously filed personal restraint petition in which he did not raise the issue presently before this Court. Brief of Respondent at 14-16. The State suggests Mr. Veth's is thus barred by RCW 10.73.140. The Washington Supreme Court, however, has concluded the abuse of the writ doctrine does not apply where the petitioner was not represented in the prior proceeding. In re the Personal Restraint Petition of Perkins, 143 Wn.2d 261, 265 n.5, 19 P.3d 1027 (2001); In re the Personal Restraint Petition of Stoudamire, 141 Wn.2d 342, 352, 5 P.3d 1240 (2000).

The State allows the Mr. Veth was not represented in the prior proceeding, a fact revealed by the docket of that matter. Docket 77222-3 attached as appendix. Thus, the present claim does not constitute an abuse of the writ. Stoudamire, 141 Wn.2d at 352.

b. Mr. Veth's is entitled to the appointment of counsel. RCW 10.73.150 provides for the appointment of counsel in a criminal case in which the defendant has filed an "appeal as a matter of right." RAP 2.5(10) provides a person may appeal as of right a motion to vacate judgment. As Mr. Veth has appealed as of right the denial of his motion to vacate the judgment in his case, he is entitled to the appointment of counsel.

The State relies on dicta from a single case stating RCW 10.73.150 applies only to a person's first appeal. Brief of Respondent at 17(citing City of Richland v. Kiehl, 87 Wn.App. 418, 422-23, 942 P.2d 988 (1997)). Kiehl concerned only the question of whether a person was entitled to appointment of counsel in a motion for discretionary review, and concluded the statute plainly did not permit appointment in such a case. It never reached the question of whether a person could be denied appointed counsel to prosecute an appeal of right. Indeed, the plain language of RCW 10.73.150 says otherwise.

c. The Court should deny any claim for costs by the State. The State has requested the Court award costs and attorney fees to the State. Brief of Respondent at 17. Mr. Veth contends

any such award will deprive him of his rights to due process and equal protection under the Fourteenth Amendment.

An indigent defendant may only be required to reimburse the state for the costs of appointed counsel if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). To do otherwise would violate equal protection and due process by imposing extra punishment on a defendant due to his poverty. State v. Blank, concluded that while RCW 10.73.160 did not expressly enumerate a requirement that the court first determine an indigent appellant's ability to pay, the statute could nonetheless be constitutionally applied "so long as the courts adhere to those requirements." 131 Wn.2d 230, 239, 930 P.2d 1213. Thus, before this Court can impose costs, it must consider Mr. Veth's ability to pay.

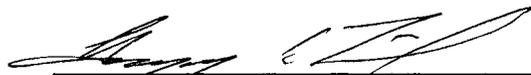
Moreover, because the provisions of RCW 10.73.160 modify the conditions of Mr. Veth's sentence, Blank, 131 Wn.2d at 243, due process requires Mr. Veth be entitled to be present at any such hearing to determine his ability to pay. The Due Process Clause prevents the loss of life or property without due process of law. U.S. Const. Amends. V, XIV; Wash. Const. Art. 1, §§ 3, 22. "The

fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). Thus, Mr. Veth must be entitled to a hearing at which he is present to determine his ability to pay before a court may modify the conditions of his sentence.

B. CONCLUSION

Because the trial court imposed a sentence in excess of its statutory authority, this Court should reverse the trial court's ruling denying Mr. Veth's motion to vacate judgment.

Respectfully submitted this 22nd day of August, 2006.



GREGORY C. LINK – 25228
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CASE EVENTS # 772223

Date	Item	Action	Participant
09/13/2005	Supreme Court case file (pouch) <i>Comment: 1 SUPREME COURT POUCH SENT TO DIVISION II IZ 742 462 03 4002 7424</i>	Sent by Court	
09/13/2005	Disposed	Status Changed	
08/25/2005	Affidavit of Service	Filed	BAUR, SUSAN IRENE
08/02/2005	Decision Filed	Status Changed	
08/02/2005	Ruling terminating Review <i>Comment: PRP is transferred to Division Two 479/24</i>	Filed	CROOKS, GEOFFREY L.
08/02/2005	Affidavit of Service <i>Comment: to petitioner at Minnesota prison</i>	Filed	BAUR, SUSAN IRENE
07/26/2005	Submitted <i>Comment: TO COMM'R</i>	Status Changed	
07/25/2005	Response to Personal Restraint Petition Service Date: 2005-07-25 <i>Comment: BRIEF IN RESPONSE TO PERSONAL RESTRAINT PETITION</i>	Filed	BAUR, SUSAN IRENE
06/20/2005	Case Received and Pending	Status Changed	
06/20/2005	Motion to file W/o Prepayment of Fil Fee Motion Status: Decision filed	Filed	VETH, VAN
06/20/2005	Other Ruling <i>Comment: PAYMENT OF FILING FEE WAIVED</i>	Filed	CARPENTER, RONALD R
06/20/2005	Letter <i>Comment: ADVISING THIS MATTER HAS BEEN DESIGNATED A PERSONAL RESTRAINT PETITION</i>	Sent by Court	CARPENTER, RONALD R
06/20/2005	Personal Restraint Petition	Filed	

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
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v.)	NO. 34240-5-II
)	
VAN VETH,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 22ND DAY OF AUGUST, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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 BY
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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF AUGUST, 2006.

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