

NO. 34426-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD D. DAVIS,

Appellant.

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

The Honorable M. Karlynn Haberly, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Imposition of the uncharged deadly weapon enhancements violates appellant's right to due process.

Issue pertaining to assignment of error

Where the amended information alleged that appellant or an accomplice was armed with a firearm but did not include the broader allegation that he was armed with a deadly weapon, does imposition of deadly weapon enhancements violate appellant's right to due process?

B. STATEMENT OF THE CASE

On August 30, 2002, the Kitsap County Prosecuting Attorney charged appellant Ronald Davis by amended information with first degree burglary, three counts of second degree assault, one count of second degree assault of a child, and one count of first degree unlawful possession of a firearm. CP 89-96; RCW 9A.52.020; RCW 9A.36.021(1)(c); RCW 9A.36.130(1)(a); RCW 9.41.040(1)(a). The amended information included special allegations that Davis or an accomplice was armed with a firearm, contrary to Former RCW 9.94A.125, and specified the sentence enhancement applicable to the firearm allegation. CP 90, 91, 93, 94.

The case proceeded to jury trial before The Honorable M. Karlynn Haberly. The court dismissed one count of second degree assault, and the jury found Davis guilty on the remaining counts. CP 21-22. The jury also

entered special verdicts on counts I, II, IV, and V, finding that Davis was armed with a deadly weapon at the time of the commission of the crimes. CP 141-42. The court imposed concurrent standard range sentences and consecutive firearm enhancements. CP 23. Davis's convictions were affirmed on appeal. CP 41.

On April 14, 2005, the Washington Supreme Court decided State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005)¹, in which it held that imposition of a firearm sentence enhancement violated the defendant's Sixth Amendment right to a jury trial where the jury found only that the defendant was armed with a deadly weapon. 154 Wn.2d at 159. Davis filed a personal restraint petition on August 22, 2005, challenging the imposition of firearm enhancements in his case, and the state conceded that the enhancements were not authorized by the jury's verdict. The case was remanded for resentencing. RP² 2; Supreme Court Cause No. 77544-3.

Davis was resentenced by Judge Haberly on February 10, 2006. At that hearing, the state asked the court to impose deadly weapon enhancements, in accordance with the jury's special verdicts, rather than the firearm enhancements originally imposed. RP 9, 12. Defense counsel

¹ Cert. granted, 126 S. Ct. 478 (2005).

² RP refers to the Verbatim Report of Proceedings from the February 10, 2006, sentencing hearing.

objected to the deadly weapon enhancements. He pointed out that the amended information alleged that Davis was armed with a firearm, but the state never filed a deadly weapon allegation. Without such an allegation, the court could not impose a deadly weapon enhancement. RP 4, 12.

The court disagreed. It recognized that the charging document alleged Davis was armed with a firearm. But since the jury was asked whether he was armed with a deadly weapon, and since a deadly weapon enhancement is shorter than a firearm enhancement, the court reasoned it was appropriate to sentence Davis under the special allegation submitted to the jury. RP 14; CP 65. The court informed Davis he had the right to appeal the sentence and finding, and Davis filed this timely appeal. RP 15; CP 73.

C. ARGUMENT

**IMPOSITION OF THE UNCHARGED DEADLY WEAPON
ENHANCEMENTS VIOLATES DAVIS'S RIGHT TO DUE
PROCESS, AND THE ENHANCEMENTS MUST BE
VACATED.**

As the state conceded, the firearm enhancements originally imposed in this case violated Davis's right to a jury determination of the facts used to enhance his sentence, because the jury was not asked to find that Davis was armed with a firearm. See RP 2, 9; Recuenco, 154 Wn.2d at 162. Under Recuenco, the firearm enhancements were properly

vacated. Id. at 164. Unlike in Recuenco, however, imposition of deadly weapon enhancements was not the appropriate remedy.

In that case, the information included a deadly weapon allegation, and the jury found by special verdict that the defendant was armed with a deadly weapon. Id. at 159-60. Imposition of a deadly weapon enhancement thus comported with constitutional due process and jury trial requirements. Id. at 164. Here, however, the state alleged that Davis was armed with a firearm, but the jury was asked to determine whether he was armed with deadly weapon. CP 90, 91, 93, 94, 141-42. Under these circumstances, the firearm enhancements were unconstitutional because the firearm allegations were not proved to the jury beyond a reasonable doubt. The deadly weapon enhancements are also unconstitutional because the state never alleged that Davis was armed with a deadly weapon.

The federal and state constitutions require that any fact used to increase the sentence the judge may impose must be both pleaded in the charging document and proved to a jury beyond a reasonable doubt. U.S. Const., Amend. 6; Const. art. 1, § 22; Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348; 147 L. Ed. 2d 435 (2000); State v. Goodman, 150 Wn.2d 774, 784-86, 83 P.3d 410 (2004)(where identity of controlled substance aggravates maximum sentence, charging document must allege

specific substance to be constitutionally sufficient). In this case, Davis's sentence was enhanced based on a fact never alleged in the information. The enhanced sentence is unconstitutional and must be reversed.

Washington courts have long held that a sentencing court is precluded from imposing a sentence enhancement unless the state specifically alleges that enhancement in the information. State v. Theroff, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980); State v. Cosner, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975); State v. Smith, 11 Wn. App. 216, 225, 521 P.2d 1197 (1974) ("it is required that the prosecution allege . . . the 'factor [which] aggravates [the] offense and causes [a] defendant to be subject to a greater punishment'"). Failure to include in the information a special allegation on which an enhancement is imposed violates a defendant's due process right to notice and requires reversal of the enhancement. Theroff, 95 Wn.2d at 393.

In Theroff, the defendant was charged by information with two counts of first degree murder. The information was subsequently amended to add a charge of second degree felony murder. Although the state filed a separate notice that it would seek a finding that the defendant was armed with a firearm and/or a deadly weapon, neither information contained a firearm or deadly weapon allegation or notice of intent to seek enhanced punishment. Theroff, 95 Wn.2d at 387.

Theroff was found guilty of second degree felony murder, and the jury returned a special interrogatory finding he was armed with a deadly weapon, a firearm, at the time. The court imposed an enhanced penalty based on the jury's firearm and deadly weapon findings. Id.

On appeal, the Supreme Court held that imposition of the enhanced penalty denied Theroff due process, because the information contained no allegation that Theroff was armed with a deadly weapon or firearm. It stated the rule clearly: "When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information." 95 Wn.2d at 392. Because the state did not follow that rule, it could not ask the court to impose an enhanced penalty. Id.

Similarly, in this case, the sentencing court erred in imposing an uncharged deadly weapon enhancement. The amended information charged Davis only with a firearm enhancement. It contained no allegations supporting a non-firearm enhancement and no notice that the state would seek a deadly weapon enhancement.

Although a firearm is, by definition, a deadly weapon, the statutory definition of deadly weapon for sentence enhancement purposes is not limited to firearms. It includes any

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.

RCW 9.94A.602. If the state alleges that the defendant was armed with a deadly weapon, the sentence may be enhanced if the jury finds the defendant was armed with any weapon falling within this definition.³ *Id.*; RCW 9.94A.533. A firearm allegation is more specific, however, and requires proof of “a weapon or device from which a projectile or

³ The jury returned special verdicts finding that “the defendant was armed with a deadly weapon during the commission of the crime[s]” in Counts I, II, IV, and V. CP 141-42. Instruction 9 provided, in relevant part, that,

Deadly weapon means explosive, firearm, whether loaded or unloaded, weapon, device, instrument, substance or article including a vehicle, which under the circumstances in which it was used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury.

CP 120. Instruction 14 provided that,

A person commits the crime of assault in the second degree when he or she intentionally assaults another with a deadly weapon.

The term “deadly weapon” includes any firearm, whether loaded or not.”

A “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

CP 125. And Instruction 28 informed the jury that,

For purposes of a special verdict the State must prove beyond a reasonable doubt that [t]he defendant was armed with a deadly weapon at the time of the commission of the crime in counts I, II, IV and V.

A pistol, revolver or any other firearm is a deadly weapon whether loaded or unloaded. If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.

A person is armed with a firearm if the weapon is easily accessible and readily available for use.

CP 140.

projectiles may be fired by an explosive such as gunpowder.” RCW 9.41.010; RCW 9.94A.533(3).

As the court below noted, the firearm allegation in the amended information put Davis on notice that he was subject to a higher sentence enhancement than would result from a deadly weapon finding. But the firearm allegation did not put him on notice that his sentence would be enhanced if the state proved he was armed with any weapon which fit within the broader definition of a deadly weapon. Imposition of the deadly weapon enhancement therefore violated Davis’s right to due process. See State v. Stamm, 16 Wn. App. 603, 616, 618, 559 P.2d 1 (1976) (due process violated absent “a specific allegation in the information of the particular enhanced penalty statute to be relied upon at sentencing”), review denied, 91 Wn.2d 1013 (1977).

The jury’s finding that Davis was armed with a deadly weapon cannot be used to enhance Davis’s punishment beyond the standard range because the state did not allege that fact in the information. Apprendi, 530 U.S. at 490; Goodman, 150 Wn.2d at 786 (charging document must allege facts which support aggravating sentence in order to be constitutionally sufficient). The state argued below that, because Davis did not challenge the information at trial, the information should be construed liberally. RP 13; State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991) (when

sufficiency of charging document is challenged for first time on appeal, court will construe information more liberally in favor of validity).

First it should be noted that whether the information supported a deadly weapon enhancement did not become an issue until the state proposed deadly weapon enhancements at the February 10, 2006, resentencing hearing. Prior to that time the relevant issue was whether imposition of the firearm enhancements, based on the allegations in the information, violated Davis's right to a jury trial. Thus there is no basis to apply the standard described in Kjorsvik.

Even if the information is liberally construed, however, it does not support the deadly weapon enhancements. Under this standard of review, the information is construed to determine if the missing elements appear "in any form, or by fair construction can be found" in the information. Kjorsvik, 117 Wn.2d at 108. But this stricter standard is a rule of construction only. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998).

The information here cannot be fairly construed as containing a deadly weapon allegation. The state specifically alleged Davis or an accomplice was armed with a firearm. CP 90, 91, 93, 94. The penalty

associated with these allegations, described in the information, was a firearm enhancement. Id. The information gave no indication that the state would seek to enhance Davis's punishment based on the broader finding that he was armed with a deadly weapon. The allegation in the information would result in enhanced punishment only if the jury found beyond a reasonable doubt that Davis or an accomplice was armed with a firearm. It did not, however, notify Davis that he faced an enhanced punishment if the jury found he was armed with a knife, a razor, a metal pipe, or any item other than a firearm which met the definition of a deadly weapon.

Since the information does not contain a deadly weapon allegation in any form, it is constitutionally inadequate to support the deadly weapon enhancements. Davis's sentence must be vacated and the case remanded for imposition of a standard range sentence with no weapon enhancements.

D. CONCLUSION

Because the state did not allege in the information that Davis was armed with a deadly weapon, the imposition of deadly weapon sentence enhancements violates Davis's right to due process. The sentence must be vacated and the case remanded for resentencing without sentence enhancements.

DATED this 22nd day of May, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Catherine E. Glinski', written over a horizontal line.

CATHERINE E. GLINSKI

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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Ronald D. Davis*, Cause No. 34426-2-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
May 22, 2006

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