

NO. 37555-9-II
Consolidated NO. 37425-1-II
COURT OF APPEALS, DIVISION II

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DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON,

Respondent

vs.

JEREMY R. TIESKOTTER,

Appellant.

AMENDED/SUPPLEMENTAL BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Chris Wickham, Judge

Cause No. 07-1-01832-1

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a “firearm” sentence enhancement where the jury only found by special verdict that Tieskotter was armed with a “deadly weapon.”

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in imposing a “firearm” sentence enhancement where the jury only found by special verdict that Tieskotter was armed with a “deadly weapon?” [Assignment of Error No. 1].

C. STATEMENT OF THE CASE

For the purposes of this brief, Jeremy R. Tieskotter (Tieskotter) adopts and incorporates the statement of the case as set forth in his opening brief of appellant.

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN IMPOSING A “FIREARM” SENTENCE ENHANCEMENT WHERE THE JURY ONLY FOUND BY SPECIAL VERDICT THAT TIESKOTTER WAS ARMED WITH A “DEADLY WEAPON.”

On March 10 2009, this court issued its published opinions in In re Delgado, Cause No. 35455-1-II and In re Scott, Cause No. 34686-9-II. In these opinions, this court decisively held that a defendant cannot be charged with a “deadly weapon” sentence enhancement, have the jury instructed on a deadly weapon with the jury making a finding of a “deadly weapon” by special verdict, and then be sentenced to a “firearm” enhancement; this error is not subject to harmless error analysis.

Here, Tieskotter was charged (and convicted) with assault in the second degree “while armed with a deadly weapon, a firearm” in Count I. [CP 3-4]. The jury was instructed in Instruction No. 15 [CP 95], “for purposes of a special verdict the State must prove beyond a reasonable doubt that the defendants were armed with a deadly weapon at the time of the commission of the crime in Count I.”¹ [Emphasis added]. The jury returned a special verdict finding that Tieskotter was armed with a deadly weapon during the commission of Count I. [CP 77]. At sentencing, the court imposed a 36-month firearm enhancement instead of a 12-month deadly weapon enhancement. [CP 110-120, 126, 127, 128]. In doing so under this court’s decisions in In re Delgado and In re Scott the trial court erred and this error was not harmless. This court should remand for resentencing to remove the improper firearm sentence enhancement on Count I.

¹ Of note but no consequence to the argument presented herein, Instruction No. 15 does define “deadly weapon” as including “pistol, revolver, or any other firearm.” [CP 95].

E. CONCLUSION

Based on the above, Tieskotter respectfully requests this court to remand for resentencing to remove the improper "firearm" sentence enhancement.

DATED this 18th day of March 2009.

Patricia A. Pethick
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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 18th day of March 2009, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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STATE OF WASHINGTON
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Signed at Tacoma, Washington this 18th day of March 2009.

Patricia A. Pethick
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