

NO. 39166-0-II
Cowlitz Co. Cause NO. 05-1-01388-2

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

TED JENSEN,

Appellant.

BRIEF OF RESPONDENT

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A. ANSWERS TO ASSIGNMENTS OF ERROR

1. Jensen waived his right to be represented by counsel at his resentencing hearing.
2. Jensen was given reasonable access to legal materials and therefore was not denied a meaningful pro se defense at resentencing.
3. The trial court did not abuse its discretion when it denied Jensen's motion to continue the resentencing hearing.
4. The trial court did not abuse its discretion when it did not address Jensen's motion regarding community custody at the resentencing hearing.
5. The State moves to dismiss the portions of Jensen's appeal that raise issues regarding the imposition of the deadly weapon enhancements.

B. STATEMENT OF THE CASE

1. FACTUAL BACKGROUND

During late October and early November 2005, Gery Snapp was living in his motor home in the Wal-Mart parking lot in Longview, Washington. *State v. Jensen*, Court of Appeals #34835-7-II (unpublished opinion). It was there that Snapp met appellant Ted Jensen, who was also staying in his vehicle in the Wal-Mart parking lot. Immediately after meeting, Jensen took Snapp to the Salvation Army for dinner. On the way back to Wal-Mart, they picked up Susan Meyer, whom neither of the

men previously knew. Nevertheless, Snapp allowed Meyer to sleep on his sofa bed in the front of his motor home for the next two days. *Id.*

A few days before November 1, 2005, and only a few days after meeting, the two men had a disagreement. Thereafter, Snapp forbid Jensen to enter his motor home under any circumstances. Meyer continued to stay with Snapp. *Id.*

In the early morning of November 1, Snapp awoke to loud music. He grabbed a flashlight to investigate because the motor home lights were not functioning. He looked out the window in the side door of the motor home and did not see anything. Snapp then opened the door, stood on the step entrance of the motor home, and shined the flashlight on the ground. Although he heard Jensen's voice, he did not see Jensen. *Id.*

Snapp turned around to put on his shoes and intended to go outside to speak with Jensen. As he turned around, Jensen stabbed him in the back. The men moved from the step of the motor home to the sofa bed, where Jensen stabbed Snapp repeatedly. Jensen was saying, "you'll always remember Monk 'cause I'm gonna kill ya." Snapp hit Jensen with the flashlight in self-defense. *Id.* The brawl continued until Meyer

agreed to go with Jensen, at which point Jensen got up to leave. However, Meyer recanted and refused to go. Jensen then left. *Id.*

An ambulance transported Snapp to the emergency room at St. John's Medical Center, where he was treated for four deep wounds and other superficial wounds. Snapp was bleeding heavily and required surgery for his life-threatening injuries. *Id.*

In a subsequent interview with detectives, Jensen admitted stabbing Snapp but claimed it was in self-defense. Jensen estimated that he stabbed Snapp between six and eighteen times. During the interview, Jensen claimed he had a black belt in karate and said that he was in love with Meyer. *Id.*

2. PROCEDURAL BACKGROUND

On November 4, 2005, the State charged Jensen with first degree assault with a deadly weapon, felony harassment with a deadly weapon, and first degree vehicle prowling with a deadly weapon. Following a three-day trial, a jury convicted Jensen as charged. *Id.* The trial court sentenced Jensen to 264 months' confinement with an offender score of six. CP 45-53. Jensen timely appealed. CP 36.

On direct appeal, Jensen argued there was not a sufficiently complete record on appeal, that the trial court made errors in admitting certain evidence at trial, and that the trial court erred in failing to enter findings of fact and conclusions of law regarding the CrR 3.5 hearing. Jensen also raised nine reviewable issues in his statement of additional grounds. The State cross-appealed, arguing that the trial court improperly required it to prove to a jury beyond a reasonable doubt that Jensen was on community custody at the time he committed his crimes and that the trial court erred when calculating Jensen's offender score and therefore erred in sentencing Jensen to 264 months in prison. *State v. Jensen*, Court of Appeals #34835-7-II (unpublished opinion).

The Court of Appeals held that the record was sufficiently complete, that the challenged evidence was either properly admitted or did not cause prejudice, that the trial court's oral findings regarding the CrR 3.5 hearing were sufficient, that the State need only have proved to the court that Jensen was on community custody at the time of his offenses, and that the case was to be remanded for recalculation of Jensen's offender score and resentencing. The reviewing court also found against

Jensen on his additional grounds for review. *State v. Jensen*, Court of Appeals #34835-7-II (unpublished opinion).

Jensen filed a petition for discretionary review of the Court of Appeals decision regarding the completeness of the record. The petition was denied. *State v. Jensen*, Supreme Court #81862-2 (order dated January 6, 2009).

On remand to the trial court, Jensen asked for and was granted the right to represent himself at resentencing. *See subsection (C)(1), infra*. The trial court appointed standby counsel *Id.* Jensen wished to relitigate the court's finding that Jensen was on community custody at the time of his offenses. *See subsection (C)(4), infra*. With the addition of the extra community custody point, the trial court recalculated Jensen's offender score on the first-degree assault as seven and resentenced him to a standard range sentence of 279 months, including 72 months of deadly weapon enhancements. CP 141-151. Jensen timely appealed this sentence, in this, his second direct appeal. CP 154-155.

C. ARGUMENT

1. JENSEN WAIVED HIS RIGHT TO BE REPRESENTED BY COUNSEL AT HIS RESENTENCING HEARING.

The constitutional right to counsel is a categorical requirement necessary to give substance to other constitutional procedural protections afforded criminal defendants. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R.2d 733 (1963). The right to counsel applies at every stage of a criminal proceeding where substantial rights of an accused may be affected, including sentencing. CrR 3.1..(b)(2).

The right to self-representation is guaranteed as well -- both by Article 1, section 22 of the Washington State Constitution and the Sixth Amendment of the United States Constitution. A criminal defendant may waive the constitutional right to be represented by counsel and choose instead to represent himself. CrR 3.1(d)(1); *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562 (1975); *State v. Smith*, 50 Wn.App. 524, 528, 749 P.2d 202, *review denied*, 110 Wn.2d 1025 (1988). To be valid, a waiver must be knowing and intelligent, which includes “awareness of the dangers and disadvantages of the decision.” *Smith*, 50 Wn.2d at 528, 749 P.2d 202; see also *State v. Tetzlaff*, 75 Wn.2d 649, 652, 453 P.2d 638 (1969).

The burden of proof is on the defendant who asserts that his right to counsel was not competently and intelligently waived. *Smith, supra*. A colloquy on the record will establish a knowing and intelligent waiver if it demonstrates that the decision regarding self-representation was made with at least minimal knowledge of what the task entails and that defendant understood the risks of self-representation. *Bellevue v. Acrey*, 103 Wn.2d 203, 210-11, 691 P.2d 957 (1984); see also *State v. Joyner*, 69 Wn.App. 356, 362, 848 P.2d 769, 773 (1993).

Standby counsel may be appointed even over objection by the defendant to aid the defendant if and when he requests help, and to be available to represent the defendant in the event that termination of the defendant's self-representation becomes necessary. *State v. Fritz*, 21 Wn.App. 354, 363, 585 P.2d 173, 179 (1978); *Faretta*, 422 U.S. at 834-35, n. 46, 95 S.Ct. 2525.

Jensen cannot meet his burden. At his first appearance on remand, before a judge other than the original sentencing judge, Jensen asked to represent himself. RP 1. Jensen stated that he would accept standby counsel if the court had concerns. *Id.* The State asked the court to conduct a colloquy regarding Jensen's waiver of the right to counsel. RP

2. The court informed Jensen he would be at a disadvantage if he represented himself. *Id.* Jensen stated that he owned and operated a paralegal business. *Id.* Jensen acknowledged he was aware that the State's position was that he was facing more time in prison under the Court of Appeals decision. RP 3-4, 6. Jensen acknowledged he would be responsible for making all objections and any "legal presentations". RP 4, 6. Jensen stated that he had represented himself in court on a number of other occasions in felony criminal proceedings. RP 4-5. Jensen said he had read the Court of Appeals opinion and understood the issues discussed in it. RP 5-6. When asked whether he had any questions regarding the issues pending in the resentencing hearing, Jensen replied, "None whatsoever." RP 6. Jensen acknowledged he would not be able to testify in the narrative. *Id.* Jensen stated unequivocally that he still wanted to represent himself. RP 5.

The matter was then put over to be heard in front of the original sentencing judge. RP 8. The State asked the original sentencing judge to conduct another colloquy with Jensen to ensure that he was making a valid waiver of his right to counsel at resentencing. RP 9-10. Jensen again stated that he wanted to represent himself. RP 12. Jensen stated he was

18 hours away from a bachelor's degree in computer science and that he had "gone through business college" as a legal secretary and as an administrative secretary. RP 12-13. In all, he said he had over 20 years of formal education. RP 13. He said he studied business law in high school and that he had won a breach of contract dispute against the Army. *Id.* He again stated he had previously represented himself in a number of criminal cases, including one that resulted in a jury trial. RP 13-14. He again mentioned his paralegal business. RP 14. He stated he understood what the midpoint of his standard range would be. RP 15.

Jensen stated that he knew the difference between a standard range sentence and what the court called an "extraordinary" sentence. *Id.* He stated he understood the issue at resentencing was the extra point for community custody. RP 16. He agreed that the facts regarding community custody were not issue and that the sole issue was a legal one. RP 17. When asked whether he understood that he was entitled to a "free lawyer", Jensen replied, "If the Court would designate them as stand-by, I would absolutely agree." RP 19. Jensen then unequivocally said again that he wanted to represent himself. *Id.* The court appointed standby counsel "to help [Jensen] with getting the paperwork done" and to do

“[a]nything else [Jensen] would want ... help ... with.” RP 19-20. The court set the matter over one week to give Jensen and his standby counsel time to meet and to set a resentencing date. RP 20-21.

Two judges conducted colloquies with Jensen. The colloquies evidence the fact that Jensen knew what representing himself entailed and that he understood the risks of self-representation. He does not meet his burden of showing that his waiver of the right to counsel was not knowing, intelligent and voluntary.

2. JENSEN WAS ALLOWED REASONABLE ACCESS TO LEGAL MATERIALS AND THEREFORE WAS NOT DENIED A MEANINGFUL PRO SE DEFENSE AT RESENTENCING.

In order to ensure a meaningful pro se defense, the State must allow the defendant reasonable access to legal materials, paper, writing materials, and the like. *State v. Nicholas*, 55 Wn.App.261, 267-68, 776 P.2d 1385 (1989) (citing *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987)).

When Jensen initially asked to represent himself, he asked that the court order the jail to make copies of documents that he had for the court, including a memorandum. RP 1-2. He then said, “I don’t even think I’ll

need a law library.” The court told him he could file whatever motions he chose. RP 2. During the colloquy regarding whether Jensen was making a valid waiver of his right to counsel, the court told Jensen, “... the fact that you are representing yourself doesn’t entitle you to additional services though the jail.” RP 4. Jensen said that he gave the jail copies so that he did not have to give away his original documents. *Id.* Jensen said, “There would be no further special requests.” *Id.*

During his second colloquy, Jensen complained that he was “unable to secure in any way, shape or manner, copies to properly present to the Court”, saying that he was “a bit leery to give [his] original existing copies even of motions....” RP 18. The court appointed a standby lawyer. RP 19. Regarding the lawyer, the court told Jensen, “He is going to help you with getting the paperwork done [and a]nything else you would want him to help you with. But, you will be able to make the pitch at your sentencing.” RP 20. At Jensen’s next appearance, standby counsel said that Jensen provided him with materials that Jensen wanted the attorney to copy for him, and the matter was set over one week at Jensen’s request. RP 22. At the resentencing hearing, Jensen told his standby counsel to give the judge and the prosecutor a copy of his motion

to continue. RP 28-29. He told the judge the reason for the requested continuance was that he had not been able to read the “current pages [he had] from DOC headquarters yet.” RP 29. He then referenced the documents he had submitted to the court. RP 30.

The record in this case does not establish that Jensen was deprived of appropriate legal materials, nor has he demonstrated prejudice by the lack of any materials. Jensen was not prevented from preparing a meaningful defense at his resentencing hearing.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED JENSEN’S MOTION TO CONTINUE THE RESENTENCING HEARING.

On remand, Jensen was first before the trial court on March 25, 2009. RP 1-8. The matter was then set over to be heard in front of the original sentencing judge. RP 8. On March 27, 2009, the sentencing judge set the matter over another week so that Jensen and his newly appointed standby counsel could consult. RP 20-21. On April 3, 2009, the sentencing judge set the resentencing hearing for April 10, 2009. RP 26. On April 10, 2009, Jensen asked to continue the resentencing hearing, claiming that he lacked proper writing materials and access to

copies and that he needed additional preparation time. RP 29-33; CP 138-139. The trial court denied the motion. RP 29-33. Jensen now argues that the trial court erred when it denied his motion to continue the sentencing hearing.

“[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). An appellate court “will not disturb the trial court’s decision unless the appellant or petitioner makes ‘a clear showing ... [that the trial court’s] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *Downing*, 151 Wn.2d at 272 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Jensen makes no such showing here. The trial court had appointed standby counsel for Jensen to assist him with paperwork and to do anything else Jensen needed. *See subsection (C)(2), supra*. Furthermore, there is nothing on the record to support Jensen’s claims of lack of materials or access to copies. As such, his case should not be remanded for another sentencing hearing on this basis.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DID NOT ADDRESS JENSEN'S MOTION REGARDING COMMUNITY CUSTODY AT THE RESENTENCING HEARING.

At the initial sentencing on May 5, 2006, the trial court found the State had proven to the court that Jensen was on community custody at the time of the offenses for which he was convicted. RP 432-33. However, the trial court ruled that before it could add a point to Jensen's offender score the State was required to prove his community custody status to a jury beyond a reasonable doubt. *Id.* Therefore, the trial court did not add a point to Jensen's offender score for his community custody status. CP 112. The State successfully appealed this ruling, with the reviewing court finding that the State need only have proved to the court that Jensen was on community custody at the time of his offenses and remanding the case for recalculation of Jensen's offender score and resentencing.

On March 25, 2009, nearly three years after the trial court's initial ruling regarding community custody, Jensen filed a "motion to admit evidence previously unavailable to supplement record" along with a memorandum in support of this motion. CP 90-105. At his resentencing hearing on April 10, 2009, Jensen then attempted to relitigate whether he was on community custody at the time he committed his offenses. RP 23-

26, 29-33. The trial court refused to readdress the issue. RP 31-33. Jensen does not cite to any authority for his contention that the trial court was required to readdress its previous finding that Jensen was on community custody at the time of his offenses.

If this court finds that Jensen's attempt to relitigate the community custody issue was a motion for relief from judgment under CrR 7.8(b) (based upon newly discovered evidence), the State's position is that the motion was not properly before the trial court. Pursuant to CrR 7.8(b), the trial court may relieve a party from final judgment due to newly discovered evidence if the evidence could not have been discovered in time to move for a new trial under CrR 7.5. *See Appendix A.* CrR 7.5(b) requires such a motion to be filed within 10 days after the decision at issue. *See Appendix B.* Furthermore, the motion for relief from judgment must be supported by affidavits setting forth a concise statement of the facts upon which the motion is based. CrR 7.8(c)(1); *see Appendix A.* Jensen failed to file any affidavits in support of his motion and failed to argue why the new evidence could not have been discovered within 10 days of the trial court's original decision regarding community custody.

As such, the motion for relief from judgment was not properly before the trial court.

Furthermore, any failure of the trial court to address the motion is harmless error, as the motion is time barred under CrR 7.8(b) and RCW 10.73.090. CrR 7.8(b) requires any motion for relief from judgment based upon newly discovered evidence to be made within a reasonable time and not more than one year after the judgment was entered. *See Appendix A.* RCW 10.73.090 states that no petition or motion for collateral attack may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. *See Appendix C.* One exception to this one-year time limit is for a claim of newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the motion. RCW 10.73.100; *see Appendix D.* Jensen fails to show that he acted with such diligence in discovering the evidence and filing his motion nearly three years after the trial court's original decision regarding community custody. As such, if there was any error in the trial court's refusal to address his motion, it is harmless error because his motion is time barred.

5. THE STATE MOVES TO DISMISS THE PORTIONS OF JENSEN'S APPEAL THAT RAISE ISSUES REGARDING THE IMPOSITION OF THE DEADLY WEAPON ENHANCEMENTS.

In his second direct appeal, Jensen argues that the imposition of the deadly weapon enhancements was improper under three different theories. As permitted by RAP 10.4(d), the State hereby moves to dismiss the portions of Jensen's appeal that raise issues regarding the imposition of the deadly weapon enhancements.

In his statement of additional grounds in his first direct appeal, Jensen argued that there was insufficient evidence for the jury to have found he was in possession of a deadly weapon at the time he committed his offenses. *State v. Jensen*, Court of Appeals #34835-7-II (unpublished opinion). The Court of Appeals found that there was sufficient evidence. *Id.* In his current appeal, Jensen argues as follows:

- (1) When multiple offenses are the "same criminal conduct," they count as a single sentence and cannot be the basis for separate firearm enhancements (Assignment of Error 5);
- (2) The imposition of additional incarceration for a deadly weapon enhancement in conjunction with Jensen's prison sentence for the assault conviction violated his double jeopardy rights (Assignment of Error 6); and
- (3) The multiple consecutive sentence enhancements imposed by the court on the basis of the jury's findings that Jensen used a

single weapon in the multiple counts violate double jeopardy (Assignment of Error 7).

BRIEF OF APPELLANT. Jensen did not raise any of these arguments in his direct appeal, despite the fact that those issues were ripe for review. None of the firearm enhancement issues now raised was presented to or passed upon by the trial court on remand. Jensen is asking this court to consider issues that could have been raised during his first direct appeal.

RAP 2.5 addresses circumstances that may affect the scope of appellate review. Subsection (c) reads as follows:

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) *Prior Trial Court Action*. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) *Prior Appellate Court Decision*. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 2.5(c).

Jensen's situation is similar to that of the appellant in *State v. Sauve*, 33 Wn.App. 181, 652 P.2d 967 (1982), *aff'd* 100 Wn.2d 84, 666

P.2d 894 (1983). *Sauve* was convicted of 16 counts and was found to be a habitual criminal. *Sauve*, 33 Wn.App. at 182, 652 P.2d 967. He appealed the judgment and sentence. *Id.* The Court of Appeals remanded the case to the trial court for rehearing as to matters relied on in the habitual criminal proceeding. *Id.* The State abandoned the habitual criminal finding upon remand, and *Sauve* was resentenced. *Id.* He then filed a direct appeal of the second judgment and sentence. *Id.* The assignments of error in his second appeal raised issues relating only to the pre-remand trial that were raised or could have been raised during his first appeal. *Id.* at 182-83.

The *Sauve* court found that the purpose of RAP 2.5(c)(1) is to restrict the law of the case doctrine by permitting the trial court upon remand to exercise independent judgment, and by permitting the appellate court to review the resulting decision. *Sauve*, 33 Wn.App. at 183, 652 P.2d 967. The rule does not permit an appellant to raise an issue in a second appeal unless it was considered by the trial court upon remand. *Id.* If the issue is not considered by the trial court upon remand, it is not “properly before the appellate court” and therefore does not satisfy the rules stated prerequisite for review. *Id.* (quoting RAP 2.5(c)(1)).

A similar case is *State v. Bailey*, 35 Wn.App. 592, 668 Pd 1285 (1983), *review denied*, 100 Wn.2d 1028 (1983). Bailey was convicted of robbery in the first degree and three counts of kidnapping in the first degree. *Bailey*, 35 Wn.App. at 593, 668 Pd 1285. The jury found that Bailey committed the robbery with a firearm. *Id.* Bailey was found to be a habitual criminal. *Id.* Bailey appealed his judgment and sentence, and the reviewing court affirmed in part but vacated the firearm and habitual criminal findings. *Id.* The case was remanded to the trial court for resentencing. *Id.* Bailey was resentenced and then filed a second direct appeal. *Id.* Some of the arguments raised in the second appeal were raised in the first appeal, while others were raised for the first time in the second appeal. *Id.*

The *Bailey* court noted that none of the issues raised in the second appeal were considered by the trial court on remand. *Id.* at 594. Moreover, it noted, three of the issues were not raised during the first appeal. *Id.* The remaining issues were decided by the reviewing court in the first appeal. *Id.* The *Bailey* court dismissed his appeal, holding that the law in such cases is clear:

This court from its early days has been committed to the rule that questions determined on appeal or questions which might have

been determined had they been presented, will not again be considered on a subsequent appeal in the same case.

Id. (quoting *David v. Davis*, 16 Wn.2d 607, 609, 134 P.2d 467 (1943)).

The Supreme Court also addressed this issue in *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993). Barberio was convicted of two counts of rape, and the trial court imposed exceptional sentences. *Barberio*, 121 Wn.2d at 49, 846 P.2d 519. He did not challenge the exceptional sentences on appeal. *Id.* The reviewing court reversed one of the rape convictions and remanded the case. *Id.* The State elected not to retry the reversed rape count. *Id.* At resentencing, Barberio challenged the aggravating factors found by the court in the first sentencing. *Id.* The trial court imposed the same exceptional sentence. *Id.* at 50. Barberio filed a second direct appeal, and the State moved to dismiss the appeal because he had not challenged the exceptional sentences in the first appeal. *Id.* The Court of Appeals dismissed the second appeal. *Id.*

On review of that decision, the Supreme Court interpreted RAP 2.5(c)(1):

This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court,

on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.

Barberio, 121 Wn.2d at 50, 846 P.2d 519. The Supreme Court found that the rule is permissive for both the trial court and the appellate court. *Id.* at 51. It found that it is discretionary for the trial court to decide whether to revisit an issue which was not the subject of appeal, and that, if it does so, RAP 2.5(c)(1) states that the appellate court may review such issue. *Barberio*, 121 Wn.2d at 51, 846 P.2d 519.

The *Barberio* court held that the deciding fact in the case as hand was whether the trial court did in fact independently review, on remand, the exceptional sentence imposed. *Id.* The *Barberio* court found in its case that the trial court did not; rather, it had made only corrective changes in the amended judgment and sentence. *Id.* The *Barberio* court stated that the case illustrated the necessity of the court rule:

The issue presented was a clear and obvious issue which could have been decided ... in the first appeal. Instead of a timely and orderly proceeding to determine the matter on the merits, the State, the Court of Appeals, a department of this Court, and allied staff, have had to deal with a procedural morass, all of which could have been avoided had the matter been raised when it should have been in the first appeal. In the interest of judicial economy, already too much wasted, we hereby affirm the Court of Appeals without further proceedings.

Id.

Jensen's case is analogous to *Sauve*, *Bailey*, and *Barberio*. He was convicted and found to have been armed with a deadly weapon. The trial court imposed a sentence that included deadly weapon enhancements. Jensen appealed the judgment and sentence but did not raise the issues regarding the enhancements that he raises today. The case was remanded for recalculation of the offender score and imposition of an amended sentence based upon that score. In his appeal of the amended judgment and sentence, Jensen argues three assignments of error that he did not raise in his first appeal. Furthermore, the trial court did not independently review the enhancements on remand. RP 27-40. As such, Jensen's appeal should be dismissed as to the assignments of error regarding the deadly weapon enhancements.¹

¹ Furthermore, under current case law Jensen would not be successful on these issues. See *State v. Mandanas*, -- Wn.2d --, -- P.3d -- (January 28, 2010) (sentencing court must impose multiple consecutive enhancements where defendant is convicted of multiple enhancement-eligible offenses that constitute same criminal conduct under the sentencing statute); *State v. Kelley*, -- Wn.2d --, -- P.3d --, 2010 WL 185947 (January 21, 2010) (imposition of firearm enhancement does not violate double jeopardy when element of the underlying offense is use of firearm); and *State v. Claborn*, 95 Wn.2d 629, 636-37, 628 P.2d 467 (1981) (single act of being armed with deadly weapon could be considered by jury for purpose of enhancing penalty for both burglary and theft convictions without violating double jeopardy).

D. CONCLUSION

For the reasons stated above, Jensen's sentence should be affirmed.

Respectfully submitted this 29th day of January, 2010.

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APPENDIX A

SUPERIOR COURT CRIMINAL RULE 7.8 RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

(c) Procedure on Vacation of Judgment.

(1) *Motion.* Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) *Transfer to Court of Appeals.* The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(3) *Order to Show Cause.* If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

APPENDIX B

SUPERIOR COURT CRIMINAL RULE 7.5 NEW TRIAL

(a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

- (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;
- (2) Misconduct of the prosecution or jury;
- (3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;
- (4) Accident or surprise;
- (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;
- (6) Error of law occurring at the trial and objected to at the time by the defendant;
- (7) That the verdict or decision is contrary to law and the evidence;
- (8) That substantial justice has not been done.

When the motion is based on matters outside the record, the facts shall be shown by affidavit.

(b) Time for Motion; Contents of Motion. A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.

The motion for a new trial shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Affidavits. When a motion for a new trial is based upon affidavits they shall be served with the motion. The prosecution has 10 days after such service within which to serve opposing affidavits. The court may extend the period for submitting affidavits to a time certain for good cause shown or upon stipulation.

(d) Statement of Reasons. In all cases where the court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record which cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(e) Disposition of Motion. The motion shall be disposed of before judgment and sentence or order deferring sentence.

APPENDIX C

RCW 10.73.090. Collateral attack--One year time limit

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, “collateral attack” means any form of postconviction relief other than a direct appeal. “Collateral attack” includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

APPENDIX D

RCW 10.73.100. Collateral attack--When one year limit not applicable

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
- (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;
- (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- (5) The sentence imposed was in excess of the court's jurisdiction; or
- (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.