

COURT OF APPEALS  
DIVISION II

10 JAN -7 PM 12:09

STATE OF WASHINGTON  
BY 

NO. 39252-6-II

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

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STATE OF WASHINGTON,

Appellant,

v.

ALFREDO GUZMAN PARTIDA,

Respondent.

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

The Honorable John Wulle and Robert Harris, Judges

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BRIEF OF RESPONDENT

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P.M. 1-4-2010

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**A. STATEMENT OF THE CASE**

Respondent Alfredo Guzman Partida<sup>1</sup> appeared before Clark County Superior Court Judge Wulle and pleaded guilty to a Third Amended Information – in part. The following plea discussion occurred on the record:

JUDGE: Let's go over it together. First off you have been charged with Intent to Deliver, Heroin. If you plead guilty to this charge you are giving up certain constitutional rights. Among those is the right to a speedy and public trial before an impartial jury, the right to remain silent before and during that trial and the right to refuse to testify against yourself. You'll be giving up the right to hear and question witnesses the state brings forward and – and to bring forward witnesses and evidence in your defense. You will be giving up the presumption of innocence and the right to appeal a finding of guilt at the trial. I also need to advise you that should the case go to trial, the State would have to prove its case quote beyond a reasonable doubt unquote. And that's a heavy burden for them to carry. Gentlemen, what is this either/or on the standard range?

RP 3.

In response to the court's question about the standard range, the prosecutor and the defense attorney told the court that they had a difference of opinion about the standard range. The prosecutor thought the standard range was 51-68 months. Defense counsel thought the standard range was 12-20 months. RP 3.

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<sup>1</sup> Mr. Guzman Partida's last name also appears in the record as a hyphenated last name. Appellant counsel believes the correct spelling is without the hyphen. No disrespect is intended.

The court went on with the plea:

JUDGE: With the assistance of your attorney would you tell the court what it is that you did that makes you guilty of this offense?

JS:<sup>2</sup> Do you want me to read this and see if you agree with it?

INT:<sup>3</sup> Yes.

JS: In Clark County, Washington on or about November 20, 2008, I, Alfredo Guzman-Partida as principal or accomplice did on that date unlawfully possess with intent to deliver Heroin, a controlled substance. I –

JUDGE: Just – okay. I’m sorry.

JS: - I understand that by pleading guilty I am waiving my right to further deny my Motion to Suppress.

JUDGE: Senor, you have heard your attorney recite the facts of this case, are you adopting that as your statement to the court?

INT: Yes.

JUDGE: The court finds the plea knowingly, intelligently and voluntarily made and the Defendant does understand the charges and the consequences of the plea, there’s a factual basis for the plea, therefore the Defendant is guilty as charged. Counsel?

RP 4-5.

Missing from the plea colloquy, was any admission or even reference to Mr. Guzman Partida being armed with a handgun while he or an accomplice possessed heroin with the intent to deliver heroin. Yet, that

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<sup>2</sup> “JS” is the defense counsel, James “Jeff” Sowder

<sup>3</sup> Mr. Guzman Partida is Spanish speaking. He entered his plea with the assistance of an interpreter. “INT” stands for interpreter. This reference is in keeping with the text in the verbatim report of proceedings.

is what the State had charged and what Mr. Guzman Partida was supposed to plead guilty to:

COUNT 01 - POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER- HEROIN - 9A.08.020(3)/69.50.401(1), (2)(a)

That he, ALFREDO GUZMAN-PARTIDA AKA CHRISTAIN GUADALUPE PONCE, in the County of Clark, State of Washington, on or about November 20, 2008, did knowingly and unlawfully possess, with intent to deliver a controlled substance, to wit: Heroin; contrary to Revised Code of Washington 69.50.401(1), (2)(a).

*And further, that the defendant did commit the foregoing offense while armed with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.533(3), to wit: a Browning .32 caliber handgun.*

(Emphasis added.) CP 6-7 (Third Amended Information).

And, from the plea form:

(6)(g) the prosecuting attorney will make the following recommendation to the judge:

1. *Dismiss all Counts except Count 1. Dismiss school zone enhancement but charge firearm enhancement.*
2. Sentence of 87 months within the standard range of 87-104 month. Defendant argue range 48-46 months based on State v. Workman, 90 Wn.2d 443.

(Emphasis added.) CP 11 (Statement of Defendant ton Plea of Guilty to Non-Sex Offense).

Because Judge Harris heard an earlier suppression motion in the case, defense counsel Sowder wanted Judge Harris to also hear sentencing. Judge Wulle agreed and set the case before Judge Harris. RP 5-6.

The sentencing hearing was heard over two days. (The State did not include the first hearing date in its Statement of Arrangements so it is not part of the record.) Prior to the second sentencing hearing, defense counsel submitted a sentencing memorandum. CP 21-25. The State did not submit a sentencing memorandum. In the sentencing memorandum, defense counsel outlined his sentencing theory which he reiterated at the second sentencing hearing. CP 21-25. Defense counsel argued that under State v. Workman<sup>4</sup>, the Court could not imposed both a specific firearm enhancement under RCW 9.94A.533(3), while at the same time using the firearm to elevate the seriousness level of the offense from a level II to a level III using the more general “deadly weapon” language of RCW 9.94A.602. (See also RCW 9.94A.517, RCW 9.94A.518.) Defense counsel suggested that the court use only the more specific firearm language and sentence Mr. Guzman Partida as a Level II offender (standard range 12-20 months) with a 36 month firearm enhancement on the Class B offense of possession heroin with intent to deliver. The State argued that the court should both elevate Mr. Guzman Partida’s sentence

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<sup>4</sup>State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978)

from a Level II to a Level III offense (standard range 51-68 months) and impose the 36 month firearm enhancement. The trial court agreed with defense counsel's argument and sentenced Mr. Guzman Partida to 20 months on a seriousness Level II with 36 additional months for the firearm enhancement for a total of 56 months. CP 31. In the judgment and sentence, the court made a special verdict finding that the "use of firearm was returned on Count(s) 01 RCW 9.94A.602, 533." CP 27.

But what defense counsel and the State failed to realize was that there was no factual basis at the plea for any sort of handgun or deadly weapon enhancement. Mr. Guzman Partida did not admit to being armed or acting as an accomplice to someone who was armed. Moreover, the court was not told that it could rely on any other "facts" to support the plea other than those read to the court by defense counsel on Mr. Guzman Partida's behalf.

The State appeals the sentence.

**B. ARGUMENT**

**THE TRIAL COURT HAD NO AUTHORITY TO SENTENCE MR. GUZMAN PARTIDA WITH ANY FIREARM OR DEADLY WEAPON ENHANCEMENT.**

Mr. Guzman Partida agrees with the State only so far as he agrees that the trial court erred at sentencing. Mr. Guzman Partida argues that he should not have been sentenced to any firearm or deadly weapon

enhancements or had his standard range increased as it related to any enhancements. He asks this court to consider the following argument and grant his requested relief.

Former RCW 9.94A.602, under which Mr. Guzman Partida was sentenced, prohibits the trial court from imposing a firearm or deadly weapon enhancement unless there is some proof that the defendant was actually armed with a deadly weapon.

In a criminal case wherein there has been a special allegation *and evidence* establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime ...[.]

(Emphasis added.) Mr. Guzman Partida pleaded guilty to a Third Amended Information. In the Third Amended Information, the State specifically alleged that Mr. Guzman Partida was armed with a handgun pursuant to both RCW 9.94A.533(3), the firearm enhancement, and RCW 9.94A.602, the definition of deadly weapon. See relevant statutes attached below as Appendix with Statutes. But during his guilty plea, there was no evidence admitted or acknowledged by Mr. Guzman Partida or accepted by the court that Mr. Guzman Partida was armed with a handgun. The factual basis for Mr. Guzman Partida's plea only recited the elements of the possession of heroin with intent to deliver charge:

JUDGE: With the assistance of your attorney would you tell the court what it is that you did that makes you guilty of this offense?

JS:<sup>5</sup> Do you want me to read this and see if you agree with it?

INT:<sup>6</sup> Yes.

JS: In Clark County, Washington on or about November 20, 2008, I, Alfredo Guzman-Partida as principal or accomplice did on that date unlawfully possess with intent to deliver Heroin, a controlled substance. I –

JUDGE: Just – okay. I’m sorry.

JS: - I understand that by pleading guilty I am waiving my right to further deny my Motion to Suppress.

JUDGE: Senor, you have heard your attorney recite the facts of this case, are you adopting that as your statement to the court?

INT: Yes.

Before accepting a guilty plea, the trial judge must determine, on the record, that the defendant has an understanding of the law in relation to the facts, and that the conduct the defendant admits to constitutes the offense charged. In re Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980).

CrR 4.2(d) states:

(d) *Voluntariness*. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment

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<sup>5</sup> “JS” is the defense counsel, James “Jeff” Sowder

<sup>6</sup> Mr. Guzman Partida is Spanish speaking. He entered his plea with the assistance of an interpreter. “INT” stands for interpreter. This reference is in keeping with the text in the verbatim report of proceedings.

upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

The court need only be convinced that there is sufficient evidence for a jury to conclude that the defendant is guilty, State v. Newton, 87 Wn.2d 363, 370, 552 P.2d 682 (1976), and the factual basis can be established from any reliable source, so long as the material relied upon is part of the record. Keene, 95 Wn.2d at 210 n. 2. Where the defendant's statements describing his conduct amount to mere conclusions of law, however, a sufficient factual basis has not been established. State v. Heaps, 34 Wn. App. 718, 724-725, 677 P.2d 1141 (1984); In re Taylor, 31 Wn.App. 254, 259, 640 P.2d 737 (1982).

To enter a “deadly weapon” special verdict finding, there must be proof of a deadly weapon as that term is defined by law:

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider., among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime, the type of weapon, or any other relevant circumstances.

If one participant 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 pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

WPIC 2.07.02.

To enter a “firearm ” special verdict finding, there must be proof of a firearm as that term is defined by law:

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime, the type of weapon, or any other relevant circumstances.

If one participant is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

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

WPIC 2.10.01.

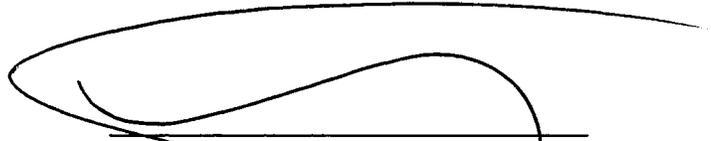
There was no evidence admitted at Mr. Guzman Partida’s plea to satisfy the requirements that there be sufficient evidence for a jury to conclude that the Mr. Guzman-Partida, or an accomplice, was armed with a deadly weapon or armed with a firearm when he possessed heroin with intent to deliver. Without any facts to support either enhancement, the

trial court erred in adding a 36-month firearm enhancement to Mr. Guzman Partida's 20-month standard range sentence.

**C. CONCLUSION**

Mr. Guzman Partida is in agreement with the State that his case should be remanded for resentencing. At resentencing, the trial court should sentence him simply as a level II offender with a standard range of 12-20 months. Mr. Guzman Partida is not asking that his plea be withdrawn.

Respectfully submitted this 4<sup>th</sup> day of January, 2010.

A large, stylized handwritten signature in black ink, consisting of a long horizontal stroke with a large loop on the left side and a smaller loop on the right side.

LISA E. TABBUT, WSBA #21344  
Attorney for Respondent

**D. APPENDIX WITH STATUTES**  
**RCW 9.94A.517 Table 3 – Drug offense sentencing grid**

(1) TABLE 3 -

**DRUG OFFENSE SENTENCING GRID**

Seriousness Level	Offender Score	Offender Score	Offender Score
	0 to 2	3 to 5	6 to 9 or more
III	51 to months	68 68+ to months	100 100+ to 120 months
II	12+ to months	20 20+ to months	60 60+ to 120 months
I	0 to months	6 6+ to months	18 12+ to 24 months

References to months represent the standard sentence ranges. 12+ equals one year and one day.

(2) The court may utilize any other sanctions or alternatives as authorized by law, including but not limited to the special drug offender sentencing alternative under RCW 9.94A.660 or drug court under RCW 2.28.170.

(3) Nothing in this section creates an entitlement for a criminal defendant to any specific sanction, alternative, sentence option, or substance abuse treatment.



counterfeit) any controlled substance (RCW 69.50.410)

II Create, deliver, or possess a counterfeit controlled substance (RCW 69.59.4011)

Deliver or possess with intent to deliver methamphetamine (RCW 69.50.401(2)(b))

Delivery of a material in lieu of a controlled substance (RCW 60.50.4012)

Maintaining a Dwelling or Place for Controlled Substances (RCW 69.50.402 (1)(f))

Manufacture, deliver, or possess with intent to deliver amphetamine (RCW 69.50.401 (2)(b))

Manufacture, deliver, or possess with intent to deliver narcotics from Schedule I or II or flunitrazepam from Schedule IV (RCW 69.50.401(2)(a))

Manufacture, deliver, or possess with intent to deliver narcotics from Schedule III, IV, or V or nonnarcotics from Schedule I-V (except marijuana, amphetamine, methamphetamines, or flunitrazepam) (RCW 69.50.401 (2) (c) through (e))

Manufacture, distribute, or possess with intent to distribute an imitation controlled substance (RCW 69.52.030 (1))

I Forged Prescription (RCW 69.41.020)

Forged Prescription for a Controlled Substance (RCW 69.50.403)

Manufacture, deliver, or possess  
with intent to deliver marijuana  
(RCW 69.50.401 (2)(c))

Possess Controlled Substance that  
is a Narcotic from Schedule III,  
IV, or V or Nonnarcotic from  
Schedule I-V (RCW 69.50.4013)

Possession of Controlled  
Substance that is either heroin or  
narcotics from Schedule I or II  
(RCW 69.50.4013)

Unlawful Use of Building for  
Drug Purposes (RCW 69.53.010)

### **RCW 9.94A.533 Adjustments to Standard Sentence**

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by seventy-five percent.

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements,

the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under \*RCW 9.94A.728(4);

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a

persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

**9.94A.602. Deadly weapon special verdict--Definition**

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

For purposes of this section, a deadly weapon is an 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.

COURT OF APPEALS  
DIVISION II

10 JAN -7 PM 12:09

STATE OF WASHINGTON  
BY \_\_\_\_\_  
COUNTY \_\_\_\_\_

CERTIFICATE OF MAILING

State of Washington, Appellant, v. Alfredo Guzman-Partida, Respondent  
Court of Appeals No. 39252-6-II

I certify that I mailed a copy of Respondent's Brief to:

Alfredo Guzman-Partida/DOC#329891  
Airway Heights Corrections Center  
P.O. Box 2049  
Airway Heights, WA 99001-1899

and to:

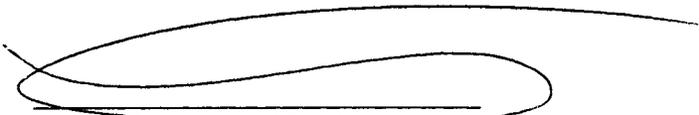
Michael C. Kinnie  
Clark County Prosecuting Attorney's Office  
P.O. Box 5000  
Vancouver, WA 98666-5000

And that I also mailed the original and one copy to the Court of Appeals, Division II.

All postage prepaid, as required, on January 4, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE  
OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on January 4, 2010.



\_\_\_\_\_  
Lisa E. Tabbut, WSBA No. 21344  
Attorney for Respondent