

No. 40169-0

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT PETITION OF:

ROBERT RICHARD RUDNER,

PETITIONER.

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**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

Robert Rudner timely filed a PRP attacking his firearm enhancements; his multiple convictions from a single criminal act; and the effectiveness of his trial counsel in several respects. The State's response argues that none of Rudner's claims has any merit. The State is incorrect—as this reply plainly demonstrates.

For example, Because Rudner's jury was asked to determine whether he was armed with "deadly weapon" enhancements, Rudner should not have been sentenced for firearm enhancements. Likewise, because Rudner's (second-degree) assault of Ms. Riley was committed to facilitate the robbery, double jeopardy prohibits both convictions.

However, a number of Rudner's claims are based on extra-record evidence. Although the State attempts to diminish the quality of that evidence, it fails to contest that evidence with its own extra-record evidence. At a minimum, this Court should remand those claims for an evidentiary hearing. However, because the State has not sufficiently disputed the facts, this Court should reverse and remand for a new trial.

Although a plea offer was made by the State and communicated by his attorney, because that attorney did not explain the relevant standard ranges and the maximum sentences that would follow convictions as charged, Mr. Rudner was not able to make a knowing and intelligent

response to that offer. Because trial counsel misadvised Rudner about the scope of cross-examination, if Rudner chose to testify, Rudner made a decision he would not have made *but for* the incompetent advice. If he had testified, Rudner would have disputed the central fact at trial—whether he pulled the trigger when pointing a gun at one of the victims. This Court concluded on direct appeal that there was no evidence he did so to one of the victims—and remanded for imposition of a second-degree conviction. If Rudner had testified as he had intended, there is at least a reasonable probability that his jury would have made a similar conclusion with regard to the second victim.

As a result, Rudner was prejudiced by counsel’s deficient performance.

B. ARGUMENT

RECORD BASED CLAIMS

1. MR. RUDNER CONCEDES THAT HIS DOUBLE JEOPARDY CLAIM IS NO LONGER VIABLE. (CLAIM ONE).

Mr. Rudner concedes that his first claim (double jeopardy prevents firearm-enhanced conviction where a firearm is a necessary element of the crime) is now controlled by *State v. Kelley*, 168 Wn.2d 72, 226 P.3d 773 (2010). However, if he seeks discretionary review, he will ask the Washington Supreme Court to revisit that issue.

2. CONVICING AND SENTENCING MR. RUDNER FOR ASSAULT IN THE SECOND DEGREE AND ROBBERY COMMITTED AGAINST THE SAME VICTIM VIOLATES DOUBLE JEOPARDY.

Rudner narrows his focus on this claim in this reply.

Rudner's convictions for second-degree assault and robbery against the same victim violate double jeopardy because the assault facilitated the robbery. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005).

On direct appeal, this Court made the connection between the assault and the robbery unmistakably clear. This Court wrote: "Rudner pointed the gun at Riley and asked for the keys to Faranda's Mustang."

As a result, even if double jeopardy does not prohibit Rudner's convictions for robbery and *first-degree* assault, Rudner's second-degree assault conviction must be dismissed.

3. RUDNER'S JURY WAS ASKED WHETHER RUDNER WAS ARMED WITH A "DEADLY WEAPON." HE COULD NOT BE SENTENCED FOR "FIREARM ENHANCEMENTS."

Instruction No. 45 asked jurors to determine whether Rudner was armed with a deadly weapon. As a result, the law requires the vacation of Mr. Rudner's firearm enhancements. *State v. Williams-Walker*, 167 Wn.2d 888, 225 P.3d 918 (2010).

Williams-Walker holds that where the jury makes a deadly weapon finding, the sentencing judge is bound by that finding and cannot impose a firearm enhancement. Where the judge exceeds the sentencing authority

authorized by a jury's deadly weapon finding by imposing a firearm enhancement, error occurs that can never be harmless.

Nevertheless, the State argues that the "error" in Instruction 45 is harmless because the State charged Rudner with a firearm enhancement and because his special verdict form referenced a firearm, even if Instruction No. 45 asked jurors to determine whether Rudner was armed with a deadly weapon.

The State is incorrect. When a jury is asked in a "to convict" instruction whether the State has proven that the defendant used a deadly weapon, then only the deadly weapon enhancement is authorized.

Washington courts have repeatedly emphasized the critical importance of the "to convict" instruction. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). The jury has a right to regard the to-convict instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction. *Mills*, 154 Wn.2d at 8. For this reason, a "to convict" instruction must contain all elements essential to the conviction. *Mills*, 154 Wash.2d at 7. In addition, reviewing courts may not rely on other instructions to supply an element missing from the "to convict" instruction. *Mills*, 154 Wn.2d at 7.

Williams-Walker involved three consolidated defendants. Each case had slightly different facts, although the Court reached one conclusion.

In the case of Matthew Robert Ruth, the jury was instructed,

[f]or purposes of the special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in [c]ount I [and count II]. A “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

Williams-Walker, 167 Wn.2d at 873 (Owens, J. dissenting).

Additionally, the “to convict” instructions for both counts of first degree assault required the jury to find the assaults were committed with a firearm. The jury returned guilty verdicts on both counts and answered “yes” to the special verdict. Given the facts and the instruction, the jury in Ruth’s case was necessarily required to find beyond a reasonable doubt that Ruth was armed with a firearm in order to answer “yes” to whether he was armed with a deadly weapon.

Nevertheless, the Washington Supreme Court held that the imposition of a firearm enhancement was an error meriting automatic reversal because:

Where a jury finds by special verdict that a defendant used a ‘deadly weapon’ in committing the crime (even if that weapon was a firearm), this finding signals the trial judge that only a two-year ‘deadly weapon’ enhancement is authorized, not the more severe five-year firearm enhancement. When the jury makes a finding on the lesser enhancement, the sentencing judge is bound by the jury’s determination.

Id. at 898. This case mirrors Ruth. It is true that, in this case, the special verdict form specified a firearm, rather than a deadly weapon. However, given the earlier instruction, it is clear that Rudner’s jury was asked to

make deadly weapon findings (even if, like in *Williams-Walker*) the weapon was a firearm. Given the centrality of the “to convict” to the jury verdict, the result can be no different.

In fact, this Court’s decision in *Pers. Restraint of Delgado*, 149 Wn. App. 223, 237, 204 P.3d 936 (2009), is directly on point:

Here, the jury was instructed that it must find the defendants were armed with a ‘deadly weapon’ in order to return the special verdicts. And the jury was not instructed on the definition of ‘firearm’ for sentencing enhancement purposes, although ‘deadly weapon’ was defined. Thus, the special verdicts, although labeled ‘firearm,’ necessarily reflect the jury’s findings that Meza and Delgado were armed with ‘deadly weapons’ that were not necessarily operable firearms.

This Court found that Delgado was prejudiced because he received higher sentence than the jury’s verdict authorized. “Thus, *Recuenco III* compels that we reverse each of Meza’s and Delgado’s firearm enhancements and remand to the trial court for resentencing and imposition of deadly weapon enhancements.” *Id.* at 238.

This Court should reverse the trial court’s imposition of firearm enhancements.

4. IF THIS COURT REJECTS RUDNER’S THIRD CLAIM, THIS COURT SHOULD REMAND FOR A NEW TRIAL BECAUSE THE DEFINITION OF FIREARM WAS DEFICIENT.

Instruction No. 45 did not require the State to prove the operability of a firearm. An earlier instruction (No. 14) defined a firearm as a weapon

from which a projectile may be fired, but did not specify whether operability was required at the time of the crime.

In its *Response*, the State argues that the law does not require proof of operability. The State is incorrect.

A firearm enhancement/element requires more than proof that the weapon was designed to fire a projectile (as the instruction required), but instead requires proof of operability. *See State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2006) (“We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement. *State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)”).

Recuenco remains good law. *Delgado*, 149 Wn. App. at 234.

The additional problem with the instructions flows from the fact that the definitional or “to convict” instruction conclusively tells the jury that a firearm is deadly weapon. The instruction does so because it is definign a firearm, rather than a deadly weapon. However, given the State’s current argument in support of the firearm enhancement, that instruction is very close to a directed verdict. Because the instructions did not require anything close to legally sufficient evidence in order for the jury to convict and because there were multiple elements which were not included in the instructions, reversal is required. *See Sullivan v. Louisiana*, 508 U.S. 275

(1993).

However, as noted earlier, if this Court reverses because the State requested “deadly weapon” verdicts, it does not need to reach this issue.

EXTRA-RECORD CLAIMS

5. RUDNER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL’S MISLEADING ADVICE RESULTED IN HIS FAILURE TO TESTIFY AND WHERE RUDNER WOULD HAVE TESTIFIED IF GIVEN COMPETENT ADVICE.

In his sworn statement, Mr. Rudner stated he wanted to testify; gave a general description of the testimony he would have given (testimony that, if believed, would have raised a reasonable doubt about the first-degree assault charge); but that his attorney incorrectly advised him that all of Rudner’s prior convictions would be admitted and that the State could argue that Rudner had a propensity to violent crime as a result. This was indisputably incorrect advice. Further, according to Rudner’s sworn statement, it was the reason he decided not to testify.

In response, the State posits a variety of subjective reasons why it finds Rudner’s declaration unpersuasive. In addition, the State then assumes the role of the jury and asserts that, even if Rudner had testified, the result of trial would not have differed. What the State utterly fails to do is to contest Rudner’s extra-record evidence with any competing extra-record evidence.

In re Pers. Restraint of Rice, 118 Wn.2d 876, 828 P.2d 1086 (1992),

establishes that, “(i)f the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief.” Rudner met that threshold requirement. The burden then switched to the State. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9.

However, in order to define disputed questions of fact, “the State must meet the petitioner's evidence with its own competent evidence.” *Rice*, 118 Wn.2d at 886. The State failed to do so. “If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.” *Id.*

Because the State failed to dispute Rudner's claims with its own extra-record evidence, Rudner should be entitled to relief. Alternatively, this Court should remand for an evidentiary hearing.

The State also argues that this Court should simply choose not to believe Rudner or should conclude that his testimony would not likely change the trial's result. Because this Court is not a factfinding court, it cannot accept the State's unlawful invitation.

Where facts are outside of the trial record and especially where the facts are disputed and/or involve credibility determinations, the need for an evidentiary hearing is at its zenith. *See Frazer v. United States*, 18 F.3d

778, 784 (9th Cir.1994) (“Because all of these factual allegations were outside the record, this claim on its face should have signaled the need for an evidentiary hearing.”).

Washington appellate courts sitting in post-conviction utilize virtually the same standard. The Washington Supreme Court has long recognized that its role is to *review* the facts found by the reference hearing court, not to *find* them based on a paper record. Once those facts are found by the trial court, “(w)e will not disturb the court's findings after a reference hearing if they are supported by substantial evidence.” *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 410, 972 P.2d 1250 (1999). Conflicting evidence is not reweighed as long as some reasonable interpretation of the evidence supports the trial court's findings. *Id.* at 411. And credibility determinations, left to the trier of fact, are not subject to review by the state appellate court. *Id.* at 410-11. That is because a trial court, unlike an appellate court, has the opportunity to evaluate the witnesses' demeanor and judge their credibility. *State v. Cord*, 103 Wn.2d 361, 366, 693 P.2d 81 (1985).

Rudner has certainly made out a *prima facie* claim of error.

Where a defendant has acceded to counsel's advice but counsel was later found to have misinformed defendants with respect to the consequences of taking the stand, courts have found ineffective assistance of counsel. *See, e.g., Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6th

Cir.1987), *cert. denied*, 485 U.S. 970, 108 S.Ct. 1247, 99 L.Ed.2d 445 (1988) (holding that defendant was deprived of meaningful opportunity to decide whether to testify where counsel misinformed defendant about the Government's use of prior convictions if defendant took the stand).

In this case, Rudner mistakenly believed that his entire record was admissible—without any meaningful limitations on the jury's consideration of the record. That was incorrect.

Prejudice should be presumed, given that it is impossible to determine how jurors would have weighed Rudner's testimony. "The testimony of a criminal defendant at his own trial is unique and inherently significant. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir.1992) (quoting *Green v. United States*, 365 U.S. 301, 304, 81 S.Ct. 653, 655, 5 L.Ed.2d 670 (1961)).

This Court should either reverse or this claim should be remanded for a reference hearing.

6. TRIAL COUNSEL WAS INEFFECTIVE FOR COMPLETELY FAILING TO EXPLAIN TO MR. RUDNER THE TOTAL SENTENCE HE FACED AT TRIAL AND TO ENGAGE IN PLEA BARGAINING.

On this issue, the State's response raises disputed facts which should be resolved at an evidentiary hearing. For example, the State acknowledges

that the State offered Rudner a plea bargain—although they fail to disclose the exact terms of their offer. *State's Response*, p. 21-22.

Because it is clear that the State offered Rudner a plea bargain and because Rudner's declaration makes it clear that he rejected the offer only because he had no idea how much time he faces if convicted as charged, this Court should remand this claim for an evidentiary hearing where more specific testimony can be taken regarding: (1) the exact terms of the offer; (2) how the offer was communicated to Rudner; (3) what counsel told Rudner about the standard ranges and maximum sentences; (4) Rudner's general willingness to accept a plea offer.

This hearing can be conducted at the same time as a hearing on the previous claim, if one is ordered.

7. TRIAL COUNSEL WAS INEFFECTIVE FOR AGREEING THAT MR. RUDNER'S PRIOR JUVENILE CONVICTIONS COUNTED AS SEPARATE CRIMINAL HISTORY.

If this Court grants relief on either Rudner's double jeopardy claim or his deadly weapon claim, resentencing will be required. If this Court grants relief on the double jeopardy claim, Rudner's offender score will also be decreased. Because there has never been a contested hearing on the issue of how many points Rudner's juvenile convictions constitute, this Court should simply remand with instructions that defense counsel can raise this issue at resentencing.

C. CONCLUSION

Based on the above, this Court should reverse and remand to the trial court first for an evidentiary hearing and then for reversal and resentencing.

DATED this 16th day of August, 2010.

Respectfully Submitted:

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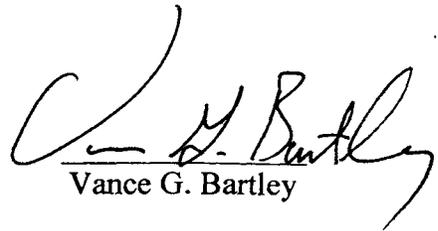
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CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on August 16, 2010 I served the parties listed below with a copy of Petitioner's Reply Brief in Support of Personal Restraint Petition as follows:

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8-16-10 Sea, WA
Date and Place


Vance G. Bartley

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