

No. 41441-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

THURMAN SHERRILL,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Vicki L. Hogan, Judge

APPELLANT'S OPENING BRIEF

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Sherrill
STATE OF WASHINGTON
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PIERCE COUNTY

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A. ASSIGNMENTS OF ERROR

1. The lower court erred and violated RAP 12.2 and this Court's order for resentencing by refusing to consider the arguments of appellant Thurman Sherrill regarding whether the new sentence should include in the sentence a term for a sentencing enhancement.

2. The lower court further erred by imposing a sentence which included 60 months of "flat time" based upon a sentencing enhancement which was invalid and improper under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Although Mr. Sherrill's original sentencing occurred in 2003, the case was before the trial court for resentencing after this Court granted Sherrill's personal restraint petition (PRP) and ordered such proceedings.

Did the trial court err and violate RAP 12.2 in failing to grant Mr. Sherrill a full resentencing and refusing to hear Sherrill's arguments on anything other than an offender score issue?

2. Under Bashaw, supra, and consistent with the principle that the defendant is entitled to the benefit of any reasonable doubt under the presumption of innocence, a jury need not be unanimous in answering a special verdict "no." Further, under Bashaw, the failure to properly and clearly instruct the jury that it need not be so unanimous is not "harmless" error because of its corrosive effect on the deliberative process.

The jury instructions in this case repeatedly told the jurors they had a duty to deliberate to reach a unanimous verdict, but then failed to make it

clear that such unanimity was not required for answering the special verdict “no.” Was the resulting special verdict invalid under Bashaw and did the resentencing court err in reimposing a sentence which included 60 months of “flat time” for the enhancement based on that improper special verdict?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Thurman Sherrill was convicted after jury trial in 2003 of charges brought in 2002 for first-degree assault with a firearm enhancement and first-degree unlawful possession of a firearm. CP 1-4; RCW 9.41.010; RCW 9.41.040; RCW 9.94A.310; RCW 9.94A.370; RCW 9.94A.510; RCW 9.94A.530. At sentencing in 2003, the court imposed 236 months in DOC plus 60 months “flat time” for the assault and 89 months in DOC to run concurrent to that time for the firearm offense, calculating the offender score by including a 1996 drug solicitation conviction. CP 10-21. Sherrill appealed and, in 2005, this Court affirmed. CP 22-36, 37-56.

In 2009, this Court granted a Personal Restraint Petition (PRP) challenging the 1996 conviction, ordering remand to allow Sherrill to withdraw his plea. See CP 152-53. The 1996 conviction was then dismissed. CP 152-53. Sherrill filed a Personal Restraint Petition (PRP) under this cause number asking for resentencing because the offender score was calculated using that now dismissed conviction. CP 152-53. This Court granted Sherrill’s PRP on August 30, 2010, and remanded the case to the trial court for resentencing. CP 152-53.

Resentencing proceedings were held before the Honorable Judge Vicki L. Hogan on September 24 and October 22, 2010. RP 1. After those proceedings, the judge imposed a sentence based on a corrected offender score. CP 182-93; RP 11-14. The new sentence was for 111 months for the assault and 34 months for the firearm offense, with 60 months “flat time” on the firearm enhancement, for a total of 171 months in custody. CP 187-89. Sherrill appealed and this pleading follows. See CP 198.

2. Relevant facts

In the original judgment and sentence, Sherrill’s offender score was calculated by including in the offender score a 1996 conviction for unlawful solicitation to deliver cocaine. CP 10-21. In 2008, Sherrill filed a personal restraint petition challenging that 1996 conviction and this Court ultimately granted him relief, ordering remand to allow withdrawal of Sherrill’s plea to that offense. See CP 152-53. The 1996 conviction was then dismissed with prejudice at the prosecution’s behest. See CP 152-53.

Based on that dismissal, Sherrill filed a Personal Restraint Petition in this case, arguing that his judgment and sentence was now facially invalid because it included as part of the offender score a conviction which had now been dismissed. See CP 152-53. The prosecution conceded the issue of facial invalidity and apparently further conceded that the time bar of RCW 10.73.090 did not apply, agreeing that “Sherrill is entitled to be resentenced without inclusion of the conviction in the now-dismissed 1996 case in his criminal history.” CP 153. This Court accepted the concession

and ordered “remand to the trial court for resentencing.” CP 153.

Just before the first hearing on the resentencing, Sherrill’s counsel filed a sentencing memorandum in which he argued that the correct offender score was now a “2” because some of the prior convictions “washed” without the 1996 conviction. CP 155. He also argued that the jury instruction for the special verdict was improper under Bashaw because it required “unanimity for an answer of ‘no’ on the Special Verdict Form.” CP 156. As a result, he argued, Sherrill was entitled to be resentenced with both the lower offender score and without having the firearm sentencing enhancement imposed. CP 157.

The prosecutor agreed with the corrected offender score but argued that the court should reimpose 60 months of “flat time” for the enhancement. RP 4. The court said the enhancement issue was a “legal issue that requires research” and continued the case for that purpose. RP 5-6.

Nearly a month later, when the parties appeared next, the court asked for argument on the issue relating to the enhancement, which the court thought was “part of sentencing.” RP 9. Counsel then argued that the instructions given in Sherrill’s case were improper under Bashaw, a case which had held it error to instruct the jury in such a way as to indicate that they had to be unanimous in order to find “no” on a special verdict. RP 9-10. Counsel noted that the court was required to impose a “valid sentence” and argued that imposition of time based on the invalid special verdict would not meet that requirement. RP 10. He gave an analogy to recent changes in the caselaw regarding the proper imposition

of an exceptional sentence and the validity of second-degree felony murder convictions, noting that, when cases came before the court for resentencing after the new rulings, the court had the obligation to apply them rather than just reimpose improper sentences on remand. RP 10.

In response, the prosecutor argued that the court did not have the authority to fully resentence Sherrill and consider whether the sentencing enhancement was valid before reimposing it. RP 11. The prosecutor claimed the “mandate is very specific and limited” about what the court was supposed to address and that meant the court could only address the changes to the offender score but not any other part of the sentence. RP 11-12. He also said there were other things such as “procedural bars” which made it “inappropriate” for the court to address the sentencing enhancement’s validity at the resentencing. RP 12.

Counsel then pointed out that the mandate was, in fact, a broad order “for the Court to resentence” Mr. Sherrill. RP 12. As a result, he concluded, the court was required to impose a valid sentence and consider all sentencing issues, including whether it should reimpose the enhancement portion of the sentence when it was based on a verdict now known to be improper. RP 12.

In ruling, the court said that it agreed with the state that “[t]he only issue now is to resentence.” RP 13. The judge did not think she was permitted to decide the validity of the enhancement before reimposing it. RP 13. She then imposed a standard-range sentence based on the new offender score, for a total of 111 months for count I with “60 months of it flat” based upon the sentencing enhancement. RP 19; CP 188-92.

D. ARGUMENT

THE LOWER COURT ERRED IN REFUSING TO PROPERLY RESENTENCE SHERRILL AS MANDATED BY THIS COURT AND IN DENYING SHERRILL RELIEF HE WAS ENTITLED TO UNDER BASHAW

Trial courts have the power and the duty to correct an erroneous sentence when it is brought to their attention. See State v. Kilgore, 167 Wn.2d 28, 41, 216 P.3d 393 (2009); McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), cert. denied, 350 U.S. 1002 (1956). When a case is on remand for resentencing, the trial court is vested with broad discretion to change any part of the sentence, even parts which were never addressed on appeal, provided due process mandates against “vindictiveness” are not offended. Kilgore, 167 Wn.2d at 41; see State v. McNeal, 142 Wn. App. 777, 175 P.3d 1139 (2008); State v. White, 123 Wn. App. 106, 97 P.3d 34 (2004). This is because a resentencing is “an entirely new sentencing proceeding,” as compared with a remand for simple amendment of a judgment. McNeal, 142 Wn. App. at 787 n. 13.

Thus, to determine a trial court’s authority on remand, the question begins and ends with what the appellate court said in its order granting that remand. Kilgore, 167 Wn.2d at 41; see RAP 12.2. Where, as here, the Court remands for resentencing, that means a full resentencing, with all parts of the sentence and all sentencing issues again before the lower court. See Kilgore, 167 Wn.2d at 41. Indeed, this Court recently held that “remand for resentencing,” the very language used here, granted the trial court authority to conduct a full, adversarial sentencing proceeding. State v. Toney, 149 Wn. App. 787, 205 P.3d 944 (2009), review denied, 168

Wn.2d 1027 (2010). And this Court also held that the trial court erred in refusing to apply the standards of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), on remand for resentencing even though the original sentencing had occurred prior to the Blakely decision. McNeal, 142 Wn. App. at 786-87. This Court reached this conclusion because the order of remand for resentencing effectively vacated the original sentence and mandated “an entirely new sentencing proceeding.” McNeal, 142 Wn. App. at 786-87.

As a result, contrary to what the trial court here believed, a trial court has discretion on remand for resentencing to revisit issues that were not the subject of an earlier appeal. Kilgore, 41.

White, supra, is instructive. In that case, the original sentence was a Drug Offender Sentencing Alternative (DOSA) sentence without probation terms. 123 Wn. App. at 109. On appeal, the defendant raised issues with a totally different part of the sentence - the offender score. Id. The appellate court reversed for resentencing based on the offender score error. Id. On remand, the court not only changed the offender score as required by Division Three’s opinion but also changed other parts of the sentence by refusing to reimpose a DOSA and adding probation terms. 123 Wn. App. at 109-110.

On appeal, the defendant argued that the trial court did not have the authority to so amend the sentence, given that the prosecution had not appealed the DOSA or the lack of probation terms and those parts of the sentence were not directly impacted by the appellate court decision. 123 Wn. App. at 110. Division Three disagreed. Rejecting theories of

“collateral estoppel,” vindictiveness and abuse of discretion, the Court noted that its previous ruling remanding the case had declared, “[s]ince Mr. White’s offender score was miscalculated, we must reverse Mr. White’s *sentence* and remand for further sentencing proceeding.” 123 Wn. App. at 112, quoting, State v. White, 114 Wash. App. 1051, 2002 WL 31697928, at 2 (emphasis in original). Further, the Court held, its “reversal and remand of the felony sentence wiped that slate clean,” because the “original sentence no longer exists as a final judgment on the merits.” White, 123 Wn. App. at 114, quoting, State v. Harrison, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003).

Indeed, in Harrison, the Supreme Court explained the reasoning behind this line of cases. In Harrison, the trial court had imposed an exceptional sentence at the original sentencing after the state had argued for a sentence based upon an offender score of eight rather than the agreed-upon seven. 148 Wn.2d at 553. On appeal, the Court of Appeals ordered reversal for resentencing, with the prosecution ordered to give specific performance by advocating for a sentence based upon a “7.” Id. Although the prosecutor complied with that order, on resentencing, the trial court refused to address Harrison’s argument against an exceptional sentence, instead reimposing such a sentence. 148 Wn.2d at 553-54. The trial court’s reasoning was that it was bound by either the “law of the case” doctrine or collateral estoppel from reconsidering whether to impose an exceptional sentence when no one had appealed on that issue and the Court of Appeals decision had not addressed it. Id.

The Supreme Court disagreed, rejecting, *inter alia*, the

prosecution's theory that "collateral estoppel" prevented the trial court from deciding anew, at the resentencing, whether to impose an exceptional sentence. 148 Wn.2d at 557-58. Collateral estoppel did not apply, the Court held, because the prior appellate court ruling had effectively erased the previous sentence:

On Harrison's first appeal, the court "reverse[d] Harrison's sentences and remand[ed] for resentencing with the State's recommendation of an offender score of 7." His entire sentence was reversed, or vacated, since "reverse" and "vacate" have the same definition and effect in this context - the finality of the judgment is destroyed. Accordingly, Harrison's prior sentence ceased to be a final judgment on the merits[.]

Harrison, 148 Wn.2d at 561 (quotations omitted).

Just as in these cases, here this Court specifically ordered "remand to the trial court for resentencing." CP 153 (emphasis added). Once that order was entered, the entire sentence was reversed, including the enhancement. Under McNeal, White and Harrison, the trial court had before it all aspects of the sentence, not just the offender score, because the original sentence no longer existed. It could craft any sentence it wanted, consistent with the new offender score and due process mandates against vindictiveness. And this makes sense because a sentence is not simply the sum of its parts but rather a balancing by the judge of the proper components of punishment, rehabilitation and other motives behind our system. Affecting any one piece can affect the balance, so that the court should be given discretion to recraft the entire sentence to strike a new balance on remand.

Notably, enhancements are an integral part of a sentence to which they apply, i.e., they are "a statutorily-mandated increase to an offender's

sentence range because of a specified factor in the commission of the offense.” See In re Charles, 135 Wn.2d 239, 253, 955 P.2d 798 (1998). To resentence Sherrill, the trial court was required, by definition, to consider the application of the enhancement.

Just like the lower court in Harrison, the resentencing court here erred in concluding that it did not have the authority to consider all arguments regarding the proper sentence to impose, including the enhancement.

Further, the prosecutor’s off-the-cuff remark about potential “procedural bars” was also not grounds for the trial court’s erroneous refusal to consider Sherrill’s sentencing issue about the validity of the special verdict. Procedural “bars” apply to requests for “collateral relief,” defined as any attempt to attack a judgment and sentence other than by direct appeal. See RCW 10.73.090(2). But Sherrill was not asking for *collateral* relief; his case was directly before the trial court on remand for resentencing. All he was asking for was consideration of the sentencing question of whether the firearm enhancement should be applied. This Court’s order reversing the sentence and remanding for resentencing had erased the prior sentence and all potential sentencing issues were thus before the trial court, including whether to impose 60-months mandatory “flat time” based upon the special verdict, even though that special verdict was invalid and entered in violation of the defendant’s rights to presumption of innocence and the benefit of the doubt.

The trial court erred in concluding that it was limited to changing only the parts of the sentence which were directly affected by the offender

score error, instead of addressing all of the sentencing issues before imposing the new sentence. As a result, it improperly reimposed the sentence enhancement of 60 months of flat time even though that sentence was based upon an invalid verdict under Bashaw. Thus, the trial court's refusal was not just a violation of RAP 12.2 and Sherrill's right to full resentencing but also perpetuated the violations of common and constitutional law which the special verdict instructions caused.

In Bashaw, the Supreme Court declared, plainly, that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence," such as a special verdict. 169 Wn.2d at 146. It is an "incorrect statement of the law," the Court held, to instruct the jurors that in a way indicating that they have to agree in order to answer a special verdict. Bashaw, 169 Wn.2d at 147. Instead, the Supreme Court held, unanimity is only required to find the "*presence* of a special finding increasing the maximum penalty. . . [but] it is not required to find the *absence* of such a special finding. 169 Wn.2d at 147 (emphasis in original).

Put another way, the Bashaw Court held, "[a] nonunanimous jury decision on . . . a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt." 169 Wn.2d at 145. Thus, jurors need not be unanimous to answer a special verdict form "no" under the law of this state. Id.; see State v. Goldberg, 149 Wn.2d 888, 890, 72 P.3d 1083 (2003).

Here, the instructions did not make this standard clear and instead

improperly suggested that unanimity was required to answer “no.” After first repeatedly informing the jurors that they had to agree to render a verdict and that their duty was to do so, the special verdict form did not then make it clear that such unanimity was not required to answer “no” on the special verdict. First, the court’s instructions to the jury told jurors they had a duty to “discuss the case with one another and to deliberate in an effort to reach a unanimous verdict,” and that, because the case was criminal, “each of you must agree to return a verdict.” Supp. CP ___, ___ (Instructions 26 and 27) (emphasis added).¹ But at the same time, with the special verdict instruction, the jurors were told that they had to be unanimous in deciding that “yes” was the correct answer in order to answer the special verdict form “yes” and also that if they had “a reasonable doubt as to the question,” they were required to answer “no.” CP 176.

Thus, taken as a whole, the jury instructions in this case failed to inform the jury that they had to be unanimous only to answer “yes” but not “no” on the special verdict. Further, although the Court in Bashaw did not address this issue, the improper instructions also deprived Sherrill of his constitutional right to the “benefit of the doubt” under the presumption of innocence. That presumption is the “bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d

¹ Although they were part of the record from the trial, Instructions 26 and 27 were not separately submitted by the defense and thus a supplemental designation of clerk’s papers is being filed. Counsel will file and serve an amended page with the new citations once she receives the supplemental clerk’s papers index. Copies of the instructions relevant to the case are attached as Appendix A.

1241 (2007). A defendant is constitutionally entitled to the benefit of the doubt when it comes to determining whether the state has proven its case. State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 2007, 173 L. Ed.2d 1102 (2009). In the context of a special verdict, indicating to jurors that they have to be unanimous not only to answer “yes” but also to answer “no” deprives the defendant of the benefit of the doubts some jurors may have had. As the Bashaw Court noted, where, as here, the jury is under the mistaken belief that unanimity is required, “jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.” 169 Wn.2d at 147.

Dismissal of the enhancement was therefore required, as the resentencing court would have found. Bashaw, supra, controls. In Bashaw, after concluding that it was error to instruct the jury that it had to be unanimous in order to answer the special verdict, the Supreme Court then turned to the question of whether the error could be deemed harmless and concluded it could not. 169 Wn.2d at 146-48. The Court reached this conclusion after looking at the “several important policies” behind prohibiting retrial on an enhancement alone. 169 Wn.2d at 146. A second trial “exact[s] a heavy toll on both society and defendants,” crowds court dockets, delays other cases and helps “drain state treasuries,” the Court noted, so that the “costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial.” 169 Wn.2d at 146. Further, the Court declared:

Retrial of a defendant implicates core concerns of judicial

economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

169 Wn.2d at 146-47.

Considering those policies, the Court next rejected the idea that the polling of the jury to have them affirm the verdict somehow rendered the error “harmless.” 169 Wn.2d at 147-48. To find the error “harmless,” the Court said, it would have to be able to conclude beyond a reasonable doubt that the jury would have reached the same verdict, absent the error. 169 Wn.2d at 147. This it could not do because the error in the procedure so tainted the conclusion:

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. *Goldberg* is illustrative. There, the jury initially answered “no” to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered “yes.” Given different instructions, the jury returned different verdicts. We can only speculate why this might be so. **For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.**

169 Wn.2d at 147 (citations omitted; emphasis added). The error was “the procedure by which unanimity would be inappropriately achieved,” the Court said, so that it was not possible to deem the error “harmless.” 169 Wn.2d at 147-48. It was not possible to “say with any confidence what might have occurred had the jury been properly instructed,” the Court said, so that, as a result, “[w]e therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.” 169 Wn.2d at 147-48.

Notably, the Bashaw Court reached this conclusion even though it

had already found that evidentiary error in relation to two of the three special verdicts and sentencing enhancements was harmless in light of the evidence in the case. 169 Wn.2d at 138-145. In Bashaw, the three enhancements were for three counts of delivery of a controlled substance, alleged to have each occurred within 1,000 feet of a school bus route stop and thus subject to a “school bus route stop” sentencing enhancement. 169 Wn.2d at 138-39. The prosecution relied on evidence from a measuring device which was not properly shown to be reliable. Id. The measuring device indicated that the three deliveries occurred 1) within 924 feet of a school bus route stop, 2) within 100 feet of a school bus route stop and 3) within 150 feet of a school bus route stop. 169 Wn.2d at 138. Officers also testified that the first delivery was approximately 1/10 mile (528 feet) or 1/4 mile (1,320 feet) from the stop. 169 Wn.2d at 138-19.

After first finding that the measuring device evidence should have been excluded, the Court concluded that admission of that evidence was harmless error as to the second and third deliveries, because the evidence was such that there was “no reasonable probability” that the jury would have concluded that those deliveries had not taken place within 1,000 feet of the stop if the measuring device evidence had been excluded. 169 Wn.2d at 143-45.

Despite that evidence, however, the Court reversed the enhancements for the second and third deliveries based upon the error in the instructions for the special verdicts. 169 Wn.2d at 143-48. The Court was not concerned with whether there was sufficient evidence to support the enhancements despite the improper instruction, because the issue was

that the procedure in gaining the verdict rendered it fundamentally flawed. 169 Wn.2d at 147-48. Indeed, the Court did not examine the issue in the light of the strength or weaknesses of the evidence on the enhancements, instead focusing on how the “flawed deliberative process” was such that the Court could not determine what result the jury would have reached, had it been properly instructed. Id.

As a result, under Bashaw, reversal and dismissal of the sentencing enhancements did not depend upon whether there was evidence which the jury *could have* relied on in saying “yes” to the special verdicts, nor did the Court substitute its own belief about whether the evidence would have supported verdicts of “yes.” Id. Instead, the near-unanimous Court refused to engage in such speculation in light of the jury instruction error, finding that the error compelled reversal. Id.

Here, just as in Bashaw, there is no way to be sure that the jury instruction error was harmless beyond a reasonable doubt, despite the verdict of “yes” for the firearm enhancement. As in Bashaw, the misleading, confusing and improper jury instructions tainted the entire process. And as in Bashaw, the question is not whether there was evidence from which the jurors could have entered “yes” to the special verdict, or whether the trial court - or indeed, this Court - believes that the state’s evidence is strong. Because the instructional error tainted the deliberative process and misled the jury into thinking that it had to be unanimous in order to answer “no” to the special verdict, the resulting special verdict was required to be dismissed under Bashaw. By failing to consider Mr. Sherrill’s very valid argument that the resulting 60 months of

flat time should not be reimposed on resentencing, the trial court not only violated RAP 12.2 and this Court's Mandate ordering resentencing but also erroneously imposed an invalid sentence. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, reversal and remand for resentencing without the firearm enhancement is required.

DATED this 18th day of February, 2011.

Respectfully submitted,



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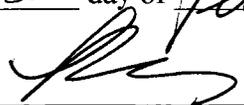
DEPUTY

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

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