

FILED
Aug 23, 2012
Court of Appeals
Division III
State of Washington

No. 292380

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent/Cross Appellant,

vs.

ARMONDO HERNANDEZ GONZALEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE C. JAMES LUST, JUDGE

SUPPLEMENTAL BRIEF OF RESPONDENT

JAMES P. HAGARTY
Prosecuting Attorney

Kevin G. Eilmes
Deputy Prosecuting Attorney
WSBA #18364
Attorney for Respondent
211, Courthouse
Yakima, WA 98901
(509) 574-1200

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I. INTRODUCTION

Appellant Armondo Hernandez Gonzalez timely appealed his convictions for second degree murder, first degree assault and unlawful possession of a firearm in the second degree, under Yakima County Superior Court cause number 08-1-02255-8. He assigned error to the trial court's decision not to remove a juror, as well as the special verdict instruction as to firearm enhancements, citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), and State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

The State filed a Brief of Respondent. Subsequently, the court stayed the appeal, pending a decision of the Supreme Court in State v. Nunez, 174 Wn.2d 707, ___ P.3d ___, (2012). With the announcement of that decision, the stay has been lifted, and the court has requested supplemental briefing as to the impact of the decision on the Appellant's second assignment of error.

II. STATEMENT OF THE CASE

The factual statements contained in the parties' briefs are incorporated, and will be supplemented, herein. RAP 10.3(b)

III. ARGUMENT.

1. **The Supreme Court has overruled *Goldberg and Bashaw*, and there was no instructional error here.**

As previously stated, the Washington Supreme Court had held that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing a defendant's maximum allowable sentence, and instead, a "nonunanimous jury decision is a final determination that the State had not proved the special finding beyond a reasonable doubt." State v. Bashaw, 169 Wn.2d 133, 145-46, 234 P.3d 195 (2010), *citing* State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). At issue was WPIC 160.00 which provided that all jurors had to unanimously agree in order to answer either "yes" or "no" as whether an aggravating factor had been proven. The court determined that instruction was error, in that a jury need not unanimous in rejecting an aggravating circumstance. Bashaw, 169 Wn.2d at 145-46.

Bashaw was announced after the verdicts were received in this case. Mr. Gonzalez did not object to the instruction at issue here.

Subsequent to Bashaw, this court held that while review may have been granted in Bashaw as a matter of public interest, even in the absence of preserved error below, claimed instructional error on this issue is not

manifest constitutional error, and review for the first time on appeal may be denied. State v. Nunez, 160 Wn. App. 150, 165, 248 P.3d 103 (2011).

Division One of the Court of Appeals reached a contrary result, affirming a conviction, but vacating an enhancement because the trial court did not give a nonunanimity instruction pursuant to Bashaw. State v. Ryan, 160 Wn. App. 944, 950, 252 P.3d 895 (2011).

The Supreme Court granted review of Ryan and Nunez. In its decision, the Supreme Court reversed Ryan, and affirmed Nunez. In so doing, the court overruled Goldberg and the portion of Bashaw which adopted the nonunanimity rule for aggravating circumstances, as the rule “is both incorrect and harmful”. Nunez, 174 Wn.2d at 718-19.

Further, the Bashaw rule “. . . conflicts with other authority, causes unnecessary confusion, does not fulfill the policies that prompted the rule, and undermines the purpose of jury unanimity. Therefore, the nonunanimity rule is overruled.” Nunez, 174 Wn.2d at 719.

As the pattern instruction at issue here is identical to that dealt with in Nunez, there was likewise no error.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the enhancements.

Respectfully submitted this 23rd day of August, 2012.

/s/ Kevin G. Eilmes
WSBA 18364
Deputy Prosecuting Attorney
Yakima County Prosecuting
Attorney
128 N. 2nd St., Room 211
Yakima, WA 98901
Telephone: (509) 574-1200
FAX: (509) 574-1201

kevin.eilmes@co.yakima.wa.us

Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4).

Dennis W. Morgan
P.O. Box 1019
Republic, WA 99166-1019
nodblspk@cabletv.com

Dated at Yakima, WA this 23rd day of August,
2012.

/s/ Kevin G. Eilmes