

NO. 82111-9

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

STATE OF WASHINGTON, RESPONDENT

v.

DUSTIN ROSS KELLEY, APPELLANT

Appeal from the Superior Court of Pierce County
No. 06-1-00938-1

Court of Appeals No. 35944-8

SUPPLEMENTAL BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court follow well-settled law, and find that the trial court could properly imposed, based upon jury findings, additional time for firearm enhancements pertaining to defendant's assault in the second degree conviction, even though one of the elements of that offense required the jury to find the defendant committed the assault with a deadly weapon?

B. STATEMENT OF THE CASE.

On February 27, 2006, the State charged defendant, Dustin Kelley, with one count of murder in the first degree. CP 1-3. The State also alleged a firearm enhancement. CP 1-3. The information was later amended so that the charges at the time of trial were murder in the first degree, unlawful possession of a firearm in the second degree, and assault in the second degree. CP 21-22. The State also alleged two firearm enhancements on each of the charges of murder and assault. CP 21-22.

The matter proceeded to jury trial and the jury convicted defendant as charged and returned four special firearm verdicts – two pertaining to the murder, and two pertaining to the assault. CP 65, 67, 68, 69, 70, 71, 72.¹

¹ The substantive facts of the case are presented in the Brief of Respondent below.

At the sentencing on February 9, 2007, the court determined that defendant had an offender score of 12 on the murder and assault convictions, and an offender score of 11 on the unlawful possession of a firearm conviction. CP 77-89. The court imposed a standard range sentence of 524 months on the murder, plus an additional 120 months for the two enhancements, a standard range sentence of 60 months on the unlawful possession of a firearm, and a standard range sentence of 48 months on the assault, plus an additional 72 months for the two enhancements. CP 77-89. The base sentences were to run concurrently, but the enhancements were ordered to run consecutively to each other and the base sentence for a total confinement time of 716 months. CP 77-89.

Defendant appealed his convictions. CP 73. Defendant appealed on two grounds: 1) that his counsel was ineffective and 2) that the firearm enhancement for his second degree assault conviction violated double jeopardy. *State v. Kelley*, 146 Wn. App. 370, 189 P.3d 853 (2008). In the decision that was published in part, the Court of Appeals, Division II, affirmed defendant's convictions. *Id.*

Defendant petitioned this court for review of the double jeopardy issue only. This court accepted review.

C. ARGUMENT.

1. THE WELL -SETTLED RULE THAT A CRIMINAL DEFENDANT IS NOT PLACED IN DOUBLE JEOPARDY BY AN IMPOSITION OF A FIREARM SENTENCE ENHANCEMENT WHEN THE UNDERLYING OFFENSE HAS USE OF A DEADLY WEAPON AS AN ELEMENT IS UNAFFECTED BY *BLAKELY*.

The double jeopardy clause bars multiple punishments for the same offense. *In re Borrereo*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007) (citing U.S. Const. amend. V; Wash. Const. art. I, sec. 9; *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)). When a defendant's act supports charges under two statutes, the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question. *Id.* "If the legislature intended that cumulative punishments can be imposed for the crimes, double jeopardy is not offended." *Id.* (citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)).

Legislative intent is the foremost consideration. "The question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. *Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.*" *Missouri v. Hunter*, 459 U.S. 359, 386, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) (emphasis in the original) (citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

Here, it is clear that the Legislature intended to impose separate enhancements for each crime committed with a firearm, regardless of whether the crimes involved the same weapon. RCW 9.94A.533(3) provides in part:

(3) The following additional times shall be added to the standard sentence range for felony crimes . . . if the offender or an accomplice was armed with a firearm . . . and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements 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. . . .

...

(e) Notwithstanding any other provision of law, any and 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.

(f) The deadly weapon 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 (emphasis added)

The “statute unambiguously shows legislative intent to impose two enhancements based on a single act of possessing a weapon, where there are two offenses eligible for an enhancement.” *State v. Huested*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003) (evaluating the deadly weapon

enhancement section of chapter 9.94A RCW, which contains the same language as the firearm enhancement section). Legislative intent is clear as to the purpose and applicability of firearm enhancements.

Washington courts have repeatedly rejected arguments that weapons enhancements violate double jeopardy. *Huested*, 118 Wn. App. at 95 (citing *State v. Claborn*, 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981)); see also, *State v. Nguyen*, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053, 187 P.3d 752 (2008). In *Claborn*, the defendant received separate weapons enhancements for burglary and theft convictions arising from the same event. 95 Wn.2d at 636-38. On appeal, *Claborn* argued that separate enhancements for the “single act” of being armed with a deadly weapon during the burglary and theft violated double jeopardy. Noting that burglary and theft have separate elements and that the enhancement statutes did not themselves create criminal offenses, the *Claborn* court held that the enhancements did not create multiple punishment for the same offense.

Courts have also rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon was an element of the crime charged. See *State v. Caldwell*, 47 Wn. App. 317, 319, 734 P.2d 542, review denied, 108 Wn.2d 1018 (1987); *State v. Pentland*, 43 Wn. App. 808, 811, 719 P.2d 605, review denied, 106 Wn.2d 1016 (1986); *State v. Harris*, 102 Wn.2d 148, 160, 685 P.2d 584 (1984), overruled on other grounds by *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

These cases make clear that, for purposes of sentence enhancements, “the double jeopardy clause does no more than prevent greater punishment for a single offense than the Legislature intended.” *Caldwell*, 47 Wn. App. at 319 (quoting *Pentland*, 43 Wn. App. at 811-12 (citing *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983))). That court concluded that the Legislature had clearly expressed its intent that a person who commits certain crimes while armed with a deadly weapon will receive an enhanced sentence, notwithstanding the fact that being armed with a deadly weapon was an element of the offense. *Caldwell*, 47 Wn. App. at 320.

In the case before the court, defendant was convicted of murder in the first degree, assault in the second degree, and unlawful possession of a firearm. The jury found two firearm enhancements on the murder and two firearm enhancements on the assault as the shooter was armed with two guns. Thus, defendant’s sentence included four firearm enhancements for a total of 192 months of enhancement time added to the standard range. CP 77-89.

Defendant only challenges the 72 months of firearm enhancements he received on his conviction for assault in the second degree, arguing that in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), this court must reexamine the well-settled rule that a sentence enhancement imposed for being armed with a firearm

does not violate double jeopardy where the use of a deadly weapon is also an element of the offense.

In rejecting defendant's claim below, Division II cited to a previous ruling on this issue in Division I. In *State v. Nguyen*, 134 Wn. App. 863, 869, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053, 187 P.3d 752 (2008), Division I found that "nothing in *Blakely* gives reason to question prior Washington cases holding that double jeopardy is not violated by weapon enhancements even if the use of the weapon is an element of the crime." The court relied on legislative intent in reaching its decision:

[U]nless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent. The intent underlying the mandatory firearm enhancement is unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies.

Nguyen, 134 Wn. App. at 868. This analysis follows the holdings of the United States Supreme Court pointing out that the *Blockburger* test is a tool used to discern legislative intent; when the legislature has made its intent clear, however, then the *Blockburger* test is irrelevant.

Our analysis and reasoning in *Whalen* and *Albernaz* lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in *Whalen* is not a constitutional rule requiring courts to negate clearly

expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear. Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.

Hunter, 459 U.S. at 368.

The Washington Legislature specifically exempted certain crimes from being eligible for enhancement. The Legislature did not include crimes on this list that had use of a deadly weapon as an element of the crime, such as assault in the second degree or robbery in the first degree. RCW 9.94A.533(3)(f). Because the intent of the Legislature is unambiguous in its desire to authorize additional punishment on crimes committed with a firearm, even when such crimes include the use of a deadly weapon as an element, double jeopardy is not violated. *Nguyen*, 134 Wn. App. at 868.

Division I also rejected a claim similar to the one that defendant makes here- that the firearm allegation essentially is duplicative of an element of the crime.

Nguyen's argument is essentially based upon semantics, and he assigns an unsupportable weight to the *Blakely* Court's use of the term "element" to describe sentencing factors. But the meaning of the Court's language in *Blakely* was made clear in *Recuenco*, wherein the Court pointed out that "elements and sentencing factors must be treated the same for Sixth Amendment purposes." Nguyen does not contend his Sixth Amendment rights to a unanimous jury and proof beyond a reasonable doubt were violated.

Nguyen, 134 Wn. App. at 869 (citations omitted). The requirement that sentencing enhancements be presented to the jury was a procedural requirement in that it only altered the method for determining the sentencing enhancement. *Schriro v. Summerlin*, 542 U.S. 348, 354, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). The jury trial guarantee for the sentencing enhancement did not alter the range of conduct that the State could criminalize. *Id.*

In the instant case, the jury made a finding that defendant had been in possession of two firearms during the crimes. Defendant does not contend that his Sixth Amendment rights were violated. As the sentencing enhancements were submitted to the jury, the requirements of *Blakely* were met.

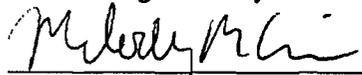
Defendant's argument is not persuasive and has now been rejected by two divisions of the Court of Appeals. Any legislative redundancy in mandating enhanced sentences for offenses involving the use of a firearm is intentional. Double jeopardy ensures that the punishment is not more than the legislature intended. The legislative intent is clear that because defendant committed assault in the second degree while armed with two firearms, his sentence can be properly enhanced. The jury made the finding that defendant was armed with two firearms. Imposition of additional time for the enhancement does not violate double jeopardy principles or *Blakely*.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the Court of Appeal decision and to affirm the judgment and sentence entered below.

DATED: April 2, 2009

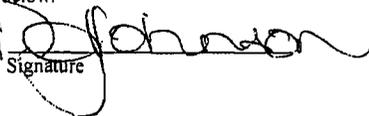
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Attached please find the State's Supplemental Brief. If you have any questions, please feel free to contact me.