

Supreme Court No. 83923-9
(COA No. 61835-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: THE PERSONAL RESTRAINT OF SALVADOR RIVERA

STATE OF WASHINGTON,

Respondent,

v.

SALVADOR RIVERA,

Petitioner.

FILED
SUPREME COURT
STATE OF WASHINGTON
09 DEC -4 PM 2:31
BY RONALD D. CARPENTER
CLERK

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

MOTION FOR DISCRETIONARY REVIEW

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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 NOV 18 PM 4:43

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A. IDENTITY OF PETITIONER.

Salvador Rivera, petitioner here and below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1); RAP 13.4(b); and RAP 13.5A.

B. COURT OF APPEALS DECISION

Mr. Rivera seeks review of the published Court of Appeals' decision dated October 19, 2009, a copy of which is attached hereto as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

The published decision of the Court of Appeals "declines to follow" a number of published decisions from other courts and finds that a trial court implicitly authorizes the imposition of a firearm sentencing enhancement even when the judgment and sentence only imposes a "deadly weapon" enhancement and the jury's special verdict form only finds the individual was armed with a deadly weapon. Where the published Court of Appeals decision expressly "declines to follow" other Court of Appeals cases, when this Court is presently reviewing a similar issue, and when the Court of Appeals' analysis is incorrect and confusing by virtue of its conflicting rulings, does substantial public interest favor review?

D. STATEMENT OF THE CASE.

The Judgment and Sentence entered in Salvador Rivera's case states that Rivera was found guilty of first degree murder "while armed with a deadly weapon." Judgment and Sentence, p. 1 (copy attached as Appendix A to Petitioner's Supplemental Brief in Court of Appeals). It lists the available sentence for the "deadly weapon clause" as 60 months. Id. at 2. It orders 60 months of confinement "for deadly weapon." Id. at 4. The warrant of commitment states that the court has ordered Rivera to be punished, including "60 months for deadly weapon." Id. at 8.

The charging document alleged Rivera was "armed with a deadly weapon," while committing a murder. First Amended Information (attached as App. B to Pet. Supp. Brf.). Although the amended information said, "to wit: a .22 caliber handgun," it further explained, "for purposes of the deadly weapon enhancement of RCW 9.94A.125 and 9.94A.310(3)(a)." Id. In a special verdict form, the jury found Rivera was "armed with a deadly weapon." Special Verdict Form (attached as App. C).

At sentencing, the court ordered Rivera to serve an additional 60 months of confinement based on the "deadly weapon

clause.” Yet the statute permitting enhanced penalties for a deadly weapon allows only 24 months, not 60 months.

The Court of Appeals acknowledged several other decisions have found that a court lacks authority to impose a firearm enhancement when the jury is only asked to decide whether the defendant was armed with a deadly weapon. Slip op. at 9-10. But the Court of Appeals ruled that the 60-month firearm enhancement was valid on its face, notwithstanding the trial court’s repeated mention to imposing a sentence under the “deadly weapon clause,” because the jury could have found he was armed with a firearm for purposes of the firearm enhancement had it been asked, and its general verdict made such a finding implicitly, even though it was never asked to make the finding required under the firearm sentencing statute. Slip op. at 10.

The facts are further set forth in the Court of Appeals opinion, pages 1-4, Petitioner’s Brief, pages 2-3, and Appellant’s Reply Brief, pages 1-3, and in the relevant argument sections. The facts as outlined in each of these pleadings are incorporated by reference herein.

E. ARGUMENT.

BECAUSE THE PUBLISHED COURT OF APPEALS DECISION ADMITS IT IS INCONSISTENT WITH OTHER PUBLISHED DECISIONS FROM THE COURT OF APPEALS, AND THE JUDGMENT AND SENTENCE DID NOT AUTHORIZE A FIREARM ENHANCEMENT, REVIEW SHOULD BE GRANTED

1. The Judgment and Sentence is facially invalid by imposing the wrong sentence for a “deadly weapon enhancement.”

A sentence that is not authorized by law is invalid on its face. In re Pers. Restraint of Tobin, 165 Wn.2d 172, 176, 196 P.3d 670 (2008).

Rivera’s Judgment and Sentence repeatedly refers to the sentencing enhancement as for a “deadly weapon” Page one of the Judgment and Sentence states Rivera was convicted of committing an offense “while armed with a deadly weapon”; page two states the authority for the sentence imposed as the “deadly weapon clause”; page four orders confinement “for deadly weapon”; and on page eight, the warrant of commitment states that the court has ordered Rivera to be punished, including “60 months for deadly weapon.” Judgment and Sentence (attached to Petitioner’s Supplemental Brief as App. A).

Furthermore, the special verdict form asked only whether Rivera was armed with “**a deadly weapon**” and the jury answered “yes.” Petitioner’s Supp. Brief, App. C (emphasis added). The information asserted Rivera was armed with “a deadly weapon” although added that this deadly weapon was a handgun. Petitioner’s Supp. Brief, App. B.

RCW 9.94A.533(3) permits a firearm enhancement only if the offender “was armed with a firearm as defined in RCW 9.41.010.” A jury must find this essential element. In the case at bar, the jury was not asked to make this finding in its special verdict form or through the express jury instructions. The court’s sentencing order indicates it is imposing a deadly weapon sentence, and yet, it ordered a 60-month sentence under the deadly weapon clause. Consequently, the firearm sentencing enhancements must be reduced to reflect the jury’s verdict and express order of the trial court.

The prosecution is neither required nor presumed to be seeking the most onerous punishment. State v. Recuenco, 163 Wn.2d 428, 436, 180 P.3d 1276 (2008). The reference to a handgun during a trial does not provide the court with authority to

impose the more onerous firearm sentencing enhancement absent a jury verdict reflecting such authority. Id.

In Recuenco, the information charged the defendant with committing a crime while armed “with a deadly weapon, to-wit: a handgun.” 163 Wn.2d at 431. Like the case at bar, the jury was not instructed on the definition of a “firearm” under RCW 9.41.010, which is an essential element of a firearm enhancement. 163 Wn.2d at 431; RCW 9.94A.533(3). And identically to the case at bar, the special verdict form merely asked whether the defendant was “armed with a deadly weapon at the time of the commission of the crime.” 163 Wn.2d at 431; CP 225. The Court of Appeals acknowledges the trial court’s repeated references to imposing a “deadly weapon clause” sentence is “confusing,” but otherwise disregards the plain language used on the Judgment and Sentence. Slip op. at 4.

In Recuenco, this Court found that a firearm sentencing enhancement has not been properly charged and proven when the charging document, instructions, and verdict form do not unambiguously demonstrate a properly noticed conviction for a firearm enhancement. 163 Wn.2d at 431, 442. Rivera’s verdict form and jury instructions were predicated on the same deadly

weapon language and do not authorize the court to impose a sentencing enhancement not dictated by the jury's verdict.

2. The published Court of Appeals decision directly contradicts other rulings from the Court of Appeals. Several recent Court of Appeals decisions have ruled that verdict forms do not authorize a court to impose a firearm enhancement when the forms ask the jury to find only that the defendant had a deadly weapon and the jury is simply given the instruction for a deadly weapon. In State v. Brainard, 148 Wn.App. 93, 104, 180 P.3d 460, rev. granted on other grounds, 166 Wn.2d 1010 (2009),¹ the court reversed a firearm enhancement when the jury was not instructed on the legal definition of a firearm as required for the enhancement. Because the jury's verdict rested on a deadly weapon enhancement, the court lacked authority to impose a firearm enhancement. Id.; see also State v. Williams, 147 Wn.App. 479, 481, 195 P.3d 578 (2009) ("Here, as in Recuenco, the jury found that the defendant was armed with a deadly weapon, rather than a firearm. Accordingly, we again conclude that the sentencing judge was without authority to impose firearm enhancements."); In re Pers. Restraint of Scott, 149 Wn.App. 213, 220, 202 P.3d 985 (2009) (firearm enhancement

facially invalid when jury was instructed on deadly weapon enhancements and returned verdicts finding the defendant armed with a deadly weapon); In re Pers. Restraint of Delgado, 149 Wn.App. 223, 227, 204 P.3d 939 (2009) (same).

In Rivera and in another case decided the same week as Rivera files his motion for discretionary review, Division One of the Court of Appeals voiced its disagreement with the analysis of these other Court of Appeals cases and signaled its intent to disregard them. Slip op. at 10; State v. Hartzell and Tieskotter, __ Wn.App. __, COA No. 63816-5-1 (decided Nov. 16, 2009). Here, the Court said, “We decline to follow this reasoning [citing Delgado and Williams] because it ignores the inescapable fact that the firearm enhancement was necessarily reflected in the jury’s general verdict.” Slip op. at 10. In Hartzell, the Court of Appeals said, “we respectfully disagree” with Delgado on this same issue. Slip op. at 32-33.

Further adding to the conflicting puzzle of Court of Appeals rulings, Division One has reversed a remarkably identical firearm sentencing enhancement in an unpublished case, In re Personal Restraint of Garlin, COA No. 63087-3-1 (decided June 8, 2009).

¹ This Court granted review only for an issue presented by the criminal

Although Garlin does not provide any precedential legal authority by virtue of its unpublished status, the explicit inconsistency between Rivera and Garlin strongly favors review by this Court.² In Garlin, the Court of Appeals found a firearm enhancement was facially invalid because the judgment and sentence stated only that Garlin was armed with a deadly weapon other than a firearm, similar to the language used in Rivera's sentencing order by the court's repeated reference to the "deadly weapon clause" and its failure to clearly state that the weapon enhancement was predicated on firearm sentencing laws.

3. This Court is presently considering the issue of the court's authority to impose a firearm enhancement when the jury's special verdict supports only a deadly weapon finding. In the consolidated cases of State v. Williams-Walker; State v. Graham; and State v. Ruth,³ this Court granted review to determine "whether the trial court's imposition of a charged firearm sentence enhancement when the jury was instructed on and found only a deadly weapon enhancement may be harmless error under

defendant, regarding the proper remedy.

² GR 14.1 provides that a party may not "cite as authority an unpublished decision of the Court of Appeals." Rivera cites to Garlin for illustrative purposes only, to show the degree of conflict over the issue in the case at bar.

³ The Court of Appeals decisions were unpublished in these cases.

Washington law.” This Court heard argument in these cases on February 10, 2009, and thus a decision should be issued shortly.⁴ The case at bar involves the same issue, as Rivera’s jury instructions and special verdict form address only the elements of a deadly weapon enhancement and not the particular findings required for a firearm sentencing enhancement.

4. Substantial public interest favors review. As demonstrated by the numerous cases involving similar issues, the trial court’s deficient instructions in cases where it imposed the firearm sentencing penalty commonly occurs, and the inconsistent analysis applied by various courts of appeal establishes a need for this Court to accept review. The imposition of a 60-month prison term has significant societal costs, not only to the individual incarcerated, but also to this state’s fiscal burden, and substantial public interest favors correcting and clarifying the requirements for the court imposing such a sentence.

⁴ The issue on review and date of oral argument may be found at the Supreme Court’s website listing issues argued in January 2009 term, available at: http://www.courts.wa.gov/appellate_trial_courts/supreme/issues.

F. CONCLUSION.

Based on the foregoing, Petitioner Salvador Rivera respectfully requests that review be granted because the decision of the Court of Appeals is inconsistent with prior decisions of other Courts of Appeals and this Court, and a raises an issue of substantial public interest to RAP 13.4(b) and RAP 13.5A.

DATED this 18th day of November 2009.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IN THE MATTER OF THE)	No. 61835-1-I
PERSONAL RESTRAINT OF)	
)	DIVISION ONE
SALVADOR HERNANDEZ RIVERA,)	
)	PUBLISHED OPINION
Petitioner.)	
)	FILED: October 19, 2009

GROSSE, J. — A trial court does not exceed its authority by imposing a firearm enhancement when the jury returns a special verdict making a deadly weapon finding if the firearm enhancement was properly charged and the fact that a firearm was used is necessarily reflected in the jury’s general verdict of guilt.

Rivera challenges the judgment and sentence in a personal restraint petition contending that it is facially invalid because the firearm enhancement was not authorized by the jury’s special verdict making a deadly weapon finding. Because the judgment and sentence properly cited the firearm enhancement statute, Rivera fails to show that the judgment and sentence was invalid on its face. But even looking beyond the face of the judgment and sentence, Rivera fails to establish that it is invalid. The firearm enhancement was authorized in law because the information provided notice of the enhancement and the jury’s general verdict that Rivera was guilty of a shooting necessarily supported a finding that he used a firearm. Accordingly, we deny the personal restraint petition.

FACTS

The State charged Salvador Rivera with first degree murder while armed with a deadly weapon. The information alleged:

MURDER IN THE FIRST DEGREE, COUNT I: That the defendants, SALVADOR HERNANDEZ RIVERA AND JOSE MANUEL RIVERA-HERNANDEZ, and each of them, then and there being in said county and state, on or about the 20th day of March, 1998, with premeditated intent to cause the death of another person, did shoot Matthew Garza, thereby causing the death of Mr. Garza, a human being, in violation of RCW 9A.32.030(1)(a), which violation is a Class "A" Felony, and during the course or commission of said crime, the defendants or one of them was armed with a deadly weapon, to-wit: a .22 caliber handgun, for the purposes of the deadly weapon enhancement of RCW 9.94A.125 and 9.94A.310(3)(a).

The jury was instructed that, in order to convict Rivera, the State had to prove beyond a reasonable doubt "[t]hat on or about the 20th day of March 1998, Salvador Hernandez Rivera shot Matthew Garza." The jury was also given a special verdict instruction stating:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

The jury found Rivera guilty as charged and returned a special verdict finding that he was "armed with a deadly weapon at the time of the commission of the crime." The trial court sentenced Rivera to 333 months confinement and imposed an additional 60 months based on the jury's deadly weapon finding.

Rivera appealed and this court affirmed his conviction;¹ the mandate was issued on May 17, 2002. He then filed a personal restraint petition, which was dismissed on October 6, 2003. Following the State Supreme Court's denial of Rivera's motion for discretionary review and subsequent motion to modify, this court issued a certificate of finality on May 28, 2004.

On June 4, 2008, Rivera filed the current petition as a CrR 7.8 motion in Whatcom County Superior Court. On June 5, 2008, the superior court denied the motion as untimely and transferred the motion to this court to be considered as a personal restraint petition. On January 21, 2009, this court appointed counsel and ordered that the petition be referred to a panel of judges for a determination on the merits, finding that the petition raised "a legitimate issue of whether petitioner is entitled to relief from his enhanced sentence under State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008)." Supplemental briefing was then submitted. As of the time of the briefing, Rivera remained incarcerated on this charge.

ANALYSIS

Rivera's personal restraint petition attacks the validity of the judgment and sentence, contending that the trial court unlawfully imposed the 60-month term of confinement for a deadly weapon enhancement because the statute limits deadly weapon enhancements to 24 months and, accordingly, under our State Supreme Court's recent decision in State v. Recuenco² (Recuenco III), reversal is required. The

¹ State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001), review denied, 146 Wn.2d 1006, 45 P.3d 551 (2002).

² 163 Wn.2d 428, 180 P.3d 1276 (2008).

State responds that Rivera's petition should be dismissed as untimely because it was filed well over a year after his sentence was final and he fails to show it is invalid on its face. We agree.

RCW 10.73.090 limits the time for filing a personal restraint petition:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

A sentence that is not authorized by law is invalid on its face.³ Rivera filed this petition four years after his judgment and sentence became final on May 28, 2004, but contends that it is not time barred because, under Recuenco III, the sentence was not authorized in law and is therefore invalid on its face.

The court's findings in the judgment and sentence state: "The defendant was found guilty on October 13, 1998, by jury verdict of murder in the first degree (while armed with a deadly weapon)," citing RCW 9.94A.125 and RCW 9.94A.310(3)(a).⁴ The judgment and sentence also lists the term of confinement as "333 + 60 months," with a handwritten notation stating: "for deadly weapon." While the judgment and sentence's use of the deadly weapon language is confusing, this does not render the judgment and sentence facially invalid because it cites the correct statutory authority for the five-year firearm enhancement.

³ In re Pers. Restraint of Tobin, 165 Wn.2d 172, 175-76, 196 P.3d 670 (2008).

⁴ As Rivera notes, the judgment and sentence included an additional "a" in its citation to RCW 9.9A.310(3)(a), citing it as "9.9A.310(3)(a)a." But this is clearly a typographical error that should be disregarded, not a citation to a nonexistent statute, as Rivera claims.

Former RCW 9.94A.310(3)(a) (1998) authorized the five-year enhancement if the offender was armed with a firearm.⁵ The other statute cited, former RCW 9.94A.125 (1998), did not authorize the 24-month deadly weapon enhancement; it only authorized the entry of a deadly weapon special verdict and defined deadly weapon to include any "pistol, revolver, or any other firearm."⁶ And in Recuenco III the court specifically recognized that this statute provides a basis for a procedure by which a jury could make a firearm finding by special verdict.⁷ Thus, on its face, the firearm enhancement was authorized in law and Rivera fails to show that the judgment and sentence is otherwise facially invalid. His personal restraint petition is therefore time barred and, accordingly, dismissed.

But even if we were to look beyond the face of the judgment and sentence, Rivera fails to show that it is invalid. We need look no further than the information, which shows that the firearm enhancement was charged. As was the case with the judgment and sentence, the information used confusing deadly weapon language but cited the specific statute authorizing the firearm enhancement. The information alleged that, during the commission of the crime, Rivera "was armed with a deadly weapon, to-

⁵ Specifically, the statute provides:

(3) The following additional times shall be added to the presumptive sentence ... if the offender or an accomplice was armed with a firearm

(a) Five years for any felony defined under any law as a class A felony ...

⁶ Former RCW 9.94A.125. A different subsection of former RCW 9.94A.310 provides for the deadly weapon enhancement of 24 months:

(4) The following additional times shall be added to the presumptive sentence ... if the offender or accomplice was armed with a deadly weapon ... other than a firearm

(a) Two years for any felony defined under any law as a class A felony.

⁷ Recuenco III, 163 Wn.2d at 439 (noting that "[f]ormer RCW 9.94A.125 expressly directs that the jury be asked by special verdict whether a defendant was armed with a deadly weapon and includes firearms within the definition of 'deadly weapon.'").

wit: a .22 caliber handgun, for the purposes of the deadly weapon enhancement of RCW 9.94A.125 and 9.94A.310(3)(a),” the same statutes cited in the judgment and sentence. As discussed above, citing to this statute does not establish that the State sought only a deadly weapon enhancement; the statute defined deadly weapons to include firearms and, since there is no comparable statute specifically authorizing a firearm special verdict, it provided a basis for the jury’s firearm special verdict. Thus, because it was charged in the information, the trial court did not exceed its authority by imposing the firearm enhancement.

Rivera’s reliance on Recuenco III is misplaced. In Recuenco III, the court held that the trial court’s imposition of a firearm enhancement based on a special verdict finding of a deadly weapon was a sentencing error that was not subject to harmless error analysis.⁸ There, the defendant was charged with second degree assault for threatening his wife with a handgun, and the information, jury instructions, and special verdict form included only a deadly weapon allegation, not a firearm allegation.⁹ But at sentencing, the trial court imposed the 36-month firearm enhancement rather than the 12-month deadly weapon enhancement authorized by the statute in effect at the time.¹⁰

This court affirmed, holding that any possible error was harmless because the only weapon mentioned at any stage of the proceedings was a firearm.¹¹ Our State Supreme Court reversed, holding that imposing the firearm enhancement without a

⁸ 163 Wn.2d at 431.

⁹ 163 Wn.2d at 431-32.

¹⁰ 163 Wn.2d at 432.

¹¹ State v. Recuenco, noted at 117 Wn. App. 1079, 2003 WL 21738927, at *5 (2003).

firearm finding by the jury violated Recuenco's Blakely¹² Sixth Amendment rights and that the federal constitution prohibited harmless error analysis of Blakely Sixth Amendment violations because they were structural errors.¹³ The United States Supreme Court reversed, holding that under federal law the failure to submit a sentencing factor to the jury is not a structural error and is therefore subject to harmless error analysis.¹⁴ But the United States Supreme Court also remanded for our State Supreme Court to consider whether the failure to submit a sentencing factor to the jury is subject to harmless error analysis under Washington law.¹⁵

On remand, in Recuenco III, the court concluded that, under Washington law, harmless error analysis does not apply when the trial court imposes a sentence not authorized by the jury's finding.¹⁶ The court did not analyze it as a Blakely error, but recast it as sentencing error that was not subject to harmless error analysis. The court explained that, because the firearm allegation was never charged or submitted to the jury, there was nothing erroneous about the jury's deadly weapon finding.¹⁷ Rather, "it was not until Recuenco was sentenced for an enhancement that was neither charged nor found by the jury that any error had occurred at all."¹⁸ Thus, the court concluded, "it

¹² Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

¹³ State v. Hughes, 154 Wn.2d 118, 164, 110 P.3d 192.

¹⁴ Washington v. Recuenco, 548 U.S. 212, 222, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (Recuenco II).

¹⁵ 548 U.S. at 218.

¹⁶ 163 Wn.2d at 441-42.

¹⁷ 163 Wn.2d at 436.

¹⁸ 163 Wn.2d at 436.

can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury.”¹⁹

There, the information did not include any specific reference to the firearm enhancement and, in fact, the prosecutor expressly informed the court that the State was alleging use of a deadly weapon, not a firearm.²⁰ The information cited former RCW 9.94A.310 generally and did not include the subsection that identified whether the enhancement was a firearm enhancement or a deadly weapon enhancement.²¹ Additionally, Recuenco’s conviction did not necessarily require that the jury find that he used a firearm in the commission of the crime, i.e., that the handgun used was in fact operable.²² Because Recuenco’s second degree assault conviction was based on a threat with a handgun, the State did not need to prove that the handgun used was operable, just that it was used to threaten.²³ Thus, the facts given to the jury there did not support a firearm enhancement finding.

But here, the information provided notice of the firearm enhancement and the jury’s general verdict necessarily supported the firearm enhancement. As discussed above, the information cited the specific statute authorizing the firearm enhancement. Additionally, unlike in Recuenco III, the jury here was given facts supporting the firearm

¹⁹ 163 Wn.2d at 442.

²⁰ 163 Wn.2d at 437-38.

²¹ 163 Wn.2d at 431.

²² Firearm is defined as “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder,” RCW 9.41.010, WPIC 2.10.01 (Supp. 2005), and our courts have held that there must be sufficient evidence to find a firearm operable to uphold a firearm 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).

²³ 163 Wn.2d at 431.

enhancement and its verdict necessarily supports a finding that Rivera was armed with a firearm because Rivera was charged with murder based on a shooting. The “to convict” instruction required the jury to find beyond a reasonable doubt that Rivera “shot Matthew Garza,” and the only deadly weapon alleged to be involved was a handgun. Thus, the jury’s general verdict finding guilt on the murder charge together with its finding that the crime was committed with a deadly weapon necessarily supports a finding that the handgun used in the shooting was in fact operable and a firearm. Thus, the trial court here did not exceed its authority and sentence someone for a crime not charged, not sought at trial, and not found by a jury, and Recuenco III does not apply.

Rather, the trial court’s error was the failure to instruct the jury on the firearm allegation, which is akin to the omission of an element in the jury instructions and is subject to harmless error analysis.²⁴ Because no other weapon was involved and Rivera was charged with shooting the victim with a handgun, the jury’s special verdict that Rivera was armed with a deadly weapon can mean only one thing--that he was armed with an operable gun, i.e., a firearm. Thus, the failure to instruct the jury on the firearm allegation was harmless and it does not render the judgment and sentence invalid on its face, as Rivera claims.

The cases upon which Rivera relies are distinguishable. In In re Personal Restraint of Delgado, Division II applied Recuenco III to vacate a firearm enhancement

²⁴ See State v. Brown, 147 Wn.2d 330, 344, 58 P.3d 889 (2002) (jury instruction that omits or misstates an element of a crime may be harmless if, from the record, it appears beyond a reasonable doubt that the error did not contribute to the verdict.); State v. Johnston, 156 Wn.2d 355, 364, 127 P.3d 707 (2006) (instructional error involving the elements of a crime may be harmless error).

where the jury returned a deadly weapon special verdict.²⁵ But, unlike here, there the information cited the penalty enhancement statute generally without including the specific statute authorizing firearm enhancement.²⁶ In In re Personal Restraint of Scott, the charge did not involve a shooting, but an attempted robbery charge alleging that the defendant used a rifle to threaten to kill victims.²⁷ Thus, unlike Rivera's case, it did not necessarily require proof that the handgun was operable.

We acknowledge that some cases have held that the enhancements were not authorized by the jury's verdict and automatically apply Recuenco III to find no harmless error even though they involved convictions based on the shooting of the gun alleged to be the deadly weapon.²⁸ We decline to follow this reasoning because it ignores the inescapable fact that the firearm enhancement was necessarily reflected in the jury's general verdict.

²⁵ 149 Wn. App. 223, 204 P.3d 936 (2009).

²⁶ 149 Wn. App. at 229. See also State v. Bainard, 148 Wn. App. 93, 199 P.3d 460 (2009) (applying Recuenco III to vacate firearm enhancement where information charged defendant with notice to seek enhancement under deadly weapon enhancements provisions, not firearm enhancement provision), review granted, 166 Wn.2d 1010, 199 P.3d 460 (2009).

²⁷ 149 Wn. App. 213, 216, 202 P.3d 985 (2009).

²⁸ See Delgado, 149 Wn. App. at 237 (attempted murder and first degree assault convictions based on shooting; court concluded that because the jury did not find that the defendants were armed with operable firearms, "the sentencing court exceeded its authority by entering a sentence that does not reflect the jury's findings."); Bainard, 148 Wn. App. at 104 (murder conviction based on shooting with a shotgun; court concluded that there was no jury determination that the defendant was armed with a firearm because the instructions and special verdict addressed only the deadly weapon allegation); State v. Williams, 147 Wn. App. 479, 484-85, 195 P.3d 578 (2008) (convictions for first degree robbery and felony murder based on shooting of robbery victim; court concluded that the jury "did not make the factual determinations necessary to impose firearm enhancements," where the State properly charged the firearm enhancements but the jury was instructed only on the deadly weapon enhancements).

We need not reach the State's alternative argument that Recuenco III cannot apply retroactively here. Because the trial court did not exceed its authority by imposing the firearm enhancement, there was no sentencing error here. Thus, Recuenco III's harmless error holding does not apply, retroactively or otherwise.

The personal restraint petition is denied.

Grosse, J.

WE CONCUR:

Dwyer, A.C.J.

Cox, J.

DECLARATION OF FILING & MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Motion for Discretionary Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 61835-1-I** (for transmittal to the Supreme Court) and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for **respondent: David McEachran and Hilary Thomas - Whatcom County Prosecuting Attorneys**, **appellant** and/or **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 18, 2009

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STATE OF WASHINGTON
2009 NOV 18 PM 4:43