

61835-1

61835-1
83923-9

No. 61835-1-I

83923-9
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2009 MAY 18 AM 11:12

IN RE PERSONAL RESTRAINT PETITION

STATE OF WASHINGTON, Respondent,

v.

SALVADOR HERNANDEZ RIVERA, Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

TABLE OF CONTENTS

A. AUTHORITY FOR RESTRAINT 1

**B. ISSUES PERTAINING TO APPELLANT'S
ASSIGNMENTS OF ERROR 1**

C. STATEMENT OF FACTS..... 1

D. ARGUMENT..... 2

**1. Rivera's judgment and sentence is not invalid on its
face because it specifically lists the statutory basis
for the enhancement as the firearm enhancement
under RCW 9.94A.310(3)(a). 4**

**2. To the extent that Rivera asserts that the firearm
enhancement was not supported by the jury's
verdict, Recuenco does not provide a basis for
vacating Rivera's firearm enhancement because
Blakely is not retroactive to cases like Rivera's that
were final when it was decided. 10**

E. CONCLUSION 13

TABLE OF AUTHORITIES

Washington State Court of Appeals

In re Personal Restraint of Rowland, ___ Wn.App. ___, 204 P.3d 953 (2009).....5

In re Personal Restraint of Scott, 149 Wn. App. 213, 202 P.2d 985, 989 (2009).....6, 8

State v. O’Neal, 126 Wn. App. 395, 109 P.3d 429 (2005), *aff’d on other grounds*, 159 Wn.2d 500, 150 P.2d 1121 (2007)5

State v. Rai, 97 Wn. App. 307, 983 P.2d 712 (1999), *abrogated by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005)6, 12

State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001), *rev. den.*, 146 Wn.2d 1006 (2002)2

Washington State Supreme Court

In re Personal Restraint of Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002).....5

In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004)5

In re Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000)5

In re West, 154 Wn.2d 204, 110 P.3d 1122 (2005)6

State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999).....6, 9

State v. Evans, 154 Wn.2d 438, 114 P.3d 627, *cert. den.*, 546 U.S. 983 (2005).....12

State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008)2, 11

State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004)5

Federal Authorities

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d
403 (2004).....3

Statutes

RCW 9.94A.125 (1998).....6
RCW 9.94A.310(3).....6
RCW 9.94A.310(3)(1998)8, 10
RCW 9.94A.310(4)(a) (1998).....6

A. AUTHORITY FOR RESTRAINT

Petitioner Salvador Rivera is restrained pursuant to judgment and sentence entered December 15, 1998 in Whatcom County Superior Court, #98-1-00289-4. Petition, Ex. D.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether a judgment and sentence is invalid on its face where the defendant was sentenced to 60 months for a firearm enhancement and the judgment and sentence specifically references the statute for the firearm deadly weapon enhancement.
2. Whether Recuenco III's holding that a sentencing court may not impose a firearm enhancement where the State did not charge a firearm enhancement and the jury's verdict only supported a deadly weapon enhancement applies to petitioner's sentence where the information specifically charged the five year firearm enhancement under RCW 9.94A.310(3)(a) and the court imposed a firearm enhancement, and where Blakely does not apply retroactively.

C. STATEMENT OF FACTS

Appellant Rivera was charged with Murder in the First Degree, while armed with a firearm deadly weapon, pursuant to RCW 9.94A.125 and RCW 9.94A.310(3)(a), for acts that occurred on March 20, 1998. Petitioner's Supp. Brief, Ex. B. He was found guilty and sentenced to 333 months on the offense and 60 months on the firearm deadly weapon enhancement. Petitioner's Supp. Brief, Ex. A. Rivera appealed his

conviction, which appeal was denied, and the mandate issued on May 17, 2002. (See, State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001), *rev. den.*, 146 Wn.2d 1006 (2002).)

On June 4, 2008 Rivera filed the current petition as a CrR 7.8 motion with Whatcom County Superior Court. State's Response Brief, App. B (Initial Consideration Order.) The Superior Court transferred Rivera's motion to the Court of Appeals to be considered as a personal restraint petition on June 5, 2008. *Id.*

D. ARGUMENT

Rivera asserts that his judgment and sentence is invalid on its face and under Recuenco III,¹ he is entitled to have his firearm deadly weapon enhancement reduced to a non-firearm deadly weapon enhancement. The judgment and sentence is not invalid on its face because it specifically lists that the deadly weapon enhancement was for a firearm enhancement under "RCW 9.94A.310(3)(a)a" (sic). Even if the Court were to go beyond the four corners of the judgment and sentence, the judgment and sentence is facially valid. The information specifically alleged the statutory section

¹ State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008). The State referred to this decision as Recuenco II in its response brief, but is using the same reference that Petitioner uses in his supplemental brief.

referencing the firearm enhancement in addition to alleging that Rivera committed the murder with a .22 caliber handgun. Moreover, although Rivera asserts that he is not raising a Blakely² issue, the portion of the Recuenco III decision related to the lack of a jury finding to support the firearm enhancement is premised squarely upon Blakely. Therefore, to the extent that Rivera asserts that the firearm enhancement is not supported by sufficient jury findings, that is an issue he cannot raise at this time because his conviction was final before Blakely was decided and Blakely is not retroactive.

Under Recuenco III a defendant is entitled to notice of the specific enhancement sought, and the jury must find the facts supporting the enhancement beyond a reasonable doubt. Rivera received notice that the State was seeking a firearm enhancement and the jury's general and special verdicts show that the jury found that Rivera was armed with a firearm when he committed the murder. Rivera's petition should be denied.

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

1. **Rivera's judgment and sentence is not invalid on its face because it specifically lists the statutory basis for the enhancement as the firearm enhancement under RCW 9.94A.310(3)(a).**

Rivera asserts that his petition is not valid on its face and therefore it is not time-barred. Specifically, Rivera asserts that the judgment and sentence only references a deadly weapon finding and that the deadly weapon statute only permits a 24 month enhancement and not a 60 month enhancement and therefore the trial court erred in imposing a 60 month enhancement. He further asserts that the judgment and sentence is invalid under Recuenco III because the sentence was unauthorized by the charging document and the jury's verdict. The judgment and sentence specifically references the statutory basis for the firearm deadly weapon enhancement, therefore the judgment and sentence is not invalid on its face. Even if this court were to go beyond the four corners of the judgment and sentence in order to determine if that judgment is valid on its face, the charging document clearly charged the firearm deadly weapon enhancement, even specifically the 60 month enhancement. The jury's verdict also supports the finding that the defendant was armed with a firearm when he murdered the victim.

A judgment and sentence is constitutionally invalid on its face only if the judgment "*without further elaboration evidences infirmities of a*

constitutional magnitude.” In re Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000) (emphasis added). The error of law or fact must appear within the four corners of the judgment and sentence itself. State v. Ross, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004); *see also*, State v. O’Neal, 126 Wn. App. 395, 431, 109 P.3d 429 (2005), *aff’d on other grounds*, 159 Wn.2d 500, 150 P.2d 1121 (2007) (defendant bears threshold burden of showing existence of error of fact or law “within the four corners of the judgment and sentence”). Only in limited cases are documents other than the judgment and sentence considered in order to determine if the judgment and sentence is valid on its face, for example plea documents. In re Personal Restraint of Rowland, ___ Wn.App. ___, 204 P.3d 953, 957 (2009); *see also*, In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004) (informations, plea statements and jury instructions were considered to determine if the conviction was for a nonexistent crime, thus rendering the judgment and sentence invalid on its face).

If the judgment and sentence reflects that the sentence imposed was within the trial court’s legal authority, the judgment and sentence is valid on its face. In re Personal Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). In order to determine whether the trial court exceeded its statutory authority in imposing sentence, the court looks to

the relevant portions of the Sentencing Reform Act at the time the defendant was convicted. In re West, 154 Wn.2d 204, 211-12, 110 P.3d 1122 (2005).

The judgment and sentence itself here reveals no facial invalidity. Under the statutes at the time, the trial court had authority to impose a five year deadly weapon enhancement where a firearm was used and a two year deadly weapon enhancement if a deadly weapon other than a firearm was used. RCW 9.94A.125 (1998); RCW 9.94A.310(3)(a); RCW 9.94A.310(4)(a) (1998).³ At the time, it was mandatory for a court to impose a firearm enhancement where the uncontested facts were that the deadly weapon was a firearm. State v. Rai, 97 Wn. App. 307, 312, 983 P.2d 712 (1999), *abrogated by* State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005); *accord*, In re Personal Restraint of Scott, 149 Wn. App. 213, 202 P.2d 985, 989 (2009) (“case law allowed a trial court to impose a

³ At the time, RCW 9.94A.125 set forth the procedure for pursuing a deadly weapon enhancement. RCW 9.94A.125 (1998). It also defined what a deadly weapon was, including but not limited to any firearm. *Id.* RCW 9.94A.310 (3) and (4) set forth what the enhancement period was depending upon whether the deadly weapon was a firearm or not and depending upon the classification of the crime committed at the time the defendant was armed with the deadly weapon. *See*, State v. Brown, 139 Wn.2d 20, 26, 983 P.2d 608 (1999) (“When a jury makes a special finding that a felony offender was armed with a deadly weapon, certain ““additional times shall be added to the presumptive sentence[.]””)

firearm enhancement on a jury's deadly weapon special verdict"). *See* State's Response Brief at 5-6.

The judgment and sentence here states:

II. FINDINGS

Based on the testimony heard, statements by the defendant and/or victims, argument of counsel, the presentence report and case record to date, **the Court finds:**

2.1 CURRENT OFFENSE(S): The defendant was found GUILTY on October 13, 1998, by JURY VERDICT of: MURDER IN THE FIRST DEGREE (while armed with a deadly weapon):

Count No. I
Crime: MURDER IN THE FIRST DEGREE
RCW: 9A.32.030(1)(a), 9.94A.125, and 9.94A.310(3)(a)a
(sic)
Crime Code: Class "A" Felony
Date of Crime: 3/20/08
Incident No. 98A-5437

(XX) with a special verdict/finding for use of deadly weapon on Count(s): I.

Petitioner's Supp. Brief, App. A, at 1-2 (emphasis added). RCW

9.94A.310(3)(a) provided:

The following times shall be added to the presumptive sentence for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed crime. ...

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

RCW 9.94A.310(3)(a) (1998).⁴ The judgment and sentence shows that the judge explicitly found that the applicable deadly weapon enhancement was the firearm enhancement, specifically the five year enhancement.⁵ The judgment and sentence shows that the applicable deadly weapon enhancement was the five year firearm enhancement and therefore there is no error on the face of the judgment because the enhancement imposed was 60 months.

Rivera alternatively argues that if the invalidity is not found on the face of the judgment and sentence, the Court should consider the charging document and the special verdict form. If this Court were to look beyond the judgment and sentence itself to other documents, the information clearly charged that the deadly weapon was a firearm and more specifically the five year firearm sentence enhancement. The information alleged:

⁴ Petitioner references RCW 9.94A.533 as the relevant statutory provision, however that statute did not exist in 1998 and wasn't passed until 2002. Petitioner's Supp. Brief at 8.

⁵ This specific finding distinguishes this case from In re Personal Restraint of Scott, 149 Wn. App. 213, 202 P.3d 985 (2009), which was not referenced by Rivera in his supplemental brief. The court there found the judgment and sentence invalid on its face, and therefore not time-barred, because the judge had not reduced to writing his finding that the deadly weapon enhancement was for a firearm. Id. at 221-22. The court further noted that while such judicial fact-finding is now prohibited by Blakely, that case could not afford defendant any relief because Blakely does not apply retroactively and defendant's case was final before Blakely was decided. Id. at 221 n.4.

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)**;

Petitioner's Supp. Brief, App. B (emphasis added).

In asserting that the information is insufficient to charge Rivera with the firearm enhancement, Rivera references only the statutory provision for deadly weapon, RCW 9.94A.125, listed in the information, inexplicably ignoring the clear reference two words later to RCW 9.94A.310(3)(a). Rivera also claims that the charging document did not cite the specific statutory definition for a firearm under RCW 9.41.010, but cites no authority that would require the definition to be set forth within the information itself.⁶ The reference to RCW 9.94A.310(3)(a) subsumes that specific definition as it is specifically referenced in RCW

⁶ This specific definition of a firearm is only required to be given in jury instructions when requested. *See, State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997) (trial court is required to define technical terms used in the jury instructions when requested).

9.94A.310(3). RCW 9.94A.310(3)(1998) (...if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010...”)

The jury’s general verdict along with the special verdict show that the jury found Rivera was armed with a firearm when he committed first degree murder. The to-convict instruction on Murder in the First Degree required that the jury find beyond a reasonable doubt that Rivera shot the victim. State’s Response Brief, App. D, Instr. No. 14. Moreover, the special verdict instruction only defined the deadly weapon in the context of a firearm. Id., Instr. No. 37. The jury’s general and special verdict, in accord with RCW 9.94A.125 and RCW 9.94A.310(3)(a), clearly provided the basis for the court’s imposition of the 60 month firearm enhancement. Rivera’s judgment and sentence is not invalid on its face. Thus, as argued in the State’s response brief, Rivera is time-barred from raising a challenge to his sentence at this late date. See, State’s Response Brief at 3-4.

2. **To the extent that Rivera asserts that the firearm enhancement was not supported by the jury’s verdict, Recuenco does not provide a basis for vacating Rivera’s firearm enhancement because Blakely is not retroactive to cases like Rivera’s that were final when it was decided.**

Rivera asserts that his reliance upon Recuenco III does not require a retroactivity analysis. He asserts that Recuenco III rests upon well-settled law that establishes that the information must contain all the

elements of the offense. The Recuenco III decision did rely in part on the lack of notice in the charging document in determining that harmless error could not apply in that case. However, the court found that the error “occurred when the trial judge imposed a sentence enhancement for something the State did not ask for *and the jury did not find*. Recuenco, 163 Wn.2d at 442 (emphasis added). After finding that the prosecution charged and sought only the lesser “deadly weapon” enhancement, the court specifically found that the “sentencing judge then committed error by imposing a sentence outside the judge’s authority, a sentence that was not authorized by the jury.” Id. at 435-36, 439. It was the State’s failure to put the defendant on notice that it intended to seek a firearm enhancement, by only alleging the non-firearm enhancement in the information, combined with the jury’s finding of only the deadly weapon enhancement that rendered the imposition of a firearm enhancement outside the judge’s sentencing authority. The court concluded that harmless error did not apply to the circumstances of that case because: “it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury.” Id. at 442.

To the extent that Recuenco III does *not* rely upon a Blakely issue, the gravamen of the error was the trial court’s imposition of a sentence not

authorized by the charges. In our case, however, as noted in the previous section, Rivera was specifically put on notice that the State was seeking a firearm enhancement and specifically the five year enhancement by referencing RCW 9.94A.310(3)(a) in the information. The charging and notice aspect of the Recuenco III case does not apply to the facts of this case.

The remaining alleged in the Recuenco III case was the issue that the jury's verdict did not support the firearm enhancement but only a deadly weapon enhancement. That is a Blakely error issue. Prior to Blakely the sentencing court was authorized, and even legally required, to make the finding as to whether a firearm or non-firearm deadly weapon enhancement applied to the facts of the case. *See, Rai, supra*. As the sentence here was valid at the time it was entered, there was no basis for asserting that the enhancement was invalid until Blakely was decided. As argued in the State's response brief, Blakely does not apply retroactively to cases that were final when it was issued and does not fall within the state law exception for retroactive application under RCW 10.73.100(6). State v. Evans, 154 Wn.2d 438, 114 P.3d 627, *cert. den.*, 546 U.S. 983 (2005). See State's Response Brief at 8-9. Recuenco III's reliance on the sentence not being authorized by the jury verdict is predicated upon Blakely and

provides no basis for relief here because Rivera's case was final before Blakely was decided.

Recuenco III does not provide Rivera any grounds for relief. The State provided Rivera notice that it was seeking a firearm enhancement in the information, the jury found that Rivera shot the victim and that he was armed with a deadly weapon, defined as a firearm for purposes of the deadly weapon allegation. The sentencing court then properly imposed the firearm deadly weapon enhancement in Rivera's case. Rivera's firearm enhancement was within the court's statutory authority to impose at the time.

E. CONCLUSION

Rivera has failed to demonstrate that the judgment is facially invalid. Even considering documents outside the four corners of the judgment and sentence, the sentence imposed was within the court's sentencing authority. His petition is procedurally barred from consideration and must be dismissed.

Respectfully submitted this 15th day of May, 2009.


HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail with proper postage thereon, or caused to be delivered, a true and correct copy of the foregoing document to this Court, petitioner's counsel, Nancy P. Collins, and petitioner Salvador Rivera, addressed as follows:

Nancy P. Collins
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

Salvador Rivera, DOC #790179
Stafford Creek Corr Ctr
191 Constantine Way
Aberdeen WA 98520

Sydney A. Koss
Legal Assistant

5/15/2009
Date

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 MAY 18 AM 11:12