

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 AUG -6 P 2:04
BY RONALD R. CARPENTER.

No. 82699-4

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

NICHOLAS ALLEN BAINARD, Petitioner

FILED
AUG 06 2009

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

SUPPLEMENTAL BRIEF

Janet G. Gemberling
Attorney for Petitioner

GEMBERLING & DOORIS, P.S.
P.O. Box 22029
Seattle, WA 98122
(206) 257-0405

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

INDEX

A.	FACTS.....	1
B.	ARGUMENT.....	1
	1. THE PLAIN LANGUAGE OF THE STATUTE PRECLUDES IMPOSITION OF A DEADLY WEAPON ENHANCEMENT FOR USE OF A FIREARM	2
	2. THE INTENT OF THE “HARD TIME FOR ARMED CRIME” ACT PRECLUDES IMPOSITION OF A DEADLY WEAPON ENHANCEMENT FOR USE OF A FIREARM	3
C.	CONCLUSION	9

TABLE OF AUTHORITIES

WASHINGTON CASES

AOL, LLC V. WASHINGTON STATE DEPT. OF REVENUE, 149 Wn. App. 533, 205 P.3d 159 (2009).....	6
BERGER V. SONNELAND, 144 Wn.2d 91, 26 P.3d 257 (2001).....	3
C.J.C. V. CORP. OF THE CATHOLIC BISHOP OF YAKIMA, 138 Wn.2d 699, 985 P.2d 262 (1999).....	6
GRAHAM V. STATE, 116 Wn. App. 185, 64 P.3d 684 (2003).....	2, 7
IN RE PERSONAL RESTRAINT OF DELGADO, 149 Wn. App. 223, 204 P.3d 936 (2009).....	1, 4
STATE DEPT. OF TRANSP. V. STATE EMPLOYEES' INS. BD., 97 Wn.2d 454, 645 P.2d 1076 (1982).....	6
STATE V. BAINARD, 148 Wn. App. 93, 199 P.3d 460 (2009).....	1, 4
STATE V. GURSKE, 155 Wn.2d 134, 118 P.3d 333 (2005).....	3, 5
STATE V. RECUENCO, 163 Wn.2d 428, 180 P.3d 1276 (2008).....	4
STATE V. SCHELIN, 147 Wn.2d 562, 55 P.3d 632, 640 (2002).....	3
STATE V. TAYLOR, 74 Wn. App. 111, 872 P.2d 53 (1994).....	4
STATE V. WILLIAMS, 62 Wn. App. 336, 813 P.2d 1293 (1991).....	2

STUCKEY V. DEPT' OF LABOR & INDUS., 129 Wn.2d 289, 295, 916 P.2d 399 (1996).....	2
TOMMY P. V. BOARD OF COMM'RS, 97 Wn.2d 385, 645 P.2d 697 (1982).....	6

STATUTES

FORMER RCW 9.94A.310(3)	7, 8
LAWS 1995, ch. 129, § 2.....	7
LAWS 1995, ch. 129, § 4.....	7
LAWS OF 1995, ch. 129.....	7
LAWS OF 1995, ch. 129, § 1.....	8
RCW 9.94A.125	6, 7
RCW 9.94A.310	7
RCW 9.94A.310(3)	6
RCW 9.94A.310(4)	8
RCW 9.94A.533	1, 3, 7
RCW 9.94A.533(3)	2, 8
RCW 9.94A.533(4)	2, 3, 6, 8, 9
RCW 9.94A.602	5, 6, 7

A. FACTS

The State charged Nicholas Bainard with two counts of second degree murder and each count alleged that he was “armed with a deadly weapon thereby invoking the provision of RCW 9.94A.533 and/or 9.94A.602 . . .” (CP 240-41) The victims, his parents Ella and Richard Bainard, had died of gunshot wounds. (RP 401-405, 409-10) There is no evidence any other weapon was used in the murders.

The trial court imposed a sentence that included two consecutive 60-month firearms enhancements. (RP 1029; CP 25-34) The Court of Appeals reversed the sentence enhancements and remanded “for correction of the sentence.” *State v. Bainard*, 148 Wn. App. 93, 199 P.3d 460 (2009). This decision has since been cited as authority for imposing a deadly weapon enhancement when the evidence shows a firearm was used. *See In re Personal Restraint of Delgado*, 149 Wn. App. 223, 228-29, 204 P.3d 936 (2009).

B. ARGUMENT

The issue is whether, as a matter of statutory construction, RCW 9.94A.533 authorizes the imposition of a sentence enhancement for use of a deadly weapon based on the defendant’s use of a shotgun.

1. THE PLAIN LANGUAGE OF THE STATUTE
PRECLUDES IMPOSITION OF A DEADLY
WEAPON ENHANCEMENT FOR USE OF A
FIREARM.

Issues of statutory construction are reviewed *de novo*. *Graham v. State*, 116 Wn. App. 185, 187-188, 64 P.3d 684 (2003) *citing* *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996). When the language of the statute is plain and unambiguous, its meaning is derived from the wording of the statute itself. *Graham, supra*; *State v. Williams*, 62 Wn. App. 336, 338, 813 P.2d 1293 (1991).

RCW 9.94A.533(3) provides: “The following additional times shall be added to the standard sentence range 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.”

RCW 9.94A.533(4) provides: “The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon *other than a firearm* . . .” (emphasis added)

These statutes are mutually exclusive. The language of RCW 9.94A.533(3), on its face, only authorizes imposing additional time

if a firearm was used, while the language of RCW 9.94A.533(4) expressly precludes use of a firearm as the basis for a deadly weapon enhancement.

The plain language of RCW 9.94A.533 bars a deadly weapon enhancement predicated on the use of a firearm.

2. THE INTENT OF THE “HARD TIME FOR ARMED CRIME” ACT PRECLUDES IMPOSITION OF A DEADLY WEAPON ENHANCEMENT FOR USE OF A FIREARM.

A statute is ambiguous if it can reasonably be interpreted in more than one way. *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). Under the presumed authority of RCW 9.94A.533, the courts have repeatedly permitted the deadly weapon enhancement in cases where the undisputed facts indicate that the basis for the enhancement was the use of a firearm. E.g. *State v. Gurske*, 155 Wn.2d 134, 138-39, 118 P.3d 333 (2005) (deadly weapon enhancement predicated on constructive possession of pistol, reversed for lack of nexus); *State v. Schelin*, 147 Wn.2d 562, 579, 55 P.3d 632 (2002) (“To justify a statutory deadly weapon sentence enhancement based on a defendant's alleged use of a firearm, the State must make the threshold showing that the defendant was actually “armed” with a firearm);

State v. Taylor, 74 Wn. App. 111, 872 P.2d 53 (1994) (deadly weapon sentencing enhancement where gun was found along with drug paraphernalia in search of defendant's home).

Recent cases suggest that the statutory exclusion of firearms from the deadly weapon enhancement has not been raised before now.

In *State v. Recuenco*, 163 Wn.2d 428, 431, 180 P.3d 1276 (2008) the defendant was charged with assault “with a deadly weapon, to-wit: a handgun.” After reversing the firearm enhancement, this court remanded for correction of the sentence. The propriety of imposing a deadly weapon enhancement on remand was not raised or addressed.

In *Personal Restraint of Delgado*, 149 Wn. App. at 228-29 the State alleged the crimes were committed while “armed with a deadly weapon, to-wit: a firearm.” Citing *State v. Bainard, supra*, the court reversed the firearm enhancements but remanded the matter “for resentencing and imposition of deadly weapon enhancements.” *Id.* at 238.

The apparent confusion likely arises from RCW 9.94A.602,¹ which requires a finding of fact or special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon” when a deadly weapon enhancement is imposed, and defines the term deadly weapon to include firearms. Thus, in *Gurske*, 155 Wn. 2d at 137, where the court imposed a deadly weapon enhancement, this court relied on RCW 9.94A.602 for the proposition “A firearm is a deadly weapon.”

The plain meaning of the statutory language “for purposes of this section” in section 602 of 9.94A RCW would seem to make it clear that the definition of “deadly weapon” is provided solely to indicate that

¹ In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. *The following instruments are included in the term deadly weapon:* Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, *pistol, revolver, or any other firearm*, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9.94A.602 (emphasis added)

section 602 requires a findings or special verdicts for enhancements involving both firearms and weapons other than firearms.

Assuming, however, that the use of the term “deadly weapon” in both RCW 9.94A.602 and RCW 9.94A.533(4) gives rise to ambiguity, several rules of statutory construction are helpful. Related statutes are read together to harmonize their provisions and to give meaning to all language insofar as possible. *AOL, LLC v. Washington State Dept. of Revenue*, 149 Wn. App. 533, 549, 205 P.3d 159 (2009) citing *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999). In interpreting a statute the court seeks to ascertain and give effect to the intent and purpose of the legislature as expressed in the act or reflected in the legislative history. *State Dept. of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982); *Tommy P. v. Board of Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

The Sentence Reform Act of 1981 authorized courts to impose enhanced sentences for the commission of certain felonies while armed with a deadly weapon “as defined in this chapter.” RCW 9.94A.310(3) The definition of deadly weapon, RCW 9.94A.125, subsequently recodified without change as RCW 9.94A.602, includes both firearms and other deadly weapons. Thus, additional punishment for use of a firearm was simply incorporated in the punishment for any deadly weapon.

All this changed in 1995 with the enactment of the Hard Time for Armed Crime Act in 1995. Laws of 1995, ch. 129. *See Graham v. State*, 116 Wn. App. at 189.

First, the prior deadly weapon enhancement was rewritten to provide separate enhancements for crimes committed with firearms “as defined in RCW 9.41.010” and crimes committed with deadly weapons “as defined in this chapter other than a firearm as defined in RCW 9.41.010.” Laws 1995, ch. 129, § 2. The statutory language thus recognized the definition of deadly weapon in RCW 9.94A.125 [now RCW 9.94A.602], and expressly excluded firearms from that definition for purposes of the deadly weapon enhancement.

Second, the terms authorized for the firearm enhancement were significantly longer than those for other deadly weapons. Former RCW 9.94A.310(3)(a-c) and (4)(a-c) [now RCW 9.94A.533].

Third, the new law also noted the distinction between “deadly weapon special verdict under RCW 9.94A.125 and deadly weapon enhancements under RCW 9.94A.310(3) or (4).” Laws 1995, ch. 129, § 4.

All of these provisions support the inference the legislature was aware of the inclusion of firearms in the deadly weapon definition provided by RCW 9.94A.125 and intended to ensure that the lesser sentence enhancement provided in RCW 9.94A.310 for use of a deadly

weapon would not be imposed where the evidence showed the defendant was armed with a firearm.

Finally, the 1995 Act contains a specific statement of findings and intent. Laws of 1995, ch. 129, § 1. Finding that “[c]urrent law also fails to distinguish between gun-carrying criminals and criminals carrying knives or clubs” the Act states an intent to “[d]istinguish between the gun predators and criminals carrying other deadly weapons and provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms.” 1995, ch. 129, § 1, subsection (1)(d) and (2)(c).

In light of the legislative history and express intent of the 1995 Act, the statutes should be construed to preclude the imposition of a deadly weapon enhancement absent evidence that some weapon other than a firearm was used in the commission of a crime.

By permitting the State to seek the lesser deadly weapons enhancements when the offense actually includes the use of a firearm, the courts have undermined the express intent of the legislation.

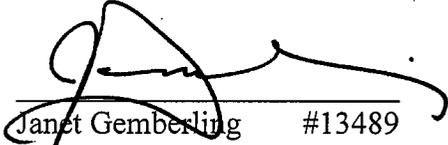
Former RCW 9.94A.310(3)and(4) [now RCW 9.94A.533(3) and (4)] do not authorize imposition of a deadly weapon enhancement absent evidence the defendant was armed with a deadly weapon other than a firearm. Here, the record is devoid of evidence reflecting the use of any

weapon other than a shotgun. The evidence would not be sufficient to support imposition of a deadly weapon enhancement pursuant to RCW 9.94A.533(4).

C. CONCLUSION

The sentence enhancements should be stricken.

Dated this 6th day of August, 2009.



Janet Gemberling #13489
Attorney for Petitioner