

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 Respondent, ) NO. 83826-7  
 )  
 vs. ) MOTION TO STRIKE  
 ) ISSUE NEVER RAISED  
 DANIEL J. SIMMS ) BELOW OR ACCEPTED BY  
 AKA TERRY JAY WEEKS, ) THIS COURT  
 )  
 Appellant. )

STATE OF WASHINGTON  
10 MAY 17 PM 3:29  
DONALD R. CARPENTER  
CLERK

1. IDENTITY OF MOVING PARTY

The State of Washington, respondent, asks for the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

This Court should strike those portions of the Supplemental Brief of Petitioner relating to an issue that was not raised in the trial court, not raised in the Court of Appeals, and was not part of this Court's order accepting review. Specifically, this Court should strike Supplement Issue Statement 2--an equal protection claim-- and all argument relating to this issue (section D 4).

**3. FACTS RELEVANT TO MOTION**

Simms was convicted of first-degree robbery with a firearm enhancement, two counts of second-degree assault with a firearm enhancement, and first-degree unlawful possession of firearm. Each violent offense involved a different victim.

Simms raised three issues in appealing his case to the Court of Appeals: (1) whether the essential elements rule required the State to charge in the Information the fact that Simms had a prior felony conviction with a firearm enhancement, (2) whether convictions for unlawful possession of a firearm and the firearm enhancement penalty violate double jeopardy, and (3) whether the trial court erred in excluding testimony regarding certain statements made by Simms to responding police officers. See Brief of Appellant and Reply Brief of Appellant.

The Court of Appeals, at State v. Simms, 151 Wn. App. 677, 214 P.3d 919 (2009), rejected all of Simms claims.

Simms subsequently filed a Petition for Review with this Court. This Court accepted review on one issue only. Specifically, this Court stated:

IT IS ORDERED:

That the Petition for Review is granted only on the issue of whether the State, in seeking a double firearm enhancement based on the prior imposition of a firearm enhancement, is required to allege in the information that the defendant has previously been sentenced to a firearm enhancement.

See Order dated March 3, 2010.

**4. GROUND FOR RELIEF AND ARGUMENT**

RAP 13.3(a) allows a party to seek review by the Supreme Court of a "decision" of the Court of Appeals. Here, the Court of Appeals was never asked to, and did not, issue a decision on the equal protection issue now raised in Simms' Supplement Brief of Petitioner.

Further, RAP 13.7(b) provides that this Court may limit the scope or issues the Court accepts for review. That is exactly what this Court did in this case. This Court did not accept an equal protection challenge to the statutes. Rather, the Court accepted review on a very narrow issue.

This Court will not ordinarily consider an issue not raised or briefed in the Court of Appeals. State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993). Simms' supplemental brief inappropriately includes argument on an issue that was not before the Court of Appeals and was not accepted by this Court. This Court should exercise its discretion and strike the inappropriately raised new issue.

DATED this 14 day of May, 2010.

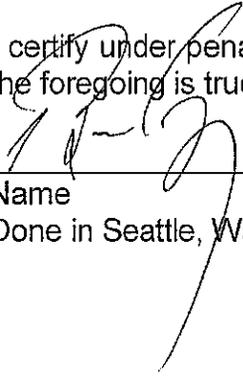
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DENNIS J. MCCURDY, WSBA #21975  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Motion to Strike, in STATE V. SIMMS, Cause No. 83826-7, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name

Done in Seattle, Washington

05/14/10  
\_\_\_\_\_  
Date