74733-9

74733-9

No. 95374-1

NO. 74733-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR THOMAS,

Appellant.

FILED
Apr 28, 2017
Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JEFFREY RAMSDELL

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUE PRESENTED

Controlling statutes, court rules, and case law all authorized the trial court to empanel a second jury to decide the firearm enhancement after the first jury failed to reach a unanimous decision. Did Thomas receive effective assistance of counsel when his attorney did not object to the court's statutory authority to empanel a second jury to consider the firearm enhancement?

B. SUPPLEMENTAL STATEMENT OF THE CASE

After the first jury was unable to agree as to whether Thomas was armed with a firearm during the commission of the offense, a second jury was impaneled to consider the firearm enhancement. Thomas objected only on the basis that double jeopardy and due process prohibited a second trial. CP 153; 10/29/15 RP 30-43. He did not allege that the court lacked statutory authority to empanel a second jury to return a special verdict relating to the firearm enhancement.

After the State argued that the alleged error was not preserved, Thomas asserts in a supplemental brief that he received ineffective assistance of counsel when his trial attorney did not argue that the court lacked statutory authority to empanel the second jury. However, as outlined in the State's initial response, the court had clear authority

to empanel a second jury to consider the firearm enhancement after the first jury was unable to unanimously agree. As such, Thomas did not receive ineffective assistance of counsel.

C. ARGUMENT

BECAUSE THE COURT HAD CLEAR STATUTORY AUTHORITY TO EMPANEL THE SECOND JURY, THOMAS HAS FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

A criminal defendant has the right to effective assistance of counsel. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden of establishing such a claim falls on the defendant. Strickland, 466 U.S. at 687. To prevail, Thomas must show that (1) his attorney's conduct fell below a professional standard of reasonableness (the performance prong), and that, (2) but for counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different (the prejudice prong). State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If he fails to establish either prong, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

When making a claim of ineffective assistance of counsel based on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained. State v. Fortun-Cebada, 158 Wn. App. 158, 172, 241 P.3d 800 (2010).

Thomas cannot make such a showing. As outlined in the State's original response, RCW 9.94A.825 explicitly permits a jury to consider a firearm enhancement. State v. Nguyen, 134 Wn. App. 863, 870-71, 142 P.3d 1117 (2006); State v. Recuenco, 163 Wn.2d 428, 437-39, 180 P.3d 1276 (2008). Moreover, even if the deadly weapon enhancement statute was silent on the question of a jury decision, because Thomas had a constitutional right to a jury determination of the enhancement, RCW 2.28.150, CrR 6.1(a), and CrR 6.16(b) authorized the trial court to empanel a jury to decide it.

Unlike the cases cited by Thomas, which deal with an exceptional sentencing scheme that explicitly directed findings to be made by the trial court, the deadly weapon enhancement statute has always authorized a jury finding. Thomas does not contend that the court lacked the ability to empanel the original jury that considered the firearm enhancement, and he does not explain why, if the court had such authority, it lost it following the original jurors' inability to agree.

Because the court had clear statutory authority to empanel a jury to decide the firearm enhancement, Thomas has failed to establish an ineffective assistance of counsel claim.

D. CONCLUSION

For the above reasons, Thomas's supplemental assignment of error must be rejected.

DATED this 28th day of April, 2017.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler, the attorney for the appellant, at winklerj@nwattorney.net, containing a copy of the SUPPLEMENTL BRIEF OF RESPONDENT, in State v. Arthur Idowu Thomas, Cause No. 74733-9, in the Court of Appeals, Division I, 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.

Dated this 28 day of April, 2017.

Name:
Done in Seattle, Washington