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No. 65942-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CARLOS BENITEZ,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT¹

1. Prosecutorial vindictiveness deprived Mr. Benitez of due process

Able Cantu, the head of the enterprise, owner of the house, target of a regional drug task force investigation, and the one who sold a machine gun to a police informant received a sentence of 8 years. CP 367-68 (Findings of Fact 2.3.4, 7, 8, 16). Mr. Benitez, by contrast, was merely a “groupie” temporarily staying at the home. CP 367 (Finding of Fact 5). Despite that, Mr. Benitez faced a standard range sentence of 63.75 years to 82.66 years. CP 369 (Finding of Fact 23).

The trial court found that the only explanation for the State’s grossly disparate treatment of Mr. Benitez was his choice “to exercise his constitutional right to go to trial.” CP 368 (Finding of Fact 19). The court found it was not a proper exercise of prosecutorial discretion by the State to charge a “groupie” such as Mr. Benitez with offenses yielding an 82 year standard range when compared to much lower sentences for violent offenses. CP 369 (Findings of Fact 24-26).

Courts have addressed two kinds of prosecutorial vindictiveness: actual vindictiveness and a presumption of vindictiveness. State v.

¹ Because the arguments are fully developed in his initial brief, Mr. Benitez’s reply brief does not offer further argument on the State’s failure to prove the elements of possessing a stolen firearm or the trial court’s admission of the fruits of a warrantless search.

Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006). In this case, the trial court's findings in support of a mitigated exceptional sentence establish actual vindictiveness by the prosecutor.

The State has not assigned error to any of the trial court's findings of fact. Instead, the State's response brief contends the ruling in Korum somehow controls in this case. The State is incorrect.

In Korum, a sharply divided Court concluded a presumption of vindictiveness does not arise merely from the adding of additional charges. Korum, 157 Wn.2d at 629. But that conclusion does not apply to this case. Korum simply held that a reviewing court may not presume vindictiveness. But the State would stretch Korum to hold that a trial court could not find actual vindictiveness. Korum does not support the State's argument.

Here, trial court made an actual finding of actual vindictiveness; that the State's charging decision was motivated solely by Mr. Benitez's assertion of his right to a trial. Again, the State has not challenged that finding. Indeed, that finding is supported by substantial evidence. Notably, the trial judge, the former Skagit County Prosecuting Attorney, found that in his time as a prosecutor and on the bench he had never seen a case prosecuted in this manner. CP 369 (Finding of Fact 22).

The Court must dismiss the added counts.

2. The State did not prove beyond a reasonable doubt that Mr. Benitez was armed with a firearm at the time of the offense.

With respect to the three counts of possession with intent to deliver drugs, Counts 2, 3, and 4, the State alleged and the jury returned special verdicts finding Mr. Benitez was armed with a firearm at the time of the commission of the offense. CP 101, 104, 107. RCW 9.94A.533 permits the imposition of such an enhancement if the jury finds beyond a reasonable doubt the person was armed at the time of the commission of the offense. The State's evidence did not permit the jury to make that finding in this case.

A person is "armed" with a firearm "if the weapon is easily accessible and readily available for use either for offensive or defensive purposes." State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Where the weapon is constructively possessed, in addition to proving the weapon is readily available, the State must also prove beyond a reasonable doubt a "nexus between the weapon and the defendant and between the weapon and the crime." State v. Schelin, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002). The nexus requirement "means that where the weapon is not actually used in the commission of the crime, it must be there to be used." State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005).

In its best light, the evidence establishes only that Mr. Benitez was present in a place in which guns were also present. The State's brief does not dispute this point. It simply contends that is enough. The State is incorrect.

There is no evidence that any of those guns were there for defensive purposes. And even if they were, there was no proven nexus between Mr. Benitez and the guns. Again, as emphasized in his opening brief, the special verdict forms specifically state that the jury found "CARLOS * BENITEZ, JR was armed with a firearm." CP 101,104, 107. Because the special verdict specifically finds Mr. Benitez, and not an accomplice, was armed, this Court cannot look to evidence regarding an accomplice to sustain the jury's special verdicts. State v. Williams-Walker, 167 Wn.2d 889, 899-900, 225 P.3d 913 (2010).

For purposes of the enhancement it is not enough that the State prove that firearms were found at crime scene. Instead, those firearms must have been at the crime scene for offensive or defensive purposes by Mr. Benitez. There is no evidence to support that finding. The State did not prove Mr. Benitez was armed in the commission of the crimes. Thus, the court must strike each of the three firearm enhancements.

3. Mr. Benitez was denied his right to a unanimous jury.

The Washington Constitution requires a unanimous jury verdict in a criminal case. Const. Art. I, §§ 21, 22. The Supreme Court has made clear Article I, section 22 applies to enhancements. State v. Recuenco, 163 Wn.2d 428, 435-36, 180 P.3d 1276 (2008) (Recuenco III). This is because an enhancement is treated as an essential element of the offense. Id. at 434. Thus, a jury must unanimously agree the State has proved beyond a reasonable doubt the facts necessary to impose the enhancement. State v. Goldberg, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003).

The failure to ensure the jury is unanimous in its verdict is a manifest constitutional error. Thus, this issue may be addressed in the absence of an objection below. State v. Watkins, 136 Wn.App. 240, 244-45, 148 P.3d 1112 (2006).

Nonetheless, the State contends that that jury need not be unanimous as to the act supporting an enhancement. Brief of Respondent at 41-42. Unfortunately for the State, the Supreme Court has held otherwise.

The State was required to either elect the gun on which it wanted the jury to rely or provide a Petrich instruction. The State did neither. Thus, because the jury was not instructed that it must unanimously agree

as to with which gun Mr. Benitez was armed, he was denied his right to a unanimous jury.

4. Mr. Benitez was denied the effective assistance of counsel by his attorney's failure to be aware of controlling law.

Once the Washington Supreme Court has decided an issue of state law, its conclusion is binding on lower courts. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). The Washington Supreme Court has determined that the provisions of RCW 9.41.040(7), which authorizes the State to charge a defendant with separate counts for each gun possessed, does not foreclose a finding that the offense arose from the same criminal conduct. State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000).

That conclusion has been reaffirmed. State v. Stockmyer, 136 Wn.App. 212, 219, 148 Wn.2d 1077 (2006), review denied, 161 Wn.2d 1023 (2007); State v. Simonson, 91 Wn.App. 874, 885, 960 P.2d 955 (1998). Stockmyer concluded, however, that Simonson was limited to instances, such as this one, in which all the guns were in a single room. 136 Wn.2d at 219.

The State relies on a single decision from Division Three which simply dismissed Haddock as not having interpreted the present statute. Brief of Respondent at 45-46 (citing State v. McReynolds, 117 Wn.App. 309, 71 P.3d 663 (2003)). As is made clear in Mr. Benitez's prior briefing

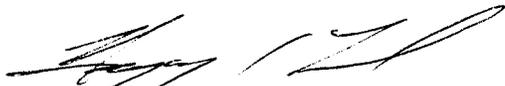
McReynolds efforts to ignore the plain conclusion of Haddock are incorrect.

Haddock has previously determined that these offenses can be found to arise from the same criminal conduct. Defense counsel failure to be aware of controlling precedent deprived Mr. Benitez of his Sixth Amendment right to the effective assistance of counsel.

B. CONCLUSION

For the reasons above this court should reverse and dismiss Mr. Benitez's convictions for unlawful possession of a firearm. Alternatively, this court should reverse the sentence and remand the matter for resentencing for the court to determine whether the multiple possession counts arose from the same criminal conduct. The court must reverse the three firearm enhancements. Further, the court must reverse and dismiss Mr. Benitez's conviction for possessing a stolen firearm and his conviction of identity theft.

Respectfully submitted this 14th day of February, 2012.



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