

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DAVID L. LANDER,

Appellant.

No. 41994-7-II
(Consolidated with No. 42000-7-II)

UNPUBLISHED OPINION

Armstrong, J. – David L. Lander appeals his resentencing, arguing that the trial court erred in imposing firearm enhancements instead of deadly weapon enhancements. We affirm.

Facts

Following Lander’s conviction of theft of a firearm, second degree theft, first degree trafficking in stolen property, and second degree unlawful possession of a firearm, the jury found that he was armed with a firearm at the time of the second degree theft and trafficking offenses. As a result, the trial court imposed two consecutive firearm enhancements in sentencing Lander.

Lander appealed, and we affirmed his convictions in an unpublished decision. We found merit, however, in Lander’s offender score challenge and remanded to the trial court to “consider whether any of his convictions constitute the ‘same criminal conduct’ under RCW 9.94A.589(1)(a) and for resentencing if his offender score calculation changes as a result.” Supp. Clerk’s Papers at 95.

At a resentencing hearing before a different judge, the State informed the court that we had remanded for consideration of whether some of Lander’s offenses were the same criminal conduct. The State conceded that Lander’s theft of a firearm and second degree theft convictions

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constituted the same criminal conduct. Although the theft of a firearm and possession of a firearm offenses were not the same criminal conduct, they did not count against each other in calculating the offender score because their sentences ran consecutively to each other. The State referred to the firearm enhancements in explaining how the standard range was reached, and Lander did not contest the enhancements. He did protest that his juvenile conviction should not prevent him from possessing firearms. Before resentencing Lander, the court reiterated that the issue before it on remand was “dealing with same criminal conduct.” Report of Proceedings (March 17, 2011) at 10. The court accepted the State’s concessions and resentenced Lander accordingly.

On appeal, Lander challenges the firearm enhancements imposed.

Analysis

The State contends that Lander is barred from challenging the firearm enhancements in this appeal because, on remand, the trial court did not exercise its independent judgment to review and consider them.

A defendant is generally prohibited from raising issues on a second appeal that were or could have been raised on the first appeal. *State v. Mandanas*, 163 Wn. App. 712, 716, 262 P.3d 522 (2011). An exception to this rule is found in RAP 2.5(c)(1), which provides:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

Such appellate review is limited, however, to instances where the trial court decides to revisit an issue that was not the subject of the initial appeal. *State v. Barberio*, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993). If the trial court elects to exercise this discretion, its decision may be the subject

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of a later appeal, but the rule provides for review only where the trial court has exercised some discretion. *State v. Kilgore*, 167 Wn.2d 28, 39, 216 P.3d 393 (2009); *Mandanas*, 163 Wn. App. at 716 n.2.

Coupled with this rule is the principle that the trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate. *Kilgore*, 167 Wn.2d at 42. Our mandate instructed the trial court to take action consistent with our opinion, which authorized the trial court to reconsider only whether any of Lander's offenses constituted the same criminal conduct. The trial court was not authorized to reassess the firearm enhancements, and it did not do so. Consequently, Lander may not now appeal their imposition.

Lander maintains that this court may consider and correct an illegal sentence at any time. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). The State cites authority that casts doubt on Lander's claim of illegality, however, and we will not address its merits here. Lander must file a personal restraint petition to obtain relief.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

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Penoyar, J.

Johanson, A.C.J.