IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RENE HERNANDEZ CASTILLO, Appellant.	No. 39889-3-II UNPUBLISHED OPINION

Hunt, J. — Rene Hernandez Castillo appeals (1) his sentence for second degree unlawful possession of a firearm (Count I), based on his guilty plea on remand following reversal of his jury conviction for first degree firearm possession in his previous appeal; and (2) his resentence on remand for his original jury conviction for methamphetamine possession while armed with a firearm (Count II), which conviction and sentence he did not previously appeal. Through appellate counsel, Castillo argues that in resentencing him on remand on Count II, the trial court improperly included in his offender score three California convictions that the State did not prove comparable to Washington felonies.

In his Statement of Additional Grounds (SAG),[1] Castillo contends that (1) his guilty plea on Count I was not voluntary because he believed his sentence would be equal to time already

[1] RAP 10.10

served,[2] and (2) the "firearm" sentence enhancement on Count II was invalid because the trial court's failure to include the "knowledge" element in the jury instruction on Count I (which caused reversal of Count I in his earlier appeal) also invalidated the jury's deadly weapon special verdict finding that he had committed Count II while armed with a firearm.[3] We disagree and affirm.

Facts

In 2007, a jury found Castillo guilty of first degree unlawful possession of a firearm, Count I, and possession of methamphetamine, Count II. The jury also found that Castillo had committed the offenses "'shortly after being released from incarceration,' an aggravating sentencing circumstance" ("rapid recidivism").[4] Clerk's Papers (CP) at 9. In addition, the jury

[2] Apparently, Castillo expected to be resentenced on Count II without the firearm special verdict (former RCW 9.94A.602, *recodified as* RCW 9.94A.825 (2009), based on our rationale for reversing Count I. *See* SAG. Had that happened, his drug seriousness level would have been reduced from III to I, making his standard range 12 to 24 months instead of 100 to 120 months (see footnote 10 for more detail). But because the special verdict remained in effect, so did the 18-month firearm sentence enhancement applicable to Count II on remand. Consequently, his sentence for Count II remained at 60 months (the statutory maximum), which exceeded the 31 months he had already served.

[3] Castillo's judgment and sentencing form on remand indicates that the jury returned a deadly weapon special verdict under RCW 9.94A.533 and former RCW 9.94A.602, finding that he "used a *firearm* in the commission of the offense in Count 02." Clerk's Papers (CP) at 29 (emphasis added). Former RCW 9.94A.620, the deadly weapon special verdict statute, provides the requisite procedure for securing a "firearm" sentence enhancement so long as the deadly weapon allegation is accompanied by specific language that the defendant was armed with a "firearm." (There is no comparable firearm special verdict statute, and a firearm is included in the definition of a "deadly weapon" in former RCW 9.94A.602, as was the case here.) *See State v. Hartzell*, 153 Wn. App. 137, 167, 221 P.3d 928 (2009), *remanded*, 168 Wn.2d 1027 (2010). Accordingly, the trial court imposed the 18-month firearm sentence enhancement on Count II as RCW 9.94A.533(3)(c) mandates for any class C felony committed while armed with a firearm.

[4] *State v. Castillo*, No. 36822-6-II, 2009 WL 1211987, at *7 (Wn. App. Div. 2, May 5, 2009); RCW 9.94A.535(3)(t) (The court may impose a sentence outside the standard sentence range

returned a deadly weapon special verdict finding that he had been armed with a firearm when he possessed the methamphetamine, as alleged in Count II.[5]

At sentencing, the parties agreed that, with an offender score of six, Castillo should receive the statutory maximum of 60 months on Count II (possession of methamphetamine).

The standard range for Count I (unlawful possession of a firearm) was 57-75 months of which the trial court sentenced Castillo to 60 months of confinement. Based on RCW 9.94A.533, the State argued that the trial court should add the firearm enhancement to the sentence for Count I because the trial court lacked authority to impose a sentence that exceeded the 60-month maximum on Count II. Following the State's recommendation, the trial court imposed an additional 18 months firearm sentencing enhancement and 12 months for the "rapid recidivism" enhancement on the 60-month sentence for Count I, which increased his total confinement on Count I to 90 months. The trial court ran Castillo's 60 months of confinement on Count II concurrently with the 90 months on Count I.

I. First Appeal, Count I

In his first appeal, Castillo challenged only his firearm possession conviction, Count I, and the trial court's imposition of the firearm sentence enhancement on that count. He did not appeal the recidivist sentence enhancement on Count I or any part of his conviction or sentence for Count II; nor did he otherwise challenge the validity of the jury's deadly weapon special verdict

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where "[t]he defendant committed the current offense shortly after being released from incarceration," an "aggravating circumstance.")

[5] *See* our previous opinion, in which we noted, "The jury also found that Castillo was armed with a firearm when he possessed methamphetamine, as alleged in Count II." *Castillo*, 2009 WL 1211987 at *13; CP at 15.

finding that he had committed Count II while armed with a firearm. He argued that we should reverse his firearm possession conviction, Count I, because the trial court had improperly failed to instruct the jury on the "knowledge" element of that charge. He also argued that the trial court "erred in using the firearm enhancement to increase his sentence for unlawful possession of a firearm," Count I, because "RCW 9.94A.533(3)(f) prohibits attaching a firearm enhancement to a sentence for unlawful possession of a firearm."[6]

Agreeing with Castillo on both points, we reversed Count I and remanded for a new trial because the trial court did not instruct the jury on the knowledge element of unlawful possession of a firearm. Noting that "RCW 9.94A.533(3)(f) expressly forbids adding a firearm enhancement to a sentence for first degree unlawful possession of a firearm,"[7] we also held that the trial court had erred in adding a firearm enhancement to Castillo's sentence for Count I and that it would be erroneous to apply a firearm enhancement to Count I again if Castillo were reconvicted on retrial.

We did not, however, address the validity of the jury's special verdict in general or the legality of its applicability to Count II, methamphetamine possession, the count with which the information associated the firearm special allegation and the count for which the jury had entered the deadly weapon special verdict. Nor did we previously address the issue Castillo raises now—whether the jury had to find knowledge in order to find that Castillo possessed a firearm while he possessed the methamphetamine, for purposes of rendering its deadly weapon special verdict. Thus, the jury's guilty verdict on Count II remained undisturbed as did its deadly weapon

[6] *Castillo*, 2009 WL 1211987, at *1, 12; CP at 14.

[7] *Castillo*, 2009 WL 1211987, at *13; CP at 15.

special verdict.

II. Remand

On remand, Castillo pled guilty to a reduced charge on Count I—second degree unlawful firearm possession. A declaration of criminal history attached to his Statement of Defendant on Plea of Guilty, and signed by Castillo and the State, included three felony convictions from California and one felony conviction from Clark County, Washington. Based on the parties' stipulation that "there [was] sufficient evidence to support the plea," the trial court accepted Castillo's guilty plea as "knowing, intelligent and voluntary." Verbatim Report of Proceedings (VRP) at 25.

On remand, the State asked the trial court to impose the firearm sentencing enhancement on Count II, citing *State v. Barnes* for the proposition that the deadly weapon special verdict remained valid because "[k]nowledge of the presence of a firearm is not a requirement of a deadly weapon[[8]] allegation and need not be included in a firearm enhancement jury instruction."[9] *State*

[8] As we explain above, former RCW 9.94A.620, the deadly weapon special verdict statute, has two principal effects: First, it sets forth a required procedure for a deadly weapon and firearm special verdict; and, second, it defines the term "deadly weapon," which includes firearms. *See In re Cruze*, 169 Wn.2d 422, 429, 237 P.3d 274 (2010). To notify a defendant of the State's intention to seek a firearm sentence enhancement, the State need only cite the "deadly weapon special verdict" statute, former RCW 9.94A.602, accompanied by the specific language alleging that the defendant "was armed with a deadly weapon, a firearm." This is because there is no comparable statute specifically authorizing afirearm special verdict. Such a statute would be unnecessary because, since a firearm is a type of deadly weapon, former RCW 9.94A.602 already authorizes a special verdict finding that the defendant committed the crime while armed with a firearm. *Hartzell*, 153 Wn. App. at 167. *See also In re Personal Restraint of Rivera*, 152 Wn. App. 794, 801, 218 P.3d 638 (2009).

[9] For this reason, the absence of the "knowledge" element in the previous "to convict" instruction for Count I did not similarly invalidate the jury's special verdict finding that Castillo had committed Count II, the crime of methamphetamine possession, while armed with a firearm.

v. Barnes, 153 Wn.2d 378, 387, 103 P.3d 1219 (2005) (firearm sentence enhancement based on jury's deadly weapon special verdict finding that Barnes had been armed with a firearm). Ruling that the facts of *Barnes* were indistinguishable from those here and, therefore, that *Barnes* controlled, the trial court granted the State's motion.

At the resentencing hearing, the State noted Castillo's offender score of six on both counts, the standard sentencing range of 22 to 29 months of confinement for Count I, and the only available sentence of 60 months for Count II.[10] Castillo did not contest the State's calculation of this offender score or its recommended sentencing for either count.

The trial court imposed a standard range sentence of 29 months of confinement for the unlawful firearm possession conviction, Count I, to run concurrently with his 60-month sentence for the methamphetamine possession conviction, Count II.[11] This time, the trial court applied the firearm sentence enhancement to Count II, running the additional 18 months consecutively to his 60-month term on the underlying drug possession conviction, as RCW 9.94A.533(3)(e)

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[10] The jury's deadly weapon special verdict on Count II elevated his methamphetamine possession conviction from a level I drug offense, with a standard sentencing range of 12+ to 24 months, to a level three drug offense, with a standard range of 100+ to 120 months. RCW 9.94A.517 (Table 3 Drug Offense Sentencing Grid); RCW 9.94A.518 (any felony offense under chapter 69.50 RCW with a deadly weapon special verdict under former RCW 9.94A.602 (firearm included in definition of "deadly weapon") is a level three drug offense). The statutory maximum for Count II was five years (60 months) of confinement, RCW 69.50.4013(2) and RCW 9A.20.021(1)(c), which RCW 9.94A.533(g) required the trial court to impose.

[11] The judgment and sentence form, which indicates that Castillo is guilty of both Counts based on a September 25, 2009 "jury verdict," CP 29, is incorrect as to Count I. As we previously explained, although a jury originally found Castillo guilty on Count I in 2007 or 2008, after we reversed this conviction, he pled guilty on remand to a reduced charge on Count I in September 2009. Thus, the judgment and sentence on remand should read "guilty plea" as the basis of his Count I conviction.

[12] RCW 9.94A.533(3)(e) provides: "Notwithstanding any other provision of law, all deadly

requires.[12] We note, however, that RCW 9.94A.533(3)(g) operates such that Castillo will first serve the mandatory 18 months for the firearm enhancement, followed by additional confinement such that he will serve a total of no more than the maximum 60 months of confinement on Count II, *including* the firearm sentencing enhancement.[13]

Castillo now appeals his guilty plea firearm possession conviction, Count I, and his sentence on remand for the methamphetamine possession jury conviction, Count II, including the jury's deadly weapon special verdict and the trial court's corresponding 18-month firearm sentence enhancement.

ANALYSIS

I. Comparability of California Crimes

Castillo argues, for the first time on appeal, that the trial court improperly included three prior California convictions in his offender score because the State failed to prove that they were comparable to Washington felonies. We do not address this issue for the following reasons, any one of which standing alone supports our decision.

First, as we noted in his previous appeal, at his original sentencing, Castillo agreed to his offender score and agreed that, "with an offender score of six, [he] should receive the statutory

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weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions[.]"

[13] RCW 9.94A.533(3)(g) provides:

> If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence . . . . If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

maximum of 60 months" for his drug conviction, Count II. *Castillo*, 2009 WL 1211987, at *7; CP at 9. Castillo has provided no record in the instant appeal to undermine his originally agreed offender score,[14] including his previous apparent decision not to contest the out-of-state prior convictions on which the score was based in part. And he has provided no verbatim report of proceedings of his original sentencing hearing or any other discussion of his offender score and its original calculation. Nor has he provided any other record that might persuade us to disregard his previous agreement and his resulting waiver of a challenge to his offender score, based on his previously uncontested California priors.

The appellant bears the burden of providing an adequate record for our review. RAP 9.2(b). In this Castillo has failed. Accordingly, we will not disturb either his original agreement to his offender score during his original sentencing or the trial court's sentencing decision on remand, based on this previously agreed and apparently uncontested offender score. *See State v. Nitsch*, 100 Wn. App. 512, 514, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000). We hold, therefore, that Castillo has waived his right to challenge his offender score.

Second, if Castillo believed that there was some defect in his previously agreed offender score or that the trial court had miscalculated his offender score at his original sentencing, he could have challenged that offender score in his previous appeal. But he did not. Under the "law of the case" doctrine, we may refuse to address issues that could have been raised in a prior appeal. *Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988); RAP

[14] On the contrary, in his SAG in his previous appeal, Castillo argued that his trial counsel was ineffective for having stated that "his [Castillo's] offender score was 'seven' instead of 'six.'" *Castillo*, 2009 WL 1211987, at *1; CP at 3. Thus, even Castillo himself previously asserted in his SAG that six, the offender score the trial court used, was the correct score.

2.5(c)(2). We hold, therefore, that the law of the case doctrine precludes Castillo's attempt to challenge his agreed offender score of six now.

Third, even assuming, without deciding, that Castillo had preserved a challenge to the comparability of his prior California convictions to Washington felonies and that his offender score should have been three instead of the agreed six, there would be no impact on his term of confinement. An offender score of three would not reduce his confinement because (1) his 29-month firearm possession sentence on Count I ran concurrently with his 60-month drug sentence on Count II; (2) a lower offender score of three would still yield a standard sentencing range of 68 to 100 months of confinement on Count II, which would exceed the statutory maximum 60 months of confinement. Thus, recalculating the offender score, as Castillo urges, would have no effect on his term of confinement.

II. Special Verdict & Firearm Enhancement

In his SAG, Castillo contends that we must vacate the jury's deadly weapon special verdict and the corresponding firearm sentence enhancement that the trial court imposed on Count II on remand. His reliance on our previous reversal of his first degree firearm possession conviction, Count I, based on the trial court's failure to instruct the jury about the knowledge element for that underlying substantive crime, is misplaced. As we have previously noted, although the crime of unlawful firearm possession requires jury instruction on the "knowledge" element, knowledge is not an element of a deadly weapon allegation and need not be included in the special verdict instructions. *See Barnes*, 153 Wn.2d at 385-87.

In his first appeal, Castillo challenged only the trial court's improper application of a firearm sentencing enhancement to his firearm possession conviction on Count I; he did not

challenge the validity of the jury's deadly weapon special verdict. Nor did we address that point in the first appeal when we held that the trial court erred in applying a firearm sentencing enhancement to Count I. Thus, on remand, the jury's deadly weapon special verdict remained intact. We hold, therefore, that the trial court did not err when, on remand, it imposed the firearm sentencing enhancement on Count II, which was mandatory under RCW 9.94A.533(3)(e).

III. Withdrawal of Guilty Plea

Castillo next contends in his SAG that we should allow him to withdraw his plea of guilty to the reduced firearm possession charge on remand, Count I, because he believed that he was pleading guilty to a crime with a recommended sentence not exceeding time served on both counts.[15] This argument also fails.

A guilty plea is involuntary if based on misinformation about the sentencing consequences.[16] But nothing in the record suggests that Castillo did not understand the

[15] Castillo also contends in his SAG that, in his original trial, the jury had no choice but to find, by special verdict, that he had been armed with a firearm while possessing methamphetamine because it had already erroneously convicted him of unlawful firearm possession based on a defective "to convict" instruction. This argument also fails, primarily because in pleading guilty to the lesser charge of second degree firearm possession on Count I on remand, Castillo admitted having had knowledge of the firearm; therefore, he cannot now argue that the record lacks proof of such knowledge. *See* VRP at 21-25.

Furthermore, to prove the deadly weapon/firearm special verdict at the original trial, the State did not need to prove that Castillo actually knew about the firearm; on the contrary, it was sufficient for the State to show that the firearm, which was a deadly weapon, was in his constructive possession. *See State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). In neither appeal has Castillo challenged the sufficiency of the evidence of his constructive possession of the firearm. Instead, he has focused on the knowledge element defect in his original firearm possession conviction, Count I, which as we explain above, has no bearing on the validity of the jury's special verdict.

[16] *See In re Murillo*, 134 Wn. App. 521, 530, 142 P.3d 615 (2006).

sentencing consequences when he pled guilty to Count I on remand. On the contrary, he knew that he had previously been sentenced to 60 months of confinement for the drug conviction, Count II, which carried a 60-month maximum, only 31 months of which he had served. As his counsel acknowledged, Castillo's guilty plea decision was not contingent on resolution of the deadly weapon special verdict question or the subsequent firearm sentence enhancement, both of which were "totally separate." VRP at 20. On the contrary, Castillo knew that his guilty plea did not resolve the issue of whether the 18-month firearm enhancement would apply to Count II.[17] And, as we have already noted, knowledge was not an element required for inclusion in special verdict instructions under former RCW 9.94A.602. *Barnes*, 153 Wn.2d at 387.

Furthermore, at Castillo's change of plea hearing, the trial court took great care to explain the possible sentence to him. It informed Castillo that whether he would be released for time served would depend on how it ruled on the deadly weapon special verdict issue: The trial court explained, "So the worst thing you're looking at here is 60 months with credit for the time you've already served." VRP at 22-23. Castillo assured the court that he understood. There is

[17] In response to the trial court's question in Castillo's presence, "Does the guilty plea decision revolve around the resolution of [applying the enhancement to Count II] at all[?]," Castillo's counsel replied, "No. . . . They're totally separate." VRP at 20.

no reason to believe he did not. He does not persuade us that his guilty plea was involuntary or that we should allow him to withdraw it.

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.

Hunt, J.

We concur:

Armstrong, P.J.

Quinn-Brintnall, J.