

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 22315-9-III

Respondent,

)

)

) **Division Three**

v.

)

)

JEREMIAH JUSTIN JONES,

) **UNPUBLISHED OPINION**

)

Appellant.

)

)

Kulik, C.J. — A jury found by a special verdict that Jeremiah Jones was armed with a deadly weapon during an assault. However, Mr. Jones was charged with first degree assault while armed with a firearm. He was also charged with possession of stolen property. The court sentenced Mr. Jones to 180 months’ incarceration for the first degree assault with an additional 60 months’ incarceration for the firearm enhancement. We affirmed the imposition of the firearm enhancement.

Ultimately, the Washington Supreme Court remanded the case for a decision in light of its holding in *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010) that the imposition of a firearm enhancement violates the defendant’s constitutional right to a

jury trial when the jury found the defendant armed with a deadly weapon. We conclude, and the State concedes, this case requires remand for resentencing.

FACTS

On January 7, 2002, Spokane Police Officer Christopher Lewis initiated a traffic stop on a speeding Toyota 4Runner. As Officer Lewis emerged from the patrol car, gunfire erupted from inside the 4Runner, shattering the rear window. The officer believed that he was being fired upon with two different guns. Officer Lewis dove to the ground, and the 4Runner sped away. Officer Lewis chased the 4Runner until the driver lost control of the vehicle, which rolled a number of times and came to a rest on the driver's side of the vehicle. The passenger door opened and an occupant, later identified as Jeremiah Jones, jumped out and fled down the railroad tracks. Another occupant, later identified as Jason Graham, then emerged, holding a gun. The two occupants went separate ways. Mr. Graham engaged in a shoot-out with multiple police officers. Mr. Jones was not a part of the shoot-out. Mr. Jones surrendered himself to Officer Paul Watson, who was near the 4Runner after it rolled. Police found Mr. Jones's 9mm pistol in the 4Runner.¹

Mr. Jones was convicted of one count of first degree assault and one count of first

¹ Mr. Jones pleaded guilty to unlawful possession of a firearm prior to trial.

degree possession of stolen property. By a special verdict, the jury found that Mr. Jones was in possession of a deadly weapon. At sentencing, Mr. Jones was sentenced to 180 months' incarceration for the first degree assault with an additional 60-month enhancement that the court categorized as a deadly weapon enhancement.

On July 10, 2008, the Washington Supreme Court stayed Mr. Jones's petition for review, pending its decision in *Williams-Walker*. The court decided *Williams-Walker* on January 14, 2010. *Williams-Walker*, 167 Wn.2d 889. In July 2010, it granted Mr. Jones's petition for review and remanded his appeal to this court for reconsideration in light of the decision in *Williams-Walker*.

ANALYSIS

The decision in *Williams-Walker* is a consolidation of three separate petitions for review. In *Williams-Walker*, Mr. Williams-Walker was charged with first degree robbery and first degree murder, as a principal or accomplice in felony murder, with a firearm enhancement. *Williams-Walker*, 167 Wn.2d at 893. A special verdict instruction asked the jury if the defendant was armed with a deadly weapon during the commission of the crime, which the jury answered in the affirmative. *Id.* The court imposed a 60-month firearm enhancement to the defendant's sentence. *Id.*

According to former RCW 9.94A.510(3)(a) (2001), a court shall impose an

additional five years to the sentence of any offender who was armed with a firearm during the commission of a class A felony. For an offender armed with a deadly weapon other than a firearm, a court shall impose an additional two years' incarceration.

Former

RCW 9.94A.510(4)(a).² According to the court,

[w]here a jury finds by special verdict that a defendant used a “deadly weapon” in committing the crime (even if that weapon was a firearm), this finding signals the trial judge that only a two-year “deadly weapon” enhancement is authorized, not the more severe five-year firearm enhancement. When the jury makes a finding on the lesser enhancement, the sentencing judge is bound by the jury’s determination.

Williams-Walker, 167 Wn.2d at 898.

The court distinguished the issue in *Williams-Walker* from that in *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008). In *Recuenco*, the State only charged the defendant with a deadly weapon enhancement, whereas in *Williams-Walker* the State initially charged the defendant with a firearm enhancement but only submitted a deadly weapon enhancement special verdict to the jury. *Williams-Walker*, 167 Wn.2d at 898. Nevertheless, the court found that this error also violated the defendant’s right to a jury

² The court notes that while the plain language of the statute would indicate that a firearm is a separate class of weapon, a deadly weapon enhancement can refer to a firearm as in *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008). See *Williams-Walker*, 167 Wn.2d at 897 n.5.

trial, even when establishing the underlying offense requires the State to prove the defendant used a firearm. *Id.* at 898-99.³ The court held that this is an error that can never be harmless because the sentencing judge is bound to the determination made by the jury. *Id.* at 902.

Applied to Mr. Jones’s appeal, this holding is directly on point. Count VII of the amended information alleged that Mr. Jones assaulted Officer Lewis with the intent to inflict great bodily harm and that Mr. Jones was “armed with a firearm under the provisions of RCW 9.94A.125 and [RCW] 9.94A.310(3).” Clerk’s Papers at 79. However, the State submitted a special verdict to the jury asking if Mr. Jones was armed with a deadly weapon. Imposing a firearm enhancement when the jury returned a deadly weapon enhancement is error under *Williams-Walker*.

Accordingly, we remand for resentencing consistent with a deadly weapon enhancement rather than a firearm enhancement.

³ The court also explicitly mentions and disapproves of *State v. Pharr*, 131 Wn. App. 119, 126 P.3d 66 (2006) in as much as the decision stands for the proposition that the use of a firearm as an underlying element of the crime authorizes the court to impose a firearm sentence enhancement. *Williams-Walker*, 167 Wn.2d at 899 n.7.

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

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Siddoway, J.