

Remand of Recuenco; Firearm vs. Deadly Weapon

By: Brett A. Purtzer; July 2006

The U.S. Supreme Court, in reviewing Washington Supreme Court's decision in the Washington v. Recuenco case, 154 Wash.2d, 156 110 P.3d 188, has remanded the case for further consideration in accordance with its decision. See, 548 U.S. ___, 126 S.Ct. 2546 (2006).

The defendant Recuenco was convicted at trial of second degree assault based on evidence that he had threatened his wife with a handgun. The jury was asked to answer yes or no to the question of whether the defendant was armed with a "deadly weapon" to which they responded yes. At sentencing, the trial court applied a three-year firearms enhancement rather than the one-year enhancement that applied to assault with a deadly weapon.

Our state supreme court in Blakely v. Washington, 542 U.S. 296, utilizing the holding in Apprendi v. New Jersey, 530 U.S. 466, states that the statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict.

The state, in Recuenco on appeal, conceded that Blakely had been violated, a Sixth Amendment violation, but argued to find the error to be harmless. Our state Supreme Court vacated Recuenco's sentence and remanded for sentencing based solely on the deadly weapon enhancement. In so doing, it held that a Blakely error is a "structural error" which will always invalidate a conviction because it is never a harmless error.

The U.S. Supremes held that the failure to submit a sentencing factor to a jury is not a "structural error" and therefore is subject to consideration of whether this error is harmless or not, remanding to our state court for further consideration.

If this remand process results in a finding that the error is not harmless, then the sentence will be the one-year enhancement. In my humble opinion, our court will find that it wasn't harmless because the state did not charge a firearm in the information nor did it request a jury finding of a firearm. This violates Blakely and cannot be harmless. We'll see.

End

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