

The Future of Firearm Enhancement

By: Brett A. Purtzer; July 2003

On May 20, 2003, the Ninth Circuit Court of Appeals decided United States v. Odom. Odom defines the term “use of a firearm” in an armed bank robbery prosecution pursuant to 18 USC § 2113(d). Mr. Odom, in the course of robbing a bank, inadvertently lifted his jacket where the bank manager saw a firearm tucked into his belt. After a bench trial the court convicted Mr. Odom of armed robbery because at the time of the event he was in possession of a loaded firearm. Mr. Odom contended that he should have been convicted of the lesser offense of unarmed bank robbery pursuant to 18 USC § 2113(a) because he did not “use” the firearm.

In a unanimous decision the Court of Appeals agreed with Mr. Odom. In reversing Mr. Odom’s conviction, the court reviewed the federal statute to determine when the “armed” portion of the bank robbery statute was invoked. § 2113(d) provides as follows:

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person *by the use of* a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.
18 USC § 2113(d) (emphasis added).

The court noted that because Mr. Odom did not “actively employ” the weapon to facilitate the bank robbery, he should have been convicted of the unarmed bank robbery which had a corresponding lesser sentence.

The Odom decision may be beneficial not only in federal court, but also in state court. Deadly weapon enhancements are codified at RCW 9.94A.602, and, under Washington State Law, the enhancement applies when the accused is “armed” with a deadly weapon at the time of the commission of the crime. Case law interpreting the term “armed” allows that the deadly weapon must be “easily accessible and readily available for use, either for offensive or defensive purposes.” See State v. Schelin, 104 Wn.App. 48, 14 P.3d 893 (2000). Even though a weapon may be present during the commission of a crime, there must be some nexus between the defendant and the weapon before the enhancement applies. See State v. Johnson, 94 Wn.App. 882, 974 P.2d 855 (1999). The Court of Appeals considers “easily accessible” as a

question of mixed law and fact that will differ depending on the case, but clearly there needs to be some nexus between the weapon's presence and the crime's commission.

Generally, in assault or homicide cases where a weapon's enhancement is alleged, the statute contemplates the firing of the weapon as opposed to using the gun as a bludgeon. Under the teachings of Odom, using a firearm to strike a person, as opposed to shooting the individual, may provide persuasive authority as to why the enhancement doesn't apply. As such, for both state and federal cases, Odom should prove helpful in assisting with the defense of firearm related offenses and enhancements, and, thus, provide some relief to the substantial prison time that is imposed when a firearm is part of the offense charged.

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