Case Law Updates | Dec. 18, 2024 – Jan. 7, 2025

Washington Supreme Court

RESENTENCING: The defendant's motion for resentencing following *Blake* was untimely because the range did not change (affirming *Richardson*).

ENHANCEMENTS: Trial court did not have discretion to impose concurrent firearm enhancements at the resentencing hearing.

State v. Kelly, ___ Wn.2d ___ (No. 102002-3, consolidated with 102003-1)
Following *State v. Blake*, Kelly sought resentencing in two felony cases. In the first case, Kelly had been convicted of PCS and other burglary-related offenses in May 2006. In the second case, Kelly had been convicted of two counts of burglary with firearm enhancements, theft, and weapons charges in Nov. 2006. In the May 2006 case, the court corrected the judgment and sentence to remove the *Blake* conviction but did not resentence Kelly because the sentence was already completed. In the Nov. 2006 case, the trial court granted resentencing and corrected the judgment and sentence by removing two *Blake* points. The State did not object, and the trial court resentenced Kelly even though the standard range did not change. The court left the original base sentence intact but modified the two firearm enhancements to run concurrently. The State appealed the trial court's ruling that the firearm enhancements run concurrently. Kelly cross-appealed, arguing the May and Nov. 2006 sentences should run concurrently because the resentencing hearings were scheduled for the same day. The Court of Appeals held that the trial court correctly denied Kelly's request for resentencing in the May 2006 case because it was time barred under RCW 10.73.090(1) and .100. In the consolidated Nov. 2006 case the Court of Appeals held that Kelly was not entitled to resentencing because of the time bar. The appellate court reversed the sentence and remanded to the trial court to remove 2 points from the offender score and to leave the previous sentence in place.

Held, Kelly's motion for resentencing more than one year after the judgment and sentence was final was untimely. The judgment and sentence was valid on its face because the range did not change after removal of the *Blake* convictions. *Blake* is not material to a sentence where correction of the offender score has no practical effect on the standard range.

Held, vacating a drug possession conviction following *Blake* did not vacate the entire judgment and sentence in the May 2006 case.

Held, the trial exceeded its authority by imposing concurrent firearm enhancements at resentencing.

Held, the State's failure to assert the time bar in the trial court is not invited error and does not preclude the State from challenging resentencing.

RESENTENCING/SCOPE: Unless the appellate court restricts issues at the resentencing hearing, resentencing is de novo.

State v. Vasquez, ___ Wn.2d ___ (No. 102045-7) (Dec. 19, 2024)
In 2021, following *State v. Blake*, Anthony Vasquez sought resentencing in a 2013 murder case. The State conceded Vasquez was entitled to resentencing but disagreed with Vasquez about the extent of the resentencing hearing. At the resentencing hearing, the trial court reduced the original sentence. The State appealed arguing that the resentencing hearing should be a limited or narrow resentencing.

Held, at resentencing, the trial court has the same discretion it has at any sentencing hearing.

Washington Court of Appeals

Family Defense: A party moving to vacate under CR 60(b) must establish prima facie evidence of a defense to termination and that their failure to timely appear and answer the petition was due to inadvertence, surprise, mistake, or excusable neglect. Parent did not make that showing.

In re Parental Rights to A.G.L., A.S.L, and L.E.L., ___ Wn.App.2d ___, No. 86090-9, Div. I, (filed on Oct. 14, 2024, published Dec. 17, 2024)

Division One filed an unpublished opinion 10/14/24, and the State filed a motion to publish. The parent who had sought appeal (E.L.) took no position. Division One granted motion to publish on 12/17/24.

The issue on appeal related to E.L.'s absence from his termination trial. E.L. was not at the termination trial, and the trial court issued a default order. E.L. later moved to vacate the default order, which the trial court denied. The Court of Appeals affirmed the denial of the motion.

E.L. was served with a summons to the termination trial a while in the Snohomish County Jail approximately 1 month before the trial date. The summons said he should appear at court for trial, the court could terminate his rights in his absence, and he had to reapply

for a public defender. A week before the trial date, E.L. was released from jail. E.L.'s court appointed dependency counsel was present at trial but reported having no information about E.L.'s whereabouts. The social worker testified, and the court signed a default order the next day. About two months later, E.L. contacted his attorney from inpatient treatment and filed a motion to vacate the default order, claiming that he lost the paperwork and had assumed was represented on the termination case by the same lawyer who represented him in the dependency.

Division One reviewed the motion to vacate under CR 60 (b) by examining whether equitable interests of justice were being served. Applying the 4 factors enunciated in *White v. Holm*, the court found the party moving to vacate must establish prima facie evidence of a defense to termination and that their failure to timely appear and answer the petition was due to inadvertence, surprise, mistake, or excusable neglect. The trial court did not abuse its discretion in denying E.L.'s CR 60 motion to vacate because he failed to establish a prima facie defense to termination or to present sufficient evidence of excusable neglect for failing to timely appear and file an answer to the petition.

Exceptional Sentence Up/Major VUCSA: if the State charges each crime individually rather than aggregating them, it cannot apply the VUCSA multiple transactions aggravator to those charges.

State v. Haas, ___ Wn.App.2d ___, No. 39752-1, Div. III (Dec. 26, 2024)
Defendant Haas was charged with 8 counts of selling or delivering controlled substances. The State added the sentence enhancement that the offenses were major violations of the controlled substance act under RCW 9.94A.535(3)(e)(i). The jury found Haas guilty on all eight counts and found the enhancement beyond a reasonable doubt.

The standard range for each count was 12+-20 months. However, the trial court imposed an exceptional sentence of 40 months for each conviction, using the aggravator. Although Defendant Haas did not object to the multiple transaction aggravator at sentencing, the Appellate Court ruled the objection was not waived because "illegal or erroneous sentences may be contested for the first time on appeal."

The appellate court emphasized that a trial court must have substantial and compelling reasons to justify exceptional sentences based on aggravating circumstances determined by the jury. Haas argued that the plain language of the aggravator applied only when a single offense involved at least three transactions. The State argued that "current offense" encompassed all conduct in the case and required only three transactions in total to apply the enhancement.

Using statutory analysis, the Court concluded that "current offense" refers to a single charge, and "involved" means included. HELD: Under the purposes of the Sentencing Reform Act (SRA) and the plain language of the aggravator, if the State charges each crime

individually rather than aggregating them, it cannot apply the VUCSA multiple transactions aggravator to those charges.

VEHICULAR HOMICIDE/ADMISSIBILITY OF BLOOD TEST: The requirements for the admission of blood test evidence are confined to the plain language of RCW 46.61.506(3) and WAC 448-14-020(3). The test of blood stored in an expired vial was admissible.

State v. Leer, ___ Wn.App.2d ___, No. 86863-2, Div. I (Dec. 30, 2024)
Defendant Leer was convicted of multiple vehicular homicide and vehicular assault charges after a wrong-way motor vehicle accident while he was driving under the influence. Leer's blood was drawn and tested at the time and retested two years later, due to the unavailability of the original forensic scientist.

Leer asked trial the trial court to suppress his retested blood results, arguing that they violated statutory and administrative rules and the expiration of the vials prior to the retest could have affected the accuracy of the test. The State's phlebotomist testified at trial that the expiration date applied to the vacuum seal of the vial stoppers and that the blood was not coagulated when she conducted the retest, suggesting that the preservatives were working. The phlebotomist also referenced journal articles suggesting that the expiration of a vial has minimal impact on the tested blood and that WSP Crime Lab training involved retesting stored samples for over five to ten years. Leer did not proffer any live expert testimony and instead relied on a declaration filed in a separate case by the vice president of quality management at Becton Dickinson and Company (BD), the manufacturer of the vials.

The appellate court used a statutory construction analysis to interpret RCW 46.61.506(3) and WAC 448-14-020(3). RCW 46.61.506(3) authorizes the State Toxicologist to approve methods for testing blood and breath. WAC 448-14-020(3), set forth by the State Toxicologist, includes the requirements for the blood sample container. WAC 448-14-020(3) only requires a chemically dry container with an inert leak-proof stopper and that the sample be preserved with an anticoagulant and enzyme poison in sufficient amounts. Nothing in the rules requires that storage vials comply with all manufacturer statements about use. Thus, the expiration of the vials did not require exclusion of the blood retest results.

The Court of Appeals also considered whether the State had presented prima facie evidence that the preservation chemicals and the blood sample were free from any adulteration that could cause error in the test results. It determined that the trial court had heard sufficient testimony from a qualified expert opining that the results from the

retest were scientifically valid to surpass the prima facie evidence threshold for admissibility.

Leer also averred on appeal the retest of the blood in vials that were past the expiration date was not a broadly accepted scientific procedure, rendering the admission of the evidence a violation of *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923). However, because Leer failed to request a *Frye* hearing or brief the issue specific to this case in the trial court, the matter was not properly preserved for appeal. **HELD:** The requirements for the admission of blood test evidence are confined to the plain language of RCW 46.61.506(3) and WAC 448-14-020(3). The trial court did not err in admitting the retest results.