

SUPREME COURT OF WASHINGTON

State v. Bashaw

234 P.3d 195 (Wash. 2010) · No. No. 81633-6 · Decided July 1, 2010

SUMMARY

The Washington Supreme Court held that results from a mechanical distance-measuring device are inadmissible unless the State makes a prima facie showing that the particular device functioned properly and produced accurate results. The court also held that unanimity is not required for a jury finding that the State failed to prove a sentence-enhancing circumstance, and that the erroneous unanimity instruction was not harmless. The court reversed all three sentence enhancements and remanded for further proceedings.

CASE DETAILS

COURT	Supreme Court of Washington
WRITING FOR THE COURT	Owens, J.; Charles W. Johnson, J.; Richard B. Sanders, J.; Tom Chambers, J.; Mary E. Fairhurst, J.; Debra L. Stephens, J.; Madsen, C.J.; Gerry L. Alexander, J.; James M. Johnson, J.
JURISDICTION	Washington
DECIDED	July 1, 2010
DOCKET	No. 81633-6
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Bashaw appealed the sentence enhancements imposed after her convictions for three counts of delivery of a controlled substance. The Washington Supreme Court granted review of the Court of Appeals' affirmance of the sentence.
STANDARD OF REVIEW	Jury instructions are reviewed de novo. Admission of evidence is reviewed for abuse of discretion. An evidentiary error is harmless unless, within reasonable probabilities, the error materially affected the outcome; a constitutional or instructional error is harmless only if the court can conclude beyond a reasonable doubt that the verdict would have been the same absent the error.
PRECEDENTIAL VALUE	Published precedential opinion of the Supreme Court of Washington
PARTIES	Bertha Iola Bashaw v. State of Washington

TOPICS

authentication evidence jury instructions harmless error appellate procedure

PRACTICE AREAS

criminal law criminal procedure evidence sentencing appellate procedure

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by admitting testimony about the results of a distance-measuring device without evidence that the particular device was reliable and accurate.
2. Whether the trial court correctly instructed the jury that its special finding concerning the sentence enhancements had to be unanimous.

HOLDINGS

1. Under ER 901(a), results from a mechanical distance-measuring device are inadmissible unless the proponent makes a prima facie showing that the particular device was functioning properly and produced accurate results.
2. The improper admission of the rolling-wheel measurements was harmless as to the sentence enhancements for counts II and III but was not harmless as to count I.
3. Unanimity is required to find the presence of a special finding that increases the defendant's maximum sentence, but unanimity is not required to find that the State failed to prove the special finding beyond a reasonable doubt. A nonunanimous negative special finding is final.
4. The erroneous unanimity instruction was not harmless beyond a reasonable doubt, so all three sentence enhancements had to be reversed.

KEY QUOTATIONS

“Simply put, results of a mechanical device are not relevant, and therefore are inadmissible, until the party offering the results makes a prima facie showing that the device was functioning properly and produced accurate results.” (at 199)

“A nonunanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt.” (at 201)

“Because there was no showing that the distance measuring device employed here produced accurate results and that error was not harmless as to the special verdict on count I, and because the trial court erred in instructing the jury on the unanimity requirements for special findings, we reverse all three sentence enhancements and remand the case to the trial court for further proceedings consistent with this opinion.” (at 205)

FACTUAL BACKGROUND

Bashaw was convicted of three deliveries of a controlled substance arising from sales to a police informant. The State sought sentence enhancements under RCW 69.50.435(1)(c), alleging that each transaction occurred within

1,000 feet of a school bus route stop. A detective used a borrowed rolling-wheel measuring device to measure the distances, but the State presented no evidence that the particular device had been tested, inspected, calibrated, or shown to produce accurate results. The jury found all three enhancements, and the trial court imposed a 36-month sentence after the enhancements doubled the applicable maximum sentence.

PROCEDURAL HISTORY

The trial court admitted measurements from a rolling-wheel distance device, instructed the jury that all twelve jurors had to agree on each special verdict, and imposed sentence enhancements after the jury found that each delivery occurred within 1,000 feet of a school bus route stop. The Court of Appeals affirmed. The Washington Supreme Court held that the measuring-device evidence lacked authentication and that the unanimity instruction was erroneous; the evidentiary error was harmless as to counts II and III but the instructional error was not harmless as to any enhancement.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Reverse all three sentence enhancements and remand to the trial court for further proceedings consistent with the opinion.

CASES CITED

- State v. Bennett, 161 Wash. 2d 303, 165 P.3d 1241 (2007)
- City of Auburn v. Hedlund, 165 Wash. 2d 645, 201 P.3d 315 (2009)
- State v. Magers, 164 Wash. 2d 174, 189 P.3d 126 (2008)
- State v. Powell, 126 Wash. 2d 244, 893 P.2d 615 (1995)
- State v. Payne, 117 Wash. App. 99, 69 P.3d 889 (2003)
- City of Bellevue v. Mociulski, 51 Wash. App. 855, 756 P.2d 1320 (1988)
- City of Bellevue v. Hellenthal, 144 Wash. 2d 425, 28 P.3d 744 (2001)
- City of Bellevue v. Lightfoot, 75 Wash. App. 214, 877 P.2d 247 (1994)
- City of Seattle v. Peterson, 39 Wash. App. 524, 693 P.2d 757 (1985)
- State v. Flores, 164 Wash. 2d 1, 186 P.3d 1038 (2008)
- State v. Neal, 144 Wash. 2d 600, 30 P.3d 1255 (2001)
- State v. Smith, 106 Wash. 2d 772, 725 P.2d 951 (1986)
- State v. Goldberg, 149 Wash. 2d 888, 72 P.3d 1083 (2003)
- State v. Labanowski, 117 Wash. 2d 405, 816 P.2d 26 (1991)
- State v. Wright, 165 Wash. 2d 783, 203 P.3d 1027 (2009)
- Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)
- State v. Brown, 147 Wash. 2d 330, 58 P.3d 889 (2002)

- *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)
- *State v. Eggleston*, 164 Wash. 2d 61, 187 P.3d 233 (2008), cert. denied, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008)
- *State v. Stephens*, 93 Wash. 2d 186, 607 P.2d 304 (1980)
- *State v. Gamble*, 168 Wash. 2d 161, 225 P.3d 973 (2010)
- *State v. Kirkman*, 159 Wash. 2d 918, 155 P.3d 125 (2007)