

SUMMARY STATEMENT

State v. Russell Allen Passons
Docket No. 44388

Russell Allen Passons was convicted of two counts of aggravated assault, Idaho Code §§ 18-901, 18-905, and one count of burglary, I.C. § 18-1401. He was sentenced to concurrent terms of five years determinate on the first count of aggravated assault, twenty years with ten years determinate on the second count of aggravated assault, and ten years with five years determinate for the burglary conviction. Passons filed an Idaho Criminal Rule 35(a) motion claiming his sentence was illegal, which the district court denied.

On appeal, Passons challenges the sentence enhancement on his second count of aggravated assault. The sentence enhancement statute increases the maximum potential penalty for particular crimes when the crimes are committed using a firearm or other deadly weapon. Passons points to the last sentence of I.C. § 19-2520 which states: "This section shall apply even in those cases where the use of a firearm is an element of the offense." He asserts that since the definition in the statute of "firearm" does not include a knife and the legislature did not include "deadly weapon" in the expression of intent in the last sentence, that clearly the legislature did not intend to provide for the additional penalty when use of a deadly weapon, as opposed to a firearm, is both an element of the offense and the basis for the enhanced punishment. Double jeopardy is implicated unless the legislature intended the additional punishment.

In *State v. Hernandez*, 126 Idaho 653, 818 P.2d 768 (Ct. App. 1991), this Court held that the enhancement applies whether the crime was committed with a firearm or a deadly weapon. While the legislature's intent was not specifically discussed in *Hernandez*, we cannot say that *Hernandez* is manifestly wrong. Even though the last sentence was not amended when the "deadly weapon" language was otherwise added to the statute, it is apparent that the legislature intended the enhancement to apply to the conviction under I.C. § 18-905, even where that conviction requires proof of use of a deadly weapon as an element of the crime. Therefore, the I.C. § 19-2520 enhancement is equally valid for double jeopardy purposes if a deadly weapon other than a firearm is used.