No. 90005-1

IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CASMER VOLK

Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

GREGORY L. ZEMPEL
Prosecuting Attorney for
Kittitas County, Washington

CHRIS HERION
Deputy Prosecuting Attorney for
Kittitas County, Washington

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I. Decision below

The Petitioner seeks review, and the Respondent opposes review of the Court of Appeals (Division III) unpublished 3-0 decision finding that the sentencing court did not err by failing to enter written findings of fact and conclusions of law supporting the Petitioner's exceptional sentence after a jury convicted him of Rape of a Child in the First Degree and found, by special interrogatory, that the 4-year-old boy entrusted to his care had been particularly vulnerable and incapable of resistance when he anally raped him.

II. Answer to Issue Presented for Review:

A. The Supreme Court *should not accept review* of the Court of Appeal's (Division III) unpublished 3-0 decision that the sentencing court did not err by failing to enter written findings of fact and conclusions of law supporting the Petitioner's exceptional sentence after a jury convicted him of Rape of a Child in the First Degree and found, by special interrogatory, that the 4-year-old boy, entrusted to his care had been particularly vulnerable and incapable of resistance when he anally raped him, without stating its reasons in written findings of fact and conclusions of law, *because* RCW 9.94A.535's requirement of written findings is a mere formality when the trial record satisfies the requirements under RCW 9.94A.585. Otherwise, this Honorable Court's decision In re Personal Restraint of Breedlove is not applicable.

III. Statement of the Case

On January 20, 2012, a Kittitas County jury found the Petitioner, a three-time convicted registered sex offender, guilty of Rape of a Child in the First Degree for anally raping a 4-year-old boy entrusted to his care by the boy's parents. The jury also found, by special interrogatory, that the 4-year-old boy, had been particularly vulnerable and incapable of resistance. CP 182-198. 2 RP 697.

At sentencing, the court sentenced the Petitioner as a sex offender. The sentencing court calculated the Petitioner's offender score as a "6" based upon his two

prior convictions, out of North Dakota for "Surreptitious Intrusion," finding them the equivalent of Washington's felony crime of Voyeurism. The sentencing court did not include the Petitioner's prior Washington conviction for Communication with a Minor for Immoral Purposes since it was not a felony, even though it constitutes a sex offense. CP 182-198.

With an offender score of "6," the sentencing court calculated the Petitioner's sentencing range as 162-216 months. The court noted in the Judgment and Sentence that during the commission of the crime the Petitioner "knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance in the commission of the offense." CP 182-198.

The sentencing court noted that it was imposing an exceptional sentence of 10 years above the standard range to a maximum sentence of life, which is the statutory maximum offense for Rape of a Child in the First Degree. The court based the exceptional sentence upon the aggravating factor found by the jury in the special interrogatory, attached to the Judgment and Sentence.

The sentencing court had the benefit of a Pre-Sentence Investigation, prepared by the Department of Corrections, recommending a sentence of 400 months based upon the Petitioner's prior criminal convictions for sex offenses and the particular vulnerability of the victim in the current case. CP 141-153. The court heard from the State of Washington and the 4-year-old victim's parents. The State of Washington recommended a sentence of 50 years to life. 2 RP 736-739.

On the record, the sentencing court told the Petitioner that he found the 4-year-old boy competent and commended his "bravery" in testifying. He told the Petitioner that

his criminal history counted against him. However, he underlined that he was sentencing the Petitioner to "the minimum sentence . . . at the top of the range which is 218 plus 120 which is 336 and the maximum is life in prison . . . because of the particular vulnerability of the child." 2 RP 736-739.

Petitioner's counsel then clarified the court's sentence:

"Sure. Basically the court (has) ordered the maximum under the mandatory minimum plus ten year(s) added on for aggravating factors?"

"Yes," replied the court. 2 RP 736-739.

In imposing the exceptional sentence, the court did not reduce its reasons to findings of fact and conclusions of law.

On appeal to Division III, the Petitioner raised six issues to include the lack of written findings.

In addressing this one issue, the Court of Appeals held, in an unpublished 3-0 decision, that the sentencing court did not err by failing to enter written findings of fact and conclusions of law, supporting the Petitioner's exceptional sentence, because the trial court record supports the sentencing court's exceptional sentence when reviewed under RCW 9.94A.585 (4) and applicable case law.

This Petition for Review followed.

IV. Argument

A. The Supreme Court *should not accept review* of the Court of Appeal's (Division III) unpublished 3-0 decision that the sentencing court did not err by failing to enter written findings of fact and conclusions of law supporting the Petitioner's exceptional sentence after a jury convicted him of Rape of a Child in the First Degree and found, by special interrogatory, that the 4-year-old boy, entrusted to his care had been particularly vulnerable and incapable of resistance when he anally raped him, without stating its reasons in written findings of fact and conclusions of law, *because* RCW 9.94A.535's requirement of written findings is a mere formality when the trial record satisfies the requirements under RCW 9.94A.585. Otherwise, this Honorable Court's decision In re Personal Restraint of Breedlove is not applicable.

The Respondent principally relies upon its Brief of Respondent. However, the Respondent will briefly address the one issue raised by the Petitioner following the Court of Appeal's decision.

In imposing an exceptional sentence, RCW 9.94A.535 requires a sentencing court to state its reasons in written findings of fact and conclusions of law.

However, RCW 9.94A.585 (4) provides, in relevant part, that:

> To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

In addition, subsection (5) provides:

> A review, under this section, shall be made solely upon the record that was before the sentencing court.

Clearly, RCW 9.94A.585 (4) governs the standard by which the reviewing court decides whether "the record" supports imposition of an exceptional sentence.

The Petitioner requests that this court accept his Petition for Review because he believes this court's ruling in In re Personal Restraint of Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999) (in which this court ruled that a sentencing court has a statutory duty to make written findings of fact and conclusions of law, when imposing an exceptional sentence) is in conflict with the Court of Appeals decision not to require written findings of fact and conclusions of law when the record is sufficiently comprehensive and clear for the reviewing court to discern the sentencing court's reasons for imposing an exceptional sentence, citing State v. Bluehorse, 159 Wn.App. 410, 423 248 P.3d 537 (2011).

However, Breedlove is distinguishable from this case. Breedlove focused on the narrow issue of whether the sentencing court could sentence the defendant to an exceptional sentence *based upon the defendant's stipulation to the sentence* as part of a plea agreement, under RCW 9.94A.390(1) which, in 1999, did not provide a stipulation as being one of the list of nonexclusive and illustrative mitigating and aggravating factors that may be relied on to justify an exceptional sentence.

RCW 9.94A.390 (1) has since been superseded by RCW 9.94A.535 (2) (a) which provides for agreement based upon the defendant's stipulation.

Regardless, this case involves the sentencing court imposing an exceptional sentence after the jury found an aggravating circumstance by special interrogatory – an entirely different set of procedural facts than in Breedlove.

Second, as the Court of Appeal's noted: "after Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004), and Laws of 2005, ch.68, 4 (codified as RCW 9.94A.537), a sentencing court's sole reason for imposing an exceptional sentence must be that the jury found an aggravating circumstance by special interrogatory. See State v. Stubbs, 170 Wn.2d 117, 123 & n.5, 240 P.3d 143 (2010); State v. Suleiman, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006).

That was exactly the basis on which the trial court imposed the exceptional sentence, attaching the jury's affirmative answer to the special interrogatory.

In citing Bluehorse, the Court of Appeals (Division III) simply pointed out that, as in this case, the sentencing court imposed an exceptional sentence, without making written findings, yet Division II found that "in the CrR 3.5 context, 'where the trial court's oral opinion and the hearing record are sufficiently comprehensive and clear that written facts would be a mere formality,' the trial court's failure to enter mandatory written findings and conclusions is harmless," citing State v. Hickman, 157 Wn.App. 767, (2010).

Therefore, in the absence of written findings of fact and conclusions of law, the sole question is whether the where the trial court's oral opinion and

the hearing record are sufficiently comprehensive and clear that written facts would be a mere formality?

RCW 9.94A.585 (4) sets the standard for review.

In this case, the sentencing court noted in the Judgment and Sentence that during the commission of the crime the Petitioner "knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance in the commission of the offense."

The sentencing court calculated the Petitioner's offender score as a "6" based upon his two prior convictions, out of North Dakota for "Surreptitious Intrusion," finding them the equivalent of Washington's felony crime of Voyeurism. The sentencing court did not include the Petitioner's prior Washington conviction for Communication with a Minor for Immoral Purposes (a sex offense) since it was not a felony.

With an offender score of "6," the sentencing court calculated the Petitioner's sentencing range as 162-216 months. He noted in the Judgment and Sentence that during the commission of the crime the Petitioner "knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance in the commission of the offense."

The sentencing court noted that it was imposing an exceptional sentence of 10 years above the standard range to a maximum sentence of life, which is the statutory maximum offense for Rape of a Child in the First Degree. The court based the exceptional sentence upon the aggravating factor found by the jury in the special interrogatory and attached it to the Judgment and Sentence

The sentencing court had the benefit of a Pre-Sentence Investigation, prepared by the Department of Corrections, recommending a sentence of 400 months based upon the Petitioner's prior criminal convictions for sex offenses and the particular vulnerability of the victim in the current case. The court heard from the State of Washington and the 4-year-old boy's parents. The State of Washington recommended a sentence of 50 years to life.

On the record, the sentencing court told the Petitioner that he found the 4-year-old boy competent and commended his "bravery" in testifying. He told the Petitioner that his criminal history counted against him. However, he underlined that he was sentencing the Petitioner to "the minimum sentence . . . at the top of the range which is 218 plus 120 which is 336 and the maximum is life in prison . . . because of the particular vulnerability of the child."

Petitioner's defense attorney then clarified the court's sentence:

"Sure. Basically the court (has) ordered the maximum under the mandatory minimum plus ten year(s) added on for aggravating factors?"

"Yes," replied the court.

The record was clear. The court's reasons justified the sentence of the Petitioner who had been found guilty of anally raping a 4-year-old boy left in his care, while being a registered sex offense for prior sex offenses.

Any sentence could be argued to be excessive. But the Court of Appeals correctly found that the trial court record supported the sentence. If there is error, in the absence of written findings of fact and conclusions of law, it is harmless error.

V. Conclusion

Based upon the foregoing legal analysis, the Respondent respectfully requests that the Petition for Review be denied because the Court of Appeal's (Division III) correctly affirmed the sentencing court's exceptional sentence based upon jury's verdict and finding of the aggravating circumstance and the trial court record provides the reasons of the sentencing judge – short of them being reduced to writing.

Respectfully submitted this 21st day of April 2014,

Chris Herion
WSBA #30417
Deputy Prosecuting Attorney

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 22, 2014 8:14 AM
To: 'Chris Herion'
Cc: 'Marie Trombley'
Subject: RE: State v. Casmer Volk (Supreme Court No. 90005-1) Response

Rec'd 4-22-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----
From: Chris Herion [mailto:Chris.Herion@co.kittitas.wa.us]
Sent: Monday, April 21, 2014 9:07 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Marie Trombley'
Subject: State v. Casmer Volk (Supreme Court No. 90005-1) Response

Mr. Carpenter,

Good evening.

Per your letter dated March 21, 2014, please find the State of Washington's attached signed response opposing Mr. Volk's Petition for Review.

By this email, I am also serving Petitioner's Counsel Marie Trombley.

Please advise if there are any issues.

Thank you,

/s/

Chris Herion
Kittitas County Deputy Prosecutor

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