92243-8

IN THE SUPREME COURT

STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

vs.

MARCUS T. ALMANZOR,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 46248-6-II
Appeal from the Superior Court for Lewis County
The Honorable James Lawler, Judge
Cause No. 13-1-00476-8

THOMAS E. DOYLE, WSBA NO. 10634
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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is MARCUS T. ALMANZOR, the Defendant and Appellant in this case.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the Ruling Granting Motion on the Merits of the Commissioner of the Court of Appeals, Division II, cause number 46248-6-II, filed June 12, 2015. A timely Motion to Modify Ruling Affirming Convictions was filed thereafter and denied August 14.

A copy of the Ruling Granting Motion on the Merits to Affirm is attached hereto in the Appendix at A1 through A4. A copy of the Order Denying Motion to Modify is in the Appendix at A5.

C. ISSUE PRESENTED FOR REVIEW

> Whether the trial court erred in imposing an exceptional sentence where the State's failure to provide proper notice regarding the aggravating factor prior to trial violated Almanzor's statutory and due process right to notice?

D. STATEMENT OF THE CASE

On October 15, 2014, Almanzor filed a Brief alleging that the trial court erred in imposing an exceptional sentence where the State failed to give him notice of such intention, and that his counsel was ineffective for failing to object. On June 12, a Commissioner ruled that "the error Almanzor alleges affects the constitutional right to notice and is

'manifest' within the meaning of RAP 2.5(a)(3)." [Ruling 3]. The Commissioner, while also acknowledging that the record shows that the State did not provide notice of its intent to seek an exceptional sentence based on the free crimes aggravator until sentencing [Ruling 2], relied on State v. Edvalds, 157 Wn. App. 517, 237 P.3d 368 (2010) petition denied, 171 Wn.2d 1021 (2011), to further rule that "the State was not required to provide Almanzor notice of the free crimes aggravator." [Ruling 4]. Almanzor's motion to modify this ruling was denied the following August 14. The reliance on Edvalds for the position that the State was not required to to give Almanzor notice of the free crime aggravator is misplaced.

E. ARGUMENT

It is submitted that the issue raised by this Petition should be addressed by this Court because the decision of the Court of Appeals is in conflict with Supreme Court and Court of Appeals decisions, and raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b)(1), (2), (3) and (4).

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THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE WHERE THE STATE'S FAILURE TO PROVIDE PROPER NOTICE REGARDING THE AGGRAVATING FACTOR PRIOR TO TRIAL VIOLATED ALMANZOR'S STATUTORY AND DUE PROCESS RIGHT TO NOTICE.

"'In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'" State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). The Commissioner ruled that "the error Almanzor alleges affects the constitutional right to notice and is 'manifest' within the meaning of RAP 2.5(a)(3)." [Ruling 3].

RCW 9.94A.537(1) provides:

> At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

While the above requires the State to provide notice of its intent to prove aggravating circumstances, it does not specify the manner in which such notice is to be given. State v. Siers, 174 Wn.2d 269, 277, 274 P.3d 358 (2012).

Concomitantly, under article 1, § 22 of the Washington Constitution, "the accused shall have the right ... to demand the nature and cause of the accusation against him." Similarly, the Sixth Amendment of the United States Constitution demands that "[i]n all criminal prosecutions, the accused shall ... be informed of the nature of the cause of the accusation." These constitutional provisions provide the same protections, State v. Hooper, 118 Wn.2d 151, 156, 822 P.2d 775 (1992), and this court reviews constitutional challenges de novo. In re Detention of Salvala, 147 Wn. App. 798, 803, 199 P.3d 413 (2008).

Here, as acknowledged by the Commissioner [Ruling 2], the record shows that the State did not provide notice of its intent to seek an exceptional sentence based on the free crimes aggravator until sentencing, when the prosecutor argued:

> Given Mr. Almanzor's exceptionally high offender score, he's looking at a standard range on the burglary two of 58 to 68 months, on the residential burglary 63 to 84, trafficking in stolen property first degree 63 to 84, and unlawful possession of a firearm in the in the second degree 51 to 60. With that range and his offender score, correspondingly of 27, 27, 20 and 20, State feels that a lot of these crimes would not be appropriately punished and pursuant to RCW 9.94A.535(2)(c) the State's asking that the sentence be on the high end of each to run consecutively.
> ....

All four to run consecutive.[1]

[RP 05/15/14 2-3].

Prior to Siers, Division I rejected a similar challenge in State v. Edvalds, supra, holding that notice is not required when the State alleges aggravating factors based on prior criminal history, 157 Wn. App. at 531, and that additional process is not required in this context because RCW 9.94A.535(2)(c) itself provides sufficient notice. Id. at 534. Though the court's central rational was based on the statutory scheme of RCW 9.94A.535 and .537, it further held, given the convictions justifying the exceptional sentence arose after trial but before sentencing, that it would be unfair to prohibit the State from seeking an exceptional sentence and "contrary to the intent of the legislature, which intended to give judges the discretion to impose an exceptional sentence where certain crimes would otherwise go unpunished." (citations omitted). State v. Edvalds, 157 Wn. App. at 535.

Contrary to the Commissioner's ruling, it is difficult to juxtapose Edvalds with Siers, wherein this court adopted the lead opinion's decision in Powell (plurality opinion), that "'notice of aggravating circumstances is required as a matter of due process. Due process is satisfied when the

[1] The court imposed an exceptional sentence of 144 months, with counts I-III served concurrently to one another but consecutive to count IV. [CP 74].

defendant receives sufficient notice from the State to prepare a defense against the aggravating circumstances that the State will seek to prove in order to support an exceptional sentence.'" State v. Siers, 174 Wn.2d at 278 (quoting State v. Powell, 167 Wn.2d 672, 682, 223 P.3d 492 (2009), overruled on other grounds by Siers, 174 Wn.2d at 282)). And such is applicable, or should be, whether the aggravating factor is to be found by the jury or, as in this case, solely on the defendant's criminal history. Division I found no such distinction in Edvalds, holding that since the calculation of the defendant's criminal history is automatic, "[a]voiding conviction on the immediate charges is the only trial strategy to avoid the application of the automatic calculation of the free crimes aggravating factor." State v. Edvalds, 157 Wn. App. at 535.

Division II's reliance on Edvalds for the position that the State was not required to give Almanzor notice of the free crime aggravator is misplaced [Ruling 4], given that Division I's reasoning in Edvalds limits the discussion, and hence the scope of the right to notice of potential aggravating factors, to the singular purpose of preparing to avoid conviction of the pending charges, and in the process ignores other vital considerations, such as a defendant's right to make an informed decision on whether to go to trial or, when offered, to accept a plea bargain. Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S. Ct. 316, 92 L. Ed. 2d 309

(1948); In re Personal Restraint of McCready, 100 Wn. App. 259, 263-64, 996 P.2d 658 (2000). The record in this case gives no indication that Almanzor was even aware that his sentence could be increased–here by 5 years [CP 74]–due to an aggravating factor first argued at the time of sentencing. That Almanzor was uninformed is not up for question, and his right to notice was violated by the imposition of the exceptional sentence, with the result that he is entitled to be resentenced within his standard range.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and remand for resentencing consistent with the arguments presented herein.

DATED this 11th day of September 2015.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Petitioner
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above petition on this date as follows:

Sara L. Beigh
appeals@lewiscountywa.gov

Marcus T. Almanzor #811590
WCC
P.O. Box 900
Shelton, WA 98584

DATED this 9th day of September 2015.

Thomas E. Doyle

THOMAS E. DOYLE
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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON,

Respondent,

v.

MARCUS ALMANZOR,

Appellant.

No. 46248-6-II

RULING GRANTING MOTION ON THE MERITS TO AFFIRM

Marcus Almanzor appeals his sentences for second degree burglary, residential burglary, first degree trafficking in stolen property, and second degree unlawful possession of a firearm, arguing that the State failed to give him notice that it planned to request an exceptional sentence. Pursuant to RAP 18.14(a)[1] and RAP 18.14(e)(1),[2] this court affirms.

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[1] RAP 18.14(a) provides, in relevant part:
> The appellate court may, on its own motion or on motion of a party, affirm or reverse a decision or any part thereof on the merits in accordance with the procedures defined in this rule.

[2] RAP 18.14(e)(1) provides:
> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

FACTS

A jury found Almanzor guilty of second degree burglary, residential burglary, first degree trafficking in stolen property, and second degree unlawful possession of a firearm. At sentencing, the State asked the trial court to impose an exceptional sentence pursuant to RCW 9.94A.535(2)(c) (the "free crimes aggravator"), to find that his high offender scores left a number of crimes unpunished. The trial court sentenced Almanzor to the high end of the standard range and ran the sentence for second degree unlawful possession consecutive to the other sentences.

ANALYSIS

Almanzor argues that the State failed to give him notice that it was going to seek a free crimes aggravator. He acknowledges that *State v. Edvalds*, 157 Wn. App. 517, 532, 237 P.3d 368 (2010), held that pretrial notice of the free crimes aggravator is not required. He, however, asserts that *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012), now requires notice.

RAP 2.5(a)

The State first argues that Almanzor cannot raise this issue for the first time on appeal. RAP 2.5(a). Assuming, however, that *Siers* now requires that he receive notice, the *Siers* decision clearly articulated pretrial notice as a constitutional requirement. 174 Wn.2d at 277-83. The record here contains no evidence that the State gave Almanzor notice of its intent to seek an exceptional sentence based on the free crimes aggravator. Additionally, the record contains no evidence that Almanzor waived his right to receive such notice. This court may not presume waiver of constitutional rights from a silent record. *See State v. Rinier*, 93 Wn.2d 309, 315, 609 P.2d 1358 (1980); *State v. Williams*,

87 Wn.2d 916, 921, 557 P.2d 1311 (1976), *superseded by rule on other grounds as noted by State v. George*, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007); *State v. McFarland*, 84 Wn.2d 391, 401, 526 P.2d 361 (1974) (Stafford, J. dissenting).

And, assuming that Almanzor is correct that *Siers* applies, this record makes the alleged error sufficiently obvious to warrant appellate review since it establishes that, "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2010). Because the error Almanzor alleges affects the constitutional right to notice and is "manifest" within the meaning of RAP 2.5(a)(3), this court turns to the merits of the claim.

Notice of Aggravator

The State next argues that *Siers* did not implicitly overrule *Edvalds*. This court agrees. First, *Siers* concerned an aggravator that post-*Blakely*,[3] needed to go to the jury. *Siers* recognized, "to allow the defendant to 'mount an adequate defense' against an aggravating circumstance listed in RCW 9.94A.535(3), the defendant must receive notice prior to the proceeding in which the State seeks to prove those circumstances *to a jury*." 174 Wn.2d at 277 (emphasis added) (quoting *State v. Schaffer*, 120 Wn.2d 616, 620, 845 P.2d 281 (1993)). In contrast, *Edvalds* concluded although "[n]otice is clearly required as to factors that go to the jury," 157 Wn. App. at 532, no notice was required for a free crimes aggravator:

> The fact of free crimes is known to the defendant. The fact of the statute providing for an exceptional sentence is known to the defendant. The trial court has authority under the statute to impose the exceptional sentence whether or not requested by the prosecutor, if the necessary factors are

[3] *See Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000),

> present. The calculation is automatic. Avoiding conviction on the immediate charges is the only trial strategy to avoid the application of the automatic calculation of the free crimes aggravating factor.

Edvalds, 157 Wn. App. at 535.

Second, at the time our Supreme Court decided *Edvalds*, *State v. Powell*, which required that the State set out an aggravator in the information, was good law. 167 Wn.2d 672, 223 P.3d 493 (2009) (plurality opinion), *overruled by Siers*, 174 Wn.2d at 277-83. Despite this, *Edvalds* nevertheless held that the State was not required to give any notice of a free crimes aggravator. *Siers* did not impose a new notice requirement post-*Edvalds*. It, in fact, relaxed the existing notice requirement for jury aggravators, holding that the State no longer needed to include them in charging documents.

In sum, because *Edvalds* clearly sets out that the State was not required to provide Almanzor notice of the free crimes aggravator, the trial court did not err in imposing this aggravator. For the same reason, trial counsel was not ineffective for failing to argue for a notice requirement.[4] Accordingly, the court grants the motion on the merits to affirm. RAP 18.14. Accordingly, it is hereby

ORDERED that this court's motion on the merits to affirm is granted.

DATED this 12th day of June, 2015.

Aurora R. Bearse
Court Commissioner

cc: Thomas E. Doyle
Sara I. Beigh
Hon. James Lawler
Marcus Almanzor

[4] Almanzor presents this argument in the event this court determines that he could not raise the notice issue for the first time on appeal.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARCUS ALMANZOR,

Appellant.

No. 46248-6-II

ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated June 12, 2015, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 14th day of August, 2015.

PANEL: Jj. Johanson, Worswick, Maxa

FOR THE COURT:

Johanson, C.J.

CHIEF JUDGE

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