NO. 69311-5-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

MICHAEL J. ROWLAND,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Where the Supreme Court has already decided in this case "that Blakely[1] did not apply when the trial court neither touched the factual findings supporting the exceptional sentence nor increased the sentence," is this Court bound by that ruling?

2. The facts supporting the exceptional sentence and the exceptional sentence were final in 1995 and have not been challenged since. While the appellant's offender score and standard range were twice corrected on review, his exceptional sentence itself was undisturbed. Under these circumstances, did RCW 9.94A.537, enacted in 2005, or the 2007 amendment of RCW 9.94A.537 require the trial court to empanel a jury in 2012 to re-find the facts supporting the exceptional sentence, or to "reimpose" the exceptional sentence?

II. STATEMENT OF THE CASE

Between November 17 and November 24, 1988, the appellant and an accomplice murdered Kenneth Eklund and took his truck. On January 31, 1991, a jury convicted the appellant of first degree murder and taking a motor vehicle without permission. On March 20, 1991, the trial court sentenced the appellant to an

exceptional sentence consisting of the top of the standard range based on fnding an offender score of 3 — 361 months — plus 15 years for deliberate cruelty. The trial court found:

> The defendants exhibited deliberate cruelty by inflicting 16 stab wounds following an ax blow to the head; by telling the victim during the course of the murder: "You're dying, dude"; by stuffing a hat into the victims mouth as he tried to crawl away from his home to stifle any further cries or pleas while inflicting the last of the stab wounds.

State v. Rowland, No. 28109-7-I, slip op. at 10, review denied, 126 Wn.2d 1025 (1995) (Rowland I). The judgment and sentence were affirmed on appeal. Id., slip op. at 22. The mandate was issued on June 26, 1995.

On April 6, 2009, this Court granted the appellant's personal restraint petition, finding that his offender score should have been 2 instead of 3. This Court made it clear that only the offender score and the standard range part of the sentence were affected. "The justification for the exceptional sentence was affirmed on direct appeal. Rowland's petition does not challenge it[.]" This Court remanded the case for resentencing on the scoring issue alone. In re Pers. Restraint of Rowland, 149 Wn. App. 496, 512, 204 P.3d

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[1] Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

953 (2009) (Rowland II).

Before the 2009 resentencing hearing, the appellant submitted a Sentencing Memorandum. In it he argued that "This court cannot now impose an exceptional sentence, nor can the court empanel a jury to rule on the exceptional sentence." 1 CP 53.

The basis for the argument against an exceptional sentence was that Blakely required that facts supporting an exceptional sentence must now be found by a jury, and the fact-finding here had been done by the court. 1 CP 55.

The basis for arguing that no jury could be empanelled was that the State did not provide notice before trial that it would seek an exceptional sentence as required by RCW 9.94A.537(1). The appellant did not argue that a jury had to be empanelled if the State intended to seek an exceptional sentence. 1 CP 56-58. In fact, he argued that empanelling a jury would violate the separation of powers and would be ex post facto. 1 CP 58-64.

The appellant also filed a Supplemental Sentencing Memorandum arguing that his offender score should be 1, not 2. 1 CP 38-39.

On September 16, 2009, the trail court, finding Blakely did not apply, resentenced the appellant on the amended standard

range. The court calculated the standard range sentence based on offender score of 2. It sentenced the defendant to the top of the new standard range, 347 months, and left unchanged the previously-imposed 180 months (15 years) for the aggravator of deliberate cruely. State v. Rowland, 160 Wn. App. 316, 321-22, 249 P.3d 635 (2011) (Rowland III), affirmed, 174 Wn.2d 150, 153, 272 P.3d 242 (2012) (Rowland IV).

The sentencing court specifically found that if, on appeal, the appellant's offender score was reduced to 1, it would still impose the same sentence if the case were again remanded for resentencing. State v. Rowland, 160 Wn. App. at 333, (Rowland III), affirmed, 174 Wn.2d at 156 (Rowland IV).

This Court reviewed the 2009 sentence on a new direct appeal. It held that Blakely did not apply, but that the proper offender score was 1. This Court also held that since the 2009 resentencing court "did not exercise independent judgment or discretion when it ordered the exceptional sentence[,]" there was no issue concerning the exceptional sentence to review. Rowland III, 160 Wn. App. at 329. This Court then reversed the sentence and remanded, once again, for correction of the offender score and standard range only. This Court found that since the court would

re-impose the same sentence on remand, despite the lower offender score, a full resentencing was unnecessary. Rowland III, 160 Wn. App. at 332-34.

> When a sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand for resentencing is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway. We conclude that the record here demonstrates a clear basis for concluding that if Rowland's offender score had been correctly calculated and the standard range correctly determined, the resentencing court would have imposed the same exceptional sentence of 527 months [347 months plus the unchanged 180 months]. *Therefore, remand solely to correct the offender score and standard range is the proper remedy, not remand for resentencing.*

Rowland III, 160 Wn. App. at 332 (emphasis supplied; internal citation omitted).

The Supreme Court reviewed Rowland III and agreed:

> In essence, no new exceptional sentence was imposed since *only the standard range was corrected.* . . . [W]e hold Blakely did not apply at Rowland's resentencing.

Rowland IV, 174 Wn.2d at 155 (emphasis added).

The Supreme Court did note that this Court had "recognized [imposing the same sentence with a lower offender score] would require increasing Rowland's exceptional sentence from 180

months to 194 months." Rowland IV, 174 Wn.2d at 155 n. 1. It then added:

> We need not decide whether Blakely would apply on remand should the trial court increase Rowland's exceptional sentence; we hold only that Blakely did not apply when the trial court neither touched the factual findings supporting the exceptional sentence nor increased the sentence.

Rowland IV, 174 Wn.2d at 156.

On September 7, 2012, the trial court again had appellant before it to correct his sentence. The State filed a sentencing memorandum. It recommended that the trial not follow the advisory oral ruling of Judge Knight[2] of reimposing the same sentence. The State recommended instead that the trial court impose the high end of the new, correct standard range of "1" — 333 months — and once again leave unchanged the previously-imposed 180 months (15 years) for the exceptional sentence. 1 CP 15. The appellant did not submit a sentence memorandum.

At the hearing, the appellant did not argue that a jury had to be empanelled for the court to reimpose the exceptional sentence. In fact the appellant said:

> I would also acknowledge that the Supreme Court does seem to give this court the authority to impose

[2] Between 2009 and 2012, the Hon. Gerald L. Knight passed away. The 2012 hearing was before the Hon. Richard T. Okrent.

> the sentence the State requests and I don't dispute that that's what that Supreme Court opinion says.

9/7/12 RP 17.

> The court ruled:
>
> Judge Knight [see n.2] made a reasoned and understanding decision, and I'm not going to disturb it at all.
>
> The two counts, Count 1, I will follow the State's recommendation which will be 333 months, plus the 180 months, for a total of 513 months.

9/7/12 RP 18.

The court adopted the factual findings supporting the exceptional sentence from 1991. 1 CP 9.

III. ARGUMENT

The primary issue here is the same as the issue presented to this Court in Rowland III and the Supreme Court in Rowland IV: Whether Blakely applied to the resentencing, and thus required facts supporting the reimposition of the exceptional sentence that was final in 1995 be proved to a jury beyond a reasonable doubt in 2012. The result should be the same: Blakely does not apply.

A. STANDARD OF REVIEW.

"We are bound by the decisions of our state Supreme Court and err when we fail to follow them." MP Med. Inc. v. Wegman, 151 Wn. App. 409, 417, 213 P.3d 931 (2009).

"Statutory interpretation is a legal question, which we also review de novo on appeal." State v. Siers, 174 Wn.2d 269, 274, 274 P.3d 358 (2012).

B. THE SUPREME COURT'S RULING ON THE BLAKELY ISSUE IS BINDING ON THIS COURT.

The appellant's first argument is that his constitutional jury trial right was violated by the reimposition of the exceptional sentence without a jury finding of facts to support that sentence. Brief of Appellant 7, 14. The appellant is wrong.

The constitutional right to have a jury determine whether facts existed to support an exceptional sentence was first recognized in Blakely. *It does not apply to exceptional sentences that were final before Blakely was decided.* State v. Evans, 154 Wn.2d 438, 448, 114 P.3d 627 (2005).

The Supreme Court has already determined that the appellant had no constitutional right to have a jury finding on his exceptional sentence.

> Blakely prohibits judicial fact finding in cases final after Blakely, which did not occur here. Based on the actions of the resentencing court, we hold Blakely did not apply at Rowland's resentencing.

Rowland IV, 174 Wn.2d at 155 (addressing the 2009 sentence).

The actions of the 2012 hearing court here did not differ from actions of the 2009 resentencing court in any legally significant way. The 2009 court did not review the factual determination that the murder was committed with deliberate cruelty. The 2012 court also did not review the factual determination that the murder was committed with deliberate cruelty. The 2009 court left imposed exactly the same exceptional sentence. And the 2012 court left imposed exactly the same exceptional sentence. While the offender score and standard range portions of the judgment and sentence were twice corrected on remand, the exceptional sentence portion was left undisturbed.

As the Supreme Court held, the appellant had no constitutional right to a jury fact-finding on the 1991 exceptional sentence.

C. RCW 9.94A.537 DID NOT REQUIRE A JURY BEFORE THE TRIAL COURT HEARINGS IN THIS CASE.

Appellant's second argument is that RCW 9.94A.537(2) and (3) required the hearing court to empanel a jury before it could impose an exceptional sentence. Brief of Appellant 10-11. The appellant fails to acknowledge that the exceptional sentence was

imposed in 1991, not 2009 or 2012. It became final when the mandate was issued by this Court on June 26, 1995.

Both this Court and the Supreme Court made it clear that in Rowland II, only the offender score and the standard range portion of the sentence were reversed. The exceptional sentence was neither challenged nor reversed. It was final when the mandate issued, since it had been upheld on direct appeal. Rowland III, 160 Wn. App. at 326, Rowland IV, 174 Wn.2d at 155.

When this Court reversed the offender score and the standard range portion of the sentence for the second time in Rowland III, it once again affirmed the exceptional sentence. Rowland III, 160 Wn. App. at 334. The Supreme Court in turn affirmed this Court's decision. Rowland IV, 174 Wn.2d at 156. The 2012 hearing court did not impose the exceptional sentence. That was imposed in 1991. It did not change in the ensuing 20 years. *It was never reversed.* Meanwhile, RCW 9.94A.537 was enacted in 2005. Laws of 2005, Ch. 68, Sec. 4. Subsection (2) of RCW 9.94A.537 was added in 2007, Laws of 2007, Ch. 205, Sec. 2. RCW 9.94A.537 did not require trial courts in 2009 or 2012 to empanel a jury on a undisturbed 1991 finding. Rowland III, 160 Wn. App. at 326, Rowland IV, 174 Wn.2d at 155.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on June 13, 2013.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Respondent, v. MICHAEL J. ROWLAND, Appellant.	No. 69311-5-I AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 13th day of June, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 13th day of June, 2013.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit