

No. 43207-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

LARRY HAYES,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **The exceptional sentence was improperly based on accomplice liability and unproven allegations of unrelated thefts**

a. The prosecution provides no authority for imposing an exceptional sentence for a single theft based on accomplice liability

It is axiomatic that the court lacks any authority to impose a sentence greater than the standard range without both statutory authority and the jury's express finding authorizing the enhanced penalty. See Appellant's Opening Brief, at 7-9.

The statute permitting a court to impose an exceptional sentence based on aggravating factors contains no blanket authority to premise such a sentence on accomplice liability, which the State rightly concedes. RCW 9.94A.535.

The State further concedes, as it must, that several cases explicitly reject the premise that liability as an accomplice permits an exceptional sentence. See State v. Pineda-Pineda, 154 Wn.App. 653, 661, 226 P.3d 164 (2010) (holding that the accomplice liability statute, RCW 9A.08.020, "does not contain a triggering device for penalty enhancement"); see also State v. McKim, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982) (rejecting accomplice liability on substantive offense as

predicate for sentence enhancement). When a statute does not contain the necessary “triggering device” needed to incorporate accomplice liability, the court may not impose enhanced punishment when the jury’s verdict rests on accomplice liability. Pineda-Pineda, 154 Wn.App. at 661.

Also, the doctrine of lenity applies when construing the governing statute. A criminal statute must be construed both “strictly and literally.” State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003). It must also be construed in the defendant’s favor when ambiguous. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005). The major economic offense aggravating factor does not unambiguously permit enhanced punishment for an accomplice.

The prosecution focuses its argument here, urging this Court to construe RCW 9.94A.535 as not clearly exempting accomplice liability from the specific definition of major economic offense, and then claiming that the ambiguity should be viewed broadly and in its favor. But this gymnastics is misplaced. There are statutes where the legislature has clearly extended accomplice liability to the sentencing enhancement, such as the firearm enhancement in RCW 9.94A.533. The legislature knows how to trigger accomplice liability for an

enhancement but did not do so for the aggravating factor at issue here or for exceptional sentences generally. See Delgado, 148 Wn.2d at 727-28. There is no clear expression of legislative intent or statutory language plainly required to provide the court with authority to impose an exceptional sentence for an accomplice. And, as Hayes detailed in his Opening Brief, at 12-13, the instructions, evidence, and argument pressed the jury to convict Hayes as an accomplice.

The aggravating factor of major economic offense may not serve as a basis for an exceptional sentence absent a clear jury finding that the accused person was the principal and not the accomplice. The jury's findings reference "the crime" -- not Mr. Hayes or "the defendant." CP 146-195 (Instruction 45). There was no authority to impose an exceptional sentence based on the jury's finding in this case.

b. The prosecution used unproven allegations to request an exceptional sentence.

The prosecution disavows any responsibility for the claims it made at sentencing as the basis for urging the court to impose an exceptional sentence. It takes advantage of the fact that the attorney who represented Mr. Hayes at the resentencing hearing after remand from this Court was entirely uninvolved in his earlier trial and therefore

had no idea what was or was not proven at that trial. However, the Legislature does not authorize the prosecution to seek an exceptional sentence based on its own factual claims that were not proven at sentencing and the prosecution disregards this obligation. RCW 9.94A.530.

When a case returns to the trial court after this Court has stricken the conviction for which the exceptional sentence was previously imposed, the prosecution is not just back in the same position it was before. It has even more reason to be mindful that it is may not seek sentence on offenses that are not currently before the sentencing court. The prosecution disregarded these responsibilities by arguing that the judge should impose an exceptional sentence based on allegations that were not charged or proven to the jury, such as the claim that Mr. Hayes had 800 receipts with credit card information. 3/16/12RP 9.

Furthermore, the prosecution asked the judge to impose an exceptional sentence for the reasons it did at the first sentencing hearing, without acknowledging that the basis for that exceptional sentence evaporated with the Court of Appeals decision reversing Mr.

Hayes's conviction for leading organized crime, which the State elected not to attempt to re-prosecute. 3/16/12RP 6-7.

Finally, the court imposed an exceptional sentence based on a single count of identity theft for the unauthorized use of Scott Mutter's credit card account. CP 13; 3/15/12RP 16. The offense involving Mutter's credit card was in no way extraordinary. There were our unauthorized charges on Mutter's account, totaling \$2047. 10RP 9. The minimum threshold for first degree identity theft is a loss of \$1500, making the crime for which Hayes was convicted, as an accomplice, only slightly above the floor upon which any conviction could be premised. RCW 9.35.020(1), (2)(a).

The court lacked authority to impose an exceptional sentence drawn from allegations and suspicions harbored by a prosecutor. Given the minor factual predicate the court cited as the basis for an exceptional sentence, it was untenable to impose such a term of confinement based on facts not proved to the jury and upon facts that were insufficient to deem count one to be a major economic offense.



**2. The prosecution correctly concedes the errors in the judgment and sentence, requiring the court to strike the improper references to offenses for which Hayes was not convicted**


The judgment and sentence erroneously includes crimes for which Hayes was not convicted in its list of criminal history. This Court should order that the trial court strike the criminal history listings that refer to charges that were dismissed by the prosecution.

**B. CONCLUSION.**

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Hayes respectfully requests this Court remand his case for further proceedings.

DATED this 25<sup>th</sup> day of October 2012.

Respectfully submitted,



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	)	
APPELLANT.	)	

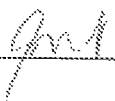
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**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF OCTOBER, 2012.

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# WASHINGTON APPELLATE PROJECT

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