

62928-0

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No. 62928-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES HORTON,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

Because the State did not comply with the notice requirement of RCW 9.94A.537 Mr. Horton's exceptional sentence is unlawful.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

RCW 9.94A.537(1) requires the State provide notice to a defendant of its intent to seek an exceptional sentence. The statute requires the notice state the basis upon which the request for an exceptional sentence will be made. Here, the State did not provide Mr. Horton written notice of its intent to seek an exceptional sentence. Does the State's failure to comply with the provisions of RCW 9.94A.537 require this Court to reverse Mr. Horton's sentence?

C. STATEMENT OF THE CASE

Mr. Horton was charged with one count of possessing a stolen vehicle and one count of attempting to elude a pursuing police vehicle. CP 6-7.¹ A jury convicted Mr. Horton of both counts. CP 70-71.

¹ A separate count of first degree driving with license suspended was dismissed prior to trial when the State conceded it could not prove Mr. Horton had received notice of the revocation of his right to drive. 10/20/09am RP 65.

Mr. Horton's offender scores on the possession and eluding counts respectively is 43 and 22, and is based in part on a criminal history which includes several prior auto thefts, and eluding charges. CP 138, 143. Based upon his offender score and criminal history, the State urged the court to impose an exceptional sentence. CP 74-105; 1/9/09 RP 40-41. The State did not provide written notice to Mr. Horton prior to trial which set forth the basis upon which it would seek an exceptional sentence.

The trial court imposed an exceptional sentence. CP 138.

D. ARGUMENT

BECAUSE THE STATE DID NOT COMPLY WITH THE NOTICE REQUIREMENTS OF RCW 9.94A.537 THE COURT MUST REVERSE MR. HORTON'S EXCEPTIONAL SENTENCE

1. The State must provide written notice of its intent to seek an exceptional sentence. RCW 9.94A.537(1) requires:

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.

The essential elements rule requires a charging document allege facts supporting every element of the offense and identify the crime charged. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276

(2008) (Recuenco III) (citing State v. Leach, 113 Wn.2d 678, 689, 782 P.2d 552 (1989)). The essential elements rule is based upon Article I, § 22 of the Washington Constitution. Auburn v. Brooke, 119 Wn.2d 623, 627-628, 836 P.2d 212 (1992). Article I, § 22 provides in relevant part: "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him, to have a copy thereof . . ." The rule "requires the State to allege in the information the crime which it seeks to establish.

Apprendi [v. New Jersey] makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. 466 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (Recuenco II). Thus, the essential elements rule applies with equal force to sentencing enhancements."

Recuenco III, 163 Wn.2d at 435. As such the, State was required to include the information the facts on which it intended to rely for its request for an exceptional sentence.

Even assuming RCW 9.94A.537 does not require the State include the aggravators in the Information and instead allows the State to employ some other form of notice, the statute plainly contemplates written notice. Generally, courts attempt to give effect to the plain terms of a statute. Tommy P. v. Board of Cy. Comm'rs, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). Moreover, ever statutory provision is intended to have some material effect. State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002). The plain language of RCW 9.94A.537(1) requires "The notice shall state aggravating circumstances upon which the requested sentence will be based." That language can only be given effect if the notice is written, as there is no other means by which the "notice [could] state" anything.

It does not matter that the aggravating factor at issue here is among those which do not require a jury finding. RCW 9.94A.537 does not distinguish between aggravating factors submitted to a judge and aggravating factors submitted to the jury. It simply states then whenever the State intends to seek an exceptional sentence it must provide notice. Here, the State indisputably sought an exceptional sentence. 1/9/09 RP 20 ("the State is recommending an exceptional sentence.")

Here, the State provided Mr. Horton oral notice of its intention to seek an exceptional sentence. However, the State did not include the necessary facts in the Information and did not provide written notice which complied with the requirements of RCW 9.94A.537(1). Because the state did not comply with the requirements of RCW 9.94A.537(1), this Court must reverse his sentence and remand for imposition of a standard range sentence.

2. Mr. Horton may raise this challenge for the first time on appeal. Mr. Horton failure to object to the absence of notice does not preclude his ability to challenge the error on appeal. First, the failure to comply with sentencing statute is an error which may be addressed fro the first time on appeal. The authority to impose an exceptional sentence is governed solely by the SRA. The Supreme Court has routinely held that where a sentencing court fails to comply with the procedures of the SRA, and in the absence of an express waiver by the defendant, the remedy is either to remand for resentencing; or, where a proper objection was raised in the trial court, a reduction of the sentence. State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999). “Because all sentencing authority is statutory “a defendant cannot . . . agree to a sentence in excess of that authorized by statute and thus cannot waive a challenge to such a

sentence.” In re the Personal Restraint of Goodwin, 146 Wn.2d 861, 872, 50 P.3d 618 (2002); see also, In re the Personal Restraint of Fleming, 129 Wn.2d 529, 919 P.2d 66 (1996). The imposition of a sentence which does not comport with RCW 9.94A.537(1) may be challenged for the first time on appeal.

Second, as Recuenco III makes clear, the error did not occur until the court imposed the unlawful sentence and thus there was nothing for Mr. Horton to object to. In Recuenco III the Court recognized that because the State elected to charge the defendant with a valid crime and enhancement, albeit less than the State could have charged, there was no error in the information to which Mr. Recuenco could object. 163 Wn.2d at 436. The Court said “no basis existed for Recuenco to challenge the information, and no argument is presented to us that any defect existed in the information until the sentencing judge imposed a sentence for a crime the State never charged or asked for.” Id. Similarly here, the Information alleged the valid and complete offenses of attempting to elude and possession of stolen vehicle. The State could have provided notice in the information of its intent to seek an exceptional, but did not. As in Recuenco III there was no error until the court imposed a sentence beyond that alleged in the

Information. Thus, Mr. Horton's failure to object to the State's failure to comply with RCW 9.94A.537(1) does not prevent him from challenging his sentence on appeal.

Finally, under the standard which applies to challenges to an information where no objection was raised below, as the dissent did in Recuecno III, that analysis requires Mr. Horton be permitted to raise this argument on appeal. When a defendant challenges a charging document prior to the verdict the court must strictly construe the document and determine whether all the elements are present.. State v. Tinker, 155 Wn.2d 219, 221, 118 P.3d 885 (2005). However, where the challenge is raised after the verdict, e.g., for the first time on appeal, a court applies a lower standard and must determine whether the necessary elements appear in any form "or by fair construction" can be found and if so whether prejudice resulted. State v. Kjorsvik. 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). Even under the Kjorsvik standard two points are clear. First, that an objection is not required to challenge the adequacy of notice on appeal, although a more deferential standard of review might apply. Second, the notice must be in written form as otherwise there is no way to determine if the essential elements appear in the document form "or by fair construction" can be found.

Because there is no document in the file expressing the State's intent to seek an exceptional sentence there is no document which might be fairly read as relaying the necessary facts. And thus there is no question of whether Mr. Horton was prejudiced.

3. The Court must reverse Mr. Horton's sentence. Where the State fails to provide notice of enhancements or aggravating factors, the proper remedy is to remand for entry of a standard range sentence. Recuenco III, 163 Wn.2d at 442. Importantly, Recuenco III did not remand the case to afford the State the opportunity to amend the Information and retry the case. Similarly, the remedy in this case is to remand the matter for imposition of the standard range sentence supported by the facts which the State alleged in the information.

E. CONCLUSION

For the reasons above, this Court must reverse Mr. Horton's exceptional sentence and remand for entry of a standard range sentence.

Respectfully submitted this 21st day of August, 2009.


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DIVISION I**

STATE OF WASHINGTON)	
Respondent)	CoA No. 62928-0
)	
v.)	
)	
JAMES HORTON,)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 21ST DAY OF AUGUST, 2009, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL ADDRESSED AS FOLLOWS:

[X] Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
516 Third Avenue
Seattle WA 98104

[X] James Horton
735731
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

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SIGNED IN SEATTLE, WASHINGTON, THIS 21ST DAY AUGUST, 2009

x Ann Joyce