

63666-9

63666-9

No. 63666-9
King County Superior Court No. 99-1-00573-9KNT

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

STATE OF WASHINGTON,
Plaintiff/Appellee,
v.

DANIEL VALENTINE,
Defendant/Appellant.

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

The Honorable LeRoy McCullough, Judge

APPELLANT'S REPLY BRIEF

David B. Zuckerman
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-1595

FILED
CLERK OF COURT
STATE OF WASHINGTON
2009 DEC 17 AM 10:49

TABLE OF CONTENTS

I. ARGUMENT.....1

 A. THE TRIAL COURT WAS REQUIRED TO HOLD A
 RESENTENCING HEARING IN VIEW OF THE VACATED
 CONVICTION AND THE CHANGE IN LEGAL STANDARDS....1

 B. EVEN IF THE TRIAL COURT WAS WITHIN ITS
 DISCRETION IN REFUSING TO HOLD A RESENTENCING
 HEARING, APPELLATE REVIEW OF THE EXCEPTIONAL
 SENTENCE IS AUTHORIZED BECAUSE THE MATTER
 WAS RAISED IN THE FIRST APPEAL.....1

 C. BECAUSE VALENTINE’S APPEAL IS PROPERLY BEFORE
 THIS COURT, HIS SENTENCE MUST BE REVERSED IN
 VIEW OF BLAKELY.....5

II. CONCLUSION5

TABLE OF AUTHORITIES

Cases

<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	4, 5
<u>State v. Barberio</u> , 121 Wn.2d 48, 846 P.2d 519 (1993).....	2, 3
<u>State v. Gore</u> , 143 Wn.2d 288, 21 P.3d 262 (2001).....	4
<u>State v. Kilgore</u> , 167 Wn.2d 28, 216 P.3d 393 (2009).....	passim

Rules

RAP 2.5.....	2, 3, 4, 5
--------------	------------

I.
ARGUMENT

A. THE TRIAL COURT WAS REQUIRED TO HOLD A RESENTENCING HEARING IN VIEW OF THE VACATED CONVICTION AND THE CHANGE IN LEGAL STANDARDS

The State does not address Valentine's arguments that a new sentencing hearing is mandatory when any count has been reversed based on Double Jeopardy. See Appellant's Opening Brief (AOB) at 6-9. It does not appear that the appellant in State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009), made a similar argument.

B. EVEN IF THE TRIAL COURT WAS WITHIN ITS DISCRETION IN REFUSING TO HOLD A RESENTENCING HEARING, APPELLATE REVIEW OF THE EXCEPTIONAL SENTENCE IS AUTHORIZED BECAUSE THE MATTER WAS RAISED IN THE FIRST APPEAL

Respondent relies exclusively on State v. Kilgore, *supra.*, for the proposition that Valentine has not raised an appealable issue. Kilgore is distinguishable, however, because the defendant in that case did not challenge his sentence in his first appeal, while Mr. Valentine did. "Kilgore appealed but did not challenge his exceptional sentence." Kilgore, 167 Wn.2d at 32. "Kilgore had his opportunity to appeal his sentence on his direct appeal, but chose not to do so." Id. at 39 n.11. Under those circumstances, according to the Kilgore court, there is no

appealable issue unless the trial court exercised its discretion to revisit the sentencing on remand. Kilgore at 39-41.

The Kilgore Court relied primarily on its prior decision in State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993). See Kilgore at 39-43. In Barberio, the Supreme Court clarified the interpretation of RAP 2.5(c) (“Law of the Case Doctrine Restricted”), which reads as follows:

The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.

The Barberio court explained that when an exceptional sentence was not challenged in the first appeal, subsection (c)(1) can apply only if there is a new trial court decision on remand to review. “This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent

judgment, reviewed and ruled again on such issue does it become an appealable question.” Barberio 121 Wn.2d at 50.

Because Barberio did not challenge his exceptional sentence in his first appeal, and because the trial court did not revisit the issue on remand, there was no appealable issue regarding the exceptional sentence. Id. at 50. “This case well illustrates the necessity of the rule which denies review at this late stage. The issue presented was a clear and obvious issue which could have been decided in 1990 in the first appeal.” Id. at 52.

Had Barberio challenged his exceptional sentence in the first appeal, RAP 2.5(c)(2) rather than (c)(1) would have applied. RAP 2.5(c)(1), which deals with decisions that were not disputed in an earlier review, expressly requires a “trial court decision” before the issue may be reviewed by an appellate court. RAP 2.5(c)(2), however, permits the appellate court to revisit its decision from an earlier appeal without regard to the actions of the trial court on remand. The latter subsection applies here. Because Mr. Valentine did challenge his exceptional sentence in the first appeal, there is no need for any trial court action on remand before this Court may revisit the issue.

The State contends that Valentine’s case should be treated the same as Kilgore’s and Barberio’s because he did not challenge his exceptional

sentence in the first appeal in precisely the same way that he is challenging it now. Valentine, however, raised all arguments that were available to him at the time. Any argument that the aggravating factors must be proved to a jury beyond a reasonable doubt was precluded by State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001). That is precisely the sort of situation contemplated by RAP 2.5(c)(2), which permits the appellate court to “decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.” In other words, the rule contemplates that a significant change in the law may justify revisiting a matter decided in an earlier appeal.

In this case, of course, Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), effectively overruled State v. Gore, and provides a strong basis for revisiting the exceptional sentence in this case. Mr. Kilgore could not take advantage of the Blakely decision because he chose not to challenge his exceptional sentence at all in his first appeal, but rather made a strategic decision to focus solely on a new trial. Mr. Valentine, by contrast, raised all challenges to his exceptional sentence that were available to him in 2001. For these reasons, the holding of Kilgore does not apply and this Court is free to review Mr. Valentine’s exceptional sentence under RAP 2.5(c)(2).

C. BECAUSE VALENTINE’S APPEAL IS PROPERLY BEFORE THIS COURT, HIS SENTENCE MUST BE REVERSED IN VIEW OF BLAKELY

The State maintains that Valentine cannot rely on Blakely because his conviction became final when his first appeal concluded. That analysis applied to Kilgore’s case only because, as discussed above, Kilgore had no appealable issue after his case was remanded. Because of that, his direct review ended before Blakely issued. In Valentine’s case, however, the remand did not end the direct appeal process. Because Valentine challenged his exceptional sentence in the first appeal, he had the option of challenging it again after remand under RAP 2.5(c)(2), regardless of the trial court’s action on remand. Therefore, Valentine’s judgment never became final.

Because Valentine has now properly continued the direct appeal process by appealing a second time to this Court, he is entitled to rely on Blakely. This Court must therefore grant relief due to the Blakely error in this case.

**II.
CONCLUSION**

Based on the foregoing, this Court should vacate the judgment and sentence, and the order purporting to amend the judgment and sentence, and remand for resentencing.

DATED this 16th day of December, 2009.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Daniel Valentine

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of this brief on the following:

Ms. Ann Summers, Senior DPA
King County Prosecutor's Office
516 Third Avenue, W554
Seattle, WA 98104

Mr. Daniel Valentine #798495
McNeil Island Corrections Center
PO Box 881000
Steilacoom, WA 98388-1000

12/16/2009
Date

Steven Plastrik
Steven Plastrik, Legal Assistant