

65348-2

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No. 65348-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ANTHONY PAPPAS,

Appellant.

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

The Honorable Anita L. Faris

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

THE DECISION IN *STATE v. STUBBS* DID NOT
OVERTURN THE DECISIONS IN *STATE v.*
NORDBY OR *STATE v. CARDENAS*

In imposing an exceptional sentence, the trial court's reasons supporting the exceptional sentence must be substantial and compelling *and must take into account factors not already considered by the Legislature in computing the presumptive range of the offense.* RCW 9.94A.537(6); *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986).

Relying on the decision in *Nordby* and *Cardenas*, Mr. Pappas submitted that the trial court's reasons for imposing an exceptional sentence here were already considered by the Legislature in computing the standard range for vehicular assault. *State v. Cardenas*, 129 Wn.2d 1, 914 P.2d 57 (1996). In *Nordby*, the Supreme Court determined that the seriousness of the injuries suffered by the victim could not justify an exceptional sentence for vehicular assault because the injuries suffered were considered by the Legislature in setting the standard range for the offense of vehicular assault. 106 Wn.2d at 519. In *Nordby*, the Court noted that the element of "serious bodily injury" for a conviction for vehicular assault "was already considered in setting the

presumptive term for vehicular assault. It cannot, therefore, be a basis for a sentence outside the presumptive range.” *Id.*

In its response, the State argues that the recent decision in *State v. Stubbs*, ___ Wn.2d ___, 240 P.3d 143 (2010) has altered the analysis and as a result, the trial court’s reasons were valid here. Brief of Respondent at 3-8. The State claims the Supreme Court’s repudiated its decision in *Cardenas*, which held that, while severe injuries *may* be a basis for an exceptional sentence, the injuries in that case resulting from vehicular assault had already been considered by the Legislature and could not be the basis for an exceptional sentence. 129 Wn.2d at 6-7.

Contrary to the State’s pronouncement, the decision in *Stubbs* did not “repudiate” the decision in *Cardenas*. The decision in *Stubbs* states the following regarding the *Cardenas* decision:

Our opinions have established that “particularly severe injuries may be used to justify an exceptional sentence,” but only if they are “greater than that contemplated by the Legislature in setting the standard range.”

Stubbs, 240 P.3d at 146, *quoting Cardenas*, 129 Wn.2d at 6. The *Stubbs* Court did *not* reverse or “repudiate” *Cardenas* nor that portion of the decision that held that severe injuries could not be a basis for an exceptional sentence in a vehicular assault matter.

Further, the decision in *Stubbs* also cited the decision in *Nordby* without reversing or “repudiating” that decision as well. *Stubbs*, 240 P.3d at 146-47, citing *Nordby*, 106 Wn.2d at 519. See also *Stubbs*, 240 P.3d at 147 (again citing *Cardenas* and *Nordby* and noting the cases stood for the proposition that severe injuries in vehicular assault matters are those already contemplated by the Legislature and cannot be used to justify an exceptional sentence).

Contrary to the State’s argument, the decision in *Stubbs* does not alter the current state of the law, does not pronounce any new rules, but merely stands for the proposition that the severity of injuries *may* be the basis for an exceptional sentence under RCW 9.94A.535(3)(y), but cannot in that case, a first degree assault case, because the severity of the injuries has already been considered by the Legislature. *Stubbs*, 240 P.3d at 149. The *Stubbs* decision reaffirmed the viability of the decisions in *Cardenas* and *Nordby*, thus the severity of injuries cannot be the basis of an exceptional sentence in a vehicular assault case because the injuries have already been considered by the Legislature in computing the standard range. *Cardenas*, 129 Wn.2d at 6-7; *Nordby*, 106 Wn.2d at 519.

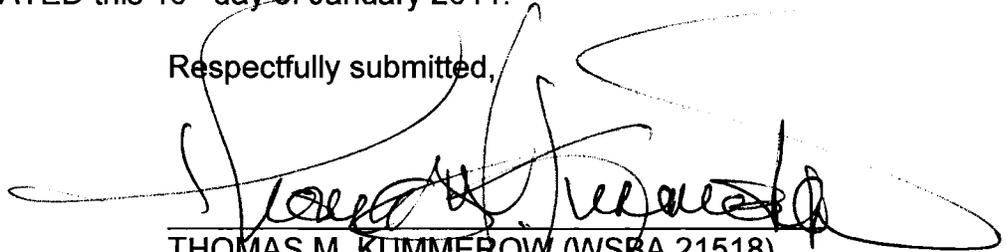
In light of the continued viability of *Cardenas* and *Nordby*, Mr. Pappas is entitled to reversal of the exceptional sentence and remand for imposition of a standard range sentence.

B. CONCLUSION

For the reasons stated, Mr. Pappas requests this Court reverse the exceptional sentence and remand for imposition of a standard range sentence.

DATED this 10th day of January 2011.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and extends across the contact information.

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant