

NO. 34804-7-II

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

STATE OF WASHINGTON, Respondent

v.

LARRY LEE BRUNER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 00-1-01280-2

BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

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STATE OF WASHINGTON
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Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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I. STATEMENT OF THE CASE

The State accepts the statement of the case as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR

The defendant raises as an assignment of error the concept that the trial court erred in including the defendant's Oregon conviction for Sexual Abuse in the First Degree. The claim is that the matter had washed out.

This matter has previously been in the appellate system and specifically looked at by the Court of Appeals in their Unpublished Opinion filed February 23, 2005, under Division II No. 31115-1-II. An unpublished Court of Appeals decision may not be cited as precedential authority on a point of law, but may be used as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties. In Re Davis, 95 Wn. App. 917, 977 P.2d 630, review granted, affirmed 142 Wn.2d 165, 12 P.3 603 (1999). A copy of that Unpublished Opinion is attached hereto and by this reference incorporated herein. Specifically, on page 5 of that opinion, it mentions that areas being reviewed at that time are "proof/comparability analysis/wash out." The appellate court has already decided this issue.

At the time of the original sentence, the court had certified copies of all the necessary and appropriate documents from the Oregon conviction. The State submits that the reasoning behind the issue being raised by the defense has a fundamental flaw: indecent liberties at the time of the crime was a class B felony, not a class C felony. As such then the wash out period would be ten years instead of the five years being alleged in the appellant's brief.

Washington courts use a three-step analysis when determining the Washington sentencing consequences of an out-of-state conviction. The first step is to convert the out-of-state crime into its Washington counterpart. The second step is to determine the relevant sentencing consequences of the Washington counterpart. The third step is to assign those same sentencing consequences to the out-of-state conviction, thus "treat[ing] a person convicted outside the state as if he or she had been convicted in Washington."

- State v. Russell, 104 Wn. App. 422, 440, 16 P.3d 664 (2001)

An offender score calculation is reviewed de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

A 1981 Oregon conviction for Sex Abuse in the First Degree is equivalent to a 1981 conviction for Indecent Liberties.

The State need only prove the existence and classification of prior out-of-state convictions by a preponderance of the evidence. See, State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999); See also, State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). "The best evidence of a prior

conviction is a certified copy of the judgment.” (citations omitted). State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). The court may look at foreign indictment and information to determine whether underlying conduct satisfies elements of Washington offense. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

In the case at bar, the court admitted into evidence a certified copy of the defendant’s plea of guilty and a certified copy of the charging document which contained the elements of the crime. This was admitted as Plaintiff’s exhibit one. Additionally, the court also admitted into evidence an affidavit by a fingerprint expert who compared the fingerprints of the Oregon conviction for Sex Abuse in the First Degree and fingerprints taken of the defendant. The affidavit stated the fingerprints of the individual convicted of the Sex Abuse 1 conviction in Oregon matched the fingerprints of the defendant. The defense did not object to the admission of these documents.

The certified copy of the defendant’s plea of guilty and certified copy of the charging document clearly set forth the elements of the crime of which the defendant was convicted. The defendant was previously convicted on June 8, 1981, of Sex Abuse 1. The elements of the Sex Abuse 1 in June of 1981 were as follows:

(1) a person knowingly causes, (2) a person under 12 years of age, (3) to have sexual contact, (4) for the purposes of arousing and gratifying the sexual desires of either party.

The certified copy of the defendant's statement on plea of guilty states:

I touched my daughter Teresa Bruner age 11 on the breasts with my hand and had Tresea [sic] touch my penis.

The comparable Washington crime in June of 1981 to the Oregon Sex Abuse 1 conviction would have been the crime of Indecent Liberties.

In 1981, the crime of Indecent Liberties was in effect and stated the following:

94.44.100 Indecent Liberties.

(1) a person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

(a) By forcible compulsion; or

(b) When the other person is less than fourteen years of age; or

(c) When the other person is incapable of consent of reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) For purposes of this section, "sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

(3) Indecent liberties is a class B felony.

- RCW 94.44.100 (1979 ed.)

Therefore, based on the evidence presented at the defendant's sentencing, the defendant's conviction would have been equivalent to a Washington conviction for Indecent Liberties in 1981.

A Washington Indecent Liberties conviction in 1981 was a class B felony. RCW 9A.44.100 (1979 ed.) The Sentencing Reform Act of 1981 set forth the following: "Class B prior felony convictions are not included if the offender has spent ten years in the community and has not been convicted of any felonies since the last date of release from confinement pursuant to a felony conviction (including full-time residential treatment), if any, or entry of judgment and sentence." RCW 9.94A.360(12) (1985).

Because the defendant was sentenced to probation on June 8, 1981, his crime would have "washed out" on June 8, 1991. However, in 1990 the wash-out rules of RCW 9.94A.360 were amended. Laws of 1990, Chapter 3, Section 706. The amendment provided the following:

(2) Except as provided in subsection (4) of this section, class A and sex prior felony convictions shall always be included in the offender score.

Indecent liberties would qualify as a felony sex conviction. See, RCW 9.94A.030(37)(a)(1).

This amendment to the wash-out rules occurred prior to previous conviction's 10 year wash-out period running. Therefore, because this prior conviction did not wash out prior to the effective date of the

amendment, the conviction is subject to the amendment. See, e.g., State v. Hodgson, 108 Wn.2d 662, 740 P.2d 848 (1987) (when the Legislature enacts an amendment increasing a criminal statutory limitation period, the new limitation period applies to all crimes not barred under the former limitation period on the effective date of the amendment.)

The State submits that a 1981 Washington conviction for Indecent Liberties would be included in the offender score of an individual sentenced on March 23, 2001, to Rape of a Child in the Second Degree and Child Molestation in the Second Degree.

Because this court would assign the same sentencing consequences of the Washington counterpart, the Sex Abuse in the First Degree counts as three points in the defendant's offender score.

The State submits that the conviction for the Oregon crime did not wash out prior to the amendment of the statute. Because of that the trial court and Court of Appeals has properly determined that it counts. Because it is a sex offense it would count as three points under the appropriate scoring.

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 24 day of January, 2007.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

APPENDIX
UNPUBLISHED OPINION

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LARRY LEE BRUNER,

Appellant.

No. 31115-1-II

UNPUBLISHED OPINION

BRIDGEWATER, J. – Larry Lee Bruner appeals his sentence on remand, arguing that (1) the court on remand was prohibited from considering a prior Oregon sex offense when determining his offender score; (2) the court on remand failed to properly classify the prior Oregon offense; and (3) his exceptional sentence is improper under *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).¹ We hold that the court on remand properly considered Bruner’s prior Oregon sex offense and that it properly relied on the trial

¹ In his opening brief, filed April 23, 2004, Bruner originally asserted that the exceptional sentence was inappropriate under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The Supreme Court filed *Blakely* in June 2004, and Bruner addressed *Blakely* in his reply brief. The State has not responded to this argument.

Bruner also argues that the facts do not support the court’s finding that he abused a position of trust and do not justify the exceptional sentence. Because we vacate Bruner’s exceptional sentence under *Blakely*, we do not reach this argument.

court's initial classification of this offense and offender score calculation because these issues were not addressed in his prior appeal. But we vacate the exceptional sentence and remand for resentencing in accordance with *Blakely*.

FACTS²

On January 24, 2001, a jury found Bruner guilty of second degree rape of a child and second degree child molestation. At sentencing, the trial court compared Bruner's 1981 Oregon conviction for first degree sex abuse committed between January and August 1980, with its counterpart under Washington law and included it in Bruner's offender score. The trial court then determined that the Oregon offense placed Bruner under the Persistent Offender Accountability Act (POAA) and sentenced him to life imprisonment without the possibility of parole.

Bruner appealed, arguing *inter alia* that "the trial court erred in imposing a sentence of life without possibility of release under the POAA," and asserting that "his prior Oregon conviction of first degree sex abuse could not be counted in his offender score." *State v. Bruner*, noted at 114 Wn. App. 1078, 2002 WL 31895139, at *8 (2002) (unpublished). In an unpublished opinion, we affirmed Bruner's convictions but stayed resolution of his sentencing argument pending our Supreme Court's review of *State v. Delgado*, 109 Wn. App. 61, 33 P 3d

² For a complete recitation of the facts underlying this case, we refer to our prior unpublished opinion, *State v. Bruner*, noted at 114 Wn. App. 1078, 2002 WL 31895139 (2002). We repeat here only those facts pertinent to Bruner's current arguments.

753 (2001). *Bruner*, 2002 WL 31895139, at *8-9; *see also*, *State v Bruner*, noted at 116 Wn. App. 1011, 2003 WL 21235424, at *1 (2003) (unpublished).

After our Supreme Court decided *Delgado*, *see State v. Delgado*, 148 Wn.2d 723, 63 P.3d 792 (2003), we issued a supplemental unpublished opinion holding that “[i]n light of *Delgado*, we hold that Bruner’s 1981 Oregon conviction cannot be included in his current offender score.” *Bruner*, 2003 WL 21235424, at *1 But, despite this holding, our entire analysis of this issue focused not on whether the Oregon offense could be included in Bruner’s offender score, but on whether the prior offense could be the basis of Bruner’s POAA sentence:

In imposing Bruner’s sentence under then existing case law, the trial court compared the 1981 Oregon conviction with its counterpart under Washington law and included it in calculating Bruner’s offender score. [Former RCW 9A.44.100 (1981), indecent liberties.] Because the resulting offender score made Bruner a persistent offender, the court sentenced him under the Persistent Offender Accountability Act (POAA) to life imprisonment without the possibility of parole. Former RCW 9.94A.030(27) (2000).

Bruner argues that the trial court erred in including his prior Oregon conviction in his current offender score.

On July 22, 2001, after Bruner committed his current offense, the legislature amended the POAA to add a comparability clause, requiring a sentencing court to equate an earlier out of state conviction with its counterpart under the Washington criminal code. Laws of 2001, ch. 7, sec. 2. The *Delgado* court was asked to determine whether the 2001 amendment applies retroactively and decided that it does not. *Delgado*, [148 Wn.2d at 727-28]. We now review Bruner’s current sentence accordingly.

We first consider the version of the POAA in effect at the time of Bruner’s current offense. *Delgado*, [148 Wn.2d at 726]. Under the 2000 Washington criminal code, *Delgado* could be sentenced as a persistent offender, first, if his current conviction was for rape in the first degree, rape of a child in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion as his current offense; and second, if before the commission of the current offense, he had been convicted of an offense enumerated in former RCW 9.94A.030(2)(b)(1). *See also* former RCW 9.94A.560 (2000); former RCW 9.94A.030(20).

The *Delgado* Court clarified that former RCW 9.94A.030(2)(b)(i) “expressly lists those qualifying prior convictions which expose an offender to a sentence of life without parole as a two-strike persistent offender.” *Delgado*, [148 Wn.2d at 727]. Indecent liberties, former RCW 9A.44.100 (1981), is not an offense enumerated in former RCW 9.94A.030(2)(b)(i). Thus, under *Delgado*, Bruner’s 1981 Oregon conviction *cannot be counted as a first strike for purposes of sentencing him as a persistent offender*.

By separate order, we lift the stay of this appeal. We vacate Bruner’s sentence of life imprisonment with no possibility of parole and remand to the superior court for resentencing in conformity with the POAA, as clarified in *Delgado*.

Bruner, 2003 WL 21235424, *1-2 (emphasis added).

On remand, defense counsel argued that our supplemental opinion precluded the court from considering the Oregon offense as part of Bruner’s criminal history. Defense counsel also argued that the State had failed to provide the court with any evidence that would support the comparability analysis or classification of the Oregon offense. The State contended that the court could still consider the Oregon offense because we had only addressed the Oregon offense in the context of whether it supported the POAA sentence.

The court agreed with the State and concluded that our supplemental opinion did not bar the use of the Oregon offense, Bruner’s only prior felony offense, in his offender score. The court also accepted the prior sentencing court’s comparability analysis because this issue was not addressed in Bruner’s initial appeal. As a result, the court adopted the previous offender score of three and determined that the standard range for the rape conviction was 102 to 136 months and that the standard range for the molestation conviction was 31 to 41 months.

Instead of imposing a POAA, the court found that Bruner had abused a position of trust, and imposed exceptional sentences of 280 months on the rape conviction and 120 months on the

molestation conviction. It ran these sentences concurrently. The court further found that it would have imposed the exceptional sentences regardless of Bruner's offender score

I. Consideration of Oregon Offense

Bruner first argues that our prior supplemental opinion precluded the court on remand from including his Oregon offense in his offender score. We disagree.

Although the opening paragraph of our supplemental opinion appears to hold that the trial court wrongly included the Oregon offense in Bruner's offender score, the only issue we addressed in the supplemental opinion was whether the trial court could use the Oregon conviction as the basis of a POAA sentence. *See Bruner*, 2003 WL 21235424, at *1-2. A complete reading of our opinions shows that we did not hold that the Oregon offense was no longer part of petitioner's offender score, and the court on remand did not err by considering this offense.

II. Proof/Comparability Analysis/Wash Out

Bruner next contends that the State failed to prove on remand that the Oregon conviction counted as a felony conviction under Washington law. He further contends that, even if this were a felony conviction, it washed out of his criminal history because he was crime free for a 10-year period.

On remand following review, a trial court may properly exercise its discretion by declining to revisit an issue that was not the subject of review. *State v Barbero*, 121 Wn.2d 48, 51, 846 P.2d 519 (1993). Although petitioner arguably raised the issues of proof, comparability, and potential wash out in his first direct appeal, our prior opinions did not address these issues,

and Bruner did not challenge these decisions. As these issues were not the subject of review, the court on remand did not err by relying on the trial court's offender score determination

III. Exceptional Sentence

Finally, Bruner argues that his exceptional sentence is invalid under *Blakely*. Because Bruner raised this issue in his reply brief, the State did not address this issue. But, because Bruner initially raised this issue in his opening brief under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), we will address the issue.

Under the Sentencing Reform Act (SRA), an exceptional sentence upward may be based upon statutory or nonstatutory aggravating factors. *See* former RCW 9.94A.535³ Our current statutory scheme permits a judge to impose an exceptional sentence without the factual determinations being charged, submitted to a jury, or proved beyond a reasonable doubt. *State v Gore*, 143 Wn.2d 288, 313-14, 21 P.3d 262 (2001) But the United States Supreme Court recently decided this practice does not comply with the Sixth Amendment Therefore, facts supporting an exceptional sentence must be admitted by the defendant or found by a jury beyond a reasonable doubt. *Blakely*, 124 S. Ct at 2538.

Here, the trial court made the findings supporting the enhancement and Bruner did not admit the facts supporting the exceptional sentence. Thus, this case clearly falls under *Blakely* Because *Blakely* errors are not subject to harmless error analysis, *State v Fero*, ___ Wn. App ___, 104 P.3d 49 (2005), we vacate the exceptional sentence and remand for resentencing

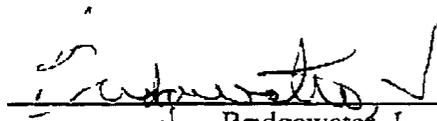
³ Laws of 2002, ch. 169, § 1.

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consistent with *Blakely*. For the purposes of compliance with *Blakely*, we adopt the rationale and holding in *State v Harris*, ___ Wn. App. ___, 99 P.3d 902 (2004), that permits the court on remand to empanel a jury to consider aggravating factors without violating double jeopardy or the separation of powers.

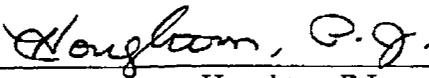
We vacate the exceptional sentence and remand for resentencing in accordance with *Blakely*.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.



Bridgewater, J.

I concur:



Houghton, P.J.

QUINN-BRINTNALL, C.J. (concurring in the result) — I agree with the majority that the sentencing court properly included Bruner's prior Oregon sex offense in his offender score and that it did not abuse its discretion by refusing to address sentencing issues not raised in his initial appeal to this court. I also agree that Bruner's exceptional sentence must be vacated and that on remand the State may empanel a jury and prove facts beyond a reasonable doubt in support of an exceptional sentence.⁴ But I part from the majority on the reason why Bruner's exceptional sentence must be reversed.

⁴ In holding that the superior court has the inherent authority to empanel a jury on remand, the majority adopts the holding and rationale of *State v. Harris*, 123 Wn. App. 906, 99 P.3d 902 (2004). I agree with *Harris*, but also cite one case which was not mentioned in that opinion. In *State ex rel. Herron v. Browet, Inc.*, 103 Wn.2d 215, 691 P.2d 571 (1984), the court addressed whether due process required the right to a jury trial under the contempt provision of the moral nuisance statute. The statute at issue required that the case be heard before a judge and without a jury. Because the statute imposed a criminal penalty, our Supreme Court concluded that the statute necessarily included the required jury trial right. The court then rejected the appellants' argument that because the statute explicitly provided that no such right existed, the statute was facially invalid:

Appellants urge this court to go further and hold that [the moral nuisance statute] is unconstitutional on its face . . .

Legislative acts are presumed to be constitutional. Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality

. . . .
[T]oday we hold that a jury trial is an additional due process protection which must be provided. Accordingly, we superimpose our case law requirement for a jury trial onto [the moral nuisance statute]. So construed, that statute fully meets due process requirements.

Browet, 103 Wn.2d at 219-20 (citations omitted).

The majority follows this court's recent opinion in *State v Fero*, ___ Wn. App. ___, 104 P.3d 49 (2005), which held that *Blakely*⁵ errors, i.e., increased sentencing based on facts not admitted by the defendant or found by a jury, are not subject to harmless error analysis. See *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (where the error concerns a misstated or omitted element of a crime, the error is harmless if the element at issue is supported by overwhelming and uncontroverted evidence). As I stated in my dissent in *Fero*, *Blakely* errors are procedural and, therefore, may be harmless. *Fero*, 104 P.3d at 61 (Quinn-Bruntnall, C.J., concurring in part and dissenting in part). Nonetheless, I agree that Bruner's exceptional sentence must be vacated because, applying what I believe to be the proper harmless error test, it does not, on this record, appear beyond a reasonable doubt that the jury would have found Bruner to have abused a position of trust when he raped and molested H.L.A.

An exceptional sentence may be imposed on the basis of an "abuse of trust" where the defendant was in a position of trust and used this position to facilitate the commission of the offense. Former RCW 9.94A.390(2)(d)(iv) (1999); *State v. Bedker*, 74 Wn. App. 87, 95, 871 P.2d 673, review denied, 125 Wn.2d 1004 (1994). In cases involving crimes against children, whether the defendant is in a position of trust depends on a number of factors, including the length of the relationship with the victim, the trust relationship between the primary caregiver and the defendant, and the vulnerability of the victim to trust because of age. *Bedker*, 74 Wn. App. at 95

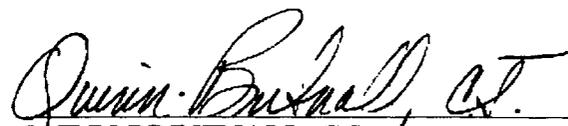
⁵ *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Here, although the evidence does support a finding that Bruner abused a position of trust in committing his offenses, such evidence is not overwhelming and uncontroverted. Bruner was the live-in boyfriend of H.L.A.'s mother. H.L.A. had lived with Bruner for approximately 14 months when the rape and molestation occurred. Both H.L.A. and Bruner testified that they had a very close friendship. The rape and molestation occurred while Bruner was giving H.L.A. a backrub which she routinely requested from Bruner due to back pain. Each of these facts would support an "abuse of trust" finding.

But had the jury been asked to make such a finding, they would also have had to consider the fact that H.L.A. was nearing 14 years of age when the rape and molestation occurred. The older a child is, the less likely it is that she or he is vulnerable to trust or that a position of trust can be used to facilitate the crime. *See* former RCW 9.94A.390(2)(b) (victim must be of "extreme youth" to be particularly vulnerable as a matter of law); *State v. Woody*, 48 Wn. App. 772, 777, 742 P.2d 133 (1987) ("[G]rade school age children" are less likely to be particularly vulnerable because they "are regarded as having achieved a level of reason that sets them apart from younger children."), *review denied*, 110 Wn.2d 1006 (1988). In addition, although the record does contain some testimony of Bruner's care for H.L.A., there is little to suggest that Bruner had assumed the role of a de facto parent or guardian, which would provide stronger support for the finding that Bruner was in a position of trust. An adult who is responsible for the care and development of a child is more likely to have power which can be used in a coercive, manipulative, or controlling manner than one whose contact with the child is merely incidental to his relationship with the child's mother. Thus, although there is substantial evidence from which

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a jury on remand may find beyond a reasonable doubt that Bruner abused a position of trust with H.L.A., the evidence is not so overwhelming and uncontroverted that it may be said as a matter of law that any reasonable jury would make such a finding. For this reason, I concur with the majority decision vacating Bruner's exceptional sentence and remanding for a jury trial on aggravating factors which, if found, may support the imposition of an exceptional sentence.


QUINN-BRINTNALL, C.J.

