

COURT OF APPEALS DIVISION II  
STATE OF WASHINGTON

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NO. 35423-3-II

STATE OF WASHINGTON

Respondent.

vs.

John K. McNeal

Appellant.

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COURT OF APPEALS  
DIVISION II  
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Lewis County Superior Court Cause No. 96-1-00261-0

Honorable Judge Richard Brosey

**STATE'S RESPONSE BRIEF**

**L. MICHAEL GOLDEN**  
**LEWIS COUNTY PROSECUTOR**

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Lori Smith, WSBA 27961

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I. STATEMENT OF THE CASE

The Appellant's procedural and factual statement of the case is adequate for purposes of this appeal.

II. ARGUMENT

**A. THE STATE CONCEDES THAT THE RULING OF *BLAKELY V. WASHINGTON* APPLIED TO RESENTENCING AFTER REMAND IN THIS CASE IN 2006, BUT THAT THE REMEDY UPON REMAND IS TO ALLOW THE STATE TO EMPANEL A SENTENCING JURY WHICH WILL DECIDE WHETHER TO IMPOSE AN EXCEPTIONAL SENTENCE USING THE STATE'S PRESENTED AGGRAVATING FACTORS, PURSUANT TO CHAPTER 205, LAWS OF 2007.**

The Appellant argues that when the Court imposed an exceptional sentence upon remand for resentencing in this case in 2006, that the ruling of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), applied and was thus violated. For different reasons than the Appellant argues, the State concedes that Blakely applied upon remand because although Appellant's case had previously been "final" well before the Blakely decision, it appears that the remand for resentencing in effect "reset" the "finality dates" for purposes of application of Blakely. (Obviously Appellant had the right to file this appeal of his resentencing in 2006, meaning his case after remand and resentencing was no longer "final" and Blakely should have been

applied at that time.) In any event, the State is conceding that Blakely applied in 2006 when the Appellant was resentenced upon remand and the trial court, not a jury, imposed an exceptional consecutive sentence. The crimes in this case are not "serious violent" offenses and thus the ruling of In re Van Delft also applies. See In re VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006)(Blakely applies to consecutive sentences imposed by the Court under 9.94A.5351(a)).

However, Appellant seeks the remedy of "remand for resentencing within the standard range." Brief of Appellant , 32. This is not the remedy. If Blakely applies to this case upon remand--as it apparently does-- by statute the State now has the right upon remand to empanel a sentencing jury to consider the aggravating factors sought by the State to support an exceptional sentence. See Chapter 205, Laws of 2007, which amends RCW 9.94A.537 and 2005 c 68 Section 4, and states in pertinent part as follows:

(2) In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

Id. Under this new statute, then, the State is allowed to empanel a jury to consider the aggravating factors of a requested exceptional sentence upon remand for resentencing.

Accordingly, this matter should again be remanded for resentencing, but the State should be allowed to empanel a sentencing jury and to present the aggravating factors for an exceptional sentence at that time. Chapter 205, Laws of 1977.

**B. THE REMANING ISSUES RAISED BY THE APPELLANT HAVE NO MERIT BECAUSE THE STATE IS NOT REQUIRED TO GIVE NOTICE IN THE CHARGING DOCUMENT AS TO THE EFFECT OF THE "DOUBLING STATUTE" PERTAINING TO A SUBSEQUENT CONVICTION FOR DRUG OFFENSES, AND, BECAUSE THIS STATUTE IS TRIGGERED ONLY UPON THE "FACT OF A PRIOR CONVICTION," BLAKELY DOES NOT APPLY TO THIS SENTENCING STATUTE.**

Appellant also claims that the trial court's imposing a sentence in excess of 120 months based upon the doubling provision of RCW 69.50.408 violated the Appellant's right to notice and that notice of this doubling provision should have been set out in the charging document. This is not correct. There is no Washington authority for this proposition, and in fact Washington case law does not require that the State provide notice of a sentencing provision such as this in the charging document.

In State v. Crawford, 159 Wn.2d, 86, 95, 147 P.2d 1288 (2006), the Court addressed a similar issue when it stated, in pertinent part:

[T]he United States Supreme Court and this court have repeatedly rejected the argument that pretrial notice of enhanced penalties for recidivism is constitutionally required. . . . while due process requires that the defendant receive formal notice of criminal charges, 'we do not extend such constitutional notice to the *penalty* exacted for conviction of the crime.'

Id., quoting State v. Clark, 129 Wn.2d 805, 811, 920 P.2d 187 (1996). The ruling of Crawford should also be applied to the "recidivist" statute here, RCW 69.50.408, and this Court should rule that the State is not required to give notice of the doubling effect of this statute in the charging document, and should reject this argument by the Appellant.

Appellant's other argument--that the ruling of Blakely applies to the doubling provision of RCW 69.50.408 is also misplaced. After all, Blakely stands for the proposition that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Blakely v. Washington, 542 U.S. 296, 301, 124 St. Ct. 2531, 159 L.Ed. 2d 403 (2004) (emphasis added). But the doubling statute at issue here is indeed triggered only by "the fact of a prior conviction," so whether

to impose the doubling factor because of a second or subsequent conviction *is* a proper sentencing issue for the Court, not a jury. Thus, this argument by the Appellant should be rejected.

### III. CONCLUSION

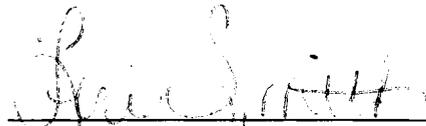
Because this 1997 case was remanded for resentencing in 2006, the State concedes that the rule announced in Blakely in 2004 applied, and the aggravating factors used to impose an exceptional sentence in this case should have been decided by a jury, not the judge. Accordingly, the State agrees this case should be remanded again for resentencing, but that the remedy upon remand is for the State to empanel a jury to consider the aggravating factors pursuant to Chapter 205, Laws of 2007, not remand for a sentence within the standard range, as argued by the Appellant.

Finally, Appellant cites no authority on point for his argument that notice of the doubling provisions of RCW 69.50.408 must be set out in the charging document. In fact, Washington law holds that there is no such notice requirement for such recidivist sentencing statutes. Furthermore, because the doubling provision of RCW 69.50.408 is triggered only because of the "fact of a prior

conviction," Blakely does not apply and the doubling provision is properly imposed by a judge and not a jury.

Respectfully submitted this 7th day of June, 2007.

L. MICHAEL GOLDEN  
Lewis County Prosecutor

A handwritten signature in cursive script, appearing to read "Lori Smith", written over a horizontal line.

Lori Smith, WSBA 27961  
Deputy Prosecutor

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
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STATE OF WASHINGTON, ) NO. 35423-3-II  
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DEPUTY

I, LORI SMITH, Deputy Prosecutor for Lewis County, Washington, declare under penalty of perjury of the laws of the State of Washington that the following is true and correct: On June 7, 2007, I mailed a copy of the Respondent's Brief in this matter by depositing same in the United States Mail, postage pre-paid, to the Attorney for Appellant at the name and address indicated below:

**Peter B. Tiller**  
**The Tiller Law Firm**  
**P.O. Box 58**  
**Centralia, WA 98531-0058**

DATED this 7th day of June, 2007, at Chehalis, Washington.

  
\_\_\_\_\_  
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