

NO. 38828-6-II

FILED
COURT OF APPEALS
DIVISION II

03 DEC 16 PM 1:39

STATE OF WASHINGTON
BY 
DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DERRICK L. HUNTER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable D. Gary Steiner

No. 07-1-00612-7

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Whether the trial court erred when it adopted the State’s comparability analysis after the court read the briefs and heard oral argument of the parties? 1

 2. Whether the trial court erred in imposing an exceptional sentence under RCW 9.94A.535(2)(c) where the defendant’s offender score was 25 with the prior Oregon convictions, and 12 without them?..... 1

 3. Whether the trial court abused its discretion in imposing an exceptional sentence? 1

B. STATEMENT OF THE CASE. 1

 1. Procedure..... 1

 2. Facts 2

C. ARGUMENT..... 7

 1. THE TRIAL COURT PROPERLY COMPARED THE APPLICABLE OREGON AND WASHINGTON STATUTES TO CALCULATE THE DEFENDANT’S OFFENDER SCORE. 7

 2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING AN EXCEPTIONAL SENTENCE UNDER RCW 9.94A.535(2)(c)..... 11

D. CONCLUSION. 13

Table of Authorities

State Cases

<i>In re Personal Restraint of Lavery</i> , 154 Wn. 2d 249, 111 P.3d 837 (2005)	8
<i>State v. Alvarado</i> , 164 Wn. 2d 556, 566, 192 P.3d 345 (2008)	12
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999)	9, 10
<i>State v. Hovig</i> , 149 Wn. App. 1, 15, 202 P.3d 318 (2009).....	12
<i>State v. Knapstad</i> , 107 Wn. 2d 346, 729 P.2d 48 (1986).....	2
<i>State v. Morley</i> , 134 Wn. 2d 588, 605-606, 952 P.2d 167 (1998)	8
<i>State v. Newlum</i> , 142 Wn. App. 730, 743, 176 P.3d 529 (2008).....	12

Federal and Other Jurisdictions

<i>Blakely v. Washington</i> , 542 U.S.296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	12
ORS 163.305(6).....	8
ORS 163.425	8

Statutes

RCW 9.94A.030(42)(a)(i)	11
RCW 9.94A.030(42)(a)(iii)	11
RCW 9.94A.510	11
RCW 9.94A.515	11
RCW 9.94A.525	7
RCW 9.94A.525(17).....	11

RCW 9.94A.525(3).....	7
RCW 9.94A.535(2)(c)	1, 11, 12
RCW 9A.44.083	8
RCW 9A.44.086	8
RCW 9A.44.100	8

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court erred when it adopted the State's comparability analysis after the court read the briefs and heard oral argument of the parties?
2. Whether the trial court erred in imposing an exceptional sentence under RCW 9.94A.535(2)(c) where the defendant's offender score was 25 with the prior Oregon convictions, and 12 without them?
3. Whether the trial court abused its discretion in imposing an exceptional sentence?

B. STATEMENT OF THE CASE.

1. Procedure

On January 31, 2007, the State charged Derrick L. Hunter (hereinafter referred to as the defendant) with one count of attempted kidnapping in the first degree, and one count of failing to register as a sex offender (FTRSO). CP 1-2. On September 4, 2007, the State amended the Information to charge two counts of attempted kidnapping in the first degree, one count of FTRSO, four counts of communication with a minor for immoral purposes (CMIP), and one count of assault in the second degree. CP 3-7.

Trial began with motions on June 18, 2008, before Hon. D. Gary Steiner. RP 6/18/2008 3 ff. After extensive argument on motions, the defendant decided to waive jury and proceed with a bench trial. CP 26. The court granted an agreed motion to dismiss without prejudice Count VIII; attempted kidnapping in the first degree. RP 6/24/2008 14. On July 7, 2008, the court granted the defendant's *Knapstad*¹ motion and dismissed Count I; attempted kidnapping in the first degree. RP 7/7/2008 190.

Trial testimony began July 14, 2008. RP 7/14/2008 273 ff. At the conclusion of the trial, the court found the defendant guilty of FTRSO and four counts of CMIP. CP 150. The court found the defendant not guilty of assault in the second degree. *Id.*

On January 23, 2009, the court held the sentencing hearing. RP 1/23/2009 3 ff. The court heard argument and imposed an exceptional sentence of 120 months. *Id.*, at 36; CP 78. The defendant filed a timely notice of appeal on the same date. CP 68.

2. Facts

The trial court's uncontested Findings of Fact appropriately provide the factual background for the crimes charged in this case:

¹ 107 Wn. 2d 346, 729 P.2d 48 (1986).

II.

On 11/8/06, M.O., age 15, was approached by a man whom she testified identified himself as Thomas. M.O. testified that the man asked her if she liked Baby Phat clothing. She said that they talked for awhile about clothing and she was shown photos of girls modeling clothes that appeared to look like Rock Ware or Baby Phat clothing, and some were in lingerie. There was a discussion about modeling and arranging an interview for the following day which was eventually cancelled by Thomas. M.O. testified that Thomas asked her if she was a virgin and she said she was a virgin. Thomas mentioned to M.O. that to lose her virginity would make her hips right. M.O. testified that Thomas told her that she should have sex with someone experienced. She told Thomas she was concerned about getting pregnant. M.O. testified that Thomas told her how to have sex and not get pregnant. She then testified that Thomas told her that if the man just put his penis in a little bit that she would not get pregnant. She then demonstrated, in court, with her finger and hand what she said Thomas told her. M.O. testified that Thomas made eye contact with her during the demonstration. M.O. testified that at no time did she feel that Thomas was asking her to have sex with him. She also testified that she did not feel threatened by him. Thomas and M.O. agreed to meet the following day to further discuss the modeling business. M.O. said she needed a note from her father to get out of class the next day to meet

Thomas. M.O. suggested that Thomas write the note and sign it as her father. The note was in fact written and signed. M.O. had given Thomas her home and cell phone numbers. Thomas called later in the day and cancelled the meeting for the following day. These acts occurred in Pierce County, Washington. The court finds that M.O. identified the defendant in a photo montage and in court. The court finds her testimony credible and that Thomas was in fact the defendant, whose date of birth is October 29, 1968, and that he communicated with her for an immoral purpose of a sexual nature.

III.

On January 16, 2007, 15 year old A.S. was approached by a black male while she was near Clover Park High School and in the Lakewood Library. While in the library, the black male asked her if she had ever modeled or wanted to model. He offered to show her photos from a modeling website and said that he had modeling pictures in his car if she wanted to see them, A.S. refused. The black male asked for her phone number and she gave him a false one. A.S. testified that the male told her she could make \$500 to interview, and as much as \$5000 for a photo shoot. A.S. declined the offer. A.S. testified that the man asked her to stand up so he could look at her figure. She told him "no". A.S. later testified "He said I had nice hips and nice thighs, that's why I guess he's think - - thinking, I guess that's why he wanted me to stand up to look at my figure." A.S. testified that at some point during the 2 minute

conversation, that he complimented her on her hips and thighs and said that they were nice. The conversation ended and he then offered her a ride home, which she declined. A.S. then got up and went to another computer. The court finds that A.S. positively identified the defendant from a photo montage, and in court that A.S. is credible, and that he communicated with her for an immoral purpose of a sexual nature. The court finds that the black male here was the defendant. These acts occurred in Pierce County, Washington.

IV.

During a period between September and October 2006, S.P. testified that she was with a couple of friends in a parking lot near the K-Mart store in Lakewood. She testified that they were approached by a black male whom she said his last name started with a "D". The man mentioned that he was advertising a catalogue he was putting together and that he wanted her to pose for the catalogue at his studio. This contact occurred about one block from what the court believes the evidence shows is the defendant's residence. He attempted to offer her a business card, but she didn't take it. S.P. testified that the man asked questions such as "have you ever kissed a girl"? What is your bra size? Would you pose in under garments? Have you posed in a catalogue before? S.P. testified that the man asked her to twirl and then bend over. S.P. refused and walked away. The man also asked for her phone number. S.P. did not identify the defendant in a photo montage or in court. The court finds S.P. credible

and that it was the defendant who approached S.P., and that he communicated with her for an immoral purpose of a sexual nature. These acts occurred in Pierce County, Washington.

V.

D.M.L. testified that during May 2006, when she was 15 years old, she and a friend, Jasmine were at the Tacoma Mall. A black male approached her and asked if she had done any modeling, she said no. She testified that the man mentioned clothes like “Baby Phat” and other name brands. She testified that the man told her that models made thousands of dollars and for starting pay, \$500. The man asked her to twirl for him. He also asked about her clothes sizes, pants, shirt, bra and underwear. He also asked if she had sex before. D.M.L. testified the man told her that he had a studio at his house where they take the pictures, he offered to take her there. He asked for her phone number, she gave him her mother’s cell phone number. D.M.L. testified that she wanted to speak to her mother before accepting any modeling opportunity. The man said not to tell anyone about the opportunity, and that because of the money involved it was a secret job. The court finds D.M.L. credible. D.M.L. identified the defendant from a photo montage but was not 100% sure, and testified she was only about 50% sure. She identified the defendant in court and “felt comfortable” with her identification. The court finds that he communicated with her for an immoral purpose of a sexual nature. These acts occurred in Pierce County, Washington.

VI.

Evidence was introduced at trial that the defendant was convicted in Oregon in 1990 and 1997 of the crimes of Sex Abuse in the First Degree, sex offenses in the State of Oregon. The defendant was convicted of Theft in the First Degree in Oregon in 1997. The defendant was notified in 1992 of his obligation to register as a sex offender, and that if he moved from Oregon that he should contact the appropriate agency in that state regarding their registration requirement. The court finds that the defendant resided in Pierce County, Washington, in and prior to February 2008, that he was required to register as a sex offender and that he failed to register with the Pierce County Sheriff. The court finds that the defendant received adequate notice from Oregon of his duty to register in another state should he move from Oregon.

CP 146-149.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY COMPARED THE APPLICABLE OREGON AND WASHINGTON STATUTES TO CALCULATE THE DEFENDANT'S OFFENDER SCORE.

A defendant's offender score is calculated according to RCW 9.94A.525. Where a defendant has out-of-state criminal history, the court must classify them according to comparable Washington law. RCW 9.94A.525(3); *In re Personal Restraint of Lavery*, 154 Wn. 2d 249, 111

P.3d 837 (2005). For the comparability analysis, the court first looks at the elements of the respective crimes. *Id.*, at 255, citing *State v. Morley*, 134 Wn. 2d 588, 605-606, 952 P.2d 167 (1998).

In the present case, the defendant (CP 89-102) and the State (CP 103-139) filed detailed sentencing memorandums. Both memorandums compared the defendant's Oregon convictions under ORS 163.425 and ORS 163.305(6) to Washington law in detail. Both defense counsel and the prosecutor did element-by-element comparisons in their respective briefs. CP 98-100, 106-109.

At the sentencing hearing, defense counsel and the prosecutor argued their respective positions at length, including the statutory comparisons. The crux of the defense argument was that the Oregon statute did not have a *mens rea* that was comparable to Washington's former indecent liberties² or current child molestation³ statutes. RP 1/23/2009 16-18. The prosecutor pointed out that the Oregon statutes and case law required the element of intent. *Id.*, at 25, CP 108.

It is clear from the record that Judge Steiner read the briefs and was familiar with issues presented. RP 1/23/2009 3, 5, 11, 25. After hearing argument, the court clearly indicated the reasons for his ruling:

² Former RCW 9A.44.100 (1986)

³ RCW 9A.44.083 and .086

I think the prosecutor is right. I think there is a basis for an exceptional sentence. I think twice the 60 months is a reasonable sentence in this matter for the reasons advanced by the prosecutor, and I don't wish to articulate them again. The motions of the defense are denied. I agree with the prosecutor's perception of the law in this case. If you would prepare the papers accordingly, I'll sign them.

RP 1/23/2009 36.

The written Findings of Fact and Conclusions of Law do reflect the courts ruling. Finding of Fact II states that the defendant's offender score is 25. CP 70. It says that 13 of those points are for prior offenses. *Id.* The total points, and those from his prior convictions, could not be reached without the court concluding that the prior Oregon convictions were comparable to Washington statutes.

The Appellant's Brief asserts, citing *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999), that the defendant's due process rights were violated by the court's conduct of the sentencing. App. Br. at 13. In *Ford*,

At the sentencing hearing, the State orally asserted the convictions would be classified as felonies under comparable Washington law. No documents of record, such as the California judgments and sentences, were presented by the State to substantiate its position. The California statutes under which Ford was convicted were not offered into evidence. No comparable Washington statutes were identified. From the record it appears the trial court did not engage in any comparison of statutory elements.

Id., at 475-476.

The record reflects quite the opposite is true in the present case. The State provided certified copies of the Oregon convictions. CP 113-139. As pointed out above, both parties cited and argued the language of the Oregon and Washington statutes. The court read the briefs submitted by the parties regarding the issues presented, listened and asked questions in the oral argument regarding the issues (including comparability).

This case is distinguishable from *Ford*. The defendant does not cite any authority for the proposition that the trial court cannot adopt the reasoning of one of the parties. Likewise, the defendant does not cite any authority that requires the court to repeat the detailed legal analysis that the parties engaged in orally and in writing. Absent such authority, the procedure in the present case was at least adequate. The court did not commit error.

The sentencing hearing in the present case was hardly “cursory”. After the legal arguments, the court went on to listen to and consider the defendant’s lengthy allocution (RP 1/23/2009 29-35). Although ultimately imposing an exceptional sentence, the court only sentenced the defendant to 120 months, where the State was requesting 252. The court did not commit error.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING AN EXCEPTIONAL SENTENCE UNDER RCW 9.94A.535(2)(c).

RCW 9.94A.535(2)(c) authorizes the court to impose an exceptional sentence where “The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished”.

In the present case, the defendant was convicted of 5 current offenses: one of FTRSO and 4 of CMIP. He had an offender score of 25. From the current offenses alone, he had a score of 12. This is because each current offense is a sex offense⁴, and therefore counts three points in the offender score⁵.

The defendant had previously been convicted in Oregon four times of a sex offense: sexual abuse in the first degree; and once of felony theft. This resulted in 13 additional points in his current offender score.

The maximum score on the scoring grid for the defendant's current offenses was 9⁶. The corresponding maximum range for CMIP was 51-60 months. The maximum range for FTRSO was 43-57 months⁷. Therefore, any offenses adding to the offender score beyond 9 would not result in additional punishment.

⁴ FTRSO: RCW 9.94A.030(42)(a)(i). CMIP: RCW 9.94A.030(42)(a)(iii).

⁵ RCW 9.94A.525(17).

⁶ RCW 9.94A.510

⁷ RCW 9.94A.510, .515.

A trial court's decision to impose an exceptional sentence is reviewed for abuse of discretion. *State v. Hovig*, 149 Wn. App. 1, 15, 202 P.3d 318 (2009). While considering whether RCW 9.94A.535(2)(c) was constitutional under *Blakely v. Washington*, 542 U.S.296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Court of Appeals concluded:

If the number of current offenses, when applied to the sentencing grid, results in the legal conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses, then an exceptional sentence may be imposed.

State v. Newlum, 142 Wn. App. 730, 743, 176 P.3d 529 (2008). *See, also*, *State v. Alvarado*, 164 Wn. 2d 556, 566, 192 P.3d 345 (2008).

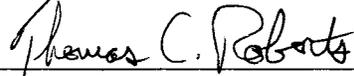
Here, the trial court's Finding of Fact II in imposing the exceptional sentence mirrored the law in the statute and in *Newlum*. The court did not commit error.

D. CONCLUSION.

The legal issues regarding the defendant's sentence and offender score, including the comparability of the prior Oregon convictions, were fully briefed and argued. The court made a decision based upon the law cited by the parties. The defendant's exceptional sentence is lawful. For the reasons argued above, the State respectfully requests that the judgment and sentence be affirmed.

DATED: December 11, 2009.

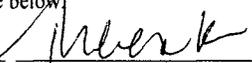
MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/11/09 
Date Signature

09 DEC 14 PM 1:23
STATE OF WASHINGTON
BY DEPUTY
CLERK OF APPEALS
COURT OF APPEALS
TACOMA, WA