

NO. 49264-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

ARNOLD MAFNAS CRUZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00436-9

BRIEF OF RESPONDENT

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SERVICE	Kathleen A. Shea 1511 Third Avenue Suite 701 Seattle, Wa 98101-3647 Email: kate@washapp.org ; wapofficemail@washapp.org	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 3, 2017, Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us
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I. COUNTERSTATEMENT OF THE ISSUES

Whether the since the Legislature specifically stated that its amendments to RCW 9.94A.535 were intended to bring the statute into compliance with *Blakely v. Washington* and that no substantive change to aggravators was intended, is it clear the Legislature intended the free-crimes aggravator's application to offender scores of greater than nine to continue as before the amendments?

II. STATEMENT OF THE CASE

Arnold Mafnas Cruz was charged by information filed in Kitsap County Superior Court under cause number 15-1-00436-9 with possession of methamphetamine, first-degree criminal trespass (a gross misdemeanor) and bail jumping. CP 9-10.

The State voluntarily dismissed the trespass count, CP 34, and Cruz entered a guilty plea to the remaining charges. CP 13. Cruz understood that the State would be seeking consecutive sentences. RP (7/29) 11.

The trial court imposed concurrent sentences within the standard range on each count. CP 24-25. However, it also ordered the sentences to run consecutive to the sentence imposed the same day in cause number 15-1-01503-4 (rendering criminal assistance), making the sentence

exceptional.¹ CP 23, 25. The court accordingly entered findings of fact and conclusions of law, which stated that the sentence was based on the “free crimes” provision of RCW 9.94A.535(2)(c). CP ____.²

III. ARGUMENT

THE LEGISLATURE SPECIFICALLY STATED THAT ITS AMENDMENTS TO RCW 9.94A.535 WERE INTENDED TO BRING THE STATUTE INTO COMPLIANCE WITH *BLAKELY V. WASHINGTON* AND THAT NO SUBSTANTIVE CHANGE TO AGGRAVATORS WAS INTENDED; AS SUCH, IT INTENDED THE FREE-CRIMES AGGRAVATOR’S APPLICATION TO OFFENDER SCORES OF GREATER THAN NINE TO CONTINUE.

Cruz argues that the use of the word “some” in RCW 9.94A.535(2)(c) means that the aggravator only applies to offender scores of 11 or greater. This contention is contrary to the explicitly stated legislative intent that the 2005 amendments to the statute were intended to effect no substantive change in the law.

To reverse an exceptional sentence, this Court must find: (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de

¹ See RCW 9.94A.525(1) (“Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed “other current offenses” within the meaning of RCW 9.94A.589.”); RCW 9.94A.589(1)(a) (“Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.”).

² The State has not received the Appellant’s supplemental index to clerk’s papers as of the time of filing. The reference is to the findings of fact and conclusions of law in support of the exceptional sentence filed on September 23, 2016.

novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient. RCW 9.94A.585(4); *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). Cruz appears to only challenge his sentence under the first prong of this review.

RCW 9.94A.535(2), the “free crimes” aggravator, provides:

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

* * *

(c) The defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.

In construing the free crimes aggravator, the Court’s primary duty is to ascertain and carry out the legislature’s intent. *State v. France*, 176 Wn. App. 463, 469-70, 308 P.3d 812 (2013).

Standard ranges do not change after a defendant amasses nine points. RCW 9.94A.510 (Table 1). Cruz argues that the “some of the current offenses” language in the free-crimes aggravator requires that at least two offenses must not be accounted for in the offender score before a trial court may find the circumstance. In other words, he argues that the aggravator only applies to offender scores of 11 or more. His reading is contrary to the historical interpretation of the provision, however.

The Supreme Court definitively rejected Cruz’s precise claim in 1992:

Here, the defendant had multiple current offenses which resulted in an offender score of 10 – 1 point over the sentencing grid’s “9 or more” category. Given that each second degree burglary conviction counts for two points, in effect, Smith is receiving one-half of a “free” crime; petitioner admits as much in his brief.

State v. Smith, 123 Wn.2d 51, 56, 864 P.2d 1371 (1993), *overruled on other grounds*, *State v. Hughes*, 154 Wn.2d 118 (2005).³ The Court specifically rejected the notion that there had to be even a whole free crime, much less multiples:

Smith argues that one-half of a free crime is insufficient to support an exceptional sentence. This argument is patently meritless. Both public policy and the stated purposes of the SRA demand full punishment for each current offense.

Id., at n.4 (*citing State v. Stephens*, 116 Wn.2d 238, 245, 803 P.2d 319 (1991)).

Although *Smith* was decided under the pre-*Blakely* version of the statute, its holding remains relevant. After *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), held that aggravating circumstances other than the fact of a prior conviction must be found by

³ *Hughes* held that the “clearly too lenient” part of the free-crimes circumstance was a fact that had to be found by the jury under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). *State v. Hughes*, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), *abrogated on other grounds*, *Washington v. Recuenco*, 548 U.S. 212 (2006). As will be discussed, the legislature eliminated that part of the aggravator when it amended the statute to comply with *Blakely*.

the jury, the Legislature amended RCW 9.94A.535 to bring the statute into compliance with the ruling. Of significance to the present case, the Legislature explicitly declared its intent to make no substantive changes to existing aggravating circumstances:

The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. ___ (2004). In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. ... *The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances.* The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances. ...

Laws 2005, ch. 68, § 1 (emphasis supplied).

The legislative intent was thus not to change substance of any aggravating circumstance, but only to bring into compliance with *Blakely*. The Legislature accomplished that task with regard to the free-crimes aggravator by simply eliminating the “clearly too lenient” aspect of the aggravator identified in *Hughes* as violating *Blakely*, leaving only the remainder to be properly found by the court. Nothing in the Legislature’s

explicitly-stated intent indicates that it intended to elevate the application of the free-crimes aggravator from defendants with a 10 or more offender score to those with at least eleven prior crimes. Because Cruz's interpretation of the statute is contrary both to existing judicial gloss as well as the explicitly-enunciated legislative intent, his claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Cruz's conviction and sentence should be affirmed.

DATED May 3, 2017.

Respectfully submitted,

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A handwritten signature in black ink, appearing to be 'TR', with a long horizontal line extending to the right.

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KITSAP COUNTY PROSECUTOR
May 03, 2017 - 7:03 AM
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