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Court of Appeals
Division II
State of Washington
1/12/2018 3:51 PM

No. 49791-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Timar Degraffe,

Appellant.

Clark County Superior Court

Cause No. 15-1-00957-5

The Honorable Judge David E. Gregerson

Appellant's Supplemental Brief

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SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Mr. DeGraffe's exceptional sentence was imposed in violation of his right to due process under the Fourteenth Amendment and Wash. Const. art. I, §3.
2. The trial court impermissibly enhanced Mr. DeGraffe's sentence under a statute that is unconstitutionally vague.
3. The rapid recidivism aggravating factor fails to provide fair notice of the conduct that will subject a person to increased punishment.
4. The rapid recidivism aggravating factor fails to provide sufficient standards to prevent arbitrary enforcement.
5. The rapid recidivism aggravating factor is so subjective that it violates due process.
6. The rapid recidivism aggravating factor is both facially invalid and unconstitutional as applied to Mr. DeGraffe.

ISSUE 1: A sentencing statute is unconstitutionally vague if it (1) allows punishment above the standard range without giving fair notice of the conduct subject to enhanced penalties, or (2) lacks standards and invites arbitrary enforcement. Does the rapid recidivism violate due process because it is unconstitutionally vague?

SUPPLEMENTAL STATEMENT OF FACTS

The State alleged that Timar DeGraffe committed his current offenses “shortly after” being released from incarceration. CP 1-2. After Mr. DeGraffe was convicted of robbery and assault, the court held a special proceeding, at which jurors were instructed to determine “[w]hether the defendant committed the crime shortly after being released from incarceration.” CP 50; RP 462-473.

The court provided no definition for the phrase “shortly after,” and gave jurors no additional guidance. CP 48-50. Jurors returned a “yes” verdict, finding that Mr. DeGraffe committed the crime shortly after being released from incarceration. CP 110. The court imposed an exceptional sentence of 220 months, and Mr. DeGraffe appealed. CP 56, 68.

ARGUMENT

MR. DEGRAFFE’S EXCEPTIONAL SENTENCE VIOLATES DUE PROCESS: THE “RAPID RECIDIVISM” AGGRAVATING FACTOR UNDER WHICH HE WAS SENTENCED IS UNCONSTITUTIONALLY VAGUE, GIVEN THE ABSENCE OF ANY STANDARDS DEFINING WHAT IT MEANS TO COMMIT A CRIME “SHORTLY AFTER” RELEASE FROM INCARCERATION.

A. This error, which is under review by the Supreme Court in *Murray*, may be raised for the first time on appeal in this case.

The Supreme Court is considering “Whether constitutional vagueness principles apply to aggravated sentencing factors, and if so,

whether the aggravating factor for committing the current crime ‘shortly after being released from incarceration,’ RCW 9.94A.535(3)(t), is unconstitutionally vague.” *State v. Murray*, Supreme Court No. 94346-0 (Oral argument 11/14/17).¹ The error may be raised for the first time on review in this case under RAP 2.5(a)(3) because it involves a manifest error affecting Mr. DeGraffe’s constitutional right to due process.

To raise a manifest constitutional error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

Here, the trial court unconstitutionally enhanced Mr. DeGraffe’s sentence through application of a statute that violates due process, as outlined below. Given what the trial court knew, the court could have corrected the error. *Id.* The error may be raised for the first time on review. *Id.*; RAP 2.5 (a)(3).

¹ Issue statement available at http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/casesNotSetAndCurrentTerm.pdf (accessed 1/11/18).

- B. The aggravating factor is unconstitutionally vague because it fails to give fair notice of the conduct subject to enhanced punishment, and because it does not provide judges and juries sufficient standards to prevent arbitrary application.

A statute violates due process if it is vague. U.S. Const. Amend. XIV; Wash. Const. art. I, §3; *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). Vague statutes are void and unenforceable. *Id.* The vagueness doctrine applies “not only to statutes defining elements of crimes, but also to statutes fixing sentences.” *Johnson v. United States*, --- U.S. ---, ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (citing *United States v. Batchelder*, 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979)).

A sentencing statute is unconstitutionally vague if it “fails to give ordinary people fair notice of the conduct it punishes,” or if it is “so standardless that it invites arbitrary enforcement.” *Id.* This includes arbitrary “enforcement” by judges and juries. *Id.*, at ___; *City of Bellevue v. Lorang*, 140 Wn.2d 19, 31, 992 P.2d 496 (2000).

The legislature may not “delegate ‘basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’” *Lorang*, 140 Wn.2d at 30-31 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972),

emphasis omitted in *Lorang*). Due process forbids criminal statutes “that contain no standards and allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.” *State v. Maciolek*, 101 Wn.2d 259, 267, 676 P.2d 996, 1000 (1984).

In *Johnson*, the United States Supreme Court applied the vagueness doctrine to a federal sentencing provision mandating enhanced sentences for offenders with three or more violent felonies. *Id.* at _____. The provision’s residual clause defined the phrase “violent felony” to include any felony involving “conduct that presents a serious potential risk of physical injury to another.” *Id.*

The *Johnson* court found this provision unconstitutionally vague: “By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.*, at _____.

The same is true of the “rapid recidivism” aggravating factor. RCW 9.94A.535(3)(t). That provision permits an enhanced sentence if jurors find that “the defendant committed the current offense *shortly after*

being released from incarceration.” RCW 9.94A.535(3)(t) (emphasis added). The statute does not define the phrase “shortly after.”

In this case, the court submitted the rapid recidivism aggravating factor to the jury during a special sentencing proceeding following the verdict. CP 50; RP 462-473. However, the court’s instructions did not define the phrase “shortly after,” or provide any standards to guide the jury’s consideration. CP 50; RP 462-473.

Like the language at issue in *Johnson*, the rapid recidivism aggravating factor is unconstitutionally vague. *Johnson*, --- U.S. at _____. Indeed, the phrase “shortly after” is arguably more vague than the provision in *Johnson* (“conduct that presents a serious potential risk of physical injury to another.”) *Id.*

Without standards, the aggravating factor is subject to enforcement ““on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”” *Lorang*, 140 Wn.2d at 30-31 (quoting *Grayned*, 408 U.S. at 108–09). In addition, the absence of standards leaves citizens without fair warning of what conduct could result in enhanced penalties. *Williams*, 144 Wn.2d at 205-206.

RCW 9.94A.535 (3)(t) is unconstitutionally vague. *Id.* Accordingly, “[i]ncreasing a defendant’s sentence” under the statute “denies due process of law.” *Johnson* --- U.S. at _____. Mr. DeGraffe’s

220-month exceptional sentence violated due process. *Id.* The sentence must be vacated, and the case remanded for sentencing within the standard range. *Id.*

C. The vagueness doctrine applies to aggravating factors in the post-*Blakely* era.

The vagueness doctrine applies to RCW 9.94A.535 (3)'s list of aggravating factors. *See Johnson*, --- U.S. at _____. This is so notwithstanding a 2003 decision finding the doctrine inapplicable to similar provisions in effect at that time. *State v. Baldwin*, 150 Wn.2d 448, 457-461, 78 P.3d 1005, 1010 (2003).

Baldwin addressed a prior version of the Sentencing Reform Act (SRA) and does not control here. At the time of the *Baldwin* decision, a sentencing judge could impose an exceptional sentence for any “substantial and compelling” reason. *Id.*, at 458, 460-461 (citing former RCW 9.94A.120 and former RCW 9.94A.390). Based on the broad discretion afforded a sentencing judge under the SRA, the *Baldwin* court found the vagueness doctrine inapplicable to sentencing provisions. *Id.*, at 458-459; *see also Beckles v. United States*, --- U.S. ---, ___, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017) (“[W]e have never suggested that unfettered discretion can be void for vagueness.”)

The sentencing landscape has undergone a radical change since 2003. U.S. Supreme Court decisions and amendments to the SRA now place limits on judicial sentencing discretion. The justifications underlying *Baldwin* no longer exist.

Baldwin's first premise was that the sentencing statutes in effect at the time did not require the imposition of any specific penalty following conviction of a crime:

Sentencing guidelines do not inform the public of the penalties attached to a criminal conduct [sic] nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature. A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct *because the guidelines do not set penalties.*

Id. (emphasis added) (citing former RCW 9.94A.120 and former RCW 9.94A.390).

This is no longer true. In 2004, the U.S. Supreme Court invalidated Washington's sentencing scheme. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Under *Blakely* (and its antecedent *Apprendi*²), due process and the constitutional right to a jury trial prohibit imposition of an exceptional sentence unless the prosecution proves aggravating factors to a jury beyond a reasonable doubt. *Blakely*,

² *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

542 U.S. at 301- 314. The state legislature subsequently amended the SRA to comport with *Blakely*'s holding. Laws of 2005, Ch. 68. (the “*Blakely* fix.”)

As *Blakely* and the 2005 legislation made clear, a sentencing judge's discretion is constrained by the “statutory maximum” – the top of the standard range set by the legislature. *Id.*, at 301-305. The judge may impose an exceptional sentence based only on statutorily limited aggravating factors found by a jury beyond a reasonable doubt. *Id.*, at 301; RCW 9.94A.535; RCW 9.94A.537.

Following *Apprendi*, *Blakely*, and the 2005 *Blakely* fix, sentencing guidelines *do* “inform the public of the penalties attached to a criminal conduct [sic].” *Baldwin*, 150 Wn.2d at 459. They *do* vary the “statutory maximum... penalties assigned to illegal conduct by the legislature.” *Id.* *Blakely* reversed the *Baldwin* court's first premise—that the “guidelines do not set penalties.” *Id.*; *see Blakely*, 542 U.S. at 301- 305.

The *Baldwin* court's second premise was that the SRA did not create a constitutionally protected liberty interest in a standard range sentence. *Baldwin*, 150 Wn.2d at 460. As with the court's first premise, this is no longer true. *Blakely* prompted the legislature to enact reforms (the 2005 *Blakely* fix) that create a liberty interest which did not exist in 2003.

A state law creates protected liberty interests when it places “substantive limits on official decision making.” *Matter of Cashaw*, 123 Wn.2d 138, 144, 866 P.2d 8, 11 (1994). A statute with such substantive limits

can create an expectation that the law will be followed, and this expectation can rise to the level of a protected liberty interest. For a state law to create a liberty interest, it must contain “substantive predicates” to the exercise of discretion and “specific directives to the decisionmaker that if the [law’s] substantive predicates are present, a particular outcome must follow.” Thus, laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.

Cashaw, 123 Wn.2d at 144 (citations omitted) (quoting *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 463, 109 S.Ct. 1904, 1910, 104 L.Ed.2d 506 (1989)).

In 2003, Washington courts were “free to exercise discretion in fashioning a sentence.” *Baldwin*, 150 Wn.2d at 460. The SRA’s “only restriction on discretion [was] a requirement to articulate a substantial and compelling reason for imposing an exceptional sentence.” *Id.* The sentencing court’s reason “need not be” an aggravating factor listed in the SRA. *Id.*, at 460-461.

The *Baldwin* court concluded that

[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline

statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest.

Id., at 461. This, the court found, was fatal to any vagueness claim. *Id.*, at 459-461.

Now, however, that the SRA does not grant sentencing judges the same “degree of discretion” addressed by the *Baldwin* court. *Cashaw*, 123 Wn.2d at 144. The sentencing guidelines and exceptional sentence provisions do more than merely “structure discretionary decisions.” *Baldwin*, 150 Wn.2d at 461.³

Since *Blakely* and the 2005 legislative fix, the top of the standard range is the “statutory maximum” set by the legislature. *Blakely*, 542 U.S. at 301-305; RCW 9.94A.535; RCW 9.94A.537. A “particular outcome must follow” when the State fails to prove one of the aggravating circumstances outlined in RCW 9.94A.535. *Cashaw*, 123 Wn.2d at 144.

The current statutes thus create a constitutionally protected liberty interest in a standard range sentence. The SRA now “places substantive

³ By contrast, the federal sentencing guidelines have been rendered “effectively advisory” by the U.S. Supreme Court, bringing them into compliance with *Apprendi* and *Blakely*. *United States v. Booker*, 543 U.S. 220, 245, 125 S. Ct. 738, 757, 160 L. Ed. 2d 621 (2005). Because of this, the vagueness doctrine does not apply to the federal guidelines. *See Beckles*. *Beckles* is thus akin to *Baldwin*: both addressed a sentencing scheme “granting a significant degree of discretion” to sentencing judges. *Cashaw*, 123 Wn.2d at 144. *Beckles* does not control here for the same reason that *Baldwin* is inapplicable.

limits on official decisionmaking” when it comes to imposing a sentence above the standard range. *Cashaw*, 123 Wn.2d at 144. This “create[s] an expectation that the law will be followed.” *Id.*

Washington sentencing statutes “contain ‘substantive predicates’ to the exercise of discretion and ‘specific directives to the decisionmaker that if the [law’s] substantive predicates are present, a particular outcome must follow.’” *Id.* The SRA requires a court to impose a standard range sentence unless the State alleges and proves beyond a reasonable doubt one of the aggravating factors listed in RCW 9.94A.535 (3). RCW 9.94A.530; RCW 9.94A.537.

Unlike the law under consideration in *Baldwin*, the provisions applicable to Mr. DeGraffe place substantive limits on decisionmaking. Mr. DeGraffe therefore had a constitutionally protected liberty interest subject to the vagueness doctrine. *Cashaw*, 123 Wn.2d at 144.

The rapid recidivism aggravating factor is unconstitutionally vague. *Williams*, 144 Wn.2d at 205-206. RCW 9.94A.535 (3)(t) is void, and cannot support Mr. DeGraffe’s exceptional sentence. *Id.* The sentence must be vacated, and the case remanded for sentencing within the standard range. *Id.*

CONCLUSION

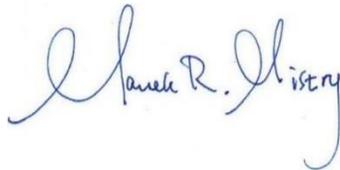
For the reasons set forth above and in the Appellant's Opening Brief, Mr. DeGraffe's exceptional sentence must be vacated and the case remanded for sentencing within the standard range.

Respectfully submitted on January 12, 2018.

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 12, 2018.



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January 12, 2018 - 3:51 PM

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Superior Court Case Number: 15-1-00957-5

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