

FILED  
Court of Appeals  
Division II  
State of Washington  
2/8/2018 3:19 PM

COA NO. 51097-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ERIC V. TRENT,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PACIFIC COUNTY

The Honorable Douglas Goelz, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The information is defective because it omits an essential element of the crime of first degree burglary. CP 47.

2. The court erred in imposing an exceptional sentence because the record does not support the aggravating factor and the court lacked statutory authority to impose it.

3. Appellant received ineffective assistance of counsel in violation of the Sixth Amendment because counsel agreed to an erroneous interpretation of the statutory provision addressing the aggravating factor relied on by the court to impose an exceptional sentence.

4. The court erred in imposing an exceptional sentence because it relied on a fact not found by the jury, in violation of appellant's Sixth Amendment right to a jury trial.

5. The court erred in entering the following "findings of fact" in support of the exceptional sentence:

(a) "Pursuant to RCW 9.94A.535(2)(d), the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient." CP 93 (FF 5).

(b) "Pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), the above-listed aggravating factors support an exceptional sentence of 136 months." CP 93 (FF 6).

6. The court erred in entering the following "conclusion of law" in support of the exceptional sentence: "The Court has authority to impose an exceptional sentence pursuant to Findings of Fact 2, 3, 4, and 5, and *Blakely v. Washington*, 542 U.S. 296 (2004) to have the judge or jury determine whether facts exist to justify an exceptional sentence." CP 93 (CL 2).

7. The court erred in imposing a discretionary legal financial obligation in the absence of inquiry into ability to pay.

8. Defense counsel was ineffective for failing to object to the trial court's imposition of a discretionary legal financial obligation.

#### **Issues Pertaining to Assignments of Error**

1. Whether reversal of the burglary conviction is required because the information failed to allege the essential element of entering or remaining unlawfully in a building "with intent to commit a crime against a person or property therein."

2. Whether the court lacked statutory authority to impose an exceptional sentence based on the aggravating circumstance of unscored

criminal history resulting in a "too lenient" presumptive sentence where no criminal history went unscored under the washout provisions?

3. Alternatively, whether counsel was ineffective in agreeing the "too lenient" aggravator could apply despite there being no criminal history that went unscored?

4. Whether imposition of an exceptional sentence based on the court's factual finding that the presumptive sentence was "too lenient" violated appellant's Sixth Amendment right to a jury trial, where there was no valid waiver of the right to have a jury decide the presence aggravating circumstances?

5. Whether the court wrongly imposed a discretionary \$250 fee for appointed counsel because it failed to make an individualized inquiry into appellant's ability to pay?

6. Alternatively, whether counsel was ineffective in failing to object to the imposition of the discretionary legal financial obligation on an indigent client without inquiry into ability to pay?

**B. STATEMENT OF THE CASE**

The State charged Eric Trent by amended information with first degree burglary (count 1), second degree assault committed against Hope Stigall (count 2), and second degree assault committed against Joshua

Stigall (count 3). CP 47-50. The State also alleged a kitchen sink's worth of aggravating circumstances. Id.

On July 7, 2017, defense counsel filed a document entitled "waiver of right to trial by jury," which was signed by Trent. CP 36. It states:

1. I understand that I have a constitutional right to have a trial by a jury.
2. I do not want a jury trial. I want my case to be tried by a judge without a jury.
3. I understand that if I have signed this waiver at the time of arraignment (entry of my plea), I have the right to withdraw this waiver and request a jury trial within 10 days from arraignment. [CrRLJ 4.1(b)(1)]

CP 36.

Above defense counsel's signature appears the statement: "I have explained this waiver to my client. I am satisfied that my client understands it and that the waiver is voluntary." CP 36.

During the July 7 hearing, defense counsel told the court: "I have a waiver of right to trial by jury that I have gone through with my client, and I would like to present this to the Court." RP 6. The following colloquy occurred:

THE COURT: Mr. Trent, have you gone over this waiver of right to trial by jury?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: And you've thought about it carefully?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: And you recognize that just because a judge decides, that doesn't give you a benefit or a foot up on sentencing? You understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: All right. I'll accept the waiver of right to jury trial. RP 7.

Following a bench trial, the court acquitted Trent on the second degree assault charge involving Hope Stigall (count 2), but found him guilty of burglary and the second degree assault charge involving Joshua Stigall (count 3). CP 55. The court vacated the assault conviction involving Joshua Stigall on double jeopardy grounds. CP 80.

Defense counsel asked the court to deny the State's request for an exceptional sentence. CP 63-68. The court imposed an exceptional sentence of 136 months. CP 85 (FF 5). In its written findings of fact, the court found this aggravator justified the exceptional sentence: "Pursuant to RCW 9.94A.535(2)(d) the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient." CP 93 (FF 5). Trent appeals. CP 116-17.

**C. ARGUMENT**

**1. THE INFORMATION IS DEFECTIVE IN FAILING TO INCLUDE ALL THE ESSENTIAL ELEMENTS OF THE BURGLARY OFFENSE.**

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Hamling v. United States, 418

U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (quoting State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)).

Trent's conviction for first degree burglary must be reversed because the charging document omits the essential element of entering or remaining unlawfully "*with intent to commit a crime against a person or property therein.*" RCW 9A.52.020(1). Even under a liberal standard of review, the information cannot be fairly read to put the accused on notice that such intent must be proved by the State to obtain a conviction.

"A challenge to the sufficiency of a charging document is of constitutional magnitude and may be raised for the first time on appeal." State v. Gonzalez-Lopez, 132 Wn. App. 622, 626-27, 132 P.3d 1128 (2006). Where, as here, a charging document is challenged for the first time on appeal, reviewing courts use a liberal standard of review consisting of a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

A challenge to the sufficiency of a charging document is reviewed de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007).

"Since it is the legislature that defines crimes, we first look to the relevant statute to determine the elements of a crime." Gonzalez-Lopez, 132 Wn. App. at 626. "If the plain language of a statute is unambiguous, the court need not construe the statute." State v. Mohamed, 175 Wn. App. 45, 49-50, 301 P.3d 504, review denied, 178 Wn.2d 1019, 312 P.3d 651 (2013). Further, "[s]tatutes should not be construed so as to render any portion meaningless or superfluous." Id. at 52 (quoting Stone v. Chelan County Sheriff's Dep't, 110 Wn.2d 806, 810, 756 P.2d 736 (1988)).

The elements of first degree burglary are set forth in RCW 9A.52.020(1). State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996). RCW 9A.52.020(1) provides: "A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person."

"In an information or complaint for a statutory offense, it is sufficient to charge in the language of the statute if the statute defines the crime sufficiently to apprise an accused person with reasonable certainty

of the nature of the accusation." State v. Leach, 113 Wn.2d 679, 686, 782 P.2d 552 (1989). If the State had charged Trent in the language of the burglary statute, then there would be no challenge to the information on appeal. But it didn't.

The State charged Trent with first degree burglary in the second amended information by alleging as follows: "The defendant, Eric V. Trent Sr., in the State of Washington, on or about October 21, 2016, did enter or remain unlawfully, in a building located at 216 Butte Creek Rd., Pacific County, and, in entering or while in the building or immediate flight therefrom, did intentionally assault any person therein, to wit: Joshua Stigall or Hope Stigall (a/k/a/ Hope Adams), in violation of RCW 9A.52.020(1)." CP 47.

The information is deficient because it omits the statutory element "with intent to commit a crime against a person or property therein." RCW 9A.52.020(1). As a matter legislative intent, it is apparent that "with intent to commit a crime against a person or property therein" is a separate element from "if, in entering or while in the building or in immediate flight therefrom, the actor . . . assaults any person." RCW 9A.52.020(1). The plain language of the statute separates the two phrases. And in construing legislative intent in defining the elements of the crime,

"[s]tatutes should not be construed so as to render any portion meaningless or superfluous." Mohamed, 175 Wn. App. at 52.

The Supreme Court "has specifically referred prosecutors to the criminal pattern instructions for the purpose of identifying, in many cases, the essential elements that must be included in a charging document." State v. Studd, 137 Wn.2d 533, 554, 973 P.2d 1049 (1999) (Madsen, J., concurring). The Court has thus counseled "[i]mposing the responsibility to include all essential elements of a crime on the prosecution should not prove unduly burdensome since the 'to convict' instructions found in the Washington Pattern Jury Instructions—Criminal (WPIC) delineate the elements of the most common crimes." Kjorsvik, 117 Wn.2d at 102 n.13. The pattern "to convict" instruction for first degree burglary lists "That the entering or remaining was with intent to commit a crime against a person or property therein" and "That in so entering or while in the building or in immediate flight from the building [the defendant] . . . [assaulted a person]" as separate elements. WPIC 60.02.<sup>1</sup> The charging document

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<sup>1</sup> WPIC 60.02 provides in full: "To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about (date) the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;

language, in Trent's case, however, does not conform to the pattern instruction.

A fair, commonsense reading of the language used in the information does not impart the necessary notice that "with intent to commit a crime against a person or property therein" is a *necessary* element that must be proven by the State. The information includes the element of "enter or remain unlawfully." CP 47. But that entry or remaining must be with "with intent to commit a crime against a person or property therein." RCW 9A.52.020(1).

The information further alleges "and, in entering or while in the building or immediate flight therefrom, did intentionally assault any person therein." CP 47. A commonsense reading of that phrase does not capture the missing essential element at issue here because it ties "did intentionally assault any person therein" with "in entering or while in the building *or immediate flight therefrom.*" CP 47. That is problematic

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(3) That in so entering or while in the building or in immediate flight from the building [the defendant] [or] [an accomplice in the crime charged] [was armed with a deadly weapon] [or] [assaulted a person]; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty."

because the State must prove in every case that the person "enters or remains unlawfully in a building" "with intent to commit a crime against a person or property therein." RCW 9A.52.020(1). The requisite criminal intent must be present while entering or remaining. But the way in which the State charged Trent allows the State to obtain a conviction without proving this element.

The reason is found in its use of the disjunctive phrase "or immediate flight therefrom." CP 47. The information leads the accused to believe the State could obtain a conviction if it proved that Trent had the intent to commit a crime against a person in immediate flight from the building, without proving he harbored that intent when he entered or remained in the building. The disjunctive "or" connecting "in entering or while in the building" with "immediate flight therefrom" mandates this conclusion.

The essential elements are those facts that *must* be proved beyond a reasonable doubt to convict a defendant of the charged crime. Zillyette, 178 Wn.2d at 158. The information must provide "constitutionally sufficient notice of the essential elements of a crime." Gonzalez-Lopez, 132 Wn. App. at 627. The information here does not convey that criminal intent *must* exist at entry or while remaining in the building as an essential element. Instead, it leaves these as two options, with a third option being

that criminal intent can exist in immediate flight from the building. CP 47. The information therefore does not convey that the intent to commit a crime against a person at the time of entry or while remaining in the building "is necessary to establish the very illegality of the behavior' charged." Zillyette, 178 Wn.2d at 158 (quoting Ward, 148 Wn.2d at 811). The information does not put the accused on notice that this element is essential. Rather, it informs the accused that this element is optional.

"If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because a necessary element for the burglary charge is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse Trent's conviction. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010).

**2. THE EXCEPTIONAL SENTENCE MUST BE REVERSED BECAUSE THE AGGRAVATING CIRCUMSTANCE RELIED ON BY THE COURT IS UNSUPPORTED BY THE RECORD OR, ALTERNATIVELY, VIOLATES THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL.**

The court imposed an exceptional sentence above the standard range based on the aggravating factor that Trent's prior criminal history

was omitted from the offender score calculation, resulting in a presumptive sentence that is "clearly too lenient." CP 93 (FF 5). The exceptional sentence is unlawful because the record does not support a finding that this aggravating factor exists. Trent's criminal history was not omitted from the offender score calculation pursuant to the washout provisions of RCW 9.94A.525. The court therefore lacked statutory authority to impose an exceptional sentence on this ground. Alternatively, the exceptional sentence must be reversed because the aggravating factor found by the court needed to be found by the jury in the absence of waiver, and Trent did not waive his Sixth Amendment right to have a jury find facts that aggravated his sentence.

- a. **Because no prior convictions wash out of the offender score, the court lacked statutory authority to impose an exceptional sentence on the ground that prior criminal history omitted from the offender score results in a sentence that is clearly too lenient.**

By statute, a court may impose an exceptional sentence outside the standard range if it concludes that "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Trent's case rests on the interpretation of RCW 9.94A.535(2)(d), which sets forth the aggravating factor relied on by the trial court to impose the exceptional sentence.

Statutory interpretation is a question of law reviewed de novo. State v. Hayes, 182 Wn.2d 556, 560, 342 P.3d 1144 (2015). If the plain language of the statute is unambiguous, no further inquiry is needed. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Legislative intent will be determined in accordance with its plain meaning. Id. Criminal statutes are given "a literal and strict interpretation." State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

RCW 9.94A.535(2)(d) sets forth the aggravating factor at issue here: "The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient."<sup>2</sup> CP 93. The plain language of RCW 9.94A.535(2)(d) requires a determination that some of the offender's prior criminal history has been omitted pursuant to RCW 9.94A.525.

The relevant portions of RCW 9.94A.525, relating to the omission of prior criminal history, involve convictions that have "washed out" after the offender spent a period of time in the community without committing a crime. RCW 9.94A.525(2)(b-d). Under RCW 9.94A.525(2)(b), for example, "Class B prior felony convictions other than sex offenses shall

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<sup>2</sup> At sentencing, the court told the parties "the only aggravator I found was unscored felonies." RP 238.

not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c), addressing class C felonies, requires a five-year washout period. RCW 9.94A.525(2)(d) has a five-year washout period for "serious traffic convictions." The washout statute contains a "trigger" clause, which identifies the beginning of the relevant period, and a "continuity/interruption" clause, which sets forth the substantive requirements a person must satisfy during that period. State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010). Any offense committed after the trigger date that results in a conviction resets the washout clock. Id.

The dispositive question, then, is whether any of Trent's prior convictions washed out of his criminal history under RCW 9.94A.525. If not, then the court's reason for imposing an exceptional sentence is necessarily erroneous. A presumptive sentence cannot be "clearly too lenient" due to unscored convictions under RCW 9.94A.535(2)(d) if none of the prior convictions are unscored.

The trial court believed the "clearly too lenient" factor under RCW 9.94A.535(2)(d) applied regardless of whether crimes washed out of

criminal history. RP 227-28. The court thought a sentence could be clearly too lenient under RCW 9.94A.535(2)(d) so long as the offender score was greater than 9 points for a single conviction. RP 228. The State agreed with this interpretation. RP 228. So did defense counsel. RP 228. But, as set forth above, that interpretation of the statute conflicts with its plain language requiring the presence of unscored criminal history pursuant to RCW 9.94A.525.

Although defense counsel agreed with the trial court's interpretation of the statute, the error is not waived for appeal. In the context of sentencing, legal errors cannot be waived for appeal. State v. Wilson, 170 Wn.2d 682, 688-91, 689, 244 P.3d 950 (2010). The meaning of a statute is a question of law. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The court's misinterpretation of the statute is an error of law.

Further, established law holds "a defendant cannot empower a sentencing court to exceed its statutory authorization." Wilson, 170 Wn.2d at 689 (citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002)). The Sentencing Reform Act does not authorize an exceptional sentence under RCW 9.94A.535(2)(d) where there is no criminal history left unscored pursuant to RCW 9.94A.525. Defense counsel's erroneous agreement to the trial court's interpretation of the

statute cannot save the illegal sentence based on that statute. A defendant cannot agree to an exceptional sentence that the court lacks statutory authority to impose. State v. Gronnert, 122 Wn. App. 214, 224-25, 93 P.3d 200 (2004).

A sentence outside the standard range will be reversed if "the reasons supplied by the sentencing court are not supported by the record which was before the judge." RCW 9.94A.585(4). Reversal follows if the sentencing court's stated reason for imposing the exceptional sentence is clearly erroneous. State v. Clarke, 156 Wn.2d 880, 895, 134 P.3d 188 (2006). "A stated reason justifying an exceptional sentence is clearly erroneous if it is not supported by substantial evidence in the record." State v. Jacobson, 92 Wn. App. 958, 964, 965 P.2d 1140 (1998). Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997) (quoting Olmstead v. Dep't of Health, 61 Wn. App. 888, 893, 812 P.2d 527 (1991)).

Under that standard of proof, the exceptional sentence in Trent's case fails. The court did not identify any prior convictions that have been omitted under the washout provisions of RCW 9.94A.525. The record does not disclose any prior convictions that washed out under this provision. The record does not support an exceptional sentence in this

case. There was never a five-year period, let alone a 10-year period, where Trent spent consecutive, crime-free years in the community. In fact, the State stressed, and the parties stipulated, that none of the convictions washed out. RP 227, CP 71. There is no "failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525." RCW 9.94A.535(2)(d). As a result, there is no "presumptive sentence that is clearly too lenient." The aggravating factor relied on by the trial court to impose an exceptional sentence is unsupported by the record. The remedy is remand for imposition of a standard range sentence. State v. Mulligan, 87 Wn. App. 261, 267, 941 P.2d 694 (1997).

**b. Alternatively, counsel was ineffective in agreeing to an erroneous interpretation of the statutory provision that the trial court relied on to impose an exceptional sentence.**

As argued above, defense counsel's agreement to the trial court's misinterpretation of the statutory aggravator does not bar a direct challenge to the sentencing error because a defendant cannot agree to a sentence in excess of statutory authority. Further, although counsel agreed with the court's statutory interpretation, counsel opposed an exceptional sentence on any ground, including the "too lenient" ground used by the court to impose the exceptional sentence. Under these circumstances, the

concept of invited error does not bar a direct challenge to the sentencing error.

But if this Court disagrees, then it will be necessary to address an ineffective assistance of counsel claim. "Invited error is not a bar to review of a claim of ineffective assistance of counsel." State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). Every defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I § 22. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. Ineffective assistance claims are reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Counsel has a duty to know the relevant law. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Effective assistance thus includes "the duty to research

relevant statutes." State v. Estes, 188 Wn.2d 450, 460, 395 P.3d 1045 (2017). The relevant statute here is RCW 9.94A.535(2)(d), the plain language of which unambiguously requires unscored criminal history to trigger its applicability. Everyone agreed none of the prior convictions washed out. Competent counsel would know the trial court had no authority to impose an exceptional sentence under this statutory provision and object to it on this basis.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Trent shows prejudice because counsel agreed to the applicability of the aggravator and the trial court relied on the improper aggravator to impose the exceptional sentence. If Trent's sentencing argument would prevail on appeal but for his attorney's agreement with the trial court's interpretation of the statute, then there is a reasonable probability that his attorney's conduct prejudiced the outcome.

**c. The exceptional sentence is invalid because the trial court violated Trent's Sixth Amendment right to a jury trial in imposing it.**

Under the Sixth Amendment, any fact that increases the penalty for a crime beyond the prescribed statutory maximum other than the fact of a prior conviction must be submitted to a jury and proved beyond a

reasonable doubt. Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). "When a court imposes an exceptional sentence predicated on an unstipulated fact not found by a jury beyond a reasonable doubt, the court violates the defendant's Sixth Amendment (Blakely) right." In re Pers. Restraint of Beito, 167 Wn.2d 497, 503, 220 P.3d 489 (2009). "After Blakely, a jury must find beyond a reasonable doubt that factual bases for establishing the aggravating factor existed." Id. In Trent's case, the judge, not a jury, found a fact used to impose the exceptional sentence. Because Trent did not waive his right to have a jury find the facts used to aggravate his sentence, the exceptional sentence must be reversed.

Defense counsel opposed imposition of an exceptional sentence but did not raise a Sixth Amendment claim. CP 63-68. Sentencing errors, however, may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Specifically, a Blakely error is properly considered for the first time on appeal. State v. O'Connell, 137 Wn. App. 81, 89, 152 P.3d 349 (2007). Constitutional issues are reviewed de novo. Clarke, 156 Wn.2d at 887.

The aggravating factor relied upon by the court in imposing the exceptional sentence required a determination that the presumptive sentence was "clearly too lenient." RCW 9.94A.535(2)(d). This is a

factual determination that must be made by a jury, as required by Blakely and the Sixth Amendment.

The statute authorizes the judge to impose an exceptional sentence based on this aggravator without a finding of fact by a jury. RCW 9.94A.535(2). The statute, however, is unconstitutional as applied to Trent.

State v. Saltz, 137 Wn. App. 576, 154 P.3d 282 (2007) shows why. In that case, the trial court imposed an exceptional sentence based on the aggravating factor in RCW 9.94A.535(2)(b): "The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(2) allows the trial court to impose this aggravated exceptional sentence without a finding of fact by a jury. RCW 9.94A.535(2)(b) violates the Sixth Amendment because it allows a judge rather than a jury to find whether a sentence would be "clearly too lenient." Saltz, 137 Wn. App. at 583-84. While the fact of a misdemeanor history is an objective determination, the "clearly too lenient" language calls for a subjective determination because of the serious harm or culpability given the number or nature of unscored misdemeanors, which would not be accounted for in

calculating the sentencing range. Id. at 582. That factual determination must be made by a jury rather than a judge. Id. at 583-84.

The same reasoning applies to the aggravating factor in RCW 9.94A.535(2)(d), which likewise requires a "clearly too lenient" finding. Whether prior criminal history is omitted from the offender score calculation pursuant to RCW 9.94A.525 is an objective fact that does not implicate Blakely. But like subsection (2)(b), the "clearly too lenient" language in (2)(d) requires a subjective factual determination of the serious harm or culpability given the number or nature of unscored convictions that are not accounted for in calculating the sentencing range.

The conclusion in Saltz, and the conclusion here, is in line with settled law. "It is well established that the 'clearly too lenient' factor cannot support an exceptional sentence when found by the judge." State v. Flores, 164 Wn.2d 1, 20, 186 P.3d 1038 (2008). The Supreme Court "has outlined specific factual findings a court must show to support a too lenient conclusion – it is not merely a legal conclusion, nor does it entail solely the existence of prior convictions. Blakely did not authorize such additional judicial fact finding." State v. Hughes, 154 Wn.2d 118, 137, 110 P.3d 192 (2005), overruled in part on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Trent did not stipulate to the fact that the presumptive sentence was too lenient. "The trial court then had to make additional factual findings above and beyond the admitted facts to support the exceptional sentence." Saltz, 137 Wn. App. at 583-84. RCW 9.94A.535(2)(d) is unconstitutional under Blakely as applied to Trent.

"Unless a defendant consents to judicial fact-finding, a sentencing court's finding that a presumptive sentence is 'too lenient' taints an exceptional sentence based on this factor." Id. at 583. Consent to judicial fact-finding requires an appropriate waiver. Blakely, 542 U.S. at 310. There is no appropriate waiver here. Trent waived his right to a jury trial for the purpose of allowing the trial court to decide whether he was guilty of the charged crimes. CP 36; RP 6-7. But he did not waive his right to have a jury decide the factual bases for aggravating factors in support of an exceptional sentence.

"[A] record sufficiently demonstrates a waiver of the right to trial by jury if the record includes either a written waiver signed by the defendant, a personal expression by the defendant of an intent to waive, or an informed acquiescence." State v. Cham, 165 Wn. App. 438, 448, 267 P.3d 528 (2011). "The State bears the burden of establishing a valid waiver, and absent a record to the contrary, we indulge every reasonable presumption against waiver." State v. Trebilcock, 184 Wn. App. 619, 632,

341 P.3d 1004 (2014), review denied, 183 Wn.2d 1001, 349 P.3d 857 (2015). The sufficiency of the record to establish a valid waiver is subject to de novo review. Id.

In Trebilcock, the record was sufficient to show a waiver of the Blakely right to a jury trial on aggravating factors where "multiple times during trial, counsel stated that [the defendant] understood and agreed that the trial judge would be deciding the aggravating factors." Id. at 633. "Counsel also commented on the significant community interest and pretrial publicity in the Trebilcocks' case as a primary reason for waiving the jury." Id. The defendant's "valid jury waiver at the beginning of the trial, as well as her informed acquiescence to her counsel's unchallenged statements, overcame any presumption that [she] did not make a knowing, intelligent, and voluntary waiver. [She] knew the role of the jury, made a strategic decision to waive the jury, and stood by her decision throughout proceedings." Id.

In Cham, the record showed waiver of the right to a jury trial on the aggravating factor of rapid recidivism due to informed acquiescence. Cham, 165 Wn. App. at 448. Defense counsel stated on the record that the client waived his right to a jury for determining the aggravating factor. Id. at 449. "The specific facts of this case, including Cham's colloquy with the court about the role of a jury, his jury trial experience, and the

unchallenged statements of his counsel, overcome any presumption that he did not make a knowing, intelligent, and voluntary waiver." Id.

Trent's case stands in contrast. The record only shows acquiescence. The record does not show an *informed* acquiescence necessary to establish valid waiver of the right to a jury trial on the aggravating circumstances.

The written waiver of a jury trial and the colloquy on it make no reference to the right to have the jury decide the presence of an aggravating factor. CP 36; RP 7. After the court rendered its verdict on the charges, there was discussion about the need for the court to address the alleged aggravating factors. RP 185-89. The attorneys submitted legal memorandums on the aggravating factors, with no reference to the right to a jury trial on the aggravating factors. CP 63-68. The case proceeded to a bifurcated bench trial on the aggravating circumstance related to the alleged rapid recidivism. RP 192. At its conclusion, the State said that the court determines the other charged aggravators. RP 194.

The attorneys argued about whether the alleged aggravators justified an exceptional sentence. RP 195-204, 212-21, 224-32. During argument, the court said the aggravator under RCW 9.94A.535(2)(b) (unscored misdemeanors or foreign felonies) "normally would be decided by a jury, but in this case has to be decided by the Court." RP 199. The

State responded that "clearly too lenient, anything related to the sentence itself, not related to scoring of other convictions, is actually a judge decision, not a jury decision." RP 200. The court countered: "I think there's a case that clearly says under Blakely that clearly too lenient, even though it says that the judge or court can decide that, despite that, has to be submitted to the jury." RP 200. This observation was made with express reference to RCW 9.94A.535(2)(b) and (c).<sup>3</sup> But then the rest of the discussion presumed the court had the authority to find whether the "clearly too lenient" aggravators under (2)(b) and (d) existed. RP 214-15, 224-28. Defense counsel did not object to the court acting as trier of fact for the aggravating factors. The record shows acquiescence to the judge acting as fact-finder.

But this acquiescence was not informed. Trent was never informed he had the right to have a jury decide the existence of an aggravating factor. Unlike in Cham and Trebilcock, the record does not reveal any statements on the record showing a specific waiver of the right to have a jury decide the aggravator. On this record, the State cannot meet its burden of showing a valid waiver. For this reason, the court's finding

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<sup>3</sup>Actually, the "free crime" aggravator under RCW 9.94A.535(2)(c), which lacks the "clearly too lenient" requirement, can be found by a judge without violating Blakely. State v. Alvarado, 164 Wn.2d 556, 559, 192 P.3d 345 (2008).

that the presumptive sentence was "too lenient" violates the Sixth Amendment. Saltz, 137 Wn. App. at 583. For the same reason, the court erred in concluding it had authority to impose an exceptional sentence pursuant to this aggravator and Blakely. CP 93 (FF 6, CL 2). Without a valid waiver, the court lacked authority to find the fact used to impose an exceptional sentence.

**3. THE DISCRETIONARY LEGAL FINANCIAL OBLIGATION MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO MAKE THE REQUISITE INQUIRY INTO ABILITY TO PAY OR DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO IT.**

**a. The court failed to inquire into Trent's ability to pay a discretionary legal financial obligation.**

The trial court erred when it imposed a discretionary legal financial obligation (LFO) without making an individualized determination of Trent's ability to pay. The \$250 fee for court appointed counsel should be reversed and the case remanded for inquiry into Trent's ability to pay it.

The court made no reference to legal financial obligations at the sentencing hearing. The judgment and sentence lists a \$200 court fee, \$500 victim penalty assessment and \$100 DNA fee. CP 87. Trent does not challenge these costs because they are considered mandatory. The judgment and sentence, however, also includes a \$250 fee for court-appointed counsel. CP 87. This fee is discretionary. State v. Malone, 193

Wn. App. 762, 764, 376 P.3d 443 (2016). Trent challenges the imposition of this fee because the court did not consider his ability to pay it.

A decision to impose discretionary LFOs is reviewed for abuse of discretion. State v. Clark, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). A decision is an abuse of discretion when it is exercised on untenable grounds or for untenable reasons. Id. A decision is made for untenable reasons if it is based on an incorrect legal standard. State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). The court did not apply the correct legal standard in imposing the discretionary LFO on Trent. It made no inquiry whatsoever into Trent's ability to pay.

Before imposing discretionary LFOs, the trial court must make an individualized inquiry into the defendant's present and future ability to pay. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The record must reflect this inquiry. Id. at 837-38. "In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3). The trial court must consider factors such as whether the defendant meets the GR 34 standard for indigency, incarceration, and the defendant's other debts. Blazina, 182 Wn.2d at 838-39.

Here, the record does not reflect that the trial court inquired into Trent's current and future ability to pay discretionary LFOs. The trial court did not consider factors set forth in Blazina, such as Trent's financial resources, other debts, and incarceration. Including boilerplate language in the judgment and sentence stating that the defendant has an ability to pay, as was done here, does not satisfy the inquiry requirement. Blazina, 182 Wn.2d at 838; see CP 84.

Trent did not object to the imposition of LFOs at sentencing. However, the imposition of discretionary LFOs without the requisite inquiry into ability to pay is a systemic problem. Blazina, 182 Wn.2d at 834-35. Appellate courts have the discretion to consider the challenge despite lack of objection below under RAP 2.5(a). State v. Lee, 188 Wn.2d 473, 501, 396 P.3d 316 (2017). Following Blazina, the Supreme Court has exercised its discretion to reach the merits of unpreserved LFO challenges. Lee, 188 Wn.2d at 501-02; State v. Marks, 185 Wn.2d 143, 145-46, 368 P.3d 485 (2016); State v. Duncan, 185 Wn.2d 430, 437-38, 374 P.3d 83 (2016). This Court has exercised its discretion as well. See, e.g., State v. Tedder, 194 Wn. App. 753, 756, 378 P.3d 246 (2016); State v. Cardenas-Flores, 194 Wn. App. 496, 521, 374 P.3d 1217 (2016), aff'd, 189 Wn.2d 243, 401 P.3d 19 (2017).

In light of the systemic problem identified by Blazina and the decision to review unpreserved challenges to LFOs in other cases, Trent requests that this Court exercise its discretion under RAP 2.5(a), reverse the imposition of the discretionary LFO, and remand for an individualized inquiry into his ability to pay.

**b. Defense counsel was ineffective for failing to object to imposition of the discretionary legal financial obligation.**

In the alternative, counsel was deficient for failing to object to the discretionary LFO in the absence of inquiry. Counsel's deficiency prejudiced Trent because there is a reasonable probability that the court would have waived the appointed counsel fee based on Trent's indigency had it been requested to do so.

Again, Trent had the constitutional right to the effective assistance of counsel. Strickland, 466 U.S. at 685-86; Thomas, 109 Wn.2d at 229; U.S. Const. amend. VI; Wash. Const. art. I § 22. Despite the statute mandating consideration of ability to pay costs, no one addressed the issue at sentencing. No one attempted to justify the discretionary cost. It was simply overlooked in the shuffle. There was no legitimate strategy for not requesting the trial court take Trent's indigency into account in assessing the LFOs. Counsel has a duty to know the relevant law, including pertinent statutes. Kyllo, 166 Wn.2d at 862; Estes, 188 Wn.2d at 460.

The relevant law is Blazina and the statute mandating inquiry into ability to pay before imposing discretionary costs. Counsel's failure to object to the imposition of the discretionary LFO based on indigency fell below the standard expected for effective representation. See State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel deficient in failing to recognize and cite appropriate case law). There was no reasonable strategy for not requesting the trial court comply with the requirements of RCW 10.01.160(3) and Blazina regarding discretionary financial liabilities. The hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Trent incurs no possible benefit from LFOs. Although \$250 may not seem like a huge amount of money to some, "LFOs accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time." Id. at 836. Trent is already saddled with \$800 in mandatory LFOs from this case alone. CP 87. The \$250 cost pointlessly increases the burden.

Counsel's deficient performance prejudiced Trent. There is no evidence in the record that Trent has the ability to pay the LFO. The court appointed a lawyer because Trent is indigent. CP 119. Trent remains indigent for appeal. CP 112-14. There is no dispute that Trent meets the GR 34 standard for indigency, in which case "courts should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839.

Further, as pointed out by the State at sentencing, Trent has spent half a lifetime in prison. RP 238. He is now serving a 136-month sentence. CP 85. Given the circumstances, there is a reasonable probability that the trial court would have waived the discretionary LFO had defense counsel alerted the trial court of the necessity to consider Trent's ability to pay it. Therefore, this Court should vacate the LFO order and remand for resentencing on this alternative basis.

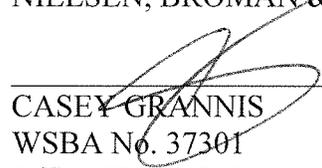
**D. CONCLUSION**

For the reasons stated, Trent requests (1) reversal of the burglary conviction; (2) reversal of the exceptional sentence and discretionary LFO; and (3) remand for resentencing within the standard range and inquiry into his ability to pay the discretionary LFO.

DATED this 24<sup>th</sup> day of February 2018

Respectfully Submitted,

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**February 08, 2018 - 3:19 PM**

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**Appellate Court Case Number:** 51097-9  
**Appellate Court Case Title:** State of Washington, Respondent v. Eric V. Trent, Appellant  
**Superior Court Case Number:** 16-1-00213-5

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