

COURT OF APPEALS
DIVISION TWO
THE STATE OF WASHINGTON

State of Washington, Respondent, v. John Thomas Tyler, Appellant

Cause No. 02-1-00419-9

STATEMENT OF ADDITIONAL GROUNDS - Pursuant to RAP 10.10

FILED
COURT OF APPEALS
DIVISION II
2019 OCT 25 PM 12:59
STATE OF WASHINGTON
BY *WS*

I, John T. Tyler, have received and reviewed the opening brief prepared by my attorney for this action. Summarized below are the additional grounds or support for review that are not addressed in that brief.

ADDITIONAL GROUND #1: DID THE SENTENCING JUDGE ABUSE HIS DISCRETION & AUTHORITY BY RELYING ON SPECULATION AND CONJECTURE BASED MATERIAL CONTAINED IN A FALSIFIED DOC--PRESENTENCE INVESTIGATION REPORT CONSIDERED "CRIMINAL HISTORY", and/or OTHER EXTRINSIC SOURCES OF INFORMATION OUTSIDE THE RECORD OF EVIDENCE SUBMITTED AT A PROPER TRIAL PROCEEDING?

IN THE CONTEXT OF DEPRIVING A CITIZEN CONSTITUTIONALLY PROTECTED PROPERTY & LIBERTY INTEREST, SENTENCING OF A CONVICTED FELON MUST BE PREDICATED ON THE **FACTS** PRESENTED TO AN IMPARTIAL JURY OF ONE'S PEERS, CONFIRMING THE **ELEMENTS** BEYOND A REASONABLE DOUBT NECESSARY TO CONVICT, ONLY **FACTS** ESTABLISHED UNDER THE CRUCIBLE OF A FAIR ADVERSARIAL TRIAL PROCEEDING, SUBJECT TO ADVERSARIAL DUE PROCESS CHALLENGES OF ADMISSIBLE EVIDENTIARY FACTS, SUBJECT TO THE RULES OF EVIDENCE, SO AS NOT TO UNDULY INFLUENCE SETTING A SENTENCE TERM LENGTH OR RELEASABILITY QUALIFICATIONS ON HEARSAY, UNSUBSTANTIATED, OR FABRICATED SUBJECTIVE STATEMENTS OF GOVERNMENT AGENTS KNOWN TO OPERATE UNDER A RUSH-TO-JUDGMENT BIAS CREATING SPECULATIVE &/OR CONJECTURED EXTRINSIC BASED FACTORS NEVER CHALLENGED UNDER THE CRUCIBLE OF TRIAL AND FOUND TO BE THE MANDATORY "**ELEMENT**" IN THE CHARGES REQUIRED TO BE SUBMITTED TO A JURY AND PROVED BEYOND A REASONABLE DOUBT.

SUPPORTING ARGUMENT: The U.S. Supreme Court (SCOTUS) has clarified that for Sixth Amendment purposes and under the supremacy clause, ANY FACT that INCREASES the penalty, the mandatory MINIMUM, is an "ELEMENT" that MUST be submitted to the JURY (triers of fact), NOT A JUDGE. Cunningham v. California, 549 US 270, 281, 147 L.Ed.2d 435 (2000). Since the Court of Appeals held that the resentencing court must follow RCW 9.94A.535(2)(c); "The only factors the trial court relies upon to impose an exceptional sentence under RCW 9.94A.535(2)(c) are BASED ON 'CRIMINAL HISTORY' (i.e., CrR 7.1's PSI report as 'history'), and the JURY's VERDICT on the current convictions..." This links the falsehoods of a PSI Report to influence a judge's justification of an Exceptional Sentence outside the range of the SRA, and challenges the veracity, reliability, and sufficiency of unproven assertions made by state witnesses in trial. Assertions are mere allegations, made in communication, without substantiation. Assertions are made with intent to convince, but are not inherently factual without empirical irrefutable evidence to support it, thus, the required corroborating eye-witness minimum in a murder conviction. A statement of alleged fact without corroboration by reliable evidence, is insufficient to stand on its own,

especially where police gathering of witness statements fail to follow strict protocol required to prevent collusion and coached facts sought by the prosecution to assure a conviction. Allegations cannot establish the beyond-a-reasonable-doubt threshold.

Where a judge is imposing a sentence term based on HIS perceived finding of unstipulated finding of aggravating "factor" or that of other government agents with a likely stereotype agenda, it unavoidably follows that any FACT necessary to prevent a sentence from being substantively unreasonable, thereby exposing the defendant to the LONGER sentence, is an ELEMENT that MUST be either admitted by the defendant, or found by the JURY. It may NOT be found by a judge. Jones v. U.S., 190 L.Ed.2d 279 (2014). Where an EXCEPTIONAL or extra-SRA SENTENCE is imposed by a judge, the U.S. Supreme Court has held that a substantively unreasonable penalty is illegal and must be SET ASIDE. Gall v. U.S., 552 US 38, 57, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

In Alleyne v. United States, 186 L.Ed.2d 314, 133 S.Ct. 2151 (2013), the Sixth Amendment provides that those "ACCUSED" of a "crime" have the right to a TRIAL "by an IMPARTIAL JURY". This right, in conjunction with the due process clause, REQUIRES that EACH ELEMENT of a crime be PROVED to a jury beyond a reasonable doubt. In re Winship, 397 US 358, 364, 90 S.Ct. 1068 (1970) (requiring beyond a reasonable doubt showing on EACH ELEMENT of a crime). The substance and scope of this right depend upon the proper designation of the FACTS that are the ELEMENTS of the crime.

The touchstone for determining whether a FACT is or must be found by a jury beyond a reasonable doubt is whether the FACT constitutes an "element" or "ingredient" of the charged offense. In Apprendi v. N.J., the U.S. S.Ct. held that a FACT is, by definition, an element of the offense and MUST be submitted to the jury if it INCREASES the PUNISHMENT "ABOVE" what is otherwise legally prescribed. While Harris v. U.S., declined to extend this principle to FACTS increasing mandatory minimum sentences, Apprendi's definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. FACTS that increase the mandatory MINIMUM sentence are therefore ELEMENTS and must be submitted to the JURY and found beyond a reasonable doubt.

APPRENDI concluded that any FACTS that increase the prescribed range of penalties to which a criminal defendant is exposed are ELEMENTS of the crime. The U.S. S.Ct. held that the Sixth Amendment provides defendants with the right to have a jury find these facts beyond a reasonable doubt, not by "judicial fact finding". While the overturned Harris standard limits Apprendi to facts

INCREASING the statutory MAXIMUM, the PRINCIPLE applied in Apprendi applies with EQUAL FORCE to FACTS increasing mandatory MINIMUMS.

It is indisputable that a FACT triggering a mandatory minimum ALTERS the prescribed range of sentences a defendant is exposed to. Because the legally prescribed RANGE is the penalty affixed to the crime, it follows that a fact increasing either end of the range produces a NEW PENALTY and constitutes an INGREDIENT of the offense.

If a statute prescribes a particular punishment to be inflicted on those who violate it under special circumstances, which it mentions, OR with particular aggravations, then those special circumstances must be SPECIFIED in the INDICTMENT.

ADDITIONAL GROUND #2: HOW DID THE STATE COMPLY WITH RCW 9.94A.537(1) giving NOTICE it was seeking an EXCEPTIONAL SENTENCE prior to going to trial, allowing appellant the right to seek a plea agreement to mitigate jeopardy and liability. Under .537(1), the NOTICE SHALL state aggravating circumstances upon which the exceptional sentence will be based.

The facts supporting aggravating circumstances shall be proved to a jury beyond-a-reasonable-doubt (B-R-D). The jury's verdict on the aggravating factor MUST BE UNANIMOUS, and by special interrogatory. If a jury is waived, proof shall be to the court B-R-D, unless the defendant STIPULATES to the aggravated FACTS. RCW 9.94A.537(3).

John Tyler did not have opportunity to prepare to defend against an exceptional sentence prosecution, nor did he stipulate to any aggravating facts.

Evidence regarding any facts supporting aggravating circumstances under 9.94A.535(3) SHALL be presented to the JURY during TRIAL of the alleged crime, unless the jury has been impaneled solely for RESENTENCING, or the state alleges the aggravating circumstances LISTED IN RCW 9.94A.535(3)(e)(iv), (h)(i), (o), or (t). If one of these circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is NOT part of the resgeste of the charged crime, if not other wise admissible in trial..., and if the court finds the probative value... is substantially outweighed by its prejudicial EFFECT on the jury's ability to determine guilt or innocence for the underlying crime. RCW 9.94A.537(4)

Where the prosecution and court have failed to comply with RCW 9.94A.537, it cannot create qualifying aggravating circumstances after the fact, in violation of the statute regulating this prior notice and due process. No reference is made to one of the qualifying aggravating circumstances required to be specified from the "exclusive list" in RCW 9.94A.535(3).

ADDITIONAL GROUND #3: Appellant Tyler, nor his family members, were participants in a process DOC uses to form the content of a pre-sentence investigation report, largely relying on unsubstantiated hearsay, speculation, conjecture, and informal police interviews of preliminary investigations gathering speculative and embellished or fabricated statements during discovery phase of proceedings used by DOC to manufacture PSI report content the way THEY perceive or prefer the truth to be, not the facts presented in trial, making it a one-sided and unrefuted tool to create harsher or vindictive punishment mandates.

Moreover, under the doctrine of due-notice, Tyler was never informed by counsel or judge pursuant to CrR 7.1 & 7.2, of the significance of such a "report" used by the judge (the purpose underlying the title "pre-SENTENCE report") in determining sentencing structure, or end-of-sentence ratings, review determining releasability, where deprivation of one's liberty interest is based on speculative supposition, fabrication, and conjecture produced falsehoods contained in the Pre-Sentence Investigation Report (PSI). Nor was he served due notice of his time constrained (CrR 7.1) opportunity to refute or correct the content, and recognize the importance of contesting such PSI Report content for its misleading propaganda properties.

This lack of fair notice necessary for informed consent to factual report content, put Mr. Tyler at a critical disadvantage and placed him in greater jeopardy in sentencing that deprived him of property and liberty interests, significant prejudice in itself, but also subjected him to misrepresentations for treatment programs, ESRC risk ratings prohibiting release (typical), predicated on prejudicial unsubstantiated misinformation, and forming conditions of release that set up parolees for likely violations of release restrictions.

The use of a PSI Criminal History document by DOC cannot substitute for substantiated evidence going to the ELEMENTS of the crime required in trial and to support aggravating circumstances necessary to seek an exceptional sentence, requiring notice of such prosecutorial pursuit prior to trial.

ADDITIONAL GROUND #4: OFFENDER SCORE RECALCULATION OFFENDS THE ORIGINAL SCORE AS IMPROPER PROCEEDINGS, RESULTING FROM JUDICIAL ABUSE OF DISCRETION AND VIOLATION OF ESTABLISHED SUPREME LAW OF THE LAND IN U.S. CONSTITUTION AND SCOTUS PRECEDENT LAW.

COURT OF APPEALS, Div. II, No. 50434-1-II, in Dec. 2018, held "that the sentencing court (judge) ERRED in calculating Tyler's offender score and that the condition prohibiting romantic relationships as written is unconstitutionally VAGUE." The Appellate Court reversed Tyler's sentence and remanded for RESENTENCING per opinion. The sentencing court is required to sentence an offender under the law IN EFFECT WHEN THE OFFENSE WAS COMMITTED. RCW 9.94A.345. Amendments to the SRA allowing inclusion of juvenile offenses in offender score calculation, was restricted to offense(s) occurring on or AFTER June 13, 2002. He is not subject to current methods of calculating offender scores the judge

appears to follow, disregarding the original offender score calculations of nine (9).

ADDITIONAL GROUND #5: Defendant Tyler did not STIPULATE to facts existing to support an exceptional sentence, that the offenses presented in trial were factual, or that the trial court could engage in judicial fact-finding.

No harmless error analysis was available for BLAKELY violation of Sixth Amendment right to jury trial arising from imposition of an Exceptional Sentence that was predicated on UNSTIPULATED fact; harmless error analysis would usurp the role reserved for the jury in determining whether aggravating factors exist to support an Exceptional Sentence. Sixth Amendment.

The Court would be required to impose standard range sentence after committing incurable BLAKELY ERROR in predicating Exceptional Sentence on an aggravating factor to which Defendant had NOT stipulated.

Therefore, is it error, in light of Blakely, for the trial court to impose an Exceptional Sentence based on unstipulated facts or those not proved to a jury beyond a reasonable doubt?

When a court imposes an Exceptional Sentence predicated on unstipulated facts not found by a jury beyond a reasonable doubt, the court violates the defendant's Sixth Amendment, Blakely, right. Hagar, 158 Wn.2d at 374, 44 P.3d 298. After Blakely, a JURY must find B-R-D that factual bases for establishing the aggravating factor existed.

In Inre Beito, 167 Wn.2d 497, 220 P.3d 489 (2009), it finds that although the 2007 amendment to RCW 9.94A.537(2) permits the trial court to impanel a jury to determine the aggravating factors, if any, the statute is not without its own express limits. RCW 9.94A.535 authorizes the jury to consider ONLY the EXCLUSIVE LIST of aggravating factors identified in subsection (3) "that were relied upon by the superior court in imposing the previous sentence..." RCW 9.94A.537(2); .535(3). See the exclusive list of circumstances that must be specified to support a sentence above the standard range.

Date: 10-21-19

Signature: John T. Tyler
John T. Tyler