

FILED
FEB 23, 2012
Court of Appeals
Division III
State of Washington

No. 30126-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

FRANK PATRICK MANN,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Jerome J. Leveque, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding No. 3 at CP 146:

3. On April 14th, 2011, the jury found the defendant abused his position of trust in the commission of these crimes.

2. To the extent it is a finding of fact, the court erred in entering

Conclusion of Law No. 4 at CP 146:

4.[sic] The defendant used his position of trust to facilitate multiple sexual assaults of the victim over a considerable amount of time.

3. To the extent it is a finding of fact, the court erred in entering

Conclusion of Law No. 5 at CP 146:

5.[sic] The defendant is a real danger to the community and a standard range sentence is too lenient under the facts and circumstances of this case.

4. To the extent it is a finding of fact, the court erred in entering

Conclusion of Law No. 9 at CP 147:

9.[sic] Either one of the bases found here alone would justify the exceptional sentence imposed. This Court would impose the same sentence based upon any one of the factors stated above standing alone.

5. The trial court erred in imposing an exceptional sentence.

6. The absence of a standard guiding the determination of whether "substantial and compelling reasons" support an exceptional sentence violates the Fourteenth Amendment Due Process Clause.

7. The record does not support the finding that Mr. Mann has the current or future ability to pay legal financial obligations.

Issues Pertaining to Assignments of Error

1. Is a defendant's right to a unanimous jury verdict violated where the jury did not find that the aggravating circumstance of abuse of trust existed as to any specific offense?

2. Are the exceptional sentences imposed as to counts II, III and IV unsupported by the record where the jury did not find that the aggravating circumstance of abuse of trust existed as to those counts?

3. Does a trial court engage in impermissible judicial fact-finding under Blakely where it finds an aggravating circumstance that is not authorized by RCW 9.94A.535(2)(a)—(d)?

4. A penal statute which fails to set forth objective guidelines to guard against arbitrary application is vague and violates the Fourteenth Amendment's Due Process Clause. Neither the SRA nor case law provide an objective framework which a sentencing judge can employ to determine when substantial and compelling reasons exist to support an exceptional

sentence. Nor does such a framework exist to guide appellate review of the imposition of an exceptional sentence. Does the absence of objective standards deprive Mr. Mann of due process and his right to appeal his exceptional sentence?

5. Should the finding that Mr. Mann has the current or future ability to pay legal financial obligations be stricken from the Judgment and Sentence as clearly erroneous, where it is not supported in the record?

B. STATEMENT OF THE CASE

1. Prior history of case.

This case is before the Court for yet a third time. *See* State v. Mann, noted at 128 Wn. App. 1010, 2005 WL 1406008 (June 14, 2005), and State v. Mann, 146 Wn. App. 349, 189 P.3d 843 (2008).

On February 9, 2004, Frank Patrick Mann was found guilty by a jury of one count of first degree child molestation and three counts of first degree child rape. The standard range on the molestation charge was 149 to 198 months. Mann, 146 Wn. App. at 353. The standard range on the child rape charges was 240 to 318 months. Id. The court sentenced Mr. Mann to 198 months on the molestation conviction. Id. The court also imposed concurrent exceptional sentences of 500 months on each of the child rape convictions, based on its determinations that Mr. Mann abused a

position of trust and was “a ~~real~~ danger to the community and a standard range sentence is too lenient under the facts and circumstances of this case.” Id.; CP 144 (line-out in original). The court entered written Findings and Conclusions for Exceptional Sentence. CP 143–44.

Soon after sentencing, the United States Supreme Court decided Blakely v. Washington,¹ which held that aggravating factors in support of an exceptional sentence must be found by a judge. After the trial court denied his Blakely motion, Mr. Mann appealed. Mann, 146 Wn. App. at 353.

Eventually, this court affirmed Mr. Mann’s convictions and remanded for sentencing within the standard range based on the then-recent Washington Supreme Court decision in State v. Hughes.² Mann, 146 Wn. App. at 354. The mandate was issued in May 2007. Id. at 354.

In January 2007 the Washington Supreme Court had decided State v. Pillatos, and held that trial courts do not have inherent authority to impanel sentencing juries. 159 Wn.2d 459, 469, 150 P.3d 1130 (2007).

¹ 542 U.S. 296, 301–02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

² 154 Wn.2d 118, 110 P.3d 192 (2005), *overruled on other grounds by* Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

The State Legislature responded with the “Pillatos-fix”, stating an intent that superior courts have authority to impanel juries to find aggravating circumstances in all cases coming before the courts for trial or sentencing, regardless of the date of the original trial or sentencing. Laws of 2007, ch. 205, § 1 (statement of legislative intent).

Mr. Mann’s trial court denied the State’s motion to impanel a jury as part of the resentencing procedure, and sentenced him to concurrent high-end standard range sentences on all counts. The State appealed. Mann, 146 Wn. App. at 354–56.

Ultimately, this court reversed the trial court’s sentence and remanded, finding that the 2007 amendment operates retroactively to allow a jury determination on the alleged aggravating factor that supported the previous exceptional sentence. Mann, 146 Wn. App. at 360–61. The mandate was issued in June 2010. CP 48.

2. Retrial on the alleged aggravating factor.

In March 2011, the State filed its Notice of Intent to Seek Aggravating Circumstances, alleging “that the following aggravating circumstance(s) exist(s) for the charged *crime*: Abuse of Trust, Zone of Privacy, Prolonged Pattern of Sexual Abuse, and Multiple Current

Offenses that result in a 9+(12) offender score.” CP 63 (emphasis added).

Prior to retrial, the State withdrew its request to proceed on the privacy and prolonged pattern of abuse factors, because the initial sentencing judge³ had specifically declined to find those factors were present. RP 4–5, 9; CP 144.

In April 2011, a jury was empanelled and heard the aggravating factors trial. Verbatim Report of Proceedings, volumes 1 (portion), 2 and 3 (portion). In her opening statement, the prosecutor reminded the jury that Mr. Mann had already been found guilty by a jury in 2004 of four crimes, and the jury’s role was to determine whether “[Mr. Mann’s] actions were an abuse of trust.” RP 298–99.

The jury heard general testimony from the now fifteen-year-old victim, T. L., and her mother, Heather McDougal (formerly Vevang). RP 304–15, 316–26. The State’s case-in-chief concluded with witness Spokane Police Detective William Marshall, who generally testified about Mr. Mann’s statements to him in an April 2003 interview. RP 327–84. The defense presented no witnesses.

³ Judge Neal Q. Rielly presided over the first and second trials/sentencings. See CP 27, 46. Undersigned counsel believes Judge Rielly was retired at the time the current case came back before the superior court. Judge Jerome J. Leveque presided over the present matter.

The jury instruction discussion was held off the record. RP 387–88. The prosecutor and defense counsel made no exceptions or objections to the final instructions. CP 389.

In part, the jury was instructed as follows:

Instruction No. 3. The defendant has previously been found to be guilty of one count of Child Molestation in the First Degree and three counts of Rape of Child in the First Degree. The jury's verdict establishes the existence of those facts and circumstances which are the elements of the crime. The jury will now determine whether any of the following aggravating circumstances exists:

Whether the defendant used his position of trust to facilitate the commission of the crime.

CP 94.

Instruction No. 4: A defendant uses a position of trust to facilitate a crime when the defendant gains access to the victim of the offense because of the trust relationship. In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant's relationship to the victim, and the vulnerability of the victim because of age or other circumstance.

CP 95.

Instruction No. 5: The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find the existence of an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

The defendant has no burden of proving that a reasonable doubt exists as to these additional facts. It is presumed that these additional facts do not exist. This presumption continues throughout this entire proceeding unless during your deliberations you find that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

CP 96.

Instruction No. 8: When you begin deliberating, you should first select a presiding juror. ...

You will also be given the exhibits admitted in evidence and a special verdict form for recording your verdict. ...

You must fill in the blank provided in the special verdict form the word "yes" or "no," according to the decision you reach.

Because this is a criminal case, all twelve of you must agree in order to answer "yes" on the special verdict form. In order to answer the special verdict form "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

If after full and fair consideration of the evidence you cannot unanimously agree the answer is "yes", then you must fill in the blank with the answer "no".

When all of you have so agreed, fill in the special verdict form to express your decision. The presiding juror must sign the special verdict form and notify the bailiff. The bailiff will bring you into court to declare your verdict.

CP 99–100.

The jury was given a single Verdict Form, which provided as follows:

We, the jury, are aware that the defendant was previously found guilty of one count of Child Molestation in the First Degree and three counts of Rape of a Child in the First Degree [and] return a special verdict by answering as follows:

QUESTION 1:

Did the defendant use his position of trust to facilitate the commission of the crime?

ANSWER: _____ (Write "yes" or "no")

CP 102 (bracketed language added). The jury answered the question “yes”. CP 102.

The trial court followed the State’s recommendations. RP 434–35, 445. It resentenced Mr. Mann to 198 months (high end of the standard range) on Count I—first degree child molestation, and to exceptional sentences of 478 months (high end of 318 months plus 160 months) on each of Counts II, III and IV—first degree rape of a child, with the sentences on all counts to be served concurrently. RP 445; CP 109.

The court entered written Findings and Conclusions for Exceptional Sentence. CP 145–47. With some additions and deletions, the document roughly tracks the Findings and Conclusions for Exceptional Sentence entered by Judge Neal Q. Rielly after the original sentencing in 2004. *See* CP 143–44. The present court made the following findings of fact and conclusions of law:

FINDINGS

1. The defendant was [previously] convicted of Child Molestation in the First Degree and three counts of Rape of a Chile in the First Degree.

2. The defendant's offender score is 12.
3. On April 14th, 2011, the jury found the defendant abused his position of trust in the commission of these crimes.

CONCLUSIONS OF LAW

- 4.[sic] The defendant used his position of trust to facilitate multiple sexual assaults of the victim over a considerable amount of time.
- 5.[sic] The defendant is a real danger to the community and a standard range sentence is too lenient under the facts and circumstances of this case.
- 6.[sic] The Court imposes a standard range sentence on Count I of 198 months.
- 7.[sic] The Court imposes an exceptional sentence of 478 months on Counts II–IV.
- 8.[sic] The Court increased the defendant's standard range sentence as to Counts II–IV by 160 months.
- 9.[sic] Either one of the bases found here alone would justify the exceptional sentence imposed. This Court would impose the same sentence based upon any one of the factors stated above standing alone.

CP 145–47 (bracketed language added).

As a condition of sentence, the court made the following finding:

¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The Court finds that the defendant has the present ability or likely

future ability to pay the financial obligations imposed herein.
RCW 9.94A.753.

CP 106 (capitalization/bolding original).

This appeal followed. CP 116.

C. ARGUMENT

1. Mr. Mann’s right to a unanimous jury verdict was violated where the jury did not find that the aggravating circumstance of abuse of trust existed as to any specific offense.⁴

a. Constitutional right to have a jury determine that an aggravating circumstance exists as to a specific offense. Our state constitution provides that “[t]he right of trial by jury shall remain inviolate” WA Const., art. I, § 21. Under both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict. State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913, 916 - 917 (2010). “Other than the fact of a prior conviction, any fact that increases the penalty *for a crime* beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable

⁴ Assignment of Error 5.

doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (emphasis added). In Blakely v. Washington, the Court clarified this rule, holding “that the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” 542 U.S. 296, 303, 124 S.Ct. 2531 (2004). The failure to submit a sentencing factor to a jury for a finding violates a defendant's right to a jury trial under both the federal and state constitutions. Williams-Walker, 167 Wn.2d at 897.

b. Statutory scheme requires a jury finding on each count as to which the aggravating circumstance is alleged.⁵ Unambiguous statutes are not subject to the rules of statutory construction. State v. Watson, 146 Wn.2d 947, 955, 51 P.3d 66 (2002). Here, the plain language of the Sentencing Reform Act’s sentencing statutes unambiguously requires that the State prove the existence of the aggravating factor of abuse of trust as it relates to a specific count⁶ of which Mr. Mann was convicted in 2004.

Standard range sentences for a person convicted *of a felony* are governed generally by RCW 9.94A.505. An exceptional sentence may be

⁵ Assignment of Error 1. The court’s finding of fact, that the jury found the defendant abused his position of trust in the commission of “these crimes” is incorrect. The jury was simply asked if it found abuse of trust as to “the crime”.

⁶ Or counts, if the State chooses to allege its existence as to more than one count.

imposed by the court if a jury finds that a defendant used his position of trust to facilitate the commission *of the current offense*. RCW 9.94A.535(3)(n)(emphasis added). The aggravating circumstances must be proved beyond a reasonable doubt. The jury's verdict must be unanimous, and by special interrogatory. RCW 9.94A.537(3). Evidence regarding any facts supporting the allegation of "abuse of trust" shall be presented during the trial *of the alleged crime* or, as in Mr. Mann's case, to a specially impanelled jury. RCW 9.94A.537(2), (4). Only then may a court consider whether substantial and compelling reasons justify an exceptional sentence up to the statutory maximum *for the underlying conviction*. RCW 9.94A.537(6)(emphasis added).

Here, the jury was given a single Verdict Form, which provided as follows:

We, the jury, are aware that the defendant was previously found guilty of one count of Child Molestation in the First Degree and three counts of Rape of a Child in the First Degree [and] return a special verdict by answering as follows:

QUESTION 1:

Did the defendant use his position of trust to facilitate the commission of the crime?⁷

ANSWER: _____ (Write "yes" or "no")

⁷ Assignment of Error 1. See footnote 5.

CP 102 (bracketed language added). The jury answered the question “yes”. CP 102.

Thus, the jury was told there were *four* crimes of which Mr. Mann had previously been convicted: one count of first degree child molestation and three counts of first degree rape of a child. It appears from the record that the State may have intended to seek a finding of aggravating circumstance as to each of these crimes. Although the language of the above statutes is plain and unambiguous, the jury was only instructed to consider whether the aggravating factor had been proven regarding “the crime”. There is no authority for inferring that a finding as to “the crime” is instead a finding of aggravating circumstance as to any one of Mr. Mann’s crimes. *Cf.* 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.01 (3d Ed 2008) (Checklist, 3., WPIC 300.06 ... “Repeat for each count”), WPIC 300.06 (3d Ed 2008) (Note on Use: “Use a separate instruction for each count on which the State has alleged the existence of an aggravating circumstance.”), WPIC 300.52 (3d Ed 2008) (Special Verdict Form, Note on Use: “Use a separate special verdict form per count on which the state alleged the existence of an aggravating circumstance.”).

As instructed, there is no way to determine that the single verdict regarding “the crime” was a finding beyond a reasonable doubt of an

aggravating circumstance on any one count— much less on one, or more, or all counts. Mr. Mann was therefore deprived of his constitutional right to a unanimous jury verdict. An alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal. State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000). The alleged errors of law in a trial court's instructions to the jury are reviewed *de novo*. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). The exceptional sentences here are invalid, and the case must be remanded for imposition of standard range sentences. *See In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (A trial court may only impose a sentence that is authorized by statute).

2. The exceptional sentences imposed as to counts II, III and IV are illegal and unsupported by the record where the jury did not find that the aggravating circumstance of abuse of trust existed as to those counts.⁸

Sentencing is a legislative power, not a judicial power. State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. State v.

⁸ Assignment of Error 1, 5.

Mulcare, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986). Statutory construction is a question of law and reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

Here, the exceptional sentences on Counts II, III and IV were illegal or erroneous because they were not based upon a jury finding that the aggravating circumstance of abuse of trust applied to those counts. See preceding argument.

“[I]llegal or erroneous sentences may be challenged for the first time on appeal,” regardless of whether defense counsel registered a proper objection before the trial court. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004), quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). A sentence enhancement must be authorized by a valid jury verdict. Williams-Walker, 167 Wn.2d at 900. Error occurs when a trial court imposes a sentence enhancement not authorized by a valid jury

verdict. *See State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (the error in imposing a firearm enhancement where the jury found only a deadly weapon, occurred during sentencing, not in the jury's determination of guilt).

Similarly, the error here occurred not just in the use of the invalid instruction, but more importantly when the trial court imposed the exceptional sentences based upon a special verdict finding that did not comport with Blakely or RCW 9.94A.535. Thus, Mr. Mann may raise this issue for the first time on appeal because it involves the imposition of an illegal or erroneous exceptional sentence which was based upon an invalid special verdict -- itself the product of an improper jury instruction.

The instructions in the present case incorrectly allowed the jury to make a finding in violation of the right to a unanimous jury verdict, and the court erred in imposing exceptional sentences on counts II, III and IV based upon the faulty jury verdict. The remedy is to strike the exceptional sentence, not remand for a new trial. Williams-Walker, 167 Wn.2d at 899-900; Recuenco, 163 Wn.2d at 441-42.

3. The exceptional sentences imposed as to counts II, III and IV are illegal where the sentencing court found an aggravating circumstance that is not authorized by RCW 9.94A.535(2)(1)—(d) and is therefore impermissible judicial fact-finding under Blakely.⁹

The United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 301, 313–14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), caused the legislature to amend chapter 9.94A RCW to conform with Blakely's holding that the Sixth Amendment requires that a jury must determine any aggravating fact, other than prior convictions, used to impose punishment beyond the standard range. Laws of 2005, ch. 68, § 1. The revised statute separately indicates a list of aggravating factors that require a jury finding of fact, RCW 9.94A.535(3), and an *exclusive* list of factors by which trial courts can impose an aggravated exceptional sentence without a finding of fact by a jury, RCW 9.94A.535(2). In relevant part, RCW 9.94A.535 states:

(2) Aggravating Circumstances--Considered and Imposed by the Court

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

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the

⁹ Assignment of Error 5.

standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(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.

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

(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.

RCW 9.94A.535(2)(a)–(d).

Here, the trial court made two findings purportedly relevant to subsection (c), that the “defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c). First, “[t]he defendant’s offender score is 12.” CP 145 at Finding 2. While perhaps a historically correct scoring of criminal history, the finding fails to establish any reason it fits within the parameter outlined in subsection (c). As a

matter of law, the judicial “finding” is insufficient under RCW 9.94A.535(2)(c) to support an exceptional sentence based upon it.¹⁰

Second, although called a conclusion of law, the court found that “[t]he defendant is a real danger to the community and a standard range sentence is too lenient under the facts and circumstances of this case.” CP 146 at Conclusion of Law 5[sic].¹¹ The very phrases used—“is a real danger”, “is too lenient” and “under the facts and circumstances of this case”—require factual determinations that cannot be made by a judge under Blakely. Nor is the factor found in the exclusive circumstances authorizing judicial fact-finding listed in RCA 9.94A.535(2). It is also undisputed that this factor was not presented to the jury.¹²

The list of factors by which trial courts can impose an aggravated exceptional sentence without a finding of fact by a jury is exclusive. State v. Mutch, 171 Wn.2d 646, 656, 254 P.3d 803 (2011). Neither judicial

¹⁰ *Cf.*, State v. Mutch, 171 Wn.2d 646, 656, 254 P.3d 803 (2011) (The trial court’s written finding that the defendant’s high offender score will result in current offenses going unpunished justifies an exceptional sentence by satisfying RCW 9.94A.535(2)(c)).

¹¹ Assignment of Error 3. The court also found (similarly calling it a conclusion of law) that “[t]he defendant used his position of trust to facilitate multiple sexual assaults of the victim over a considerable amount of time.” CP 146, Conclusion of Law 4.[sic]. This finding appears to be a holdover from the original 2004 sentencing judge’s conclusions of law. *See* CP 144, Conclusion of Law 4. This finding clearly requires factual determinations that cannot be made by a judge under Blakely. Nor is the factor found in the exclusive circumstances authorizing judicial fact-finding listed in RCW 9.94A.535(2). The finding should be stricken. Assignment of Error 2.

¹² The factor does not appear to be listed in RCW 9.94A.535(3)(a)—(z). Since the factors listed in RCW 9.94A.535(3) are exclusive, a jury finding of the presence of this factor would likewise not support an exceptional sentence.

finding here qualifies as a circumstance under RCW 9.94A.535(2) that would justify an exceptional sentence based upon judicial fact-finding. The trial court erred in imposing an exceptional sentence on these bases.

4. Reversal of the exceptional sentences are required where there are no valid supporting factors as required by RCW 9.94A.535.¹³

Here, the court concluded that “either one of the bases found here alone would justify the exceptional sentence imposed” and stated it would impose the same sentence based upon either one. CP 147, Conclusion of Law 9.[sic]. Where, as here, the jury finding and judicial fact-finding are each invalid, no justification remains for imposition of the exceptional sentences. *See State v. Harding*, 62 Wn. App. 245, 250, 813 P.2d 1259, 1262, *rev. denied*, 118 Wn.2d 1003, 822 P.2d 287 (1991). The matter must be remanded for resentencing to a standard range.

5. Because there is no objective definition of what constitutes a “substantial and compelling reason”, the statutes governing the imposition and review of an exceptional sentence deprive Mr. Mann of due process and a meaningful review upon appeal.¹⁴

¹³ Assignment of Error 4, 5.

¹⁴ Assignment of Error 6.

The vagueness doctrine of the 14th Amendment due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "A vague law impermissibly delegates 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." Id. at 108-09. A "statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The vagueness doctrine is most concerned with ensuring the existence of minimal guidelines to govern enforcement. Kolender v. Lawson, 461 U.S. 352, 358, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983); O'Day v. King County, 109 Wn.2d 796, 810, 749 P.2d 142 (1988).

In addition to due process protections, "In criminal prosecutions the accused shall have ... the right to appeal" Const. art. I, §22; State v.

Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959). An individual also has a statutory right to appeal an exceptional sentence. RCW 9.94A.585(2). Mr. Mann asserts that because the provisions of the Sentencing Reform Act governing the imposition and appeal of an exceptional sentence are without any meaningful standard governing their application, he is deprived of due process and of his right to appeal.

a. The requirement that a sentencing court determine that substantial and compelling reasons exist to warrant an exceptional sentence is wholly subjective. Due Process requires objective guidelines to guard against arbitrary application of penal statutes. *See, Kolender*, 461 U.S. at 358. The provisions of the SRA governing the imposition of an exceptional sentence, particularly RCW 9.94A.535 and RCW 9.94A.537, as applied to Mr. Mann, lack any articulable guidelines.

With a few narrow exceptions, RCW 9.94A.537 requires the facts establishing an aggravating factor be found by a jury beyond a reasonable doubt. *See also* RCW 9.94A.535(2) (outlining aggravating factors which may be found by judge); *see also Blakely*, 542 U.S. at 302 n.5, 124 S.Ct.2531 (Sixth Amendment requires "every fact which is legally essential to the punishment must be charged in the indictment and proved

to a jury."). Where a jury has properly found an aggravating factor exists,

RCW 9.94A.535 provides in relevant part:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Prior to Blakely, an aggravating factor was legally sufficient, i.e., substantial and compelling, so long as it was not considered by the legislature in setting the standard range and differentiated the present crime from other crimes of the same category. *See State v. Grewe*, 117Wn.2d 211,216, 813 P.2d 1238 (1991). But to apply that same analytical framework post-Blakely would either be contrary to the plain language of RCW 9.94A.535 or would presuppose a judicial fact-finding in violation of the Sixth Amendment. Nonetheless, that is the analysis which RCW 9.94A.585(4) still requires. The statute still directs

... the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4).

Thus, to comply with the Sixth Amendment, the legislature has required a jury determine the facts necessary to support the exceptional sentence. RCW 9.4A.535(3). At the same time, however, the legislature has maintained the requirement that the trial court determine substantial and compelling reasons exist. Because the trial judge no longer finds the facts upon which to rest an exceptional sentence, the focus of the substantial and compelling analysis employed by the trial court and reviewed by this Court cannot be a factual one.

Prior to Blakely, the SRA listed 14 nonexclusive aggravating factors and authorized courts to rely upon nonstatutory aggravators. Former RCW 9.94A.535 (2004). Following Blakely the SRA was fundamentally altered to eliminate nonstatutory aggravating factors, and to limit the imposition of exceptional sentences above the standard range to the 35 factors specifically listed.¹⁵ RCW 9.94A.535(2) and (3). Under the former scheme, the analysis of whether there were substantial and compelling reasons existed primarily to ensure that nonstatutory factors were legally sufficient to warrant an exceptional sentence, i.e., not considered by the legislature in setting the standard range. However, in

¹⁵ Because the imposition of a sentence below the standard range does not implicate the same Sixth Amendment concerns, courts remain free to rely upon nonstatutory mitigating factors.

light of the present exclusivity of the statutory aggravating factors, that analysis is no longer meaningful, as the legislature has necessarily made that determination by including a given factor among the 35.

As yet another holdover of the pre-Blakely scheme, if the trial court imposes an exceptional sentence, the court is still required to "set forth its reasons in written findings of fact and conclusions of law." RCW 9.94A.535. Post-Blakely, it is clear the trial court cannot engage in any judicial fact-finding. Further, the trial judge cannot know what facts the jury ultimately found or relied upon in reaching its verdict. While it is apparent this statute was intended to provide the necessary appellate record (*see* RCW 9.94A.585(4) (directing reviewing court to assess the adequacy of court's stated reasons)), it is not clear now what "fact(s)" the court could find nor what conclusions the court could draw.

Thus, a trial court's determination that substantial and compelling reasons exist is no longer factual, and is no longer necessary to ensure the legal sufficiency of an aggravating factor. But the court is still required to make a finding that substantial and compelling reasons exist. Following the post-Blakely revisions to the SRA, and because of the Sixth Amendment prohibition of judicial fact-finding, there is no definable standard by which a trial court may make that finding.

Here, Mr. Mann's challenge to Judge Leveque's ruling is not premised on the fact that a different judge might have reached a different conclusion. Rather, the evil is that a different judge would use different standards, because neither the statutes nor the case law provide a standard. It is this inherent subjectivity in the determination of what the legal standard is that violates due process.

b. The trial court's determination that substantial and compelling reasons exist lacks any objective limitations and is effectively unreviewable. Having excluded the trial judge from either the factual or legal determinations required under the former statute, the present statutory scheme employed by Judge Leveque allows a judge unfettered discretion to impose an exceptional sentence once the jury returns a verdict on an aggravator. After divorcing the trial judge from either the factual or legal determination, the SRA nonetheless vests the trial judge with the sole authority to impose an exceptional sentence.

In the end, a trial judge is tasked with determining if substantial and compelling reasons exist but is barred from making either the factual or legal determinations that define that term. This Court's review is limited to determining whether the judge's stated reasons support the imposition of an exceptional sentence, but it is left with no record to

review, as the Court has no insight into the jury's deliberations. Moreover, this Court has no analytical yardstick by which to measure the correctness of the trial court's decision.

Here, the trial court did make written findings of facts and conclusions of law in support of the exceptional sentence, as required by RCW 9.94A.535. However, the court did not provide any reasons—orally or in writing— for imposing an exceptional sentence other than the fact that the jury had returned a special verdict. RP 442; CP 146. The court did not articulate how or why an exceptional sentence was consistent with the purposes of the SRA. The court offered no indication of what substantial and compelling reasons might exist. In short, the court offered no record that allows this Court to determine the correctness of the decision or that substantial and compelling reasons do in fact exist.

Under the existing substantial and compelling analysis, a jury finding beyond a reasonable doubt of a statutory aggravating factor would always constitute a substantial and compelling reason to impose an exceptional sentence. If that remains the measure either there is nothing for the judge to find, or the statute requires the judge to make a finding of the existence of an aggravating factor. The latter plainly violates the Sixth

Amendment, while the former relegates the judge's function to rubberstamping a jury finding.

In a pre-Blakely case, the Supreme Court said

... even though the sentence may be statutorily authorized, when a trial court imposes a sentence which is outside the standard range set by the Legislature, the court must find a substantial and compelling reason to justify the exceptional sentence.

In re the Personal Restraint Petition of Breedlove, 138 Wn.2d 298, 305, 979 P.2d 417 (1999). Thus, the requirement of RCW 9.94A.535 that the trial court determine there are substantial and compelling reasons must be something other than a mere recognition of the jury's finding and cannot be a judicial finding of fact establishing the aggravator[s].

Additionally, the determination that substantial compelling reasons exists cannot be reduced to a process whereby the jury finding simply grants the judge discretion to sentence as he or she wishes. First, this result fails to give effect to the independence of those two determinations. Second, the Supreme Court has reaffirmed post-Blakely that the determination that substantial and compelling reasons exist is a legal determination subject to *de novo* review as opposed to a discretionary or factual decision. See State v. Suleiman, 158 Wn.2d 280, 291 n.3, P.3d 795 (2005).

Following Blakely and the substantial revisions of the SRA, there is no longer an objective standard by which a trial or appellate court can determine whether substantial and compelling reasons exist to impose an exceptional sentence. In the absence of an objective standard governing the statute's application to Mr. Mann, the statute is unconstitutionally vague as applied to Mr. Mann.

c. This Court must reverse Mr. Mann's exceptional sentence.

Because of the absence of standards governing the imposition of Mr. Mann's sentence, and his inability to obtain any meaningful review of the imposition of the sentence, this Court must reverse the sentence imposed.

6. The finding that Mr. Mann has the current or future ability to pay legal financial obligations is not supported in the record and must be stricken from the Judgment and Sentence.¹⁶

The record does not support the trial court's judgment and sentence "finding" that Mr. Mann has the current or future ability to pay legal financial obligations (hereinafter "LFOs"). CP 106 at ¶ 2.5. The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, ___ Wn. App. ___, 267 P.3d 511, 2011 WL

¹⁶ Assignment of Error 7.

6097718, *4 (Dec. 18, 2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden’ imposed by LFOs under the clearly erroneous standard (bracketed material added) (internal citation omitted).” Bertrand, 2011 WL 6097718, *4, citing Baldwin, 63 Wn. App. at 312.

The record here does not show that the trial court took into account Mr. Mann’s financial resources and the nature of the burden of imposing LFOs. In fact, the record contains no evidence to support the trial court's finding in ¶ 2.5 that Mr. Mann has the present or future ability to pay LFOs. The finding is therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 2011 WL 6097718, *5.

D. CONCLUSION

For the reasons stated, this Court should remand the matter for resentencing to a standard range sentence and to strike the finding as to ability and means to pay legal financial obligations.

Respectfully submitted on February 23, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 23, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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