

FILED

NO. 303420

AUG 02 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Appellee

VS

JAMES STEPHEN DUVALL, JR.

Appellant

REPLY BRIEF OF APPELLANT, JAMES STEPHEN DUVALL, JR.

EWING ANDERSON, P.S.

By: 

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TABLE OF CONTENTS

	<u>Page</u>
I. LEGAL ARGUMENT	1
II. CONCLUSION	4

TABLE OF AUTHORITIES

Page

TABLE OF CASES

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531 (2004)	1,2
<i>State v. Anderson</i> , 72 Wn.App. 453, 864 P.2d 1001 (1994)	3
<i>State v. Hale</i> , 146 Wn. App. 299, 189 P.3d 829 (Div. II, 2008)	1,2,3,4

I. ARGUMENT

A. Legal Argument.

1. The Respondent Refers to Specific Facts and Evidence Purportedly Entered at Appellant's Trial Without Proper Attribution to the Record.

Respondent relies upon a hypothetical scenario to support its argument and then “generally” tries to attribute such a speculative conclusion to established case law, all without any appropriate citations to materials/transcripts before this Court.

On page 2 of Respondent's reply brief, it states:

“For example, after hearing the evidence in this case, the trial court could have found that the defendant acted with deliberate cruelty based upon the fact that that he continually beat an unconscious victim's face into the concrete; then, after walking away, returned to kick the victim while the victim lie motionless in a pool of his own blood. *See generally, Blakely v. Washington*, 542 U.S. 296; *State v. Hale*, 146 Wn.App 299.”

Respondent apparently is citing to some aspect of Appellant's criminal trial without citing to any specific portion of the trial transcript, as required by RAP 10.4(f). In fact, Respondent never ordered nor supplied to this Court a trial transcript to reference. It is improper for Respondent to introduce evidence from the trial court to this Court as supportive of its argument without following the proper appellate rules.

In addition, Respondent appears to “generally” cite to *Blakely v. Washington* and *State v. Hale* as justification for its argument that the uncited trial court evidence should be sufficient. Respondent cites to no specific parallel of facts or application of law between the present case and the cited cases. In fact, in every specific mention of *Blakely* in Respondent’s brief, it simple cites to “*Id*” as supportive justification for its argument. It appears that Respondent is stating its own interpretation of *Blakely* without stating specifically where in the case its argument is supported. Yet it asks this Court to rely upon *Blakely* and other cited cases in support of its argument. Based upon the aforementioned, Appellant would ask that the Court disregard the referred to section(s) of Respondent’s response brief for failure to follow the RAP’s and improper use of cited case law.

2. *State v. Hale*, When Read Accurately, Actually Supports Appellant’s Argument.

In *State v. Hale*, 146 Wn. App. 299, 189 P.3d 829 (Div. II, 2008), the trial court entered Findings of Facts and Conclusions of Law which the appellate court referenced:

“Here, the trial court carefully worded its findings to reiterate the jury's special verdict and avoided entering any additional findings that would have violated Hale's right to have a jury find beyond a reasonable doubt any factor used

to increase his sentence. **The trial court's findings of facts noted that the jury found Hale guilty and returned a special verdict, and recited verbatim the jury's special verdict. Then it concluded, as a matter of law, that (1) the jury found the aggravating circumstances, (2) "the facts found by the jury in the special interrogatory are substantial and compelling reasons justifying an exceptional sentence," (3) a sentence above the standard range was "in the interest of justice and [was] consistent with the purposes of the Sentencing Reform Act," and (4) the exceptional sentence was "appropriate to ensure that punishment is proportionate to the seriousness of the offense."** Clerk's Papers (CP) at 110. In addition, even before the Legislature added this enumerated aggravating circumstance, we upheld the trial court's imposition of an exceptional sentence when the defendant assaulted a law enforcement officer who was performing his or her official duties. *See, e.g., State v. Anderson*, 72 Wash.App. 453, 465–66, 864 P.2d 1001 (1994); *State v. Kidd*, 57 Wash.App. 95, 104, 786 P.2d 847 (1990). The trial court's reasons for imposing an exceptional sentence were substantial and compelling.

State v. Hale, 146 Wn. App at 308 (emphasis added). The trial court in *Hale* followed the statutory and case law requirements. It entered detailed Findings of Fact and Conclusions of Law that clearly reiterated the substantial and compelling reasons for the imposition of an exceptional sentence. *Id.*

Such was not the case here. The trial court's Findings of Facts and Conclusions of Law provide no "substantial and compelling" reasons for imposition of the exceptional sentence beyond stating that a finding of

deliberate cruelty was made by the jury and that “such a finding was appropriate.” CP 55. The trial court provides no other reasons or justifications that can even be reviewed by this Court to determine if they are “substantial and compelling.” The one sentence Conclusions of Law offered by the trial court is wholly lacking the required comprehensive, specific findings as requisite to justify the exceptional sentence, let alone withstand appellate review. As such the exceptional sentence should be reversed.

II. CONCLUSION

Respondent has failed to adhere to the rules and requirements of the RAP’s and has improperly cited and referred to established case law and support for its argument. In addition, Respondent relies upon *State v. Hale* in support of its argument yet, when read appropriately and in its entirety, the case supports Appellants arguments and assertions. As a result, Appellant again respectfully requests this Court to reverse the trial court’s imposition of an exceptional sentence against Appellant and remand the case back to the trial court for resentencing.

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RESPECTFULLY SUBMITTED this 2nd day of August, 2012.

EWING ANDERSON, P.S.

By: 

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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2012, a true and correct copy of the foregoing document was served on the following in the manner set forth herein by agreement of the parties:

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