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APRIL 11, 2013
Court of Appeals
Division III
State of Washington

NO. 31061-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN VILLEGAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON

The Honorable Craig Matheson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. VILLEGAS DID NOT AGREE OR STIPULATE TO AN EXCEPIONAL SETENCE.

The State contends Villegas "apparently concedes that the prosecutor's statement at the guilty plea hearing established a factual basis for the finding of the gang aggravating factor" but that he "did not stipulate to those facts." Brief of Respondent (BOR) at 6. The State misapprehends Villegas' arguments.

At the plea hearing, Villegas told the court he understood by pleading to the charged offense, which included the gang aggravator allegation, the State would request an exceptional sentence of a total of seven years. RP 5-6 (6/14/2012). The sole factual basis for the plea was Villegas' statement that "On May 30, 2011 I did intentionally shoot Jaime Tovar in the leg in Benton County" and that the offense included deadly weapon, firearm enhancement. CP 18-19.

At the hearing the State correctly pointed out the plea form was "not very well-drafted" regarding the gang aggravator allegation. RP 4 (6/14/2012). The State understood there was no factual basis in Villegas' Statement on Plea of Guilty to support the alleged gang aggravator. CP 12-20. The prosecutor attempted to rectify that problem by providing a factual summary. The prosecutor recited that either a member or

somebody affiliated with Villegas' gang told Villegas about an "interaction" he had with a rival gang member earlier in the evening. Villegas then "came to the scene with his gun, did find a the [sic] rival gang members, including the one that had the altercation with the guy from his own gang, and that that was the motivation of shooting the victim." RP 7-8 (6/14/2012).

Defense counsel told the court the prosecutor's understanding of the facts was different than her understanding, but that Villegas would "save that for sentencing." The court asked Villegas if he accepted the State's factual recitation for the purposes of the plea and Villegas responded "yes." RP 8(6/14/2012).

A sentencing court may impose an exceptional sentence based on an aggravating factor where the defendant expressly agrees to the sentence. See, State v. Dillon, 142 Wn. App. 269, 277, 174 P.3d 1201 (2007) (rejecting challenge to exceptional sentence because defendant made an agreed recommendation of an exceptional sentence as part of plea bargain); State v. Poston, 138 Wn. App. 898, 906-07, 158 P.3d 1286 (2007) (defendant stipulated there are substantial and compelling reasons for an exceptional sentence of 15 years); State v. Cooper, 63 Wn. App. 8, 9, 816 P.2d 734 (1991) (finding invited error where plea agreement stated the defense will agree with the state s recommendation of an exceptional

sentence). The court may also impose an exceptional sentence where the defendant stipulates to the aggravating factors and the facts constitute a legal basis for an exceptional sentence. See, State v. Ermels, 156 Wn.2d 528, 539, 131 P.3d 299 (2006) ("Ermels stipulated to the facts supporting his exceptional sentence, he stipulated that he knew or reasonably should have known that his victim was particularly vulnerable because he was lying on the ground when Ermels assaulted him, and Ermels stipulated that there was a legal basis for an exceptional sentence."); see also, RCW 9.94A.535(2)(a) (the trial court may impose an aggravated exceptional sentence without a finding of fact by a jury if the "defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the 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.").

In his opening brief, Villegas argues that absent his express agreement to an exceptional sentence or stipulation that the facts supported the basis for an exceptional sentence, the court was required to find the facts supported the aggravator beyond a reasonable doubt. Opening Brief of Appellant (BOA) at 11-13, citing State v. Suleiman, 158 Wn.2d 280, 293, 143 P.3d 795 (2006). Contrary to the State's characterization of Villegas' argument, he does not argue he disagreed

with the State's rendition of the facts, such as it was, but that under Suleiman his agreement was not a legally required stipulation that would allow the court to impose an exceptional sentence based on the alleged gang aggravator without making factual conclusions. State v. Suleiman, 158 Wn.2d at 295 (citing Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)).

The State further claims Villegas "incorrectly" cites Suleiman. BOR at 7.[1] The State contends Villegas' case is different because the "without stipulating that those facts are a legal basis for an exceptional sentence" language that was in Suleiman's plea form is not in Villegas' Statement on Plea of Guilty plea form. BOR at 7. That is a distinction without a difference.

Suleiman pleaded guilty to three counts of vehicular assault. In the plea form Suleiman stipulated to the "real and material facts as written in the certification for determination of probable cause and the prosecutor's summary *without stipulating that those facts are a legal basis for an exceptional sentence*." Suleiman, 158 Wn.2d at 285 (emphasis original). The plea form stated the prosecutor planned to recommend a 36 month exceptional sentence. The trial court imposed an exceptional sentence

[1] What the State apparently means is that Suleiman is distinguishable not that Villegas incorrectly cites the case.

based in part that Suleiman knew or should have known that the victim was particularly vulnerable. Id. at 286.

The Suleiman Court reversed the sentence. It reasoned that to justify the exceptional sentence Suleiman had to stipulate that he knew or should have known of the victim's particular vulnerability, and that vulnerability was a substantial factor in the crime. He did not stipulate to these facts. The court noted that although the documents in the certification for probable cause and the prosecutor's summary imply that he knew or should have known victim was particularly vulnerable, they do not say so specifically. Without the required stipulation the sentencing court engaged in prohibited fact-finding. Suleiman, 158 Wn.2d at 292-23.

Villegas agreed to the State's rendition of the "facts" just as Suleiman stipulated to the facts in the certification of probable cause and prosecutor's summary. He did not agree or stipulate the crime was committed "with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang...its reputation, influence or membership." RCW 9.94A.535(3)(aa). While Villegas' plea form does not have a statement affirming he is not stipulating the facts are legal basis for an exceptional sentence, the record shows Villegas did not expressly agree to an exceptional sentence, he did not agree that the facts supported a legal basis for an exceptional sentence,

and he did not agree that justice would be served by the imposition of an exceptional sentence. Thus, as in Suleiman, the court's finding of the gang aggravator[2] and its imposition of the exceptional sentence was the result of prohibited fact-finding. State v. Suleiman, 158 Wn.2d at 295 (citing Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)).

2. UNDER THE CONDITIONS IN THE PLEA FORM A SEPARATE JURY WAIVER WAS REQUIRED BEFORE THE JUDGE COULD ENGAGE IN FACT-FINDING TO DETERMINE IF THE STATE HAD PROVEN THE ALLEGED AGGRAVATOR.

The State contends Villegas' argument -- that he did not waive his right to a jury to determine the aggravating factor beyond a reasonable doubt -- is contradicted by the facts. BOR at 8. According to the State, those "facts" are that Villegas does not also claim "he did not waive his right to a jury on the firearm allegation/enhancement," and that the "guilty plea did not separate the crime from the gang aggravator." Id.

The State, however, fails to mention the conditions in the Statement of Defendant on Plea of Guilty plea form under which an exceptional sentence could be imposed:

> (ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more

[2] CP 21 (box finding gang aggravator checked).

> than one crime and I have an offender score of more than nine
>
> (iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.
>
> (iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

BOA at 3; CP 15.

There is no sign any of these conditions were met. Subsection (ii) does not apply because Villegas' offender score was 0. CP 13. Subsection (iii), and that part of Subsection (iv) ("by stipulated facts") do not apply, because, as discussed above, Villegas did not stipulate justice would be best served by an exceptional sentence or stipulate the facts justified an exceptional sentence.

Under Subsection (iv) Villegas did acknowledge he was on notice the State would seek an exceptional sentence based on facts proven by a "reasonable doubt to a unanimous jury" and that the judge could impose an exceptional sentence <u>if</u> he waived a jury. Because the Statement on Plea of Guilty contains a waiver of the right to a jury, CP 12, its additional

language, that a judge can impose an exceptional sentence "if I waive a jury," should be interpreted to mean there must be a specific waiver of the right to a jury for the purpose of determining whether the facts support an exceptional sentence apart from the waiver of a right to a jury trial for the underlying crime. See, BOA at 15-16 (the general waiver of the right to a jury trial in the plea form refers to the crime and not an exceptional sentence). If the form's general jury waiver was sufficient to also waive a jury for the purpose of determining an aggravating factor the "to a judge if I waive a jury" language would be unnecessary. Cf. State v. Steele, 134 Wn. App. 844, 142 P.3d 649, review denied, 159 Wn. 2d 1007, 149 P.3d 378 (2006) (where court identified the facts that show a valid waiver of the right to have a jury decide the aggravator).[3] Moreover, there is a separate stipulation to the firearm enhancement that Villegas expressly acknowledged that specifically informed him the enhancement was included as part of his plea. CP 18. The State's "facts" that show Villegas

[3] "Steele's Statement is sufficient to show waiver. As we have noted, Steele: (1) waived his right to a jury; (2) acknowledged that the court could impose a sentence outside the standard range; and (3) expressed his desire to take advantage of the plea agreement. In the plea agreement, which was incorporated by reference in his Statement, Steele stipulated to the existence of the aggravating factors. Along with the plea agreement, the State included detailed findings of fact and conclusions of law that the sentencing court would enter if it did not grant SSOSA, but instead imposed an exceptional sentence. And Steele's counsel acknowledged, both at the time of plea and at sentencing, that grounds for an exceptional sentence existed. Thus, Steele's plea agreement cannot be separated from his statement, and his waiver of a jury was effective as to sentencing as well." Steele, 134 Wn. App. at 851.

waived his right to have a jury determine whether the facts support an exceptional sentence do no such thing.

3. THE COURT FAILED TO FIND THE AGGRAVATOR BEYOND A REASONABLE DOUBT.

Under RCW 9.94A.537 "If a jury is waived, proof [of the facts supporting the exceptional sentence] shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts." Villegas argued that if it is found he waived his right to a jury for purposes of determining whether the facts justified an exceptional sentence the judge failed to make the required factual findings to support the sentence. BOA at 16-18. The State responds by citing to the sentencing judge's statements at the sentencing hearing and referring to those statements as "extensive findings." BOR at 10-11. Those statements are legally inadequate.

"Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535. "An exceptional sentence may be imposed only where the trial court finds substantial and compelling reasons, set forth in written findings and conclusions, which support an exceptional sentence." State v. Gore, 143 Wn.2d 288, 315, 21 P.3d 262 (2001), *overruled on other grounds by* State

v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). A trial court imposing an exceptional sentence has an independent statutory duty to make findings that show the sentence imposed is consistent with the goals of the Sentencing Reform Act (SRA). In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 300, 979 P.2d 417 (1999).

The court indicated it was not required to make any independent findings that the facts proved beyond a reasonable doubt the gang aggravator because it erroneously believed it was unnecessary given Villegas' plea. RP 35, 37 (7/12/2012). Nowhere in its statements does the sentencing court find beyond a reasonable doubt that the gang aggravator was proven, that there were substantial and compelling reasons to support the exceptional sentence or that the sentence is consistent with the goals of the SRA. In sum the sentencing court's statements are legally insufficient to justify an exceptional sentence based on the alleged gang aggravator.

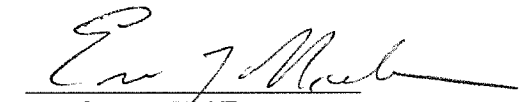
B. CONCLUSION

This Court should reverse Villegas' exceptional sentence and remand for a sentence within the standard range.

DATED this 11 day of April, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 11th day of April, 2013, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 11th day of April, 2013.

x Patrick Mayovsky