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JAN 31, 2014

Court of Appeals
Division III
State of Washington

31999-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANNY S. HERRON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to follow the statutes governing imposition of a sentence outside the standard range.
2. The court erred in imposing a minimum sentence above the standard range based on a reason for which there is no factual support in the record.

B. ISSUES

1. The sentencing judge disregarded statutory provisions requiring notice of intent to seek a sentence above the standard range, jury determination of facts relied upon to support an exceptional sentence, and written findings as to the sufficiency of the factor relied upon to justify the exceptional sentence. Did the court err in nevertheless imposing a minimum sentence above the standard range?
2. The court imposed an exceptional sentence based on its determination that the defendant abused a position of trust by engaging in intercourse with his adult daughter. Evidence established that the defendant had no contact with the daughter between the time she was an infant and the time she voluntarily came to live with him as an adult.

Was imposition of the exceptional sentence clearly erroneous?

C. STATEMENT OF THE CASE

Danny Herron pleaded guilty to Second Degree Possession Of Depictions Of A Minor Engaged In Sexually Explicit Conduct and First Degree Incest. (CP 11; RP 6). The State agreed to dismiss three additional depiction charges. (CP 8, 44) At the plea hearing, the court advised Mr. Herron of the penalties for these offenses:

Sir, it's the Court's understanding your score going in as to both counts would be a six, so standard range as to Count Four would be 32 to 43 months, five years -- community custody is actually five years, and the maximum term and fine is five years and/or \$10,000. And then Count Five, again, the score being a six going in, would be 46 to 61 months and/or up to 10 years, community custody 10 years. The maximum term and fine is 10 years and/or \$20,000. Sir, are you aware of those standard range punishments provided for by Washington law?

(RP 4; see CP 6)

In addition, there will be a community custody period for the statutory maximum on each case, due to the defendant's prior conviction for, I believe it's first-degree child molestation. These fall under the provisions of 9.94A.507. So that is why there is a maximum on each, as well as a minimum within the standard range, and then the community custody.

(RP 7)

The guilty plea statement included the following provision:

(h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:

(i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.

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

(CP 8-9)

At sentencing, a Ms. Stephanie Widhalm with Partners with Families and Children read a letter written by the defendant's daughter, who was the victim of the alleged incest charge:

When I moved to Spokane and had no place to stay, you offered to help me, yet you only managed to turn my life into a living hell. You forced me to kiss you every day before I was allowed to leave for work.

...

When we were in the car wreck in November and my back was injured, you insisted on rubbing my back, and it turned into a sexual act. I wanted treatment for my back from a doctor, not you.

(RP 18)

According to the Pre-Sentence Investigation report, Mr. Herron's daughter told an investigating officer "that she did not know her father while growing up. She said in July 2012 she has reunited with him when she was moving to Spokane. Mr. Herron and his wife Connie had agreed to allow her to live with them" (CP 22) She explained that she remained in his home "because she was afraid her father would kick her out" (CP 22-23) The report also states: "Lisa was raised by her paternal uncle after both Mr. Herron and [her mother] Carlene relinquished parental rights. Until 2010 when she contacted him he had not had a relationship or contact with her since she was a small baby."

(CP 29)

The court imposed a sentence consisting of the statutory maximum for each offense: "As to Count Four, I'm going to impose 60 months. Count Five, again, being mindful of 94A.507, the Court is going to impose 120 months." (RP 41; see CP 45)

The court explained its decision to impose a sentence outside the standard range:

. . . when counsel sometimes ask to go outside the standard range, they'll reference a position of trust. But it doesn't have to be under those circumstances. But, you know, minor or not, 19 or not, this is a person that is in an absolute position of trust, relative to you, who you referenced in the discussion with the CCO as a blood family member. Well, it's your daughter. A complete situation of trust that's present. And that situation of trust, Mr. Herron, was just stunningly breached by you, completely breached.

(RP 36-37)

And I look back at your 1999 conviction, and it's just clear to me, Mr. Herron, that we're really dealing with a variety of the same issues now that we were dealing with in terms of you 14 years ago. And there's just no excuse, Mr. Herron. Perhaps you don't share my belief or perhaps you didn't share it before. But my personal opinion is, in a civilized society, sir, there is no excuse, no possible excuse for child pornography. It totally victimizes children, and children are our most precious resource.

(RP 37)

Defense counsel objected to the imposition of an exceptional sentence and the court explained: "Counsel, maybe you disagree with me. I'm not even sure what *Blakely* says to us anymore. So I'm going to leave it where it stands, Counsel, but -- and I don't think it's an exceptional sentence under my determination this morning." (RP 44)

D. ARGUMENT

It appears from this record that, despite substantial amendment of the sentencing statutes since the decision in *Blakely v. Washington*, 542 U.S. 296, 306-7, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the trial court believed the imposition of a sentence under RCW 9.94A.507 is still governed by the pre-*Blakely* sentencing statutes.¹ Mr. Herron does not allege violation of his constitutional rights pursuant to *Blakely*. The issues in this appeal relate solely to whether the sentence was authorized by statute.

Whether the sentencing court has exceeded its statutory authority under the Sentencing Reform Act of 1981, chapter 9.94A RCW (SRA), is an issue of law. *In re W.*, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005) citing *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

When an offender is convicted of a sex offense and has a prior conviction for a most serious offense, the legislature has authorized imposition of a sentence consisting of a maximum term equal to the statutory maximum term and a minimum term “within the standard range for the current offense, or *outside the standard sentence range pursuant to RCW 9.94A.535*” RCW 9.94A.505(2)(a)(ix) (emphasis added); *see*

¹ The decision in *State v. Clarke*, 156 Wn.2d 880, 891, 134 P.3d 188 (2006) may have contributed to the court’s confusion. *Clarke* was decided before the enactment of the current relevant statutes.

RCW 9.94A.507(1)(b) and (3)(c)(i); Mr. Herron has a prior conviction for second degree child molestation, which is a most serious offense. RCWA 9.94A.030(32)(d). His sentence is, accordingly, governed by the provisions of RCW 9.94A.507.

It is undisputed that the standard range for Mr. Herron's possession of depictions conviction is 32 to 43 months, and for the incest conviction 46-61 months, with maximum terms of five and 10 years, respectively. The court imposed minimum terms of five and ten years, both outside the standard range. Thus, the minimum terms imposed by the court were outside the standard range and could only be imposed pursuant to the provisions of RCW 9.94A.535.

1. THE COURT FAILED TO FOLLOW THE PROCEDURAL REQUIREMENTS OF 9.94A RCW GOVERNING THE IMPOSITION OF A SENTENCE OUTSIDE THE STANDARD RANGE.

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.

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.

A sentence outside the standard sentence range shall be a determinate sentence.

RCW 9.94A.535.

Facts relied upon to justify a sentence above the standard range must be determined according to the provisions of RCW 9.94A.537. RCW 9.94A.535; *see* RCW 9.94A.530(3).

RCW 9.94A.537(1) requires notice to a defendant, prior to entering a guilty plea, if the State intends to seek a sentence above the standard range. Although enacted in light of constitutional concerns, the notice requirement is now required by statute. *See State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012). The statute does not authorize the court to *sua sponte* consider an exceptional sentence.

The State did not give notice of intent to seek a sentence above the standard range. Indeed, at the time Mr. Herron entered his guilty pleas, the prosecuting attorney told the court the State was seeking a standard range sentence. (RP 7) In imposing an exceptional sentence, of which Mr. Heron had received no notice, the court violated this provision of RCW 9.94A.537(1).

More significantly, the court failed to follow the prescription of RCW 9.94A.537(3) governing the determination of facts relied upon to

support a sentence above the standard range:

The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. 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 beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

RCWA 9.94A.537(3). Where a defendant pleads guilty, the legislature intends for the trial court to impanel a jury to determine the existence of aggravating circumstances. *State v. Pillatos*, 159 Wn.2d 459, 477, 150 P.3d 1130 (2007).

Obviously, no jury considered any evidence tending to prove beyond a reasonable doubt any aggravating sentencing factors. Nor is there any suggestion anywhere in the record that would support a determination that Mr. Herron waived his statutory right to have a jury consider whether the facts supported any aggravating circumstances.

Finally, RCW 9.94A.535 requires the sentencing court to set forth the reasons for its decision in written findings of fact and conclusions of law. No written findings have been entered.

No statutory provisions authorize the procedure followed by the sentencing court in this case. The court exceeded its authority in imposing a minimum sentence significantly greater than the high end of the standard range. The sentence must be vacated.

2. THE COURT’S REASON FOR IMPOSING AN EXCEPTIONAL SENTENCE IS NOT SUPPORTED BY THE RECORD.

(4) To reverse a sentence which is outside the standard sentence range, 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.

RCWA 9.94A.585.

The court’s oral decision indicates the court imposed an exceptional sentence based on what it perceived to be evidence of an abuse of trust:

But, you know, minor or not, 19 or not, this is a person that is in an absolute position of trust, relative to you, who you referenced in the discussion with the CCO as a blood family member. Well, it’s your daughter. A complete situation of trust that’s present. And that situation of trust, Mr. Herron, was just stunningly breached by you, completely breached.

(RP 36-37)

“To establish the abuse of trust aggravating factor, the State must prove that the ‘defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.’” RCW 9.94A.535(3)(n). *State v. Tewee*, 176 Wn. App. 964, 971, 309 P.3d 791 (2013). “The duration and degree of the relationship is a factor in deciding whether abuse of a position of trust is present.

State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991). For example, “a parent who has abandoned a child for 5 years may not be in a position of trust or authority when the parent reappears in the child’s life.” *State v. Collins*, 69 Wn. App. 110, 116, 847 P.2d 528 (1993)

The only evidence in the record that would support finding an abuse of a trust relationship is the fact that the victim was the defendant’s daughter. But both the victim’s written statement and information provided in the PSI report establish that until she initiated contact and came to live with her father in 2012, Mr. Herron had had no contact with her since she was an infant. This record would not support a finding that Mr. Herron abused a position of trust in committing incest. The court does not cite any recognizable factor as justification for imposing an exceptional sentence for possessing a depiction of a minor.

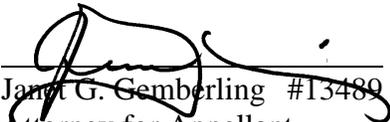
The reason supplied by the sentencing court is not supported by the record that was before the judge. *See* RCW 9.94A.585.

E. CONCLUSION

The sentence was imposed without regard for the required statutory procedures, and based on a reason for which there is insufficient support in the record. The sentence should be vacated and the matter remanded for imposition of a standard range sentence.

Dated this 31st day of January, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 31999-7-III
)	
vs.)	CERTIFICATE
)	OF MAILING
DANNY S. HERRON,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on January 31, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey
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I certify under penalty of perjury under the laws of the State of Washington that on January 31, 2014, I mailed a copy of the Appellant's Brief in this matter to:

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