

No. 78166-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

BRIAN ZANE WOMAC, Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

Court of Appeals No. 31557-2-II
Appealed from the Superior Court for Pierce County
Superior Court Cause No. 02-1-05575-5

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I. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred when it held that the trial court is not required to vacate convictions that constitute double jeopardy.
2. Whether, in light of *Washington v. Recuenco*, __ U.S. __, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006), the Court of Appeals properly remanded for re-sentencing within the standard range.

II. STATEMENT OF THE CASE

Petitioner has set forth the facts of this case in his Petition for Review, pages one through four, and hereby incorporates this by reference.

III. ARGUMENT

ISSUE 1: THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE TRIAL COURT IS NOT REQUIRED TO VACATE CONVICTIONS THAT CONSTITUTE DOUBLE JEOPARDY.

This issue is briefed in full in Womac's petition for review and is hereby incorporated by reference.

ISSUE 2: UNDER STATE V. RECUENCO, THE COURT MUST UNDERTAKE A HARMLESS ERROR ANALYSIS, AND SHOULD DETERMINE THAT THE ERROR IN THIS CASE IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Womac was given an exceptional sentence for his conviction for homicide by abuse based on two factors: particular vulnerability of the victim due to extreme youth and abuse of a position of trust. CP 30, 43. These were additional factual findings not made by the jury, but found by the judge as dictated by the sentencing law. In his appeal, Womac argued, and the Court of Appeals held, that under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the trial court erred by basing an exceptional sentence based on facts not found by the jury. Opinion at 7.

Following *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), the Court held that “a *Blakely* error cannot be harmless and requires remand for re-sentencing within the standard range.” Opinion at 7. Accordingly, the Court vacated the exceptional sentence and remanded for re-sentencing within the standard range. Opinion at 7.

In this court’s order granting Womac’s petition for review as to the double jeopardy issue, the Court ordered, *sue sponte*, that the parties address how the recent case of *Washington v. Recuenco*, ___ U.S. ___, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006), impacts the Court of Appeals’

decision remanding this case with the order to impose a standard range sentence.

In *Washington v. Recuenco*, the U.S. Supreme Court abrogated *State v. Hughes*, holding that *Blakely* errors are not structural errors and are subject to harmless error analysis. 126 S.Ct. at 2553. However, the Court specifically declined to decide if the error was actually harmless, holding that this was a factual decision to be decided on a case-by-case basis. 126 S.Ct. at 2550. Therefore, under *Recuenco*, it was error for the Court of Appeals to reverse the exceptional sentence without first conducting a harmless error analysis.

In order to find a constitutional error harmless, the court must find beyond a reasonable doubt that the result would have been the same absent the error. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In other words, the Court must find here that the sentence would have been the same if the judge had not made the factual findings.

Because state law does not and did not provide for a jury to be empanelled to make the factual findings necessary to support the exceptional sentence in this case, the error cannot be said to be harmless beyond a reasonable doubt.

1. *At the time of sentencing in this case, the law did not permit the jury to decide the facts necessary to an exceptional sentence.*

Former RCW 9.94A.535, in effect at the time of sentencing in this case, specifically provided that an exceptional sentence could be imposed only when the trial court makes the necessary factual findings (unless the parties stipulate to the facts). *See State v. Hughes*, 154 Wn.2d 118, 149. No procedure existed at that time that would allow juries “to be convened for the purpose of deciding aggravating factors either after conviction or on remand after an appeal.” *Id.*

Although *Recuenco* abrogated the holding in *Hughes* that *Blakely* errors are structural and therefore not subject to harmless error, the Court specifically declined to consider whether it was a legal impossibility for the jury to be impaneled to decide facts related to an exceptional sentence.

The Court stated that:

If respondent is correct that Washington law does not provide for a procedure by which this jury could have made a finding pertaining to his possession of a firearm, that merely suggests that respondent will be able to demonstrate that the *Blakely* violation *in this particular case* was not harmless.

Recuenco, 126 S.Ct. at 2550. Therefore, applying *Recuenco* to this case does not change the result. It was not possible for the jury to decide the

facts necessary to an exceptional sentence and therefore it cannot be said that the error in this case was harmless beyond a reasonable doubt.

2. *The new sentencing provisions became effective on April 15, 2005, and therefore do not apply to this case.*

Following the *Blakely* decision, the Washington legislature changed the sentencing section of the SRA in an attempt to bring the exceptional sentencing provision in compliance with the Constitution. Laws of 2005, ch. 68; RCW 9.94A.535, .537. The Legislature accomplished this by amending the SRA to permit the entry of an exceptional sentence under the following procedure:

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) 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.

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3)(e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of

the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(4) If the court conducts a separate proceeding to determine the existence of aggravating circumstances, the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.537.

The effective date of this new provision was April 15, 2005. The law went into effect after this crime was committed (December 1, 2002) and after Womac was sentenced (March 19, 2004). *See* CP 5-11, 25-38. Therefore, it only applies to Womac if it is applied retroactively to crimes committed prior to the effective date.

As a general rule, changes to a statute apply prospectively only.

Howell v. Spokane & Inland Empire Blood Bank, 114 Wn.2d 42, 47, 785 P.2d 815 (1990). “Remedial” amendments may be applied retroactively

under certain circumstances.¹ *In re Mota*, 114 Wn.2d 465, 471, 788 P.2d 538 (1990), superseded on other grounds in *Matter of Williams*, 121 Wn.2d 655, 662, 853 P.2d 444 (1993).

Curative amendments can be applied retroactively only if they do not contravene a judicial construction of the original statute.² *State v. Jones*, 110 Wn.2d 74, 82, 750 P.2d 620 (1988); *State v. Dunaway*, 109 Wn.2d 207, 216 n. 6, 743 P.2d 1237 (1987), 749 P.2d 160 (1987) (to do so would make the Legislature a court of last resort); *Johnson v. Morris*, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976) (“Such a proposition is disturbing in that it would effectively be giving license to the legislature to overrule [the state Supreme Court], raising separation of powers problems.”).

In this case, the legislature was making a wholesale change to the defendant’s rights in the manner his sentence will be determined. The legislature declared that this statute should go into effect immediately. However, the legislature did not mandate that the statute be applied retroactively to crimes committed prior to the effective date. The very

¹ An amendment is deemed remedial and applied retroactively when it relates to practice, procedure or remedies, and does not affect substantive or vested right. *Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986).

² An amendment is “clearly curative” if it clarifies or technically corrects an ambiguous statute. Ambiguity exists when a law can reasonably be

structure of the statute, permitting only the jury that entered the verdict to be the sentencing fact-finder, indicates that the legislature did not intend for this statute to apply retroactively. Therefore, the new statute should not be applied retroactively to this case.

3. *The new sentencing provisions do not permit the a new jury to be empanelled to decide the facts necessary to an exceptional sentence in this case.*

Even if the new SRA provisions on exceptional sentences do apply retroactively to this case, RCW 9.94A.537 does not permit a new jury to be convened to make the factual findings related to an exceptional sentence. RCW 9.94A.537(1) permits an exceptional sentence only when the State has given notice of intent to seek an exceptional sentence prior to trial or entry of a guilty plea. It is too late for the State to comply with that provision in this case. Further, RCW 9.94A.537(3) provides that the evidence relating to aggravating factors should either be submitted to the jury during trial, or, under RCW 9.94A.537(4), to the same jury following trial. The law still does not authorize empanelling a new jury to make the necessary findings.

interpreted in more than one way. *Vashon Island v. Washington State Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995).

Therefore, it still cannot be said that the error in this case was harmless beyond a reasonable doubt.

IV. CONCLUSION

Under *Recuenco*, harmless error analysis can be applied to the *Blakely* error in this case. However, because the law did not and does not authorize empanelling a new jury to decide the facts necessary to an exceptional sentence, it cannot be said in this case that the error was harmless beyond a reasonable doubt. Therefore, the Court of Appeals was correct to reverse the exceptional sentence and remand for re-sentencing within the standard range.

In view of Womac's conviction for homicide by abuse, his convictions for second degree murder and first degree assault violated double jeopardy. The proper remedy for double jeopardy violations is that the lesser offenses must be vacated. The Court of Appeals erred by holding that conditional dismissal of the erroneous convictions satisfies the constitution. Therefore, Womac asks that the Court reverse the Court of Appeals and order the trial court to vacate his convictions for second degree murder and first degree assault.

DATED: October 5th, 2006

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CERTIFICATE OF SERVICE

I certify that on the 5th day of October 2006, I caused a true and correct copy of this Supplemental Brief of Petitioner to be served on the following via prepaid first class mail:

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