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COA No. 52447-0-1
Supreme Court No. 77893-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ROBINSON,

Appellant.

2007 MAR - 8 PM 4:43
COURT OF APPEALS
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer

SUPPLEMENTAL BRIEF OF APPELLANT ON REMAND

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A. ARGUMENT ON REMAND

1. HARMLESS ERROR ANALYSIS IS IMPOSSIBLE WHERE IT INVOLVES AN INQUIRY THAT CANNOT TAKE PLACE UNDER STATE LAW.

On remand, the State of Washington argues that Mr.

Robinson's case is subject to "harmless error" analysis on remand under authority of Recuenco v. Washington, 548 U.S. ____, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). Supplemental Brief of Respondent on Remand, at p. 5. Arguing that errors under Blakely v. Washington, 542 U.S. 296, 124 U.S. 2531, 159 L. Ed. 2d 403 (2004), can be harmless beyond a reasonable doubt, the State contends that in Mr. Robinson's case there was uncontroverted "evidence" such that the "verdict" would have been the same even had the error not occurred. Supplemental Brief of Respondent on Remand, at pp. 7-8. However, State law makes Recuenco largely irrelevant.

Recuenco's holding is narrow: Failing to submit a sentencing factor to a jury, which is no different than failing to submit any other element to the jury, is not structural error. Stated conversely, some Blakely errors can be harmless as a matter of federal constitutional law.

What Recuenco did not, and could not, reach is whether

such an error is or can ever be harmless based on state law.

Recuenco, 126 S. Ct. at 2551 (“Thus, we need not resolve this open question of Washington law.”); Id. at 2551 n.1 (“Respondent’s argument that, as a matter of state law, the Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), error was not harmless remains open to him on remand”).

Importantly, in the first place, the doctrine of harmless error applies where, in a jury trial, the trial court fails to instruct the jury on an element of the offense charged, but where the reviewing court can conclude beyond a reasonable doubt that the evidence adduced at trial would have resulted in the defendant’s jury finding that element proved beyond a reasonable doubt: State v. Linehan, 147 Wn.2d 638, 653-54, 56 P.3d 542 (2002) (stating that a jury instruction that relieves the State of its burden to prove all of the elements of the crime is harmless only if the appellate court is convinced beyond a reasonable doubt that the jury would have reached the same result absent the error). Mr. Robinson’s case did not involve a jury trial and the State has provided no authority stating how, if at all, the doctrine of harmless error can be applied to circumstances of a guilty plea.

Specifically, when applied to an element omitted from, or

misstated in, a jury instruction, the constitutional harmless error doctrine will save the jury verdict of guilty only where that element was supported by uncontroverted evidence that was actually produced at the actual trial to the jury in question. State v. Brown, 147 Wn.2d 330, 341, 344, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). It makes little sense to speculate as to what the defendant's "jury" would have decided, or whether "uncontroverted" evidence supported the elements upon which that jury was not instructed, when there was no jury, and where the evidence on which the State now relies are admissions by the defendant that would by definition not have been made, or gone uncontroverted, in an actual jury trial

Furthermore, it would have violated state law to submit aggravating factors to the jury to be determined beyond a reasonable doubt at the time of Mr. Robinson's trial. The harmless error question posed in Recuenco -- whether, if properly instructed, "a jury" would have found the requisite aggravating factors beyond a reasonable doubt -- could not have been answered in practice, even if harmless error doctrine applies to guilty pleas. When Mr. Robinson was convicted, it would have violated state law to submit

the question of aggravating factors to the jury. The question of harmless error does not arise here because there simply was no procedure under which aggravating factors could have been constitutionally submitted to a jury for its determination beyond a reasonable doubt in the first place. This Court of Appeals cannot utilize harmless error review to sustain a sentence by imagining what would have happened in a previous proceeding that would have been illegal in the first place. Even if Blakely errors may be harmless under other circumstances, they cannot be harmless here.

It follows from the Supreme Court's holding in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), that the logic that precluded remand for re-sentencing under a judicially substituted regime also precludes the appellate courts from speculating as to what a jury might have done in Mr. Robinson's case. Not only was there no jury in Mr. Robinson's case, but even had there been, it would not have been permitted to decide the question of aggravating factors. Therefore to indulge the fiction that such a procedure existed, much less what the result of such a hearing would have been, would be to "create such a procedure out of whole cloth [and] usurp the power of the legislature." See Hughes, 154 Wn.2d at 151-52.

2. MR. ROBINSON'S "REAL FACTS" STIPULATION DOES NOT CONTAIN THE FACTS NECESSARY TO DETERMINE WHETHER THE AGGRAVATING FACTORS WERE SATISFIED.

The "real facts" stipulation in the present case contains no evidence of a yardstick to show what the "typical" injuries or impact of the offenses charged against Mr. Robinson normally are, and a theoretical jury's determination of these aggravating factors would necessarily require such evidence. The trial court's findings and conclusions list the following aggravating factors in support of the sentence as follows:

1. The facts are far more egregious than the typical vehicular assault under the driving under the influence prong.
2. The victims were all particularly vulnerable and the defendant knew or should have know of that vulnerability.
3. The lack of liability insurance makes the financial consequences of the vehicular assault significantly greater for the victim.
4. The effects of Zachery Moss's injury is significantly more serious than in the usual vehicular assault, even if the injury is viewed under the "serious bodily injury" level.
5. The increased mental anguish and psychological harm suffered by the three children and their mother in witnessing their family being hurt is a substantial and compelling factor distinguishing this vehicular assault from other vehicular assaults.

CP 69-70. The argument offered by the Respondent is that the defendant's "jury" could do but one thing when faced with the real

facts stipulation in this case, i.e., could only find that these aggravating factors were proved beyond a reasonable doubt. Supplemental Brief of Respondent on Remand, at pp. 7-8.

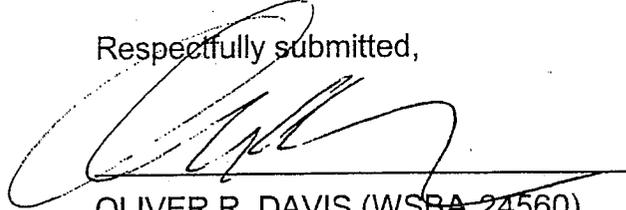
However, in discussing the former exceptional sentence statutes, the Washington courts noted that the judicial process of determining whether aggravating factors in support of an exceptional sentence were satisfied involved a process of comparison to the typical offenses of their kind. The standard to be satisfied in any exceptional sentence case was whether the defendant's conduct was more egregious than typical. See, e.g., State v. Perez, 69 Wn. App. 133, 138, 847 P.2d 532, review denied, 122 Wn.2d 1015 (1993). Yet none of the facts set forth in the Real Facts stipulation describe the typical harm, injuries or impact that normally occurs in vehicular assault cases. Even if the Real Facts stipulation can be considered as evidence before a theoretical jury, there is no evidence, much less uncontroverted evidence, that any of the factors was established.

B. CONCLUSION

Mr. Robinson asks this Court to reverse his exceptional sentences and remand for standard range sentences.

DATED this 8 day of March, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "O. R. Davis", is written over a horizontal line.

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DIVISION ONE

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 52447-0-1
)	SUPREME COURT NO. 77893-1
v.)	
)	
WILLIAM ROBINSON,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 8TH DAY OF MARCH, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT ON REMAND** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF MARCH, 2007.

X _____
Carle

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