

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ROBINSON,

Petitioner.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE PRESENTED ON REVIEW

The trial court imposed exceptional sentences in violation of Blakely v. Washington, 542 U.S. 296, 124 U.S. 2531, 159 L. Ed. 2d 403 (2004), and Mr. Robinson sought review, alleging this to be error. This Court agreed, thus granting the petition, and remanded to the Court of Appeals. The Court of Appeals applied harmless error analysis to the Blakely violation and affirmed the sentences.

Can harmless error analysis apply to the Blakely violation of Mr. Robinson's jury trial right in the present case, where, at the time of his sentencing, no procedure existed under the SRA (Sentencing Reform Act) or other state law whereby a jury would ever decide the existence of the aggravating factors required to impose exceptional sentences?

B. STATEMENT OF THE CASE

William Robinson entered guilty pleas to three counts vehicular assault on March 19, 2003. CP 7-30. Attached as part of the defendant's statement on plea of guilty is the document entitled, "Felony Plea Agreement." CP 27. The plea agreement contains the following language, including a stipulation in which Mr. Robinson waived his statutory right to demand a bench hearing in which sentencing facts would have to be determined by the judge under a

“preponderance of the evidence” standard pursuant to RCW

9.94A.530:

REAL FACTS OF HIGHER/MORE SERIOUS AND/OR
ADDITIONAL CRIMES: In accordance with RCW
9.94A.530, the parties have stipulated that the
following are real and material facts for purposes of
this sentencing: The facts set forth in the certification(s)
for determination of probable cause and prosecutor’s
summary as amended and attached to plea [and] The
facts set forth in Appendix C[.]”

* * *

OTHER: St. will file no other charges.

CRIMINAL HISTORY AND OFFENDER SCORE: . . .

The State makes the sentencing recommendation set
forth in the State’s sentence recommendation.

CP 27. The defendant’s plea included an acknowledgment that the State would proffer a “recommendation” that Mr. Robinson be given exceptional sentences above the standard range, of 60, 60 and 20 months on the respective counts. CP 27, 30. And in his statement of defendant on plea of guilty, the defendant acknowledges that the “prosecuting attorney will make the following recommendation to the judge: “Ct I and II 60 months Ct III 20 months,” CP 7-30 (statement of defendant, at pp. 4-5). The document entitled “State’s Sentence Recommendation” reads that the “State recommends that the defendant be sentenced to” concurrent terms of 60, 60 and 20 months incarceration on the three respective counts. CP 30. The

document also references the Court to arguments in support of the State's hoped-for exceptional sentence in the State's "Supplemental Brief." CP 30.

At sentencing, the trial court imposed exceptional sentences of 96, 60 and 60 months. CP 60-67 (judgment and sentence, filed May 5, 2003, at p. 2); CP 68-70 (findings in support of exceptional sentence, at pp. 1-2). Pursuant to his express reservation of rights in the plea agreement, the defendant appealed his exceptional sentences, arguing that they were illegal under the case of Blakely v. Washington. CP 71 (notice of appeal). The Court of Appeals disagreed, in a decision issued September 12, 2005.

Mr. Robinson sought review seeking reversal of his exceptional sentences, and on January 3, 2007, this Court remanded the case to the Court of Appeals for reconsideration in light of State v. Suleiman, 158 Wn.2d 280, 143 P.3d 795 (2006), and State v. Hagar, 158 Wn.2d 369, 144 P.3d 298 (2006).

Thereafter, on April 9, 2007, the Court of Appeals affirmed Mr. Robinson's exceptional sentences under the doctrine of "harmless error," stating,

We affirm Robinson's sentence[s], because the judicial fact-finding in violation of Blakely v. Washington was harmless error.

(Footnote to Blakely v. Washington omitted.) Court of Appeals decision of April 9, 2007, at p. 2. The Court held that if a jury trial had been held on the aggravating factors, “the same stipulated facts contained in his plea agreement would have been submitted to a jury.” Court of Appeals decision of April 9, 2007, at p. 2. The Court rejected Mr. Robinson’s argument that harmless error analysis could not apply to his case:

[A]t the time of his guilty plea, there was no procedure available in our law for a jury to try issues of aggravating factors which might justify exceptional sentences. However, harmless error analysis always involves an inquiry into the hypothetical.

Court of Appeals decision of April 9, 2007, at p. 2. Mr. Robinson filed a petition for review to this Court on May 8, 2007. Shortly thereafter, on June 14, 2007, this Court decided the case of State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), and on April 3, 2008, this Court decided In re Pers. Restraint of Hall, No. 75800-0 (2008 Wash. LEXIS 265 (April 3, 2008)).

This Court accepted review.

C. SUPPLEMENTAL ARGUMENT PURSUANT TO RAP 13.7(d)

THE TRIAL COURT'S IMPOSITION OF EXCEPTIONAL SENTENCES IN VIOLATION OF MR. ROBINSON'S JURY TRIAL RIGHT UNDER BLAKELY V. WASHINGTON IS NOT AN ERROR THAT CAN BE DEEMED "HARMLESS" WHERE STATE LAW AT THE TIME OF HIS SENTENCING DID NOT ALLOW A JURY TO MAKE THE FINDINGS REQUIRED FOR IMPOSITION OF EXCEPTIONAL SENTENCES.

In the present case the trial court found from the bench, by a preponderance of the evidence, in the absence of any knowing waiver by Mr. Robinson of his Blakely rights to a jury determination of aggravating facts beyond a reasonable doubt, that the assaults were committed by him with the stated aggravating factual circumstances. CP 68-70. Based upon these findings the court imposed exceptional sentences. This procedure violated Mr. Robinson's Sixth Amendment jury right. Blakely v. Washington, 124 S.Ct. at 2537. After Blakely, the Sixth Amendment right to a jury trial is satisfied "only if the jury finds all the facts needed to support the sentence that the defendant actually must serve, whether or not those facts are elements of the crime." State v. Borboa, 124 Wn. App. 779, 786-87, 102 P.3d 183 (2004). As this Court necessarily held in granting Mr. Robinson's first petition, and as the Court of

Appeals held in advance of determining that the Blakely jury trial violation was harmless, this case is one of Blakely error.

Regardless of whether harmless error analysis can theoretically apply under Washington constitutional law to the failure to submit a sentencing factor to a jury, the Blakely error in the present case was not harmless because under the SRA's exceptional sentencing provisions applicable to Mr. Robinson, no procedure existed whereby some hypothetical jury could have been asked to find the aggravating circumstances. See In re Pers. Restraint of Hall, 2008 Wash. LEXIS 265, at pp. 2-3 (citing State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007)).

In Womac, this Court held that when no legal procedure existed under the SRA at the time of conviction whereby a jury could have made the findings necessary to support the imposition of an exceptional sentence, a Blakely error committed by the sentencing judge in making the factual determination necessary to support the imposition of an exceptional sentence cannot be harmless. State v. Womac, 160 Wn.2d at 663; see also State v. Vance, 142 Wn. App. 398, 406, 174 P.3d 697 (2008) (following same rule). And trial courts do not have inherent authority to impanel sentencing juries. Womac, 160 Wn.2d at 663.

At the time of Mr. Robinson's convictions, no procedure authorizing the impaneling of a jury to conduct fact-finding related to the imposition of an exceptional sentence. The Blakely error in this case was not harmless and Mr. Robinson's exceptional sentences must be reversed.

The only possible stated exception to the rule of Hall was outlined in that case as follows:

This case does not present, and we do not decide, the effect of a procedural inability to obtain a constitutionally valid jury finding when a defendant expressly waived his or her Apprendi¹ /Blakely Sixth Amendment rights, either by "stipulat[ing] to the relevant facts or consent[ing] to judicial factfinding."

Hall, 2008 Wash. LEXIS 265, at p. 8 n. 6 (citing Blakely, 542 U.S. at 310). This suggests that some exception to Womac and Hall's bar against harmless error analysis may apply in cases of such "procedural inability," if the defendant waived his jury trial right on all the facts necessary to an exceptional sentence. In essence, however, the Court's language indicates that the exception will not apply if there was no Blakely violation in the first place.

The answer to that question in this case has already been given by two Washington Courts, and that answer is that there was

¹Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

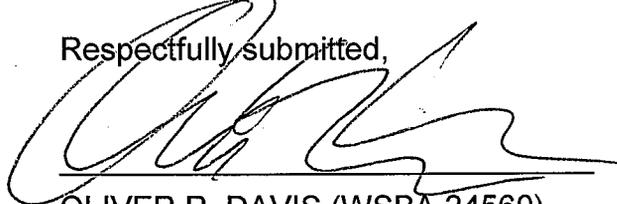
indeed Blakely error. This Court granted Mr. Robinson's petition for review alleging Blakely error. Supreme Court of Washington, Order of January 3, 2007. The Court of Appeals subsequently held that this "judicial fact-finding in violation of Blakely v. Washington," was, however, "harmless" error. Court of Appeals decision of April 9, 2007, at p. 2. Whatever the nature and requirements of the exception to Womac and Hall described in the latter case may be, it does not apply here, the Court of Appeals erred in applying harmless error analysis, and Mr. Robinson's exceptional sentences must be reversed.

D. CONCLUSION

Based on the foregoing and on his petition for review, Mr. Robinson asks this Court to reverse his exceptional sentences and remand for standard range sentences.

DATED this 11 day of April, 2008.

Respectfully submitted,



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