FILED
COURT OF APPEALS
DIVISION II

06 APR 25 PM 2:25

STATE OF WASHINGTON
BY
DEPUTY

81020-6

NO. 34053-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARK P. KILGORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Vicki Hogan, Judge

BRIEF OF APPELLANT

ORIGINAL

JAMES R. DIXON
Attorney for Appellant

Dixon & Cannon
216 First Ave. S, Suite 202
Seattle, WA 98104
(206) 957-2247

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining to Assignments of Error 2

B. STATEMENT OF FACTS 2

C. ARGUMENT 7

1. ANY POST-BLAKELY SENTENCE, WHETHER AN INITIAL SENTENCING OR A RE-SENTENCE ON REMAND, MUST COMPLY WITH THE CONSTITUTIONAL REQUIREMENTS OF BLAKELY AND HUGHES. 7

2. WITH A REDUCED OFFENDER SCORE AND FEWER CURRENT OFFENSES, APPELLANT WAS ENTITLED TO A NEW SENTENCING HEARING FOLLOWING REMAND 10

3. THE "CORRECTING" OF THE JUDGMENT AND SENTENCE FAILED TO SATISFY THE CONSTITUTIONAL REQUIRE-MENTS OF BLAKELY 16

D. CONCLUSION 18

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Advanced Silicon Materials v. Grant County
156 Wn.2d 84, 124 P.3d 294 (2005) 15

State v. Evans,
154 Wn.2d 118, 110 P.3d 192 (2005) 7, 9, 16-17

State v. Hughes,
154 Wn.2d 118, 110 P.3d 192 (2005) 4-5, 7-9

State v. Jackson,
129 Wn. App. 95, 117 P.3d 1182 (2005) 11

State v. Johnson,
61 Wn. App. 539, 811 P.2d 687 (1991) 13, 14

State v. Kilgore,
107 Wn. App. 160, 26 P.3d 308 (2001) 3

State v. Kilgore,
47 wn.2d 288, 53 P.3d 974 (2002) 4

State v. Parker,
132 Wn.2d 182, 937 P.2d 575 (1997) 11

State v. Roche,
75 Wn. App. 500, 78 P.2d 497 (1994 11

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Apprendi v. New Jersey,
530 U.S. 466, 490, 120 S. Ct. 2348,
147 L. Ed. 2d 435 (2000) 7

Blakely v. Washington,
542 U.S. 296, 124 S.Ct 2531,
195 L.Ed. 2d 403 (2004) 4, 7, 8

RULES, STATUTES AND OTHERS

U.S. Const. amend. 6 8

A. ASSIGNMENTS OF ERROR

1. The trial court erred in holding that, as a matter of law, appellant was not entitled to a new sentencing hearing following a partially successful appeal in which two convictions were reversed.

2. The trial court violated appellant's right to due process when it decided to simply "correct" the judgment and sentence without providing appellant an opportunity to argue for a new sentence based on a reduced offender score and fewer current convictions.

3. The trial court erred when it concluded that appellant's request to be sentenced under a correct offender score following remand from an appeal was a "collateral attack."

4. The court erred in finding that the judgment was final, when the trial court had not undertaken the "further proceedings" mandated by this Court after reversing two of appellant's convictions.

5. The trial court violated appellant's Sixth Amendment Right when it re-imposed an exceptional sentence based on aggravating factors that were never found by a jury.

Issues Pertaining to Assignments of Error

1. Two of appellant's convictions were reversed on appeal, lowering his offender score and reducing the number of current offenses. In reversing two of the convictions, this Court ordered the case remanded for further proceedings. Did the trial court err in refusing to hold a sentencing hearing based on Mr. Kilgore's changed status following a partially successful appeal?

2. The State acknowledged that if the appellant was entitled to a new sentencing hearing, then under Washington v. Blakely, the exceptional sentence could not stand. To avoid that result, the State asked the court to simply "correct" the judgment and sentence rather than "re-sentence" the defendant. Where the trial court seeks to modify the judgment and sentence, must the court do so in a constitutionally permissible manner?

B. STATEMENT OF FACTS

Mark Kilgore is an honorably discharged veteran of the United States Navy. He is 45 years old, and before this case, had no prior involvement with the criminal justice system. CP 31.

In 1998, Mr. Kilgore was convicted of 4 counts of child molestation and 3 counts of child rape. Supp CP ____ (judgment and sentence). He did not have any prior convictions, but because

of the multiple offense policy, his offender score for each count was 18. SRP 1559-60.[1] A sentencing hearing was held on December 1, 1998, at which time the Honorable Vicki Hogan imposed an exceptional sentence of 560 months, twice the standard range. Supp CP ____ (judgment and sentence); SRP 1583-84. The court relied upon three separate aggravating circumstances to justify the exceptional sentence—an abuse of trust, particular vulnerability, and a lack of remorse. SRP 1583-87

Mr. Kilgore challenged his convictions on appeal. This Court concluded that the trial court had abused its discretion in excluding exculpatory evidence relating to C.M., one of the complaining witnesses. State v. Kilgore, 107 Wn. App. 160, 177-82, 26 P.3d 308 (2001). Accordingly, the Court reversed one count of child rape and one count of child molestation. The Court affirmed the other convictions, and then remanded for further proceedings. *Id.* at 190.

The Washington Supreme Court accepted review to resolve an ER 404(b) issue as to the remaining convictions. The State did not cross appeal the reversal of the two convictions. The Supreme

---

[1] SRP refers to the verbatim report from the sentencing hearing held on December 1, 1998, while "RP" refers to the hearing held on October 7, 2005.

Court ultimately concluded that there was no error in the admission of ER 404(b) evidence and affirmed the remaining five convictions in an opinion dated September 12, 2002. State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002).

The case was remanded to the superior court in a Mandate issued on October 9, 2002. CP 8-21. Unfortunately, despite the fact that Mr. Kilgore now had a lower offender score and fewer convictions, the court failed to bring him back for a new sentencing hearing. The only hearing that occurred was a hearing to impose additional financial obligations on the defendant, which was held on February 7, 2003. CP 26-27.

With the State neglecting to bring Mr. Kilgore back to court for a new sentencing hearing, Mr. Kilgore retained counsel and brought a motion for a sentencing hearing.[2] Through counsel, Mr. Kilgore filed a brief on July 15, 2005 asking the court to impose a standard range sentence pursuant to Blakely v. Washington, 542 U.S. 296, 124 S.Ct 2531, 195 L.Ed2d 403 (2004) and State v.

---

[2] Mr. Kilgore was present for the first scheduled hearing in September of 2005, but that case was continued because of the court's calendar. Mr. Kilgore was sent back to prison. Through counsel he then waived his presence at the second hearing because of health issues that had arisen during his first trip back to Pierce County. RP 4-5; CP 30, 97; Supp. CP ___ (9/15/2005, copy of letter from James Dixon)

Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). CP 31 - 49. Appellant pointed out in that brief that this was not a collateral attack on the exceptional sentence, but rather a straight forward sentencing hearing required by a partially successful appeal which had resulted in a lower offender score and fewer current offenses.

The State acknowledged that if this was characterized as a sentencing hearing, then Blakely and Hughes required the court to impose a standard range sentence. CP 55. The State insisted, however, that this was not a sentencing hearing. Instead, argued the State, the trial court should simply "correct" the judgment and sentence to reflect a lower offender score and fewer current convictions. CP 53-55; RP 8-11.

The defense responded that while the reduction in current offenses may not, under normal circumstances, compel the court to change it's sentence, it does compel the court to exercise its discretion and consider changing the sentence. This means that the hearing following remand cannot be characterized as an administrative act to "correct" the judgment and sentence, but rather, as an actual sentencing hearing. CP 85-89; RP 6-8, 11.

The court disagreed, finding that Mr. Kilgore was not entitled to a sentencing hearing, and that the court would simply "correct" the judgment and sentence:

> The Defendant's case was final in October or November of 2002. I am not re-sentencing the Defendant based upon the decisions of the higher court. Rather, I am correcting the Judgment and Sentence, and that's what we need to accomplish.

RP 13. The court entered a written order, which stated in relevant part:

> 1. This case was final October 2, 2002
>
> 2. Defendant is entitled to an order correcting Judgment and Sentence, striking Counts I and II and correcting the offender score from 18 to 12 on the remaining five counts;
>
> 3. The defendant is not entitled to a new sentencing hearing;
>
> 4. All other terms and conditions of the original Judgment and Sentence shall remain in full force and effect as if set forth in full herein.

CP 101-02.

In addition to the order, the court also signed a 3-page Motion and Order Correcting Judgment and Sentence, which set forth numerous changes to the offender score and number of current offenses. CP 102-04. The order specifically incorporated by reference the terms of the earlier sentencing: "5) All other

terms and conditions of the original Judgment and Sentence shall remain in full force and effect as if set forth in full herein." CP 104

C. ARGUMENT

1. Any post-Blakely sentence, whether an initial sentencing or a sentence on remand, must comply with the constitutional requirements of Blakely and Hughes.

In Washington, four key cases dominate the landscape of sentencing jurisprudence: Apprendi v. New Jersey,[3] Blakely v. Washington,[4] State v. Hughes,[5] and State v. Evans,[6] While these seminal cases are no doubt etched into minds of judges and practitioners alike, a brief review of their holdings may be useful.

In Apprendi v. New Jersey, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. at 490.

In Blakely v. Washington, the United States Supreme Court held that this rule of Apprendi applies to the facts necessary to

---

[3] 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[4] 542 U.S. 296, 124 S.Ct 2531, 195 L.Ed.2d 403 (2004).

[5] 154 Wn.2d 118, 110 P.3d 192 (2005).

[6] 154 Wn.2d 438, 114 P.3d 627 (2005).

support an exceptional sentence under the Sentencing Reform Act. The Blakely Court further held that "[t]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." 542 U.S. at 303. In Washington, the maximum a trial court can impose without additional findings is the top of the standard range. Id. Any sentence above that standard range without the requisite jury findings violates the defendant's Sixth Amendment. Id. at 305.

State v. Hughes, the Washington Supreme Court's first post-Blakely decision, made it clear that the courts in Washington were not intending to chip away at the protection provided by that case. State v. Hughes involved a consolidated appeal with three defendants, all of whom received an exceptional sentence above the standard range. 154 Wn.2d at 126-30. Two of the aggravating factors relied upon by the lower court were the same as those relied upon in the present case, abuse of trust and particular vulnerability. Id. In reversing the exceptional sentence, the Washington Supreme Court explained, "the judge made specific findings of fact, which the jury had not found and which increased Anderson's punishment, thereby violating the express terms of

Blakely." Id. at 201. The Court in Hughes removed all doubt as to whether a trial court could impose an exceptional sentence in the absence of the requisite jury findings.

In State v. Evans, the Washington Supreme Court stemmed the potential flood of retroactive attacks on prior sentences by holding that "Blakely and Apprendi do not apply generally on collateral review." 154 Wn.2d at 637 (emphasis added). Under Evans, a trial court is required to follow the mandates of Blakely when imposing a sentence, but the courts need not go back and correct every sentence of every inmate who received an exceptional sentence. Thus, the court need not correct a sentence if it comes to the court by means of a collateral review.

Mr. Kilgore's case does not involve a collateral attack on the sentence. Following the reversal of two convictions and the remand for further proceedings, the trial court was required to re-sentence Mr. Kilgore based on his reduced offender score and fewer current offenses. The sentence must comply with the constitutional requirements of Blakely and Hughes.

In its briefing before the trial court, the State conceded that Blakley applies to sentencing hearings, and that if the court were to re-impose a sentence, it would have to impose a standard range

sentence. CP 55. The State argued, however, that because the standard range had not changed, the court should not treat this as a sentencing hearing, and should instead simply "correct" the judgment and sentence by reducing the number of current offenses and the offender score. CP 53-55; RP 8-11. The trial court accepted this reasoning. RP 13.

The State was wrong in two regards. First, as set forth below, Mr. Kilgore was entitled to be re-sentenced following the reversal of two current convictions. But even accepting the State's characterization that this was not a sentencing hearing, what occurred back in the trial court was not a collateral attack. The court modified the judgment and sentence, and in doing so, it was required to modify it in a constitutional manner. The trial court failed in this regard, and as such, the sentence must be reversed.

2. With a reduced offender score and fewer current offenses, appellant was entitled to a new sentencing hearing following remand.

The State argued there is "no practical difference" between an offender score of 18 and 12, and that the only remedy for a person in Mr. Kilgore's shoes is to ask the court to "correct" the judgment and sentence. The State's argument that the actual offender score <u>and</u> number of current offenses are irrelevant is not

supported by the law and ignores the facts in the case. As an initial matter, the court is required to have a correct understanding of the offender score at the time of sentencing. See State v. Jackson, 129 Wn. App. 95, fn 14, 117 P.3d 1182 (2005) ("A correct offender score must be calculated before a presumptive or exceptional sentence is imposed."); State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) ("It is axiomatic that a sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score.") With few exceptions, the miscalculation will result in a new sentencing hearing. State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

Even more important than the offender score, however, is the number of current offenses at the time of sentencing. Whether a particular offense from 10 years ago did or did not "wash out" may not have much of an impact on how a sentencing court views the defendant and his culpability for the current crimes. By contrast, a change in the number of crimes for which a person is being sentenced is more likely to have an impact on the court. After all, a court does not sentence a defendant for each current offense in a vacuum, disregarding the other current offenses. This does not mean that a court will necessarily always change its

sentence on remand. At the same time, it defies reason to suggest that the number of current crimes has no bearing upon the court's perception of the defendant's level of culpability. A sentencing at which the court considers crimes for which the defendant has not been convicted simply is not a fair sentencing hearing.

Indeed, looking at the facts in this particular case, it cannot be said that the offender score and the number of current offenses was of no concern to the court. At the time of the initial sentencing, there was a conflict in the offender score between the PSI and the briefs of the two parties. DOC believed the offender score was 21, while the State and defense believed it to be 18. The court specifically addressed that issue with both parties, understanding the need to establish a correct offender score before determining the appropriate sentence. *See* SRP 1559-60.

Furthermore, while the court did not specifically rely upon the multiple offense policy as one of its three aggravating factors, the sentencing transcript makes it clear that the court did consider the number of current offenses when it decided on its sentence. The court told the defendant,

> [there has been] no acceptance of responsibility for the acts which were committed, and <u>we are looking at three counts of rape of a child in the first degree, and</u>

> four counts of child molestation. Those are most serious offenses. As previously discussed, the seriousness level for these offenses is 10 and 11, and an offender score of 18.

SRP 1586 (emphasis added). The trial court was clearly bothered by the number of offenses, and it is pure speculation to say that fewer convictions and a lower offender score have no impact on a sentencing court.

It is helpful to look at one of the few cases in which the appellate court reversed a current offense and did not require a new sentencing hearing. In State v. Johnson, 61 Wn. App. 539, 811 P.2d 687 (1991), the defendant was convicted of simple possession and possession with intent to deliver, giving him an offender score of one on each offense. The court of appeals found insufficient evidence to support the possession with intent charge, reversed that conviction, and remanded for entry of a simple possession conviction. Id. at 551. The court then addressed whether it would be necessary to re-sentence on the simple possession offense. The court concluded that it would not.

As a preliminary matter, the Johnson court noted that the offender score and the standard range had not changed, even though the particular current offense had changed. More

importantly, explained the appellate court, the trial judge had already determined there were no grounds for an exceptional sentence, and that the court had imposed a sentence at the bottom end of the standard range. Thus, there was no potential gain to be realized by the defendant from another sentencing hearing, despite the change in the current offense. Id. at 551-52. As such, under these limited circumstances, even though there was a change in the current offense, it was appropriate for the trial court to simply modify the judgment and sentence, rather than holding a new sentencing hearing. Id. at 552.

The facts in our case stand in sharp contrast to those in Johnson. Here, there was an actual reduction in the offender score and the number of current offenses. More importantly, unlike the defendant in Johnson, Mr. Kilgore did not receive the bottom end of the standard range. Rather, he received an exceptional sentence after the court improperly considered two current convictions that he did not commit. The court of appeals' reasoning in Johnson highlights the need for requiring a new sentencing hearing in Mr. Kilgore's case.

It should be noted that the issue is not whether a trial judge is required to change a sentence following a partially successful

appeal in which some of the current offenses were reversed. The real issue is whether a judge has the *discretion* to change a sentence based on fewer convictions and a lower offender score. Under the State's theory, a judge simply does not have that discretion unless there is a change in the standard range. There is no sentencing hearing at which the court may exercise that discretion; instead, there is only a "correcting" of the judgment and sentence. Accordingly, even though a judge may well believe that his or her sentence is no longer appropriate in light of the lower offender score and the reduced number of current convictions under the State's theory, there is no sentencing hearing and the judge lacks the ability to impose a more appropriate sentence. The State's theory produces an absurd result, and can be rejected on that basis alone. *See* Advanced Silicon Materials v. Grant County, 156 Wn.2d 84, 90, 124 P.3d 294 (2005) (courts should "avoid readings of statutes that result in unlikely, absurd, or strained consequences.")

Following remand from this Court, Mr. Kilgore had a lower offender score and fewer current convictions. This Court ordered further proceedings. The trial court, at the State's urging, failed to comply with this Court's order. Mr. Kilgore is entitled to a new

sentencing hearing, and this Court should now specifically direct the trial court to provide him with one.

3. The "correcting" of the judgment and sentence failed to satisfy the constitutional requirements of Blakely.

As noted above, the trial court was obligated to re-sentence Mr. Kilgore based on his changed status following a partially successful appeal. But even if there was merit to the State's position that the defendant was only entitled to a "correcting" of the judgment and sentence, that "correction" still had to be a lawful one. And under Blakely, an order that expressly incorporates an exceptional sentence that was entered without the requisite jury findings is not a lawful sentence.

Contrary to the apparent reasoning of the State and trial court, State v. Evans did not relieve the court of its obligation to enter lawful orders. Evans placed limitations on the means by which a previously entered sentenced could be challenged. Specifically, it excluded challenges which could only be brought through a collateral attack. This is apparent from an examination of the holding and wording in that decision.

The Washington Supreme Court began its discussion in Evans by setting forth its holding: "We conclude that neither

Apprendi nor Blakely apply retroactively on collateral review to convictions that were final when Blakely was announced." Evans, at 442 (emphasis added). The Evans Court reiterated the scope of this limitation in its Conclusion section, explaining yet again, "We hold that Blakely and Apprendi do not apply generally on collateral review." *Id.* at 457 (emphasis added). Thus, under Evans, only if the challenge is brought by means of a collateral attack, will the Court permit an unconstitutional exceptional sentence to stand.

The "correcting" of the judgment and sentence was not a collateral attack, and there is no way to characterize it as such. Rather, it is part of the "further proceedings" mandated by this Court. As such, Evans has no application. Nor are the issues that prompoted the concern in Evans present in this case.

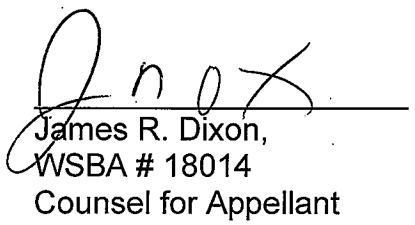
On a more fundamental level, Evans has no application because it relates to challenges to past orders, whereas the issue here is the current order entered by the trial court. When the court changed the judgment and sentence, it was required to do so in a constitutional manner. It did not. Rather, it specifically incorporated the prior sentence, "as if set forth in full herein." Thus, this is not a retroactive challenge to the prior sentence; it is a challenge to an unconstitutional order entered on October 7, 2006,

after Blakely was decided. Evans did not relieve the trial court of acting lawfully when "correcting" a sentence.

D. CONCLUSION

Mr. Kilgore was entitled to a sentencing hearing following the reversal of two current convictions and a reduction in his offender score. This Court should remand the case back to the trial court for a new sentencing hearing, a sentencing to be held in compliance with the requirements of Blakely. Alternatively, even if there was merit to the State's contention that only a "correction" of the judgment and sentence was necessary, the "correction" resulted in an unlawful sentence under Blakely. Regardless of which terminology is used, the sentence cannot stand. A new sentencing hearing, done in compliance with Blakely, is required

DATED: April 25, 2006



James R. Dixon,
WSBA # 18014
Counsel for Appellant

Certificate of Service

Certificate of Service
The undersigned certifies that on this day he caused to be delivered by ABC-Legal Messenger to the attorney of record a true and correct copy of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed in Seattle, WA on the date listed below.

4/25/06
Date

Signature

FILED
COURT OF APPEALS
DIVISION II
06 APR 25 PM 2:25
STATE OF WASHINGTON
BY
DEPUTY