

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER ALVARADO,

Appellant.

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SUPREME COURT
STATE OF WASHINGTON

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

The Honorable Steven J. Mura, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ISSUE

Should this Court overrule State v. Newlun, __ Wn. App. __, 176 P.3d 529 (2008) and hold RCW 9.94A.535(2)(c) violated Alvarado's Sixth Amendment right to a jury trial?

B. ARGUMENT

NEWLUN'S INTERPRETATION OF THE STATUTE CONFLICTS WITH THE LEGISLATURE'S EXPRESSED INTENT THAT 2005 STATUTORY AMENDMENTS WERE NOT MEANT TO RESTRICT OR EXPAND THE "FREE CRIME" AGGRAVATING FACTOR.

In Newlun, Division One held the judicial findings required for imposition of an exceptional sentence under RCW 9.94A.535(2)(c) "relate solely to the fact of a defendant's criminal convictions" and therefore do not violate the jury trial requirements of the Sixth Amendment. Newlun, 176 P.3d at 530. This Court should overrule Newlun because it misconstrues the nature of the "free crime" analysis envisioned by the statute.

In rewriting RCW 9.94A.535, the Legislature intended "to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, *without expanding or restricting existing statutory or common law aggravating circumstances. The legislature does not intend the codification of common law aggravating factors to expand or restrict*

currently available statutory or common law aggravating circumstances."

Laws of 2005, ch. 68, § 1 (emphasis added).

The "multiple offense policy"/"clearly too lenient" aggravating factor under former RCW 9.94A.535(2)(i) was a currently available statutory factor.¹ Express legislative intent shows this factor did not disappear from the sentencing scheme. Rather, it reappeared in the form of current RCW 9.94A.535(2)(c). Newlun's interpretation is flawed because it is predicated on the presumption that the Legislature created RCW 9.94A.535(2)(c) out of whole cloth. The statute is the latest incarnation of the "free crime" factor that existed long before the 2005 amendments came about.

According to Newlun, whether a crime goes "unpunished" is not a finding of fact at all. Newlun, 176 P.3d at 535. Rather, it is simply a legal conclusion. Id. But whether a crime goes "unpunished" is just another way of saying a defendant receives a "free crime." State v. Van Buren, 123 Wn. App. 634, 653, 98 P.3d 1235 (2004) (addressing former RCW 9.94A.535(2)(i)). The Legislature may have reworded the statute from

¹ Former RCW 9.94A.535(2)(i) provided "The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010."

"clearly too lenient" to its current version, but the "free crime" analysis in relation to multiple current offenses remains the same.

This Court in State v. Hughes rejected the argument that the "free crime" factor fit within the "prior convictions" exception to the Blakely rule.² State v. Hughes, 154 Wn.2d 118, 138-40, 110 P.3d 192 (2005). Only a jury may find an offender goes unpunished when his offender score is greater than "nine" and he has multiple current offenses. State v. Ose, 156 Wn.2d 140, 149, 124 P.3d 635 (2005); In re Pers. Restraint of VanDelft, 158 Wn.2d 731, 742-43, 147 P.3d 573 (2006). The trial courts in Ose and VanDelft engaged in the very same "free crime" analysis that Newlun now maintains may be made by a judge. Ose, 156 Wn.2d at 149; VanDelft, 158 Wn.2d at 739-40. Newlun cannot be reconciled with Hughes, Ose and VanDelft.

Newlun maintains Hughes and its progeny do not control Newlun's interpretation of RCW 9.94A.535(2)(c) because Hughes only addressed the predecessor statute, former RCW 9.94A.535(2)(i). Newlun, 176 P.3d at 532, 534. Newlun's attempt to distinguish Hughes fails in light of the Legislature's expressed intent that the "multiple offense"/"clearly too

² Blakely v. Washington, 542 U.S. 296, 301-05, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004) (except for fact of prior conviction, factual basis for exceptional sentence must be submitted to a jury and proven beyond a reasonable doubt).

lenient" factor was meant to be retained in the amended version of the statute. Laws of 2005, ch. 68, § 1.

Further examination of expressed legislative intent shows the misguided nature of Newlun's interpretation. In amending the statute in 2005, the Legislature "recognize[d] the need to restore the judicial discretion that has been limited as a result of the Blakely decision." Laws of 2005, ch. 68, § 1. This peculiar phrase reveals the Legislature chafed against Blakely in amending RCW 9.94A.535 even as it purported to comply with its holding. If Blakely limited judicial discretion, then the Legislature was bound to honor the limitation as a matter of constitutional law. The Legislature nonetheless sought to "restore" the discretion that Blakely "limited" by amending RCW 9.94A.535.

But according to Newlun, a judge exercises no discretion in finding crimes go unpunished under RCW 9.94A.535(2)(c) because the fact of conviction results in an automatic finding of this aggravator as a matter of law. Newlun, 176 P.3d at 535. This interpretation of the statute cannot be squared with the expressed legislative intent to restore judicial discretion to the fact finding inquiry.

In adopting RCW 9.94A.535(2)(c), the State insists the Legislature simply codified "the "free crimes" aggravating factor "announced" in State

v. Smith, 123 Wn.2d 51, 864 P.2d 1371 (1993). Brief of Respondent at 9-10. If so, then Newlun misinterpreted the statute.

Smith interpreted the "multiple offense"/"clearly too lenient" factor already codified in the Sentencing Reform Act, holding the factor was "automatically satisfied whenever 'the defendant's high offender score is combined with multiple current offenses so that a standard sentence would result in 'free' crimes - crimes for which there is no additional penalty.'" Smith, 123 Wn.2d at 56 (quoting State v. Stephens, 116 Wn.2d 238, 243, 803 P.2d 319 (1991)). This Court in Hughes overruled Smith insofar as Smith allowed a judge to find this factor. Hughes, 154 Wn.2d at 140. If, as the State argues, the Legislature intended to codify the Smith holding, then RCW 9.94A.535(2)(c) violates the Sixth Amendment in light of Hughes.

When the Legislature amended RCW 9.94A.535 in 2005, it presumably acted knowing the appellate court's interpretation of former RCW 9.94A.535(2)(i). See State v. George, 161 Wn.2d 203, 211, 164 P.3d 506 (2007) (Legislature is presumed to be aware of judicial interpretations of its statutes). In 2004, Division Two in Van Buren addressed former RCW 9.94A.535(2)(i) and held a trial court's imposition of an exceptional sentence under the "free crimes" doctrine did not violate the Sixth Amendment because that analysis did not require anyone to

weigh evidence, determine credibility, or make a finding of disputed fact. Van Buren, 123 Wn. App. at 653. Van Buren expressly equated a "free crime" with a crime that went "unpunished." Id. RCW 9.94A.535(2)(c) represents a distillation of Van Buren's holding, but Hughes overruled Van Buren. Hughes, 154 Wn.2d at 139-40.

The linguistic change from former RCW 9.94A.535(2)(i) to its current version does not suggest a departure from Van Buren's holding. Rather, the consistency between the two statutes and omnipresence of the "unpunished" theme imply the Legislature's endorsement of Van Buren's flawed analysis. Newlun's interpretation of the current statute ignores the presumption that Van Buren guided the Legislature as it attempted to comply with Blakely, and that this Court in Hughes subsequently overruled Van Buren.

Newlun emphasizes the Legislature enacted the 2005 SRA amendments in an attempt to comply with Blakely. Newlun, 176 P.3d at 533, 535. The Legislature intended to amend RCW 9.94A.535 to comply with Blakely but did not succeed.

Examination of a corollary amendment further illustrates the point. Relying on Hughes and Van Delft, Division Three in State v. Saltz held

RCW 9.94A.535(2)(b)³ violates the Sixth Amendment. State v. Saltz, 137 Wn. App. 576, 583-84, 154 P.3d 282 (2007). The Legislature, in enacting the 2005 amendments, presumed a judge could still make the "free crime" analysis in light of Blakely. The Legislature wrongly predicted (2)(b) would pass constitutional muster, just as it wrongly predicted (2)(c) would comply with this Court's subsequent interpretation of the Blakely requirement.⁴

Newlun distinguishes Saltz on the ground that Saltz dealt with the "clearly too lenient" factor whereas RCW 9.94A.535(2)(c) supposedly represents nothing more than simple arithmetic. Id. at 534. In making this interpretation, Newlun implies the Legislature carefully crafted (2)(c) to avoid the Hughes restriction. But the Legislature did not have the benefit of Hughes before it enacted (2)(c). The fact that the Legislature retained the "clearly too lenient" factor in (2)(b) further shows it wrongly predicted the types of findings that required a jury, including the finding that a crime goes "unpunished."

³ RCW 9.94A.535(2)(b) provides "The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010."

⁴ RCW 9.94A.535(2)(d) suffers from the same infirmity. It provides: "The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient."

Newlun claims it only followed the clear and unequivocal language of the statute in reducing a finding under RCW 9.94A.535(2)(c) to a pure mathematical equation. Newlun, 176 P.3d at 535. According to Newlun, RCW 9.94A.535(2)(c) "*explicitly provides* that, when confronted with a situation where the structure of RCW 9.94A.510's sentencing grid - specifically, the maximum listed offender score of nine - results in multiple current offenses going unpunished, the sentencing court may impose an exceptional sentence based on factors related solely to criminal history." Id. (emphasis added).

RCW 9.94A.535(2)(c) explicitly provides no such thing. Rather, the statute explicitly provides a judge may find "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). If, as Newlun contends, the Legislature intended the sentencing court to impose an exceptional sentence based solely on the number of convictions when confronted with a situation where the maximum offender score of nine results in multiple current offenses going unpunished, then the Legislature could have worded the statute to say just that. But the statute says otherwise.

The statute specifies a "high" offender score. RCW 9.94A.535(2)(c). It would have been quite easy for the Legislature to

include the phrase "offender score greater than nine" rather than "high offender score," but it chose not to do so. What constitutes a "high offender score" is a variable fact dependent upon the particular circumstances of a given case rather than a legal conclusion and, as such, needs to be found by a jury rather than a judge.

In any event, Newlun wrongly assumes the term "unpunished" represents nothing more than the outcome of a mathematical equation with which no one could disagree. As set forth above, whether a crime goes "unpunished" is a finding of fact that must be made by a jury because it is synonymous with the free crime aspect of the old "multiple offense"/"clearly too lenient" factor.

C. CONCLUSION

For the reasons stated, this Court should reverse the exceptional sentence and remand for sentencing within the standard range.

DATED this 6th day of March 2008.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 81069-9
vs.)	
)	
ALEXANDER ALVARADO,)	
)	
Petitioner.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF MARCH 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPELMENTAL BRIEF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF MARCH, 2008.

x *Patrick Mayovsky*