

81270-5  
No. 23946-2-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Appellant/Cross-Respondent,

vs.

RAYMOND C. HUGHES,

Defendant/Respondent/Cross-Appellant.

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Brief of Respondent/Cross-Appellant

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**A. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court erred in applying Blakely v. Washington to the minimum term sentence under RCW 9.94A.712.

2. The trial court erred by declining to consider the imposition of an exceptional sentence.

3. The trial court erred in deciding it lacked authority to impose an exceptional sentence.

**B. RESPONDENT'S ASSIGNMENT OF ERROR**

The trial court erred in denying Mr. Hughes motion to dismiss one of the rape charges based on double jeopardy.

*Issues pertaining to Assignments of Error*

1. Did Mr. Hughes' convictions for second-degree rape and second-degree rape of a child of the same victim violate the constitutional prohibition against double jeopardy, where the evidence required to support a conviction upon one of the charged crimes would have been sufficient to warrant a conviction upon the other?

2. Do Apprendi and Blakely apply to the imposition of an exceptional minimum term sentence under RCW 9.94A.712?

**C. STATEMENT OF THE CASE**

For purposes of this review, respondent accepts the statement of facts set forth in the State's brief and offers the following additional pertinent facts.

The trial court denied the defendant's double jeopardy motion on October 14, 2004, and prior to the guilty plea, holding that the motion was

premature since jeopardy had not yet attached. (10/14 RP 15-16) At the guilty plea hearing, the court informed the defendant:

The judge must impose a sentence within the standard range unless a jury finds substantial and compelling reasons not to do so or unless you enter a waiver of a right to have a jury make such a finding.

(10/14 RP 28)

When Mr. Hughes was asked to state in his own words what he did that made him guilty of this offense, he wrote in the Statement of Defendant on plea of guilty for both counts, "I engaged in sexual intercourse with S.E.H. when she was 12 years old on 4/20/04 in Spokane, Washington." (10/14 RP 32)

At the sentencing hearing on January 26, 2005, the State conceded that the two convictions constituted the same criminal conduct. (1/26 RP 6) At that same hearing, the defendant again raised the issue of double jeopardy but the court declined to rule at that time. (1/26 RP 7) On February 9, 2005, the double jeopardy motion was argued and the court ruled that the two convictions did not violate double jeopardy. (2/9 RP 12-22)

## D. ARGUMENT

**1. Mr. Hughes' convictions for second-degree rape and second-degree rape of a child of the same victim violate the constitutional prohibition against double jeopardy, since the evidence required to support a conviction upon one of the charged crimes would have been sufficient to warrant a conviction upon the other?**

The Washington Supreme Court recently reexamined this issue in In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). The Court held that Mr. Orange's convictions for first degree attempted murder and first degree assault of the same victim violated constitutional prohibition against double jeopardy, because the two crimes were based on the same gunshot in the same incident. Orange, 152 Wn.2d at 820-21, 100 P.3d 291. The Court noted that the State alleged in count two of the information that Orange committed the crime of first degree attempted murder, when he "act[ed] with premeditated intent to cause the death of another person and did attempt to cause the death of Marcel Walker." Orange, 152 Wn.2d at 814, 100 P.3d 291. Count three alleged that Orange committed an assault in the first degree when he, "at the same time as the crime charged in count 2, then and there, with intent to inflict great bodily harm upon another person, did intentionally assault Marcel Walker with a firearm." Orange, 152 Wn.2d at 815, 100 P.3d 291.

In reaching its decision, the Court stated that the Blockburger<sup>1</sup> “same elements” and “same evidence” test remains the correct means of determining whether convictions for two offenses violate double jeopardy. Orange, 152 Wn.2d at 815-16, 100 P.3d 291. However, in some cases our appellate courts have misapplied the “same elements” test by merely comparing the statutory elements of the two crimes in a generic sense. Id. 152 Wn.2d at 817-19; State v. Valentine, 108 Wn.App. 24, 29 P.3d 42 (2001). Instead, the Blockburger test requires the court to determine “whether each provision *requires proof of a fact which the other does not.*” Id. 100 P.3d at 302, *citing* Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (emphasis added). Thus, double jeopardy will be violated where “the evidence required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other.” Id. 152 Wn.2d at 820, *citing* State v. Reiff, 14 Wn. 664, 667, 45 P. 318 (1896).

Herein, the trial court's acceptance of Mr. Hughes' plea constitutes a "conviction" for double jeopardy purposes. State v. Crisler, 73 Wn.App. 219, 222-23, 868 P.2d 204 (1994), *aff'd sub nom.* State v. Gocken, 127 Wash.2d 95, 896 P.2d 1267 (1995). Moreover, Mr. Hughes did not waive

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<sup>1</sup> Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

his right to appeal based on a claim of double jeopardy by pleading guilty to the two crimes that constituted the same criminal conduct. In Restraint of Butler, 24 Wn.App. 175, 599 P.2d 1311 (1979); Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975).

The factual scenario in this case for the purposes of double jeopardy analysis is indistinguishable from Orange. When Mr. Hughes was asked to state in his own words what he did that made him guilty of this offense, he wrote in the Statement of Defendant on plea of guilty for both counts, "I engaged in sexual intercourse with S.E.H. when she was 12 years old on 4/20/04 in Spokane, Washington." (10/14 RP 32) The State also conceded that the two convictions constituted the same criminal conduct. (1/26 RP 6)

As noted in Orange, the trial court here misapplied the "same elements" test by merely comparing the statutory elements of the two crimes in a generic sense. Instead, the Blockburger test required the court to determine "whether *each* provision requires proof of a fact which the other does not." Clearly, the evidence required to support a conviction on one of the charged crimes, herein, would have been sufficient to warrant a conviction upon the other. Therefore, allowing both convictions to stand violated the constitutional prohibition against double jeopardy.

**2. Apprendi and Blakely apply to the setting of an exceptional minimum term sentence under RCW 9.94A.712.**

In State v. Borboa,<sup>2</sup> 124 Wn.App. 779, 102 P.3d 183, 187 (2004), Division 2 held that Apprendi<sup>3</sup> and Blakely<sup>4</sup> require that a jury find each fact needed to support a court's exceptional minimum term under RCW 9.94A.712. The Court noted that RCW 9.94A.712 provides that an exceptional minimum term must meet the requirements of [former] RCW 9.94A.535. Id. RCW 9.94A.535 provides that the facts needed to support an exceptional term are not just the elements of the crime, but must include one or more aggravating facts that are not elements of the crime. Id. A jury does not find each fact needed to support an exceptional minimum term simply because it returns a general verdict of guilty--and without jury findings, an exceptional minimum term violates the Sixth Amendment's right to jury trial. Id.

The State argues that the Sixth Amendment's right to jury trial does not affect an exceptional minimum term imposed under RCW 9.94A.712 because it applies only to maximum sentences.<sup>5</sup> The State relies primarily on State v. Clarke, 124 Wn.App. 893, 103 P.3d 2262 (2004), a Division

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<sup>2</sup> Review granted; oral argument scheduled October 18, 2005.

<sup>3</sup> Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

<sup>4</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

<sup>5</sup> State's brief, pp 3-6.

One decision, which reached a result opposite from Borboa.<sup>6</sup> The State's argument and the Clarke decision not only run afoul of the central ruling in Apprendi and Blakely, but also contradict our Supreme Court's recent decision in State v. Hughes, \_\_\_ Wn.2d \_\_\_, 110 P.3d 192 (April 14, 2005). For these reasons, as set forth below, this Court should reject the State's argument and follow Borboa.

According to Blakely itself, the relevant sentence is the longest one supported by the jury's findings of fact. Borboa 102 P.3d at 188. It does not matter whether the sentence is labeled "minimum," "maximum," or something else:

Those who would reject Apprendi are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels as sentencing factors—no matter how much they increase punishment—may be found by a judge. This would mean, for example, that a judge could sentence a man for committing a murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene. Not even Apprendi's critics would advocate this result. The jury could not function as at circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime that the State actually seeks to punish.

Blakely, 124 S. Ct. at 2549 (internal citations omitted).]

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<sup>6</sup> Review granted; oral argument scheduled October 18, 2005.

Thus, under Blakely, it does not matter how the Legislature labels a fact; what matters is what impact the resolution of that fact has on the punishment that the defendant may receive. See Ring v. Arizona, 536 U.S. 584, 610, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (“[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt.”)

The Borboa decision is further supported by the Washington Supreme Court’s recent decision in Hughes. In Hughes, the Court rejected the State’s arguments that a jury could be empanelled to consider aggravating factors and impose an exceptional sentence because *former* RCW 9.94A.535 did not authorize such a procedure. For this reason, on remand, the defendants could receive a sentence no greater than the top of the standard range. Hughes, 110 P.3d at 208.

Based on the decisions in Apprendi, Blakely, Borboa and Hughes, the trial court, herein, was correct in concluding that it lacked any authority to impose an exceptional minimum sentence or empanel a jury to decide any aggravating factors. The trial court was also correct in

concluding that if it imposed such a sentence it would violate the Sixth Amendment right to a jury trial.

**E. CONCLUSION**

For the reasons stated, this court should reverse the conviction for second-degree rape based on double jeopardy, affirm the trial court's decision not to impose an exceptional minimum sentence, and remand this matter for resentencing.

Respectfully submitted August 30, 2005.



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