

NO. 81393-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ROBERT L. VANCE,

Respondent.

STATE OF WASHINGTON
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J. RONALD R. CARPENTER

SUPPLEMENTAL BRIEF OF PETITIONER

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I. ISSUE

Does a defendant have a federal constitutional right to a jury determination of facts supporting the imposition of consecutive sentences?

II. STATEMENT OF THE CASE

The case has a long and complex procedural history. For purposes of the issue discussed in this brief, the essential facts are the following:

In 2003, the defendant (respondent), Robert L. Vance, was found guilty by a jury of eight counts of sexual offenses: three counts of first degree child molestation, two counts of second degree child molestation, and three counts of communicating with a minor for immoral purposes. These crimes involved four different victims. 1 CP 19, 65-67.

The defendant was initially sentenced as a persistent offender, but this sentence was reversed on appeal. 1 CP 45-47. Re-sentencing occurred in November, 2004. The court computed offender scores of 27 for each count. This yielded standard sentence ranges of 149-198 months for each count of first degree child molestation, 87-116 months for each count of second degree child molestation, and 51-60 months for each count of

communicating with a minor for immoral purposes. 1 CP 21. The court imposed a sentence at the top of the applicable range for each count. As an exceptional sentence, the court made the sentences for the three counts of first degree child molestation consecutive, for a total sentence of 594 months. 1 CP 24. In support of this sentence, the court determined that a standard-range sentence would be clearly too lenient. 1 CP 32-33.

The Court of Appeals initially affirmed this sentence. This court granted review and remanded for reconsideration. On remand, the Court of Appeals reversed the sentence and directed re-sentencing within the standard range. State v. Vance, 142 Wn. App. 398, 174 P.3d 697 (2008). The State filed a petition for review and a subsequent motion to supplement that petition. This court granted the motion to supplement and the petition for review.

III. ARGUMENT

SINCE THERE IS NO CONSTITUTIONAL RIGHT TO A JURY TRIAL ON FACTS SUPPORTING CONSECUTIVE SENTENCES, THE TRIAL COURT PROPERLY IMPOSED SUCH SENTENCES BASED ON ITS DETERMINATION THAT A STANDARD-RANGE SENTENCE WOULD BE CLEARLY TOO LENIENT.

The Court of Appeals had only one reason for reversing the defendant's sentence: that it violated his Sixth Amendment right to a jury trial. Vance, 142 Wn. App. at 404 ¶ 4, citing Blakely v.

Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The defendant did not assert any non-federal basis for overturning the sentence. See Appellant's Opening Brief at 4-9 (arguing that the sentencing procedure violated the defendant's rights under the Sixth and Fourteenth amendments to the federal constitution).

The constitutional issue involved in this case was recently resolved by the United States Supreme Court in Oregon v. Ice, ___ U.S. ___, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009). Ice involved a statute that required concurrent sentences unless the trial court made certain factual findings. The Supreme Court held that there was no constitutional right to a jury trial as to those facts. It limited Blakely to cases involving sentencing for discrete crimes, not multiple crimes. Historically, juries have played no role in deciding whether to impose concurrent or consecutive sentences for multiple crimes. Id., 129 S. Ct. at 717.

Prior to Ice, this court had reached a contrary conclusion in In re VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006), cert. denied, ___ U.S. ___, 127 S. Ct. 2876, 187 L. Ed. 2d 1172 (2007). This court is, however, bound by the decisions of the United States Supreme Court on issues of federal constitutional law. Tricon, Inc.

v. King County, 60 Wn.2d 392, 394, 374 P.3d 174 (1962). Since the holding of VanDelft is contrary to Ice, this court's decision no longer has any precedential value.

In the present case, the sentence imposed for each discrete offense was within the standard sentencing range. 1 CP 21, 124. The sentences were exceptional only because of their consecutive nature. Under Ice, there is no constitutional right to a jury trial as to the facts supporting consecutive sentences. Consequently, the sentencing procedure followed in this case was constitutionally permissible.

The petition for review raises other issues, but all of them are now moot. One issue was whether the jury findings in this case were sufficient to support application of the aggravating factor that a standard range sentence would be "clearly too lenient." Since Ice holds that no jury findings are necessary, this issue need not be decided. Two other issues relate to whether an exceptional sentence could be imposed on remand. Under Ice, there was no error, and therefore no need for any remand. Consequently, this court need not decide what procedure would be appropriate on a remand.

IV. CONCLUSION

The sentencing procedure followed in this case was constitutionally proper. The judgment of the Court of Appeals should therefore be reversed, and the sentence imposed by the trial court should be reinstated.

Respectfully submitted on May 14, 2009.

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