

ORIGINAL

Supreme Court No. 81650-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TROY DEAN STUBBS,

Petitioner.

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STATE OF WASHINGTON

PETITIONER'S ANSWER TO BRIEF OF *AMICUS CURIAE*
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A. SUMMARY OF ANSWER

At this Court's direction, *amicus curiae* Washington Association of Prosecuting Attorneys (WAPA) and the Washington Association of Criminal Defense Lawyers (WACDL) filed amicus briefs.

WAPA claims that the jury was properly instructed on the aggravating circumstance contained in RCW 9.94A.535(3)(y), asserting that because assault in the first degree can be committed by alternative means, not all of which require injury, an exceptional sentence may be imposed based on the level of the victim's injuries. But the State did not make an election at trial; thus, WAPA may not now speculate on the jury's verdict. Further, WAPA's theory would permit an exceptional sentence to be imposed in any first-degree assault charged under RCW 9A.36.011(1)(a) or (b) where an injury also was inflicted, a result which would create a statutory redundancy.

WAPA alternatively attempts to differentiate Stubbs' crime from other, hypothetical assaults in the first degree. But WAPA fails to show why this assault, although serious, was not contemplated by the Legislature in fixing the elements of RCW 9A.36.011(c).

Last, WAPA mounts a variety of rejoinders to Stubbs' vagueness challenges to the aggravating circumstance, claiming, *inter alia*, (1) the statute is not susceptible of a vagueness challenge, and (2) the statute is

not vague. None of WAPA's claims has merit. Stubbs' exceptional sentence must be reversed and this matter remanded for imposition of a standard range sentence.

B. ARGUMENT

1. THE AGGRAVATING CIRCUMSTANCE
CONTAINED IN RCW 9.94A.535(3) (y) INHERED
IN THE JURY'S VERDICT CONVICTING STUBBS
OF FIRST-DEGREE ASSAULT.

a. WAPA's "alternative means" argument requires the Court to speculate on the jury's verdict and conflicts with principles of statutory construction. WAPA's principal argument is that since the jury was instructed under the alternative means contained in RCW 9A.36.011(1)(a) and (c), an exceptional sentence was properly imposed because RCW 9A.36.011(1)(a) does not require proof of injuries. WAPA's argument depends on the presumption that the jury in fact based its verdict solely on the alternative means contained in RCW 9A.36.011(a), and not the means contained in RCW 9A.36.011(1)(c). This WAPA cannot show.

The jury was instructed on both alternative means contained in RCW 9A.36.011(1)(a) and (c) in the "to convict" instruction. CP 76. The jury returned a general verdict convicting Stubbs of assault in the first degree. There is no reason to conclude that the jury did not follow the

instructions they were given and consider both means in reaching its verdict. WAPA has not explained how this Court may now speculate on the jury's general verdict to conclude the jury convicted on one prong, and not the other. See Blue Chelan, Inc., v. Department of Labor and Industries of State of Washington, 33 Wn. App. 220, 223, 653 P.2d 1343 (1982) ("A court should not speculate as to the meaning of a jury verdict.")

There is a second, more significant defect with WAPA's argument. WAPA essentially asks this Court to hold that where conduct can be prosecuted under different statutory means, a prosecutor should have the discretion to charge a person with a violation of one and then seek an exceptional sentence for his violation of the other. Such a result would violate the Legislature's prerogative to define and fix punishments for crimes.

Imagine a hypothetical scenario in which a person discharges a firearm at someone and causes permanent disfigurement. Under WAPA's theory, the State could deliberately choose to prosecute under RCW 9A.36.011(1)(a) only, and then seek an exceptional sentence based on the victim's injuries, even though these same injuries would have properly

been the basis for a prosecution under RCW 9A.36.011(1)(c).¹ This result would render RCW 9A.36.011(1)(c) entirely redundant, which is contrary to principles of legislative intent. “Under the usual rule of statutory construction, ‘[c]ourts should not construe statutes to render any language superfluous.’” In re Detention of Kistenmacher, 163 Wn.2d 166, 180, 178 P.3d 949 (2008) (quoting State v. Riles, 135 Wn.2d 326, 340, 957 P.2d 655 (1998)).

Further, WAPA’s cynical proposal conflicts with the foundational principle that factors that are inherent in the crime may not justify an exceptional sentence. State v. Ferguson, 142 Wn.2d 631, 647-48, 16 P.3d 1271 (2001); see also, State v. Gore, 143 Wn.2d 288, 315-16, 21 P.3d 262 (“A reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense”), reversed on other grounds, Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). “Crime” in this context means the abstract offense codified by the Legislature, not some dissected piece of the offense that comprises the basis for the prosecutor’s charging decision.

The Legislature unambiguously intended the standard range for

¹ It is easy to conceive the abuses that such a practice would encourage. For example, an offender could be induced to plead guilty to serious charges by the threat of an exceptional sentence, regardless of the seriousness of his conduct.

assault in the first degree to apply to a conviction under RCW 9A.36.011(a), (b), or (c), as the Legislature did not distinguish between these subsections in setting the standard range. RCW 9.94A.515 is replete with examples of the Legislature differentiating between various subsections of criminal statutes and allocating varying punishments accordingly. For example, the Legislature has assigned vehicular homicide by being under the influence of intoxicating liquor or any drug a seriousness level of nine, vehicular homicide by the operation of any vehicle in a reckless manner a seriousness level of eight, and vehicular homicide by disregard for the safety of others a seriousness level of seven. RCW 9.94A.515 (citing RCW 46.61.520). The Legislature has assigned assault in the third degree a seriousness level of three except where the assault is committed with a stun gun against a peace officer, in which case the crime carries a seriousness level of four. RCW 9.94A.515 (citing RCW 9A.36.031(1)(h)). The Legislature has assigned differing seriousness levels to the crime of indecent liberties with forcible compulsion versus without forcible compulsion. RCW 9.94A.515 (assigning a seriousness level of ten for violations of RCW 9A.44.100(1)(a) and a seriousness level of seven for violations of RCW 9A.44.100(1)(b) and (c)).

Given the facility that the Legislature has demonstrated with respect to assigning punishment for other offenses, this Court can only conclude that the Legislature intended a violation of any subsection of RCW 9A.36.011 to carry the same standard range. Cf., State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 181 (2005) (observing that the Legislature “clearly knows how to” specify the punishment it intends for certain offenses).

a. By its plain terms, RCW 9A.04.110(c) applies to the injuries inflicted here. WAPA concedes that “great bodily harm,” as it is defined for purposes of assault in the first degree, means “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c). As *amici* WACDL argue, “the only injury that could ‘substantially exceed’ the standard of ‘probability of death’ is death itself.” Br. WACDL at 10. Thus, by the statute’s plain terms, Stubbs’ offense falls within the gamut of crimes contemplated by the Legislature in classifying and setting the standard range for assault in the first degree.

WAPA claims, however, that because “great bodily harm can occur if the victim fully recovers from the injuries so long as the injuries were, at one point, life threatening,” Br. WAPA at 7, Stubbs’ exceptional

sentence should be upheld because Goodwin will not fully recover. But the Legislature did not draw the distinction WAPA now urges on the Court. Rather, by including “bodily injury which creates a probability of death” in the definition of “great bodily harm,” the Legislature appears to have repudiated the notion that some life-threatening injuries should be punished differently than others. Nor was the jury instructed to differentiate Stubbs’ offense from others of the same category in the manner creatively advocated by WAPA.² Goodwin’s injuries, although serious, simply do not present a basis for distinguishing this first degree assault from others.

Amici WACDL note that in amending the SRA to make it Blakely-compliant, the Legislature expressly specified it did not intend to create new categories of aggravating circumstances. Br. WACDL (quoting Laws of 2005, Ch. 68, § 1). But under WAPA’s theory, any injuries “that substantially exceed the level of injury required to establish the crime” – i.e., injuries which exceed the level necessary to withstand a sufficiency challenge – become exceptional. Br. WAPA at 5-6. WAPA’s theory

² WAPA finds it “note worthy” [sic] that Stubbs did not challenge the sufficiency of the evidence to support the aggravating circumstance. Br. WAPA at 9. But Stubbs does not dispute that the “great bodily harm” element of assault in the first degree was proven. Instead, Stubbs challenges the implicit claim that the Legislature intended to create a new category of crime to punish the infliction of injuries in addition to those that (1) create a probability of death; or (2) result in death itself.

conflicts with the Legislature's intent, and would radically expand the class of crimes in which the State could seek exceptional sentences.

WAPA's arguments should be rejected.

2. THE AGGRAVATING CIRCUMSTANCE THAT
"THE VICTIM'S INJURIES SUBSTANTIALLY
EXCEED THE LEVEL NECESSARY TO
ESTABLISH THE ELEMENTS OF THE OFFENSE"
VIOLATES DUE PROCESS VAGUENESS
PROHIBITIONS.

WAPA claims that the aggravating circumstance contained in RCW 9.94A.535(3)(y) is not susceptible of a vagueness challenge, and in the alternative, contends that Stubbs' vagueness challenge to the jury instruction is waived.³ Neither claim has merit.

a. Like other elements of criminal offenses, aggravating circumstances are subject to vagueness challenges. WAPA's claim that aggravating circumstances are not subject to vagueness challenges is based on three false premises: first, that Blakely's sole import was to require that a jury, rather than a judge, "make[]the finding of whether an aggravating circumstance accompanied the commission of the crime"; second, that aggravating circumstances "do not purport to define criminal conduct; and third, that discretionary sentencing does not implicate vagueness considerations. Br. WAPA at 12-13.

³ Stubbs has moved to strike this argument in a separate pleading.

Missing from WAPA's discussion is any understanding of the basis for the Blakely decision. Indeed, WAPA does not even cite to the Sixth or Fourteenth Amendment. In fact, WAPA's argument differs little from the argument advanced by the State to defend Washington's exceptional sentencing scheme in Blakely, an argument soundly rejected by the Supreme Court.⁴

The Supreme Court observed, "The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea." Blakely, 542 U.S. at 304. Because the jury's verdict alone did not authorize the sentence, but instead the judge acquired that authority only upon finding some additional facts, the sentence violated the Sixth Amendment. Id. at 305; see also id. at 305 n. 8 ("Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence.") (emphasis in original).

And based on a misapprehension similar to WAPA's faulty logic here, California suffered invalidation of the aspect of its determinate sentencing law that permitted judges to impose an "upper term" sentence

⁴ This incorrect reasoning was the precise basis for the Court of Appeals' subsequently-reversed holding in State v. Blakely, 111 Wn. App. 851, 871, 47 P.3d 149 (2002) ("Because the statutory and nonstatutory aggravating factors neither increase the maximum punishment nor define separate offenses calling for separate penalties, the Apprendi [v. New Jersey], 530 U.S. 566, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)] rule is not triggered.").

based on factual findings, even though this schema was discretionary.

Cunningham v. California, 549 U.S. 270, 288-90, 127 S.Ct. 856, 166

L.Ed.2d 856 (2007). The Court in Cunningham reiterated:

We cautioned in Blakely . . . that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

Id. at 290 (citing Blakely, 542 U.S. at 305, and n. 8).

WAPA's second and third contentions – that aggravating circumstances do not define conduct and discretionary sentencing does not implicate vagueness considerations – likewise do not survive scrutiny.

WAPA's arguments are based upon this Court's opinion in State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), but WAPA fails to recognize that Baldwin was founded upon the erroneous premise that aggravating factors do not alter the maximum penalty for an offense. See Baldwin, 150 Wn.2d 461 (“The guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest.”)

This Court's reasoning in Baldwin was in all pertinent respects identical to the reasoning of the California Supreme Court disapproved in Cunningham.

Ultimately the [California Supreme] court relied on an equation of California's [determinate sentencing law] to the post-Booker⁵¹ federal system. "The level of discretion available to a California judge in selecting which of the three available terms to impose," the court said, "appears comparable to the level of discretion that the high court has chosen to permit federal judges in post-Booker sentencing." [People v. Black, 35 Cal.4th 1238, 1261, 29 Cal. Rptr.3d 740, 113 P.3d 534 (2005).] . . . The attempted comparison is unavailing.

Cunningham, 549 U.S. at 291.

Likewise, the claim that discretionary sentencing does not implicate vagueness considerations is flatly incorrect. If this premise were true, then statutory schemes in jurisdictions which employ discretionary sentencing – i.e., post-Booker federal sentencing – would be immune from vagueness challenges. The same could be said of any felony offense in Washington which does not trigger a mandatory minimum, as well as the vast majority of misdemeanors, because a jury finding does not require the court to impose a particular sentence. But see City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000) (addressing vagueness challenge to municipal ordinance).

⁵ United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

Thus, the degree of the sentencing court's discretion is a non sequitur to the question whether the vagueness doctrine applies to penal statutes. Because an aggravating factor allows a court to extend the term of confinement beyond that otherwise permitted by the jury's verdict, it defines the lawfulness of the confinement. To the extent Baldwin was based on the misguided premise that the addition of an aggravating circumstance does not affect the sentencing judge's discretion, Baldwin must be overruled.

b. Statutory vagueness challenges may be considered for the first time on appeal. WAPA asserts that Stubbs' vagueness challenge to the jury instruction is waived. Br. WAPA at 14-15. Stubbs has challenged both the statute and the jury instruction, thus this argument is not germane to this appeal. As WAPA concedes, vagueness analysis applies to statutes, without regard to when the argument first was raised. Br. WAPA at 15 (quoting State v. Whitaker, 133 Wn. App. 199, 233, 135 P.3d 923 (2006)); see also, Lorang, 140 Wn.2d at 30 (considering vagueness challenge as a potential "manifest error affecting a constitutional right," even though argument was raised for the first time in the Supreme Court).

Moreover, WAPA fails to explain why a waiver analysis would apply even if Stubbs had challenged only the jury instruction.

[RAP 2.5(a)] reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

State v. Scott, 110 Wn.2d 680, 685, 767 P.2d 492 (1988).

Stubbs moved to strike the aggravating circumstance but the trial court denied the motion, finding RCW 9.94A.535(3)(y) was "a fairly straightforward jury question." 6/26/06 RP 22-23. The record supplies no basis to conclude the trial court would have issued "clarifying instructions" if they had been proposed.

c. RCW 9.94A.535(3)(y) is vague. WAPA claims that "[t]he facts of this case are on the far end of the spectrum of possible injuries that could be inflicted in a first degree assault case." Br. WAPA at 17. But the question is not whether a particular prosecutor (or association of prosecutors), or even this Court, can describe a "spectrum of possible injuries." Instead, the only pertinent question is whether the jury was provided with uniform and measurable standards to cabin its factfinding.

The jury was not informed of what might constitute a "typical" assault in the first degree. Nor was the jury provided with any instructions or evidence to identify what "level" of injuries might constitute the "level"

necessary to satisfy the elements of the offense. Finally, the jury was not given any instructions on how to determine whether injuries substantially exceed this "level." Thus WAPA's claim that the term "substantial" is not vague, Br. WAPA at 18-19, falls short of the mark. WAPA has failed to identify any objective criterion on which this Court may be confident the jury rested its special verdict.

What is forbidden by the due process clause are criminal statutes that contain no standards and allow police officers, judge and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in a given case.

Lorang, 140 Wn.2d at 31.

RCW 9.94A.535(3)(y) lacks any objective standards to prevent arbitrary and discriminatory application. See generally, Br. WACDL at 16. Nor does the statute, read in conjunction with RCW 9A.36.011, provide any notice to Stubbs that his offense could be punished more severely than authorized by the standard range. This Court should conclude the statute is void for vagueness.

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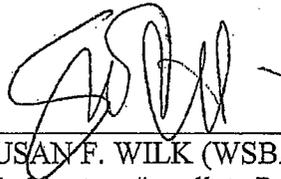
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C. CONCLUSION

For the foregoing reasons, and for the reasons argued in Stubbs' supplemental brief and the *amicus curiae* brief of WACDL, Stubbs' exceptional sentence must be reversed and this matter remanded for imposition of a standard range sentence.

DATED this 26th day of October, 2009.

Respectfully submitted:



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