

NO. 63697-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRIAN LEROY SIERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES ROGERS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the State was required to allege the exceptional sentence aggravating circumstance in the information.

2. Whether appellant Brian Siers has failed to show that he is entitled to reversal of his second-degree assault conviction based upon the failure to allege the aggravating circumstance in the information when the State did not request and the trial court did not impose an exceptional sentence.

3. Whether the addition of the deadly weapon enhancements to Siers's second-degree assault convictions did not offend double jeopardy.

B. STATEMENT OF THE CASE

On the night of June 20, 2008, Jesse Hoover went to the Jai Thai Restaurant in Seattle, hoping to see a woman he knew. 2RP 24-25.¹ Siers was sitting at the bar a few seats down from Hoover and, for unknown reasons, became annoyed with Hoover and started calling him names. 2RP 28; 3RP 29-31. Later that

¹ The verbatim report of proceedings consists of four volumes. 1RP refers to the transcript dated April 20, 21 and 30, 2009. 2RP refers to the transcript dated April 22, 2009. 3RP refers to the transcript dated April 23, 2009. 4RP refers to the transcript dated May 4, and June 5, 2009.

night, Siers went outside for a cigarette, and Hoover approached and started calling Siers names. 2RP 30-34, 60-62, 97-98. The two men began to argue, and a third man, Daniel Whitten, unsuccessfully attempted to break them up. 1RP 35-38. Siers started swinging at Hoover, and Hoover returned punches. 1RP 38; 2RP 36, 68.

Siers pulled a knife from his pocket and began slashing at Hoover. 1RP 40-42; 3RP 46-47. Siers stabbed Hoover in the arm and forehead. 2RP 39-40; 3RP 12-13. Whitten attempted to intervene and tried to pull Siers back, but Siers responded by stabbing Whitten in the abdomen. 1RP 42-46; 3RP 8-10. Siers fled the scene. 1RP 47. Whitten and Hoover were transported to Harborview Medical Center for treatment of their knife wounds. 1RP 49-50; 2RP 42-44.

The State charged Siers with two counts of second-degree assault. CP 8-9. The State further alleged a deadly weapon enhancement on each count. Id. In early April 2009, the State gave written notice to Siers that it intended to seek a jury finding on the "Good Samaritan" aggravating circumstance on the assault count relating to Whitten. CP 29.

Trial began on April 20, 2009. On the first day, the prosecutor advised the court that the State was seeking a jury finding on the "Good Samaritan" aggravating circumstance. 1RP 9. The trial court inquired whether the jury should consider this aggravating circumstance during their deliberations on the case-in-chief, and the prosecutor responded that they should. 1RP 9. The court then asked defense counsel if he had any position on the issue, he replied no. 1RP 9.

At trial, Siers testified that he had acted in self-defense, and he denied ever using a knife. 2RP 83-87.

After both parties rested, Siers objected to the submission of the aggravating circumstance on the basis that it had not been charged in the information. 1RP 142, 154; 4RP 7-8. The trial court denied the objection, noting that under existing caselaw, the State was not required to allege the aggravating circumstance in the information. 4RP 10.

The jury found Siers guilty as charged. CP 22. The jury also found the deadly weapon enhancement and the "Good Samaritan" aggravating circumstance. CP 23-25.

At sentencing, the State did not request an exceptional sentence. 4RP 87. The court agreed that an exceptional sentence

was not appropriate and imposed standard range sentences on both counts. 4RP 89-90; CP 68. This appeal follows.

C. ARGUMENT

1. SIERS IS NOT ENTITLED TO REVERSAL OF HIS CONVICTION BASED UPON THE FAILURE TO ALLEGE THE AGGRAVATING CIRCUMSTANCE IN THE INFORMATION.

After the trial in this case, the Washington Supreme Court held that the State must allege exceptional sentence aggravating circumstances in the information. Siers now claims that he is entitled to reversal of one of his second-degree assault convictions based upon the State's failure to allege the "Good Samaritan" aggravating circumstance in the information. The Court should reject this claim; there is no authority for the proposition that a defendant is entitled to reversal of a criminal conviction based upon the failure to allege a sentencing enhancement in the information. Instead, the remedy is vacation of the enhancement, not dismissal of the underlying criminal conviction. Because the prosecutor did not request and the trial court did not impose an exceptional sentence, there is no need to re-sentence Siers, and this Court should affirm his convictions.

a. The State Was Not Required To Allege The Aggravating Circumstance In The Information.

Siers argues that the State erred by failing to allege the aggravating circumstance in the charging document. In State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009), a majority of Washington Supreme Court justices held that the State must allege exceptional sentencing aggravating circumstances in the charging document. While this Court is bound by Powell,² the State respectfully submits that this holding is incorrect and offers the following argument in order to preserve the issue.

The Sentencing Reform Act requires that the State provide advance notice to a defendant that it intends to seek an exceptional sentence, and identify the relevant aggravating circumstances. The statute does not specify the type of notice required:

At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

RCW 9.94A.537(1).

² The holding of the court is the holding joined by a majority of the justices on a case. Spain v. Employment Sec. Dept., 164 Wn.2d 252, 260 n.8, 185 P.3d 1188 (2008).

Prior to trial in this case, in State v. Berrier, 143 Wn. App. 547, 178 P.3d 1064 (2008), the Court of Appeals held that the State was not constitutionally required to allege the aggravating circumstance in the charging document. "[T]here is no statutory or constitutional requirement to plead aggravating factors in the information and, therefore, the State's separate notice of intent to seek an exceptional sentence [i]s sufficient." Id. at 549.

However, after Siers's trial, in Powell, a majority of the justices held that the State must charge aggravating factors in the information in order to obtain an enhanced sentence. In a dissenting opinion joined by three Justices, Justice Owens held that "aggravating circumstances are essential elements of a crime that must be charged in an information." 167 Wn.2d at 695 (Owens, J., dissenting). In her concurring opinion, Justice Stephens, joined by Justice Charles Johnson, agreed with the dissent on this issue. Id. at 690 (Stephens, J., concurring).

In the plurality opinion, Justice Alexander, joined by three other justices, disagreed and explained:

The aggravating circumstances under RCW 9.94A.535(3) are not elements of an offense. Therefore, they do not fall within the rule that all the elements of a crime must be set forth in the charging instrument pursuant to article I, section 22. Rather,

notice of aggravating circumstances is required as a matter of due process. Due process is satisfied when the defendant receives sufficient notice from the State to prepare a defense against the aggravating circumstances that the State will seek to prove in order to support an exceptional sentence.

Id. at 682.

As authority, the dissenting and concurring opinions cited Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). See 167 Wn.2d at 689-90 (Stephens, J., concurring); 167 Wn.2d at 693-94 (Owens, J., dissenting). Yet neither case stands for the proposition that the Constitution requires that the State allege aggravating circumstances in the charging document. In Apprendi, the Court expressly noted that Apprendi's challenge was not based upon the omission of any reference to the sentence enhancement in the indictment. 530 U.S. at 477 n.3. Similarly, Blakely did not challenge the sufficiency of the charging document and the Court did not address the issue. See, e.g., 542 U.S. at 296, 301.

The vast majority of state courts that have addressed the issue have rejected the argument that Blakely requires that sentencing enhancements be alleged in the charging document.

See State v. Dague, 143 P.3d 988, 1007 (Alaska Ct. App. 2006) ("the due process clause of the Fourteenth Amendment does not require sentencing factors to be included in the indictment-even when, under Apprendi and Blakely, the Sixth and Fourteenth Amendments would require the states to give defendants a jury trial on those same factors"); State v. Kendell, 723 N.W.2d 597, 611 (Minn. 2006) (holding that "aggravating sentencing factors need not be charged in an indictment in Minnesota"); State v. Caudle, 182 N.C. App. 171, 173, 641 S.E.2d 351 (N.C. Ct. App. 2007) (holding that aggravating factors do not need to be charged in the indictment); State v. Heilman, 339 Or. 661, 670, 125 P.3d 728 (Or. 2005) (holding that the State was not required to plead the elements of the enhancement in the indictment); State v. Berry, 141 S.W.3d 549, 562 (Tenn. 2004) (holding that aggravating circumstances need not be included in the indictment); but see State v. Jess, 117 Hawai'i 381, 184 P.3d 133 (2008) (holding that charging instrument must include sentencing enhancement allegation).

The Constitution does not require that the State allege exceptional sentence aggravating circumstances in the information. By providing advance written notice to Siers of the "Good

Samaritan" aggravating circumstance, the State satisfied Siers's right to notice.

b. Siers Is Not Entitled To Reversal Of His Second-Degree Assault Conviction.

Even if the State erred by not alleging the aggravating circumstance in the charging document, Siers is not entitled to the relief he seeks -- vacation of one of his second-degree assault convictions. Siers claims that the failure to allege the aggravating circumstance rendered the charging language for one of the second-degree assault charges constitutionally insufficient. This argument is without merit. The information included all essential elements of the crime of second-degree assault. The claimed error is that the State failed to give proper notice of an aggravating circumstance that could serve as a possible sentencing enhancement on one of the counts. When the State fails to give proper notice of a sentencing enhancement, the remedy is vacation of the enhancement, not vacation of the underlying conviction.

Prior to Blakely, Washington State had sentencing enhancements that were required to be found by a jury. When the State failed to give proper notice of the enhancement, the court

reversed the sentence, not the underlying conviction. In State v. Frazier, 81 Wn.2d 628, 503 P.2d 1073 (1972), the Washington Supreme Court held that the State was required to allege the firearm enhancement set forth in former RCW 9.41.025 in the charging document. The court reasoned that due process required such notice because the enhancement, "if determined adversely to the appellant, irrevocably forbids the court from exercising its independent judgment concerning whether the appellant is to receive a deferred or suspended sentence." Id. at 628. In Frazier, the State had not provided such notice, and when ordering relief, the court did not reverse Frazier's second-degree assault conviction, but simply remanded the case for resentencing without the enhancement. Id. at 635.

After Frazier, the appellate courts repeatedly confronted cases where the enhancement had not been properly alleged in the information. In each case, the court simply remanded for resentencing and left the underlying conviction intact. See State v. Theroff, 95 Wn.2d 385, 393, 622 P.2d 1240 (1980); State v. Smith, 11 Wn. App. 216, 225-26, 521 P.2d 1197 (1974); State v. Mims, 9 Wn. App. 213, 217-20, 511 P.2d 1383 (1973).

Siers would be entitled to the same relief, yet in this case, he does not request it, undoubtedly because there is no need to remand for resentencing. Though the jury found the aggravating circumstance, the State did not request and the court did not impose an exceptional sentence.

Siers cites State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995), for the proposition that he is entitled to vacation of one of his second-degree assault convictions. In Vangerpen, the information charged the defendant with attempted murder in the first degree, but omitted the statutory element of premeditation. After the State rested, the trial court allowed the State to amend the information, and the jury found the defendant guilty as charged. Id. at 785-86. The Washington Supreme Court held that the trial court erred in allowing the amendment and remanded for a new trial. Id. at 791. The Court rejected the argument that the defendant should be resentenced for the crime of attempted second-degree murder:

The defendant contends that because he was charged (albeit inadvertently) with attempted murder in the second degree, he should be sentenced only for that crime. However, the defendant here was not really charged with attempted murder in the second degree because the charging document was ambiguous on its face. It stated the charge was "attempted murder in the first degree" and cited to the correct statutory citations for that offense, but

then it accidentally omitted an element of that crime and thereby inadvertently listed the statutory elements of only attempted murder in the second degree. The document was internally inconsistent and contradictory on its face. And perhaps even more importantly, upon proper instructions for both first and second degree attempted murder, *the jury* found the defendant guilty of attempted murder in the first degree.

....

We have repeatedly and recently held that the remedy for an insufficient charging document is reversal and dismissal of charges without prejudice to the State's ability to refile charges.... The State has a right to refile a proper information.

Id. at 792-93.

Vangerpen can be easily distinguished; the information in that case omitted an essential element of the substantive crime charged. The error in Siers's case is not in the charging language for second-degree assault, but the failure to provide proper notice of the aggravating circumstance. In light of Powell, Siers's trial counsel's objection to the "Good Samaritan" aggravating circumstance was well-taken, and the trial court should not have

instructed the jury on that aggravating circumstance. However, this error does not undermine the jury's verdict on the second-degree assault count, and there is no basis to reverse that conviction.

2. THE WASHINGTON SUPREME COURT HAS REJECTED SIERS'S DOUBLE JEOPARDY CLAIM.

Siers claims that his right to be free from double jeopardy was violated by the imposition of the deadly weapon enhancements on his two second-degree assault convictions because the use of a deadly weapon is also an element of the second-degree assault. Shortly before Siers filed his opening brief, the Washington Supreme Court addressed and rejected this identical claim. State v. Kelley, No. 82111-9, 2010 WL 185947 (Wash. Jan. 21, 2010) (holding that imposition of a firearm enhancement on a second-degree assault conviction does not violate double jeopardy when element of assault was use of a firearm); see also State v. Aguirre, No. 82226-3, 2010 WL 727592 (Wash. Mar. 4, 2010) (same). This claim is without merit.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm Siers's convictions and sentence.

DATED this 19th day of March, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BRIAN SIERS, Cause No. 63697-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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