

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

BRIAN LEROY SIERS,
Respondent.

STATE'S SUPPLEMENTAL BRIEF

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STATE OF WASHINGTON
2011 MAY 13 P 3:15
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A. ISSUES PRESENTED

1. Whether the State is constitutionally required to allege an exceptional sentence aggravating circumstance in the information.

2. Whether the proper remedy for the failure to allege an aggravating circumstance in the information is to vacate any exceptional sentence imposed, rather than to reverse the underlying criminal conviction.

B. STATEMENT OF THE CASE

Detailed facts are set forth in the Brief of Respondent filed in the Court of Appeals.

In summary, Brian Siers got into a bar fight and stabbed Jesse Hoover and Daniel Whitten. 1RP 35-46; 2RP 30-40, 60-68, 97-98; 3RP 8-13, 46-47. The State charged Siers with two counts of second-degree assault and alleged a deadly weapon enhancement on each count. CP 8-9. The State also gave pretrial written notice that it would seek a jury finding on the “Good Samaritan” aggravating circumstance¹ for the assault count relating to Whitten. CP 29.

¹ RCW 9.94A.535(3)(w).

After both parties rested at trial, Siers objected to submitting the aggravating circumstance to the jury because it had not been charged in the information. 1RP 142, 154; 4RP 7-8. Siers did not argue that he was entitled to dismissal of one of the assault charges. At the time of this trial, the Court of Appeals had held that an aggravating circumstance did not need to be alleged in the information,² and the trial court denied Siers's objection. 4RP 10.

The jury found Siers guilty as charged. CP 22. The jury also found the deadly weapon enhancements and the "Good Samaritan" aggravating circumstance. CP 23-25. At sentencing, the State did not request an exceptional sentence, and the court imposed a standard range sentence. 4RP 87-90; CP 68.

On appeal, Siers argued that he was entitled to reversal of the second-degree assault conviction associated with the aggravating circumstance because the State had not alleged the aggravating circumstance in the information. A two-judge majority of the Court of Appeals agreed and reversed the assault conviction. State v. Siers, 158 Wn. App. 686, 244 P.3d 15, 20 (2010), rev. granted, ___ Wn.2d ___ (2011). In its opinion, the Court of Appeals noted that in State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009),

² State v. Berrier, 143 Wn. App. 547, 549, 178 P.3d 1064 (2008).

a majority of this Court had concluded that an aggravating circumstance was the functional equivalent of an element of a crime that must be charged in the information. 158 Wn. App. at 694-96. The court then reasoned that the State had prosecuted Siers for “second-degree assault against a good Samaritan” and that because the Good Samaritan “element” was omitted from the information, Siers’s remedy was reversal of his conviction. Id. at 696-703.

This Court granted the State’s petition for review, which raised two issues: (1) whether the State is required to allege an exceptional sentence aggravating circumstance in the information, and (2) whether the Court of Appeals erred by holding that the remedy for the failure to allege an aggravating circumstance in the information is reversal of the underlying criminal conviction.

C. ARGUMENT

The Court of Appeals reversed one of Siers’s second degree assault convictions because the State did not allege the aggravating circumstance associated with that count in the information. However, Siers claimed no error at trial relating to this conviction, and the trial court did not impose an exceptional

sentence on that count. Moreover, prior to trial, Siers had actual notice of the aggravating circumstance. In imposing this extraordinary and unprecedented remedy, the Court of Appeals believed that it was following the logic of State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009), where five justices endorsed the notion that there is a constitutional requirement to allege an aggravating circumstance in the information.

The Court should reconsider Powell. An aggravating circumstance is not an essential element of a crime; it is not necessary to allege or prove it in order to establish the illegality of the defendant's behavior. Rather, an aggravating circumstance may be present when a crime occurs, and, if proven, gives the trial court greater discretion when imposing punishment. Decisions by the United States Supreme Court concerning sentencing enhancements, cited in Powell, do not address the issue of notice, and the vast majority of courts that have considered this issue have held that there is no constitutional requirement to allege a sentencing enhancement in the charging document.

Even if the Court chooses not to reconsider Powell, the Court should correct the Court of Appeals' error in fashioning the remedy for the failure to allege an aggravating circumstance in the

information. The Court of Appeals held that the information was constitutionally deficient and reversed the conviction. However, there was no error in the information; it charged all the essential elements of second-degree assault. The error was in submitting the aggravating circumstance to the jury when it had not been alleged. The remedy for this error is to vacate the aggravating circumstance special finding and any exceptional sentence imposed as a result.

1. THE CONSTITUTION DOES NOT REQUIRE THAT THE STATE ALLEGE AGGRAVATING CIRCUMSTANCES IN THE INFORMATION.

The State must inform the defendant of the nature and cause of the accusation against him. U.S. Const. amend. VI; Washington Const. art. I, § 22 (amend. 10). The protection afforded by each of these constitutional provisions is the same. State v. Hopper, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). In enforcing these constitutional notice provisions, this Court has avoided technical rules and tailored its jurisprudence toward the precise evil that they were designed to prevent -- charging documents that prejudice the defendant's ability to mount an

adequate defense by failing to provide sufficient notice. State v. Schaffer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993).

To be constitutionally adequate, the Court has repeatedly held that all essential elements of the crime must be included in the charging document. State v. Tandecki, 153 Wn.2d 842, 846, 109 P.3d 398 (2005). "An element is 'essential' if its 'specification is necessary to establish the very illegality of the behavior.'" State v. Yates, 161 Wn.2d 714, 757, 168 P.3d 359 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).³

Applying this definition in Yates, this Court rejected the argument that the aggravating factors for first-degree murder set forth in RCW 10.95.020 were essential elements of the crime, although they raise the possible maximum sentence from life with the possibility of parole to life without the possibility of parole or the death penalty. 161 Wn.2d at 758.

Under this Court's definition of essential elements, exceptional sentence aggravating circumstances do not qualify. It

³ The United States Supreme Court has never held that the essential elements rule is constitutionally required. See Hartman v. Lee, 283 F.3d 190, 195-96 (4th Cir. 2002). Professor LaFave has characterized the notion that the Sixth Amendment mandates the essential elements rule as a "dubious proposition." See 2 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 19.3(a), at 247-48 (2007).

is not necessary to allege or prove an aggravating circumstance to establish the illegality of a defendant's behavior. Rather, the elements of the underlying crime establish the illegality of the behavior. Aggravating circumstances may accompany the commission of the crime. If they are proven, the trial court may have discretion to impose a higher sentence. This Court recently explained that "[t]he purpose of sentencing enhancements is to provide legislative guidance to courts in calibrating the appropriate punishment for crimes based on relevant circumstances surrounding the underlying conduct." State v. Eaton, 168 Wn.2d 476, 483, 229 P.3d 704 (2010).

Even after Blakely, this Court has treated sentence enhancements differently from elements of a crime. A unanimous jury is required to acquit a defendant of a crime. Washington Const. art. I, § 21; State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966). Yet, recently, in State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010), this Court held that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." The Court's reasoning was based upon the difference between a crime and a sentencing

enhancement. “Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.” Id. at 146-47.

The Sentencing Reform Act requires that the State provide notice of an exceptional sentence aggravating circumstance, but it does not mandate the manner in which notice is given. RCW 9.94A.537(1). When this Court recently addressed the issue of notice in Powell, it issued three opinions. A four justice plurality concluded that the State was not constitutionally required to allege aggravating circumstances in the information. 167 Wn.2d at 681-88 (Alexander, C.J.). However, a two justice concurrence and a three justice dissent agreed that aggravating circumstances must be alleged in the information. Id. at 689-91 (Stephens, J., concurring); id. at 691-94 (Owens, J., dissenting).

In Powell, as support for the proposition that aggravating circumstances are essential elements of a crime that must be charged in an information, 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 United States Supreme Court held that certain facts, designated by state law as sentencing factors, had to be submitted to a jury and proven beyond a reasonable doubt. In Blakely, the Court held that the rule in Apprendi applied to exceptional sentence aggravating circumstances. Neither Apprendi nor Blakely addressed the issue of notice. 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.

After Apprendi and Blakely, numerous state courts confronted the issue of whether there was a constitutional requirement to allege sentencing enhancements in the charging document. The vast majority of courts have held that such notice is not constitutionally required. Professor LaFave has summarized the state of the law on this issue:

[T]he States would have a constitutional obligation to include Apprendi-type elements in their charging instruments only if the notice requirement of the Sixth Amendment... imposed such a requirement. Three of the Supreme Court's element-definition cases (Apprendi, Ring and Blakely) involved state prosecutions, but none presented a challenge to the charging document...

More than dozen state courts so far have addressed the question of whether the federal constitution requires a state pleading to allege an Apprendi-type element. Only a few appear to have concluded there is such a requirement. The vast majority have directly held that there is no such requirement. Some have focused primarily on the Fifth Amendment's grand jury clause not being applicable to the states. Others have cited the need to take account of a possible Sixth [Amendment] requirement of notice, but conclude that adequate notice can be provided without alleging the Apprendi-type element in the charging document.

2 Wayne R. LaFare & Jerold H. Israel, Criminal Procedure
§ 19.3(a), at 253-55 (2007) (footnotes omitted).

The Minnesota Supreme Court is part of the majority of courts that have rejected the argument that aggravating factors must be alleged in the charging document.⁴ That court has explained:

⁴ This Court has repeatedly recognized that Minnesota caselaw on aggravating circumstances is persuasive authority in Washington because Minnesota's sentencing statute was the model for Washington's. In re Breedlove, 138 Wn.2d 298, 307, 979 P.2d 417 (1999); State v. Nordby, 106 Wn.2d 514, 521 n.5, 723 P.2d 1117 (1986) (Utter, J., dissenting).

[T]he Supreme Court's conclusion that sentencing factors operate as the "functional equivalent" of elements for purposes of the Sixth Amendment jury trial right does not dictate that such factors are elements for purposes of a Minnesota indictment. The right to a jury trial serves a different purpose than the "nature and cause" requirement and the due process notice requirement; the former addresses the adequacy of proof of the offense charged and of the aggravating sentencing factors, while the latter simply provides a defendant notice of the charges. We therefore conclude that aggravating sentencing factors need not be charged in an indictment in Minnesota. This conclusion is in line with the vast majority of states that have considered this issue.

State v. Kendell, 723 N.W.2d 597, 611-12 (Minn. 2006) (internal citations and footnote omitted).⁵

This Court should reconsider the majority position in Powell; it is clearly "incorrect and harmful." State v. Barber, ___ Wn.2d ___, 248 P.3d 494, 499-500 (2011) (discussing the standard for overruling a prior decision). The federal authority cited in the

⁵ See also 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. 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).

concurring and dissenting opinions does not require that sentencing enhancements be alleged in the information. Moreover, the notion that there is a constitutional requirement that aggravating circumstances be alleged in the information is inconsistent with this court's prior precedent and the vast majority of courts considering the issue. The majority position in Powell is also harmful to the public interest. It will allow convicted criminals, who had actual notice of the sentence enhancement allegation and suffered no prejudice, to be released early from prison, and, if the Court of Appeals' remedy is upheld, to obtain vacation of their underlying criminal convictions.

Though the concurring and dissenting opinions in Powell primarily relied upon Blakely and Apprendi for their position, there is some prior precedent from this Court mandating notice of a sentencing enhancement in the information. Decades before Apprendi and Blakely, this Court held that firearm and deadly weapon enhancements must be alleged in the information. State v. Frazier, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972). The Court explained that the basis for this rule was that a finding of these

enhancements removed judicial discretion and that the additional punishment was mandatory upon a jury finding. 81 Wn.2d at 634-35. This reasoning does not apply to aggravating circumstances. The finding of an aggravating circumstance does not mandate the imposition of an exceptional sentence or remove judicial discretion. Even if an aggravating circumstance is found by a jury, it may not justify an exceptional sentence as a matter of law. See State v. Stubbs, 170 Wn.2d 117, 124, 240 P.3d 143 (2010) (holding that the severity of victim's injuries cannot support an exceptional sentence on a first-degree assault conviction). In addition, as this case demonstrates, even if an aggravating circumstance could justify an exceptional sentence as a matter of law, the trial court still has the discretion to not impose one.

The United States Constitution does not require that the State allege exceptional sentence aggravating circumstances in the information. Here, because the State gave advance written notice to Siers of the "Good Samaritan" aggravating circumstance, the Court should hold that Siers's right to notice was satisfied.

2. THE REMEDY FOR THE FAILURE TO GIVE PROPER NOTICE OF AN AGGRAVATING CIRCUMSTANCE IS TO VACATE ANY ENHANCED SENTENCE.

The Court of Appeals held that Siers was entitled to reversal of his second-degree assault conviction because the State had not alleged the aggravating circumstance in the information. This remedy was disproportionate to the error and inconsistent with this Court's caselaw. In cases where proper notice of a sentencing enhancement is not given, this Court should hold that the remedy is to vacate any sentence enhancement.

As noted above, when enforcing constitutional notice provisions, the Court has avoided technical rules and tailored its decisions toward the evil that they were designed to prevent -- charging documents that prejudice the defendant by failing to provide sufficient notice. Schaffer, 120 Wn.2d at 620. When fashioning a remedy for an error in providing proper notice, this Court has applied remedies consistent with the nature of the error.

In the past, when addressing charging errors involving sentencing enhancements, the Court has vacated the sentence enhancement; it has not reversed the underlying criminal conviction. In cases where the State failed to allege a firearm

enhancement in the charging document, the remedy imposed was resentencing without the enhancement. Frazier, 81 Wn.2d at 635; see also 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).⁶ Accordingly, when there has been constitutional error in failing to allege a sentence enhancement, the Court has never held that such error requires reversal of the underlying criminal conviction.

This Court employed a similar commonsense solution in Powell. In that case, although the State had not alleged the aggravating circumstances in the information, a majority of this Court held that the State could proceed to a jury trial on the aggravating circumstances. In her concurrence, Justice Stephens explained that the failure to allege the aggravating circumstance should not require reversal of the underlying criminal conviction:

The problem in Mr. Powell's case is that certain factors had to be charged in the information but were

⁶ The Court of Appeals distinguished Frazier and its progeny in part on the basis that there was no indication in those cases that any party sought the remedy of reversal of the underlying conviction. However, this Court has not limited itself to the remedy requested by the parties. Indeed, in one of the cases relied upon by the Court of Appeals, State v. Vangerpen, 125 Wn.2d 782, 791-95, 888 P.2d 1177 (1995), this Court imposed a remedy, dismissal of the charges without prejudice, that neither the State nor the defendant requested.

not. The State cannot go back in time to amend the original information, and amending it now would require retrial on the underlying offense, which was already proved to the jury and admits of no constitutional defect. The Constitution does not require the impossible.

167 Wn.2d at 690 (Stephens, J., concurring).

It is difficult to reconcile the result in Powell with the Court of Appeals' holding in Siers. Under the logic of Siers, this Court should have reversed Powell's conviction because the State had not alleged the aggravating circumstances in the charging document. Not only did this Court not reverse Powell's conviction, but it held that the State could proceed to present the aggravating circumstances to a jury.

The Court of Appeals' analysis went astray by relying upon caselaw concerning *constitutionally deficient* charging documents. It is settled that when a charging document is constitutionally deficient, the remedy is reversal of the conviction. State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010). Here, the Court of Appeals reasoned that, in light of Powell, there exists the crime of second-degree assault against a Good Samaritan. Siers, 158 Wn. App. at 702. The court proceeded to hold that the State had failed to allege all the elements of that crime in the information, and that

Siers was therefore entitled to reversal of his conviction. Id. at 702-03.

The flaw in this analysis is that the information in this case did not purport to charge Siers with the crime of “second-degree assault against a Good Samaritan.” Instead, it charged him with two counts of second-degree assault and included all essential elements of the crimes. The information was constitutionally sufficient. Neither the Court of Appeals nor Siers cited any authority for the proposition that a charging document is constitutionally deficient because later at trial the State seeks a jury finding on a sentencing enhancement that was not alleged in the charging document.

Rather, in the cases cited by the Court of Appeals, the charging document was, in fact, constitutionally deficient — it failed to allege all essential elements of the crime charged in the information. In State v. McCarty, 140 Wn.2d 420, 424, 998 P.2d 296 (2000), the information charged the defendant with conspiracy to deliver a controlled substance, but it omitted the common-law

element of involvement of a third person. In State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995), the information charged the defendant with attempted murder in the first degree, but omitted the statutory element of premeditation.

In light of Powell, the error in Siers's case was submitting the aggravating circumstance to the jury when it had not been charged.⁷ Below, Siers's trial counsel recognized that this was the error, and he asked the trial court not to submit the aggravating circumstance to the jury. He did not argue that the information was deficient and that the corresponding assault count had to be dismissed. Because there was no error in the information, the proper remedy for the lack of proper notice is to vacate the jury's finding on the aggravating circumstance and reverse the exceptional sentence, had one been imposed.

⁷ In his answer to the petition for review, Siers claimed that the State's argument in the petition had "changed significantly" and that the State had not previously argued that the error was the trial court's submission of the aggravating circumstance to the jury. Answer at 4. In fact, the State has consistently argued that, in light of Powell, the error in this case was submitting the aggravating circumstance to the jury when it had not been charged in the information. See Brief of Respondent at 12-13.

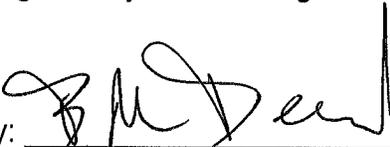
D. CONCLUSION

For all the foregoing reasons, this Court should reverse the Court of Appeals' opinion and affirm Siers's convictions and sentence.

DATED this 12th day of May, 2011.

Respectfully submitted,

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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 STATE'S SUPPLEMENTAL BRIEF, in STATE V. BRIAN SIERS, Cause No. 85469-6, in the Supreme Court for the State of Washington.

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