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No. 62237-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUN 26 PM 4:48

STATE OF WASHINGTON,

Respondent,

v.

RICHARD DUNCALF,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION

As originally enacted and applied, the Sentencing Reform Act (SRA) afforded sentencing judges the ability to impose an exceptional sentence beyond the standard range so long as the judge found substantial and compelling reasons to do so. By statute and common law, a reason was substantial and compelling if it legally distinguished the crime from other crimes of the same category and the judge found facts to support it. A sentencing court's reliance on an inherently subjective aggravating factor was not subject to challenge as violative of the void-for-vagueness doctrine because aggravating factors were not seen as increasing did not increase the maximum punishment of the offense..

In Blakely v. Washington,¹ the Supreme Court held that punishment may only follow from facts found by a jury beyond a reasonable doubt, thus invalidating the SRA's exceptional sentencing scheme. Blakely rested this result upon the conclusion that aggravating factors did increase the maximum punishment for the offense.

¹ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Revisions of the SRA following Blakely require a jury find all facts necessary to support an exceptional sentence and limit the potential aggravating factors to those specifically listed in the statute. In doing so, these revisions removed from the sentencing judge the ability to make either of the determinations of substantial and compelling reasons. Without providing a new framework for determining what constitutes a substantial and compelling reasons, the SRA still requires that before a sentencing judge imposes an exceptional sentence the judge must find substantial and compelling reasons exist.

While judges are expected to recognize what is truly “exceptional” and what is not, jurors are presumed to follow only the instructions they are given. Those instructions must ensure the jurors have not improperly based their verdicts on factors the Legislature considered in setting the standard range for the offense, or on their own arbitrary and subjective definitions of the circumstances they are asked to find. But the SRA does not include objective standards to ensure this is the case.

Applying these statutes, a jury was asked whether Richard Duncalf’s second degree assault conviction included injuries which substantially exceeded those necessary to prove the offense.

Faced with this inherently subjective determination, the jury sought an instruction from the court defining when injuries substantially exceed those necessary to prove the offense. The Honorable Gregory Canova refused to provide a legal standard, instead directing the jury to employ the common meaning of the terms. The jury returned a verdict finding Mr. Duncalf inflicted injuries which substantially exceeded those necessary to prove second degree assault. Based upon that finding, Judge Canova imposed an exceptional sentence.

This sentence deprives Mr. Duncalf of due process. The Legislature necessarily contemplated the possibility of severe injuries in setting the standard range for the crime of assault in the second degree and thus an exceptional sentence may not be imposed on this basis.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing an exceptional sentence.
2. RCW 9.94A.535(3)(y), as applied to Mr. Duncalf, is unconstitutionally vague and violates the Fourteenth Amendment Due Process Clause.
3. The absence of a standard guiding the determination of whether “substantial and compelling reasons” support an

exceptional sentence violates the Fourteenth Amendment Due Process Clause.

4. The trial court deprived Mr. Duncalf of his right to appeal by failing to set forth the reasons supporting its imposition of a 100 month sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Facts contemplated by the Legislature in setting the standard range for the charged offense cannot support an exceptional sentence. A jury acquitted Mr. Duncalf of first degree assault and convicted him of second degree assault. Without the benefit of a legal standard to guide their determination, the jury concluded Mr. Duncalf inflicted injuries which substantially exceed those necessary to prove second degree assault. In crafting the standard range for second degree assault, did the Legislature contemplate injuries which do not rise to the level of first degree assault?

2. A penal statute which fails to set forth objective guidelines to guard against arbitrary application is vague and violates the Fourteenth Amendment's Due Process Clause. RCW 9.94A.535(3)(y), setting forth the aggravating factor of injuries which substantially exceed those necessary to prove a crime does

not provide any standard to govern the determination of what injuries are minimally necessary or when injuries “substantially exceed” this undefined base. By leaving it to the jury in Mr. Duncalf’s case to define this element, was Mr. Duncalf deprived of due process?

3. A penal statute which fails to set forth objective guidelines to guard against arbitrary application is vague and violates the Fourteenth Amendment’s Due Process Clause. Neither the SRA nor caselaw provide an objective framework which a sentencing judge can employ to determine when substantial and compelling reasons exist to support an exceptional sentence. Nor does such a framework exist to guide appellate review of the imposition of an exceptional sentence. Does the absence of objective standards deprive Mr. Duncalf of due process and his right to appeal his exceptional sentence?

4. Does the trial court’s failure to explain the basis for the length of the sentence imposed deny Mr. Duncalf his constitutional and statutory right to appeal his exceptional sentence?

D. STATEMENT OF THE CASE

Mr. Duncalf returned to the apartment which he shared with his girlfriend, Tasha Deptula, and James Ketchum, but did not find

Ms. Deptula home. Mr. Ketchum, however, was home in his bedroom with his sometime girlfriend, Stacey Worthington, engaged in sexual intercourse. 6/17/08 RP 15. Mr. Duncalf opened the door of the darkened room and immediately left closing the door behind him. Id. at 16. Shortly, Mr. Duncalf entered the room pushed Mr. Ketchum off the bed and punched him numerous times. Id. at 16-17. Mr. Duncalf stopped, looked at Ms. Worthington and left. Id. at 18. Mr. Duncalf returned and said “I thought you were my girlfriend” and asked Ms. Worthington to help him wash Mr. Ketchum’s face Id.

Mr. Ketchum was unconscious, suffered several fractures to his jaw, had two broken ribs, and a small pneumothorax (pocket of air in the chest cavity). 6/18/08 53-55, 66. Mr. Ketchum underwent facial surgery which his surgeon described as “quite successful.” 6/23/08 RP 152.

In addition to other charges not relevant to this appeal, the State charged Mr. Duncalf with both first-degree assault and in the alternative second-degree assault with the allegation that the injuries Mr. Ketchum suffered substantially exceeded those necessary to establish substantial bodily injury. CP 12-15.

A jury acquitted Mr. Duncalf of first degree assault, CP 396, and instead convicted him of second degree assault with a special verdict that the injuries inflicted exceeded those necessary to prove second degree assault. CP 397-98. Judge Canova imposed an exceptional sentence of 100 months. CP 649.

E. ARGUMENT

1. THE STANDARD RANGE PRESCRIBED BY THE LEGISLATURE FOR THE CRIME OF ASSAULT IN THE SECOND DEGREE CONTEMPLATES THE INJURIES THAT OCCURRED HERE, SO NO EXCEPTIONAL SENTENCE COULD HAVE BEEN IMPOSED PURSUANT TO RCW 9.94A.535(3)(y)

a. An injury which constitutes "substantial bodily harm but which does not amount to great bodily harm is an element of second-degree assault; thus the severity of the victim's injuries could not authorize an exceptional sentence. "An element of the charged offense may not be used to justify an exceptional sentence." State v. Ferguson, 142 Wn.2d 631, 647-48, 16 P.3d 1271 (2001). The rationale for this rule is that some factors are

inherent in the crime – inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and do not distinguish the defendant's behavior from that inherent in all crimes of that type.

Id. (citing State v. Chadderton, 119 Wn.2d 390, 396, 832 P.2d 481 (1992) (alterations in original)). Thus, “[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.” State v. Gore, 143 Wn.2d 288, 316, 21 P.3d 362 (2001) (same) (reversed on other grounds, State v. Hughes, 154 Wn.2d 118, 132, 110 P.3d 192 (2005)).

As was explained prior to Blakely,

we use a two-part analysis to determine the validity of an aggravating factor: “First, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range. Second, the asserted aggravating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” Under the second prong of this analysis, a “typical” offense is defined by the elements of the charged crime.

State v. Owens, 95 Wn.App. 619, 624, 976 P.2d 656 (1999)

(emphasis added, citation omitted).

Courts have repeatedly stricken exceptional sentences where the alleged “aggravating circumstance” inhered in the jury verdict for the underlying offense. Ferguson, 142 Wn.2d at 648 (“deliberate cruelty” finding inhered in jury’s verdict for assault by

intentionally exposing the human immunodeficiency virus (HIV) to another person with intent to inflict bodily harm); State v. Dunaway, 109 Wn.2d 207, 218-19, 743 P.2d 1237 (1987) (planning is inherent in the premeditation element of first degree murder, thus may not be used to justify an exceptional sentence for the crime of first degree murder); Gore, 143 Wn.2d at 320 (same); State v. Bourgeois, 72 Wn.App. 650, 662, 866 P.2d 43 (1994) (serious wounds inflicted on victims fell within the scope of the statutory definition of first-degree assault, and could not support sentence outside standard range); State v. Baker, 40 Wn.App. 845, 848-49, 700 P.2d 1198 (1985) (planning inherent in verdict for attempted first-degree escape); State v. Armstrong, 106 Wn.2d 547, 551, 723 P.2d 1111 (1986) (burns inflicted on the 10-month-old victim by defendant's throwing boiling coffee on the child and plunging the child's foot in the coffee were injuries accounted for in the offense of second degree assault and could not justify an exceptional sentence); State v. Nordby, 106 Wn.2d 514, 519, 723 P.2d 1117 (1986) (seriousness of bodily injuries could not justify exceptional sentence for vehicular assault because injuries were considered by the Legislature in setting the standard range for the offense); State v. Cardenas, 129 Wn.2d 1, 6-7, 914 P.2d 57 (1996) (same).

The State charged Mr. Duncalf with both first-degree assault and in the alternative second-degree assault with the allegation that the injuries inflicted substantially exceeded those necessary to establish substantial bodily injury. CP 12-15. The jury, however, acquitted Mr. Duncalf of first degree assault, CP 396, and instead convicted him of second degree assault with a special verdict that the injuries inflicted exceeded those necessary to prove second degree assault. CP 397-98.

Consistent with the statutory definition of “great bodily harm,” the jury was instructed,

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

CP 366; see RCW 9A.04.110(4)(c). The jury was further instructed that

“Substantial bodily harm” means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part;

CP 373, see, RCW 9.94A.110(4)(b). However, when the jury asked for a definition of “what constitutes ‘substantially exceeds’ the level of bodily injury necessary to constitute ‘substantial bodily injury’,”

CP 392, the court instructed there is no specific definition and the jury should employ the “commonly held meaning to the words.” CP 393.

By its plain terms the second-degree assault statute contemplates all injuries more significant than “substantial bodily harm” but which do not rise to level of “great bodily harm.” Bourgeois, 72 Wn.App. at 662. The Legislature has elected to divide assault into four degrees dependent upon the *mens rea* and level of injury inflicted. The legislature has not created an offense of Assault 1.5°, or Assault 1.3°. That Mr. Ketchum’s injuries satisfy the elements of such a hypothetical offense cannot be the basis for an exceptional sentence. RCW 9.94A.530(3) provides

Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(3)(d), (e), (g), and (h).

Instead, injuries which do not rise to the level of great bodily injury but are nonetheless substantial bodily injury fall within the category of second degree assault, and cannot support an exceptional sentence.

The jury’s verdicts establish that while Mr. Duncalf assaulted Mr. Ketchum the jury found the injuries were not sufficient to

elevate the crime from second degree to first degree assault.

Rather, the jury found the injuries fit within those the Legislature has categorized as constituting second degree assault.

The Legislature has created a broad standard range for assault in the second degree which permits particularly egregious offenders to receive sentences approximately 32% longer than their counterparts whose conduct is less serious. It is absurd to assume the Legislature did not consider the possibility that serious injury might result from a second degree assault, or that the Legislature only contemplated no-injury or minor-injury offenses in fixing the standard range for the crime. The standard cannot be that the presumptive range only applies to the level of injuries minimally necessary to satisfy the elements of the offense and any injuries that “substantially exceed” this “level” – whatever that may mean – permits a sentence outside the standard range. Such a construct defeats the point of the standard range. Further, there are few if any offenses which only minimally satisfy the elements of an offense. If the standard range only applies to the minimum level of injury, exceptional sentences become the rule rather than the exception.

In Bourgeois, this Court repudiated this approach. Bourgeois, a juvenile, had shot his victims with a handgun. 72 Wn.App. at 652. Both victims “would have died as a result of the gunshot wounds had they not received emergency care.” Id. As a result of the wounds, one victim had portions of his pancreas, colon, and his entire spleen removed. Id.

The trial court had reasoned a manifest injustice disposition upward was appropriate because “the injuries actually inflicted were more severe than the minimum injuries that could have led to the same conviction.” Id. at 662. The court of appeals responded,

We believe that this approach avoids the relevant question: did the Legislature contemplate the injuries actually inflicted in defining, and setting the standard range for, the crime of conviction?

Id. Answering this question in the affirmative, the court reversed the disposition.

In this case, the answer to this question is also yes. This Court should conclude that because the “substantial bodily injury” prong of assault in the second degree contemplates serious injuries short of “great bodily injury,” imposing an exceptional sentence based on the degree of injuries is contrary to legislative intent.

b. This Court must reverse Mr. Duncalf's sentence and remand for a sentence within the standard range. Where an exceptional sentence is based on reasons insufficient to justify the sentence as a matter of law, the sentence must be reversed and remanded for resentencing within the standard range. Ferguson, 142 Wn.2d at 649; State v. Batista, 116 Wn.2d 777, 793, 808 P.2d 1141 (1991). Mr. Duncalf's sentence must be reversed and remanded for imposition of a standard range sentence.

2. RCW 9.94A.535(3)(y) PERMITTING AN EXCEPTIONAL SENTENCE TO BE IMPOSED IF "THE INJURIES SUBSTANTIALLY EXCEED THE LEVEL NECESSARY TO SATISFY THE ELEMENTS" OF THE CRIME VIOLATES DUE PROCESS VAGUENESS PROHIBITIONS.

The vagueness doctrine of the due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. at

108-09. A “statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites “unfettered latitude” in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The vagueness doctrine is most concerned with ensuring the existence of minimal guidelines to govern enforcement. Kolender v. Lawson, 461 U.S. 352, 358, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983); O’Day v. King County, 109 Wn.2d 796, 810, 749 P.2d 142 (1988).

a. The void-for-vagueness doctrine applies to statutes that authorize increased punishment based on factual findings by juries. Before Blakely, in State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003), the Supreme Court held “the void for vagueness doctrine should have application only to laws that “proscribe or prescribe conduct” and ... it was “analytically unsound” to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences.” Baldwin, 150 Wn.2d at 458 (quoting State v. Jacobsen, 92 Wn.App. 958, 966, 965 P.2d 1140, review denied, 137 Wn.2d 1033 (1999) (internal quotation omitted)). The Court concluded the vagueness

doctrine did not apply to statutory aggravating factors, reasoning, “before a state law can create a liberty interest, it must contain “substantive predicates” to the exercise of discretion and “specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow.”

Baldwin, 150 Wn.2d at 460 (quoting In re Personal Restraint of Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)). Relying on this premise, this Court concluded that sentencing guidelines “do not define conduct ... nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature[,]” and so found the void-for-vagueness doctrine “[has] no application in the context of sentencing guidelines.” Baldwin, 150 Wn.2d at 459.

In light of Blakely and its progeny, however, the opposite is true. I.e., if “laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot,” Baldwin, 150 Wn.2d at 460, then an accused person has a liberty interest in laws authorizing exceptional sentences based on factual findings by juries. Blakely plainly held that an aggravating factors which warrant an exceptional sentence under the SRA alters the statutory maximum

for the offense. 542 U.S. at 306-07. It is for that reason that the Sixth and Fourteenth Amendments require the State plead the aggravators and prove them beyond a reasonable doubt to a jury. Thus, even under Baldwin's flawed understanding of the application of the vagueness doctrine, the doctrine must apply here as the aggravator increases the maximum penalty for the offense. must be applied to statutory aggravating circumstances.

Indeed, after Blakely, this conclusion is inescapable. The Supreme Court has repeatedly made it clear that the right to a jury determination of facts essential to punishment channels sentencing judges' discretion – not the other way around. Blakely, 542 U.S. at 304-05. This rule is closely tied to the other foundational premise of Blakely, Apprendi v. New Jersey, and the many decisions applying Apprendi's rule: because they increase the maximum punishment to which an accused person would otherwise be exposed, aggravating circumstances are elements. Blakely, 542 U.S. at 306-07; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). If a fact “increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt.”

Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003); see also Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2348, 153 L.Ed.2d 556 (2002); Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002).

Whether it is because it is an element of a new offense or merely because the aggravating factor in this case increases the maximum punishment, the vagueness doctrine of the Due Process Clause must apply. See Baldwin, 150 Wn.2d at 459; see also, State v. Schmidt, 208 P.3d 214 (Ariz. 2009) (concluding aggravating factor unconstitutionally vague).

b. RCW 9.94A.535(3)(y) as applied in this case by the special verdict requiring the jury decide whether the injuries “substantially exceed” the level necessary to satisfy the elements of the offense violates the vagueness prohibitions. Citing Baldwin, Division Three recently concluded “the void for vagueness doctrine does not apply to a sentencing scheme.” State v. Stubbs, 144 Wn.App. 644, 650, 184 P.3d 660 (2008), review granted, 203 P.3d 380 (2009). The court alternately concluded the statute was not vague “because it apprises the individuals that inflicting serious bodily injury upon another would subject them to a higher sentence” and found,

[T]he term “substantially exceeds” is not vague because it denotes ascertainable standards for an exceptional sentence and is used in relationship to the definition for great bodily harm, which provides the jury with a standard for comparison. Accordingly, there is no constitutional vagueness violation.

Id. at 651. The court concluded the special verdict had a “commonsense meaning that juries could understand.” Id. at 650-51 (citing Tuilaepa v. California, 512 U.S. 967, 976, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994)).

Stubb’s reasoning is inherently flawed. Citizens are apprised by the plain language of the first-degree assault statute that a “typical” assault in the first degree will result in serious injury or even the probability of death. Cf., Stubbs, 144 Wn.App. at 644. They are further notified by the first and second-degree assault statutes that the infliction of injuries less than “great bodily injury” but more than “substantial bodily injury” constitute second degree assault. Because of the definitions of these two degrees of assault, RCW 9.94A.535(3)(y) does nothing to enhance citizens’ understanding that more severe penalties may follow from some second degree assaults.

Further, while judges may understand what “substantially exceeds” means, the term is so imprecise that it carries no

“commonsense meaning” that could consistently be applied by jurors.

Presciently, Judge Canova told the deputy prosecutor “[y]ou will also need an instruction that defines substantially exceed. That will be the first question or one of the first questions we will get from the jury.” 6/23/09 RP 101. Indeed, the jury inquired “what constitutes ‘substantially exceeds’ the level of bodily injury necessary to constitute ‘substantial bodily injury.’” CP 392. Despite its earlier understanding of the need to define this term the court inexplicably responded there is no specific definition and the jury should employ the “commonly held meaning to the words.” CP 393. Without further instruction, there is no way to ascertain how the jury defined “the level necessary to satisfy the elements of the offense” or what injuries might “substantially exceed” that level.

When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

Walton v. Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled in part by Ring, 536 U.S. at 609.

After California's determinate sentencing scheme was struck down in Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2006), the California Supreme Court addressed the problems with submitting factors typically decided by judges to juries:

[T]o the extent a potential aggravating circumstance at issue in a particular case rests on a somewhat vague or subjective standard, it may be difficult for a reviewing court to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court. The sentencing rules that set forth aggravating circumstances were not drafted with a jury in mind. Rather, they were intended to "provid[e] criteria for the consideration of the trial judge." ... It has been recognized that, because the rules provide criteria intended to be applied to a broad spectrum of offenses, they are "framed more broadly than" criminal statutes and necessarily "partake of a certain amount of vagueness which would be impermissible if those standards were attempting to define specific criminal offenses." ... Many of the aggravating circumstances described in the rules require an imprecise quantitative or comparative evaluation of the facts. For example, aggravating circumstances set forth in the sentencing rules call for a determination as to whether "[t]he victim was "particularly vulnerable," whether the crime "involved ... a taking or damage of great monetary value," or whether the "quantity of contraband" involved was "large."

People v. Sandoval, 41 Cal. 4th 825, 161 P.3d 1146, 1155-56 (2007) (emphasis in original).

In the Eighth Amendment context the Supreme Court has explained:

In our decisions holding a death sentence unconstitutional because of a vague sentencing factor, the State had presented a specific proposition that the sentencer had to find true or false (e.g., whether the crime was especially heinous, atrocious, or cruel). We have held, under certain sentencing schemes, that a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). See Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). Those concerns are mitigated when a factor does not require a yes or no answer to a specific question, but only points the sentencer to a subject matter.

Tuilaepa, 512 U.S. 974-75. The risk of randomness which flows from an inherently subjective factor and gives rise to an Eighth Amendment violation is the same arbitrariness with which the Due Process vagueness doctrine is concerned.

Here the emergency room physician testified that he could not say whether he facial injuries resulted from one punch or more.

6/18/08 RP 70. Dr. Kris Moe, the plastic surgeon, allowed the injuries most likely resulted from more than a single punch but were nonetheless moderate by comparison to those of his other patients.

6/23/08 RP 170. Despite this testimony, and having acquitted Mr.

Duncalf of first degree assault, the jury nonetheless concluded the injuries substantially exceeded those necessary to prove second degree assault. Neither RCW 9.94A.535(3)(y) nor the court's instruction to the jury provided the jury objective guidance in its application of the aggravator to Mr. Duncalf and the facts of this case.

Importantly, Mr. Duncalf does not contend that the statute is vague because a different jury might reach a different result. Instead, he contends the doctrine is violated because there is no assurance that a subsequent jury would apply the same definition of "substantially exceeds." Because RCW 9.94A.535(3)(y) does not guard against this arbitrary and inherently subjective application it is void for vagueness. Mr. Duncalf's sentence which is predicated on this unconstitutionally vague aggravator must be reversed.

3. BECAUSE THERE IS NO OBJECTIVE DEFINITION OF WHAT CONSTITUTES A SUBSTANTIAL AND COMPELLING REASON THE STATUTES GOVERNING THE IMPOSITION AND REVIEW OF AN EXCEPTIONAL SENTENCE DEPRIVE MR. DUNCALF OF DUE PROCESS.

In addition, to the due process protections discussed previously, "In criminal prosecutions the accused shall have . . . the right to appeal . . ." Const. art. I, §22; State v. Schoel, 54 Wn.2d

388, 341 P.2d 481 (1959). An individual also has a statutory right to appeal an exceptional sentence. RCW 9.94A.585(2). Mr. Duncalf asserts that because the provisions of the Sentencing Reform Act governing the imposition and appeal of an exceptional sentence are without any meaningful standard governing their application, he is deprived of due process and of his right to appeal.

a. The requirement that a sentencing court determine that substantial and compelling reasons exist to warrant an exceptional sentence is wholly subjective. As discussed, due Process requires objective guidelines to guard against arbitrary application of penal statutes. See, Kolender, 461 U.S. at 358. The provisions of the SRA governing the imposition of an exception sentence, particularly RCW 9.94.535 and RCW 9.94A.537, as applied to Mr. Duncalf, lack any articulable guidelines.

With a few narrow exceptions, RCW 9.94A.537 requires the facts establishing an aggravating factor be found by a jury beyond a reasonable doubt. See also, RCW 9.94A.535(2) and (3) (outlining aggravating factors which may be found by judge); see also, Blakely, 542 U.S. at 302 n.5 (Sixth Amendment requires “every fact which is legally essential to the punishment must be charged in the indictment and proved to a jury.”) Where a jury has properly found

an aggravating factor exists, RCW 9.94A.535 provides in relevant part

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Prior to Blakely, an aggravating factor was legally sufficient, i.e., substantial and compelling, so long as it was not considered by the legislature in setting the standard range and differentiated the present crime from other crimes of the same category. See, State v. Grewe, 117 Wn.2d 211, 216, 813 P.2d 1238 (1991). But to apply that same analytical framework post-Blakely would either be contrary to the plain language of RCW 9.94A.535 or would presuppose a judicial factfinding in violation of the Sixth Amendment. Nonetheless, that is the analysis which RCW 9.94A.585(4) still requires. The statute still directs

. . . the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient

To comply with the Sixth Amendment, the legislature has required a jury determine the facts necessary to support the exceptional sentence. RCW 9.4A.535(4). At the same time, however, the legislature has maintained the requirement that the trial court determine substantial and compelling reasons exist. Because the trial judge no longer finds the facts upon which to rest an exceptional the focus of the substantial and compelling analysis employed by the trial court and reviewed by this Court cannot be a factual one.

Prior to Blakely, the SRA listed 14 nonexclusive aggravating factors and authorized courts to rely upon nonstatutory aggravators. Former RCW 9.94A.535 (2004). Following Blakely the SRA was fundamentally altered to eliminate nonstatutory aggravating factors, and to limit the imposition of exceptional sentences above the standard range to the 35 factors specifically listed.² RCW 9.94A.535(3) and (4). Under the former scheme, the analysis of whether there were substantial and compelling reasons existed primarily to ensure that nonstatutory factors were legally sufficient to warrant an exceptional sentence, i.e., not considered

² Because the imposition of a sentence below the standard range does not implicate the same Sixth Amendment concerns, courts remain free to rely upon nonstatutory mitigating factors.

by the legislature in setting the standard range. However, in light of the exclusivity of the statutory aggravating factors, that analysis is no longer meaningful, as the legislature has necessarily made that determination by including a given factor among the 35.

As yet another artifact of the pre-Blakely scheme, if the trial court imposes an exceptional sentence, the court is still required to “set forth its reasons in written findings of fact and conclusions of law.” RCW 9.94A.535. To be sure, the trial court cannot engage in any judicial fact-finding. Further, the trial judge cannot know what facts the jury ultimately found or relied upon in reaching its verdict. While it is apparent this statute was intended to provide the necessary appellate record, See RCW 9.94A.585(4) (directing reviewing court to assess the adequacy of court’s stated reasons), it is not clear what “fact” the court could find nor what conclusions the court could draw.

Thus, a court’s determination that substantial and compelling reasons exists is no longer factual, and is no longer necessary to ensure the legal sufficiency of an aggravating factor. But the court is still required to make a finding that substantial and compelling reasons exist. Following the post-Blakely revisions to the SRA, and because of the Sixth Amendment prohibition of judicial fact-finding,

there is no definable standard by which a trial court makes that finding.

As with his challenge to the absence of a standard guiding the jury's finding, Mr. Duncalf's challenge to Judge Canova's ruling is not premised on the fact that a different judge might have reached a different conclusion. Rather, the evil is that different a judge would use different standards, because neither the statutes nor the caselaw provide a standard. It is this inherent subjectivity in the determination of what the legal standard is that violates due process.

b. The trial court's determination that substantial and compelling reasons exists lacks any objective limitations and is effectively unreviewable. Having excluded the trial judge from either the factual or legal determinations required under the former statute, the present statutory scheme employed by Judge Canova allows a judge unfettered discretion to impose an exceptional sentence once the jury returns a verdict on an aggravator. After divorcing the trial judge from either the factual or legal determination, the SRA nonetheless vests the trial judge with the sole authority to impose an exceptional sentence.

In the end, a trial judge is tasked with determining if substantial and compelling reasons exist but is barred from making either the factual or legal determinations that define that term. This Court's review is limited to determining whether the judge's stated reasons support the imposition of an exceptional sentence, but it is left with no record to review, as the Court has no insight in to the jury's deliberations. Moreover, this court has no analytical yardstick by which to measure the correctness of the trial court's decision.

Judge Canova found an exceptional sentence was warranted because:

Based upon the jury's finding of an aggravating circumstance, considering the mandate of the statute the court does find that imposing an exceptional sentence is consistent with the purposes of the Sentencing Reform Act and that the facts found are substantial and compelling reasons justifying an exceptional sentence.

8/8/08 RP 128. The court did not provide any reasons for its conclusion other than the fact that the jury had returned a special verdict. The court did not articulate how or why an exceptional sentence was consistent with the purposes of the SRA. The court offered no indication of what it was finding when it concluded substantial and compelling reasons exist. In short, the court offered no record that allows this Court to determine the

correctness of the decision or that substantial and compelling reasons exist.

Under the existing substantial and compelling analysis, a jury finding beyond a reasonable doubt of a statutory aggravating factor would always constitute a substantial and compelling reason to impose an exceptional sentence. If that remains the measure either there is nothing for the judge to find, or the statute requires the judge to make a finding of the existence of an aggravating factor. The later plainly violates the Sixth Amendment, while the former relegates the judge's function to rubberstamping a jury finding.

In a pre-Blakely case, the Supreme Court said

. . . even though the sentence may be statutorily authorized, when a trial court imposes a sentence which is outside the standard range set by the Legislature, the court must find a substantial and compelling reason to justify the exceptional sentence.

In re the Personal Restraint Petition of Breedlove, 138 Wn.2d 298, 305, 979 P.2d 417 (1999). Thus, the requirement of RCW 9.94.535 that the trial court determine there are substantial and compelling reasons must be something other than a mere recognition of the jury's finding and cannot be a judicial finding of fact establishing the aggravator[s].

Additionally, the determination that substantial compelling reasons exists cannot be reduced to a process whereby the jury finding simply grants the judge discretion to sentence as she wishes. First, because this result fails to give effect to the independence of those two determinations. Second, the Supreme Court has reaffirmed post-Blakely that the determination that substantial and compelling reasons exist is a legal determination subject to *de novo* review as opposed to a discretionary or factual decision. See State v. Suleiman, 158 Wn.2d 280, 291 n.3, 143 P.3d 795 (2005).

Following Blakely and the substantial revisions of the SRA, there is no longer an objective standard by which a trial or appellate court can determine whether substantial and compelling reasons exist to impose an exceptional sentence. In the absence of an objective standard governing the statute's application to Mr. Duncalf, the statute is unconstitutionally vague as applied to Mr. Duncalf.

c. The lack of an explanation for the length of the sentence imposed denies Mr. Duncalf his constitutional and statutory right to appeal. Article 1, § 22 guarantees the right to appeal "in all cases." This Court has previously held the right to

appeal is a fundamental right. State v. Garcia-Martinez, 88 Wn.App. 322, 327, 944 P.2d 1104 (1997).

Whenever a court imposes an exceptional sentence, the trial court must set forth the reasons for that decision in written findings of fact. RCW 9.94A.535. An appeal of an exceptional sentence must be “made solely upon the record that was before the sentencing court.” RCW 9.94A.585(5). In reviewing an exceptional sentence, an appellate court must determine whether: (1) the reasons are supported by the record and the reasons, as a matter of law, justify the exceptional sentence; and (2) whether the sentence is clearly excessive. RCW 9.94A.585(4). “[F]or action to be clearly excessive, it must be shown to be clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would take.” State v. Ritchie, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995) (citing State v. Oxborrow, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986)).

The Ritchie Court concluded the relevant statutes did not require the trial court to set forth the reasons supporting the length of an exceptional sentence. 126 Wn.2d at 395. The Court stated that prior decisions requiring such an explanation were “wholly faulty.” Id. at 394-95. Mr. Duncalf does not contend that Ritchie

reached the wrong result. Instead, Mr. Duncalf asserts that without a statement of reasons supporting the length of time, it is impossible for this Court or any other reviewing court to determine if Judge Canova's decision to impose 100 months was based on untenable reasons. Mr. Duncalf merely points out an apparently unforeseen result of the Ritchie decision. The petitioners in Ritchie did not assert they had been denied the right to appeal or would be denied this right unless the Court required trial courts to set forth the reasons supporting the length of a sentence. Neither the petitioners nor the majority addressed the effects of the Court's ruling on the right and ability to appeal. Quite simply, the issue presented here was not before the Court. Thus, Mr. Duncalf is not attempting to challenge Ritchie.

The Supreme Court has also held that in reviewing the imposition of exceptional sentences appellate courts may not compare the case at hand to other cases. State v. Solberg, 122 Wn.2d 688, 703-04, 861 P.2d 460 (1993). The Court reversed the Court of Appeals stating "the comparison to other appellate cases was not the proper way to determine whether an exceptional sentence should be reversed." Id.

In light of Ritchie and Solberg, this Court must review Mr. Duncalf's case in a complete vacuum. Judge Canova stated

I do not believe the State's recommendation of 120 months is appropriate. I'm going to impose an additional 30 months at the top of the range and make the total sentence 100 months.

8/8/08 RP 128. But the court offered no explanation of why 100 months was appropriate as opposed to 80 months, or even the 120 months sought by the state. The court apparently engaged in some calculus to reach its decision, but the record is devoid of what that was. This Court cannot look to the established case law to determine if the unstated and unknown reasoning of Judge Canova was based on untenable reasons or grounds. Because the question of whether Judge Canova's decision was based on untenable reasons becomes unreviewable, Mr. Duncalf is denied meaningful appellate review.

The four-justice dissent in Ritchie apparently recognized this potential problem reasoning the Court's decision "insures no meaningful review can ever be had and that no common law principles to structure discretion will ever be developed for departure sentencing." 126 Wn.2d at 404 (Madsen dissenting).

Moreover this Court cannot supplant its subjective reasoning for Judge Canova's. A court abuses its discretion where it relies on untenable grounds or where the resulting sentence "shocks the conscience of the reviewing court." Ritchie, 126 Wn.2d at 396-97 (citing State v. Ross, 71 Wn.App. 556, 571-72, 861 P.2d 473 (1993)). However, this second means of determining whether a sentence is excessive conflicts with the SRA itself. RCW 9.94A.585(5) provides: "[a] review [of an exceptional sentence] shall be made solely upon the record that was before the sentencing court." Without question the degree to which a given sentence "shocks the conscience of the reviewing court" was not a part of the record before the trial court. Thus, this "shocks the conscience" analysis cannot be a part of this Court's review.

This Court is left with no standard to judge the reasonableness of the length of Mr. Duncalf's sentence. While Mr. Duncalf can file a notice of appeal and write a brief regarding the length of his sentence, absent some explanation of the basis for the length of the sentence he cannot begin to hope to receive the meaningful appellate review to which he is constitutionally guaranteed. In light of Ritchie, Solberg, and RCW 9.94A.585(5),

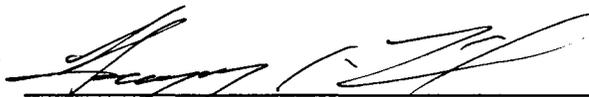
the length of Mr. Duncalf sentence is unreviewable and he is denied the right to appeal.

d. This Court must reverse Mr. Duncalf's exceptional sentence. Because of the absence of standards governing the imposition of Mr. Duncalf's sentence, and his inability obtain any meaningful review of the imposition of the sentence, this Court must reverse the sentence imposed.

F. CONCLUSION

For the reasons above, this Court must reverse Mr. Duncalf's sentence.

Respectfully submitted this 26th day of June, 2009.



GREGORY C. LINK – 25228
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)		
)		
Respondent,)		
)		
v.)	NO. 62237-4-I	
)		
RICHARD DUNCALF,)		
)		
Appellant.)		

FILED
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STATE OF WASHINGTON
2009 JUN 26 PM 4:48

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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