

62928-0

62928-0

NO. 62928-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES HORTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLEY PROCHNAU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Notice of the State's intent to seek an aggravated sentence is mandated by RCW 9.94A.535 and RCW 9.94A.537 except when the relevant facts relate only to prior convictions. The exceptional sentence here was sought and imposed based upon multiple current offenses and a high offender score that resulted in some crimes going unpunished. The only facts relied upon were prior convictions. Was pretrial notice of the State's intent to seek an exceptional sentence based on prior convictions unnecessary?

2. Written notice of the State's intent to seek an exceptional sentence was provided months before Horton's trial. Horton did not object to the nature of that notice or the adequacy of the notice. Was any statutory defect in that notice waived by failure to raise it below?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, James Horton, was charged by amended information with possession of a stolen vehicle, attempting to elude

a pursuing police vehicle and driving while license suspended, all related to one incident occurring on February 19, 2008. CP 6-7.

In the State's Omnibus Application, filed June 19, 2008, the State advised Horton that it would "likely seek an exceptional sentence." CP 156. During pretrial motions, the State referred to the prior notice on its Omnibus Application and reiterated that intention to request an exceptional sentence. 1RP 8.¹ Defense counsel stated that he would require extra time in voir dire because the State's intention to request an exceptional sentence increased the seriousness of the consequences of conviction. 1RP 75.

Horton was tried in King County Superior Court beginning on October 20, 2008, the Honorable Kimberley Prochnau presiding. 1RP 1. The charge of driving while license suspended was dismissed without prejudice during pretrial motions. 1RP 66. A jury found Horton guilty of possession of a stolen vehicle and attempting to elude a pursuing police vehicle. CP 70-71; 6RP 150-52.

The State requested an exceptional sentence based on RCW 9.94A.535(2)(c) because of the defendant's high offender and

¹ The Verbatim Record of Proceedings will be cited as follows: 1RP – 10/20/08; 2RP – 10/20/08 (Voir Dire I); 3RP – 10/21/08 (Voir Dire II) (the face sheet inaccurately is dated 2009); 4RP – 10/21/08; 5RP – 10/22/08; 6RP – 10/23/08; 7RP – 11/21/08; 8RP 1/9/09.

multiple current offenses, which would otherwise result in current offenses going unpunished. CP 74; 8RP 21-23. The judge concluded that Horton had an offender score of 39 on the possession of a stolen vehicle and 22 on the attempting to elude. CP154; 8RP 42. The judge imposed an exceptional sentence of 80 months for the possession of stolen vehicle and 60 months for the attempting to elude, to run concurrently. CP 137-43. 8RP 41-47.

2. SUBSTANTIVE FACTS.

Donald Isaacs' green Mustang convertible was stolen the night of February 10, 2008, from Isaacs' home in Bellevue, Washington. 4RP 72-74, 85. Isaacs did not know defendant James Horton and Horton did not have permission to drive the car. 4RP 80-81.

On February 19, 2008, Horton was driving Isaacs' Mustang on the city streets of Auburn, Washington. 4RP 32-33, 39-40; 70, 74-76. When Horton saw Auburn Police Sgt. Marc Caillier approach in a marked Auburn Police car, Horton sped away. 4RP 37. Sgt. Caillier turned on his car's lights and siren and followed Horton, as Horton drove at speeds in excess of 90 mph, ran stop signs, and drove in oncoming lanes. 4RP 41-50.

Finally, driving in the oncoming lane on 15th Street Northeast, Horton hit a guard rail and the car spun to a stop. 4RP 51-54, 101. Horton came out through the back window of the car and was arrested. 4RP 54-55, 91.

The ignition assembly of the Mustang had been removed and was in the back seat. 4RP 57-60. The entire dash was a gaping hole. 4RP 81. Isaacs' vanity license plates were crumpled and inside the trunk. 4RP 70, 75-76.

C. ARGUMENT

1. NO PRETRIAL NOTICE OF AN EXCEPTIONAL SENTENCE REQUEST IS REQUIRED WHEN THE REQUEST IS BASED ON PRIOR CONVICTIONS.

Horton argues that the notice of the State's intent to seek an exceptional sentence in this case was required by RCW 9.94A.537(1) and that notice under that statute must be included in the charging document. Both claims are without merit. Washington courts have rejected the argument that notice of intent to seek an exceptional sentence must be included in the charging document. Further, the statutory notice requirement of RCW 9.94A.537(1) does not apply to the aggravating factor relied upon in this case.

- a. The Intent To Request An Exceptional Sentence Is Not An Essential Element Of The Crimes Charged.

The State's intent to request an exceptional sentence is not an essential element of the crimes charged in this case. The specific aggravating factor applied here is based solely on prior and current convictions, which are specifically exempt from the charging and proof requirements of Apprendi v. New Jersey.²

RCW 9.94A.535 describes permissible departures from a standard range sentence. It begins with a general provision:

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.

RCW 9.94A.535. RCW 9.94A.535(2) provides a list of aggravating circumstances that may be found by a judge:

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

² Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), requires that any fact that increases the penalty for a crime beyond the statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.

- (a) ...
- (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.
- (d) ...

RCW 9.94A.535(2). RCW 9.94A.535(2)(c), the aggravating factor that is based on free crimes, is the aggravating factor relied upon in the case at bar. 8RP 46; CP 74.

The Washington Supreme Court considered the applicability of Apprendi, supra, to an exceptional sentence imposed under RCW 9.94A.535(2)(c) in State v. Alvarado, 164 Wn.2d 556, 192 P.3d 345 (2008). The Court held that the free crimes aggravating factor is a mere mathematical calculation, based on two components, criminal history and the jury's current verdicts. Alvarado, 164 Wn.2d at 566-67. While aggravating factors that are based on additional facts must be found by a jury, both components of the free crimes aggravating factor fall under the prior convictions exception recognized in Apprendi and in Blakely v. Washington,³ as no additional fact finding is involved. Alvarado, 164 Wn.2d at 567. The Court noted that current offenses are treated as prior

³ Blakely v. Washington, 542 U.S. 296, 301-03, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), applied Apprendi, to the exceptional sentence procedure in Washington and held that any fact, other than the fact of a prior conviction, that is used to support an exceptional sentence upward must be found by a jury beyond a reasonable doubt.

convictions for purposes of computing an offender score. Id.; RCW 9.94A.589(1)(a).

The Court in Alvarado described RCW 9.94A.535(2)(c) as a provision that "where current offenses go unpunished based on criminal history and current offenses, this is an aggravating circumstance per se." Alvarado, 164 Wn.2d at 567. The Court characterized it as an "automatic aggravator" based solely on criminal history and offender score. Id. at 567-69.

The Alvarado court cited with approval this Court's opinion in State v. Newlun, 142 Wn. App. 730, 176 P.3d 529, rev. denied, 165 Wn.2d 1007 (2008), which also had concluded that the findings required for the free crimes aggravating factor related solely to the existence of criminal convictions and those findings are outside the scope of Apprendi and Blakely. Newlun, 142 Wn. App. at 742-45. "The sentencing court need only find the fact of the defendant's convictions in order to be justified in imposing an exceptional sentence pursuant to RCW 9.94A.535(2)(c)." Id. at 742. The only other judicial act required is application of the sentencing grid in RCW 9.94A.510 to the current offenses. Id. at 743. If the defendant's presumptive sentence "is identical to that which would be imposed if the defendant had committed fewer current offenses,

then an exceptional sentence may be imposed." Id. By the terms of the statute, the exceptional sentence is based on factors related solely to criminal history. Id. at 744.

Horton relies on State v. Recuenco⁴ and Apprendi for the proposition that sentence enhancements are essential elements, which must be charged in the information. However, the matter at issue in Recuenco was a firearm enhancement, not an exceptional sentence. Recuenco, 163 Wn.2d at 442. Horton offers no authority for the proposition that the statutory notice requirement of RCW 9.94A.537(1) converts the basis for an exceptional sentence into an essential element of the crime.

Washington courts have rejected the proposition that the notice required by RCW 9.94A.537(1) must be included in the charging document. State v. Berrier, 143 Wn. App. 547, 549, 178 P.3d 1064 (2008); State v. Bobenhouse, 143 Wn. App. 315, 331, 177 P.3d 209 (2008), aff'd on other grounds, 166 Wn.2d 881 (2009). The court in Berrier rejected both constitutional and statutory arguments that notice of an intent to seek an exceptional sentence must be included in the information. Berrier, 143 Wn. App. at 553-59.

b. The Notice Requirement Of RCW 9.94A.537(1) Does Not Apply To This Case.

RCW 9.94A.535 provides that the procedural requirements set out in RCW 9.94A.537 apply only to facts alleged other than the fact of a prior conviction. The aggravator in this case was that Horton committed multiple current offenses and his high offender score resulted in some of his current crimes going unpunished, based on RCW 9.94A.535(2)(c). The notice provision of RCW 9.94A.537(1)⁵ is inapplicable.

The objective of statutory interpretation is to give effect to the legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the meaning of the statute is plain on its face, the court must give effect to that meaning. Id. The plain meaning of a statute is determined based on the language at issue, the context of the statute, related provisions, and the statutory scheme as a whole. Id.

RCW 9.94A.535 describes permissible departures from a standard range sentence. It begins with a general provision:

⁴ 163 Wn.2d 428, 180 P.3d 1276 (2008).

⁵ RCW 9.94A.537(1) provides: "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."

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.*

RCW 9.94A.535 (emphasis supplied).

RCW 9.94A.535(2) provides a list of aggravating circumstances that may be found by a judge, including the free crimes aggravator at issue here. It does not refer to RCW 9.94A.537.

RCW 9.94A.535(3) lists aggravating circumstances that must be determined by a jury. It begins with general language that specifically incorporates RCW 9.94A.537:

(3) Aggravating Circumstances - Considered by a Jury -Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

RCW 9.94A.535(3).

The first paragraph of RCW 9.94A.535 explicitly provides that the procedures in RCW 9.94A.537 apply only to facts supporting aggravated sentences "other than the fact of a prior

conviction." RCW 9.94A.535. Further, while RCW 9.94A.535(3), which refers to jury determined aggravating circumstances, specifically incorporates the procedures of RCW 9.94A.537, there is no comparable reference to RCW 9.94A.537 in RCW 9.94A.535(2), which provides for judicially determined aggravating circumstances. The omission of a reference to RCW 9.94A.537 in one section and inclusion of a reference in the other also demonstrates that RCW 9.94A.537 does not apply to judicially determined aggravating factors, such as the free crimes aggravator.

The terms of RCW 9.94A.537 also indicate that the legislature's intent was that this section establish procedures relating only to jury determined aggravating circumstances, as subsections (2) through (6) all address issues relating to that process and the statute includes no reference to the process for judicially determined factors. Although subsection (1), which includes the notice requirement, does not explicitly refer to jury proceedings, it is clear from the context (the complete text of RCW 9.94A.535 and RCW 9.94A.537) that it applies only to factors that must be determined by a jury.

This distinction is logically supported by the rationale underlying the statutory requirements. Under Apprendi and Blakely, facts other than those involving a defendant's criminal history must be proved to a jury in order to provide a basis for an exceptional sentence. Apprendi, 530 U.S. at 490; Blakely, 542 U.S. at 301-03. The legislature enacted RCW 9.94A.535-537 to satisfy these requirements: requiring that the State provide notice prior to trial that it is seeking an aggravated sentence, requiring the State to provide notice to the defendant of the facts that will be at issue, and making procedural arrangements regarding how the jury will consider this information. Newlun, 142 Wn. App. at 738-39. In contrast, when the exceptional sentence is sought based purely on the defendant's criminal history, notice is not necessary because no additional facts are at issue at trial and the prior convictions of the defendant are a matter for the judge to determine at every sentencing.

As discussed in the previous section of this brief, both the Supreme Court and this Court have concluded that the only findings necessary to impose an aggravated sentence based on

RCW 9.94A.535(2)(c) are findings of prior convictions.⁶ Alvarado, 164 Wn.2d at 566-67; Newlun, 142 Wn. App. at 742-43. After determining the existence of prior convictions, the sentencing court simply applies the sentencing grid set out in RCW 9.94A.510. Alvarado, 164 Wn.2d at 566-69; Newlun, 142 Wn. App. at 743. If that results in the legal conclusion that the presumptive sentence is identical to that which would apply if there were fewer current offenses, an exceptional sentence may be imposed. Alvarado, 164 Wn.2d at 567; Newlun, 142 Wn. App. at 743.

The court in Newlun refused to reach the issue of whether the State was required to provide notice of its intent to seek an exceptional sentence because Newlun did not raise the issue until rebuttal oral argument. Newlun, 142 Wn. App. at 738 n.5. In that case, the State did not request an exceptional sentence at any time—the exceptional sentence was imposed by the judge after the State made a recommendation of a sentence within the standard range. Newlun, 142 Wn. App. at 734-36. The trial court's authority to rely on the free crimes aggravator even when the State has not

⁶ The opinion in Alvarado indicates that the defendant was given notice of the State's intent to seek an exceptional sentence after he was convicted by a jury. Alvarado, 164 Wn.2d at 560. That notice would not have complied with RCW 9.94A.537. However, the issue of the adequacy of that notice was not raised or addressed by the Court.

requested an exceptional sentence illustrates the absurdity of applying the notice requirement of RCW 9.94A.537(1) to the free crimes aggravator.⁷

The analysis of Alvarado and Newlun establishes that the aggravated sentence imposed here was not based on facts other than prior convictions. By the terms of RCW 9.94A.535, the procedures of RCW 9.94A.537, including the notice requirement, are inapplicable.

2. HORTON WAIVED ANY DEFICIENCY IN THE STATUTORY NOTICE BY FAILING TO OBJECT IN THE TRIAL COURT.

If this Court concludes that RCW 9.94A.537(1) applies to the case at bar, Horton waived any objection to the sufficiency of the notice provided in this case. The State provided written notice that it would be seeking an exceptional sentence four months before trial. CP 156;1RP 8, 75. In the State's Omnibus Application, filed June 19, 2008, the State advised Horton that it would "likely seek an exceptional sentence." CP 156.

⁷ In State v. Bobenhouse, supra, the court stated that notice was required by RCW 9.94A.537(1) when the State was requesting an exceptional sentence based on RCW 9.94A.535(2)(c), but there is no indication that the court was presented with the argument that RCW 9.94A.537 was entirely inapplicable. That argument was not addressed by the court.

RCW 9.94A.537(1) requires that the State "give notice" prior to trial if it is seeking a sentence above the standard range.

Assuming that requirement applies here, providing notice in the State's Omnibus Application was sufficient. A letter has been found sufficient to provide notice. Bobenhouse, 143 Wn. App. at 331.

The State's notice in this case did not specify the basis for the request. However, any deficiency in that respect was waived because it is being raised for the first time in this appeal. RAP 2.5(a) bars consideration of this issue. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Even if the deficiency of the notice here is considered a constitutional error, not every constitutional error falls within the exception that allows review for the first time on appeal; the defendant must show that the error caused actual prejudice to his rights. State v. Sweet, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999). It is the showing of actual prejudice that makes the error manifest, allowing appellate review. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

Horton was aware of the State's intention to seek an exceptional sentence. He mentioned it before jury selection began. 1RP 75. Immediately after the verdict, as the court and the parties discussed scheduling the sentencing hearing, the request for an exceptional sentence was mentioned again. 6RP 153-54. The prosecutor explicitly stated the basis for the request at that point, "based on the defendant's criminal history and the number of crimes and the result of crimes going unpunished." 6RP 155. Horton never expressed any question or surprise as to the basis for the State's request for an exceptional sentence.

The State filed its written request for an exceptional sentence on November 12, 2008. CP 74-105. That memorandum included a list of Horton's 14 prior adult felony convictions and 14 prior juvenile felony convictions, including seven prior felony car theft convictions, that resulted in Horton's score of 39 for his conviction of possession of a stolen vehicle and 22 on the attempting to elude. CP 83, 85-87, 154.

Horton's response to the request for an exceptional sentence was filed on November 19, 2008. CP 106. In it, he did not claim that the free crimes aggravating factor was not applicable to his convictions, but argued that for fiscal and policy reasons the length

of time that the State requested (120 months) was inappropriate. CP 106-14. He did not claim that he had not received notice. On November 21, 2008, after all of the briefing had been filed, Horton requested a continuance of sentencing for the convenience of Horton's family members; he did not assert lack of notice. 7RP 4-5. Horton challenged the State's proof of his criminal history, but the trial court found that the certified copy of the Judgment and Sentence for each conviction⁸ was sufficient to meet the State's burden. 8RP 20, 25-26, 41-42. No constitutional error or prejudice as a result of any vagueness of the written notice has been shown.

Horton claims that he could not have preserved the error below because, as in Recuenco, supra, there was no error until the sentence was imposed. App. Br. at 6. To the contrary, his claim that the notice here was inadequate to satisfy RCW 9.94A.537 could have been raised when the written notice was received in June 2008, or when there was reference to the notice pretrial, or when the basis for the request was specified after the verdict, or in response to the State's brief requesting an exceptional sentence. No such objection was raised.

⁸ Certified copies were provided for all of the convictions with the exception of one juvenile conviction that was not included in Horton's offender score. 8RP 20, 41.

Horton broadly claims that any failure to comply with a sentencing statute may be raised for the first time on appeal. App. Br. at 5. The case cited for that proposition, State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), involved a challenge to the sufficiency of proof of the comparability of California crimes included in the offender score. Ford and the cases cited therein involved errors in the sentence or its calculation, which would result in sentences beyond the court's authority. Ford, 137 Wn.2d at 477-78. In contrast, this case involves an alleged procedural error that had no substantive consequence, as the sentence could have been imposed by the judge even if the State had not requested it. Horton does not claim that the sentence imposed was not justified by the free crimes aggravating factor.

The Court in Ford explained the policy that justified review of the alleged scoring error in that case:

A justification for the rule is that it tends to bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court.

Ford, 137 Wn.2d at 478 (quoting State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993)). The same policy militates against review of the unpreserved claim at bar. Reversal based on the

error alleged here would result in a windfall to a defendant whose sentence was authorized under the sentencing statutes.

Even if this Court remands for resentencing and the State is not permitted to request an exceptional sentence, there is no basis for limiting the sentence imposed on remand to a standard range sentence, as the trial court had and would still have the independent authority to impose an exceptional sentence although not requested by the State.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Horton's sentence.

DATED this 9TH day of November, 2009.

Respectfully submitted,

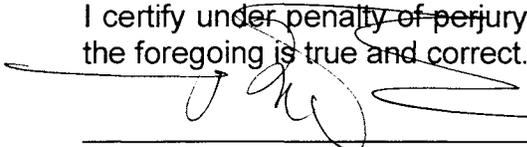
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory C. Link, 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. JAMES HORTON, Cause No. 62928-0-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.



Name
Done in Seattle, Washington

11-09-2009

Date