

63666-9

63666-9

NO. 63666-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANIEL VALENTINE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY McCULLOUGH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 NOV 16 PM 2:41

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO RESENTENCE VALENTINE	3
2. <u>BLAKELY V. WASHINGTON</u> DOES NOT APPLY RETROACTIVELY TO VALENTINE'S EXCEPTIONAL SENTENCE, WHICH WAS FINAL IN 2002	6
3. THIS APPEAL SHOULD BE DISMISSED BECAUSE THERE ARE NO REVIEWABLE ISSUES	8
D. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Blakely v. Washington, 542 U.S. 296,
124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... 6, 8

Griffith v. Kentucky, 479 U.S. 314,
107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)..... 7

Washington State:

In re Personal Restraint of St. Pierre,
118 Wn.2d 321, 823 P.2d 492 (1992)..... 7

State v. Evans, 154 Wn.2d 438,
114 P.3d 627 (2005)..... 6

State v. Kilgore, ___ Wn.2d ___,
216 P.3d 393 (September 24, 2009) 3, 4, 5, 6, 7, 8

State v. Valentine, 108 Wn. App. 24,
29 P.3d 42 (2001)..... 1

Rules and Regulations

Washington State:

RAP 2.5..... 5

A. ISSUE PRESENTED.

Whether this appeal should be dismissed where the court properly chose not to resentence the defendant on remand from this Court, and where as such, there are no reviewable issues.

B. STATEMENT OF THE CASE.

In 1999, Daniel Valentine was found guilty by jury verdict of attempted murder in the second degree (Count I) and assault in the first degree (Count II). CP 7. The facts of the crime were outlined in this Court's opinion affirming the murder in the second degree conviction in State v. Valentine, 108 Wn. App. 24, 29 P.3d 42 (2001). The victim, who was Valentine's girlfriend, was preparing to leave his apartment when Valentine came up behind her in the bathroom and struck her on the head with his fist several times, knocking her into the bathtub. Id. at 30; CP 64. He took a knife from his belt and stabbed her eleven times in her upper body. Id.; CP 17, 64. She lost half of her blood supply before medics arrived. Id. After the assault, she remained in a coma for over a week. Id.

The trial court imposed an exceptional sentence based on deliberate cruelty on both counts to be served concurrently. CP 9.¹ On appeal, this Court affirmed the imposition of an exceptional sentence, finding the repeated stabbing was gratuitous. 108 Wn. App. at 30; CP 64-65. This Court held, however, that the conviction for assault in the first degree, committed against the same victim and involving the same actions as the attempted murder in the second degree, violated double jeopardy. Id. at 29. This Court held that "[t]he conviction for attempted murder is affirmed, the assault conviction is vacated, and the sentence is affirmed." Id. at 30; CP 65. The mandate issued on March 28, 2002. CP 58. However, no order vacating the assault in the first degree conviction was entered following the mandate.

In 2009, Valentine filed a motion for remand. CP 20-21. A hearing was held on May 11, 2009, before the trial court. RP 1. The Court heard argument from the parties regarding the scope of the remand. In argument, defense counsel conceded that the Court of Appeals' mandate was "open-ended" and did not explicitly command that resentencing occur. RP 5, 18. The trial court

¹ Because the trial court determined that the two crimes were the same criminal conduct, they were not included in the offender score for the other crime, and the offender score for each crime was 0. CP 8.

accepted the State's argument that no resentencing was needed, and that an order vacating Count II was sufficient to comply with this Court's mandate. RP 23-24, 27. The trial court entered an order amending the judgment and sentence to vacate Count II. CP 14-15.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO RESENTENCE VALENTINE.

Valentine contends that the trial court erred in not holding a resentencing hearing on remand after this Court vacated Count II. He is mistaken. Pursuant to the state supreme court's recent decision in State v. Kilgore, ___ Wn.2d ___, 216 P.3d 393 (September 24, 2009), the court did not abuse its discretion in refusing to resentence Valentine.

Kilgore is directly on point. Kilgore was convicted at trial of seven sex offenses. Kilgore, 216 P.3d at 395. The court imposed an exceptional sentence of 560 months on each count to be served concurrently. Id. On appeal, two of the seven counts were reversed and the case was remanded for further proceedings. Id. at 396. The mandate issued in 2002. Id. On remand, the State

elected not to retry the vacated counts. The offender score changed from 18 to 12, but that change did not alter the standard range that the trial court had considered in imposing the exceptional sentence. Id. At the remand hearing in 2005, the trial court denied Kilgore's motion for resentencing. Instead, the trial court entered an order correcting the judgment and sentence to strike the two vacated counts from the judgment and sentence, and correcting the offender score. Id.

The Washington Supreme Court held that under those circumstances, where the sentence need not be altered to comply with the appellate court's mandate on remand, the trial court had the discretion either to review and resentence a defendant under a new judgment and sentence or to simply correct the existing judgment and sentence. Id. at 399-400. Because the appellate court's mandate did not explicitly require resentencing, the trial court did not abuse its discretion in refusing to resentence Kilgore. Id. at 400.

Likewise, in the present case, this Court's mandate did not explicitly require resentencing. Indeed, this Court's opinion explicitly affirmed the exceptional sentence that was imposed. CP 65 ("[T]he sentence is affirmed."). In contrast to Kilgore, the

offender score here did not change. As the State argued and the trial court agreed, the two crimes had always been considered a single event with a single victim. The trial court had previously determined that the two counts constituted the same criminal conduct for purposes of sentencing. As in Kilgore, the trial court was not required to resentence Valentine. Indeed, this case is even more compelling in this regard, as Valentine's offender score did not change.

Valentine's attempt to distinguish Kilgore should be rejected. In Kilgore, the supreme court noted that the trial court had the discretion pursuant to RAP 2.5(c)(1) to consider issues that were not raised in the appeal. Kilgore, 216 P.3d at 398. Valentine argues that Kilgore is distinguishable because Kilgore did not challenge his exceptional sentence on appeal. Id. at 396. While Valentine challenged the sufficiency of evidence supporting the basis for the exceptional sentence on appeal, he did not challenge the procedure by which the exceptional sentence was imposed, or the lack of a jury finding. CP 60, 63-65. In this respect, Valentine and Kilgore are not distinguishable.

Pursuant to Kilgore, the trial court had the discretion to either resentence Valentine, or simply correct the judgment and sentence.

The trial court did not abuse its discretion in choosing to simply correct the judgment and sentence in order to vacate Count II.

2. BLAKELY V. WASHINGTON DOES NOT APPLY RETROACTIVELY TO VALENTINE'S EXCEPTIONAL SENTENCE, WHICH WAS FINAL IN 2002.

Valentine argues that because his case was remanded on appeal it was not final when Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), was issued and thus the exceptional sentence imposed without a jury determination is invalid. This claim must also be rejected. Pursuant to Kilgore, because the trial court exercised its discretion in not resentencing Valentine, his case became final in 2002.

In State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005), the Washington Supreme Court held that Blakely v. Washington, supra, constituted a new rule of criminal procedure that does not apply retroactively to cases that were final when that decision was issued in 2004. A case is final for purposes of retroactive application of a new rule when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari

finally decided." In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992) (quoting Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)).

Washington courts look to the Washington rules of appeal, not federal law, to determine when a petitioner has exhausted his right to appeal. Kilgore, 216 P.3d at 397.

In Kilgore, the Washington Supreme Court held that a case is final as having no remaining appealable issues "where an appellate court issues its mandate reversing one or more counts and affirming the remaining count, and where the trial court exercises no discretion on remand as to the remaining final counts." Id. Because the trial court in Kilgore did not reconsider the exceptional sentence on remand, and merely corrected the judgment and sentence to reflect that two counts were vacated, no appealable issues remained and Kilgore's case was final for purposes of retroactivity when the time for a petition for certiorari elapsed 90 days after the issuance of the mandate. Id. at 399.

Kilgore controls the present case. The trial court did not reconsider Valentine's exceptional sentence on remand, but simply corrected the judgment and sentence to reflect that Count II was vacated. As such, no appealable issues remain. For purposes of

retroactivity, Valentine's case was final 90 days after the mandate issued on March 28, 2002. Valentine's case was final before the decision in Blakely was issued, and Blakely does not apply retroactively to Valentine's case. Valentine's exceptional sentence based on deliberate cruelty remains valid.

3. THIS APPEAL SHOULD BE DISMISSED BECAUSE THERE ARE NO REVIEWABLE ISSUES.

In Kilgore, the Court of Appeals dismissed the appeal. Kilgore, 216 P.3d at 396. The Washington Supreme Court affirmed the Court of Appeals' dismissal of Kilgore's appeal, finding that because the trial court chose not to resentence Kilgore there were no reviewable issues. Id. at 399, 401. Likewise, because the trial court chose not to resentence Valentine, but simply entered an order to comply with this Court's mandate and vacate Count II, no reviewable issues remain. As in Kilgore, this appeal should be dismissed.²

² The State is filing a motion to dismiss contemporaneously with this response.

D. CONCLUSION.

The trial court having properly declined to resentence Valentine, there are no reviewable issues in this case, and the appeal should be dismissed.

DATED this 16th day of November, 2009.

Respectfully submitted,

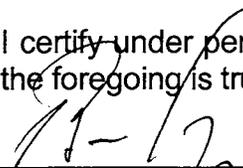
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 David Zuckerman, the attorney for the appellant, at 1300 Hoge Building, 705 Second Avenue, Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. VALENTINE, Cause No. 63666-9-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

11-16-2009

Date