

64262-6

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No. 64262-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ROWLAND,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE STATE PROPERLY CONCEDES THE ERROR IN ROWLAND'S OFFENDER SCORE BUT NONSENSICALLY OPPOSES CORRECTING THE ERROR

The prosecution begrudgingly agrees that case law “would seem to require” that Rowland’s two prior California convictions should have counted as a single point in his offender score. Response Brief, at 11 n.4. The prosecution refuses to agree that Rowland is entitled to resentencing by clinging to a belief that Rowland cannot correct the error in his offender score because he did not identify this error in his earlier appeal.

A recent ruling from the Unites States Supreme Court should put the State’s hesitant concession to rest. In Magwood v. Patterson, __ U.S. __, 130 S.Ct. 2788 (June 24, 2010), the Court explained that when a case is remanded for a new sentencing hearing, the defendant may raise claims on appeal that were not previously raised, when those same errors occur at the new sentencing hearing. Put another way, the appeal stems from the resentencing, which constitutes a new judgment. Id. at 2802. “An error made a second time is still a new error.” Id. at 2801.

The same analysis applies here. Rowland's case was remanded for resentencing. CP 72. At the resentencing hearing, he objected to the two points accorded the two prior California convictions. 9/16/09RP 18, 22-23. The trial court believed it lacked authority to consider the argument because it had not prompted the resentencing hearing, even though the court otherwise acknowledged it had full authority to resentence Rowland.

The court's new sentence constituted a new judgment against Rowland. The court recalculated Hayes's standard range, heard argument on the appropriate sentence, and imposed a lesser term than it previously ordered. Rowland is entitled to an accurate sentence. The court erred by refusing to correct his offender score.

2. THE COURT LACKED AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE

The State's response brief addressing the exceptional sentence imposed on remand is largely devoid of discussion of relevant, recent case law and willfully blind to the facts of the 2009 sentencing hearing.

The prosecution claims, without citation to the record, that the trial court "did not intend to review its exceptional sentence."

But in fact, the court expressly acknowledged it was not bound by its earlier sentence and considered whether a different sentence should be imposed. 9/16/09RP 24. After such consideration, the court decided that it still believed an exceptional sentence was appropriate. It imposed another exceptional sentence, but the new sentence was slightly lower than the earlier sentence. CP 15, 100.

Thus, the prosecution's insistence that State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993), controls is hard to understand. In Barberio, there was no resentencing hearing. Instead, the prosecution struck one count that was reversed on appeal and left the second count intact. Id. at 51.

Rowland's case is inapposite. His case was remanded for resentencing, including whether the court would impose an exceptional sentence. At the subsequent sentencing hearing, the judge exercised his discretion and imposed a new, different, sentence.

Additionally, the Washington Supreme Court addressed a similar situation in State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009). Like Barberio, in Kilgore the trial court struck a conviction during a resentencing hearing but otherwise declined to revisit the sentence imposed on other counts. Again, Rowland's

case is different, because the court resentenced Rowland to a different prison term for a single count. By the court's exercise of discretion, this case is different from the proceedings that occurred in either Barberio or Kilgore.

The prosecution agrees, as it must, that Kilgore holds that when a court exercises any discretion in a resentencing hearing, it imposes a new sentence and that sentence may be independently challenged. 167 Wn.2d at 41. The State tries to distinguish Kilgore by claiming that here, the court exercised no discretion. This claim is puzzling in light of the judge's comment that he was, in fact, exercising discretion, and he did, in fact, impose a different sentence than he had previously imposed. 9/16/09RP 24.

The prosecution also distances itself from State v. McNeal, 142 Wn.App. 777, 175 P.3d 1139 (2008), by claiming that McNeal rests on the State's concession that it would need to empanel a jury if it sought an exceptional sentence. It is true that the prosecution in McNeal conceded that Blakely¹ would apply at a resentencing hearing. More importantly for purposes of this case, not only did the State concede, the Court of Appeals held, "we

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

agree.” Id. at 786. The McNeal Court held that once the case was remanded for a new sentencing hearing, the judgment was no longer final and “the trial court therefore erred when it found Blakely did not apply to McNeal’s sentence on remand.” Id. at 786. McNeal independently analyzes the trial court’s ruling and does not merely accept a concession offered by the prosecution.

Finally, the State claims that the right to a jury determination on the facts underlying the exceptional sentence would be a “useless exercise,” and therefore, any error is harmless. But the prosecution pays no heed to the “inviolable” and broadly protected right to a jury trial under Article I, section 21. State v. Williams-Walker, 167 Wn.2d 889, 916-17, 225 P.2d 913, 918 (2010). The jury’s verdict controls the punishment a court may impose, and when the jury’s verdict reflects a finding of lesser punishment, the sentencing judge is bound by the jury’s finding. Id. at 918-19.

Moreover, the prosecution’s sketchy analysis of the findings necessary for the aggravating factor of deliberate cruelty overlook the appropriate legal threshold, even if harmless error analysis is available. In State v. Gordon, 153 Wn.App. 516, 223 P.3d 519 (2009), this Court addressed the necessary jury findings for a verdict of “deliberate cruelty,” the same aggravating factor used to

justify the court's exceptional sentence here. The jury must consider whether "the defendants' conduct was inflicted . . . as an end in itself, or whether the cruelty went beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense." Id. at 536. The acts must be both "deliberate" and "cruel." Id.

Moreover, the acts must be personal to the defendant, not simply acts undertaken by another participant. State v. Pineda-Pineda, 154 Wn.App. 653, 661, 226 P.3d 164 (2010) (accomplice liability statute, RCW 9A.08.020, "does not contain a triggering device for penalty enhancement."); see also State v. Roberts, 142 Wn.2d 471, 501-02, 14 P.3d 713 (2000) (personal participation required for aggravating circumstance unless statute otherwise directs in clear language).

No jury found that Rowland personally inflicted suffering on the deceased as an end to itself and this cruelty went beyond what is generally associated with first degree murder. In its Response Brief, the prosecution does not even try to show the fact unambiguously established Rowland's personal actions, but rather argues that either Rowland or the co-accused engaged in cruel acts. On this record, the prosecution has not and cannot establish

the lack of jury verdict is harmless beyond a reasonable doubt.

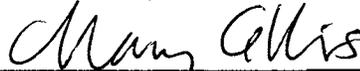
Gordon, 153 Wn.App. at 538-39.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Rowland respectfully requests this Court reverse his exceptional sentence and remand his case for an accurate sentence within the standard range.

DATED this ^{29th} day of July 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)

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NO. 64262-6-I

MICHAEL ROWLAND,)

Appellant.)

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **REPLY 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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