

Supreme Court No. 89578-3
(COA No. 69311-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ROWLAND,

Petitioner.

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

PETITION FOR REVIEW

FILED
NOV 22 2013
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

10/11/13 5:01 PM
N

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND DECISION BELOW..... 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT..... 6

Michael Rowland’s exceptional sentence, imposed without jury findings on the facts essential to the increase in punishment, violates the Sixth and Fourteenth Amendments 6

1. The court’s imposition of an exceptional sentence based on facts not found by the jury violates Mr. Rowland’s right to a fair trial by jury 6

2. The court lacked statutory authority to impose the exceptional sentence 9

3. This Court should accept review to determine the nature of the judicial fact-finding that occurred at the 2012 sentencing hearing, an issue addressed in dicta in its prior ruling 10

E. CONCLUSION..... 12

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Parker, 132 Wn.2d 182, 937 P.3d 575 (1997)..... 6, 7

State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009)..... 10

State v. Rowland, 174 Wn.2d 150, 272 P.3d 242 (2012)..... 4, 7, 10

State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003) 7

Washington Court of Appeals Decisions

In re Pers. Restraint of Rowland, 149 Wn.App. 496, 509, 204 P.3d 953
(2009)..... 3

United States Supreme Court Decisions

Alleyne v. United States, _ U.S. _, 133 S. Ct. 2151, 2162 (2013) 6, 8

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.435
(2000)..... 6

United States Constitution

Fourteenth Amendment 6

Sixth Amendment 6

Washington Constitution

Article I, section 3 6

Article I, section 21 6

Article I, section 22 6

Statutes

RCW 9.94A.505 6

RCW 9.94A.535 9, 11

RCW 9.94A.537 9, 10

Court Rules

RAP 13.3(a)(1) 1

RAP 13.4(b)..... 1, 12

A. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner Michael Rowland asks this Court to accept review of the Court of Appeals decision terminating review, dated October 14, 2013, pursuant to RAP 13.3(a)(1) and RAP 13.4(b). A copy is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. When an appellate court remands a case for resentencing, the prior sentence is vacated. By statute and under the governing constitutional principles, the court may not impose an exceptional sentence on remand unless a jury has made the necessary factual determinations. Was Michael Rowland denied his right to a jury trial and due process of law when the judge an exceptional sentence based on an aggravating factor that was never proved to the jury beyond a reasonable doubt?

2. This Court recently remanded Mr. Rowland's case for a new sentencing hearing based on an erroneous offender score and declined to determine whether Mr. Rowland's jury trial rights were violated by the imposition of an exceptional sentence based on factual allegations never proved to the jury because it was "premature" to rule on this issue. Now that Mr. Rowland has received an exceptional sentence

based on facts not found by the jury, the sentencing error is ripe for review. Has Mr. Rowland been denied his right to a trial by jury when a judge who took no part in the original trial decided that the aggravating circumstance found by a prior judge, not a jury, merited an exceptional sentence of 15 years above the standard range?

C. STATEMENT OF THE CASE

Michael Rowland was convicted and sentenced for first degree murder based on accomplice liability, where the jury was presented with the alternatives of felony murder predicated on his participation in a robbery or premeditated intentional murder. CP 143-44. The jury issued general verdict. CP 97. At the original sentencing hearing, Judge Gerald Knight noted that the jury's verdict made no finding on the nature and extent of Rowland's participation:

the court is caught in somewhat of a difficult position inasmuch as the testimony presented at trial was in contradiction and the jury was not asked by interrogatory or other means to specify the grounds upon which is reached its conclusion that Mr. Rowland was guilty of murder.

3/12/91RP 18. Although the testimony was "certainly disputed as to who initiated what and who said what," Judge Knight decided that Mr. Rowland and the other participants' conduct constituted the aggravating

factor of deliberate cruelty. 3/12/91RP 78, 83. Judge Knight imposed an exceptional sentence of 180 months greater punishment than that allowed by the standard range. CP 113-14.

After a successful personal restraint petition reducing his offender score,¹ Judge Knight held a new sentencing hearing in 2009, at which he listened to sentencing arguments from the family of the deceased, the prosecution, and Mr. Rowland. 9/16/09RP 11, 13, 17. Judge Knight acknowledged his discretionary sentencing authority, saying, “I very well can sentence you down or up.” *Id.* at 24.

Judge Knight explained that he believed Mr. Rowland deserved an exceptional sentence but also thought his sentence should be reduced in accordance with the change in his standard range. 9/16/09RP 24. He shortened Mr. Rowland’s sentence by 14 months, but again imposed an exceptional sentence based on the judicially-found aggravating factor on which he relied in 1991. 9/16/09RP 25.

This Court reversed Michael Rowland’s sentence after the prosecution conceded for a second time that his standard range was incorrectly calculated. *State v. Rowland*, 174 Wn.2d 150, 156, 272 P.3d

¹ *In re Pers. Restraint of Rowland*, 149 Wn.App. 496, 503, 509, 204 P.3d 953 (2009).

242 (2012). However, the Court declined to rule on whether the judge violated Mr. Rowland's jury trial rights when he imposed an exceptional sentence based on the aggravating circumstance of deliberate cruelty without any jury finding relating to the allegation of such conduct. The opinion explained that it was "premature" to make a final decision on the legality of Mr. Rowland's exceptional sentence because he was entitled to resentencing for the incorrect offender score. *Id.* at 156.

Judge Knight, who presided at the original trial and was the sentencing judge in 2009, passed away before the 2012 sentencing hearing ordered by this Court. CP 15. He was replaced by Judge Richard Okrent, who had no prior involvement in the case.

Judge Okrent heard from four members of the victim's family, who described the crime, gave the judge pictures of the deceased, and the talked about the pain the family suffered in the aftermath of the incident. 9/17/12RP 7-17. The prosecution brought a detective to the sentencing hearing to answer any questions the judge might have about the facts of the case. 9/17/12RP 3.

Judge Okrent determined that Judge Knight had "made a reasoned and understanding decision" when sentencing Mr. Rowland to

the high end of the standard range along with an exceptional sentence of 180 months. Judge Okrent decided he would not “disturb” Judge Knight’s sentence and again imposed an exceptional sentence above the standard range based on the aggravating circumstance of “deliberate cruelty,” although he used the reduced standard range brought about by the corrected offender score. 9/7/12RP 18. Judge Okrent imposed a sentence of 333 months, the high end of the standard range, along with 180 months as an exceptional sentence, for a total of 513 months. 9/7/12RP 18.

The Court of Appeals affirmed the imposition of the exceptional sentence, ruling that it was bound by this Court’s holding that the Sixth Amendment right to a jury trial does not apply when a judge does not “redecide” the factual basis of a prior exceptional sentence. Slip op. at 3. Mr. Rowland seeks review.

D. ARGUMENT

Michael Rowland’s exceptional sentence, imposed without jury findings on the facts essential to the increase in punishment, violates the Sixth and Fourteenth Amendments

1. *The court’s imposition of an exceptional sentence based on facts not found by the jury violates Mr. Rowland’s right to a fair trial by jury.*

Settled United States Supreme Court precedent dictates that “[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.” *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 2162 (2013); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 21, 22. Any fact that produces a higher presumptive sentence is “conclusively” “an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt.” *Id.* at 2163; *Apprendi v. New Jersey*, 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.435 (2000).

Under Washington law, a court may not impose an exceptional sentence without first accurately determining an offender’s standard range. *State v. Parker*, 132 Wn.2d 182, 187, 937 P.3d 575 (1997); RCW 9.94A.505(2)(a)(i). The court “must first consider the

presumptive punishment as legislatively determined for an ordinary commission of the crime before it may adjust it up or down to account for the compelling nature of the aggravating or mitigating circumstances of the particular case.” *Parker*, 132 Wn.2d at 187; *see also State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) (“A correct offender score must be calculated before a presumptive or exceptional sentence is imposed”).

In 2012, Judge Okrent imposed a new sentence for a single conviction based on a reduced calculation of Mr. Rowland’s offender score, which lowered his standard range. When this Court ordered a new sentencing hearing in Mr. Rowland’s case based on the incorrect offender score, it acknowledged the discretionary nature of the resentencing judge’s authority and noted that the judge was not required to impose an exceptional sentence on remand, even while painting the sentencing decision of the judge as related to the length of the sentence, not the factual justification for an exceptional sentence. *Rowland*, 174 Wn.2d at 155-56.

It is undisputed that the judge imposed a sentence far in excess of that authorized by the jury’s verdict based on a claim of “deliberate cruelty, a fact not found by the jury. CP 15. The original sentencing

judge noted that it was “impossible” to know whether Mr. Rowland was responsible for, or even present during, the parts of the incident that it believed constituted deliberate cruelty. CP 98, 107.

Judge Okrent was not bound by a prior exceptional sentence finding, but rather exercised its authority when sentencing Mr. Rowland. *See* 9/17/12RP 7-18. Moreover, it was the nature of the aggravating circumstance that drove the length of the exceptional sentence – these two intertwined decisions cannot be viewed in isolation. Based on its broad sentencing authority and because the court believed the factual predicate merited an extraordinary sentence, Judge Okrent imposed a sentence greater than the standard range in 2012, based on factual determinations never made by the jury. 9/17/12RP 18.

As the United States Supreme Court recently held in *Alleyne*, “a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.” 133 S.Ct. at 2160. When this fact is not proved to a jury, it may not serve as the basis of an exceptional sentence imposed in 2012. *Id.* at 2162-63.

Mr. Rowland’s exceptional sentence was imposed in 2012, after adjusting his offender score for accuracy, and because the sentence was

based on factual findings not made by a jury, the sentence imposed violates Mr. Rowland's rights to a jury trial and due process of law.

2. *The court lacked statutory authority to impose the exceptional sentence.*

RCW 9.94A.530(3) dictates the court's sentencing authority when imposing an exceptional term. It provides, "In determining *any* sentence above the standard sentence range, the court shall follow the procedures set forth in RCW 9.94A.537." RCW 9.94A.530(3) (emphasis added).

RCW 9.94A.537(2) controls any remanded case involving an exceptional sentence:

In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

(emphasis added.). This procedure is not optional – the State may decline to pursue an exceptional sentence in a remanded case but if it seeks an exceptional sentence, the facts supporting an aggravating

circumstance “*shall* be proved to a jury beyond a reasonable doubt.”
RCW 9.94A.537(3) (emphasis added).²

“The resentencing provision” contained in RCW 9.94A.537
“applies in cases such as the instant where the defendant's trial began
prior to the 2005 amendment and there has been a remand for a new
sentencing hearing.” *State v. Powell*, 167 Wn.2d 672, 679, 223 P.3d
493 (2009). It applies in any case where the defendant is being
resentenced but not retried. *Id.* RCW 9.94A.537(2) describes the
circumstances of Rowland’s case: he previously received an
exceptional sentence and “a new sentence hearing is required.” The
SRA dictates the procedures the court’s must follow but did not follow
in Mr. Rowland’s case. Judge Okrent lacked statutory authority to
impose an exceptional sentence in the case at bar.

3. *This Court should accept review to determine the nature of
the judicial fact-finding that occurred at the 2012 sentencing
hearing, an issue addressed in dicta in its prior ruling.*

This Court granted review of Mr. Rowland’s prior appeal to
determine whether the imposition of an exceptional sentence in 2009
violated Mr. Rowland’s jury trial rights. Although this Court noted that

² Narrow exceptions to the jury trial requirement for exceptional sentences based solely on criminal history or a stipulation by the parties are not

the trial court had not “redecided” the factual justification for the exceptional sentence, it held that it was “premature” to decide the legality of Mr. Rowland’s sentence because he was entitled to another resentencing due to the use of an incorrect offender score. 174 Wn.2d at 155-56.

The legality of Mr. Rowland’s exceptional sentence is squarely before the Court and should be addressed now that he has received an exceptional sentence based on a judge’s discretionary decision when that judge took no part in the original trial and the factual basis for the exceptional sentence was never proved to any jury. Judge Okrent weighed the nature of the exceptional sentence and the pleas that Mr. Rowland deserved a lengthy sentence when deciding the term to imposed. This factual and discretionary decision was made without the authority of a jury finding and outside the procedures of RCW 9.94A.587, and therefore, should be reversed.

pertinent here. RCW 9.94A.535(2).

E. CONCLUSION

Based on the foregoing, Petitioner Michael Rowland respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 13th day of November 2013.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) No. 69311-5-I
)
 v.) DIVISION ONE
)
 MICHAEL J. ROWLAND,) UNPUBLISHED OPINION
)
 Appellant.) FILED: OCT 14 2013

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 OCT 14 AM 9:54

PER CURIAM. — Michael Rowland appeals the exceptional sentence imposed following his second resentencing for first degree murder and taking a motor vehicle without permission. He contends his sentence violates Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and sentencing statutes because it is based on a factual finding made by the court, not a jury. We affirm.

In 1991, a jury convicted Rowland of first degree murder and taking a motor vehicle without permission. The trial court imposed a high-end standard range sentence of 361 months and added an exceptional sentence of 180 months based on its finding of deliberate cruelty. Rowland challenged the basis for the exceptional sentence on direct appeal. This court affirmed. State v. Rowland, 76 Wn. App. 1072, No. 28109-7-I, 1995 WL 925646 (1995) (unpublished opinion), review denied, State v. Rowland, 126 Wn.2d 1025, 896 P.2d 63 (1995). The mandate issued on June 26, 1995.

In January 2007, Rowland filed a personal restraint petition challenging his offender score. This court accepted the State's concession that the offender score should have been 2, not 3. We remanded for resentencing, stating “[t]he error in the offender score potentially bears upon the length of the exceptional sentence, but it does

No. 69311-5/2

not implicate the findings that justified imposition of the exceptional sentence.” In re Pers. Restraint of Rowland, 149 Wn. App. 496, 512, 204 P.3d 953 (2009). On remand, the court left the original exceptional sentence of 180 months intact but reduced the remainder of the sentence in accordance with the reduced standard range.

Rowland appealed, arguing that his exceptional sentence violated Blakely because it was based on an aggravating factor found by the court, not a jury. This court and the Supreme Court affirmed. State v. Rowland, 160 Wn. App. 316, 329, 249 P.3d 635, review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011); State v. Rowland, 174 Wn.2d 150, 156, 272 P.3d 242 (2012). The Supreme Court held “that Blakely did not apply when the trial court neither touched the factual findings supporting the exceptional sentence nor increased the sentence.” Id. Because the State conceded that Rowland’s offender score was actually one, not two, the Supreme Court remanded “for any further proceedings.” On remand, the court again reduced Rowland’s standard range sentence but left the exceptional sentence unchanged.

Rowland appeals again, arguing, as he did before, that the sentence imposed on remand violated Blakely because the court relied on an aggravating factor found by the original sentencing judge, not a jury. He acknowledges that his original sentencing occurred prior to Blakely and that the exceptional portion of his sentence remains unchanged. He argues, however, that both the deliberate cruelty finding and exceptional sentence were imposed anew at his resentencing because the resentencing court had discretion to alter the sentence. He concludes, therefore, that Blakely applied at his

resentencing. This argument is controlled by the Washington Supreme Court's decision following Rowland's first resentencing.

The Supreme Court held that while the resentencing court had discretion to change Rowland's sentence, Blakely did not apply because the sentencing court "did not redecide the justification for the exceptional sentence, and the change to Rowland's standard range left the justification intact" and "did not increase the sentence." Rowland, 174 Wn.2d at 155-56. That holding applies equally to Rowland's second resentencing hearing. Although Rowland disagrees with the Supreme Court's conclusion, we are bound by it. MP Med. Inc. v. Wegman, 151 Wn. App. 409, 417, 213 P.3d 931 (2009).

Rowland also argues that RCW 9.94A.537, which authorizes courts to empanel juries at resentencing for the purpose of considering aggravating factors, required the court to empanel a jury at his second resentencing hearing. But the statute contains no such requirement. In any event, both this court and the Supreme Court previously noted that the factual basis for Rowland's exceptional sentence was upheld in, and became final after, his initial appeal, and that only his offender score and standard range were in issue at his subsequent resentencing hearings. Rowland, 160 Wn. App at 326; Rowland, 174 Wn.2d at 155. Accordingly, the statute did not apply below.

Affirmed.

For the court:

Spencer, J.

Cox, J.

Leach, C. J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69311-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Charles Blackman, DPA
Snohomish County Prosecutor's Office
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 13, 2013

NOV 13 2013 11:14:31
COURT OF APPEALS
CLERK OF COURT