

NO. 43207-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LARRY HAYES,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 7

 1. The aggravating factor of “major economic offense” was not supported by substantial evidence and not based on acts by Hayes alone 7

 a. An aggravating factor justifying an exceptional sentence must be proved to the jury and authorized by statute... 7

 b. Accomplice liability cannot be the basis for an exceptional sentence unless explicitly statutorily authorized..... 9

 c. The prosecution premised its request for an exceptional sentence on uncharged, unproven allegations and did not establish sufficient proof of the major economic crime aggravating factor for first degree theft..... 13

 2. The criminal history listed on the judgment and sentence improperly includes charges that were dismissed..... 17

F. CONCLUSION 20

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Handley, 115 Wn.2d 275, 796 P.2d 1266 (1990)..... 14

State v. Houf, 120 Wn.2d 327, 841 P.2d 42 (1992) 14

State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005) 11

State v. McAlpin, 108 Wn.2d 458, 740 P.2d 824 (1987) 14

State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007) 8

State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008) 9

State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010) 18, 19

Washington Court of Appeals Decisions

State v. Bush, 26 Wn.App. 486, 616 P.2d 666 (1980) 17

State v. Hayes, 164 Wn.App. 459, 262 P.3d 538 (2011) 3, 5

State v. Morreira, 107 Wn.App. 450, 27 P.3d 639 (2001) 14

State v. Pineda-Pineda, 154 Wn.App. 653, 226 P.3d 164 (2010) 10,
11

State v. Quiros, 78 Wn.App. 134, 896 P.2d 91, rev. denied, 127
Wn.2d 1024 (1995)..... 13

United States Supreme Court Decisions

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147
L.Ed.435 (2000) 8, 19

<u>Ball v. United States</u> , 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)	18
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).	8
<u>Green v. United States</u> , 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)	18
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	17

United States Constitution

Fourteenth Amendment	8, 9
Sixth Amendment.....	8, 9

Washington Constitution

Article I, section 21	8
Article I, section 22	8, 9

Statutes

RCW 9.35.020.....	17
RCW 9.94A.530	13, 14
RCW 9.94A.533	10
RCW 9.94A.535	7, 8, 11, 14, 17
RCW 9.94A.537	14

A. INTRODUCTION.

When Larry Hayes returned to court after several of his convictions were reversed on appeal, the State conceded it would simply dismiss the reversed charges rather than attempt to prosecute them. Yet it asked the judge to impose the same exceptional sentence it had originally imposed. Its argument for an exceptional sentence was based on allegations for which Hayes no longer stood convicted. Hayes's exceptional sentence is unauthorized and must be reversed.

B. ASSIGNMENTS OF ERROR.

1. The court improperly imposed an exceptional sentence based on conduct for which Hayes was convicted as an accomplice.

2. The court impermissibly imposed an exceptional sentence based on unproven allegations.

3. The prosecution did not present sufficient evidence that the crime for which the court imposed an exceptional sentence satisfied the criteria for the aggravating factor of major economic offense.

4. The court included offenses in Hayes's judgment and sentence for which Hayes had not been convicted.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. An exceptional sentence may be imposed for an accomplice only if the governing statute authorizes accomplice liability. Hayes was convicted as an accomplice. Did the court lack authority to impose an exceptional sentence when there was no jury finding that he was culpable as a principle?

2. An exceptional sentence may not be imposed based on conduct that was not proved to the jury as part of the crime of conviction. The prosecution asked the court to impose an exceptional sentence based on allegations that it did not prove and expressly declined to charge after remand from the Court of Appeals. Did the court use uncharged accusations as the basis for imposing an exceptional sentence?

3. An exceptional sentence based on a major economic offense must involve conduct that substantially exceeds that contemplated by the standard range. Hayes received an exceptional sentence for count one, first degree identity theft. This offense requires a minimum theft of \$1500 and Hayes was accused of taking \$2000. Did Hayes's conduct sufficiently establish the extraordinary behavior required for an exceptional sentence

when his conduct involved a taking that was minimally beyond the bare elements of the crime?

4. The court lacks authority to enter convictions for offenses that were charged but not proved. The judgment and sentence lists several offenses as part of Hayes's criminal history that the prosecution dismissed after the Court of Appeals remanded the case for resentencing. Should this court strike the dismissed charges from the list of criminal history in the judgment and sentence?

D. STATEMENT OF THE CASE.

Larry Hayes returned to trial court for resentencing after several of his convictions were reversed on appeal. CP 70; State v. Hayes, 164 Wn.App. 459, 483, 262 P.3d 538 (2011). The State declined to prosecute any of the reversed charges. 3/16/12RP 6-7.¹ The prosecution asked the trial court to impose the same 180-month exceptional sentence that it had previously ordered. 3/16/12RP 8-10.

¹ The verbatim report of proceedings (RP) from the resentencing hearing is cited by reference to the date of proceedings. The transcripts from Hayes's trial are referred to in the same manner as used in COA 66646-1-I: they refer to the volume designated on the cover page of the trial transcripts; transcripts that do not have a volume designated on the cover page will be referred to by the date of the proceeding.

The court imposed an exceptional sentence of 96 months for count one based on the aggravating factor of a major economic offense. 3/15/12RP 16. In count one, Hayes was convicted of first degree identity theft for the unauthorized use of Scott Mutter's credit card account. CP 13. A representative of Mutter's bank testified that there were four unauthorized charges on Mutter's account, totaling \$2047. 10RP 9. The court imposed standard range terms for the remaining offenses. 3/16/12RP 16.

Hayes was originally charged with leading organized crime based on a claim by Benny Epstein that Hayes led others in stealing property or creating false identities. CP 21-22. But at Hayes's trial, multiple witnesses testified that Epstein, not Hayes, was the person who was responsible for the criminal conduct for which Epstein accused Hayes. See 164 Wn.App. at 465-66. The prosecution altered its theory to accuse Hayes of being an accomplice to Epstein. 12RP 10; 6/23/09a.m.RP 37-39, 52-53; 6/23/09p.m.RP 54-55. The Court of Appeals reversed Hayes's conviction for leading organized crime on the basis that leading organized crime punishes the leader and not the accomplice, and

Hayes has filed a motion to transfer the transcripts from his prior appeal, COA 66646-1-I, to the instant appeal.

therefore cannot be based on accomplice liability. Hayes, 164 Wn.App. at 483.

The remaining convictions for which Hayes was being sentenced involved one credit card and four receipts found in a silver briefcase in Hayes's home. Each item contained a credit card account number and Hayes was charged with both identity theft and second degree possession of stolen property for the receipts and card. CP 14-20; 3RP 73. The briefcase was found in Hayes's home and contained over 800 credit card receipts from Great Clips, a hair salon. 3RP 72, 78. These receipts had been stolen from a storage unit. 3RP 90, 93.

Benny Epstein testified that the briefcase belonged to Hayes, but a number of Epstein's friends and acquaintances testified that Epstein always carried a briefcase with him and the silver briefcase looked like one Epstein had. 10RP 108, 125, 142; 11RP 38, 92, 121. Several witnesses also testified that when the police were preparing to search Hayes's home, Epstein created a "bomb" of fireworks and said he wanted to bomb Hayes's home so the police would not get "his briefcase." 10RP 125, 147; 11RP 93-94.

The Great Clips credit card receipts had been taken from a storage unit that was next door to a storage unit Epstein rented. 3RP 90; 10RP 97-100. While Epstein accused Hayes of burglarizing the neighboring storage unit, other people testified that Epstein bragged of stealing from other storage units. 10RP 50, 130; 11 RP 39, 98. Epstein was found in possession of several Great Clips credit card receipts when he was arrested in Idaho. 10RP 27. Epstein testified against Hayes under a grant of immunity after he pled guilty in federal court to identity theft and credit card fraud in an effort to reduce his pending federal sentence. 7RP 27; 8RP 8.²

The jury was instructed that Hayes could be convicted as an accomplice or principle. COA 66646-1-I, CP 11, 13. The verdict forms did not ask the jury to specify whether its verdict rested on accomplice liability. The jury was also asked whether the State had proven “the crime” was a major economic offense or series of offenses. CP 25.

Hayes had originally received an exceptional sentence for his conviction of leading organized crime. Hayes challenged he

² The substance of Epstein’s federal charges was not discussed in court, but they seem to rest on allegations unrelated to Hayes. 8RP 75-76.

imposition of the exceptional sentence on appeal. The Court of Appeals did not address the issue because it reversed the conviction for which the exceptional sentence was imposed. 164 Wn.App. at 483. The Court of Appeals decision provided as follows:

Hayes argues that the aggravating factor of a major economic offense as defined in RCW 9.94A.535(3)(d) cannot be the basis for an exceptional sentence unless there is a jury finding, absent here, that Hayes himself engaged in the actions that made his crime a major economic offense. Because we reverse Hayes' conviction for leading organized crime, the only crime for which he was given an exceptional sentence, this issue is moot and we decline to address it.

164 Wn.App. at 483. Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. The aggravating factor of “major economic offense” was not supported by substantial evidence and not based on acts by Hayes alone

- a. An aggravating factor justifying an exceptional sentence must be proved to the jury and authorized by statute.

A judge exceeds her constitutional authority if she imposes a sentence based on factual determinations that are made by the judge, not the jury, and are not proven beyond a reasonable doubt.

Apprendi v. New Jersey, 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.435 (2000); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 21, 22. Any fact increasing punishment beyond the standard sentencing range constitutes an element that must be proved to the jury beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The court's sentencing authority is controlled by statute. State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). The Legislature enacted an "exclusive list" of aggravating factors that may serve as the basis of an exceptional sentence above the standard range. RCW 9.94A.535(3) ("the following circumstances are an exclusive list of factors that can support a sentence above the standard range").

The prosecution sought an exceptional sentence based on the "major economic offense" aggravating factor. The jury was instructed:

To find that a crime is a major economic offense, at least one of the following factors must be proved beyond a reasonable doubt:

- (1) The crime involved multiple victims or multiple incidents per victim; or
- (2) The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time.

COA 66646-1-I, CP 102. The court also told the jury that these factors were alternative means for which the jury did not need to be unanimous, as long as each juror found one alternative had been proved. Id.

The court impermissibly relied on this aggravating factor to impose an exceptional sentence on count one because Hayes's conviction rested on accomplice liability, and the aggravating factor must be based on a finding of personal culpability without regard to complicity as an accomplice. Furthermore, the evidence underlying count one cannot rise to the level of harm contemplated by the major economic offense aggravator.

- b. Accomplice liability cannot be the basis for an exceptional sentence unless explicitly statutorily authorized**Error! Bookmark not defined.**

Although an aggravating factor permitting an enhanced penalty must be charged and proven beyond a reasonable doubt, "it is decidedly not an element needed to convict the defendant of the charged crime." State v. Roswell, 165 Wn.2d 186, 195, 196 P.3d 705 (2008); see Blakely, 542 U.S. at 303; U.S. Const. amends. 6, 14; Wash. Const. art. I, § 22. Exceptional sentence criteria involve separate factors from the question of whether a

person may be convicted of the underlying crime. Roswell, 165 Wn.2d at 195.

The accomplice liability statute, RCW 9A.08.020, “cannot be the basis to impose a sentencing enhancement on an accomplice.” State v. Pineda-Pineda, 154 Wn.App. 653, 661, 226 P.3d 164 (2010). The accomplice liability statute, RCW 9A.08.020, “does not contain a triggering device for penalty enhancement.” Id. Accordingly, “the authority to impose a sentencing enhancement on the basis of accomplice liability must come from the specific enhancement statute.” Id.

Pineda-Pineda explains that the legislature has made a policy choice to hold accomplices liable for another person’s conduct in certain statutes, such as for possession of a firearm. The firearm enhancement statute provides that additional prison sentences “shall be added to the standard range sentence . . . if the offender or an accomplice was armed with a firearm.” 154 Wn.App. at 663 n.4 (citing RCW 9.94A.533(3)). Similarly, the legislature specifically contemplates the possibility of accomplice liability in the context of the death penalty by expressly authorizing a conviction for aggravated first degree murder when a person

solicits another to commit the crime. Id. (citing Roberts, 142 Wn.2d at 502).

The authority to impose a sentencing enhancement must be derived from specific authorizing language in the enhancement itself. Roberts, 142 Wn.2d at 501-02. Major participation by the accused is necessary for an aggravating factor to apply in the context of aggravated first degree murder. Roberts, 142 Wn.2d at 505. In the absence of special interrogatories, the court does not speculate as to the basis of the jury's verdict and presumes it may have rested on accomplice liability. Id. at 509.

The statute authorizing exceptional sentences does not explicitly trigger accomplice liability. RCW 9.94A.535(3). Because the statute is silent on the applicability of accomplice liability, it does not contain the necessary "triggering device" needed to incorporate accomplice liability. Pineda-Pineda, 154 Wn.App. at 661. Also, a criminal statute must be construed in the defendant's favor when ambiguous, and therefore accomplice liability is not an available predicate for the enhanced punishment. See State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

The jury's verdict for each "current offense" finding against Hayes was premised on the availability of accomplice liability.

There was no jury finding that Hayes himself engaged in actions constituting a major economic crime. There was little evidence of Hayes' own involvement in any scheme that caused actual loss to a significant number of people.

The jury instructions and arguments presented by the prosecution asked the jury to convict Hayes as either a principle or accomplice. Instruction 11 defined accomplice liability and explained that Hayes would be "legally accountable for the conduct of another person" if he was an accomplice in the commission of "identity theft in the first degree" or other crimes charged. COA 66646-1-I CP 67 (Instruction 11). The "to convict" instruction for first degree identity theft told the jury that the prosecution was required to prove that "the defendant, or an accomplice" committed the acts necessary for first degree identity theft.

The prosecution argued that Hayes would be guilty of all charged offenses by aiding or abetting Epstein. 6/23/09p.m.RP 38.

The prosecution said,

if Larry Hayes aided, abetted, or assisted Benjamin Epstein as an accomplice then you can return a verdict of guilty on any charge where you find that he has acted as an accomplice.

6/23/09p.m.RP 38.

The jury was not asked to find Hayes did more than aid or abet Epstein in his commission of any of the charged crimes. It made no finding about the degree of Hayes's personal culpability.

The court imposed an exceptional sentence on Hayes premised on the jury's finding that "the crime" constituted a "major economic crime." CP 25, 102. The jury's verdict for each crime rested on accomplice liability. The trial court did not note any factual basis for finding Hayes himself caused a major economic crime. 9/11/09RP 27.

Because aggravating factors authorizing exceptional sentences may not be premised on accomplice liability absent express statutory authorization, and no such authorization is present, Hayes should not have received an exceptional sentence based on a verdict that rests on accomplice liability.

- c. The prosecution premised its request for an exceptional sentence on uncharged, unproven allegations and did not establish sufficient proof of the major economic crime aggravating factor for first degree theft

Under the real facts doctrine, the sentencing court can consider facts only if proven at trial, and not allegations of other crimes. State v. Quiros, 78 Wn.App. 134, 138-39, 896 P.2d 91, rev. denied, 127 Wn.2d 1024 (1995); RCW 9.94A.530(2). The purpose

of this doctrine is to protect the defendant from the trial court's "consideration of unreliable or inaccurate information." State v. Morreira, 107 Wn.App. 450, 456-57, 27 P.3d 639 (2001) (quoting State v. Handley, 115 Wn.2d 275, 282, 796 P.2d 1266 (1990)).

Under the real facts doctrine, a defendant's sentence may be based only on the current crime for which he is convicted, his criminal history, and the circumstances surrounding the crime. State v. Houf, 120 Wn.2d 327, 333, 841 P.2d 42 (1992). A defendant may not be punished for uncharged crimes. State v. McAlpin, 108 Wn.2d 458, 466, 740 P.2d 824 (1987).

RCW 9.94A.530 codifies the real facts doctrine as follows:

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. . . .

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in RCW 9.94A.537. 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).

The prosecution did not address the offenses for which Hayes was convicted when it argued to the court that it should

impose an exceptional sentence. Instead, the prosecutor first argued that Hayes had been convicted of similar offenses in the past. 3/16/12RP 9. But that type of criminal history is accounted for in the standard range and may not serve as a basis for an exceptional sentence.

Second, the prosecutor argued that this case was not a “normal run-of-the-mill small operation.” 3/16/12RP 9. He claimed Hayes had “800” full account numbers from credit card receipts [and] the jury heard evidence he was skilled at creating false identifications.” Id. Finally, the prosecutor said, “I’m sure that you remember your reasons for giving an exceptional sentence in the first place. I’m going to ask that you impose the same sentence that you imposed back two and a half years ago and impose 180 months.” 3/16/12RP 9-10.

The latter two reasons for an exceptional sentence are premised on uncharged crimes and allegations that the prosecution elected to dismiss rather than prove to a jury. The court previously imposed an exceptional sentence for Hayes’s leading organized crime conviction, but that conviction was reversed and then dismissed on remand at the prosecution’s request. For the prosecution to ask that the court impose an exceptional sentence

for the same reason it had before, when it was not even charging Hayes for that offense anymore, demonstrates the faulty premise of the State's request for an exceptional sentence.

Additionally, Hayes was not convicted of possessing "800" receipts in the briefcase. Hayes was convicted of possessing credit card receipts and one card – each item resulted in two separate charges, for identity theft and possession of stolen property in the second degree. CP 14-20; 3RP 73. Based on the overlap between the offenses, the court counted the related identity theft and possession of stolen property convictions as same criminal conduct. 3/16/12RP 16. Hayes was not accused of having used the credit card receipts to construct false identifications. 6BRP 29. He was not convicted of making false identifications. Instead, he was convicted of merely possessing credit card receipts and one credit card.

His other remaining conviction involved the use of Scott Mutter's stolen credit card, which someone used to amass \$2047 in unauthorized charges. 10RP 9. Hayes was convicted of first degree identity theft for this offense. CP 13. Since first degree identity theft requires the perpetrator obtain property over \$1500, the \$2000 theft is hardly an extraordinary departure from acts contemplated

by the statute and the standard range. RCW 9.35.020(1),(2)(a). The court imposed an exceptional sentence based on count one, which involved the use of Mutter's credit card account, but this offense does not meet the criteria or intent of the major economic offense aggravating factor. RCW 9.94A.535(3)(d).

By seeking an exceptional sentence based on facts for which Hayes was not convicted, the prosecution's argument was misplaced. The court had authority to impose an exceptional sentence only if drawn from proved facts, not allegations and suspicions harbored by a deputy prosecutor. The exceptional sentence imposed was based on facts not proved to the jury, and the facts proved to the jury were insufficient to deem count one to be a major economic offense.

2. The criminal history listed on the judgment and sentence improperly includes charges that were dismissed

It is axiomatic that when the prosecution dismisses a charge that has been reversed on appeal, or otherwise declines to pursue a conviction, the accused person may not be punished for the charged conduct. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); see State v. Bush, 26 Wn.App. 486, 616 P.2d 666 (1980) ("the judiciary's function ends with ... a verdict of

acquittal”). No person may be forced to “run the gantlet” after an acquittal. Green v. United States, 355 U.S. 184, 190, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

The fact of reported conviction has punitive consequences, even when the court does not impose a prison term for the crime. State v. Turner, 169 Wn.2d 448, 454-55, 238 P.3d 461 (2010). (citing Ball v. United States, 470 U.S. 856, 865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)). Consequently, the judgment and sentence may not list crimes as convictions when they may not be punished under the double jeopardy prohibition. Turner, 169 Wn.2d at 464-65. Similarly, it is punitive to list charges as convictions when no punishment may flow based on the prosecution’s failure to prove those offenses to the jury.

Hayes judgment and sentence contains a list of “criminal history” purportedly found by the court. CP 101-02. This list contains several offenses that were reversed by the Court of Appeals and dismissed by the prosecution on remand.

The list of criminal history includes as number nine, “UPSV,” short for unlawful possession of a stolen vehicle, although that charge was reversed by the Court of Appeals and dismissed by the prosecution. 3/16/12RP 6; CP 101. Under number 21, it lists “lead

or crime,” short for leading organized crime, which was similarly reversed on appeal and dismissed by the prosecution. 3/16/12RP 7; CP 96-97; 102. Under number 22, it lists “UPSV,” which was likewise reversed and dismissed. Id. Finally, the prosecution agreed to dismiss count 13, second degree possession of stolen property, based on an error in charging and proof, but that offense appears to be included on the list of criminal history as number 20. 3/16/12RP 7; CP 101.

Although the court did not impose terms of imprisonment for the offenses for which Hayes was not convicted, they should not be listed as criminal history. See Turner, 169 Wn.2d at 464-65 (“no reference should be made” to a vacated conviction at sentencing). Similarly, it violates due process as well as the appearance of fairness to use conduct for which the accused person was acquitted in the course of an argument seeking a sentence above the standard range. See Apprendi, 530 U.S. at 483-84. This court should order that the trial court strike the criminal history listings that refer to charges that were dismissed by the prosecution.

F. CONCLUSION.

For the foregoing reasons, Mr. Hayes respectfully requests this Court reverse the exceptional sentence and order the court to correct the judgment and sentence.

DATED this 26th day of June 2012.

Respectfully submitted,



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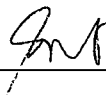
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