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Court of Appeals
Division III
State of Washington

No. 32696-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JONATHAN KUHLMAN,

Defendant/Appellant.

Appellant's Supplemental Brief

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A. RESPONSE TO COURT'S INQUIRIES

The following responses to this Court's inquiries in a letter dated November 18, 2015, are in the same numerical order as the inquiries.

1. The Court sentenced Mr. Kuhlman to a minimum sentence of 246 months under an indeterminate sentence on the most serious charge of second degree rape, based on an offender score of 14. CP 60, 63. The sentence included two 18-month enhancements for the special verdicts of sexual motivation on the two counts of distribution of a controlled substance to a person under the age of 18. CP 63; RCW 9.94A.533(8)(a)(ii).

In order to arrive at an offender score of 14 on the second degree rape conviction, the court must have counted two points each for the four prior aggravated burglary convictions and one point for the second degree burglary all from Tennessee, for a subtotal of nine points. CP 59; RCW 9.94A.525(8). It then counted three points for the other current offense of communication with a minor for immoral purposes (RCW 9.94A.525(17)) and one point each for the two counts of distribution of a controlled substance to a person under the age of 18, for a total of a subtotal of five points. CP 57, 60.

2. The sentencing score of 14 is correct if the prior aggravated burglary convictions from Tennessee are at least violent felonies, in which case they would count two points each. RCW 9.94A.525(8). However, whether they are violent offenses or not is irrelevant since Mr. Kuhlman's offender score would still be over nine even if they counted just one point each. 14 minus 4 = 10.

3. In order to arrive at an offender score of 14 on the second degree rape conviction, the court must have counted only one point each for the two counts of distribution of a controlled substance to a person under the age of 18 with sexual motivation. Therefore, the court apparently did not count these convictions as sex offenses. See No. 1 *supra*. This is contrary to RCW 9.94A.030(46)(c), which defines "sex offense" to include "A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135."

4. The court imposed 18-month enhancements on the two counts of distribution of a controlled substance and added them to the 210-month minimum sentence on the second degree rape for a total of 246 months. This was incorrect based on the argument presented in Appellant's initial brief that RCW 9.94A.030(46)(c) is inconsistent with RCW 9.94A.835(1)

and (2) and, therefore, ambiguous. See No. 3 *supra* and Appellant's initial brief.

5. The law does not permit the trial court, for sentencing purposes, to consider convictions for distribution of a controlled substance to a minor to be sex offenses and, in addition, impose sentence enhancements for the same convictions. RCW 9.94A.835(1) and (2); RCW 9.94A.030(46)(c); See also No 3 *supra* and Appellant's initial brief.

6. The correct sentence on the second degree rape is a minimum sentence of 210 months. Even when the convictions for distribution of a controlled substance are not counted as sex offenses, as apparently occurred in this case, the enhancements should still be stricken because of the ambiguity of RCW 9.94A.835(1) and (2). RCW 9.94A.030(46)(c) defines "sex offense" to include "A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135." But this statute is inconsistent with RCW 9.94A.835(1) and (2), which excludes sex offenses from sexual motivation enhancements. See Appellant's initial brief. Since RCW 9.94A.835(1) and (2) are ambiguous, the rule of lenity applies and the statute must be interpreted in the defendant's favor. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 283 (2005). Therefore, the finding of sexual motivation by special verdict should be stricken.

B. CONCLUSION

For the reasons stated the matter should be remanded to strike the special verdicts, reduce the sentence to 210 months, and to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs.

Respectfully submitted, December 3, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on December 3, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the supplemental brief of appellant:

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