74422-4

FILED
November 17, 2016
Court of Appeals
Division I
State of Washington

NO. 74422-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MURRAY,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

The exceptional sentence cannot stand.

1. The State's claim of waiver is unsupported in law or fact.

The State claims Michael Murray "waived his challenge to the imposition of an exceptional sentence upward by seeking one himself." BOR at 10-12. The invited error doctrine is inapplicable. This is a poorly reasoned argument.

Mr. Murray certainly asked for an exceptional sentence, because the case cried out for a downward departure. 12/10/15RP 10; AOB at 31-34. Even if the jury did not accept the diminished capacity defense, Dr. Beaver's expert conclusion that Mr. Murray's behavioral dysregulation is secondary to brain damage was a compelling basis for a mitigated sentence. Defense counsel did well to request it. But this does not mean Mr. Murray now cannot challenge the exceptional-up sentence imposed against him.

The prosecution points to State v. Emels, 156 Wn.2d 529, 539, 131 P.3d 299 (2006), which in turn cites to In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 300, 979 P.2d 417 (1999), but those cases are distinguishable from the one at bar.

Emels explicitly stipulated "there is sufficient evidence for the court to impose an exceptional sentence upward," because the victim was particularly vulnerable. Id. Emels further agreed that under Breedlove, his stipulation was factually and legally sufficient to support an exceptional sentence up. He even acknowledged "that pursuant to this plea agreement, there is a substantial likelihood that the court will impose an exceptional sentence upward." Id. at 300-301.

The defendant in Breedlove also bargained for reduced charges and a shorter sentence, agreeing "in writing and orally in open court, that the stipulation… justified the exceptional sentence in his case." Breedlove, 138 Wn.2d at 313.

In contrast, Mr. Murray bargained for nothing and agreed to nothing. The government cannot point to any stipulation similar to what took place in Emels or Breedlove.

If anything, Mr. Murray's sentencing request that he receive a mitigated sentence was an objection, not waiver. The State's argument on this point should be rejected out-of-hand.

2. Nudity is not enough: the crime of indecent exposure requires an "obscene" or "lascivious" exposure which is why sexual motivation inheres in the offense.

Mr. Murray stands by his argument that the sexual motivation enhancement cannot apply to indecent exposure, an inherently sexual offense. AOB at 20-24. It is surprising the State disagrees, when State v. Galbreath, 69 Wn.2d 664, 668, 419 P.2d 800 (1966) and other authority confirm the "indecent" part of the offense must be a lascivious – sexual in nature – exhibition. Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973); State v. Steen, 155 Wn. App. 243, 247, 228 P.3d 1285 (2010) (confirming trial court accurately defined "obscene exposure" as an exposure "of the sexual or intimate parts of one's body for a sexual purpose") (emphasis added).

Without addressing Steen, the State erroneously asserts the government may prosecute "scenarios of indecent exposure that are not sexual in nature." BOR at 14. However, the indecent exposure statute is not a prohibition on nudity, it is a prohibition on obscenity. RCW 9A.88.010. The State's attempts to show there is such a thing as non-sexual indecent exposure fail.

To consider the first of the government's meanderings, women disrobing together in public protest against a political

candidate's misogyny would be exercising their free speech rights, not committing a crime. The conduct of the Republican National Convention protestors would not violate RCW 9A.88.010 because their intent was to make a political statement, not be obscene.[1]

The same is true of the hundreds of Seattleites who annually express themselves by bicycling naked at the Fremont Solstice parade. As the former Seattle Chief of Police R. Gil Kerlikowske put it when asked about the very tradition, "There is no law against being naked."[2] These are not lawless revelers. Because self-expression, not obscenity, motivates their behavior, they are not violating RCW 9A.88.010.[3]

The State's college "streaking" hypothetical fails for largely the same reasons. That behavior, apparently somewhat common at many institutions of higher learning,[4] also appears to be a ritual of

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[1] It is unclear why the government, acknowledging the women disrobed "as a political protest," and "stood naked… to peacefully protest," missed the plain First Amendment implications here. BOR at 15.

[2] See Seattle Police Department Public Affairs communication, November 14, 2008. http://spdblotter.seattle.gov/2008/11/14/is-nudity-illegal/ (this and all subsequent online citations last accessed November 15, 2016).

[3] See "To ride or not to ride: the Fremont Solstice Cyclists," The Stranger, June 18, 2015, accessible at: http://www.thestranger.com/blogs/slog/2015/06/18/22412004/to-ride-or-not-to-ride-the-fremont-solstice-cyclists (showing portrait of a cheerful and naked participant dressed-up as the Statute of Liberty).

[4] See https://en.wikipedia.org/wiki/Streaking_at_educational_institutions

communal bonding and self-expression, rather than an intentionally open and obscene exposure.

In suggesting indecent exposure occurs when "people intentionally and explicitly display their genitalia for a reason other than sexual gratification," the State misleads. BOR at 15. The law requires not just that the display be intentional and open, the law specifically requires the exposure to be obscene. RCW 9A.88.010. That means sexually motivated. State v. Steen; Miller v. California.

3. Rapid recidivism was not proven, the aggravator is subject to a vagueness challenge, and here, fails to comport with due process.

As argued in the opening brief, there is more to the rapid recidivism analysis than marking-off days on a calendar. AOB 24-28. Despite the State's wish to the contrary, "[t]he gravamen of the [rapid recidivism] offense is disdain for the law." State v. Combs, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010); BOR at 19.

The most "rapid" thing Mr. Murray did after his release was seek out help. Ex. 13 at 3; Ex. 14 at 1; RP 518. Yes, he did reoffend, but as Dr. Beaver explained the recidivism was tied to Mr. Murray's stroke-induced dementia:

> he was not able to reflect and consciously know what the impact of the behaviors was going to be until after the behaviors had occurred because he doesn't have that inhibitive or reflective control that we would expect most normal people to have, and he has lost that ability related to his dementia and his cerebral vascular disease.

RP 522.

There is no indication that the offenders whose prosecutions give rise to the appellate opinions on rapid recidivism were similarly impaired. The aggravator was not sufficiently proven.

Responding to Mr. Murray's vagueness challenge, the State relies on State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003) and its dated holding that aggravating circumstances are not subject to due process vagueness challenges. But the United States Supreme Court's application of the vagueness doctrine to a federal sentencing aggravator in Johnson v. United States, __ U.S. ___, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015) overrules Baldwin and that is what this Court should explicitly recognize.[5]

Contrary to what the State argues, the vagueness problem in Johnson did not stem from the fact that ACCA dictated an aggravated sentence. The residual clause of ACCA had to be struck down because there was "no reliable way" to interpret it, and

[5] Mr. Murray is not attempting to "sidestep" Baldwin, which predates Johnson. BOR at 22. Baldwin is simply no longer good law.

also because there was "grave uncertainty" about its scope. Id. at 2557-58. The fact that a judge serves as an intermediary between a jury finding of rapid recidivism and the imposition of an aggravated sentence is of no solace. BOR at 23.

The reality is the law fails to sufficiently guide the jury or the judge. Consequently, just like the DACCA residual clause, the "rapid recidivism" aggravating factor does not give sufficient notice to a defendant of what conduct will subject him to a greater sentence. Id. at 2560-62.

The State's own inability to provide a coherent legal standard for resolving the "rapid recidivism" question proves that Mr. Murray's vagueness challenge is well-taken. At the outset, the State concedes the law does not define the phrase "shortly after." BOR at 16. The State equivocates on the role Mr. Murray's brain injury and attempt to seek help should play in the analysis. It could, or it could not, be relevant, the State says. BOR at 19 ("professional help upon release bears minimally, if at all, on the question"). Even if the jury could find the aggravator was proven, trial judges can do what they want with it. BOR at 20.

In this appeal, Mr. Murray established the rapid recidivism aggravator was vague as applied to him. AOB 28-31. He is not

even remotely comparable to the offender in State v. Williams, 159 Wn. App. 298, 304, 244 P.3d 1018 (2011), who was released from jail in the morning only to attack police in the same evening.

The law allows for diminished capacity to serve as a defense to a charge. See CP 89 (jury instruction). The law allows for a failed diminished capacity defense to serve as a basis for a mitigated sentence. RCW 9.94A.535(1)(e). But the law says nothing about how to consider a defendant's diminished capacity when judging whether he committed an offense "shortly after being released from incarceration." RCW 9.94A.535(3)(t).

The law is so "standardless that it invites arbitrary enforcement," and thus vague. Johnson, 135 S. Ct. at 2556. This Court should reach the issue and rule in Mr. Murray's favor.

4. The sentence was excessive.

Mr. Murray is a brain-damaged stroke victim, not a predator. To paraphrase Miller v. Alabama, 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407 (2012), "the heart of the retribution rationale relates to an offender's blameworthiness, [and] the case for retribution is not as strong with [a brain damaged man] as with [a fully-functioning] adult." Below and on appeal, the State offered nothing to contest the reality of this man's injury and its implication on his functioning.

See AOB at 32-34 (discussing link between Mr. Murray's brain damage and sexual dysregulation).

Exceptional circumstances must truly distinguish the crime from others of the same category, but that is not the case here. State v. Tili, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003). The exceptional sentence was clearly excessive and should be reversed. See AOB 31-37.

E. CONCLUSION

For the reasons set forth above and in the appellant's opening brief, Mr. Murray respectfully requests this Court vacate the exceptional sentence and remand for sentencing within the standard range.

DATED this 17th day of November 2016

Respectfully submitted,

/s/ Mick Woynarowski

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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF NOVEMBER, 2016, 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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	(X)	AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF NOVEMBER, 2016.

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