

see order of 1/18

NO. 48143-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DANNY ALLEN WING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson Hunt, Judge

SECOND SUPPLEMENTAL BRIEF OF APPELLANT

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SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in imposing an exceptional sentence on facts not stipulated to by Mr. Wing.

2. Mr. Wing did not waive his right to jury determination of an exceptional sentence.

3. The trial court failed to enter written findings of fact to support the exceptional sentence as required by the Sentencing Reform Act.

4. The court erred in imposing an exceptional sentence.

SUPPLEMENTAL ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in sentencing Mr. Wing to an exceptional sentence when he Wing did not agree to facts the court could and did rely on to impose the sentence and did not his waive his right to a jury determination of those factors?

2. Whether the court erred in imposing an exceptional sentence?

3. Whether the trial court's failure to enter actual written findings of fact supporting its factual and legal basis for an exceptional sentence requires remand for entry?

SUPPLEMENTAL STATEMENT OF FACTS

Mr. Wing pleaded guilty to an amended information charging manslaughter in the first degree and assault of a child in the third degree.

CP 5-6. Both charges alleged that the offenses were domestic violence. There were no allegations pled in the amended information that (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time; (ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim. See domestic violence aggravating sentencing factor RCW 9.94A.535(3)(h)(i-iii).

In his statement on plea of guilty Mr. Wing's explained his actions:

In Lewis Co. I recklessly caused the death of [JHW] (DOB: 1-26-2011) by failing to get him medical care, for the injuries he sustained while a member of my household (July 2014 – Oct. 5, 2014). [JHW] died within 2 hours of my wife placing the call to 911 from our house in Vader, WA. During latter August 2014 I open-palm hit [JHW] in the mouth, an inappropriate discipline that caused his lips to swell I substantial pain extending for a period sufficient to cause considerable suffering. I am truly sorry.

CP 17.

Passing reference was made to the plea Proffer Agreement during the plea hearing. The Proffer Agreement was mentioned in the statement

of defendant on a plea of guilty but was not attached to the plea form. (See Proffer Agreement at Appendix to Brief of Appellant.)

Prior to sentencing, Mr. Wing agreed he did not abide by certain conditions of his Proffer Agreement. The State presented the court with a document titled "Supplement To Amended Information Adding Aggravating Factors." CP 20-21. The document referenced both the first degree manslaughter and the assault of a child in the third degree. It also listed three statutory aggravating factors.

- Crime committed against a family or household member, RCW 10.99.020
- The defendant used a position of trust, or confidence to facilitate the commission of the current offense contrary to RCW 9.94A.535(3)(n)
- The defendant knew or should have known the victim of the current offense was particularly vulnerable or incapable of resistance, RCW 9.94A.535(3)(b)

The court heard sentencing to include statements from a first responder, and JHW's mother and father. RP 3/9/15. The court imposed an exceptional sentence on both counts. CP 27. The court later ostensibly entered written findings of fact and conclusions in support of its sentence. CP 162-63. But the Findings were limited to a citation to the name and RCW for each of the three exceptional factors it found. CP 162-63.

SUPPLEMENTAL ARGUMENT

1. Mr. Wing did not stipulate to facts the trial court relied on in imposing an exceptional sentence or waive his right to a jury determination of the use of those facts to support an exceptional sentence.

The United States Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, besides the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The United States Supreme Court noted in *Blakely* that the “ ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The Sixth Amendment guarantees a criminal defendant the right to a jury trial. When a court imposes an exceptional sentence predicated on an unstipulated fact not found by a jury beyond a reasonable doubt, the court violates the defendant's Sixth Amendment (*Blakely*) right. *State v. Hagar*, 158 Wn.2d 369, 374, 144 P.3d 298 (2006). After *Blakely*, a jury must find beyond a reasonable doubt that factual bases for establishing the aggravating factor existed. *In re Beito*, 167 Wn.2d 497, 503, 220 P.3d 489

(2009). Although Mr. Wing pleaded guilty, he did not waive his right to a jury determination of the State's proposed aggravating factors. He certainly did not agree on specific facts to support each factor.

Where a *Blakely* error occurs, the defendant may challenge the imposition of an exceptional sentence pursuant to *Blakely* without first having to withdraw his plea. *Hagar*, 158 Wn.2d at 374 (defendant need not challenge his stipulation in order to establish that a *Blakely* violation occurred). In *Hagar*, the defendant stipulated to certain facts but did not stipulate that the crimes constituted a "major economic offense." There, the trial court imposed an exceptional sentence based on a finding that *Hagar* committed a major economic offense. On review, the court held the sentence violated *Blakely* because the exceptional sentence was predicated on an unstipulated fact that was not found by a jury beyond a reasonable doubt.

In *Suleiman*, the court held that a defendant's stipulation to facts that support imposing an exceptional sentence would survive *Blakely* requirements only where the defendant stipulated specifically to the aggravating factor at issue and agreed the record supported the factor. *State v. Suleiman*, 158 Wn.2d 280, 292, 143 P.3d 795 (2006). Put otherwise, it is not enough to stipulate to facts from which the trial court

could find additional facts, the existence of which would support finding the aggravating factor was present and provides support for imposing an exceptional sentence. *Id.* at 493.

The *Suleiman* court imposed an exceptional sentence relying on the statutory aggravating sentencing factor that the victim was particularly vulnerable. *Id.* at 281. To reach its conclusions, the trial court had to engage in judicial fact-finding to find *particular* vulnerability, a fact Mr. Suleiman neither stipulated to nor was found by a jury. *Id.* The finding violated Suleiman's *Blakely* right to a jury. In order for Suleiman's plea to comply with the *Blakely* stipulation exception, he must have stipulated to the underlying facts and stipulated that the record supported a determination of particular vulnerability. Otherwise, the trial court engaged in decision-making that this court has labeled as fact finding. *Id.* at 292. The "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." In other words, the "statutory maximum" is the maximum that a judge may impose "without any additional findings."

Here Mr. Wing seemingly agreed to the application of three statutory aggravating factors to be considered in imposing an exceptional sentence upward. The first factor, domestic violence is flawed because the

offenses were not domestic violence as Mr. Wing's relationship with the victim does not meet the definition of domestic violence. (See Issue 1, Brief of Appellant). Further, "domestic violence" alone is not an aggravating factor. Instead the appropriate fact finding would also have to find (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time; (ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim. RCW 9.94A.535(3)(h)(i-iii). The State never pled those allegations and Mr. Wing never stipulated to those facts.

The second factor, abuse of a position of trust, had no basis in any agreed facts. Third, as in *Suleiman*, the court engaged in judicial fact finding when it found the victim "particularly" vulnerable. Mr. Wing never stipulated to facts supporting particular vulnerability.

Under *Suleiman*, because Mr. Wing did not stipulate to the facts relied on by the trial court to support the exceptional sentence, he did not waive his *Apprendi/Blakely* Sixth Amendment right to have a jury find

beyond a reasonable doubt that the aggravating factor supporting an exceptional sentence existed.

Mr. Wing's case should be remanded to the trial court to take action on the sentence. RCW 9.94A.537(2) provides the following remedy:

In any case where an exceptional sentence 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.

2. The sentencing court failed to enter adequate written findings of fact and conclusions of law in support of an exceptional sentence.

- a. Written findings of fact and conclusions of law to support an exceptional sentence are mandatory.*

The Sentencing Reform Act (SRA) imposes a mandatory duty on the trial court to enter written findings of fact and conclusions of law whenever it imposes an exceptional sentence in a criminal case. RCW 9.94A.535 expressly provides: "Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law."

The duty to enter written findings and conclusions is a mandatory duty that may not be circumvented. *State v. Friedlund*, 182 Wn.2d 388,

395, 341 P.3d 280 (2015). The SRA’s requirement that the court set forth its reasons for imposing an exceptional sentence in written findings of fact and conclusions of law has been part of the SRA from its inception. *Id.* at 394 (citing Laws of 1981, ch. 137, § 12(3)). The written findings provision requires exactly what it says—the entry of “written findings.” *Id.*

A court’s oral ruling cannot satisfy the mandate of the statute. To permit a court’s verbal reasoning to substitute for written findings ignores the statute. *Id.* “[A] trial court’s oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.” *Id.* A written judgment and sentence, by contrast, is a final order subject to appeal. *Id.* Allowing a trial court to rely solely on its oral ruling would “deprive defendants of the finality accorded by the inclusion of written findings in the court’s formal judgment and sentence.” *Id.*

In addition, allowing trial courts to ignore the SRA’s written findings requirement “would also run contrary to the SRA’s explicit statutory purpose of making the criminal justice system accountable to the public.” *Friedlund*, 182 Wn.2d at 395 (quoting RCW 9.94A.010). The criminal court rules require a court’s written findings entered to support an exceptional

sentence be sent to the Washington State Sentencing Guidelines Commission with the judgment and sentence. *Id.* (citing CrR 7.2(d) (“If the sentence imposed departs from the applicable standard sentence range, the court’s written findings of fact and conclusions of law shall also be supplied to the Commission.”)). Without written findings, the Sentencing Guidelines Commission and the public at large cannot readily determine the reasons behind an exceptional sentence, greatly hampering the public accountability that the SRA requires.

b. Mr. Wing’s case must be remanded.

The remedy for a trial court’s failure to enter written findings of fact and conclusions of law to support an exceptional sentence is to remand the case for entry of those findings and conclusions. *Friedlund*, 182 Wn.2d at 395.

Here, the trial court imposed an exceptional sentence but never entered written findings of fact. Instead, the court listed only the aggravating factors: domestic violence, abuse of trust, and particular vulnerability. CP 162-63. The remedy is to remand the case to the trial court for entry of those written findings and conclusions. *Friedlund*, 182 Wn.2d at 395.

CONCLUSION

The exceptional sentence should be reversed and remanded to the trial court for further proceedings. In the alternative, the case must be remanded for the entry of the court's written findings of fact and conclusions of law in support of the exceptional sentence.

Respectfully submitted January 17, 2017.



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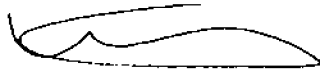
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Lewis County Prosecutor's Office, at appeals@lewiscountywa.gov and (3) I mailed it to Danny Allen Wing/DOC# 326805, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 17, 2017, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Danny Allen Wing, Appellant

LISA E TABBUT LAW OFFICE

January 17, 2017 - 8:12 AM

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