Supreme Court No. 95721-5

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

MATTHEW HENRY DEVORE,
Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. ISSUES PRESENTED FOR REVIEW

1. Is there a significant question of constitutional law, or an issue of substantial public interest, regarding the "void-for-vagueness" doctrine when the defendant commits a murder in front of the victim's significant other and admits that his action had a "destructive and foreseeable impact on persons other than the victim"?

a) Where the defendant pleaded guilty and admitted the aggravating factor of "destructive and foreseeable impact on persons other than the victim," should he be allowed to appeal an exceptional sentence under the invited error doctrine or RAP 2.5?

b) Are there any significant questions of constitutional law under the "void-for-vagueness doctrine" where the aggravating factor does not increase the maximum sentence or proscribe conduct?

c) Is there any substantial public interest or significant constitutional question in the issue of whether the defendant's murder of Thomas Christian in front of his significant other, Brenda Losey, constitutes a "destructive and foreseeable impact on persons other than the victim"?

II. STATEMENT OF THE CASE

Probably in order to prevent the prosecution from amending the charge to Murder in the First Degree, the defendant pleaded guilty at arraignment to Murder in the Second Degree and admitted that the murder had a foreseeable and destructive impact on someone other than the victim, Thomas Christian. CP 3-14, 111-22.

The basis for the defendant's admission of the aggravating factor was as follows: On November 24, 2014, Mr. Christian and Brenda Losey, who were in a relationship, were sitting together and holding hands at Biomat waiting to donate plasma when the defendant, Ms. Losey's estranged husband, entered the lobby, walked directly to Mr. Christian and stabbed him. CP 17-19; RP at 12-13, 33. Ms. Losey made frantic efforts to protect Mr. Christian during the stabbing, including getting between the defendant and Mr. Christian, and even pushing the defendant although knowing he was armed with a knife. RP at 13. Ms. Losey tried to comfort Mr. Christian as he died from the stabbing. RP at 34.

She testified that "I can't get the blood out of my head, out of my heart, off my hands. Though you don't see it, it's still there. I relive this every day." RP at 34.

The trial court entered Findings and Conclusions on the exceptional sentence. CP 127-29. Some of the trial court's significant

Findings include: the video of the murder showed the significant impact on Ms. Losey, it was difficult to watch the video and, being present, the murder of Mr. Christian would have a significant impact on her, the victim's other family members were significantly impacted, although they were not present, and the crime had a severe impact on Ms. Losey, her family, Mr. Christian's family and the defendant's family. *Id.*

III. ARGUMENT

A. The petition should be denied because the defendant waived a challenge to the aggravating factor when he pleaded guilty; there is no constitutional issue because the "void-for-vagueness" doctrine does not apply for aggravating factors and there is no substantial public interest concerning the facts of the case.

1. The defendant waived the "void-for-vagueness" argument when he acknowledged he committed the "destructive impact on others" aggravating factor.

State v. Smith dealt with a defendant whose attorney acknowledged "deliberate cruelty" in the severity of the victim's injuries. *State v. Smith*, 82 Wn. App. 153, 163, 916 P.2d 960 (1996). The court held this factor alone was sufficient to preclude the defendant's challenge to the trial court's reliance on that aggravating factor. Here, the defendant pleaded guilty at arraignment to Murder in the Second Degree and the "destructive impact on others" aggravating factor, thus preventing the State from amending the Information to Murder in the First Degree. The elements of the invited error doctrine apply: the defendant affirmatively assented to the

alleged error by admitting the aggravating factor materially contributed to it, or benefitted from it. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009).

The defendant has also not addressed why RAP 2.5 should not preclude review on this issue. Not only did he fail to object to the aggravating factor, he admitted his murder of Mr. Christian had a foreseeable impact on others.

The Court of Appeals decision states that the State did not raise this issue. To the contrary, the State raised the issue on page 11-12 of its brief. To repeat, the defendant avoided a Murder in the First Degree charge by pleading guilty to Murder in the Second Degree and admitting the "destructive impact on others" aggravating factor. This Court should not allow him to receive the benefit of a plea, and then allow him to argue it was inappropriate.

2. There is no significant constitutional question because the "void-for-vagueness" doctrine does not apply to aggravating factors for exceptional sentences.

As stated by the Court of Appeals, a vagueness analysis has two due process concerns. *State v. DeVore,* 2 Wn. App. 651, 661, 413 P.3d 58 (2018). One, criminal statutes must be specific enough that citizens have fair notice of proscribed conduct. Two, laws must provide ascertainable

standards of guilt to protect against arbitrary arrest and prosecution. Neither element is met. An aggravating factor alone is not a crime. A citizen cannot be arrested or prosecuted for, say, violating the trust of an employer. RCW 9.94A.535(3)(n).

If an employee embezzles from his employer, it may constitute Theft and the "breach of trust" aggravator may also be present. But, the sentencing court does not have to impose an exceptional sentence. The Sentencing Reform Act, RCW 9.94A. does not impose a requirement that a trial judge sentence a defendant above the standard range if an aggravating factor is present.

This is consistent with *State v. Baldwin*, which held that "due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines." *State v. Baldwin*, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). The defendant argues that *Blakely v. Washington* changed this. *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). However, *Blakely* did not affect the reasoning in *Baldwin:* a citizen will be arrested only for committing a crime, not an aggravating factor. If an aggravating factor has been proven or admitted by the defendant, the trial court has the discretion to impose an exceptional sentence, but is not required to do so.

Since the *Blakely* decision, caselaw supports the proposition that void-for-vagueness arguments are not applicable for aggravating factors. *State v. Chanthabouly,* 164 Wn. App. 104, 262 P.3d 144 (2011), was decided seven years after *Blakely.* The defendant was not allowed to challenge the "destructive impact on others" aggravator because the sentencing guidelines did not define conduct, allow for arbitrary arrest and prosecution, inform the public of penalties attached to criminal conduct, or vary the legislatively imposed maximum and minimum sentences for any crime. *Id.* at 142.

Also, note the distinction in two recent U.S. Supreme Court cases, *Beckles v. United States*, 137 S. Ct. 886, 197 L. Ed. 2d 145, 85 U.S.L.W. 4086 (2017) and *Johnson v. United States,* 135 S. Ct. 2551, 192 L. Ed. 2d 569, 83 U.S.L.W. 4576 (2015). In *Johnson,* the defendant successfully argued that the "void-for-vagueness" doctrine should apply when a defendant's prison term was increased from a maximum of 10 years to a minimum of 15 years. In *Beckles*, however, the defendant challenged for vagueness a provision in the federal advisory sentencing guidelines that allowed, but did not require, a sentence enhancement for a "crime of violence." The *Beckles* Court held the guidelines were not subject to a vagueness challenge under that circumstance.

One additional point: the defendant states that "because they increase the maximum punishment to which an accused person would otherwise be exposed, aggravating circumstances are elements." Petition for Review (hereinafter referred to as "PRV") at 5. This is incorrect on both counts. An aggravating factor does not raise the maximum punishment. It allows a trial judge to sentence above the guidelines set forth in the sentencing grid in RCW 9.94A.510. And, an aggravating factor is not an element of a crime. The defendant cites *Blakely* and *Apprendi v. New Jersey* for this proposition, but neither case supports the defendant's above quote. *Blakely,* 542 U.S. at 306-07; *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

An aggravating factor does not require a trial judge to increase the sentence of a defendant. There is no constitutional reason to accept review.

3. In reviewing the facts of the case, there is no reason to accept review under either the "substantial public interest" prong or "significant constitutional question" prongs; the defendant's murder of Mr. Christian in front of his significant other had a destructive impact on her and the defendant knew it.

The court evaluates vagueness challenges in light of the particular facts of each case, unless the First Amendment is implicated. *State v. Eckblad*, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Here, was it just a

coincidence that the defendant murdered Mr. Christian in front of Ms. Losey, who was then Mr. Christian's significant other and the defendant's estranged wife? Is it any wonder that Ms. Losey relives this murder every day and that she "can't get the blood out of [her] head, out of [her] heart, off [her] hands"? RP at 34.

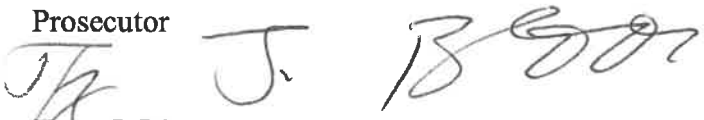
The defendant is correct in stating that the aggravating factor does not specify the type of impact which qualifies as "destructive" or "persons other than the victim" should be considered. But, the defendant's murder of Mr. Christian without question had a foreseeable and destructive impact on Ms. Losey. He admitted it, the trial court made Findings establishing it, and the evidence was clear.

IV. CONCLUSION

Accordingly, the petitioner for review should be denied.

RESPECTFULLY SUBMITTED this 10 day of August, 2018.

ANDY K. MILLER
Prosecutor



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on August 10, 2018.

Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

August 10, 2018 - 11:07 AM

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