

69102-3

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No. 69102-3-I

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR BUZZELLE,

Appellant.

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

The Honorable Alan R. Hancock

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **The bifurcated proceeding lacked statutory authority, and sentences entered without statutory authority are invalid.**

Arthur Buzzelle received an exceptional sentence of 240 months, 80 months above the high end of the statutorily-authorized standard range. The sentence was imposed following an unusual procedure devised by the State and ratified by the trial court in which Mr. Buzzelle pleaded guilty to the crime charged and, in a bifurcated sentencing proceeding, the court found facts sufficient to support the exceptional sentence. On appeal Mr. Buzzelle contends that the bifurcated proceeding lacked statutory authority, and that therefore the resulting exceptional sentence is invalid.

The Sentencing Reform Act of 1981 supplies the sole authority for sentencing procedures in Washington. This axiomatic principle has been reiterated by the Washington Supreme Court in multiple decisions. See e.g. State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007); In re Personal Restraint of West, 154 Wn.2d 204, 213, 110 P.3d

1122 (2005); In re Personal Restraint of Goodwin, 146 Wn.2d 861, 870, 50 P.3d 618 (2002). Where a sentence is imposed in excess of statutory authority, it is invalid and must be vacated, even if the underlying proceeding was not objected to below, or agreed by the parties. West, 154 Wn.2d at 213-14.

There is no statutory authority for the bifurcated fact-finding proceeding utilized below. See Br. App. at 5-12. RCW 9.94A.537 provides the sole mechanisms whereby exceptional sentences may be imposed in Washington. RCW 9.94.537 stipulates that certain aggravating circumstances, including all but one of the aggravating circumstances alleged by the State in this case, must be proven during the trial on the alleged offense. RCW 9.94A.537(4). RCW 9.94A.537 neither contemplates nor permits a bifurcated fact-finding proceeding with regard to these aggravating circumstances.

2. The State cannot empower the sentencing court to exceed its statutory authority.

The State does not respond to the authorities cited in Mr. Buzzelle's opening brief. The State also does not identify

any statutory authority for the bifurcated proceeding. Instead, the State claims that RCW 9.94A.537 is “inapplicable.” Br. Resp. at 9.

This claim is based on the State’s assertion that Mr. Buzzelle waived a jury determination of aggravating facts pursuant to RCW 9.94A.537(3). Id. The State claims that because Mr. Buzzelle waived his right to a jury determination of aggravating facts, RCW 9.94A.537(4) is “moot.”

However RCW 9.94A.537(3) does not permit bifurcation of proceedings in which the Legislature has specified that aggravating circumstances must be considered in the same trial at which the jury decides the underlying crime. Instead, the statute merely explains how aggravating circumstances should be determined following a general waiver of the jury trial right. RCW 9.94A.537(3) (providing, “If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts”). The subsection neither references nor authorizes bifurcated fact-finding proceedings such as the proceeding that was conducted below.

The State essentially concedes that a literal reading of RCW 9.94A.537 compels the conclusion that the bifurcated proceeding lacked statutory authority. Br. Resp. at 9-10. The State, however, urges this Court to ignore this outcome because it is “absurd.” *Id.* The State’s complaint is more appropriately addressed to the Legislature, as courts are prohibited from inventing sentencing proceedings beyond what the SRA has authorized. *Pillatos*, 159 Wn.2d at 469.

3. The cases cited by the State do not supply authority for the bifurcated proceeding.

The State claims that other appellate decisions, involving cases in which there was some form of bifurcation, establish that the proceeding was permissible. Br. Resp. at 10. But in *State v. Cham*, 165 Wn. App. 438, 267 P.3d 528 (2011), the aggravating circumstance at issue was the defendant’s “rapid recidivism.” 165 Wn. App. at 449. Rapid recidivism is an aggravating circumstance that may support an exceptional sentence pursuant to RCW 9.94A.535(3)(t).¹ Where the State alleges the aggravating circumstance in RCW 9.94A.535(3)(t), a separate proceeding is expressly

¹ RCW 9.94A.535(3)(t) reads, “The defendant committed the current offense shortly after being released from incarceration.”

permitted. RCW 9.94A.537(4). Thus, assuming a valid waiver of the right to a jury determination of facts by the defendant, it was entirely proper for the court to determine whether this aggravating circumstance had been proven beyond a reasonable doubt.

In State v. Berrier, 143 Wn. App. 547, 178 P.3d 1064 (2008), the Court considered the narrow question whether the State may allege aggravating circumstances separate from the criminal information. Although it appears that the sentencing court in that case empanelled a jury to consider aggravating circumstances, Mr. Berrier does not seem to have challenged the absence of statutory authority for the procedure. The State does not even cite to dicta finding such a procedure permissible.

In short, the State has failed in its duty to provide this Court with authority under the SRA for the bifurcated proceeding in this case. This Court should conclude that because the proceeding exceeded the sentencing court's statutory authority, it was invalid, and the resulting sentence must be vacated.

4. The remedy is resentencing within the standard range.

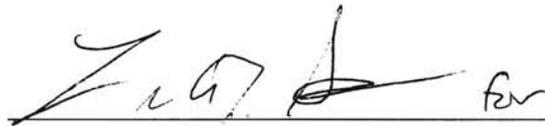
The State contends that if error occurred, it was a “procedural” error and that the remedy is remand for full resentencing. Br. Resp. at 11. This contention ignores Mr. Buzzelle’s rights under the plea bargain. Mr. Buzzelle fully performed his side of the bargain by giving up his constitutional rights and pleading guilty to the crimes charged in the information. If the State wished to seek an exceptional sentence, the State should have obligated Mr. Buzzelle to stipulate to these facts as part of the plea. But the State is not permitted to unravel the plea simply because it failed to ascertain what the SRA authorized with respect to sentencing before securing Mr. Buzzelle’s guilty plea. As argued in Mr. Buzzelle’s opening brief, Br. App. at 12-16, the remedy is resentencing within the standard range.

E. CONCLUSION

For the foregoing reasons, this Court should reverse and vacate Mr. Buzzelle's exceptional sentence, and remand for resentencing within the standard range.

DATED this 15th day of ~~January~~, 2013.

Respectfully submitted:



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STATE OF WASHINGTON,)	
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)	NO. 69102-3-I
v.)	
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ARTHUR BUZZELLE,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF MAY, 2013, 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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SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF MAY, 2013.

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