

NO. 35169-2-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LOUIS ARMIJO, APPELLANT

07 MAR 19 PM 2:08
STATE OF WASHINGTON
BY _____
COURT OF APPEALS
DIVISION II

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 01-1-04764-9

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
Karen A. Watson
Deputy Prosecuting Attorney
WSB # 24259

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Is the defendant barred from raising issues in his second appeal that could have been raised in his first appeal, but were not? Alternatively, is the record insufficient to determine whether the trial court applied the correct standard range in this case? 1

 2. Should the defendant's case be remanded for the sole purpose of correcting a scrivener's error? 1

B. STATEMENT OF THE CASE. 1

 1. Procedure 1

 2. Facts 3

C. ARGUMENT..... 5

 1. THE DEFENDANT IS BARRED FROM RAISING ISSUES IN HIS SECOND APPEAL THAT COULD HAVE BEEN RAISED IN HIS FIRST APPEAL, BUT WERE NOT. ALTERNATIVELY, THE RECORD IS INSUFFICIENT TO DETERMINE WHETHER THE TRIAL COURT APPLIED THE CORRECT STANDARD RANGE AT THE DEFENDANT'S SENTENCING..... 5

 2. THE COURT SHOULD REMAND THIS CASE TO THE TRIAL COURT TO CORRECT A SCRIVENER'S ERROR IN THE 2006 JUDGMENT AND SENTENCE..... 12

D. CONCLUSION. 14

Table of Authorities

Federal Cases

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531,
159 L.Ed.2d 403 (2004).....2, 3, 9

State Cases

In Re the Personal Restraint of Mayer, 128 Wn. App 694,
117 P.3d 353 (2005) 12, 13, 14

State v. Sauve, 100 Wn.2d 84, 85, 666 P.2d 894 (1983).....6, 7

State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993).....5, 6, 7

State v. Barberio, 66 Wn. App. 902, 833 P.2d 459 (1992).....6, 7

State v. Parker, 132 Wn.2d 182, 187, 937 P.2d 575 (1997) 11

Statutes

RCW 10.73.090.....12

Rules and Regulations

CrR 7.8(a) 12, 14

RAP 2.5(c)(1)5, 6, 10

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is the defendant barred from raising issues in his second appeal that could have been raised in his first appeal, but were not? Alternatively, is the record insufficient to determine whether the trial court applied the correct standard range in this case?

2. Should the defendant's case be remanded for the sole purpose of correcting a scrivener's error?

B. STATEMENT OF THE CASE.

1. Procedure

On September 17, 2001, Louis Armijo, hereinafter "the defendant," was charged by information with three counts of first degree child rape, and three counts of first degree child molestation. CP 1-3. Prior to trial, the State filed an amended information charging the defendant with first degree child rape, first degree child molestation, second degree child rape, and two counts of second degree child molestation. CP 5-7. A jury convicted the defendant on all five counts on January 23, 2002. CP 99-103. On March 22, 2002, the trial court sentenced the defendant to an exceptional sentence of 400 months on counts I, II, and III, and to the high end of the standard range on counts IV

and V. 2002 RP 18¹; CP 15, 18. The trial court ordered 36 to 48 months community custody on all five counts. CP 19.

The defendant appealed on three issues, none of which addressed the standard range sentences on which the defendant's sentences were based, or the 36 to 48 months community custody ordered by the trial court. See CP 32. After his convictions were affirmed in an unpublished opinion, the defendant filed a Personal Restraint Petition, arguing his restraint was unlawful because 1) the judge, not the jury, decided the aggravating factor underlying his exceptional sentence, and 2) his right to confront witnesses was violated. See CP 32. The court ruled that the defendant's exceptional sentence violated Blakely² and remanded for resentencing within the standard range, but rejected the defendant's confrontation clause claim because it was not properly before the court.

On July 14, 2006, the Honorable Stephanie Arend resentenced the defendant within the standard range and ordered 36 to month 48 months community custody on all five counts. CP 37, 49-64; 2006 RP 14. A Motion and Order Correcting Judgment and Sentence was filed on September 14, 2006, correcting section 4.6 to say "36 months of

¹ The verbatim report of proceedings consists of one volume and includes the defendant's 2002 and 2006 sentencing hearings. These proceedings shall be referred to as: March 22, 2002 sentencing as "2002 RP", July 18, 2006 sentencing as "2006 RP"

² Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004).

community placement.” CP 71-71. The defendant now appeals his standard range sentences and the imposition of 36 community placement.

2. Facts

On March 22, 2002, the defendant appeared before Judge Stephanie Arend for sentencing after the jury convicted him of first degree rape of a child, second degree rape of a child, first degree child molestation, and two counts of second degree child molestation. CP 99-103; 2002 RP 4-18. Both the defendant and the State agreed the controlling standard range was 240 to 318 months. 2002 RP 6, 7, 8, 9. The State asked for an exceptional sentence of 400 months based upon abuse of trust, whereas the defense asked for a sentence within the standard range: 2002 RP 6,7, 9. The court granted the State’s request and sentenced the defendant to 400 months on counts I, II, and III, and 116 months on counts IV and V. 2002 RP 9; CP 10-26. The court ordered 36 to 48 months community custody on each of the five counts.

The defendant appealed and the Court of Appeals affirmed in an unpublished opinion. CP 29-41.

While on appeal, Blakely v. Washington was decided. After his convictions were affirmed, the defendant filed a personal restraint petition claiming he was unlawfully restrained based on Blakely, and asserted a confrontation clause claim. The court granted relief in part and remanded the case for resentencing within the standard range pursuant to Blakely, but dismissed the confrontation clause claim. CP 42-44.

On July 14, 2006, the defendant was resentenced within the standard range. CP 49-64. The State and defense counsel agreed the standard range was 240 to 318 months. 2006 RP 8, 9. The court imposed a high end standard range sentence on counts I, II, and III, which were the only counts on which an exceptional sentence had previously been imposed. The trial court sentenced the defendant to 318, 280, and 198 months respectively on counts I, II, and III. 2006 RP 14; CP 53, 56, The trial court made no other adjustments to the defendant's sentence.³ Id. The court sentenced the defendant to 116 months on both counts IV and V, and ordered the same community custody (36 to 48 months) that had been ordered in the 2002 sentencing. 2006 RP 8, 9; CP 53-57. The 2006 Judgment and Sentence was later corrected to reflect 36 months community placement, instead of 36-48 months community custody. CP 71-72.

The defendant now appeals his standard range sentences and the community custody ordered by the court.

³ The court did adjust the defendant's credit for time served in the 2006 Judgment and Sentence to reflect the current time served on this case. CP 57.

C. ARGUMENT.

1. THE DEFENDANT IS BARRED FROM RAISING ISSUES IN HIS SECOND APPEAL THAT COULD HAVE BEEN RAISED IN HIS FIRST APPEAL, BUT WERE NOT. ALTERNATIVELY, THE RECORD IS INSUFFICIENT TO DETERMINE WHETHER THE TRAIL COURT APPLIED THE CORRECT STANDARD RANGE AT THE DEFENDANT'S SENTENCING.

a. The defendant is barred from challenging the standard ranges used and the community custody ordered at this resentencing because the defendant could have raised these issues in his first appeal, but did not, and the court did not exercise its independent judgment to review these issues at the 2006 resentencing.

RAP 2.5(c)(1) controls what issues may be raised in a second appeal.

RAP 2.5(c)(1) states:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

RAP 2.5(c)(1) does not revive every issue which was not raised in an earlier appeal. State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993).

“Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.” Barberio, 121 Wn.2d at 50. If the trial court did not exercise

its independent judgment or rule again on the issue, then it is not properly before the appellate court and *may not* be reviewed pursuant to RAP 2.5(c)(1). See Barberio at 51. However, even if the trial court exercised its independent judgment, the appellate court is not required to review the issue on a second appeal. Id. at 50.

In State v. Sauve, 100 Wn.2d 84, 85, 666 P.2d 894 (1983), the defendant was convicted of multiple counts of robbery, kidnapping, assault, and possession of stolen property. He was found to be a habitual offender and sentenced. Sauve, 100 Wn.2d at 85. Sauve appealed his conviction and the court of appeals remanded the case for a rehearing as to matters relied on in the habitual criminal proceeding. On remand, the State abandoned the habitual criminal charges against Sauve and the trial court resentenced him. Suave appealed again and, for the first time, challenged the forcible warrantless entry into his house. The Sauve court stated that even though an appeal raises constitutional issues, at some point the appellate process must stop. Id. at 87. The court held that Sauve could not raise the warrantless entry issue in his second appeal because he could have raised it in his first appeal, but did not. Id.

In State v. Barberio, the defendant was convicted at trial of second degree rape and third degree rape. State v. Barberio, 66 Wn. App. 902, 833 P.2d 459 (1992). The court imposed an exceptional sentence of 72 months. Barberio, 66 Wn. App. at 903. Barberio appealed, challenging a jury instruction on the third degree rape count, but not the exceptional

sentenced imposed by the trial court. Id. at 904. The court affirmed the second degree rape conviction, but reversed the third degree rape conviction. Id. On remand, the State opted not to retry the third degree rape count. Id. at 905. This decision impacted the defendant's points and standard range. Id. The trial court adjusted each accordingly before resentencing Barberio on the surviving conviction. Id. The court imposed the same 72 month exceptional sentence. Id.

Barberio appealed a second time. This time he challenged, among other issues, the court's basis for an exceptional sentence. Barberio, at 906. Based on Sauve, the State moved to dismiss Barberio's second appeal in its entirety. Id. at 905. The Court of Appeals granted that motion on all issues that could have been raised in the first appeal, but were not. Id.

The Supreme Court granted limited review to clarify the rationale that lead to the dismissal. State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). In affirming the Court of Appeals, the Supreme Court said:

The issue presented was a clear and obvious issue which could have been decided...in the first appeal. Instead of a timely and orderly proceeding to determine the matter on the merits, the State, the Court of Appeals, a department of this court, and allied staff, have had to deal with a procedural morass, all of which could have been avoided had the matter been raised when it should have been in the first appeal."

Barberio, 121 Wn.2d at 52.

In the present case, at both the March 22, 2002, sentencing, and the July 14, 2006, resentencing, the State, the defense attorney, and the trial court all agreed that the defendant's standard sentencing range was 240 to 318 months. 2002 RP 6, 7, 8, 9; 2006 8, 9. At the first sentencing, the State asked for an exceptional sentence of 400 months based upon abuse of trust, whereas the defense asked for a sentence within the standard range of 240 to 318 months. 2002, RP 6, 8, 9. The defendant chose not to address the court. The court sentenced the defendant to an exceptional sentence of 400 months. 2002 RP 18.

At the July 16, 2006, resentencing, the State requested a high end sentence of 318 months. 2006 RP 8, 9. Defense counsel requested a mid range sentence. 2006 RP 9, 10. The defendant addressed the court at the July 14, 2006, sentencing, and the following colloquy took place:

THE DEFENDANT: Your Honor, I also think there should be a downward departure from the standard range. It is due to the numerous constitutional violations that the State has so flagrantly created to my case such as the 5th, 6th, and 14th which I don't need to expound upon at this time.

I'm also asking for the mandatory minimum term under 9.94A.540, five years. And, finally, Your Honor, I wholeheartedly know, declare, and maintain that I am completely innocent of all said charges. Thank you.

THE COURT: Okay. I'm a little confused about a mandatory minimum that you just said of five years. Are you disagreeing with the standard sentencing range that [the prosecutor], Ms. Ko, has outlined?

THE DEFENDANT: I'm asking you to look at that, if you would, please.

MS. KO: I have no idea what he's talking about, Your Honor.

THE COURT: Mr. Purtzer, do you know?

MR. PURTZER: No.

July 16, 2006 CP 13.

After the above colloquy, the trial court reviewed the Court of Appeals' unpublished opinion from the first appeal, which upheld the defendant's exceptional sentence. "The only reason that the exceptional sentence was later overturned by the Court of Appeals [when the defendant filed his personal restraint petition] was due to Blakely, so I don't see any reason not to impose the high end of the standard sentencing range. 2006 RP 14. The court did not review the defendant's standard range, nor did she review the community custody that was ordered in the 2002 sentencing before imposing a high end standard range sentence and the same community custody. 2006 RP14; CP 57.

The only evidence that the standard range was questioned was during the colloquy between the trial court and the defendant when he asks for an exceptional sentence down from the standard range, lists (but does not elaborate on) the State's numerous alleged constitutional violations, and asks for "the mandatory minimum term under 9.94A.540, five years"

2006 RP 12-13. The court asks if the defendant is disagreeing with the standard range set out by the prosecutor and the defendant replies: “I am asking you to look at that.” 2006 RP 13. At best, this is an invitation to review the standard range being applied in this case. The court declined that invitation and did not review the standard range, nor did the court exercise its independent judgment in determining the standard range or community custody.

Like the Barberio cases, the issues regarding the defendant’s standard range and community custody were clear and obvious at the time of his first appeal, but were not raised until his second appeal. Because the trial court did not exercise its independent judgment and rule on either issue, the defendant is prohibited from raising these issues in his second appeal.

- b. There is insufficient evidence in the record before the court to determine whether the sentencing court applied the correct standard range at defendant’s sentencing.

If the Court should find that trial court exercised its independent judgment and the defendant’s claims are not barred pursuant to RAP 2.5(c)(1), then the defendant’s claims fail because there is insufficient evidence in the record to determine if the sentencing court applied the correct standard range.

The standard range is the starting point in the application of the

Sentencing Reform Act (SRA) to an individual case. State v. Parker, 132 Wn.2d 182, 187, 937 P.2d 575 (1997). When a court properly imposes a standard range sentence, that sentence is not subject to review. Parker, 132 Wn.2d at 188.

In Parker, the defendant was charged with two counts of child molestation and one count of child rape for crimes occurring between 1987 and 1991. In closing, the State alleged the acts occurred at various points during the five year time period, and the jury could convict on any one of those acts. The jury convicted Parker on two counts, but did not specify when the acts occurred during the five year period. Parker at 185.

In 1990, the Legislature amended the SRA to significantly increase the penalty for the two crimes Parker committed. At Parker's sentencing, court applied the SRA as amended with the higher sentencing range. Parker at 185–186. The defendant appealed and the Supreme Court reversed holding that the sentencing court used the increased penalties without requiring the State to prove the acts occurred after the effective dates of the increased penalties. Parker at 191. The Court found this to be a violation of the ex post facto prohibition. Id. at 191.

In the instant case, the defendant was convicted of crimes that occurred between September 1995, and September 2000. In 1997, the sentencing range for first degree child rape increased from 210 -280 months, to 240 – 318 months. See Wash. Sentencing Guidelines Commission, Adult Sentencing Guidelines Manual 1997, at III-140. At

both the 2002 sentencing and the 2006 resentencing, the parties stipulated to the higher sentencing range and the court sentencing him based on that range. 2002 RP 6, 7, 8, 9; 2006 8, 9.

The defendant now appeals the stipulated standard range, however, the record before this court is insufficient to determine on what the jury based their verdicts. Because the trial transcripts are not part of the record before this court, the record is insufficient to determine what facts were adduced at trial or whether the State elected a particular act that occurred after the SRA had been amended and standard ranges increased.

The sentencing range applied in this case is not properly before this court and the record is insufficient to resolve the issue. The defendant is not without a remedy, however, because he may have a valid issue to raise in a personal restraint petition under RCW 10.73.090.

The defendant's claim must fail because the record is incomplete and the defendant has an appropriate avenue for relief through a personal restraint petition.

2. THE COURT SHOULD REMAND THIS CASE TO THE TRIAL COURT TO CORRECT A SCRIVENER'S ERROR IN THE 2006 JUDGMENT AND SENTENCE.

A clerical error in a judgment and sentence may be corrected by the court at any time pursuant to CrR 7.8(a). In In Re the Personal Restraint of Mayer, 128 Wn. App 694, 117 P.3d 353 (2005), the defendant entered an Alford plea to an amended information. Mayer, 128 Wn. App.

at 698. Both the amended information and the judgment and sentence contained the same clerical error. *Id.* at 699. The court remanded the case to the trial court for the purpose of correcting the clerical error in the judgment and sentence. *Id.* at 708

In the present case, the State filed amended information prior to trial. CP 5-7. The amended information charged the defendant as follows:

Count I - First Degree Child Rape that occurred on or about a time period between September 29, 1995, and September 29, 1999.

Count II – Second Degree Child Rape that occurred on or about a time period between September 29, 1999, and September 29, 2000.

Count III – First Degree Child Molestation that occurred on or about a time period between September 29, 1995, and September 29, 1999.

Counts IV and V – Second Degree Child Molestation that occurred on or about a time period between September 29, 1999, and September 2000.

CP 5-7. All five counts went to the jury; the jury instructions were consistent with the amended information. CP 88, 90, 92, 94, 95. The jury returned guilty verdicts on all five counts. CP 99-103. However, § 2.1 of the 2006 judgment and sentence incorrectly lists the date of crime for counts II-V as follows:

Count II - September 29, 1995 to September 29, 1995

Count III – September 29, 1995 to September 29, 1995

Count IV – September 29, 1995 to September 29, 1999

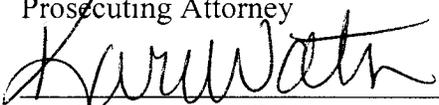
Count V – September 29, 1995 to September 29, 1999.

Like In Re the Personal Restraint of Mayer, the court should remand this case back to the trial court for the sole purpose of correcting the scrivener's errors in § 2.1 of the 2006 judgment and sentence pursuant to CrR 7.8(a).

D. CONCLUSION.

For the above mentioned reasons, the State respectfully requests that this Court affirm the defendant's convictions below and remand the case for the sole purpose of correcting the scrivener's errors.

DATED: March 15, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

KAREN A. WATSON
Deputy Prosecuting Attorney
WSB # 24259

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Donnan

3/16/07 _____
Date Signature

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
07 MAR 19 PM 2:09
BY  DEPUTY PROSECUTOR