

original

NO. 35405-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JERRY W. STALLINGS,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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LISA E. TABBUT
STATE DEPUTY
BY

BRIEF OF APPELLANT

LISA E. TABBUT/WSBA #21344
Attorney for Appellant

1402 Broadway
Longview, WA 98632
(360) 425-8155

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I. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN ACCEPTING JERRY STALLINGS' SENTENCING STIPULATION WITHOUT FIRST HAVING FOUND A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF HIS RIGHT TO AN AGGRAVATING FACTOR SENTENCING JURY TRIAL.
2. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE.
3. THE TRIAL COURT ERRED IN SENTENCING MR. STALLINGS TO 129 MONTHS ON A CLASS B FELONY WITH A STATUTORY MAXIMUM OF 120 MONTHS.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. WHETHER JERRY STALLINGS SIXTH AMENDMENT RIGHT TO A JURY WAS VIOLATED WHEN THE TRIAL COURT ACCEPTED A FACTUAL SENTENCING STIPULATION FROM MR. STALLINGS WITHOUT MR. STALLINGS HAVING FIRST WAIVED HIS JURY TRIAL RIGHT?
2. WHETHER THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT SENTENCED MR. STALLINGS TO 129 MONTHS ON A CLASS B FELONY WITH A MAXIMUM PENALTY OF 120 MONTHS?

III. STATEMENT OF THE CASE

On July 6, 2006, Jerry Stallings pled guilty to two counts of first-degree rape of a child¹ (counts I and II) and one count of sexual exploitation of a child² (count IV). CP 4-6, 7-30. Both rape charges included language in the amended information that

¹ RCW 9A.44.073

² RCW 9.68A.040

Stallings knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth. CP 4.

The plea to the three charges was reached as a result of plea negotiations. The State's Offer of Settlement was attached to Stallings' plea form. CP 22-30. By the plea, the State and Stallings agreed to a 25-year (300-month) minimum sentence concurrent on the rape charges which was within the standard range of 20-26.5 years (240-318 months).³ CP 23.

At the plea hearing, the State mischaracterized the agreed minimum sentence as an exceptional sentence:

The State has alleged ... items that are – would require a finding by a jury that the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth. That's an exceptional sentence finding that would generally need to be found by a jury. The defendant is going to be, as I understand, waiving on that, and that is part of the exceptional – agreed exceptional sentence.

1RP⁴ 5.

³ The sentence for first-degree rape of a child falls under the authority of RCW 9.94A.712 mandating that the Indeterminate Sentencing Review Board review defendants for release at the end of the minimum term imposed by the trial court. The length of incarceration is limited only by the maximum sentence. First-degree rape of a child is a class A felony.

⁴ "1RP" refers to the first of three volumes of verbatim transcription. 1RP is the verbatim of the July 6, 2006, plea hearing.

Oddly, given that the agreed sentence was within the standard range, defense counsel indicated that “we’ve stipulated to the basis for an exceptional sentence.” 1RP 17. When the court was going over the elements of the two rape charges with Mr. Stallings, it did include the particular vulnerability language. 1RP 19-20. Mr. Stallings acknowledged his guilt. 1RP 19-20. The court accepted Mr. Stallings’ plea. 1RP 23. After accepting the plea, the court noted that it had composed findings of fact. The court quoted from them on the record:

If you’ll agree in the interest of justice, sentence the defendant to an exceptional above the standard range knew or should have known the victim of the current offense was particularly vulnerable or incapable of resistance due to her extreme youth.

1RP 23. Mr. Stallings agreed that he has “signed to same.” 1RP 23. Findings of Fact and Conclusions of Law for an Exceptional Sentence were filed on July 7 (as below).

I. FINDINGS OF FACT

The defendant and the state agree that it is in the interest of justice to sentence the defendant to an exceptional sentence above the standard range, and further, the defendant knew have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to her extreme youth, as to counts 1,2, and 4.

II. CONCLUSIONS OF LAW

The court finds that given that both parties are in agreement as to a recommended sentence above the standard range, and further that it is in the interest of justice to order an exceptional sentence above the standard range. The defendant waives his right to have a jury determine any issues related to the imposition of an exceptional sentence upward, specifically as it relates to the issue of: the defendant knowing or that he should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to her extreme youth. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 435 (2000). Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531, 159 L.Ed. 2d 403 (2004).

The Findings and Conclusions included the signature of the court, the prosecutor, defense counsel and Mr. Stallings. CP 32.

The court at no time during the plea colloquy discussed or even mentioned to Mr. Stallings his right to have a jury determine whether there were aggravating circumstances that could justify an exceptional sentence. 1RP 10-23. The written Findings and Conclusions were not mentioned by the court until after the court accepted Mr. Stallings' plea. 1RP 23.

The court ordered a pre-sentence investigation. 1RP 23; CP 21. Sentencing was heard on August 24. 3 RP.⁵ The court sentenced Mr. Stallings concurrently on all three counts. CP 52.

⁵ "3RP" refers to the third of three volumes of verbatim transcription. 3RP is the verbatim transcription of the August 24, 2006, sentencing hearing.

On the rape charges, the court set an exceptional minimum sentence of 400 months. CP 52. On the sexual exploitation charge, the court imposed 129 months even though the statutory maximum for this class B felony is only 10 years (120 months). CP 52.

Mr. Stallings filed a notice of appeal on September 25.

IV. ARGUMENT

1. **THE TRIAL COURT DENIED JERRY STALLINGS HIS SIXTH AMENDMENT RIGHTS; IT ACCEPTED STIPULATED SENTENCING FACTS FROM MR. STALLINGS WHEN MR. STALLINGS HAD NOT WAIVED HIS RIGHT TO A SENTENCING JURY.**

The Sixth Amendment guarantees criminal defendants a right to a trial by a jury. U.S. Const. Amend VI. In 2000, the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increased the penalty for a crime beyond the prescribed statutory maximum 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). After Apprendi, this court held that “the factual basis for an exceptional sentence upward need not be charged, submitted to the jury, and proved beyond a reasonable doubt” because aggravating factors “neither increase the maximum sentence nor define a separate

offense calling for a separate penalty.” State v. Gore, 143 Wn.2d 288, 314-15, 21 P.3d 262 (2001), overruled by Hughes, 154 Wn.2d 118, 110 P.3d 192. In Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) , the United States Supreme Court disagreed and held that the “statutory maximum” 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.” In other words, the statutory maximum is the maximum that a judge may impose “without additional findings”. Id. at 303-04.

However, the Blakely court also acknowledged that a jury need not find facts supporting an exceptional sentence when a defendant pleads guilty and stipulates to the relevant facts: But nothing prevents a defendant from waiving his Apprendi rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact-finding. If appropriate waivers are procured, States may continue to offer judicial fact-finding as a matter of course to all defendants who plead guilty. Id. at 310. Washington State’s statutory authority clarifies that even a stipulation to facts in this context still requires a jury waiver.

The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. *If a jury is waived*, proof shall be to the court beyond a reasonable doubt, *unless the defendant stipulates to the aggravating factors*.

(Emphasis added) RCW 9.94A.537(2). The record is devoid of any proof that Mr. Stallings waived his jury trial right to a sentencing hearing before stipulating to sentencing facts.

This court must entertain every presumption against waiver of constitutional rights. A waiver of a constitutional right must be knowing, intelligent, and voluntary. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). Absent an adequate record to the contrary, a reviewing court must indulge every reasonable presumption against the validity of an alleged waiver of a constitutional right. Johnson v. Zerbst, 30 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed 2d 1461 (1938); State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). The court does not "presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 304 U.S. at 458.

In order to be effective, therefore, the "waiver of a fundamental constitutional right must be an intentional relinquishment or abandonment of a known right or privilege." State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996) (citing

Johnson v. Zerbst, 304 U.S. at 458). The burden is on the State to demonstrate a valid waiver on the record. Id. “Presuming waiver from a silent record is impermissible.” Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L.Ed.2d 274, (1969) (quoting Cauley v. Cochran, 369 U.S. 506, 516, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962)). Here, the record is just that – silent. While Mr. Stallings did sign findings of fact and conclusions of law that made reference to waiver of his right to have a jury determine sentencing facts, there was no discussion of the waiver on the record. The balance of the record makes clear that the State and Mr. Stallings were only agreeing to a 25-year standard range sentence.

II. THE 129-MONTH SENTENCE FOR A CLASS B FELONY EXCEEDED THE COURT’S SENTENCING AUTHORITY.

The class of felony for which a defendant is convicted determines the maximum sentence. RCW 9A.20.021. Mr. Stallings plead guilty to sexual exploitation of a minor in violation of 9.68A.040, a class B felony. The maximum sentence for a class B felony in Washington is 10 years. The trial court sentenced Mr. Stallings to 129 months in violation of his statutory maximum.

V. CONCLUSION

Mr. Stallings case should be remanded for imposition of a standard range sentence.

Respectfully submitted this 9th day of March, 2007.

A handwritten signature in black ink, appearing to read "LISA E. TABBUTA", is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

LISA E. TABBUTA/WSBA #21344
Attorney for Appellant

APPENDIX

RCW 9.68A.040

Sexual exploitation of a minor — Elements of crime — Penalty.

(1) A person is guilty of sexual exploitation of a minor if the person:

(a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;

(b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or

(c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

(2) Sexual exploitation of a minor is a class B felony punishable under chapter 9A.20 RCW.

RCW 9.94A.537

Aggravating circumstances — Sentences above standard range.

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(4) If the court conducts a separate proceeding to determine the existence of aggravating circumstances, the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.712

Sentencing of nonpersistent offenders.

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a);

committed on or after September 1, 2001; or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(33)(b), and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c)(i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(ii) If the offense that caused the offender to be sentenced under this section was rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, and

there has been a finding that the offense was predatory under RCW 9.94A.836, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section was rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section is rape in the first degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding under RCW 9.94A.838 that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, the minimum sentence shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.

(d) The minimum terms in (c)(ii) of this subsection do not apply to a juvenile tried as an adult pursuant to RCW 13.04.030(1)(e) (i) or (v). The minimum term for such a juvenile shall be imposed under (c)(i) of this subsection.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6)(a)(i) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to

participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of re-offending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(ii) If the offense that caused the offender to be sentenced under this section was an offense listed in subsection (1)(a) of this section and the victim of the offense was under eighteen years of age at the time of the offense, the court shall, as a condition of community custody, prohibit the offender from residing in a community protection zone.

(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435 .

RCW 9A.20.021

Maximum sentences for crimes committed July 1, 1984, and after.

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

(4) This section applies to only those crimes committed on or after July 1, 1984.

[RCW 9A.44.073

Rape of a child in the first degree.

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

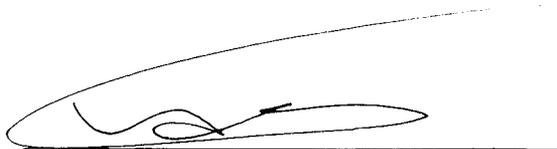
(2) Rape of a child in the first degree is a class A felony.

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and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) AFFIDAVIT OF MAILING

Dated this 9th day of March 2007



LISA E. TABBUT, WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 9th day of March 2007.



Stanley W. Munger
Notary Public in and for the
State of Washington
Residing at Longview, WA 98632
My commission expires 05/24/08

