

COURT OF APPEALS
DIVISION II

NO. 38014-5-II

03 MAY 12 PM 2:14

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

JOHN K. McNEAL,

Petitioner.

ON APPEAL FROM THE
SUPERIOR COURT OF LEWIS COUNTY

Before the Honorable Richard L. Brosey, Judge

OPENING BRIEF OF PETITIONER

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A. ASSIGNMENTS OF ERROR

1. The trial court erroneously ordered that the State could ask a jury to consider aggravating factors to support an exceptional sentence where the factors are not contained in RCW 9.94A.535(2).

2. The State failed to provide proper notice to Petitioner that it would seek an aggravated exceptional sentence.

3. The State lacked authority to request an exceptional sentence as it had not complied with the mandatory notice requirements of RCW 9.94A.537(1).

4. The trial court erred in concluding that Subsection (1) and (2) of RCW 9.94A.537 are “stand-alone provisions,” CP 22 (Conclusion of Law 1).

5. The trial court erred in concluding that Subsection (2) of RCW 9.94A.537 is applicable only in a case where there is an exceptional sentence imposed and where a new sentencing hearing is required. CP 22 (CL 2).

6. The trial court erred in conclusion that there is “no requirement to give advance notice of the aggravating factor to the defense because the giving of such notice would be impossible due to the date of the original trial and sentencing, which have already occurred.” CP 22 (CL 3).

7. The trial court erred in ordering that the State may make its

election to have a jury determine the aggravating factor as outlined in RCW 9.94A.535(3) for the purpose of seeking an exceptional sentence above the standard range. CP 23.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Separation of powers prohibits a court from creating a sentencing scheme without statutory authority. Here the trial court asked the jury to consider aggravating factors despite the lack of any statutory authority to do so. Did the trial court's actions result in an unconstitutional exceptional sentence? Assignments of Error 1, 4, and 7.

2. RCW 9.94A.537(1) expressly requires the prosecution to provide notice before the entry of a plea or trial if it seeks an exceptional sentence. The notice requirement is not limited to aggravating factors that may be found by a court and not a jury. Did the prosecution's failure to provide the statutorily-required notice to Mr. McNeal invalidate its request for an exceptional sentence? Assignments of Error 2, 3, 5, and 6.

C. STATEMENT OF THE CASE

1. Procedural history:

A jury convicted John McNeal of vehicular homicide, vehicular assault, and possession of a controlled substance with intent to deliver. *State v. McNeal*, 98 Wn. App. 585, 590, 991 P.2d 649 (1999).

Mr. McNeal has been sentenced twice previously, and his sentence

has each time been vacated and remanded. *State v. McNeal*, 142 Wn.App. 777, 783-84, 175 P.3d 1139 (2008). Following the second remand for resentencing, the State filed a Notice of Intent to Seek a Sentence Above the Standard Sentencing Range on June 20, 2008. CP 28-29. In the Notice, the State sought to have a jury impaneled to consider whether Mr. McNeal had committed multiple current offenses and whether his current offender score results in some of the of the current offenses going unpunished, which is an aggravating factor listed in RCW 9.94A.535(2).¹

The trial court certified that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion, and this Court granted review under RAP 2.3(b)(4) on October 2, 2008.

D. ARGUMENT

1. **THE 2007 AMENDMENT TO RCW 9.94A.537(2) DOES NOT CONTAIN STATUTORY AUTHORITY TO CHARGE A JURY WITH CONSIDERING AN AGGRAVATING FACTOR NOT LISTED IN RCW 9.94A.535(3).**

¹In its June 20, 2008 Notice, the State alleged the following aggravating factor:

“The Defendant has committed multiple current offenses and the Defendant’s high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c).”

CP 28.

The State is asking a jury to determine aggravating factors even though there is no controlling statutory authority allowing it to do so. Sentencing authority derives strictly from statute, subject to the constitutional rights to due process, a jury trial, and prohibition against cruel and unusual punishment. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 3456 (1986); U.S. Const. amends. 6,² 8,³ 14;⁴ Wash. Const. art. I, § 22.⁵

The legislative branch retains the power to set the terms of a sentence. In *Ammons*, the court said “the fixing of legal punishments for criminal offenses is a legislative function.” *Id.* at 180. In Washington, the Legislature delegated sentencing authority to the court in the Sentencing Reform Act (SRA) within the limits set by the statute. *Id.* at 181. The constitutional separation of powers doctrine both precludes the judiciary

²The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .”

³The Eighth Amendment provides, “Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted.” Washington Constitution, Article I, § 14 likewise states, “excessive bail shall not be required, . . . nor cruel punishment inflicted.”

⁴Fourteenth Amendment to the United States Constitution provides, in relevant part, “No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .”

⁵Article I, § 22 provides: In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

and executive branch from asserting sentencing powers not expressly granted by the Legislature. *Id.* at 180. The Legislature historically has set the parameters of sentencing laws and granted the courts specific authority to impose sentences within its guidelines. *See State v. Le Pitre*, 54 Wash. 166, 169, 103 P. 27 (1909) (legislature exercises control over sentences by setting minimum and maximum terms and giving the court broad discretion within these limits).

The court's authority under the SRA is drawn from the language of the statute delegating authority. Principles of statutory construction require courts to presume the legislative body did not use any nonessential words and to rely upon the plain language of the statute. *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003); *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002). The court is required to give meaning to every word in a statute if possible. *Beaver*, 148 Wn.2d at 343. When the Legislature uses different words in the same statute, courts recognize the legislature intended a different meaning. *Id.*

In *Blakely*, the United States Supreme Court invalidated the SRA's scheme for imposing aggravated exceptional sentences as it existed at the time of the 1997 offenses for which Mr. McNeal was convicted. *State v. Hughes*, 154 Wn.2d 118, 131-34, 110 P.3d 192 (2005), overruled

in part on other grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006).

In 2005 the Washington Legislature amended the SRA to comply with *Blakely*. This act, known as the 2005 “*Blakely* fix,” creates exceptional sentencing procedures for new offenses that had not been subject to conviction. The Legislature’s statement of intent provides:

The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances.

Laws of 2005, ch. 68, § 1.

The law, “by its terms, applies to all pending criminal matters where trials have not begun or pleas not yet accepted.” *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007). *Pillatos* upheld the *Blakely* fix. In doing so, the *Pillatos* Court adhered to its prior decisions in *Hughes* and *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164 (1980), holding the judicial branch lacks inherent authority to impose exceptional sentences because altering the sentencing process is the legislature's function. 159 Wn.2d at 469. The *Pillatos* Court also held the 2005 law applies only to those “pending criminal matters where trials have not begun or pleas not yet accepted.” 159 Wn.2d at 470 (citing Laws of 2005, ch. 68, § 4).

Therefore, the 2005 amendment does not apply to Mr. McNeal, who was convicted in 1997.

In response to *Pillatos*, the legislature again amended the SRA in 2007, expressly authorizing courts to empanel juries to decide aggravating factors "in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing." Laws of 2007, ch. 205, § 1. In the 2007 *Blakely* fix, the legislature altered RCW 9.94A.537(2) to provide the court with authority to impose an exceptional sentence when a prior exceptional sentence was reversed and the case remanded for further proceedings.

Among the amendments to RCW 9.94A.537 was to add Subsection (2), which provides a framework and legal mechanism for consideration of aggravating factors by impaneling a jury where other requirements are met. Currently, RCW 9.94A.537 provides, in part:

(2) In any case where an exceptional sentence above the standard range 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.

The language of the current version of the SRA therefore authorizes the court to impanel a jury on remand to make the factual findings necessary to support an exceptional sentence and to consider the

aggravating circumstances listed in RCW 9.94A.535(3). The State seeks to have a jury impaneled to consider whether Mr. McNeal committed multiple current offenses, and whether his current offense score results in some of the current offenses going unpunished, which is an aggravating factor under RCW 9.94A.535(2), not RCW 9.94A.535(3). CP 28.

Under RCW 9.94A.535(2), the court may impose an exceptional sentence without a jury under the following aggravating circumstances:

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

The 2007 “*Blakely* fix” of subsection (2) does not contain the alleged aggravating factor listed in the State’s Notice in the exclusive list of factors that may be considered by a jury. RCW 9.94A.535(3). RCW 9.94A.535(2) specifically refers to “any alleged aggravating circumstances listed in RCW 9.94A.535(3) which are realized upon by the superior court in imposing the previous sentence.” Then none of the factors listed in the Notice filed by the State are included in the exclusive list of factors contained in RCW 9.94A.535(3).

In *State v. Vance*, 142 Wn.App. 398, 174 P.3d 697 (2008) the State sought to impanel jury based upon an aggravating factor not listed in RCW 9.94A.535(3). The Court found that the aggravating circumstance listed in RCW 9.94A.535(3) are an exclusive list of the factors that a jury may consider, and the court held that a trial court not impanel a jury to consider a factor not listed in that statute and remanded the matter for resentencing within the standard range. *Vance*, 142 Wn.App. at 411, 412.

Because RCW 9.94A.535(2) does not provide for a jury determination of aggravating factors, the court does not have statutory authority to submit those factors to the jury for determination or impose an exceptional sentence based on them. Our Supreme Court considered a related issue in *State v. Hughes, supra*. The *Hughes* Court found exceptional sentences three judges had imposed under the SRA based on

judicially-found facts were unconstitutional after *Blakely* because they were not supported by jury findings. *Id.* at 134. The *Hughes* Court also noted the then-current SRA directed the trial court to find aggravating factors if appropriate, but included no process for having a jury do so:

[N]o procedure is currently in place allowing juries to be convened for the purpose of deciding aggravating factors either after conviction or on remand after an appeal. To allow exceptional sentences here, we would need to imply a procedure by which to empanel juries on remand to find the necessary facts, which would be contrary to the explicit language of the statute.

Hughes, 154 Wn.2d at 149.

The Court went on to note it was without the authority to alter the process outlined in the SRA because “the fixing of legal punishments for criminal offenses is a legislative function.” *Id.* at 149. The Court explained:

Where the legislature has not created a procedure for juries to find a aggravating factors and had, instead explicitly provided for judges to do so, we refuse to imply such a procedure on remand.

...

"It is one thing to fill a minor gap in a statute-to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

[T]he exceptional sentence provisions of the SRA do not provide a mechanism by which a jury could be empanelled on remand to find aggravating factors warranting an

enhanced sentence. To the contrary, the statute provides that the court should find facts necessary to support such a sentence.

Hughes, 154 Wn.2d at 151 (citations, quotation marks and footnotes omitted).

In addition, separation of powers prohibits the trial court from creating a sentencing procedure. Under the separation of powers doctrine, one branch of government may not usurp, encroach upon, or impair the power of another branch. *State Bar Ass'n v. State*, 125 Wn.2d 901, 907-09, 890 P.2d 1047 (1995). In particular, the judicial branch may not be assigned or allowed tasks that are more properly accomplished by the other branches. *Carrick v. Locke*, 125 Wn.2d 129, 136, 882 P.2d 173 (1994).

Because there is no statutory provision for the determination of aggravating factors by a jury under RCW 9.94A.535(2), Mr. McNeal should be resentenced within the standard range. As the *Hughes* court pointed out, in the absence of statutory authority, the court may not create a means for determining aggravating factors:

[T]he exceptional sentence provisions of the SRA do not provide a mechanism by which a jury could be empanelled on remand to find aggravating factors warranting an enhanced sentence. To the contrary, the statute provides that the court should find facts necessary to support such a sentence. This situation is distinct from those where a statute merely is silent or ambiguous on an

issue and the court takes the opportunity to imply a necessary procedure.

State v. Hughes, 154 Wn.2d at 151. *See also Ford*, 137 Wn.2d 484, 973 P.2d 452 (1999) (upholding procedurally defective sentencing hearings would send wrong message to trial courts, defendants, and the public).

Where, as here, the statute does not authorize a specific authorization to impanel a jury, the court may not impose it. Because the court lacks statutory or inherent power to order jury to determine aggravating factors under the statute, the court must impose a sentence within the standard range.

2. THE STATE MUST PROVIDE NOTICE IT WILL SEEK AN EXCEPTIONAL SENTENCE PRIOR TO TRIAL.

a. The prosecutor must provide its intent to seek an exceptional aggravated sentence.

On remand, Mr. McNeal objected to imposition of an exceptional sentence on the basis that the State failed to give notice of its intent to impanel a jury to consider a factor not listed in 9.94A.535(3). Notice of Aggravating Factors is required by RCW 9.94A.537, as well as the Sixth and Fourteenth Amendments and Articles I, §§3, 22 of the Washington Constitution.

In *Gault v. Lewis*, 489 F.3d 993, 1002-03 (9 Cir. 2007), the Ninth Circuit ruled that the constitutional right to notice of the charges against an

accused included sentencing enhancements. Adequate notice must apprise the accused of the elements with sufficient clarity to let the defendant know what he must be prepared to defend against. *Id.* at 1003.

RCW 9.94A.537(1) provides:

- (2) 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.

Washington has long required a complete and comprehensive charging document. *See e.g., Leonard v. Territory*, 2 Wash. Terr. 381, 392, 7 P. 872 (1885) (“Under our laws an indictment must be direct and certain, both as regards the crime charged and as to regards the particular circumstances thereof, when they are necessary to constitute a complete crime.”); *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (““essential elements”” rule requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged.” (emphasis in original)). Any fact increasing punishment is an element of the offense. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Even if notice of prior convictions is not expressly required by the

constitution, notice of intent to seek an exceptional sentence is statutorily required in Washington.

b. The statute specifically requires notice by the prosecution before trial.

RCW 9.94A.537(1) expressly mandates the prosecution must “give notice” that it intends to seek an exceptional sentence “prior to trial or entry of a guilty plea.” Here, Mr. McNeal’s trial occurred in 1997. Mr. McNeal did not receive notice of an exceptional sentence prior to trial. The notice was not given as part of the information or filed as a separate document.

The requirements of RCW 9.94A.537 are plain and unambiguous. A trial court is authorized to impose an exceptional sentence only after compliance with specified statutory procedures.

The defendant must have received notice, prior to trial, of any aggravating factor the prosecution would seek to establish. Because Mr. McNeal did not receive notice of the aggravating factors the trial court lacks authority to impose an exceptional sentence.

The language of RCW 9.94A.537 dictates the steps the prosecution must follow anytime it seeks an exceptional sentence. By its plain terms, the State must give notice prior to trial or a plea, anytime it seeks an exceptional sentence. The statute does not create any alternatives

excusing the State from complying with the mandatory notice requirement. *See Delgado*, 148 Wn.2d 723, 730, 63 P.3d 792 (2003) (refusing to construe statute absent clear inconsistency rendering statute meaningless, as “[t]his court has exhibited a long history of restraint in compensating for legislative omissions.” *State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982)). Because the statute is unambiguous, it requires no construction and its plain terms must be enforced. Here, the prosecution did not provide notice of its intent to seek an exceptional sentence prior to Mr. McNeal’s trial.

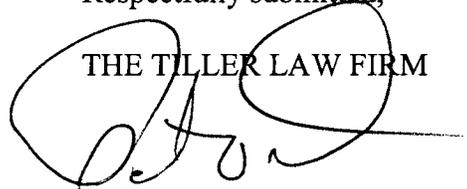
F. CONCLUSION

For the reasons set forth above, John McNeal respectfully requests that this matter be remanded to the trial court for resentencing within the standard range.

DATED: May 11, 2009.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over a horizontal line. The signature is stylized and somewhat cursive.

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COURT OF APPEALS
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STATE OF WASHINGTON
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vs.

JOHN K. McNEAL,

Petitioner.

COURT OF APPEALS NO.
38014-5-II

LEWIS COUNTY NO.
96-1-00261-0

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Petitioner were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to, John K. McNeal, Petitioner, and Lori Smith, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on May 11, 2009, at the Centralia, Washington post office addressed as follows:

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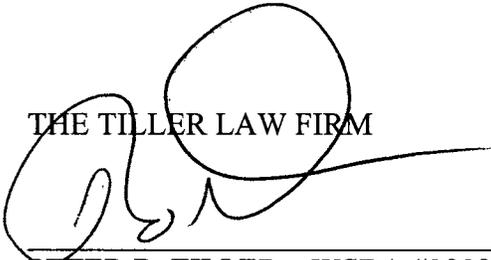
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