

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
)
Respondent,)
)
v.)
)
Wayne R Knapp)
(your name))
)
Appellant.)

No. 38769-7-II

STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

FILED
COURT OF APPEALS
DIVISION II
09 SEP 14 PM 12:21
STATE OF WASHINGTON
BY DEPUTY

I, Wayne Knapp, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

I received my court transcripts on Aug. 18 2009 and found that the state ~~failed~~ failed in not giving me pre-trial notice of its intention to seek an exceptional sentence. State V. Vance 142 Wn App 398, 174 P.3d 697 (2008). State argued unsuccessfully that although the aggravating factor relied upon by a sentencing judge in imposing an exceptional sentence, i.e., that concurrent sentences would have resulted in too lenient a sentence, was not listed in RCW 9.94A.535(2) that it should be still allowed to seek an exceptional sentence on remand because the court could not ignore the plain language of the statute and moreover, even if the 2007 amendments allowed 2005 provisions to be applied retroactively, the sta failed to satisfy RCW 9.94A.537(1) because it had not given defendant pretrial notice of its intention to seek an exceptional sentence.

Additional Ground 2

I also want to bring up the issue that I received 120 month community custody after release from prison. I haven't studied the issue much but know it is ~~illegal~~ illegal for them to give me that much time. I have a time limit and want to get this out so your help would be great on the research being that you do this all the time and know what needs to be done.

If there are additional grounds, a brief summary is attached to this statement.

Date: Sep 9 09

Signature: Wayne Knapp

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COURT OF APPEALS
DIVISION II

09 SEP 21 AM 9:54

STATE OF WASHINGTON
BY _____

DEPT. _____

NO. 38769-7-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

WAYNE R. KNAPP,

Appellant.

STATEMENT OF ADDITIONAL GROUNDS

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Chris Wickham, Judge

Cause NO. 08-1-01755-2

Wayne R. Knapp
Pro-se

Coyote Ridge Correction Center
P.O. BOX 769
Connell, WA 99326

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A. ASSIGNMENTS OF ERROR

Because the State did not comply with the notice requirement of RCW 9.94A.537 Mr. Knapp's exceptional sentence is unlawful.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

RCW 9.94A.537 (1) requires the State provide notice to a defendant of its intent to seek an exceptional sentence. The statute requires the notice state the basis upon which the request for an exceptional sentence will be made. Here, the State did not provide Mr. Knapp written notice of its intent to seek an exceptional sentence. Does the State's failure to comply with the provisions of RCW 9.94A.537 require this Court to reverse Mr. Knapp's sentence?

C. STATEMENT OF THE CASE

Wayne R. Knapp (Knapp) was charged by second amended Information filed in Thurston County Superior Court with one count of conspiracy to commit robbery in the first degree (Count I), one count of unlawful possession of a firearm in the first degree (Count II), and one

Count of unlawful possession of a controlled substance (Count III). [CP 14-15]. Count I also included a sentence enhancement allegation charging that the crime was committed while armed with a firearm. [CP 14-15].

They found Mr. Knapp guilty on count I (conspiracy to commit robbery in the first degree) entering a special verdict finding that the crime was committed while armed with a firearm; guilty of Count II (unlawful possession of a firearm in the first degree); and not guilty of Count III (unlawful possession of a controlled substance). [CP 17, 18, 50, 51; Vol. III RP 320-326].

The Court sentenced Knapp to 120-months on Count I (84-months for the underlying crime plus 36-months for the firearm enhancements) and 101-months on Count II, after finding substantial and compelling reasons to impose an exceptional sentence (Knapp's high offender score of 23 resulting in his actions going unpunished pursuant to *State v. Alverado*, 164 Wn.2d 556, 192 P.3d 345 (2008)) ordered that the sentence be served consecutively for a total of 221-months. [CP 52-74, 76-86,87-98,102,103-107; 1-8-09 RP 17-22].

However, the State did not include the necessary facts in the information and did not provide written notice which complied with the requirements of RCW 9.94A.537 (1), this Court must reverse his sentence and remand for imposition of a standard range sentence.

2. Mr. Knapp may raise this challenge for the first time on appeal.

Mr. Knapp failed to object to the absence of notice does not preclude his ability to challenge the error on appeal. First, the failure comply with sentencing statute is an error which may be addressed for the first time on appeal. The authority to impose an exceptional sentence is governed solely by the SRA. The Supreme Court has routinely held that there where a sentencing Court fails to comply with the procedures of the SRA, and in the absence of an express waiver by the defendant, the remedy is either to remand for resentencing; or, where a proper objection was raised in the trial Court, a reduction of the sentence. State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999). “Because all sentencing authority is statutory “ a defendant cannot... agree to a sentence in excess of that authorized by statute and thus cannot waive a challenge to such a sentence.” In re the Personal restraint of Goodwin, 146Wn.2d 861,872,50 P.3d 618 (2002); see also, In re the Personal Restraint of Fleming, 129 Wn.2d 529, 919 P.2d 66 (1996). The imposition of a sentence which does not comport with RWC 9.94A.537 (1) may be challenged for the first time on appeal.

Second, as Recuenco III, makes clear, the error did not occur until the court imposed the unlawful sentence and thus there was nothing for Mr. Knapp to object to. In Recuenco III the court recognized that because the State elected to charge the defendant with a valid crime and enhancement, albeit less than the State could have charged, there was no

error in the information to which Mr. Recuenco could object. 163 Wn.2d at 436. The court said “ no basis existed for Recuenco to challenge the information and no argument is presented to us that any defect existed in the information until the sentencing Judge imposed a sentence for a crime the State never charged or asked for.” Id. Similarly here, the information alleged the valid and complete offences of conspiracy to commit robbery in the first degree and unlawful possession of a firearm in the first degree. The State could have provided notice in the information of its intent to seek an exceptional, but did not. As in Recuenco III there was no error until the court imposed a sentence beyond that alleged in the information. Thus, Mr. Knapp’s failure to object to the States failure to comply with RCW 9.94A.537 (1) does not prevent him from challenging his sentence on appeal.

Finally, under the standard which applies to challenges to an information where no objection was raised below, as the dissent did in Recuenco III, that analysis requires Mr. Knapp to be permitted to raise this argument on appeal. When a defendant challenges a charging document and prior to the verdict the court must strictly construe the document and determine whether all elements are present.. State v. Tinker, 155 Wn.2d 219, 221, 118 P.3d 885 (2005). However where the challenge is raised after the verdict e.g., for the first time on appeal, the Court applies a lower

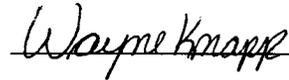
standard and must determine whether the necessary elements appear in any form “or by fair construction” can be found and if so whether prejudice resulted. State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). Even under the Kjorsvik standard two points are clear. First, that an objection is not required to challenge the adequacy of notice on appeal, although a more differential standard of review might apply. Second, the notice must be in written form as otherwise there is no way to determine if the essential elements appear in the document form “or by fair construction” can be found. Because there was no document in the file expressing the States intent to seek an exceptional sentence there in no document which might be fairly read as relaying the necessary facts. And thus there is no question of whether Mr. Knapp was prejudiced.

3. The Court must reverse Mr. Knapp’s sentence. Where the State fails to proved notice of enhancements or aggravating factors, the proper remedy is to remand for entry of the standard range sentence. Recuenco III, 163 Wn.2d at 442. Importantly, Recuenco III did not remand the case to afford the State the opportunity to amend the information and retried the case. Similarly, the remedy in this case is to remand the matter for imposition of the standard range sentence supported by the facts which the State alleged the information.

E. CONCLUSION

For the reasons above, the Court must reverse Mr. Knapp's exceptional sentence and remand for entry of a standard range sentence.

Respectively submitted this 18th day of September 2009.

 _____

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