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ASSIGNMENT OF ERROR

Assignment of Error

Under RCW 9.94A.535(2)(a), Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, the trial court erred when it imposed an exceptional sentence exceeding the sentence to which the parties stipulated because the state did not allege, the state did not prove, and the defendant did not stipulate to the existence of aggravating facts.

Issues Pertaining to Assignment of Error

Under RCW 9.94A.535(2)(a), Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, does a trial court err if it imposes an exceptional sentence exceeding the sentence to which the parties stipulated when the state did not allege, the state did not prove, and the defendant did not stipulate to the existence of any aggravating facts?

STATEMENT OF THE CASE

By information filed October 18, 2007, the Skamania County Prosecutor charged the defendant Richard W. Akuna with two counts of second degree rape of a child and one count of felony harassment. CP 1-3. On August 8, 2008, the state filed an amended information adding two counts of second degree rape and one count of tampering with a witness. CP 31-34. Three and one-half months later, on November 24, 2008, the state filed a second amended information adding six counts of conspiracy to commit premeditated first degree murder. RP 40-46. Finally, on February 26, 2009, pursuant to a plea bargain, the state filed a third amended information charging the defendant with one count of second degree rape and one count of first degree assault. RP 67-68. The third and last amended information alleged the following in its entirety:

COMES NOW, CHRISTOPHER R. LANZ, Chief Deputy Prosecuting Attorney, in and for Skamania County, State of Washington, in the name and by the authority of the State of Washington, and by this Information accuses RICHARD W. AKUNA of the crimes of RAPE IN THE SECOND DEGREE, RCW 9A.44.050(1)(a) or RCW 9A.44.050(1)(b) and ASSAULT IN THE FIRST DEGREE, RCW 9A.36.011 committed as follows, to-wit:

COUNT I:
RAPE IN THE SECOND DEGREE
RCW 9A.44.050(1)(a) OR RCW 9A.44.050(1)(b)

That he, RICHARD W. AKUNA, in the County of Skamania, State of Washington, on or about October 14, 2007 did engage in sexual intercourse by forcible compulsion with A.F.B. and/or C.S.C.

or in the alternative did engage in sexual intercourse with A.F.B. and/or C.S.C. when A.F.B. and/or C.S.C. was incapable of consent by reason of being physically helpless or mentally incapacitated; contrary to Revised Code of Washington 9A.44.050(1)(a) or 9A.44.050(1)(b). *(Maximum Penalty - Life imprisonment and/or a \$50,000 fine pursuant to RCW 9A.44.050(2) and 0A.20.021(1)(a), plus restitution and assessments.)* *(If the defendant has previously been convicted on two separate occasions on a "most serious offense" as defined by RCW 9.94A.030(32), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to 9.94A.030(32)(a) and 9.94A.120(4) or 9.94A.570.)* *(If the defendant has previously been convicted in this state, in federal court, or elsewhere on one separate occasion of rape in the first or second degree, child molestation in the first degree or indecent liberties by forcible compulsion, or any of the following, provided there is a finding of sexual motivation: murder in the first or second degree, kidnaping in the first or second degree, assault in the first or second degree, and burglary in the first degree, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to RCW 9.94A.030(32)(b) and RCW 9.94A.120(4) or RCW 9.94A.570.)*

**COUNT II:
ASSAULT IN THE FIRST DEGREE
RCW 9A.36.011(1)(c)**

That he, RICHARD W. AKUNA, in the County of Skamania, State of Washington, on or about September 13, 2008, with intent to inflict great bodily harm, did assault another person, to wit A.F.B. and/or C.S.C. and/or CHRISTOPHER BRILL, and did inflict great bodily harm; contrary to Revised Code of Washington 9A.36.011(1)(c).

(Maximum Penalty - Life imprisonment and/or a \$50,000.00 fine pursuant to RCW 9A.36.011(2) and RCW 9A.20.021(1)(a), plus restitution and assessments.)

(If the defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(32), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to RCW 9.94A.030(32)(a) and RCW 9.94A.120(4) or RCW 9.94A.570.)

CP 67-68 (capitalization, italics, bold and font sizes in original).

The original information, the first amended information, the second amended, and ultimately, the third amended information quoted above did not allege the existence of any aggravating circumstances upon which to base the imposition of a sentence in excess of the standard range, and they did not

state that the prosecutor would seek such a sentence. CP 1-3, 31-34, 40-46, 67-68. Neither did the prosecutor file any separate notice alleging the existence of any aggravating circumstances or stating an intent to seek an exceptional sentence. CP 1-129.

On February 26, 2009, the same day as the state filed the third amended information quoted above, the defendant entered a guilty plea to both counts of the information under *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984). CP 69-79. However, while the third amended information alleged alternative methods of committing count I, and alleged alternative victims on both counts, under paragraph 4(b) of the statement of defendant on plea of guilty the defendant did not plead guilty to committing the offenses in alternative methods or against alternative victims. CP 69. Rather, paragraph (4)(b) of the statement of defendant on plea of guilty stated as follows:

(b) I am charged with Count 1: Rape in the Second Degree - 9A.44.050(1)(b).

The elements are: In Skamania County, Washington, on or about October 14, 2007, I did engage in sexual intercourse with A.F.B. when A.F.B. was incapable of consent by reason of being physically helpless.

I am charged with Count 2: Assault in the First degree - 9A.36.011.

The elements are: In Skamania County, Washington, on or about October 14, 2007, I did with intent to inflict great bodily harm, assault C.S.C. with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

administers, exposes, or transmits or causes to be taken by C.S.C., poison, or any other destructive or noxious substance; or assault C.S.C. and inflict great bodily harm.

CP 69 (underlining in original).

The statement of defendant on plea of guilty listed the defendant's standard range on count I as 95 to 125 months and a standard range on count II of 111 to 147 months. CP 70. Both of these standard ranges reflect an offender score of two concurrent points. *Id.*

Paragraph 6(g) of the statement of defendant on plea of guilty gave the following as the prosecutor's recommendation in the case:

The prosecuting attorney will make the following recommendation to the judge: RECOMMENDATION AS TO CONFINEMENT: 250 months (20 years 10 months in prison[]), lifetime supervision by DOC, with conditions of no contact with the victims and witnesses, no contact with any child under the age of 16, and registration as a sex offender.

ADDITIONAL TERMS: court costs of \$200, crime victim's compensation fee of \$500, fine of \$500, biological collection fee of \$150, Sheriff's Office investigation fee of \$500, appointed attorney fees and related costs of supervision, restitution to be set.

SUPERVISION: Lifetime community custody/supervision.

OTHER CONDITIONS OF SUPERVI[SI]ON: standard conditions of supervision.

CP 73 (capitalization in original).

Paragraph 7 of the statement of defendant on plea of guilty set out the defendant's reason for entering an *In re Bar* plea. CP 76. They stated as follows:

7. Pursuant to *In re Barr*, 102 Wn.2d 265 (1984), and *State v.*

Hilyard, 63 Wn.App. 413 (1991), I plead guilty to Count 1; Rape in the Second Degree and Count 2: Assault in the First Degree, I do this in order to settle my case under certain terms and conditions; even if the facts and stand sentence associated with the amended charges would not ordinarily be the same as what is being agreed to in my case. I have received a copy of the third amended information and waive a formal reading.

CP 76.

Under paragraph 11 of the statement of defendant on plea of guilty, the defendant did not stipulate to the existence of any particular facts in the case. CP 76. Rather, he admitted there was sufficient evidence to support a conviction if believed by the trier of fact, and he invited the court to review the probable cause statement and the police report to determine whether or not there were sufficient facts to support a conviction. *Id.* This paragraph stated:

11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea. I have reviewed the police reports, and agree that if the facts were presented to a jury there is a possibility that I would be convicted.

CP 76.

Although the written statement of defendant on plea of guilty does not state that the defendant was stipulating to the entry of the specific exceptional sentence the prosecutor was requesting, defense counsel stated during the

guilty plea colloquy that this is was the defendant was doing. RP 6-8. This colloquy went as follows:

THE COURT: Question, Counsel. The recommendation's 250 months. Is that beyond standard range?

MR. BANKS: This is a situation, Your Honor, where it would be – essentially be (inaudible) sentence (inaudible).

(LOW VOLUME ON CD, CANNOT
BE ADJUSTED ANY HIGHER)

MR. SCHULTZ: Different victims. Odds are they would have to run consecutive. Also this is an In Re Bar, slash, In Re Hillard plea wherein the court looks at the underlying offenses and could (inaudible) situation much (inaudible).

THE COURT: Okay.

MR. SCHULTZ: Mr. Akuna has been made aware of that. I set that argument forth in Paragraph 7 on Page 8 that essentially he wishes to settle this case under the specific terms and conditions even if the facts and the standard sentence associated with the amended charges would not ordinarily be the same.

But, regardless, in this situation, there are different victims on the two counts that would likely run consecutive, regardless.

THE COURT: Okay, I understand. Thank you.

RP 6-7.

While the statement of defendant on plea of guilty spoke of allowing the court to review the probable cause statement and the police reports to determine whether or not there was a factual basis for the plea, the court did not review either document. RP 8-10. Rather, the court called upon the

prosecutor to provide a factual basis. *Id.* This colloquy proceeded as follows:

THE COURT: This statement has a place where you tell me some information. Here it says:

Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea. I have reviewed the police reports and agree that if the facts were presented to a jury there is a possibility that I would be convicted.

Is that your statement?

MR. AKUNA: Uhm, I guess (phonetic).

THE COURT: Mr. Lanz, could you give me a factual basis, please?

MR. LANZ: Yes, Your Honor. First as to the Rape in the Second Degree. It would be proven beyond a reasonable doubt if this matter did go to trial that on or about October 14, 2007, here in Skamania County, Washington, that the Defendant did have sexual intercourse with a person under the age of 16 at a point in time which she was incapable of any consent by reason of her being either physically or helpless, or otherwise able to give consent.

As to the Assault in the First Degree, I believe this is where the In Re Bard and Hillard elements come into fact. It would be proven that the more severe offense of attempted murder would have been proven beyond a reasonable doubt that on November 13, 2008, Mr. Akuna did, with intent to inflict great bodily harm to assault a person under the age of 16 as well as two other individuals. Basically he had arranged to have deadly force used against them, in essence, to eliminate their ability to testify at the time of trial, in essence, have them murdered. And therefore I believe that the elements of Assault First Degree would be necessarily proven by proving the more severe offense of Murder -- Attempted Murder in the First Degree.

THE COURT: These all took place in Skamania County?

MR. LANZ: It did, Your Honor.

THE COURT: I do find there is a factual basis to support the plea of guilty. I do find the plea has been knowingly, voluntarily and intelligently made. I will accept the plea of guilty.

Since this is a sex offense, I believe we need to do a PSI.

RP 8-10.

The court later called the case for sentencing, with both sides asking the court to impose an agreed exceptional sentence of 250 months. RP 17-52. During the sentencing hearing, the court took statements from the victims and family members of the victims. *Id.* After these statements, the defense stated on the record that it disputed these factual allegations, noting as follows:

He does contest the factual allegations of the victims put forth. However, [he] does acknowledge and did acknowledge a prior change of plea that there was sufficient evidence that a jury could likely convict him on it.

RP 35.

In spite of the fact that the state did not allege the existence of aggravating factors, and the defendant did not stipulate to the existence of aggravating factors, the court imposed an exceptional sentence in excess of that stipulated by the parties. RP 42-55. Specifically, the court imposed a sentence of 310 months. CP 106-116. The court then entered the following findings of fact and conclusions of law, with the defense objecting to the imposition of any sentence in excess of that stipulated by the parties:

I. Findings of Fact

A. On February 26, 2009, the defendant entered a plea of guilty to (1) Rape in the Second Degree, with a standard range of 111 months to 147 months in prison.

B. Prior to the entry of pleas of guilty to the two counts, the State and the defendant, through plea negotiations, stipulated and agreed to an exceptional sentence of 250 months, believing justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interest of justice and the purposes of the sentencing reform act. RCW 9.94A.535(2)(a).

C. On April 30, 2009, the Court at the time of sentencing, upon hearing the victim impact statements, the argument of counsel, and the allocution of the defendant, believing justice is not best served by an exceptional sentence of 250 months, imposed an exceptional sentence of 310 months.

II. Conclusions of Law

A. The crimes as committed by the defendant shock the conscience of society.

B. The harm done to the victims by the defendant need to be assuaged by a lengthy term of imprisonment.

C. Justice is best served by imposition of an exceptional sentence of 310 [months], which is an exceptional sentence above the stipulated exceptional sentence of 250 months.

CP 114.

Following imposition of sentence, the defendant filed timely notice of appeal. CP 117-129.

ARGUMENT

UNDER RCW 9.94A.535(2)(a), WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE IN EXCESS OF THE SENTENCE TO WHICH THE PARTIES STIPULATED BECAUSE THE STATE DID NOT ALLEGE, THE STATE DID NOT PROVE, AND THE DEFENDANT DID NOT STIPULATE TO THE EXISTENCE OF AGGRAVATING FACTS.

In Washington, the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). Under the original Sentencing Reform Act (SRA) found in RCW 9.94A, the legislature gave trial courts the authority to impose sentences outside the standard range if the court found the existence of either aggravating or mitigating facts by a preponderance of the evidence. The state did not need to give notice of an intent to seek an exceptional sentence and the court could impose such a sentence *sua sponte*.

In 2000, this statutory methodology for imposing exceptional sentences came into question with the decision of this United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147

L.Ed.2d 435 (2000). In this case, the court held that under the Sixth Amendment “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

Initially, the courts in Washington took the position that the phrase “prescribed statutory maximum” in *Apprendi* meant the statutory maximum for the type of offense the defendant committed. However, in 2004, in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the United States Supreme Court held that the term “prescribed statutory maximum” meant the “standard range” for the offense, not the “statutory maximum.” These two cases left open the question whether or not it was still possible to impose an exceptional sentence under the Washington Sentencing Reform Act, particularly for those exceptional sentences which were reversed for *Apprendi* and *Blakely* violations.

In *State v. Hughes*, 154 Wn.2d 119, 110 P.3d 192 (2005), the Washington Supreme Court addressed this question. In this case, the state argued that the trial court had inherent authority to empanel sentencing juries for those exceptional sentences reversed under *Apprendi* and *Blakely* even though the RCW 9.94A did not establish a procedural basis for such actions. The state also argued that errors under *Apprendi* and *Blakely* could be harmless beyond a reasonable doubt under appropriate facts. The defense

responded that (1) *Apprendi* and *Blakely* made Washington's statutory scheme for imposing exceptional sentences unconstitutional on its face, (2) that no inherent judicial authority existed to establish procedures for empaneling sentencing juries, and (3) the failure to submit aggravating factors to the jury constituted a structural error that could never be harmless beyond a reasonable doubt. The Washington Supreme Court agreed with each of the defense arguments.

The Washington State Legislature responded to the decision in *Hughes* by amending the SRA to provide for jury determinations of aggravating factors justifying exceptional sentences upward. LAWS OF 2005, ch. 68 (amending RCW 9.94A.530 and RCW 9.94A.535, and adding RCW 9.94A.537 (effective April 15, 2005)). Sections (1) and (2) of this statute provide as follows:

(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.

RCW 9.94A.537(1)-(2).

Under the plain language of this section, the court may only impose

an exceptional sentence if (1) the state first gives notice of its intent to seek an exceptional sentence “prior to trial or entry of the guilty plea,” and (2) the judge or the jury finds the alleged aggravating facts proven beyond a reasonable doubt or “the defendant stipulates to the aggravating facts.” The statute provides no exceptions to these requirements, except those found in RCW 9.94A.535(2). Subsection (a) of this statute states:

(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.

RCW 9.94A.535(2)(a).

Under this statute, the legislature has given the court authority to exceed the standard range and impose an exceptional sentence if (1) the parties stipulate to the imposition of an exceptional sentence, and (2) “the court finds *the exceptional sentence* to be consistent with and in furtherance of the interest of justice and the purposes of the sentencing reform act.” The legislature’s use of the term “the exceptional sentence,” is critical under this analysis. By employing the definite article “the” as opposed to the indefinite article “an”, the legislature is only giving the court authority to impose “the

exceptional sentence” to which the parties stipulated, provided the court also finds that the sentence to which the parties stipulated is “consistent with and in furtherance of” the purposes of the sentencing reform act. The legislature did not give the court authority to impose “any” exceptional sentence the court thought appropriate.

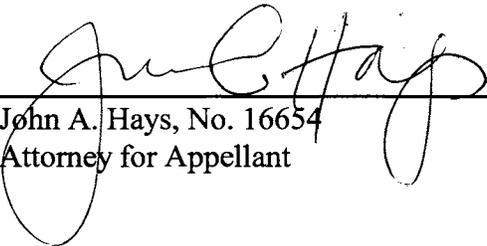
Had the parties in this case intended to leave the amount of the exceptional sentence up to the court’s discretion, then they could have stipulated to the existence of aggravating factors, which would have left the court free to exercise its discretion on the amount of the sentence. However, in the case at bar, the state did not allege the existence of any “aggravating facts.” Neither did the defendant “stipulate” to the existence of any “aggravating facts.” Rather, the state and the defendant stipulated to the entry of a specific exceptional sentence under RCW 9.94A.535(2)(a) because both the state and the defendant saw a benefit in doing so. Under both RCW 9.94A.535, RCW 9.94A.537, and the decision in *Blakely, supra*, the only authority the trial court had was to either impose the exceptional sentence to which the parties stipulated, or to impose a sentence within the standard range. Thus, the trial court erred when it imposed a sentence beyond that stipulated by the parties. As a result, this court should vacate the sentence and remand with instructions to either impose the stipulated exceptional sentence or impose a sentence within the standard range.

CONCLUSION

The trial court exceeded its statutory authority when it imposed a sentence in excess of that stipulated by the parties. As a result, this court should vacate the sentence and remand with instructions to either impose the stipulated exceptional sentence or impose a sentence within the standard range.

DATED this 17th day of November, 2009.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 21

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

RCW 9.94A.535(1)(a)

(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.

