

NO. 44556-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SEAN M. KLAMN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Richard Brosey, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to file written findings of fact and conclusions of law following the bench trial.
2. In this case, appellate review is not possible without written findings of fact and conclusions of law.
3. The trial court erred by failing to enter written findings and conclusions in support of the exceptional sentence.
4. In this case, appellate review of the exceptional sentence is not possible without written findings of fact and conclusions of law.
5. IF appellate review was possible, the trial court's oral ruling is inconsistent with the judgment and sentence and does not support the exceptional sentence.
6. The exceptional sentence is clearly excessive.

Issues Presented on Appeal

1. Did the trial court err by failing to file written findings of fact and conclusions of law following the bench trial?
2. In this case, was appellate review precluded without written

findings of fact and conclusions of law?

3. Did the trial court err by failing to enter written findings and conclusions in support of the exceptional sentence?
4. In this case, was appellate review of the exceptional sentence precluded without written findings of fact and conclusions of law?
5. If appellate review was possible, was the trial court's inconsistent oral ruling fail to support the exceptional sentence?
6. Was the 600 month exceptional sentence is clearly excessive?

B. STATEMENT OF THE CASE

SUBSTANTIVE FACTS

Mr. Klamn was charged with 14 counts of rape of his biological daughter, indecent liberties and child molestation occurring over a 6-7 year period as follows:

| <i>Count</i> | <i>Crime</i> | <i>RCW (w/subsection)</i> | <i>Class</i> | <i>Date of Crime</i> |
|--------------|--|-------------------------------|--------------|--------------------------|
| I | Child Molestation in the First Degree-DV | 9A.44.083 | FA | 2/28/05- 2/27/06 |
| II | Child Molestation in the First Degree-DV | 9A.44.083 | FA | 2/28/06- 2/27/07 |
| III | Rape of Child in the First Degree-DV | 9A.44.073 | FA | 2/28/06- 2/27/07 |
| IV | Child Molestation in the First Degree-DV | 9A.44.083 | FA | 2/28/07- 2/27/08 |
| V | Rape of Child in the First Degree-DV | 9A.44.073 | FA | 2/28/07- 2/27/08 |

| | | | | |
|------|--|-----------------|----|---------------------|
| VI | Child Molestation in the First Degree-DV | 9A.44.083 | FA | 2/28/08- 2/27/09 |
| VII | Rape of Child in the First Degree-DV | 9A.44.073 | FA | 2/28/08- 2/27/09 |
| VIII | Child Molestation in the First Degree-DV | 9A.44.083 | FA | 2/28/09- 2/27/10 |
| IX | Rape of Child in the First Degree-DV | 9A.44.073 | FA | 2/28/09- 2/27/10 |
| X | Child Molestation in the Second Degree-DV | 9A.44.086 | FA | 2/28/10- 2/27/11 |
| XI | Rape of Child in the Second Degree-DV | 9A.44.076 | FA | 2/28/10- 2/27/11 |
| XII | Child Molestation in the Second Degree-DV | 9A.44.086 | FA | 2/28/11- 2/27/12 |
| XIII | Rape of Child in the Second Degree-DV | 9A.44.076 | FA | 2/28/11- 2/27/12 |
| XIV | Indecent Liberties with Forceful Compulsion-DV | 9A.44.100(1)(a) | FA | 2/28/06- 2/27/12 |

CP 9-25.

The trial court did not enter written findings of guilt but orally ruled that Mr. Klamn was guilty as charged. RP 247-259.

The oral ruling as to guilt is as follows:

THE COURT: Well, first of all, the Court finds that the alleged victim here, Sara Kaech, was very credible. She came across as forthright. She did not appear to me to be embellishing her story as to what happened here and what was done to her. In instances

where she didn't remember or didn't know, she was upfront about that. Even her father when asked by Detective Silva said she's not vindictive and I don't think she would lie. There's no motive whatsoever, no explanation given for why she would make up this story.

Mr. Underwood argues, well, the evidence is inconsistent and basically all you have here -- no physical evidence -- all you have here is her story versus his and he never admitted that he committed the offenses. The problem that I have with him not admitting is that Mr. Klamn appeared to the Court to be very carefully parsing his words, when he was testifying in this proceeding today, and I think he was also very careful about what he said and what he didn't say, when he was on the phone with his daughter and also when he was being interrogated by Detective Silva.

Now, Mr. Underwood is right, we don't have the both sides of the conversation for the first recorded telephone call, but we do have one side of it, and Mr. Klamn when he testified today his testimony as to his responses to his daughter's inquiries I find to be grossly inconsistent with her responsive questions that she asked in what was admitted here as Exhibit I, which is what I'll refer to as the one-sided conversation.

What I didn't hear in her repeated questions that **would follow a response, given by Mr. Klamn that she could hear and unfortunately is not reproduced on the tape is I didn't hear the kind of response that I would expect to her, if in fact what we got was an unequivocal denial. As Detective Silva pointed out, when he was interrogating Mr. Klamn, the standard response that you would expect from somebody who is adamant that something like this never occurred is not only a no, but heck, no type response, but it's unequivocal, very forceful, very upfront, I don't know what you are talking about. I don't know anything about this. This never happened. But we didn't see that response from Mr. Klamn, first of all, in the conversation that Ms. Kaech talked about during the first phone call and we certainly didn't see it in the**

second phone call, and in the second recorded phone call we do have the benefit of both sides of the conversation being in evidence. Just my notes reflect just some of those are quite concerning.

I have Mr. Klamn saying in response to a question, "How can I be sure that you are not going to do this again to me? It will never happen. It will never happen again.

I will find a way to fix this." A lot of stuff.

I have nothing. I don't have the -- it says, "I understand you are angry. I don't have anything to give to you. I can't come up with something. I feel bad. I'm sorry. I will figure it out. I'll make it right. I just can't do that right now." Those are not the kind of responses that one would expect from somebody who's wrongfully accused of committing these kind of crimes. These are serious acts. These are -- they are not only actions that constitutes by our law major crimes, but they are acts that society as a whole finds repugnant between people in generally, but they certainly find him repugnant, between a father and a daughter. This is something that is alarming. It's an attack on somebody to accuse them of doing this kind of stuff, and when someone is accused and they are adamant that they didn't do it, they generally come right out and say that.

As Detective Silva pointed out, he says, I've raised kids, and if somebody accused me of touching one of my daughters, it would be, I don't know what the hell you are talking about. Not only did I not do this, but there's no way in the world I could have done this.

That's the kind of response that we expect, but that's not the response that Mr. Klamn gave in the recorded phone conversation and the conversation with his daughter and frankly was also not the response that we heard from Mr. Klamn, when they testified today. It may very well be that he never same came out and said I admit I raped you, I molested you or we had sexual intercourse, etc. but he's dancing all around the allegations in the claims made by his daughter in the conversation. He is never coming out and admitting it, but he's never explicitly denying that

it took place.

As I mentioned, I find her to be very credible. I also find that there's also lot of corroboration, as far as the ample opportunity that Mr. Klamm had to commit these acts. I will admit it's hard to imagine that something like this went on as long as it did and virtually weekend, and if you add those up and total the aggregate, it's a large number of sometimes that you would have expected that Mr. Klamm would have molested and otherwise sexually abused his daughter, but the problem is that there's corroboration there of what happened. He says she had separate bedrooms, but even if they had separate bedrooms, they are still in a situation where she's sleeping in the same room as he is long past the time when she's an infant.

We often see in that situation where you have an infant and an infant might sleep in the parents' room, might even sleep in the parents' bed, and we all know having raised children there are times when our kids are young that in the middle of the night if they wake up from a bad dream they may very well go crawl in bed with you, but that doesn't generally happen, when they reach anything close to puberty. It's just not something that's done. It's not appropriate. It's not considered something that's acceptable. Sleeping in the same bed with somebody especially a child, who is of the opposite sex when they get to be that age is not something that is generally done and not something that's condoned. But it isn't that the Court is basing its finding here as to whether or not the State has proven its case that the Court is relying on, it's the fact as far as I'm concerned I believe Sara Kaech, when she says these acts occurred to her, and as far as I'm concerned there's enough evidence here to convince me that the State in fact has proven beyond a reasonable doubt these charges in each and every one of these counts.

The first one occurred -- Count I occurred when she was approximately seven years-old of age, between

February 25 and February 27.

The State has proven that Mr. Kaech (sic) was at least 36 months-older than her. She was less than 12 at that time, not married to him, not in a domestic partnership relationship, and he had sexual contact with her. He specifically molested her. He fondled her. He touched her areas of genitalia for the purpose of sexual gratification and she certainly was a family member, because she's his biological daughter.

With respect to Count II, that occurred between February 28, 2006 and February 27, 2007. Again, the State has proven all of the elements of that particular offense.

And, again, it's a domestic violence offense, because she's his biological daughter.

With respect to Count III, which is Rape of a Child, the Court is satisfied that the State has proven beyond a reasonable doubt that between to be 28th of '06 and February 27 of '07, he did in fact commit the crime of Rape of a Child in the First Degree, because the Court believes the testimony that there was in fact penetration of her sexual organs by Mr. Kaech, (sic), and, again, this was his biological daughter, so that's a **domestic violence** aspect to that.

With respect to Count IV, the Court finds that the State has proven beyond a reasonable doubt all of the elements to establish that between February 28, '07 and February 27 of '08, Mr. Kaech (sic) again engaged in --... in fact commit the crime of Child Molestation in the First Degree, and, again, this was his biological daughter.

With respect to Count V, I find the State has proven beyond a reasonable doubt that Mr. Klamn did commit Rape of a Child in the First Degree, again, between February 28 of '07 and February 27 of '08, and, again, this was his biological daughter, all of the elements having been met.

Count VI, again, the State has proven beyond a reasonable doubt that between February 28, '08 and February 27, '09, all of the elements have been met with respect to Child Molestation in the First Degree and again

this was his biological daughter.

Count VIII, the State has proven all of the elements to establish that Mr. Klamn committed Rape of a Child in the First Degree, **domestic violence**, between February 28 and February 27 of -- '08 and February 27 of '09, and, again, this was his biological daughter.

Count VIII, the Court finds that between February 28, '09 and February 27 of 2010, the State has proven beyond a reasonable doubt that Mr. Klamn committed the crime of Child Molestation in the First Degree and that all of the elements have been met and again this was his biological daughter.

With respect to Count IX, the Court finds Mr. Klamn has been proven to have committed the crime of Rape in the First Degree, **domestic violence**, between February 28 of '09 and February 27 of 2010, and, again, this was his biological daughter.

Count X, the Court finds that Mr. Klamn has committed the crime of Child Molestation in the Second Degree, domestic violence, between February 28, 2010 and February 27 of 2011, in that he had sexual contact with his biological daughter.

Count XI, the State has proven beyond a reasonable doubt that Mr. Klamn committed Rape of a Child Second Degree, domestic violence, by meeting all of the elements of the crime as charged, and, again, this was his biological daughter.

Count XII, the State has proven beyond a reasonable doubt that Mr. Klamn has committed Child Molestation in the Second Degree, **domestic violence**, in that between February 28, of '11 and February 27 of '12, he did in fact have sexual contact with his biological daughter.

Count XIII, between February 28, 2011 and February 27 of 2012, when Sara Kaech was at least 12, but less than 14 -- because she's now 14 -- I find the State has proven beyond a reasonable doubt by meeting all of the elements that Mr. Klamn committed Rape of a Child in the Second Degree, and, again, it was his biological daughter.

Count XIV, the Court finds the State has proven beyond a reasonable doubt that Mr. Klamn did in fact commit the crime of Indecent Liberties with Forceable Compulsion on his biological daughter during the period of February 28, 2006 and February 27, 2012, at least one count of that, and she testified specifically that one point that he held her down and sexual contact as defined in the other offenses would in fact also amount to Indecent Liberties and the Court finds that the State has proven that.

The State also finds that this was an ongoing pattern of abuse perpetrated by Mr. Klamn on Sara Kaech. There were multiple incidents over a period of time, and, again, the most striking aspect of this entire case is the fact that, number 1, she is believable, she's credibility, and there's sufficient corroboration for the Court to believe what she says happened, but also the corroboration on the small points, such as the lack of a bedroom, the fact that she was sleeping -- that he was on a Futon, which he admitted at one point that's what he had what he was at his parents' house, there's sufficient details there to give her testimony an aura of not only believability but of correctness, and what's really striking, again, is that there was no out and out denial and I recognize **Mr. Klamn may argue as Mr. Underwood has, well, he didn't really admit this, but he didn't deny it, either, and one would expect a normal person falsely accused of something like this to make a clear, unequivocal denial, assertion of innocence, and we just have this -- and we have Mr. Klamn described himself as passive. It's not even a passive response. It's more of acquiescence in the accusation and charges and that is not at all the reaction that one would expect from somebody who's been falsely accused.**

Again, with respect to the issue of falsely accusing, which Mr. Klamn has at least indirectly asserted was going on here, there's no motivation that's even been suggested that rises to the level of credibility for

Ms. Kaech making all of this up and falsely accusing Mr. Klamm of doing what happened here. There's no even suggestion as to what it would be that would cause her to create this fantasy that all of this went on.

I also find that the fact that Dr. Hall's examination in the Child Sexual Assault Clinic in Olympia part of Saint Peter's did not discern any necessary damage to the hymenal tissue or evidence of recent sexual activity to be not significant to the Court's finding of guilty here, because, again, as Dr. Hall testified and it's not refuted in children, especially even young adolescence, if in fact there is damage, the damage can heal relatively rapidly, but also the testimony of Sara Kaech was that she didn't recall that there ever was any blood, and if there had been a tearing of the hymenal tissue, one would have been expected some blood. There wasn't any testimony on her part there ever was any blood, but there was testimony that this activity was ongoing on a regular basis, and that's consistent also with Dr. Hall's testimony, so I don't think the fact that there was no physical evidence in the form of -- although she did talk about there was some tags as I recall or perhaps abnormalities that were demonstrated by close up examination, but they were not sufficient to warrant the doctor's conclusions that they actually showed that there was in fact physical evidence of penetration, **but taking all of the evidence and looking at the evidence from the perspective of has the State proven its case beyond a reasonable doubt, my conclusion is the State did, with respect to each and every one of these charges and each and every one of the aggravators, and that's my ruling.** MS. O'ROURKE: **Your Honor is finding that he did use his position of trust as well?**

THE COURT: Yes, I am.

MS. O'ROURKE: Are you finding that each count is a separate conduct.

THE COURT: Yes. We need to order a presentence investigation prior to sentencing in this, because this is

a conviction for a class A sex offense, so that has to be ordered, and we have to continue the matter for sentencing.

I'm going to remand Mr. Klamm to the custody of the Sheriff to be held without bail pending sentencing. I'm going to order the Presentence Report. The last time I knew the minimum period to do a Presentence was approximately 30 days. What I would suggest doing is sign the order for the Presentence Report and perhaps Mr. Underwood next Thursday at your time on the criminal docket

(emphasis added) RP 247-259.

The court imposed a 600 month exceptional sentence based on the aggravating factors of:

“(2) Aggravating Circumstances

....

“(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(3)(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

....

“(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

“(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the

following was present:

“(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

....

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

RCW 9.94A.535 (Amended by 2013 Wash. Legis. Serv. 2nd Sp. Sess. Ch. 35 (S.S.S.B. 5912) (WEST) effective July 28, 2013). The Judgment and sentence lists the aggravating factors hereunder:

2.3 Sentencing Data.

| Count No. | Offender Score | Seriousness Level | Standard Range (not including enhancements) | Plus Enhancements/Aggravators* | Total Standard Range (including enhancements) | Maximum Term |
|-----------|----------------|-------------------|---|---|---|--------------|
| I | 39 | X | 149-198 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 149-198 months to Life | Life |
| II | 39 | X | 149-198 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 149-198 months to Life | Life |
| III | 39 | XII | 240-318 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 240-318 months to Life | Life |
| IV | 39 | X | 149-198 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 149-198 months to Life | Life |
| V | 39 | XII | 240-318 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 240-318 months to Life | Life |
| VI | 39 | X | 149-198 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 149-198 months to Life | Life |
| VII | 39 | XII | 240-318 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 240-318 months to Life | Life |
| VIII | 39 | X | 149-198 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 149-198 months to Life | Life |
| IX | 39 | XII | 240-318 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 240-318 months to Life | Life |
| X | 39 | VII | 87-116 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 87-116 months to Life | Life |

| | | | | | | |
|------|----|-----|------------------------|--|------------------------|------|
| XI | 39 | XI | 210-280 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 210-280 months to Life | Life |
| XII | 39 | VII | 87-116 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 87-116 months to Life | Life |
| XIII | 39 | XI | 210-280 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) | 210-280 months to Life | Life |
| XIV | 39 | X | 149-198 months to Life | 9.94A.535(2)(c) 9.94A.535(3)(g) 9.94A.535(3)(h)(i) 9.94A.535(3)(n) 9.94A.507(3)(c)(ii) | 25 years to Life | Life |

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520. (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude,

CP 46-62. Different from the Judgment and Sentence, the trial court's oral ruling listed the following grounds for an exceptional sentence: abuse of position of trust, domestic violence, and an ongoing pattern of abuse. RP 247-259, 273-274; CP 46-62.

In relevant part, the court's oral ruling on sentencing is as follows:

It would be the judgment of the Court with respect to Counts I through IV on each one of those the maximum is life under the statute. It will be the judgment of the Court Mr. Klamm will serve 198 months. On Counts VI -- strike that, that's I through V, 198 months. On Counts VI through VII, 116 months. On Counts VIII through IX, keeping in mind the **aggravating factors that the Court found, 600 months. On Counts XII and XIII, 600 months.** On Count XIV, 116 months. **The time is concurrent on all counts, so lest there be any misunderstanding, the time imposed here is 50 years, and lest there be any misunderstanding about it, with respect to the issue of the 600 months that was imposed by the Court on Counts VIII through XI and XII**

through XIII, in the event that the Court of Appeals should for whatever reason deem it inappropriate that the Court imposed an exceptional sentence of 600 months on those counts, again, giving keeping in mind that Mr. Klamn's supervision is for the rest of his natural life, then, it's the intention of the Court that in such an event those counts would run consecutively, not concurrently. That would result in 598 months, if I'm not mistaken, adding the two together, plus the other additional time that was imposed. Yes. 598 months, so any way you look at it as far as the Court is concerned 50 years is an appropriate period of time. Legal financial obligations: \$500 crime -- excuse me \$200 filing fee, \$500 crime victim assessment, \$100 domestic violence assessment, \$492 in separate costs, \$100 DNA, \$1000 jail, attorney fee by separate billing, based upon what Mr. Underwood submits, and restitution if any by separate order to be done within 180 days. I'm prohibiting Mr. Klamn for the balance of his life from having any contact in any way, shape or form directly or indirectly or through a third party with the victim here. I think she's better off, without Mr. Klamn being in her life, and it's my intention that he not be allowed to do that.

(Emphasis added to identify aggravating facts) RP 273-274.

This timely appeal follows. CP 64.

C. ARGUMENTS

1. THE TRIAL COURT'S FAILURE TO ENTER WRITTEN FINDINGS AND CONCLUSIONS FOLLOWING THE BENCH TRIAL REQUIRES REVERSAL OF THE CONVICTIONS AND REMAND FOR A NEW TRIAL.

Under the rules of criminal procedure, written findings of fact and

conclusions of law are to be entered at the conclusion of a bench trial. CrR 6.1(d); *State v. Head*, 136 Wn. 2d 619, 621– 22, 964 P. 2d 1187 (1998); *State v. Otis*, 151 Wn.App. 572, 576, 213 P.3d 613 (2009). The purpose of the rule is to enable the appellate court to review the questions raised on appeal. *Head*, 136 Wn. 2d at 622. “An appellate court should not have to comb an oral ruling to determine whether appropriate ‘ findings’ have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.” *Head*, 136 Wn. 2d at 624.

Generally, the appellate Court will refuse to address issues raised on appeal in the absence of such findings and conclusions. *Head*, 136 Wn.2d at 964. CrR 6.1(d) states:

In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

When a trial court fails to enter written findings and conclusion following a bench trial, effective appellate review is precluded, unless the record is sufficient to facilitate review in the absence of written findings and conclusions. *Otis*, 151 Wn.App, at 577, citing, *State v. Denison*, 78 Wn.App.

566, 897 P.2d 437 *review denied*, 128 Wn.2d 1006, 907 P.2d 297 (1995). In *Denison*, the Court vacated the judgment and remanded for entry of findings and conclusions on the issues that could not be addressed without the findings of fact.

In *Otis*, because the record was sufficient to address the defendant's one challenge to his right to present an affirmative defense. *Otis*, 151 Wn.App. at 577. In *Head*, the Supreme Court remanded for entry of findings and refused to make do with the oral ruling. *Head*, 136 Wn. 2d at 624. The Court in *Head* cautioned that where findings are entered belatedly, reversal may be appropriate where a defendant can demonstrate actual prejudice, for example where there is a strong indication that the findings ultimately entered have been tailored to meet issues raised on appeal. *Head*, 136 Wn. 2d at 624

Here the record is insufficient to permit effective appellate review. The case involved fourteen serious counts with exceptional sentences. Because the oral ruling is scant, the reviewing court cannot conduct meaningful appellate review. The remedy in the absence of written findings of fact and conclusions of law, and in the absence of a sufficient oral ruling, is reversal of the conviction and remand for a new trial. *Head*, 136 Wn.2d at 620–21; *Otis*, 151 Wn.App. at 576. Remand in this case is necessary to comply with CrR 6.1 and

State v. Head.

2. THE TRIAL COURT'S FAILURE TO ENTER WRITTEN FINDINGS AND CONCLUSIONS FOLLOWING IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED ON AGGRAVATING CIRCUMSTANCES REQUIRES REVERSAL OF THE CONVICTIONS AND REMAND FOR A NEW TRIAL AND SENTENCING.

The trial court was required to file written findings in support of the imposition of the exceptional sentence. RCW 9.94A.535. This statute states that “[w]henver a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.” *State v. Bluehorse*, 159 Wn.App. 410, 423, 248 P. 3d 537 (2011); *See State v. Hale*, 146 Wn.App. 299, 304 n. 2, 189 P.3d 829 (2008). The term “shall” is a mandatory term which requires compliance. *State v. Bunker*, 169 Wn.2d 571, 577, 578, 238 P.3d 487 (2010).

However when the oral ruling is sufficiently clear, this Court may rely on that ruling for appellate review. *Bluehorse*, 159 Wn.App. at 423; *Hale*, 146 Wn.App. at, 304. Here, the trial court’s ruling on the exceptional sentence is insufficient to permit appellate review. The trial court’s only mention of the aggravating factors are as follows:

[THE COURT] The State also finds that this was an ongoing pattern of abuse perpetrated by Mr. Klamn on Sara Kaech.

RP 256.

[THE COURT] And, again, it's a domestic violence offense, because she's his biological daughter.

RP 253.

[THE COURT] but taking all of the evidence and looking at the evidence from the perspective of has the State proven its case beyond a reasonable doubt, my conclusion is the State did, with respect to each and every one of these charge and each and every one of the aggravators, and that's my ruling.

MS. O'ROURKE: Your Honor is finding that he did use his position of trust as well?

THE COURT: Yes, I am.

RP 258.

[THE COURT] On Counts VIII through IX, keeping in mind the aggravating factors that the Court found, 600 months. On Counts XII and XIII, 600 months. On Count XIV, 116 months. The time is concurrent on all counts, so lest there be any misunderstanding, the time imposed here is 50 years, and lest there be any misunderstanding about it, with respect to the issue of the 600 months that was imposed by the Court on Counts VIII through XI and XII through XIII, in the event that the Court of Appeals should for whatever reason deem it inappropriate that the Court imposed an exceptional sentence of 600 months on those counts, again, giving keeping in mind that Mr. Klamn's supervision is for the rest of his natural life, then, it's the intention of the Court that in such an event those counts would run consecutively, not concurrently. That would result in 598 months, if I'm not mistaken, adding the two together, plus the other additional time that was imposed. Yes. 598 months, so any way you look at it as far as the Court is concerned 50 years is an appropriate period of time.

RP 274. These oral rulings are not sufficiently clear to permit appellate review and the oral comments are inconsistent with the Judgment and Sentence and do no more than mere mention the existence of some of the aggravating factors which is insufficient to permit appellate review. Thus under *Bluehorse*, and RCW 9.94A.535, review is not possible and remand is necessary for entry of written findings and conclusions.

Moreover, there is no mention of any facts to support the imposition of an aggravating sentence based on RCW 9.94A.535((3)(c) that the defendant knew that victim of the current offense was pregnant”, or (3)(c)(ii) which does not exist as an aggravating factor. An exceptional sentence may be upheld on appeal even where all but one of the trial court's reasons for the sentence have been overturned, as long as the trial court is clear that it would have imposed an exceptional sentence on the basis of any valid aggravating factor. *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993); *State v. Harding*, 62 Wn.App. 245, 250, 813 P.2d 1259, *review denied*, 118 Wn.2d 1003, 822 P.2d 287 (1991) (exceptional sentence upheld where 2 of 3 aggravating factors invalidated).

In Mr. Klamns’ case, remand for resentencing is necessary because it is

not clear whether the trial court would have imposed an exceptional sentence on the basis the remaining valid factors. *Gaines*, 122 Wn.2d at 512 36 (1993); *State v. Henshaw*, 62 Wn.App.135, 140, 813 P.2d 146 (1991).

In Klamm's case, appellate review of the exceptional sentence is not possible without written findings and conclusions and there is no mention in the record of any facts to support several of the aggravating factors. Even if review was possible, since the trial court did not state that it would impose the same sentence if any aggravating factor was invalid, this Court must reverse the exceptional sentence and remand for sentencing.

3. THE SENTENCE IMPOSED WAS CLEARLY EXCESSIVE.

If the record is sufficient to allow review of the exceptional sentence, this Court should hold that a 600 month sentence that is 320 months above the standard range is clearly excessive under RCW 9.94A.585. RCW 9.94A.585(4) provides:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly

excessive or clearly too lenient.

This Court reviews whether an exceptional sentence is excessively long for abuse of discretion; this Court will reverse when it finds the length clearly excessive. *State v. Ritchie*, 126 Wn.2d 388, 392–393, 894 P.2d 1308 (1995). A sentence is clearly excessive if it is based on untenable grounds or untenable reasons or if it is an action no reasonable judge would have taken. *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995); *State v. Sao*, 156 Wn.App. 67, 80, 230 P.3d 277 (2010).

Our Supreme Court has held that although state statute requires the trial court to set forth reasons for its decision to impose an exceptional sentence, there is no corresponding statutory requirement to articulate reasons for the length of an exceptional sentence, and the trial court need not do so. *Ritchie*, 126 Wn.2d at 392.

Klamn's sentence was excessive because the standard range is 198 months and the sentence imposed is three times that length. Moreover, while the trial court need not state its reasons for imposing the 600 months, it was required to provide that it found the aggravating factors outweighed any leniency the law afforded. 9.94A.585(4). The trial court did not explain its reasons for the exceptional sentence and did not state that the aggravating

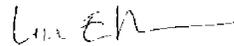
factors outweighed any leniency. Under RCW 9.94A.585(4) this sentence is an abuse of discretion and should be reversed.

D. CONCLUSION

Sean Klamm respectfully requests this Court reverse his convictions and sentence and remand for a new trial and new sentencing based on the trial court's failure to enter written findings and based on invalid aggravating factors in support of the exceptional sentence.

DATED this 13th day of August 2013.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County prosecutor's office Sara Beigh appeals@lewiscountywa.gov and **Sean Klamm DOC 363354 Coyote Ridge Corrections Center** Post Office Box 769 Connell, WA 99326-0769 a true copy of the document to which this certificate is affixed, on August 15, 2013. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.



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