

No. 48106-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jeffrey Weller,

Appellant.

Clark County Superior Court Cause No. 11-1-01678-1

The Honorable Judge Barbara Johnson

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court infringed Mr. Weller's Sixth and Fourteenth Amendment right to a jury trial by imposing an exceptional sentence based on judicial factfinding.
2. The trial court infringed Mr. Weller's Fourteenth Amendment right to proof beyond a reasonable doubt by imposing an exceptional sentence based on judicial factfinding.
3. The trial court erred by adopting Finding of Fact No. 2.
4. The trial court erred by adopting Finding of Fact No. 3.
5. The trial court erred by adopting Finding of Fact No. 4.
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11. The trial court erred by adopting Finding of Fact No. 10.
12. The trial court erred by adopting Finding of Fact No. 11.
13. The trial court erred by adopting Finding of Fact No. 12.
14. The trial court erred by adopting Finding of Fact No. 13.
15. The trial court erred by adopting Finding of Fact No. 14.
16. The trial court erred by adopting Finding of Fact No. 15.
17. The trial court erred by adopting Finding of Fact No. 16.

ISSUE 1: A sentencing court may not rely on judicial factfinding to impose an exceptional sentence. Here, the trial court imposed an exceptional sentence based in part on judicial

factfinding. Did the trial court infringe Mr. Weller's Sixth and Fourteenth Amendment right to a jury trial and to proof beyond a reasonable doubt by imposing an exceptional sentence based in part on judicial factfinding?

18. The trial court erred by refusing to permit defense counsel to provide his client with an appropriately redacted copy of the police reports.

ISSUE 2: CrR 4.7(h)(3) requires defense counsel to maintain exclusive custody of discovery materials, but permits counsel to provide an appropriately redacted copy to the defendant. Should the trial court have allowed defense counsel to provide his client an appropriately redacted copy of the police reports?

19. Pursuant to RAP 10.1, Mr. Weller adopts and incorporates any applicable assignments of error set forth in Ms. Weller's Opening Brief.

ISSUE 3: Pursuant to RAP 10.1, Mr. Weller adopts and incorporates any applicable issues set forth in Ms. Weller's Opening Brief.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Following a jury trial, Jeffrey Weller was convicted of numerous felony charges and two gross misdemeanors. CP 4-5. The trial court imposed an exceptional sentence based on two aggravating factors found by the jury—deliberate cruelty and an ongoing pattern of abuse. Opinion, pp. 5-6, Supp. CP.

Mr. Weller appealed, and the Court of Appeals invalidated the exceptional sentence, finding the ongoing pattern aggravating factor inapplicable. Opinion, p. 15, Supp. CP. The appellate court remanded the case for resentencing, and the trial court entered an order vacating the original judgment and sentence. CP 1.

Following a resentencing hearing, the trial court heard about Mr. Weller's positive accomplishments since the original sentence. RP 13. The court again imposed an exceptional sentence, but reduced Mr. Weller's overall term by ordering that he serve his felony sentence concurrently with the gross misdemeanors. RP 13, 19-22; CP 7.¹

The court supplemented the jury's special verdict with factual findings. CP 17-19. These findings summarized certain evidence introduced at trial. CP 17-19. The judge found that this evidence

¹ The court suspended jail time imposed on the gross misdemeanor charges. CP 21.

“supports the sentence imposed by the Court as an exceptional sentence.”

CP 19. In a separate finding, the court also found that the evidence supported the jury’s “deliberate cruelty” special verdict. CP 19.

Defense counsel notified the court that Mr. Weller wanted a copy of his police reports, and cited CrR 4.7. RP 31, 34-35. The prosecutor objected. RP 34. The court declined to allow counsel to provide his client with a copy of discovery:

At this point I'll deny it as a matter for the trial court. If there is something in the way of a further appeal, then it would be up to the Court of Appeals whether they would grant any records or transcripts in connection with it.
RP 35.

Mr. Weller timely appealed. CP 28.

ARGUMENT

I. THE TRIAL COURT INFRINGED MR. WELLER’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY DETERMINATION OF ALL FACTS SUPPORTING HIS EXCEPTIONAL SENTENCE.

Any fact that increases the penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 21, 22.; *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Imposition of an enhanced sentence based on judicial factfinding violates an accused

person's right to due process and to a jury trial. *Blakely*, 542 U.S. at 303; *Alleyne v. United States*, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

Blakely errors may be raised for the first time on review. RAP 2.5(a)(3); see *State v. O'Connell*, 137 Wn. App. 81, 89, 152 P.3d 349 (2007). In Washington, such errors are not subject to harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (citing art. I, § 21).

Here, the trial court supplemented the jury's special verdict with numerous factual findings. CP 17-19. The trial judge specifically relied on certain trial testimony (summarized in these findings) to "support[] the sentence imposed by the Court as an exceptional sentence." CP 19.

A court may not impose an exceptional sentence based on judicial factfinding. *Blakely*, 542 U.S. at 303. The sentence here violated Mr. Weller's right to a jury determination beyond a reasonable doubt of the facts listed in the trial court's findings. *Id.*

Although the Court of Appeals previously addressed this argument in a footnote,² RAP 2.5(c)(2) permits the court to review its earlier decision. Review is appropriate here in the interests of justice.

First, the trial court conducted a new sentencing hearing and imposed a new sentence. RP 3-22. The entire sentence should be subject

to appeal. *See, e.g., State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009).

Second, the Court of Appeals' prior decision on this issue is *dicta*. *See Gabelein v. Diking Dist. No. 1 of Island Cty. of State*, 182 Wn. App. 217, 239, 328 P.3d 1008 (2014) (defining *dicta*). Having reversed one aggravating factor, sustained the second, and remanded the case for a new sentencing hearing, the appellate court had no need to address the trial court's factual findings, since the court was free to adopt new findings (or no findings at all) upon resentencing.

Third, the Court of Appeals' prior decision reflected an incomplete understanding of the trial court's findings. The court's factual findings explicitly served two purposes. It is true that the trial judge "properly was evaluating the evidence supporting the jury's findings before imposing the exceptional sentences." Opinion, p. 13, n. 11, Supp. CP. This can be seen in Finding No. 17, CP 19.

But the trial judge also explicitly relied upon "the above summarized trial testimony"—that is, evidence outlined in Findings Nos. 1-16—to "support[] the sentence imposed by the Court as an exceptional sentence." *See* Finding No. 16, CP 19. The Court of Appeals' prior decision did not address this aspect of the trial court's findings.

² Opinion, p 13 n. 11, Supp. CP.

Accordingly, the issue should be revisited in this appeal, notwithstanding the prior decision. RAP 2.5(c)(2).

The trial court's factual findings must be vacated. *Blakely*, 542 U.S. at 303. Mr. Weller's exceptional sentence must be reversed and the case remanded for a new sentencing hearing. *Id.*

II. MR. WELLER IS ENTITLED TO AN APPROPRIATELY REDACTED COPY OF “[A]NY MATERIALS FURNISHED TO [HIS] ATTORNEY” AS PART OF THE DISCOVERY IN THIS CASE.

Court rules are interpreted in the same manner as statutes, using the tools of statutory construction. *State v. Hawkins*, 181 Wn.2d 170, 183, 332 P.3d 408 (2014), *as amended* (Sept. 30, 2014), *reconsideration denied* (Oct. 1, 2014). The court's objective is to determine and give effect to the intent, as expressed in the rule's plain language. *State v. Larson*, No. 91457-5, 2015 WL 9460073, at *2 (Wash. Dec. 24, 2015).

The use of the word “shall” is presumptively imperative. *State v. Peeler*, 183 Wn.2d 169, 185 n. 9, 349 P.3d 842 (2015). Under the criminal discovery rules, “a defense attorney *shall be permitted* to provide a copy of [discovery] materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.” CrR 4.7(h)(3) (emphasis added).

The rule's use of the word “shall” emphasizes the mandatory nature of this provision. *See Eubanks v. Brown*, 180 Wn.2d 590, 596 n. 1,

327 P.3d 635 (2014). The rule does not impose any restrictions on the timeframe when discovery material may be provided.

Here, when defense counsel sought permission to provide a copy of the police reports to his client, the prosecutor objected. RP 34. But the plain language of the rule does not permit the prosecution to thwart counsel's efforts to provide a copy of discovery. CrR 4.7(h)(3). Instead, the prosecution must either approve appropriate redactions or submit the issue to the court. CrR 4.7(h)(3).

The trial court should not have declined Mr. Weller's request. CrR 4.7. The Court of Appeals must reverse the trial court's decision and remand the case to permit defense counsel to provide his client with a copy of the discovery, including any police reports. If defense counsel and the prosecutor cannot agree on appropriate redactions, the issue must be submitted to the court for an order under CrR 4.7(h)(3).

III. MR. WELLER ADOPTS AND INCORPORATES ANY APPLICABLE ARGUMENTS MADE BY MS. WELLER.

Pursuant to RAP 10.1, Mr. Weller adopts and incorporates any applicable arguments set forth in Ms. Weller's Opening Brief.

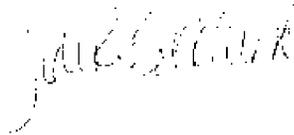
CONCLUSION

Mr. Weller's exceptional sentence must be vacated. The court engaged in judicial factfinding to impose a sentence above the standard range.

In addition, Mr. Weller must be provided a copy of his police reports, redacted as necessary.

Respectfully submitted on January 22, 2016,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jeffrey Weller, DOC #365334
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

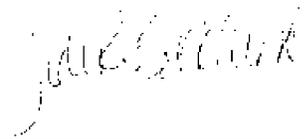
Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

Washington Appellate Project
wapofficemail@washapp.org

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 22, 2016.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

January 22, 2016 - 2:52 PM

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