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COURT OF APPEALS

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT L. DONEY, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JEROME J. LEVEQUE

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

- (1) The trial court erred ruling that a jury could be empanelled to determine whether aggravating factors existed to support an exceptional sentence.
- (2) The trial court erred when it empanelled a jury to determine whether aggravating factors existed to support an exceptional sentence.
- (3) The trial court erred in imposing an exceptional sentence.

II.

ISSUES PRESENTED

- (1) Did the trial court have the power to empanel a jury to determine whether aggravating factors existed to support the imposition of an exceptional sentence?
- (2) Did the trial court violate defendant's rights to due process, equal protection, and equity by empanelling a jury to determine whether aggravating factors existed to support imposition of an exceptional sentence?

III.

STATEMENT OF THE CASE

The appellant/defendant was charged by amended information with the crime of first degree murder for the slaying of two-year old V.R. CP 57-58. The amended information included aggravating factors appurtenant to the charged crime for which the State sought an exceptional sentence. On March 7, 2005, the defendant was arraigned on the amended information and the trial before a jury commenced that same day. On March 16, 2005, defendant pleaded guilty as charged to First Degree Murder towards the end of the State's case-in-chief. 031605-RP 237.

Defendant entered his guilty plea without any plea agreement, bargain or deal with the State. 031605-RP 238-250. The State specifically requested that the trial court advise the defendant that the State would request that the trial court instruct the jury regarding the charged aggravating factors after the plea. The trial court did so advise the jury before accepting defendant's guilty plea. 031705-RP 251.

Thereafter, the trial court retained the jury until the issue of whether the jury would be allowed to determine the aggravating factors was resolved. 031705-RP 251-261. The trial court heard the arguments of the parties and ruled that the jury would take evidence and determine whether the State had proved beyond a reasonable doubt the aggravating

factors per *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The jury then heard the evidence, arguments, was instructed by the trial court and returned verdicts. 031705-RP 251-261.

On March 18, 2005, the jury returned special verdicts that the State had proved beyond a reasonable doubt that the defendant: showed an egregious lack of remorse, inflicted multiple injuries to V.R., knew or should have known that V.R. was particularly vulnerable and incapable of resistance due to extreme youth, and manifested deliberate cruelty toward V.R. at the time of the murder. The trial court set the sentencing for May 13, 2005, at defendant's request. CP 73-76.

On April 14, 2005, the Supreme Court issued *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005). On April 15, 2005, the Legislature enacted legislation amending the Sentencing Reform Act of 1981 ("SRA") to address the concerns of the United State Supreme Court set forth in its *Blakely* decision. On April 16, 2005, the Governor signed the bill into law which thereby codified the process for imposing exceptional sentences.

On May 10, 2005, defendant was granted a continuance of the sentencing to June 6, 2005. CP 78. On May 31, 2005, defendant filed a motion with the trial court to vacate the jury's findings concerning the aggravating factors. CP 79-121.

On July 13, 2005, the trial court ruled that the statutory amendment was remedial and applied to this case. CP 67-68; 071305-RP 356-363. The trial court further held that the procedural process it had utilized had substantially complied with legislative amendment. Nevertheless, the trial court acknowledged the possibility of some irregularities during the exceptional sentence phase of the proceedings, so it vacated the jury's findings concerning the aggravating factors. CP 67-68; 071305-RP 356-363.

On July 20, 2005, the trial court ordered: the jury findings regarding the aggravating factors vacated; that the State could move to impanel a new jury to consider the aggravating factors; and scheduled the motion for August 19, 2005, with the sentencing for September 6, 2005. Finally, the trial court ordered "that the Laws of 2005, c. 68 (the legislative *Blakely* amendment)" applied retroactively. CP 67-68.

On August 11, 2005, the State filed its motion to impanel another jury to determine the existence of the aggravating factors. CP 122. The trial court granted the motion for a new sentencing hearing. CP 123.

On September 19, 2005, the jury returned special verdicts finding two of the three aggravating factors had been proved beyond a reasonable doubt, yet was unable to agree regarding the third factor. CP 69-71.

On October 12, 2005, the trial court imposed an exceptional sentence upon the defendant. CP 124-136. The Court of Appeals affirmed the conviction and exceptional sentence finding that the trial court's impaneling of a jury to determine the aggravating factors was harmless error. *State v. Doney*, 142 Wn. App. 450, 174 P.3d 1261 (2008).

While defendant's appeal was pending in 2007, the Legislature amended RCW 9.94A.537, noting that it intended the statute to apply retroactively to "all cases that come before the court for trial or sentencing, regardless of the date of the original trial or sentencing." Laws of 2007, ch. 205, §1. The Legislature added a new subsection, effective April 27, 2007, that:

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.

RCW 9.94A.537(2).

The Legislature entered the following comment in enacting the amendment in the legislative history as follows:

Intent—2007 c 205. In *State v. Pillatos*, 150 P.3d 1130 (2007), the Washington supreme court held that the changes made to the sentencing reform act concerning exceptional sentences in chapter 68, Laws of 2005 do not apply to cases where the trials had already begun or guilty

pleas had already been entered prior to the effective date of the act on April 15, 2005. The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.

RCW 9.94A.537.

On January 13, 2009, the Supreme Court vacated the exceptional sentence finding that the trial court lacked the inherent authority to impanel a jury for the purpose of sentencing. *State v. Doney*, 165 Wn.2d 400, 198 P.3d 483 (2008). Nevertheless, the Supreme Court left unresolved the question of whether the 2007 version of RCW 9.94A.537(2) applies to defendant's case.

On May 22, 2009, the trial court granted the State's motion to impanel a jury pursuant to RCW 9.94A.537(2) to determine whether aggravating factors existed which would support an exceptional sentence. 052209-RP 41-46.

On August 27, 2010, the jury returned special verdicts finding that the aggravating factors of deliberate cruelty and a particularly vulnerable victim had been proved beyond a reasonable doubt to have occurred in the commission of the murder of two year old V.R. by defendant. CP 20.

On October 15, 2010, the trial court once again imposed an exceptional sentence based upon the aggravating circumstances found by

the jury. CP 25-35. The trial court entered its factual findings and legal conclusions supporting its imposition of the sentence. CP 23-24. Defendant thereafter filed this appeal.

IV.

ARGUMENT

A. THE TRIAL COURT PROPERLY RULED THAT A SENTENCING JURY COULD BE IMPANELED TO DETERMINE WHETHER AGGRAVATING FACTORS EXISTED TO SUPPORT AN IMPOSITION OF AN EXCEPTIONAL SENTENCE.

Appellant contends that the trial court was not legally empowered to impanel a jury to determine the existence of aggravating factors vis-à-vis as supporting an exceptional sentence pursuant to former RCW 9.94A.535 (2004). At the time, the statute provided, in pertinent part:

The court may impose a sentence outside the standard...range for an offense if it finds...there are substantial and compelling reasons justifying an exceptional sentence...the court shall set forth its decision in written findings of fact and conclusions of law...The following are illustrative factors...the court may consider in the exercise of its discretion to impose an exceptional sentence power to impose an exceptional sentence...

(2) Aggravating Circumstances...

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance due to extreme youth...

Former RCW 9.94A.535 (2004).

Appellant argues that the trial court's impaneling of the jury in 2005 to determine the existence of the aggravating circumstances during the brutal and senseless murder of two year old V.R. constituted an error of constitutional magnitude.

In 2005, appellant contended that the trial court lacked the authority to impanel the first jury and that the subsequent legislative enactments addressing the procedural deficiencies recognized in the *Blakely* decision do not apply retroactively to his case. CP 67-68; 071305-RP 332-346. Appellant based that position upon the decision in *Hughes*.

Currently, appellant incorporates the decision in *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007), with the holding in *State v. Hughes, supra.*, to argue that it is the Legislature's function, not the court's, to alter the sentencing process. Specifically, appellant argues that the trial court's inference of the power to impanel a jury to resolve the existence of aggravating factors in 2005 violated the separation of powers doctrine by altering the sentencing procedure in Washington State.

It is noteworthy that in this current appeal, appellant maintains that the Legislature's 2005 amendments to former RCW 9.94A.535 and 2007 amendments to RCW 9.94A.537(2) violated the separation of powers doctrine to render the sentencing challenged herein unauthorized.

Initially, it should be resolved what is appellant's position vis-à-vis the claim that either the trial court in 2005 or the Legislature in 2005 and 2007 violated the separation of powers doctrine by their respective actions. The contention that the trial court violated the separation of powers doctrine was rendered moot by the Legislature's 2005 ("*Blakely* fix") and 2007 ("*Pillatos* fix") enactments regardless of the decision in *State v. Pillatos, supra*. The 2007 amendment to RCW 9.94A.537(2), (effective April 27, 2007) expressly granted authority to the trial court to impanel a jury to resolve whether aggravating factors existed to support imposition of an exceptional sentence. On October 13, 2011, the Supreme Court recently offered the following observation with regard to the issue of retroactive application of legislation:

While statutory amendments generally apply only prospectively, an amendment may apply retroactively "if the Legislature so intended...we may look to sources other than the statutory text, such as the legislative history, to determine whether the Legislature intended the amendment to apply retroactively.

State v. Franklin, No. 84545-0, slip op. (Oct. 13, 2011).

As noted, the Legislature specifically provided that the amendments to the sentencing procedure applied retroactively despite the decision in *State v. Pillatos, supra*. Accordingly, the trial court was legislatively empowered to impanel a jury to resolve whether the aggravating factors existed when it did so for yet a third time.

B. THE TRIAL COURT PROPERLY IMPANELED
A JURY TO DETERMINE WHETHER
AGGRAVATING FACTORS EXISTED TO
SUPPORT AN EXCEPTIONAL SENTENCE.

The 2007 amendments to the exceptional sentencing procedure set forth in RCW 9.94A.537 included an emergency clause which made those procedural provisions effective as of that date the Governor signed it into law on April 27, 2007. As noted, in the “Intent” section of RCW 9.94A.537, the Legislature references the decision in *State v. Pillatos*, and expressed the intent that “superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, *regardless of the date of the original trial or sentencing.*” *Id.*, Intent-2007 c 205.

RCW 9.94A.537(2) specifies that whenever a new sentencing proceeding is required in a case where an exceptional sentence had previously been imposed, “the superior court may impanel a jury to consider any alleged aggravating factors 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.” *Id.* Basically, the 2007 amendments extended the 2005 original “*Blakely*-fix” to all exceptional sentence cases that were upended by that decision.

The *Pillatos* court had already determined that the original “*Blakely*-fix” statute was procedural in nature and could be applied to cases that were pending trial when the statute took effect. *Pillatos*, 159 Wn.2d at 470-471. Remedial statutes typically are “enforced as soon as they are effective, even if they relate to transactions predating their enactment.” *Id.* at 473. The same results should be reached with the 2007 amendments to RCW 9.94A.537. The 2007 enactment was simply an amendment to the 2005 legislation that the court already approved in *Pillatos*. The Legislature’s safeguard mechanism is equally clear in that the amendment applies to any exceptional sentence case that has to be re-sentenced. RCW 9.94A.537(2).

When the Supreme Court vacated the earlier sentence, it made the 2007 amendments to RCW 9.94A.537 applicable to this case. As a direct result of the trial court’s actions to ensure that the defendant’s due process rights were protected, the trial court afforded the defendant not one, not two, but three separate and distinct juries to resolve whether aggravating factors existed to support an exceptional sentence herein. Having already

received his *Blakely* jury finding right on three distinct occasions the defendant's due process rights were more than adequately protected. The application of the 2007 amendments to RCW 9.94A.537 moots out defendant's claim for relief. Accordingly, the sentence should be affirmed.

C. THE TRIAL COURT PROPERLY IMPOSED AN EXCEPTIONAL SENTENCE HEREIN BASED UPON THE JURY HAVING FOUND THE EXISTENCE OF AGGRAVATING FACTORS SUPPORTING SUCH A SENTENCE.

Appellant also contends that the trial court's imposition of an exceptional sentence violated his right to equal protection and the general principles of equity because it is fundamentally unfair. Appellant claims that the retroactive application of the 2005 and 2007 amendments to RCW 9.94A.537 violate the bill of attainder clauses of the federal and state constitutions.

Art. I, §23 of the Washington Constitution provides, "No bill of attainder...shall ever be passed. Art. I, §10 of the federal constitution provides that "no state shall...pass any bill of attainder..." The bill of attainder clause was intended to prohibit trials by the Legislature, and forbids the imposition of punishment by the Legislature on specific persons. *United States v. Brown*, 381 U.S. 437, 442, 85 S. Ct. 1701,

14 L. Ed. 2d 484 (1965). A bill of attainder is a legislative act which applies to named individuals or to easily ascertained members of a group in such a way as to inflict punishment on them without judicial trial. *State v. Scheffel*, 82 Wn.2d 872, 881, 514 P.2d 1052 (1973). The prohibitions against bills of attainder prevent legislatures from singling out disfavored persons and meting out summary punishment for past conduct. *State v. Hennings*, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). A legislative enactment is a bill of attainder when it (1) specifies the affected persons, (2) inflicts punishment, and (3) lacks judicial trial. *Id.*, 129 Wn.2d at 527. The protection against bills of attainder safeguard against legislative exercise of the judicial function (i.e. trial by legislature). *State v. Manussier*, 129 Wn.2d 652, 666, 921 P.2d 473 (1996).

Appellant's claim that the 2005 and 2007 amendments to RCW 9.94A.537 constitute bills of attainder is simply incorrect. Here, appellant received no punishment without the right to a trial; rather, appellant only received an exceptional sentence after three separate juries found that the aggravating factors supporting such a sentence existed beyond a reasonable doubt. Appellant's perspective ignores the fact that it is the condition precedent of the imposition of an exceptional sentence that triggers the protections of the 2007 amendments to RCW 9.94A.537, not

the erroneous impaneling of a jury. Finally, a legislative act is not a bill of attainder simply because it compels an individual or group thereof to endure burdens that they dislike. *Id.*, 129 Wn.2d at 666.

Appellant contends that there is no rational basis for the 2007 amendments to RCW 9.94A.537 because the amendments do not apply to all cases remanded for resentencing. This argument is based upon a faulty premise that the 2007 legislation was enacted to address all cases remanded for a sentencing errors. Clearly, the 2007 amendments to RCW 9.94A.537 were enacted to address defendants who received an exceptional sentence based upon the trial court finding of the aggravating factors instead of a jury. The legislation actually provides greater protection for those individuals so situated because it requires that a jury of twelve people find the aggravating factor beyond a reasonable doubt as opposed to one trial court judge from making the same finding.

Here, defendant was on notice long before sentencing, before the trial court even accepted his guilty plea, that the State would be seeking an exceptional sentence based upon the alleged aggravating factors. At the time, the SRA permitted a trial court to impose exceptional sentences based upon aggravating or mitigating factors long before the *Blakely* decision was entered. The only aspect of the procedure that was impacted by *Blakely* was whether the trial court or the jury made the determination

of whether aggravating factors had been proved. Accordingly, appellant's position vis-à-vis receiving an exceptional sentence was not altered by the 2005 or 2007 amendments to the SRA.

D. RCW 9.94A.537 IS CONSTITUTIONAL AS AMENDED AND APPLIED BY THE TRIAL COURT IN THIS CASE.

Appellant makes several claims that the 2007 amendments to RCW 9.94A.537 violate various aspects of the constitutional protections afforded by both the federal and state constitutions. The appellant's claim of a due process violation has previously been addressed. Appellant also contends that the 2007 amendments to RCW 9.94A.537 violate his right to equal protection.

A statute is presumed to be constitutional, and the party challenging it bears the burden of proving that it is unconstitutional beyond a reasonable doubt. *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005), *overruled on other grounds by, Washington v. Recuenco*, 548 U.S. 212 (2006). The party challenging the classification must show that it is purely arbitrary and that the means employed by the statute are not rationally related to a legitimate State goal. *State v. Manussier*, 129 Wn.2d at 673. Disparity, or even the possibility thereof, in sentencing does not typically raise concerns for equal

protection. *State v. Handley*, 115 Wn.2d 275, 286-87, 796 P.2d 1266 (1990).

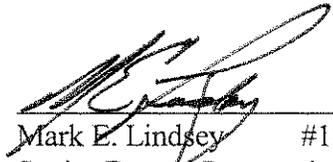
Here, appellant has not identified any particular class that he is similarly associated with, merely offered theoretical defendants of potentially like circumstance. This type of speculative group is insufficient to establish similarly situated defendants in a class as is necessary for an equal protection analysis. Hence, appellant's equal protection claim must fail. Assuming, *arguendo*, that this Court finds a protected class, the Legislature's decision to allow trial courts to impanel juries to resolve aggravating factors in all cases that come before the court for sentencing on remand, regardless of the date of the original trial or sentencing, is rationally related to the legitimate State objective of protecting the public. RCW 9.94A.010(4). Application of the 2007 amendments to RCW 9.94A.537 is not purely arbitrary. Equal protection provides equal application of law but does not provide complete equality among individuals or classes of individuals. *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). Moreover, the appellant has not established beyond a reasonable doubt that RCW 9.94A.537 is unconstitutional. Hence, there is not an equal protection or any other constitutional violation suffered upon appellant by the 2005 or 2007 amendments to RCW 9.94A.537.

V.

CONCLUSION

For the reasons stated, the sentence should be affirmed.

Respectfully submitted this 4TH day of November, 2011.



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