

FILED

JUN 23 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 29600-8-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

RAYMOND CARL HUGHES,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

1. The State failed to comply with the provisions of RCW 9.94A.537(1) and as a result the trial court improperly imposed an exceptional minimum sentence under RCW 9.94A.507.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Does the State's failure to detail the aggravating circumstances upon which it seeks an exceptional sentence in either the Information, a plea agreement, a proposed Judgment and Sentence, or any other document allow imposition of an exceptional minimum sentence under RCW 9.94A.507?

STATEMENT OF CASE

On December 2, 2010 Raymond Carl Hughes appeared in Court to be resentenced on a conviction of second degree child rape. (RP 4, ll. 1-18).

An Information was originally filed on April 23, 2004 charging him with one count of 2nd ° child rape and one count of 2nd ° rape. (CP 4).

Mr. Hughes appealed the original Judgment and Sentence entered on February 18, 2005. The Washington State Supreme Court eventually reversed one of his convictions and remanded the case by Mandate dated August 19, 2009. (CP 27; CP 40).

Mr. Hughes waived impaneling of a jury to address aggravating factors. He signed stipulated facts concerning the aggravators. (RP 5, ll. 1-13; CP 68; CP 70).

When Mr. Hughes entered his guilty plea on October 15, 2004, the Statement of Defendant on Plea of Guilty contained the following language: "State will request an exceptional sentence on both counts." (CP 3; CP 6).

The original Judgment and Sentence contained the following language: "The Prosecuting Attorney did...request an exceptional sentence...denied by the court based on procedural issue not factual insufficiency." (CP 29).

The trial court originally sentenced Mr. Hughes to one hundred and two months (102) in prison. Following resentencing the Court imposed a one hundred and eighty month (180) sentence based upon aggravating factors of abuse of trust, victim vulnerability and deliberate cruelty. (RP 14, l. 19 to RP 15, l. 11; RP 16, ll. 3-13; RP 17, l. 16 to RP 19, l. 3; RP 29, l. 25 to RP 30, l. 4; RP 51, l. 23 to RP 57, l. 14; CP 33; CP 76).

Following entry of Judgment and Sentence on December 2, 2010, Mr. Hughes filed a Notice of Appeal on January 6, 2011. (CP 72; CP 86).

SUMMARY OF ARGUMENT

The trial court imposed an erroneous exceptional minimum sentence under RCW 9.94A.507.

Mr. Hughes is entitled to be resentenced to a minimum sentence within the standard range.

ARGUMENT

Any facts justifying a sentence above an offense's standard sentencing range are functionally equivalent to elements of the crime. (Citations omitted.) Such facts must be found by a jury beyond a reasonable doubt. (Citation omitted.)

...To the extent that aggravating factors are "fact[s] ...essential to the punishment" when they support an upward departure, they must be part of the State's formal "accusation" or information. [*Blakely v. Washington*, 542 U.S. 296, 301-02 & n. 5 (quoting **1. JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE** § 87, at 55(2d ed. 1872)); *accord United States v. Booker*, 543 U.S. 220, 239, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)].

State v. Powell, 167 Wn. 2d 672, 689, 223 P. 3d 493(2009) (STEPHENS, J., concurring).

The Information in this case does not advise Mr. Hughes that the State will be seeking an exceptional sentence. The first mention of an exceptional sentence is in Mr. Hughes' guilty plea statement.

The trial court, at the original sentencing hearing, declined to impose an exceptional sentence due to procedural reasons.

When Mr. Hughes was sentenced on February 18, 2005, the statute covering his sentencing was former RCW 9.94A.712. The statute is currently recodified as RCW 9.94A.507.

RCW 9.94A.507 provides, in part:

- (1) An offender who is not a persistent offender shall be sentenced under this section if the offender:
 - (a) Is convicted of:
 - (i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion....

Mr. Hughes concedes that RCW 9.94A.507(1)(a)(i) is the correct sentencing statute.

It is another subsection of this statute that Mr. Hughes contests.

RCW 9.94A.507(3) provides, in part:

- (a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.
- (b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c) (i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

Mr. Hughes has an offender score of 0. The standard range sentence is 78 to 102 months. The maximum sentence is life.

RCW 9.94A.535 deals with departures from the Sentencing Guidelines. These can be either mitigating or aggravating circumstances.

Mr. Hughes waived a jury trial on the aggravating circumstances. He stipulated to the facts allowing him to be sentenced under RCW 9.94A.537.

RCW 9.94A.537(1) permits the imposition of an exceptional sentence *only* when the State has given notice, prior to trial, that it intends to seek a sentence above the standard sentencing range... .

State v. Womac, 160 Wn. 2d 643, 663, 160 P. 3d 40 (2007).

Mr. Hughes contends that the State failed to comply with the statutory requirements.

No notice was given in the Information. The prosecutor's recommendation, as set out in the Guilty Plea Statement, does not indicate the basis for seeking an exceptional sentence.

The original Judgment and Sentence, under paragraph 2.4, does not set forth any of the facts upon which the State intended to seek an exceptional sentence.

RCW 9.94A.537(1) states:

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.**

(Emphasis supplied).

Mr. Hughes concedes that *Blakely* does not prohibit judicial fact-finding to support an exceptional minimum sentence under RCW 9.94A.507 so long as that sentence does not exceed the maximum sentence imposed. *See: State v. Clarke*, 156 Wn. 2d 880, 894, 134 P. 3d 188 (2006).

The Washington Supreme Court addressed the issue of an exceptional minimum sentence in its prior decision. However, it did not fully explain the trial court's sentencing authority if the State fails to comply with RCW 9.94A.537(1). *See: State v. Hughes*, 166 Wn. 2d 675, 687-88, 212 P. 3d 558 (2009).

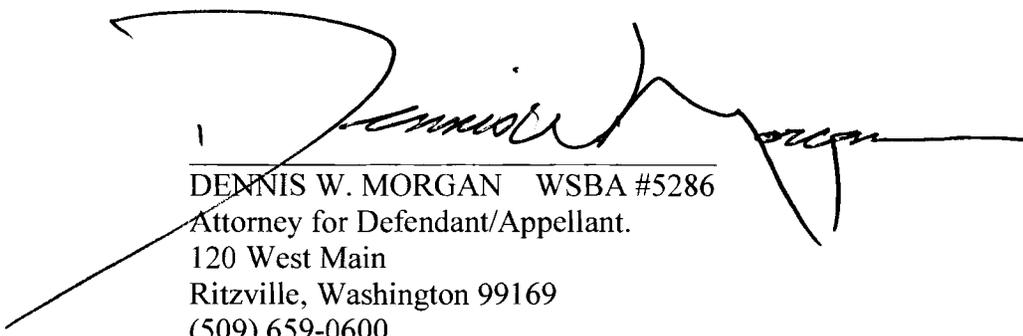
CONCLUSION

The State failed to give appropriate notice of an exceptional sentence as required by RCW 9.94A.537(1). Mr. Hughes respectfully re-

quests that his case be remanded to the trial court with directions to impose a standard range minimum sentence.

DATED this 22^d day of June, 2011.

Respectfully submitted,



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