

FILED
2020 OCT 14 11:41 AM
COURT OF APPEALS
STATE OF WASHINGTON
SPokane, Washington

29600-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RAYMOND C. HUGHES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

FILED
JUL 11 2011
CLERK OF COURTS
STATE OF WASHINGTON
SPOKANE COUNTY

29600-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RAYMOND C. HUGHES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENT OF ERROR.....1

ISSUE PRESENTED.....1

STATEMENT OF THE CASE.....1

ARGUMENT.....3

 A. THE TRIAL COURT PROPERLY IMPOSED AN
 EXCEPTIONAL MINIMUM SENTENCE BASED
 UPON THE STIPULATED AGGRAVATING
 CIRCUMSTANCES.....3

 B. THE TRIAL COURT DID NOT ABUSE ITS
 DISCRETION IN IMPOSING AN EXCEPTIONAL
 SENTENCE IN THIS CASE.....8

CONCLUSION.....10

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE EX REL. CARROLL V. JUNKER, 79 Wn.2d 12,
482 P.2d 775 (1971)..... 9

STATE V. ARMSTRONG, 106 Wn.2d 547,
723 P.2d 1111 (1986)..... 9

STATE V. HUGHES, 166 Wn.2d 675,
212 P.3d 558 (2009)..... 3, 4

STATE V. NELSON, 108 Wn.2d 491,
740 P.2d 835 (1987)..... 9

STATE V. NORDBY, 106 Wn.2d 514,
723 P.2d 1117 (1986)..... 9

STATE V. OXBORROW, 106 Wn.2d 525,
723 P.2d 1123 (1986)..... 9

STATE V. POWELL, 167 Wn.2d 672,
223 P.3d 493 (2009)..... 5

STATE V. WOMAC, 160 Wn.2d 643,
169 P.3d 40 (2007)..... 5, 6

STATUTES

RCW 9.94A.535..... 4, 9

RCW 9.94A.535(3)(a) 10

RCW 9.94A.535(3)(b) 10

RCW 9.94A.535(3)(n) 10

RCW 9.94A.535(3)(p) 10

RCW 9.94A.537	9
RCW 9.94A.537(1).....	1, 5, 7
RCW 9.94A.585(4).....	4, 9

I.

APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court improperly imposed an exceptional minimum sentence because the State failed to comply with the notice requirements of RCW 9.94A.537(1).

II.

ISSUE PRESENTED

A. Did the trial court err by imposing an exceptional minimum sentence above the standard sentencing range based upon stipulated aggravating circumstances?

III.

STATEMENT OF THE CASE

Defendant Raymond Hughes was charged in the Spokane County Superior Court with one count of second degree child rape and one count of second degree rape. CP 1-2. Defendant had been hired to care for a severely disabled, bedridden, physically and mentally incapacitated twelve-year-old girl. RP 14-19; CP 3-13. The charges arose out of his forcing sexual intercourse upon her despite her condition. RP 17-18; CP 3-13.

Defendant sought to dismiss one of the counts prior to trial on the basis of double jeopardy. CP 88-90. The trial court denied the motion. CP 92. Defendant then pled guilty as charged *while acknowledging that the State would be seeking an exceptional sentence*. CP 3-13. The matter was set over for sentencing. CP 91, 93. The State filed memoranda in support of an exceptional sentence. CP 94-112. The defense responded by arguing that the *Blakely* decision precluded an exceptional sentence. CP 113-123.

The parties argued the applicability of the *Blakely* decision to the sentencing court in this case as well as whether a court could convene a jury. CP 94-112, 113-123. The trial court ruled that it lacked the statutory authority to impanel a jury and that no exceptional sentence could therefore be considered. CP 125-126, 27-39.

Sentencing occurred three weeks later. CP 27-39. The State presented several exhibits, including a “day in the life” video, concerning the victim and her condition (Exhibits 1-6). CP 125-126. Several people addressed the court concerning the impact of the case. RP 34-41.

The trial court declined to reconsider its previous ruling about the exceptional sentence. CP 124. The court imposed a life sentence and set the minimum term at 102 months, a figure that reflected the top end of the range. CP 27-39. The State appealed and the Supreme Court issued its

opinion in *State v. Hughes*, 166 Wn.2d 675, 212 P.3d 558 (2009). CP 40-59. The Supreme Court remanded the case to the trial court for vacation of one of the counts and resentencing on the other, ruling that the trial court could consider the State's request for an exceptional minimum indeterminate sentence. CP 40-59.

The trial court resentenced defendant on December 2, 2010, and imposed an exceptional minimum indeterminate sentence as authorized by the Supreme Court. CP 74-85, RP 1-61. Defendant promptly appealed the sentence.

IV.

ARGUMENT

A. THE TRIAL COURT PROPERLY IMPOSED AN EXCEPTIONAL MINIMUM SENTENCE BASED UPON THE STIPULATED AGGRAVATING CIRCUMSTANCES.

The defendant contends that the trial court lacked the authority to impose an exceptional minimum sentence because the State failed to notify him that it would seek same. Initially, it is provident to recall that the Sentencing Reform Act of 1981 ("SRA") specifically empowers trial courts to impose a sentence outside the standard sentencing range within

certain parameters regardless of the parties' positions. The SRA provides, in pertinent part:

The court may impose a sentence outside the standard sentence range for an offense if it finds ... there are substantial and compelling reasons justifying an exceptional sentence. ... If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review *only as provided for in RCW 9.94A.585(4)*.... (emphasis added)

RCW 9.94A.535.

RCW 9.94A.585(4) provides, in pertinent part:

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.

RCW 9.94A.585(4).

Here, the defendant was before the trial court for a mandated resentencing. The mandate was based upon the Supreme Court's holdings that: (1) defendant's convictions for two counts of rape resulting from one act of sexual intercourse constituted double jeopardy meaning that defendant could only be sentenced for one crime; and (2) the trial court had the statutory authority to consider the State's request for the imposition of an exceptional minimum indeterminate sentence upon remand. *State v. Hughes, supra*. The parties agreed that the State would

dismiss the second rape count and defendant would be sentenced on the second degree rape of a child conviction. At the resentencing, defendant formally waived his right to have a jury determine whether aggravating circumstances existed beyond a reasonable doubt. CP 68-69. Thereafter, defendant entered a stipulation regarding the evidence to be considered by the trial court in determining whether the aggravating circumstances existed beyond a reasonable doubt. CP 70-71.

The trial court reviewed the stipulated evidence and found it sufficient to establish beyond a reasonable doubt the aggravating circumstances at issue. The trial court then imposed an exceptional minimum sentence based upon those aggravating circumstances.

The defendant contends that the trial court was not legally situated to impose an exceptional minimum sentence because the State failed to properly notify defendant that it would seek an exceptional sentence pursuant to RCW 9.94A.537(1). Defendant bases this argument on the decision in *State v. Womac*, 160 Wn.2d 643, 169 P.3d 40 (2007) and the concurring opinion of Justice Stephens in *State v. Powell*, 167 Wn.2d 672, 223 P.3d 493 (2009). In *Womac*, the court interpreted RCW 9.94A.537(1) as mandating that the State include in the formal charging document notice that it would seek an exceptional sentence upon conviction. The defendant supports the imposition of the *Womac* court's interpretation of

RCW 9.94A.537(1) by Justice Stephens's concurring opinion in *Powell*. Therein, Justice Stephens opined that aggravating factors that are used to justify an exceptional sentence above the standard range must be part of the State's formal charge.

Respectfully, the defendant's reliance upon *Womac* is misplaced because that decision addressed how to proceed when the determination of whether aggravating factors exist is left to a jury for resolution. Here, the defendant specifically waived his right to have a jury determine whether the aggravating circumstances existed beyond a reasonable doubt. Moreover, defendant's stipulation to the admissibility of the evidence that supported the aggravating factors prior to sentencing weakens this position. Returning to the entry of defendant's guilty plea, the statement of defendant on plea of guilty reflects that defendant knew prior to trial the State's intention to seek an exceptional sentence upon conviction. CP 3-13. In light thereof, defendant's contention rings a little hollow since a guilty plea typically is a resolution short of trial and it is at trial that the existence of aggravating circumstances is decided.

In *Powell*, the court specifically rejected the argument defendant proffers herein. The court held that:

RCW 9.94A.537(1)...merely states that the State 'may' give notice that it is seeking a sentence above the standard

sentence range prior to trial or entry of a guilty plea. The fact that Powell was not given notice prior to trial of the State's intention to seek an exceptional sentence does not, therefore, run afoul of the plain language of the statute.

Id., 167 at 679. The court observed that the notice provision was intended by the Legislature to address the issue raised by *Blakely* with regard to defendants who had not yet gone to trial or plead guilty as of the effective date of the amendment in 2005. *Id.* at 679. The court concluded that the notice provision of RCW 9.94A.537(1) had no application to Powell because (1) the statute does not require the State to give notice of its intent to seek an exceptional sentence; (2) Powell was tried and convicted in 2002, three years prior to the 2005 enactment; and (3) the notice provision does not apply retroactively. *Id.* at 680.

Here, defendant's claim of a lack of notice of the State's intention to seek an exceptional minimum sentence fails because his guilty plea was entered prior to the 2005 enactment and the notice provision has been held to not apply retroactively. Additionally, the plain language of the statute provides that the act of providing notice is a discretionary rather than mandatory act by the State. Finally, defendant's argument fails because the Supreme Court specifically addressed the issue in its opinion that remanded this case back for a resentencing.

We conclude that [Hughes] is not subject to the 2005 amendments to RCW 9.94A.535 because his convictions

were entered in 2004 before those amendments became effective. *See State v. Pillatos*, 159 Wash.2d 459, 470, 150 P.3d 1130 (2007)...We therefore hold that the trial court has the authority to consider the State's request for an exceptional minimum indeterminate sentence.

As noted, defendant's claim of a lack of notice that the State would seek an exceptional minimum sentence is negated by defendant's Statement on Plea of Guilty. CP 3-13. Until such time as the trial court accepted defendant's guilty plea as being knowingly, voluntarily, and intelligently entered, the case was still in a *pre-trial* posture. After the guilty plea was entered, counsel filed a sentencing brief and proffered argument opposing the legality of the trial court entertaining the imposition of an exceptional sentence. CP 60-67.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING AN EXCEPTIONAL SENTENCE IN THIS CASE.

Defendant contends that the law and the record do not support the imposition of an exceptional sentence in this case.

As noted, the standards of review for examining an exceptional sentence are clearly established. An exceptional sentence may be challenged on any or all of three bases: (1) the reasons given for the exceptional sentence are not supported by the record; (2) the reasons given do not justify an exceptional sentence; (3) the sentence is clearly

too lenient or too excessive. RCW 9.94A.585(4); *State v. Nordby*, 106 Wn.2d 514, 517-518, 723 P.2d 1117 (1986).

Under *Nordby*, a trial court's factual findings will be upheld unless they are "clearly erroneous." *Id.* The legal sufficiency of the reasons for the exceptional sentence, the second *Nordby* factor, is reviewed as a "matter of law." *Id.* at 518. Whether a sentence is too lenient or excessive is reviewed for abuse of discretion. *State v. Oxborrow*, 106 Wn.2d 525, 530-531, 723 P.2d 1123 (1986); *State v. Armstrong*, 106 Wn.2d 547, 551-552, 723 P.2d 1111 (1986). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The test also is sometimes described as: whether any reasonable judge would enter the same ruling under the circumstances. *State v. Nelson*, 108 Wn.2d 491, 504-505, 740 P.2d 835 (1987).

Clearly, the Legislature intended to permit the trial court to impose an exceptional sentence on proper proof of such facts and a judicial determination that in the specific case before it these facts are substantial and compelling reasons justifying the imposition of an exceptional sentence. RCW 9.94A.535 and 9.94A.537. There is no question here that defendant was on notice that the State would seek an exceptional minimum sentence herein. There also is no question that the trial judge had a valid

basis to impose an exceptional minimum sentence pursuant to RCW 9.94A.535(3)(a), (b), (n), and (p). The evidence admitted before the trial court by defendant's stipulation was more than sufficient to establish each of the identified aggravating circumstances. There was no abuse of discretion. The sentence was not excessive.

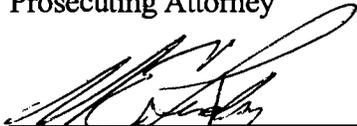
V.

CONCLUSION

For the reasons stated, the sentence should be affirmed.

Respectfully submitted this 18th day of July, 2011.

STEVEN J. TUCKER
Prosecuting Attorney



Mark E. Lindsey #18272
Senior Deputy Prosecuting Attorney
Attorney for Respondent