

FILED
DECEMBER 31, 2012
Court of Appeals
Division III
State of Washington

NO. 31061-2-III

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

STATE OF WASHINGTON, Respondent,

v.

JONATHON VILLEGAS, Appellant.

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

The Honorable Robert Swisher and the Honorable Craig Matheson,
Judges

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The exceptional sentence is invalid.
2. The sentencing court erred by finding without evidence that Villegas had stipulated to the gang aggravating factor.
3. The sentencing court failed to make the required factual findings in support of an exceptional sentence beyond a reasonable doubt.
4. The sentencing court failed to make a finding that “the exceptional sentence [is] consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act,” as required by RCW 9.94A.535(2).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The exceptional sentence must be reversed because (1) the defendant did not stipulate that the crime was for a gang purpose; (2) the defendant did not stipulate to the exceptional sentence; (3) the jury did not find the facts that supported the exceptional factor; and (4) the court did not

make any factual findings to support the exceptional sentence.

B. STATEMENT OF THE CASE

On June 8, 2011, 17-year-old Jonathon Villegas was charged with drive-by shooting and first degree assault. CP 1-3. The State alleged Villegas was armed with a firearm during the assault and committed the crime for a gang-related purpose. CP 2.

The parties reached a plea agreement and on June 14, the State filed an amended information charging Villegas with second degree assault, with a firearm enhancement and an allegation of an aggravating factor, namely that the crime was committed for a gang purpose. CP 10.

The Statement of Defendant on Plea of Guilty reiterates the charge and allegations from the amended information. CP 12. It states that the defendant gives up his right to a jury trial and the right to appeal a guilty verdict. CP 12-13. The standard range for the charge, with an offender score of 0, is listed as 3-9 months, with 36 additional months for the firearm enhancement. CP 13. The prosecutor's agreement was: "The prosecuting attorney will make

the following recommendation to the judge: 7 years; however defendant is free to argue within the standard range.” CP 15.

The agreement further states the circumstances under which a judge could give the defendant an exceptional sentence above the standard range:

(ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.

(iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.

(iii) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

CP 15. This statement is followed by: “If the court imposes an exceptional sentence after a hearing, either the State or I can appeal the sentence.” CP 15.

The defendant’s factual statement in support of his plea is: “On May 20, 2011, I did intentionally shoot Jaime Tovar in the leg in

Benton County.” CP 19. The box allowing the court to review the police reports or statement of probable cause to establish a factual basis for the plea is not checked. CP 19.

The trial court accepted the plea, finding that: “it was knowingly, intelligently and voluntarily made with an understanding of the charges and the consequences of the plea, and that there’s a factual basis for it.” 6/14/12 RP 9.

At the sentencing hearing, before a different judge, the State called two witnesses in support of its recommendation for an exceptional sentence. 7/12/12 RP 2. Villegas’ probation officer, Shawn Guajardo, testified that Villegas was in a gang during high school. 7/12/12 RP 5. Detective Daniel Long stated that he believed the assault was gang-related, primarily because the people involved were affiliated with gangs. 7/12/12 RP 13-14. Long testified there had been an earlier altercation between a friend of Villegas’, Juan Ramirez, a known gang member, and the victim of this shooting, Jaime Tovar, a member of a rival gang. 7/12/12 RP 14. Villegas was not present, but Ramirez texted Villegas him several times after the incident. 7/12/12 RP 19. Many the text messages involved Villegas’ girlfriend, Myra, being at the club. 7/12/12 RP 19. Ramirez also asked Villegas in the messages to

come and bring a gun. 7/12/12 RP 15. In addition, some witnesses told the Detective that Villegas had shouted his gang's name before the shooting. 7/12/12 RP 15. Other witnesses reported that the shooting was all over a dispute involving Myra, rather than the gang. 7/12/12 RP 19, 21. Directly after this shooting, Tovar and some of his friends committed a drive-by shooting on the home of other gang members in Ramirez's gang. 7/12/12 RP 17.

Villegas called no witnesses. His attorney argued that the crime was not gang-related, but rather was a dispute over a girl. 7/12/12 RP 23, 28.

The sentencing judge noted that Villegas had not stipulated to the aggravating factor in the plea agreement. 7/12/12 RP 27. Nevertheless, the judge ruled that because Villegas pled guilty to the amended information, which included the gang aggravator allegation, "it's not really for me to decide whether or not he should get a gang enhancement. It's only a matter of how much that ought to be, if any." 7/12/12 RP 35. The judge imposed the exceptional sentence recommended by the State—84 months. 7/12/12 RP 36. He stated that the term was "based upon the agreed aggravating factors that were addressed at sentencing—or at the change of

plea, and, of course, reinforced here today by testimony.” 7/12/12

RP 37.

This appeal timely follows. CP 31-32.

C. ARGUMENT

1. THE EXCEPTIONAL SENTENCE MUST BE REVERSED.

- a. A court cannot impose an exceptional sentence unless either the defendant stipulates to the facts in support of the aggravating factor, or the defendant waives his right to have the jury determine the facts and the court finds that the facts support the aggravating factor beyond a reasonable doubt.

A sentencing court may depart from the standard range if a jury finds “[t]he defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.” RCW 9.94A.535(3)(aa). The statutory presumption is that this aggravating circumstance will be presented to and found by a jury. RCW 9.94A.535(3); RCW 9.94A.537. In pertinent part, RCW 9.94A.535(2) provides that the trial court may impose an aggravated exceptional sentence without a jury finding only upon

stipulation, or where it is based on criminal history that has led to an exceptionally high offender score.

In addition to the statutory right to jury fact-finding, the Sixth Amendment guarantees the right to a jury finding of any fact not encompassed in the verdict or admitted by the defendant. Blakely v. Washington, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); State v. Malicoat, 126 Wn. App. 612, 106 P.3d 813, rev. denied 155 Wn.2d 1013 (2005). Even where pleading guilty, the defendant retains the right to a jury at sentencing absent express stipulation or waiver. Blakely, 542 U.S. at 310.

b. Villegas did not stipulate to the facts in support of the gang-related aggravating factor.

Villegas never knowingly stipulated to the facts in support of the gang aggravating factor. The plea agreement does not contain any stipulation to the aggravating factor or the exceptional sentence.¹ To the contrary, it expressly reserves Villegas' right to argue for a standard range sentence. CP 15. Moreover, the Villegas' statement refers only to the assault and contains no facts suggesting the crime was gang-related. CP 19. The agreement

¹ By contrast, the agreement contains an express stipulation to the firearm enhancement. CP 18.

assures Villegas that he cannot be sentenced to an exceptional sentence without a stipulation or a jury finding of facts in support of an aggravating factor. CP 15. Finally, Villegas' right to appeal an exceptional sentence is preserved. CP 15.

At the plea hearing, the prosecutor expressed his concern that the plea agreement did not clearly explain the effect of the alleged gang aggravator:

[Prosecutor]: Your Honor, [Defense Attorney] and I talked about this. The guilty plea, I think, is not very well-drafted in this regard. But very clear is his sentencing range would be three to nine months for the assault two and a mandatory 36 months for the firearm allegation.

However, the fact that he's pleading guilty to the aggravating gang circumstance means the prosecutor could ask the Court and the Court can impose a sentence above nine months for the assault in the second degree, and it will be the State's intent, in fact, to ask for a total sentence of seven years.

But I don't think the guilty plea—[Defense Attorney] and I both looked at it. We don't think it explains the effect of the aggravating circumstance very well, so we wanted to make sure we discussed that on the record.

[Defense Attorney]: And I had fully discussed that with him, so he understands that that's the recommendation. They can go above with our plea to the aggravating circumstances.

The Court: Okay. So, [Defense Attorney], [Prosecutor] recited what your understanding is; is that correct?

[Defense Attorney]: Yes.

The Court: And you've discussed that, and that's your client's understanding, also?

[Defense Attorney]: Yes.

[Prosecutor]: I think the client has to indicate an understanding.

The Court: Is that true, Mr. Villegas?

The Defendant: Yes, Your Honor.

[The Court]: The prosecuting attorney is going to recommend a total of seven years in prison; however, at sentencing, the defendant is free to argue for a sentence within the standard range. And then there would be standard fines and costs.

Is that your understanding, Mr. Villegas?

[The Defendant]: Yes, Your Honor.

[The Court]: Okay. So that that's your understanding of what the prosecuting attorney is recommending, seven years in prison?

[The Defendant]: Yes, Your Honor.

...

[The Court]: Okay. And you understand the sentencing judge doesn't have to accept the recommendation of the prosecuting attorney or your attorney's recommendations, but, in fact, could go above the seven years, I think. Do you understand that?

[The Defendant]: Yes, Your Honor.

6/14/12 RP 4-6.

After the Court read Villegas' factual statement in the plea agreement, the prosecutor recited the facts he believed established the crime was gang-related. 6/14/12 RP 7-8. Upon prompting of the Court, Villegas acknowledged that the prosecutor's recitation correctly related to his guilty plea. 6/14/12 RP 8. Defense counsel, however, immediately clarified that Villegas did not agree with the prosecutor's statement of facts in support of the aggravating factor. Counsel said she would save her argument for sentencing. 6/14/12 RP 8. The court then prompted:

[The Court]: Okay. But for purposes of the plea, you're accepting the facts that [the Prosecutor] has recited; is that correct, Mr. Villegas?

[The Defendant]: Yes, Your Honor.

6/14/12 RP 8.

It is clear from these discussions that Villegas understood that the prosecutor believed an exceptional is justified and would ask for one. There is no indication, either explicit or implicit, that Villegas was waiving his right to have the State prove that the crime was gang-related beyond a reasonable doubt.

Blakely requires a clear and unambiguous stipulation to facts in support of an exceptional sentence. Illustrative of the situation here is State v. Suleiman, 158 Wn.2d 280, 292-93, 143 P.3d 795

(2006). In his plea agreement, Suleiman agreed to “stipulate to real and material facts as written in the certification for determination of probable cause and the prosecutor’s summary *without stipulating that those facts are a legal basis for an exceptional sentence.*” Italics added, Id., at 285. Suleiman did not waive his right to appeal an exceptional sentence. Id., at 285-86. The sentencing court then relied on presentence reports and briefing from both parties, a slide show on the victim’s life, letters sent on behalf of Suleiman and the victims, and arguments of counsel to impose an exceptional sentence based on a particularly vulnerable victim. Id., at 286-87. The Supreme Court reversed the exceptional sentence. Id., at 293. The court found a proper stipulation required not only agreement regarding the underlying facts, but also the required bases for particular vulnerability; i.e., that Suleiman knew or should have known the victim was particularly vulnerable and that this was a substantial factor in the crime. Id., at 292-93. Without such a stipulation, the Court held, the sentencing court engaged in prohibited fact-finding. Id., at 292-93.

As in Suleiman, Villegas’s did not not stipulate to the exceptional factor, nor to the specific factual findings necessary to support this factor, such as that the crime was committed “with the

intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.” RCW 9.94A.535(3)(aa). The colloquy during the plea hearing does not change this fatal flaw. When defense counsel disputed the prosecutor’s factual recitation, the court’s question to Villegas whether he agreed that the prosecutor had stated the facts related to the plea does not inform him that he is requesting a legal stipulation. 6/14/12 RP 8-9. No-one used the word stipulation, nor informs the defendant that the court is asking if he is agreeing to the gang aggravator, when it is very clear the defense does not agree with the State’s recommendation of an exceptional sentence.

In stark contrast are other cases in which exceptional sentences have been upheld based on the Blakely stipulation exception. For example, in State v. Ermels, the defendant’s written statement, attached to the plea agreement, expressly stated:

I hereby knowingly, voluntarily, and intelligently agree and stipulate that there is a basis for an exceptional sentence upward . . . [and]

I further agree that there is sufficient evidence for the court to impose an exceptional sentence upward based on the following aggravating factor . . . the

victim was particularly vulnerable because he was lying on the ground at the time I assaulted him . . . [and]

My stipulation that there is basis for an exceptional sentence as part of a plea agreement is a substantial compelling reason that justifies such a sentence . . . [and]

I knowingly, voluntarily, and intelligently waive my right to appeal the basis for an propriety of the imposition of an exceptional sentence upward, but reserve the right to appeal the length of the sentence imposed.

156 Wn.2d 528, 533-34, 131 P.3d 299 (2006). In other words, Ermels did what Villegas did not—he stipulated to grounds for an exceptional sentence, stipulated to the facts in support of an exceptional sentence, and waived his right to appeal the basis for the imposition of an exceptional sentence.

Likewise, in State v. Poston, the defendant expressly stipulated to the exceptional sentence within the plea agreement. 138 Wn. App. 898, 905, 158 P.3d 1286 (2007). Poston’s plea agreement contained the following statement: “At sentencing, the state will recommend that [the defendant] be ordered to serve 180 months confinement . . . This is an agreed recommendation.” Id., at 905. Although Poston had not stipulated to the facts in support of the exceptional sentence, the Court held that his stipulation to the exceptional sentence itself was expressly contained within

Poston's written plea agreement and that his stipulation to a joint sentence recommendation validated the court's imposition of an exceptional sentence. *Id.*, at 909-10. Villegas, on the other hand, did not stipulate to the exceptional sentence. Villegas' plea agreement preserved his right to argue the exceptional sentence was not justified and to appeal an exceptional sentence. CP 15.

The State may argue that Villegas stipulated to the exceptional sentence when, at the court's prompting, he "accepted" the prosecutor's recitation of facts "for purposes of the plea". This Court should reject such a claim. Villegas was responding to a question that was unclear. The sentencing judge did not ask for a stipulation, nor did the judge or anyone else warn Villegas that answering "yes" meant he is agreed there was a basis for an exceptional sentence. The Court's exchange with Villegas is ambiguous at best, especially when defense counsel had just told the court that she disputed the prosecutor's factual statement and would argue against it at sentencing. 6/14/12 RP 8.

In Ermels and Poston, the accepted stipulations were based on very clear written statements within the plea agreement itself, not through ambiguous questioning during the plea hearing.

Villegas' agreement contained no such clear stipulation. Nor was the court's exchange with Villegas a clear, suitable substitute.

- c. Villegas did not knowingly waive his right to a jury determination of facts in support of the aggravating factor.

The plea agreement informed Villegas that an exceptional sentence cannot be given unless he and the State have stipulated to the facts, or they are determined by a jury beyond a reasonable doubt, which is an accurate statement of the law. CP 15. The plea agreement does not contain a stipulation to the facts, nor does it contain a waiver of the right to have a jury determine the facts in support of an exceptional sentence.

There is a general waiver of the right to trial by jury contained in the first section of the plea, but this appears to refer to the crime, not the exceptional sentence. CP 12-13. The agreement goes on to address separately the defendant's stipulation to the firearm enhancement, CP 18, and the right to have a jury trial on the aggravating factor, CP 15, which supports the reading that the general waiver to a jury does not include the aggravating factor. Blakely requires either a waiver of jury trial on the exceptional sentence factor or a clear stipulation. Suleiman,

158 Wn.2d at 292. Villegas did not waive his right to jury trial on the aggravating factor, which invalidates his exceptional sentence.

d. The sentencing judge failed to make factual findings in support of the exceptional sentence.

Even if Villegas is deemed to have waived his right to jury fact-finding, the sentencing judge erroneously concluded that Villegas stipulated to the facts and failed to make factual findings in support of the aggravating factor beyond a reasonable doubt. The judge also failed to find that “the exceptional sentence [is] consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act,” as required by RCW 9.94A.535(2).

The confusion over the effect of the plea on the exceptional factor allegation continued to the sentencing hearing. The sentencing judge was not the same judge who accepted the plea. 7/12/12 RP. The prosecutor stated his understanding that the defendant “pled guilty to a gang allegation.” 7/12/12 RP 2. Villegas’ counsel stated that she understood the State had to prove the gang factor: “I think what they would need to put forth is I assume that they were going to do, how it was related to this particular crime, because that’s what the elements would need to

show in order for the enhancement.” 7/12/12 RP 6. Counsel disputed that the assault was gang-related. 7/12/12 23, 28. The State then presented two witnesses to support its allegation.

It is of note that the sentencing judge correctly found that Villegas had not stipulated to the aggravating factor in the plea agreement. 7/12/12 RP 27. Yet, following argument, the court concluded that because Villegas pled guilty to the amended information, which included the gang aggravator allegation, “it’s not really for me to decide whether or not he should get a gang enhancement. It’s only a matter of how much that ought to be, if any.” 7/12/12 RP 35. The court imposed an exceptional term nearly five times the standard range, “based upon the agreed aggravating factors that were addressed at sentencing—or at the change of plea, and, of course, reinforced here today by the testimony.” 7/12/12 RP 37. The court did not find beyond a reasonable doubt that the gang aggravator had been proved, nor did he find that an exceptional sentence was consistent with the provisions of the sentencing reform act. These findings are required by the sentencing reform act. RCW 9.94A.535(3); RCW 9.94A.537.

The court's failure to make such findings invalidates the exceptional sentence.

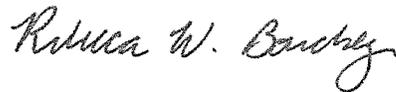
D. CONCLUSION

The exceptional sentence must be reversed because Villegas did not stipulate to the facts in support of the aggravating factor, did not stipulate to an exceptional sentence, and did not waive his right to a jury fact-finding, and because the court did not make the required factual findings to support an exceptional sentence.

DATED: December 31, 2012

Respectfully submitted,

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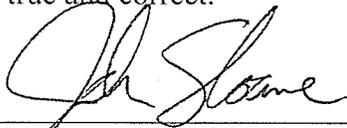
Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

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Containing a copy of the brief of appellant, in State v. Jonathon Villegas,
Cause No. 31061-2-III, in the Court of Appeals, Division III, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



John Sloane
Done in Seattle, Washington

12-31-12
Date