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THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE PERSONAL
RESTRAINT OF:

COREY BEITO, JR.

NO. 56056-5

PETITIONER'S REPLY

FILED
COURT OF APPEALS
STATE OF WASHINGTON
DIV. #1
2005 JUL 25 PM 4:43

A. ARGUMENT

*MR. BEITO IS SUFFERING UNLAWFUL
RESTRAINT AND IS ENTITLED TO RELIEF BY
WAY OF A PERSONAL RESTRAINT PETITION*

Petitioner Corey Beito contends the exceptional sentence imposed by the trial court in this case violates the Fifth, Sixth, and Fourteenth Amendments. He contends the judicial determination of the relevant aggravating factors deprived him of his the Sixth Amendment right to a jury determination of the facts of conviction. Blakely v. Washington, __ U.S. __ 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). As with any other element of a crime, the Fourteenth Amendment Due Process Clause requires these facts be proven beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Ring v. Arizona, 536 U.S. 584, 604, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Mr. Beito contends his conviction violates the Sixth and Fourteenth

Amendment as he was not advised of and thus did not validly waive his rights to a jury determination of the these facts beyond a reasonable doubt. Further, he contends his rights under Article I, §§ 21, 22 to a jury determination beyond a reasonable doubt were also violated.

Additionally, Mr. Beito contends the imposition of an exceptional sentence based upon a judicial finding of fact after his guilty to plea to an offense is a judgment notwithstanding the verdict and thus violates the Double Jeopardy provisions of the Fifth and Fourteenth Amendments. Therefore, Mr. Beito's restraint is unlawful pursuant to RAP 16.4(c)(2).

The State's response is predicated on its view that even after Apprendi and Blakely the aggravating factors employed by the trial courts are not elements but merely "sentencing factors." Such a position may only be maintained by ignoring the plain holdings of several United States Supreme Court decisions. Beginning with Apprendi the Court has repeatedly stated that the term or title the state wishes to attach to a given fact is wholly irrelevant. The Court has said "[t]he relevant inquiry is one not of form, but of effect - - does the required finding expose the defendant to greater

punishment than that authorized by the jury's guilty verdict?"

Apprendi, 530 U.S. at 494. In simpler terms:

The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

Ring, 122 S.Ct. at 2444 (Scalia concurring).

But the Court has gone further to explain that the facts at issue must be treated in every respect as elements of the offense.

In Apprendi the court distinguished the term “element” from the term “sentencing factor” noting that the former refers to facts which increase the maximum penalty for an offense while the later refers to facts which set the penalty with the existing range. Apprendi, 530 U.S. at 494. The Court further explained this saying

Apprendi and McMillan, mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are **the elements** of the crime for purposes of the constitutional analysis.

Harris v. United States, 536 U.S. 545, 557-58, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2003) (Emphasis added); See also, Ring, 536 U.S. at 609 (aggravating circumstances that make a defendant eligible for increased punishment “operates as the functional equivalent of an element of a greater offense”), Sattazahn v. Pennsylvania, 537 U.S.

101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) (plurality decision)(“we can think of no principled reason to distinguish, between what constitutes an offense for the purposes of the Sixth Amendment’s jury-trial guarantee and constitutes and ‘offence’ for purposes of the Fifth Amendment’s Double Jeopardy Clause”). Thus it is plain that the facts used to impose an exceptional sentence in Mr. Beito’s case are elements, and must be analyzed as such.

Once one acknowledges that whether they are called “aggravating factors” or “sentencing factors,” facts which increase the maximum penalty for an offense must be treated in every way as an “element,” it readily follows that Mr. Beito’s petition must be granted

a. Mr. Beito’s real facts stipulation is wholly irrelevant to the legality of the judgment imposed. The State maintains that by agreeing to allow the trial court to consider the facts alleged in the police reports, autopsy reports and witness statements, he has somehow (1) waived the present challenge, or (2) limited his remedy to withdrawal of the plea agreement. Response at 4-7. The State is incorrect in both regards.

First, it is important to note that Mr. Beito is in no way challenging his real facts agreement. By that agreement the trial court was permitted to consider those fact for any lawful purposes. However, that agreement did not permit the court to put the facts to the unlawful purpose of imposing a judgment which violated the Fifth, Sixth and Fourteenth Amendments. In fact, on remand the court could again rely on the real facts agreement for any number of purposes, such as imposing a sentence at the top of the standard range, imposing conditions of community placement, setting restitution or any number of other legitimate sentencing uses. The court cannot rely on the agreement to impose an exceptional sentence.

The State's waiver argument suffers one critical flaw, while Mr. Beito may have stipulated to the court's consideration of the facts, he was never advised that his doing so would be a waiver of his rights to a jury trial and proof beyond a reasonable doubt. A waiver of a constitutional right is valid only where the record establishes the defendant was aware of the nature of the rights at stake and voluntarily waived them. Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 82 L.Ed 1461 (1938). Before it could be considered a valid of his right to proof beyond a reasonable

doubt to a jury, Mr. Beito's real facts agreement would have to advise him that he had such rights. It does not do so. As such, the agreement to real facts is not a waiver of Mr. Beito's constitutional rights.

The State next argues that if the stipulation to real facts is not a valid waiver of Mr. Beito's rights, his only remedy is to withdraw his plea. Response at 6. The State baldly claims this stipulation was an integral part of the agreement of the parties, yet cannot cite a single portion of the record, much less the plea agreement itself, which actually supports this claim. The State claims Mr. Beito's only remedy is to withdraw his plea. *Id.* In doing so the State fundamentally misstates the issues in this case. The State wrongly claims Mr. Beito "wants this court to enforce the portion of the plea agreement that he benefits from (reduction of the charge . . .) but relieve him from the portion of the plea agreement that disadvantages him (stipulation to facts supporting exceptional sentence)."

First, Mr. Beito does not in any way challenge the validity of the real facts agreement, he merely contends it does not permit the court to deprive him of constitutional rights by imposing a judgment for an aggravated offense. Second, the State frames its response

as "Beito's claim that his stipulation was an unknowing waiver of his constitutional rights goes to the validity of his plea. . . ." Response at 6. The unstated proposition underlying this statement is that State in fact understood the real agreement to be a waiver of Mr. Beito's constitutional rights. Given that prior to Blakely the courts of this state had concluded the imposition of an exceptional sentence did not implicate Apprendi at all, such a fanciful notion of the extent of the real agreement is wholly preposterous. Moreover, neither the real facts agreement nor any other part of the plea agreement was an agreement to the imposition of an exceptional sentence. Because of that there is nothing which requires this Court to invalidate or excise the real facts agreement from the plea agreement. Thus, whether the real facts agreement is an integral and indivisible portion of the contract is wholly irrelevant to issue in this case.

The State's argument would only have merit if it could establish Mr. Beito not only agreed to permit the court to consider facts supporting an exceptional sentence but in fact agreed to the imposition of an exceptional sentence. If this were so, then the State might be able to claim Mr. Beito's challenge to the judgment imposed was an effort to skirt an integral component of the

agreement. But that is not the case. The plea agreement specifically informed both parties that the court was not bound to follow either party's recommendation. The plea agreement specifically provided that Mr. Beito could request a lower sentence and appeal the imposition of an aggravated sentence. In fact Mr. Beito did so on three prior occasions, succeeding in have the sentence vacated twice. Yet on none of these prior occasions did the State assert the challenges to the judgment imposed was an attack on an integral component of the plea agreement requiring Mr. Beito's remedy be limited to withdrawing his plea. Nor did this Court in twice reversing the sentence, require Mr. Beito withdraw his plea as a condition for doing so. Because an agreement to an aggravated sentence was not an integral component of the plea agreement, and in fact was not a negotiated component at all, there is no basis for denying Mr. Beito the relief he has requested, imposition of a standard range sentence.

A hypothetical illustrates this point. Had Mr. Beito pleaded guilty to first degree assault stating in his guilty plea he was guilty of assault because he had killed a person, there would be no dispute that the trial court could not impose a judgment of conviction of murder. If Mr. Beito challenged such a judgment he would not be

required to withdraw his valid plea to the assault charge. Moreover, there would be no claim that on remand the State would be entitled to seek a judgment of murder. Apprendi, and the cases which have followed it up to an including Blakely have established that facts which increase the maximum penalty for a crime are the elements of the crime. The State cannot cite a single authority which allows the court to force Mr. Beito to withdraw his valid plea to a charge because he wishes to challenge the fact that the court entered judgment on a greater charge. Mr. Beito is entitled to the relief he has requested.

b. Imposition of an exceptional sentence violates the Fifth Amendment's prohibition of Double Jeopardy. Mr. Beito contends that any judicial finding which increases the crime of conviction to a greater degree violates not only the Sixth and Fourteenth Amendments, it also violates the Fifth Amendment's Double Jeopardy Clause. Specifically, he argues that the imposition of an exceptional sentence based upon judicial determination of the existence of aggravating factors amounts to a judgment notwithstanding the verdict, a procedure which plainly violates Double Jeopardy protections. Standefer v. United States, 447 U.S. 10, 21-25, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980); see

also, State v. Mullins-Costin, 152 Wn.2d 107, 116, 95 P.3d 321 (2004) (“The prosecution in a criminal case cannot obtain a directed verdict or judgment notwithstanding the verdict, no matter how clear the evidence of guilt.”); State v. Goins, 151 Wn.2d 728, 735, 92 P.3d 181 (2004) (refusing to strike plainly inconsistent verdicts of guilt based on “traditional approach of exercising restraint from interfering with jury verdicts.”)

The State responds that Double Jeopardy protections do not extend to sentencing. Response at 8-9. Again, the State’s argument hinges on the single incorrect premise that Apprendi and its progeny are concerned only with sentencing matters and not elements of the offense. To support this claim, the State cites to California v. Monge, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998).

Monge concluded that a reversal for sufficiency of the evidence to establish a sentencing factor – proof of a prior conviction - did not implicate double jeopardy provisions because that fact was not an element of a crime nor an “offense.” In reaching this result the Court pointed to its then recent decision in Almendarez-Torres v. United States which of course held the fact of recidivism was a sentencing factor in the traditional sense and need

not be pleaded and proved to a jury beyond a reasonable doubt. Monge, 524 U.S. at 728-29 (citing inter alia Almendarez-Torres, 523 U.S. 224, 188 S.Ct. 1219, 140 L.Ed.2d 350(1998)). Monge stated “[Almendarez-Torres] rejected an absolute rule that an enhancement constitutes an element of the offense any time it increases the maximum sentence to which a defendant is exposed.” 524 U.S. at 729. Thus, the critical point for the Court was whether the fact at issue was an element or merely a sentencing factor, and because the Court concluded the fact at issue was not an element, double jeopardy principles were not implicated.

Monge only holds that double jeopardy is not implicated where sentencing factors are involved. But since that time, the Court has adopted an “absolute rule” that facts which increase the maximum penalty are elements. See, Apprendi, 530 U.S. at 494; Harris, 536 U.S. at 557-58; Ring, 536 U.S. at 609; Sattazahn, 537 U.S. at 111. Blakely held that the aggravating factors used to impose exceptional sentence in Washington fall under this absolute rule. As the Court has held there is “no principled reason to distinguish, between what constitutes an offense for the purposes of the Sixth Amendment’s jury-trial guarantee and constitutes and

'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause." Sattazahn, 537 U.S. at 111.

As argued in his petition, because of the Fifth Amendment's Double Jeopardy Clause, Mr. Beito's valid guilty plea to the crime charged in the second amended information limits the punishment that may be imposed to the standard range sentence for first degree murder. Mr. Beito is entitled to relief

B CONCLUSION

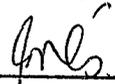
For the reasons set forth above and in his petition, Mr. Beito's restraint is unlawful. He requests this Court grant his PRP, reverse his sentence and remand his case for the imposition of a standard range sentence for the offense of first degree murder as reflected in the guilty plea, before a new judge.


19271 (fn:)

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Attorneys for Petitioner

Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

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


Name

JUL 25 2005
Date

Done in Seattle, Washington

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