

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY D. DAVIS

Petitioner.

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

Supplemental Brief of Petitioner

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A. ISSUE ON REVIEW.

Where the Legislature at the time of Mr. Davis's trial dictated that the judge make findings regarding an exceptional sentence using a preponderance of the evidence standard, but the trial judge instead instructed the jury to make such findings, does the judge's lack of inherent authority to implement such a procedure require reversal of the exceptional sentence findings and sentence?

B. STATEMENT OF THE CASE.

Mr. Davis was initially charged with harassment (RCW 9A.46.020(2)(b)) and fourth degree assault (RCW 9A.36.041) following an incident with his girlfriend on May 7, 2004. CP 1. In June 2004, the United States Supreme Court issued its decision in Blakely v. Washington, finding the procedures for imposing exceptional sentences under the Sentencing Reform Act (SRA) violated the Sixth Amendment right to trial by jury. 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

On November 4, 2004, the information was amended. CP 2-3. In addition to the harassment charge, the fourth degree assault allegation was elevated to second degree assault and additional charges of unlawful imprisonment (RCW 9A.40.040); second degree assault against Mr. Davis's girlfriend's child; unlawful imprisonment of the child; third degree malicious mischief (RCW 9A.48.090); and violation of a criminal

protection order (RCW 26.50.110(1)) were added. CP 2-3. Each of the assault and unlawful imprisonment charges included allegations the offenses were aggravated by certain additional circumstances within the meaning of the former RCW 9.94A.535(2)(b), (h). CP 2-3.

At trial in January 2005, the jury found Mr. Davis not guilty of unlawful imprisonment (Count III) and not guilty of the second degree assault charges (Counts II and IV), but guilty of the lesser offenses of fourth degree assault. CP 47-53. The jury also found Mr. Davis guilty of unlawful imprisonment as charged for the child (Count V), as well as finding “the victim was particularly vulnerable and incapable of resistance due to extreme youth.” CP 51, 55.

On review, the Court of Appeals found the trial court had the authority under RCW 2.28.150 and CrR 6.16(b) to craft its own sentencing procedures following the decision in Blakely, and affirmed Mr. Davis’s exceptional sentence. Slip op at 13. This Court granted review of this sentencing issue by order dated April 5, 2007.

C. ARGUMENT

WHERE THE TRIAL JUDGE LACKED THE AUTHORITY TO CREATE HIS OWN SENTENCING PROCEDURES CONTRARY TO THE LEGISLATIVE SCHEME, THE DEFENDANT IS ENTITLED TO HAVE THE FINDINGS AND SENTENCE STRICKEN

1. The exceptional sentence proceeding which occurred in Mr. Davis's case was contrary to the statutory scheme in effect at the time. At the time Mr. Davis was charged, tried, convicted and sentenced, the exceptional sentencing provisions of Washington's Sentencing Reform Act (SRA) specifically required the trial judge to weigh the evidence regarding potential aggravating sentence factors and determine whether they were sufficient for an exceptional sentence. Former RCW 9.94A.535 (2004). The 2004 statute explicitly directed the trial court to make the necessary factual findings and did not include any provision permitting the use of a jury to make those determinations either during trial or during a separate sentencing proceeding.¹ The United States Supreme Court held, however, that this procedure violated the Sixth Amendment right to trial by jury. Blakely v. Washington, 542 U.S. 302-07.²

¹ State v. Hughes, 154 Wn.2d 118, 133-34, 148-49, 11 P.3d 192 (2005), *overruled in part on other grounds by* Washington v. Recuenco, 548 U.S. ___, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

² Blakely, and Apprendi upon which it was based, held that any fact, other than the fact of a prior conviction, increasing the penalty beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Following Blakely, and notwithstanding the contrary statutory directive of Former RCW 9.94A.535 (2004), the trial judge charged the jury with special interrogatories regarding the potential aggravating factor alleged by the prosecutor. CP 55. This Court has since twice rejected the idea that the Washington courts had the inherent authority to implement such procedures and reiterated “it is the function of the legislature and not of the judiciary to alter the sentencing process.” State v. Hughes, 154 Wn.2d at 149, *quoting* State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975); State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007).

In Hughes the Court explained that “[w]here the legislature has not created a procedure for juries to find aggravating factors and has, instead, explicitly provided for judges to do so,” the Court was unable to imply such a procedure on remand. 154 Wn.2d at 150.

To create such a procedure out of whole cloth would be to usurp the power of the legislature.

Hughes, 154 Wn.2d at 151-52.

Neither the courts, nor the parties, could therefore provide the authority where it was contrary to the specific direction of the Legislature.³ Id., *citing* State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980);

³ A defendant “cannot empower a sentencing court to exceed its statutory authorizations.” In re Matter of the PRP of West, 154 Wn.2d 204, 214, 110 P.3d 1122 (2005), *quoting* State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980). West reiterated that “waiver does not apply where the alleged sentencing error is a legal error

State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981). For that reason, when presented the specific question of whether Washington courts had the inherent authority to empanel juries in these circumstances, this Court unanimously concluded that:

Consistent with our decisions in Hughes and Martin, we conclude that trial courts do not have inherent authority to empanel sentencing juries.

State v. Pillatos, 159 Wn.2d at 470 (emphasis added). This reluctance to rewrite statutes where the Legislature has described a particular path is grounded in respect for the separation of powers and should be observed.⁴

leading to an excessive sentence.” 154 Wn.2d at 213, *quoting In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 619 (2002). Davis’s acquiescence to instructing the jury on the aggravating factor does not alter the fact that the court lacked the authority to implement such a procedure. Goodwin, 146 Wn.2d at 874.

⁴ As recognized in Hughes, “separation-of-powers” principles preclude a court from re-writing the language of a statute to bring it up to constitutional minimums. 154 Wn.2d at 150-51 (citing State v. Martin, *supra* and State v. Frampton, 95 Wn.2d at 476-79); *see also, e.g., In re Custody of Smith*, 137 Wn.2d 1, 11-13, 969 P.2d 21 (1988), *aff’d sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); Miller v. Cam, 135 Wn.2d 193, 203, 955 P.2d 791 (1998) (courts cannot “amend” or “rewrite a statute to avoid difficulties in construing and applying them) (internal quotation omitted); State v. Groom, 133 Wn.2d 679, 689, 698, 947 P.2d 240 (1997) (“however much members of this court may think a statute should be rewritten. . . . We simply have no such authority.”).

2. The Court of Appeals reliance on RCW 2.28.150 and CrR 6.15(b) was misplaced. The Court of Appeals held that the trial court had the authority to “submit forms to the jury for special findings” under CrR 6.16(b)⁵ and that the procedure used was proper under RCW 2.28.150,⁶ because “[a]t the time of Mr. Davis’s trial, there was no specific procedure for imposing an exceptional sentence...” Slip op at 13. This view of the trial court’s inherent authority was rejected in Hughes, 154 Wn.2d at 152 n16, and Pillatos, 159 Wn.2d at 469. The Court of Appeals’ conclusion is erroneous because it is contrary to the plain language of both the statute and rule since the SRA expressly dictated a fundamentally different procedure.

The court rule only allows the trial court to submit forms to the jury to make “such special findings which *may be required or authorized by law.*” CrR 6.16 (emphasis added). Former RCW 9.94A.535 (2004) did not authorize submitting the issue to the jury because, as Pillatos and Hughes clearly reiterated, the statute directed the judge to make the

⁵ CrR 6.16 provides that a trial court “may submit to the jury forms for such special findings which may be required or authorized by law.”

⁶ RCW 2.28.150 provides:

When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

finding regarding the aggravating factors. 159 Wn.2d at 469-70; 154 Wn.2d at 151. Therefore there was no applicable law requiring or authorizing a jury to make findings on aggravating circumstances upon which the court rule could be used. Hughes, 154 Wn.2d at 149.

RCW 2.28.150 is equally clear that the statute may only be invoked if the “course of proceeding is not specifically pointed out by statute.” The statute only permits “courts to adopt suitable procedures to effect their jurisdiction *when no procedures are specifically provided.*” In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) (emphasis added). Furthermore, where the statute is applied in a situation involving the deprivation of a liberty interest, the statute is strictly construed. Id.⁶

But the Court in Hughes recognized that the statutory scheme at issue here was a “situation. . . distinct from those where a statute merely is silent or ambiguous on an issue and the court takes the opportunity to imply a necessary procedure.” 154 Wn.2d at 151.⁷ Hughes held that former RCW 9.94A.535 (2003) was not “silent or ambiguous” as to

⁶ See also State v. Nelson, 53 Wn.App. 128, 134-35, 766 P.2d 471 (1988) (RCW 2.28.150 did not apply, because the relevant restitution statutes specifically provided a “course of proceeding” by providing that a court could either confine a defendant or modify monetary payments or community service obligations).

⁷ This Court in Hughes specifically rejected Division One’s opinion on this point in State v. Harris, 123 Wn.App. 906, 922-26, 99 P.3d 902 (2004). Hughes, 154 Wn.2d at 153 n. 16. The Court of Appeals held that RCW 2.28.150 and CrR 6.16 “envison situations in which the superior courts will use procedures that are not specifically prescribed by statute.” 123 Wn.App. at 923-24.

whether the jury or judge was authorized to find aggravating factors to support an exceptional sentence. 154 Wn.2d at 151. It was specific.

This Court has already, therefore, rejected the very same reasoning used by the Court of Appeals in Mr. Davis' case. Hughes held that where, as here, the procedure was all-encompassing but constitutionally infirm the Court was without authority to draft a new scheme. Former RCW 9.94A.535 (2004) clearly and unequivocally directed that only the trial court could make findings of fact regarding the aggravating factors necessary to support an exceptional sentence. In the absence of a statutory directive to be applied in the event the procedure it required was found constitutionally infirm, neither the statute nor the court rule can provide the trial court with the authority to craft its own scheme.

3. The use of an unauthorized procedure requires striking of the exceptional sentence findings and sentence. This Court has held that where a court fails to comply with the procedures of the SRA, and in the absence of an express waiver by the defendant, the remedy is either to remand for resentencing, or where a proper objection was raised in the trial court to reduce the sentence. State v. Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999); State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996) (imposition of penalty without compliance with sentencing statute subject to appellate review). In those instances in which courts have

applied something akin to harmless-error analysis, they have simply concluded the resulting sentence did not or would not change as a matter of law; did not reweigh the evidence or otherwise assess the facts supporting the sentence imposed.⁸ In Mr. Davis's case, however, it is complete speculation for an appellate court to say that despite the procedural errors in the earlier consideration of evidence, an alternate fact-finder acting under a new legislative mandate would reach the same result. Instead, where sentencing errors turn on factual errors or errors in the procedure by which the jury and sentencing court considered the proof, remand should be required.⁹

4. Laws of 2005, Chapter 68 (SB 5477) cannot be applied retroactively to save the prior proceeding. The Legislature did not express an intention that Laws of 2005, Chapter 68, (SB 5477) be applied retroactively. Instead, this Court concluded that the legislation "by its terms, applies to all pending criminal matters where trials have not begun or pleas not yet accepted" Pillatos, 159 Wn.2d at 470, *citing* Laws of

⁸ See State v. Argo, 81 Wn.App. 552, 569, 915 P.2d 1103 (1996) (concluding remand for resentencing was unnecessary where even if correct appellant's challenge to offender score calculation would only result in reduction from 16 points to 13).

⁹ See, e.g., State v. Beals, 100 Wn.App. 189, 195-96, 997 P.2d 941, review denied, 141 Wn.2d 1006 (2000) (Appellant challenged the trial court's determination of the comparability of an out-of state offense and its reliance on that offense as a prior "most serious offense." The state had provided and the trial court had considered the facts of the prior offense, but the state did not provide and the sentencing court failed to examine the actual language of the foreign statute. The Court of Appeals concluded the failure to first consider the statutory language was error that required reversal.)

2005, ch. 68, § 4(1) (“At any time prior to trial or entry of the guilty plea....”). The statute, by its terms, does not retrospectively grant authority to the trial court that it did not otherwise have at the time of Mr. Davis’s trial in January 2005, before the legislation was even passed. “The act clearly contemplates that either the entry of the plea or the trial is the precipitating event.” Pillatos, 159 Wn.2d at 471. “[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment.” Landgraf v. USI Film Prods., 511 U.S. 244, 269-70, 114 S.Ct 1483, 128 L.Ed. 2d 229 (1994). To apply the statute retrospectively to events completed, i.e., the trial and sentencing in this case, would be impermissible.

5. Laws of 2007, Chapter 205 (EHB 2070) would violate separation of powers if applied to Mr. Davis’s case. The State may now be expected to argue that the newly adopted provisions of Laws of 2007, Chapter 205 (EHB 2070), can be invoked to find the error in the prior proceedings harmless or permit a new aggravated-sentence hearing. (A copy of the legislation is attached hereto as Appendix A.) Newly enacted statutes such as this, however, are *presumed not* to apply retroactively. State v. Cruz, 139 Wn.2d 186, 190, 985 P.2d 384 (1999). This presumption is “deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.” Id. (quoting Lynce v. Mathis,

519 U.S. 433, 439, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997) and Landgraf v. USI Film Prods., 511 U.S. at 265); State v. T.K., 139 Wn.2d 320, 329, 987 P.2d 63 (1999).

This presumption may be overcome only if: (1) the Legislature clearly conveyed its intent for retrospective application; (2) the amendment is “curative”; or (3) the amendment is remedial. PRP of Stewart, 115 Wn.App. 319, 332, 75 P.3d 521 (2003). Even if these requirements are satisfied, an amendment may still not apply retroactively if to do so would run afoul of any constitutional prohibition. In re F.D. Processing, Inc., 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). In this case, that constitutional prohibition is the separation of powers doctrine.

a. The 2007 amendment is not “curative.” A curative amendment clarifies or technically corrects an ambiguous statute. State v. Smith, 144 Wn.2d 665, 674, 30 P.3d 1245 (2001); F.D. Processing, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992). An amendment must be “clearly curative” for it to be retroactively applied. F.D. Processing, 119 Wn.2d at 461; Howell v. Spokane & Inland Empire Blood Bank, 114 Wn.2d 42, 47, 785 P.2d 815 (1990). *Compare*, Stewart, 115 Wn. App. at 337-39 (rejecting claim that amendment to unambiguous statute was curative).

The 2007 amendments in EHB 2070 seek to significantly expand the scope of the 2005 amendments after Pillatos found it by its terms

applied only to cases in which the trial or guilty plea occurred after the effective date. Pillatos found the statutory mandate in the Laws of 2005, chapter 68, was clear, so legislative attempts to “clarify” the scope of the statute should be viewed with suspicion. Furthermore, where ambiguity is lacking in statutory language, as in the previous amendments to RCW 9.94A.535, the Court presumes an amendment to the statute constitutes a substantive change in the law, and the 2007 amendment presumptively is not to be applied retroactively. F.D. Processing, 119 Wn.2d at 462; Overton v. Economic Assistance Auth., 96 Wn.2d 552, 557, 637 P.2d 652 (1981).

b. The 2007 amendment is not “remedial.” Generally, an amendment is deemed remedial and applied retroactively when it relates to practice, procedure or remedies, and does not affect a substantive or vested right. In re Mota, 114 Wn.2d 465, 471, 788 P.2d 538 (1990); Addleman v. Board of Prison Terms & Parole, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986). Procedural rules, therefore, apply to pending causes of action only insofar as they “do not affect a contractual or vested right or do not impose a penalty.” State v. Matlock, 27 Wn. App. 152, 157, 61 P.2d 684 (1980); Godfrey v. State, 84 Wn.2d 959, 961, 530 P.2d 630

(1975).¹⁰ EHB 2070 clearly has as its goal the imposition of a penalty—an exceptional sentence—it cannot, therefore, be deemed a mere procedural rule that applies to pending cases.¹¹ Thus, the legislation passed in direct response to Pillatos falls outside the rule that a mere procedural amendment may be applied to pending cases.

c. The subsequent amendments cannot be invoked to save an improperly obtained exceptional sentence. This Court ruled that *former* RCW 9.94A.535 does not permit a sentence outside the standard range for persons whose cases were pending at the time of the Blakely decision.

¹⁰ Matlock held that an amendment to CrR 3.3 excluding time between dismissal and arraignment on a re-filed charge was procedural and could be applied to pending cases. Matlock relied on: (1) a definition of “vested right” as something more than an expectation that the existing law would continue: an equitable or legal entitlement “to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another;” and (2) the provision in CrR 1.3(b) specifying that the criminal rules apply to pending proceedings unless “the *former* procedure should continue to be made applicable in a particular case in the interests of justice.” 27 Wn. App. at 157. The court distinguished its analysis of the procedural rule from “cases concerned with application of case law or the adoption of a new rule.” Id.

¹¹ This proposition derived from the United States Supreme Court:

While . . . cases do not explicitly define what they mean by the word “procedural,” it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.

Collins v. Youngblood, 497 U.S. 37, 45, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (citing Dobbert v. Florida, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925); Mallett v. North Carolina, 181 U.S. 589, 597, 21 S.Ct. 730, 45 L.Ed. 1015 (1901)).

In Dobbert v. Florida, the Supreme Court held that it did not violate the prohibition against ex post facto laws to sentence the defendant to death under a statute which was enacted while his case was pending. Dobbert based this conclusion on two principles: (1) the changes in the statute were procedural; and (2) there was “fair warning” as to the penalty for the crime committed. In rejecting an *ex post facto* challenge, Dobbert concluded the provisions of the new statute were completely procedural and ameliorative; the new statute merely altered the methods employed with no change in the quantum of punishment imposed. 432 U.S. at 295.

Hughes, 154 Wn.2d at 148-52. In Hughes, the court concluded that *former* RCW 9.94A.535 did not allow a jury to be empaneled to consider aggravating factors and impose an exceptional sentence. Pillatos, 159 Wn.2d at 469-70, citing Hughes, 154 Wn.2d at 151-52. For this reason, the defendants could receive a sentence no greater than the top of the standard range. Hughes, 154 Wn.2d at 149.

By its express terms, Laws of 2005, chapter 68, was enacted to create a process that complied with Blakely. EHB 2070 now seeks to apply this process to further sentencing proceedings held after Pillatos. Where these types of amendments to the S.R.A. disadvantage an accused, however, they may not be retroactively applied without running afoul of *ex post facto* prohibitions. State v. Parker, 132 Wn.2d 182, 191-92, 927 P.2d 575 (1997). In a circumstance such as this, the new statute violates *ex post facto* prohibitions because it inflicts a greater punishment for the commission of a crime than that which was originally constitutionally permitted when committed. WA Const. art. I, § 23; U.S. Const. art. I, § 9; In re Personal Restraint of Smith, 139 Wn.2d 199, 207-09, 986 P.2d 131 (1999); State v. Ward, 123 Wn.2d 488, 497, 870 P.2d 295 (1994); In re Powell, 117 Wn.2d 175, 184, 814 P.2d 635 (1991); Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 251 (1987) (Florida's revised

sentencing guidelines were not merely procedural, since they increased the quantum of punishment).

d. Retroactive application of the new amendments violates the Bill of Attainder Clauses of the state and federal constitution. Related to the separation of powers doctrine is the prohibition against bills of attainder set forth at Article I, § 10 of the federal constitution and Article 1, § 23 of the Washington Constitution. United States v. Brown, 381 U.S. 437, 442, 14 L.Ed.2d 484, 85 S.Ct. 1707 (1965). As utilized in the federal constitution, the prohibition against bills of attainder also includes a prohibition against bills of pains and penalties. *See, e.g.,* Nixon v. Administrator of General Services, 433 U.S. 425, 473-74, 53 L.Ed.2d 867, 97 S.Ct. 2777 (1976).

The Bill of Attainder Clause prohibits “legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial” United States v. Lovett, 328 U.S. 303, 315, 90 L.Ed. 1252, 66 S.Ct. 1073 (1946). Stated another way, “[t]he prohibitions on ‘Bills of Attainder’ in Art I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct.” Landgraf, 511 U.S. at 266; *see also, Nixon*, 433 U.S. at 468 (key features of a bill of attainder are “a law that legislatively

determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.”) Here, EHB 2070 seeks to punish a small but readily identifiable class of individuals, those persons whose cases were pending prior to the 2005 enactment, where such a punishment would not be available. The amendment, therefore, violates the constitutional prohibitions against bills of attainder.

D. CONCLUSION.

Mr. Davis asks this Court to hold that the exceptional sentence and associated findings must be stricken as having been obtained and entered contrary to the Legislative scheme.

Dated this 5th day of May 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Donnan", written over a horizontal line.

David L. Donnan
Attorney for Petitioner

CERTIFICATION OF ENROLLMENT

ENGROSSED HOUSE BILL 2070

Chapter 205, Laws of 2007

60th Legislature
2007 Regular Session

EXCEPTIONAL SENTENCES

EFFECTIVE DATE: 04/27/07

Passed by the House April 18, 2007
Yeas 97 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 17, 2007
Yeas 47 Nays 0

BRAD OWEN

President of the Senate

Approved April 27, 2007, 2:09 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is ENGROSSED HOUSE BILL 2070 as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER

Chief Clerk

FILED

April 30, 2007

Secretary of State
State of Washington

APPENDIX

ENGROSSED HOUSE BILL 2070

AS AMENDED BY THE SENATE

Passed Legislature - 2007 Regular Session

State of Washington 60th Legislature 2007 Regular Session

By Representatives O'Brien, Goodman and Pearson

Read first time 02/07/2007. Referred to Committee on Public Safety & Emergency Preparedness.

1 AN ACT Relating to exceptional sentences; amending RCW 9.94A.537;
2 creating a new section; and declaring an emergency.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** In *State v. Pillatos*, 150 P.3d 1130 (2007),
5 the Washington supreme court held that the changes made to the
6 sentencing reform act concerning exceptional sentences in chapter 68,
7 Laws of 2005 do not apply to cases where the trials had already begun
8 or guilty pleas had already been entered prior to the effective date of
9 the act on April 15, 2005. The legislature intends that the superior
10 courts shall have the authority to impanel juries to find aggravating
11 circumstances in all cases that come before the courts for trial or
12 sentencing, regardless of the date of the original trial or sentencing.

13 **Sec. 2.** RCW 9.94A.537 and 2005 c 68 s 4 are each amended to read
14 as follows:

15 (1) At any time prior to trial or entry of the guilty plea if
16 substantial rights of the defendant are not prejudiced, the state may
17 give notice that it is seeking a sentence above the standard sentencing

1 range. The notice shall state aggravating circumstances upon which the
2 requested sentence will be based.

3 (2) In any case where an exceptional sentence above the standard
4 range was imposed and where a new sentencing hearing is required, the
5 superior court may impanel a jury to consider any alleged aggravating
6 circumstances listed in RCW 9.94A.535(3), that were relied upon by the
7 superior court in imposing the previous sentence, at the new sentencing
8 hearing.

9 (3) The facts supporting aggravating circumstances shall be proved
10 to a jury beyond a reasonable doubt. The jury's verdict on the
11 aggravating factor must be unanimous, and by special interrogatory. If
12 a jury is waived, proof shall be to the court beyond a reasonable
13 doubt, unless the defendant stipulates to the aggravating facts.

14 (~~(3)~~) (4) Evidence regarding any facts supporting aggravating
15 circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented
16 to the jury during the trial of the alleged crime, unless the jury has
17 been impaneled solely for resentencing, or unless the state alleges the
18 aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i),
19 (o), or (t). If one of these aggravating circumstances is alleged, the
20 trial court may conduct a separate proceeding if the evidence
21 supporting the aggravating fact is not part of the res geste of the
22 charged crime, if the evidence is not otherwise admissible in trial of
23 the charged crime, and if the court finds that the probative value of
24 the evidence to the aggravated fact is substantially outweighed by its
25 prejudicial effect on the jury's ability to determine guilt or
26 innocence for the underlying crime.

27 (~~(4)~~) (5) If the superior court conducts a separate proceeding to
28 determine the existence of aggravating circumstances listed in RCW
29 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall
30 immediately follow the trial on the underlying conviction, if possible.
31 If any person who served on the jury is unable to continue, the court
32 shall substitute an alternate juror.

33 (~~(5)~~) (6) If the jury finds, unanimously and beyond a reasonable
34 doubt, one or more of the facts alleged by the state in support of an
35 aggravated sentence, the court may sentence the offender pursuant to
36 RCW 9.94A.535 to a term of confinement up to the maximum allowed under
37 RCW 9A.20.021 for the underlying conviction if it finds, considering

1 the purposes of this chapter, that the facts found are substantial and
2 compelling reasons justifying an exceptional sentence.

3 NEW SECTION. Sec. 3. This act is necessary for the immediate
4 preservation of the public peace, health, or safety, or support of the
5 state government and its existing public institutions, and takes effect
6 immediately.

Passed by the House April 18, 2007.

Passed by the Senate April 17, 2007.

Approved by the Governor April 27, 2007.

Filed in Office of Secretary of State April 30, 2007.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	COA NO. 79068-0
Respondent,)	
)	
v.)	
)	
ANTHONY DAVIS,)	
)	
Petitioner.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 7TH DAY OF MAY, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KEVIN KORSMO	(X)	U.S. MAIL
SPOKANE COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
1100 W. MALLON AVENUE	()	_____
SPOKANE, WA 99260-0270		

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF MAY, 2007.

x _____ 