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NO. ~~59553-9-1~~ 59553-9

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

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER ALVARADO,

Appellant.

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

The Honorable Steven J. Mura, Judge

REPLY BRIEF OF APPELLANT

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

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

Patrick M. Mayorsky 12/13/2007
Name Done in Seattle, WA Date

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A. ARGUMENTS IN REPLY

1. THE EXCEPTIONAL SENTENCE IS INVALID BECAUSE A JURY NEEDED TO FIND THE AGGRAVATING FACT.

The State claims a jury did not need to find Alvarado's "high offender score results in some of the current offenses going unpunished." Brief of Respondent (BOR) at 12-19; RCW 9.94A.535(2)(c).¹ The State reasons a judge properly makes this finding because current offenses automatically go unpunished as a matter of law when a defendant receives no additional confinement for current offenses as a result of an offender score greater than nine. BOR at 8, 9, 14, 18. The State attempts to distinguish the "clearly too lenient" aggravating factor under former RCW 9.94A.535(2)(i)² on this ground. BOR at 14-19.

The State's argument cannot be reconciled with the Supreme Court's decisions in State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005), and In re Pers. Restraint of VanDelft, 158 Wn.2d 731, 147 P.3d 573 (2006).

In Ose, the trial court found the "clearly too lenient" factor and imposed an exceptional sentence in part on the ground that Ose would otherwise receive "free crimes" because her "standard range would not

¹ Laws of 2005, ch. 68 § 3.

² Laws of 2003, ch. 267 § 4.

change once she got to an offender score of nine." Ose, 156 Wn.2d at 149. The Supreme Court vacated the exceptional sentence because a jury did not find this aggravating factor. The Court specifically rejected the State's argument that the "free crimes" factor fit within the "prior convictions" exception to the Blakely³ rule. Id. Ose disposes of the State's claim in Alvarado's case that free crimes can be found by a judge as a matter of law where a defendant has an offender score greater than nine.

In VanDelft, the trial court imposed an exceptional consecutive sentence on the ground that allowing a current offense to go unpunished was clearly too lenient under former RCW 9.94A.535(2)(i). VanDelft, 158 Wn.2d at 739-40, 742. VanDelft's offender score was at least 15 based on his criminal history and the multiple current offenses, but the maximum offender score accounted for on the sentencing grid was nine. "As a result, VanDelft would receive no additional punishment for count 1 if it were served concurrently to the others." Id. at 740. The trial judge concluded concurrent sentencing would "fail to hold [VanDelft] accountable for all of the crimes for which he was convicted" and was therefore "clearly too

³ Blakely v. Washington, 542 U.S. 296, 301-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (factual basis for an exceptional sentence must be submitted to a jury and proven beyond a reasonable doubt).

lenient." Id. at 735, 739-40. The Court held the exceptional sentence was invalid because a jury had to make that finding. Id. 742-43.

The "clearly too lenient" analysis engaged in by the VanDelft trial judge is the same analysis used by the judge in Alvarado's case to find current offenses would go unpunished. 4RP 36. It is also the same analysis used by the State on appeal to argue the jury did not need to find the aggravating factor. If VanDelft is right, the State must be wrong. Both VanDelft and Alvarado's case involve a pure consideration of whether current offenses would result in free crimes where the defendant's high offender score outstrips the sentencing grid. Under VanDelft, a jury needs to make this finding.

The Legislature may have reworded the statute from "clearly too lenient" to "unpunished," but the "free crime" analysis remains the same. If, as the State contends, the Legislature intended a necessary finding that current offenses go unpunished when a defendant receives no additional confinement for current offenses as a result of an offender score greater than 9, then the Legislature could have worded the statute to say just that. But the statute says otherwise, which indicates the Legislature meant something other than what the State says it means.

The courts will not assume the Legislature intended to effect a significant change in the law by implication. Philippides v. Bernard, 151 Wn.2d 376, 385, 88 P.3d 939 (2004). The interpretation advanced by the State would indeed effect a significant change because it would remove any subjective determination that an aggravating factor exists, whereas none of the aggravating factors in existence before the 2005 amendment were automatically found as a matter of law.⁴ By using the term "unpunished," the Legislature may have intended for the fact finder to subjectively determine whether a defendant would adequately be held accountable for current offenses, regardless of whether the offender score was greater than nine.

Even if the statute could be interpreted to mean what the State says it means, the rule of lenity must be applied in favor of Alvarado. The Legislature has not defined what it means for current offenses to go "unpunished." In a criminal case, the rule of lenity requires "any ambiguity in a statute must be resolved in favor of the defendant." State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979). "The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the

⁴ Nor does the State contend any other factors in existence after the 2005 amendment are automatically found as a matter of law.

actions that expose them to liability for penalties and what those penalties are." State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991). The Legislature, by neglecting to define or otherwise provide clear guidance on what it means for current offenses to go unpunished, has failed to unequivocally warn Alvarado of the potential sentence he faced. The rule of lenity is fatal to the State's position.

2. THE APPROPRIATE REMEDY IS REMAND FOR RESENTENCING WITHIN THE STANDARD RANGE.

The State claims the remedy is remand for a jury determination of whether Alvarado's current offenses go unpunished under RCW 9.94A.535(2)(c). BOR at 22-26. The State is wrong because the statute does not authorize a jury to make that finding.

RCW 9.94A.535(2)(c) only allows a judge to find "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.537(2) provides:

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

(Emphasis added).

Trial courts do not have inherent authority to empanel sentencing juries. State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007). The fixing of legal punishments for criminal offenses is a legislative function. State v. Hughes, 154 Wn.2d 118, 149, 110 P.3d 192 (2005). RCW 9.94A.537(2) only authorizes a jury on remand to make factual findings of aggravating circumstances listed in RCW 9.94A.535(3). It does not authorize a jury to make factual findings of aggravating circumstances listed in RCW 9.94A.535(2). No statutory procedure is currently in place allowing juries to be convened for the purpose of deciding aggravating factors listed in RCW 9.94A.535(2) on remand after appeal. The only possible remedy is remand for resentencing within the standard range because Alvarado's jury could not have made the findings necessary to support his exceptional sentence and trial courts are not authorized to impanel juries to find aggravating factors under RCW 9.94A.535(2). Hughes, 154 Wn.2d at 149-52; State v. Womac, 160 Wn.2d 643, 664, 160 P.3d 40 (2007).

3. THE FAILURE OF THE JURY TO FIND THE AGGRAVATING FACTOR WAS NOT HARMLESS.

The State claims the sentencing error was harmless. BOR at 20-22. The error was not harmless because, as set forth above, there was no legal

procedure whereby Alvarado's jury could have made the finding necessary to support his exceptional sentence. Womac, 160 Wn.2d at 663.

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should vacate the sentence and remand for resentencing within the standard range.

DATED this 13th day of December, 2007.

Respectfully Submitted,

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