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23946-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

RAYMOND C. HUGHES, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JEROME J. LEVEQUE

BRIEF OF APPELLANT

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I.

ASSIGNMENTS OF ERROR

(1) The trial court erred in applying *Blakely v. Washington*¹ to the minimum term sentence under RCW 9.94A.712.

(2) The trial court erred by declining to consider the imposition of an exceptional sentence.

(3) The trial court erred in deciding it lacked authority to impose an exceptional sentence.

II.

ISSUE PRESENTED

(1) Does *Blakely v. Washington* apply to the setting of an exceptional minimum term under RCW 9.94A.712?

III.

STATEMENT OF THE CASE

Defendant/respondent 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. The charges arose

¹ Blakely v. Washington, --- U.S. ---, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).

after defendant engaged in sexual intercourse with a dying twelve-year-old girl he had been hired to nurse. CP 3-6.

Defendant sought to dismiss one of the counts prior to trial on the basis of double jeopardy. The trial court denied the motion. 10/14 RP 1-16.² Defendant then pled guilty as charged while acknowledging that the State would be seeking an exceptional sentence. CP 7-17; 10/14 RP 17-36. The matter was set over for sentencing. The State filed a memorandum, in support of an exceptional sentence. The defense responded by arguing that the *Blakely* decision precluded an exceptional sentence. CP 20-49.

The parties argued the applicability of the *Blakely* decision to the sentencing in this case as well as whether a court could convene a jury. RP 9-40. Judge Leveque ruled that he lacked the statutory authority to impanel a jury and that no exceptional sentence could therefore be considered. RP 41-47.

Sentencing occurred three weeks later. The State presented several exhibits, including a “day in the life” video, concerning the victim and her condition. Exhibits 1-7; RP 51-52, 54-55. Several people

² The transcripts of the October 14, 2004, and February 9, 2005, proceedings will be denominated as “date/RP.” The consecutively numbered transcript prepared by Jo Ann Farrell will be designated simply as “RP.”

addressed the court concerning the impact of the case. RP 64-88. The victim's first nurse detailed the child's lengthy surgical history. RP 72-77.

The trial court declined to reconsider its previous ruling about the exceptional sentence. RP 97. The court imposed a life sentence and set the minimum term at 102 months, a figure that reflected the top end of the range. RP 99; CP 61-73. The State then appealed to this court. CP 74-88.

IV.

ARGUMENT

A. THE BLAKELY DECISION DOES NOT APPLY TO THE SETTING OF A MINIMUM SENTENCE UNDER RCW 9.94A.712.

The sole issue presented by this appeal is whether the decision in *Blakely* applies to the minimum sentence set by a trial court under RCW 9.94A.712. This court should rule that it does not and remand to the trial court for a new sentencing proceeding.

By its own terms, the rule of Blakely does not apply to minimum term sentences. This issue has divided the other two divisions of the Court of Appeals. Division One found that Blakely did not apply to §712 sentences in State v. Clarke, 124 Wn. App. 893, 103 P.3d 262 (2004). The Division Two judges are split on the issue, but their cases have found

that Blakely does apply. State v. Borboa, 124 Wn. App. 779, 102 P.3d 183 (2004); State v. Brundage, 126 Wn. App. 55, 107 P.3d 742 (2005); State v. Monroe, 126 Wn. App. 435, 109 P.3d 449 (2005).³ This court should follow the Clarke decision.

The basic rationale comes straight from the decisions in Blakely and Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). As set forth in Apprendi: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (emphasis supplied). The Blakely court adhered to this rule. 159 L. Ed. 2d at 412. What was new about Blakely is that the court defined the Apprendi concept of “statutory maximum” to mean the top end of the standard range as computed by the trial court. Id. at 413.

When sentencing under §712, the trial court must impose the statutory maximum for the offense as the maximum term. The court then must set a *minimum term* consistent with the standard ranges for the offense. However, the trial court can impose an exceptional minimum term pursuant to the exceptional sentence power of RCW 9.94A.535. RCW 9.94A.712(3).

³ Petitions for review have been filed, but not voted on, in all of these cases.

Because the exceptional sentence operates only on the minimum term sentence, Blakely and Apprendi are not implicated. Instead, what is really at issue is the rule of McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986). There, the defendant had made an Apprendi-type argument many years before Apprendi was decided, arguing that only a jury, not the sentencing judge, could find facts that established a mandatory minimum sentence. The Supreme Court disagreed and affirmed the defendant's sentence.

When it issued Apprendi, and again when it issued Blakely, the United States Supreme Court maintained its decision in McMillan and distinguished the situation of mandatory *minimum* sentences from those of enhanced *maximum* sentences at issue in the latter cases. See Blakely, 159 L. Ed. 2d at 414. The Court likewise had reached the same conclusion in another post-Apprendi case, Harris v. United States, 536 U.S. 545, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002). In Harris the court imposed a seven year mandatory minimum sentence based on a factual determination, denied by the defendant and not covered by his guilty plea, that he "brandished" a weapon in the course of his offense. The Supreme Court applied McMillan and found that the Apprendi rule did not apply to minimum sentences, but only applied to statutory maximum sentences.

The same situation exists here. The minimum term is what is at issue in this exceptional sentence. Facts that establish that term are not subject to Apprendi. The Clarke court properly recognized that §712 is not subject to the Apprendi and Blakely rules.

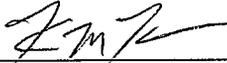
For all of these reasons, this court should hold that Apprendi and Blakely do not apply to the setting of a minimum term of confinement under RCW 9.94A.712. The matter must be remanded for a new sentencing proceeding since the trial court thought it lacked authority to impose an exceptional sentence. State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993); State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003); State v. Ammons, 105 Wn.2d 175, 182-183, 713 P.2d 719, 718 P.2d 796 (1986) [appeal can challenge process by which a standard range sentence was imposed]. Defendant's conduct justified an exceptional sentence on the basis of the victim's vulnerability and defendant's abuse of a position of trust.

V.

CONCLUSION

For the reasons stated, the sentence should be reversed and the matter remanded for a new sentencing proceeding with directions to consider the request for an exceptional sentence.

Respectfully submitted this 28th day of June, 2005.



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