

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
Respondent,) S.Ct. No.82029-5
)
)
v.) STATEMENT OF
) GROUNDS FOR
) DIRECT REVIEW BY
RICHARD MUTCH,) THE SUPREME
Appellant.) COURT
)

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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I. NATURE OF THE CASE AND DECISION

Appellant, Richard Mutch, by and through his attorneys David Donnan and Nancy P. Collins, seeks review of the trial court's imposition of an exceptional sentence on July 31, 2008, after the prosecution conceded that his prior "three-strike" life sentence, imposed in 1994, was unlawful. The re-sentencing follows this Court's grant of Mr. Mutch's personal restraint petition and remand to the trial court for resentencing.¹ Mr. Mutch filed an appeal in this Court on July 31, 2008, and in a ruling dated August 22, 2008, this Court ordered counsel to provide a Statement of Grounds for Direct Review.

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II. ISSUES PRESENTED FOR REVIEW

A. RCW 9.94A.537 limits the court's authority to impose an exceptional sentence to instances where the trial occurred after

¹ See Supreme Court No. 80958-5, order entered granting personal restraint petition and remanding case on April 30, 2008.

the statute's enactment, or if a previously imposed exceptional sentence was reversed. Here, Mr. Mutch's trial occurred in 1994, long before the enactment of RCW 9.94A.537, and he did not previously receive an exceptional sentence. Did the trial court act without authority and in violation of Mr. Mutch's rights to due process of law by imposing an exceptional sentence on remand after the reversal of his sentence?

B. When Mr. Mutch's sentence was reversed by this Court because the trial court improperly relied on a federal bank robbery conviction to impose a sentence of life without the possibility of parole under the Persistent Offender Accountability Act, did the court deny Mr. Mutch due process of law by relying on that same offense to impose an exceptional sentence?

C. The right to complete and accurate notice of criminal charges includes the right to notice of the prosecution's intent to seek an exceptional sentence before trial, and is further mandated by RCW 9.94A.537. Where Mr. Mutch did not receive notice of the State's intent to seek an exceptional sentence before his trial, was he deprived of his fundamental right to notice under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, sections 3 and 22 of the Washington Constitution as well as a violation of the statutory mandate?

D. Assuming a trial court may impose an exceptional sentence predicated on criminal history that renders the standard range “clearly too lenient,” the court lacks authority to impose such a sentence without complying with the basic requirements of due process of law. In the instant matter, the court imposed an exceptional sentence based on Mr. Mutch’s criminal history but refused Mr. Mutch’s request to accurately determine his criminal history, neglected to correctly compare and classify out-of-state convictions, and erroneously calculated Mr. Mutch’s offender score. Is the imposition of an exceptional sentence, predicated on an offender’s criminal history, a violation of due process of law and contrary to the sentencing statutes when the court inaccurately calculates the offender score?

E. This Court has previously ruled that a determination that the standard range is “clearly too lenient” is a factual determination that must be submitted to a jury. Did the trial court deny Mr. Mutch his rights to trial by jury and due process of law by imposing an exceptional sentence based on a judicial determination that his criminal history rendered the standard range “clearly too lenient.”

F. Should this Court accept review based on considerations of fundamental fairness, when Mr. Mutch’s 1994 sentence was reversed after extensive litigation, he has now

served the entirety of a standard range sentence, and justice requires a speedy resolution of this appeal?

III. REASONS FOR GRANTING REVIEW

THIS COURT SHOULD ACCEPT REVIEW TO DECIDE CONSTITUTIONAL QUESTIONS OF BROAD PUBLIC IMPORTANCE REGARDING THE IMPOSITION OF AN EXCEPTIONAL SENTENCE AFTER THE REVERSAL OF A NON-EXCEPTIONAL SENTENCE IMPOSED PRIOR TO *BLAKELY*

A. The trial court's imposition of an exceptional sentence for the first time after the reversal of a sentence on appeal, based on facts neither charged nor proven, has never been sanctioned by this Court. For cases originating prior to the enactment of RCW 9.94A.537, this statute allows a court to impose an exceptional sentence only where either no trial or plea has been entered, or a prior exceptional sentence was reversed, assuming appropriate aggravating factors are properly charged and proven.

In State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007), this Court ruled that RCW 9.94A.537, the 2005 legislation passed in an effort to comport with Blakely v. Washington, did not apply to cases where the trial had already begun or the guilty plea was already entered. ("Since Butters and Pillatos each pleaded guilty [prior to the RCW 9.94A.537], the statute, by its terms, does not apply to them."); see also State v. Womac, 160 Wn.2d 643,

663, 160 P.3d 40 (2007) (new exceptional sentencing procedures do not apply to person tried prior to enactment). In the case at bar, Mr. Mutch was tried and convicted in 1994, long before the 2005 changes to the exceptional sentence statute.

After Pillatos, the Legislature altered RCW 9.94A.537(2) to provide the court with authority to impose an exceptional sentence when a prior exceptional sentence was reversed and the case remanded for further proceedings. But Mr. Mutch did not previously receive an exceptional sentence, and thus, RCW 9.94A.537(2) does not give the court authority to impose an exceptional sentence after the reversal of his prior sentence.

The changes to RCW 9.94A.535 and RCW 9.94A.537 are not retroactive to cases completed in 1994, as Mr. Mutch's case was. The imposition of an exceptional sentence based on factors neither charged nor proven violates Mr. Mutch's rights to trial by jury and due process of law. U.S. Const. amends. 6,² 14;³ Wash.

² The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . ."

³ The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Const. art. I, §§ 3,⁴ 21,⁵ 22.⁶

B. Notice of an exceptional sentence may not be predicated on a prior imposition of a persistent offender sentence, which itself was never charged in an Information. Notice of aggravating factors is required by RCW 9.94A.537, as well as the Sixth Amendment and Article I, § 22 of the Washington Constitution.

In Gault v. Lewis, 489 F.3d 993, 1002-03 (9th Cir. 2007), the Ninth Circuit ruled that the constitutional right to notice of the charges against an accused includes sentencing enhancements. Adequate notice must appraise the accused of the elements with sufficient clarity to let the defendant know what he must be prepared to defend against. Id. at 1003.

Washington has long required a complete and comprehensive charging document.⁷ A charging document must

⁴ Wash. Const. art. I, § 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

⁵ Wash. Const. art. I, § 21 provides in pertinent part, "The right of trial by jury shall remain inviolate"

⁶ Wash. Const. art. I, § 22 provides in pertinent part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof,"

⁷ See e.g., Leonard v. Territory, 2 Wash.Terr. 381, 392, 7 P. 872 (1885) ("Under our laws an indictment must be direct and certain, both as regards the crime charged and as regards the particular circumstances thereof, when they are necessary to constitute a complete crime."); State v. Unosawa, 29 Wn.2d

contain, “[a]ll essential elements of a crime.” State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); see CrR 2.1(a)(1) (charging document “shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.”).

Under RCW 9.94A.537(1), the prosecution must “give notice” that it intends to seek an exceptional sentence prior to trial or entry of a guilty plea. Here, Mr. Mutch did not receive notice of an exceptional sentence prior to trial. His previous sentence was not an exceptional sentence, and thus does not excuse the lack of actual notice under RCW 9.94A.537.

The requirements of RCW 9.94A.537 are plain and unambiguous. A trial court is authorized to impanel a jury for consideration of aggravating factors on remand after a reversal of an exceptional sentence. The defendant must have received notice, prior to trial, of the aggravating factors the prosecution would seek to establish. Because Mr. Mutch did not receive notice of the aggravating factors, and he did not receive an exceptional sentence previously, the trial court lacks authority to impose an exceptional sentence.

578, 588-89, 188 P.2d 104 (1948) (each count must independently include all essential facts unless it incorporates allegations in other counts by “clear, specific” reference); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (“essential elements” rule requires that a charging document *allege facts*

This Court is presently considering a similar case involving a retrial without a prior exceptional sentence in State v. Powell, S.Ct. No 80496-6. The issue presented in Powell is:

Whether, under the 2007 amendments to RCW 9.94A.537, a trial court on remand following reversal of an exceptional sentence may impanel a jury to determine aggravating factors if the State did not give notice before trial that it intended to seek an exceptional sentence.⁸

Mr. Mutch's case also involves the lack of authority of the court to impose an exceptional sentence for a conviction when the plain terms of RCW 9.94A.537 have not been met. Accordingly, this Court should accept review to determine the trial court's authority to impose an exceptional sentence on remand without convening a jury to decide aggravating factors.

C. The trial court's imposition of an exceptional sentence based on unproven and non-comparable out-of-state convictions violates due process of law. The Sentencing Reform Act ("SRA") provides for the structured sentencing of felony offenders through standard sentence ranges based upon the seriousness of the offense and the defendant's criminal history. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). Before sentencing any

supporting every element of the offense, in addition to adequately identifying the crime charged." (emphasis in original)).

offender, the court must determine the offender's standard sentence range, and that calculation includes a determination of the offender score. RCW 9.94A.505(2)(a)(i); State v. Haddock, 141 Wn.2d 103, 108, 3 P.3d 733 (2000). Where the State alleges a defendant's criminal history contains out-of-state felony convictions, the SRA requires the State to prove the existence and comparability of those convictions by a preponderance of the evidence. RCW 9.94A.525; Ford, 137 Wn.2d at 480.

Additionally, when a criminal defendant registers an objection to the calculation of his or her offender score, the court is required to properly calculate the score based on proof offered by the prosecution. State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). The calculation of the offender score requires the court to add the current and prior convictions, and determine the comparability and classification of any out-of-state convictions when not agreed by the parties. Id. at 92-93. If elements of the foreign conviction are different from or broader than the elements of the parallel crime in Washington, the court must determine whether the underlying facts, necessarily proven beyond a reasonable doubt or expressly admitted by the defendant, make

⁸ The issue statement is available on the Supreme Court website, at: http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_suprem

the offense comparable. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

Here, Mr. Mutch objected to the State's calculation of his criminal history. The trial court relied on its 1994 sentencing rulings, even though Mr. Mutch's sentence was reversed based on the lack of comparability of a prior, out-of-state conviction. Indeed, that very out-of-state conviction, a federal bank robbery, was counted in Mr. Mutch's offender score as if it were comparable to a Washington violent felony without any proof or finding of such comparability.

Although the court imposed an exceptional sentence because it claimed Mr. Mutch had an offender score of "20," in fact, the court miscalculated Mr. Mutch's criminal history. In addition to the court's erroneous assumption that out-of-state convictions count as if they are Washington felonies of the same title, the court counted two out-of-state robbery convictions from 1966 separately, and as two points each, when prior offenses committed before 1981, served concurrently, must be counted as a one offense. Former RCW 9.94A.360(6)(c) (1994). It counted Mr. Mutch's current conviction for second degree kidnapping as a violent felony, and thus as two points, when it was not classified as

such in 1994. Former RCW 9.94A.030(36) (1994).

Because the court relied on an erroneous impression of Mr. Mutch's offender score, and refused to hold the prosecution to its burden of proving Mr. Mutch's criminal history despite his objection, the exceptional sentence violates due process of law and is contrary to the court's sentencing authority.

D. The aggravating factor of "unpunished" convictions requires proof to a jury beyond a reasonable doubt, as demonstrated by numerous decisions of this Court. In State v. Hughes, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), this Court ruled that the question of whether additional criminal history makes the standard range "clearly too lenient," encompasses discretionary factual determinations that must be made by a jury. This Court affirmed this ruling in In re Pers. Restraint of VanDelft, 158 Wn.2d 731, 734, 147 P.3d 573 (2006) (reversing imposition of consecutive sentences based on trial court's finding that a concurrent sentence would be clearly too lenient). In State v. Gonzalez-Flores, 164 Wn.2d 1, 20, 186 P.3d 1038 (2008), this Court ruled, "It is well established that the 'clearly too lenient' factor cannot support an exceptional sentence when found by the judge."

Division One of the Court of Appeals interpreted the

recently enacted RCW 9.94A.535 to allow a judicially imposed exceptional sentence based on a finding that prior or current convictions render the standard range clearly too lenient.⁹ Review of Newlun by this Court has been stayed pending this Court's decision in State v. Alvarado, S.Ct. No. 81069-9.

This Court is presently considering whether under the statutory revisions of RCW 9.94A.535, enacted long after 1994, permitted multiple prior offenses as a basis for a judge-imposed exceptional sentence without notice and the right to a jury trial and proof beyond a reasonable doubt. Alvarado, S.Ct. No. 81069-9. The issue presented in Alvarado is listed on this Court's website as:

Whether in order to impose an exceptional sentence pursuant to former RCW 9.94A.535(2)(c) (2006), a jury (rather than the trial judge) was required to find the defendant had multiple current offenses and the defendant's high offender score resulted in some of the current offenses going unpublished.¹⁰

Yet Alvarado and Newlun present questions of cases occurring after the enactment of the "Blakely fix" to the exceptional sentence statute. See Newlun, 142 Wn.App. at 733. Hughes,

⁹ State v. Newlun, 142 Wn.App. 730, 176 P.3d 529 (2008), petition for review deferred, S.Ct. No. 81373-6, September 3, 2008, available at: http://www.courts.wa.gov/appellate_trial_courts/supreme/.

¹⁰ Available at: http://www.courts.wa.gov/appellate_trial_courts/supreme

VanDelft, and Gonzalez-Flores plainly control Mr. Mutch's case, because his case involves offenses committed in 1994. Under this mandatory authority, and consistent with the jury trial rights articulated in Blakely, the trial court lacked authority to increase Mr. Mutch's sentence based on a judge's determination that the standard range was "clearly too lenient."

E. THIS COURT SHOULD GRANT REVIEW IN THE INTEREST OF JUSTICE

Mr. Mutch has filed numerous petitions in this Court and the Court of Appeals challenging his conviction and sentence. After extensive litigation regarding the comparability of his prior federal bank robbery conviction, this Court reversed Mr. Mutch's sentence of life without the possibility of parole on April 30, 2008, and remanded his case for resentencing. Upon remand, the State sought an exceptional sentence based on Mr. Mutch's high offender score and the trial court entered such a sentence without revisiting the accuracy of Mr. Mutch's offender score and without impaneling a jury to consider the merits of an exceptional sentence. Mr. Mutch has now served the entirety of a standard range term and seeks a speedy resolution of the constitutional errors presented. This Court should accept review in the interest

/issues/?fa=atc_supreme_issues.display&fileID=2008May#P835_49982.

of justice and based on the substantial public importance of the issues raised.

IV. CONCLUSION.

Mr. Mutch respectfully requests that this Court accept review of the case at bar.

Respectfully submitted this ^{9th} day of September 2008.



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DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the document filed under **Supreme Court No. 82029-5** to which this declaration is affixed/attached, was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for respondent **David McEachran - Whatcom County Prosecuting Attorney**, appellant and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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