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No. 85469-6

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BRIAN LEROY SIERS,

Respondent.

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

The Honorable James E. Rogers

SUPPLEMENTAL BRIEF OF RESPONDENT BRIAN SIERS

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ORIGINAL

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A. SUMMARY OF ARGUMENT

Brian Siers was charged in an information with two counts of second degree assault. Over Mr. Siers' objection, the trial court instructed the jury to consider whether Mr. Siers' assault was against a Good Samaritan, a statutory aggravating factor not charged in the information. The jury found this aggravating factor but the trial court chose not to impose an exceptional sentence. Instead the judge used the aggravating factor to justify sentencing Mr. Siers to the high end of the standard range.

The Court of Appeals reversed Mr. Siers' conviction and sentence and remanded for resentencing, relying on this Court's decision in *State v. Powell*, 167 Wn.2d 672, 223 P.3d 493 (2009). Mr. Siers urges this Court to affirm the Court of Appeals opinion as consistent with *Powell* as well as other decisions of this Court.

B. ISSUES PRESENTED ON REVIEW

1. Where this Court's decision in *State v. Powell* unequivocally requires the State to charge the aggravating circumstance in the information, and the State failed to charge the aggravating circumstance here, was the Court of Appeals correct in reversing Mr. Siers' conviction and sentence?

2. *Powell* determined that statutory aggravating factors are essential elements of the greater offense. Was the Court of Appeals' decision determining that the remedy for the State's failure to charge the aggravating factor in the information was dismissal of the underlying conviction without prejudice to the State's right to refile consistent with this Court's decisions in *Powell*, *Goodman*, *McCarty*, *Vangerpen*, and *Kjorsvik*?

C. STATEMENT OF THE CASE

Brian Siers was charged with stabbing Jesse Hoover and Daniel Whitten during a fight at the Jai Thai restaurant in Seattle. CP 8-9. The State also charged a deadly weapon enhancement on each count. CP 8-9.

Prior to submitting the case to the jury, the State noted it was seeking a sentence enhancement for Count II (Mr. Whitten), alleging Mr. Whitten was acting as a Good Samaritan. 4/20/09RP 8. Mr. Siers objected to the Good Samaritan aggravator because it was not alleged in the information, and further objected to the court's instructing the jury regarding the aggravating factor. 4/30/09RP 141-42, 160, 5/4/09RP 7. The trial court overruled Mr. Siers' objections and submitted the aggravating factor to the jury. CP 60-63. The jury found Mr. Siers guilty as charged of both

counts, found the deadly enhancements to be proven as well, and answered "yes" to the special verdict regarding the Good Samaritan aggravator. CP 22-27; 5/4/09RP 54-56.

At sentencing, the trial court did not impose an exceptional sentence based on the aggravating factor, but cited the aggravating factor in imposing a high end sentence.

I could impose an exceptional sentence because of the good samaritan aggravator. I think the State's taking the right position in this case in not requesting an exceptional sentence given the facts, but I do think in order to give some weight to the jury's finding of a good samaritan aggravator that I will impose the high end of the range.

5/4/09RP 90.

On appeal, the State conceded the information failed to charge the aggravating "Good Samaritan" factor. *State v. Siers*, 158 Wn.App. 686, 697, 244 P.3d 15 (2010), *review granted*, ___ Wn.2d ___ (March 29, 2011). The State has argued, however, that since the trial court did not impose an exceptional sentence, the error was essentially harmless in light of the lack of a remedy.¹ The Court of Appeals reversed Count II, the assault conviction with the Good Samaritan aggravator, finding the State had failed to charge

¹ The State had argued the remedy for the failure to charge the aggravating factor in the information was to vacate only the sentence, not the underlying conviction, and remand for resentencing. *Siers*, 158 Wn.App. at 697.

an essential element of the offense, thus the conviction and sentence must be reversed. *Id.* at 702-03.

D. ARGUMENT

SINCE THE AGGRAVATING FACTOR INCREASED THE MAXIMUM SENTENCE BEYOND THE OTHERWISE APPLICABLE STATUTORY LIMIT, IT WAS AN ESSENTIAL ELEMENT THAT HAD TO BE CHARGED IN THE INFORMATION

1. Aggravating factors that increase the maximum sentence a court may impose are elements of the offense and must be charged in the information. The Sixth Amendment to the United States Constitution and Article I, 22 of the Washington Constitution require a charging document include all essential elements of a crime--statutory and nonstatutory--so as to inform a defendant of the charges and to allow preparation of the defense. *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); *Leonard v. Territory*, 2 Wash.Terr. 381, 392, 7 P. 872 (1885). "Therefore an accused has a right to be informed of the criminal charge against him so he will be able to prepare and mount a defense at trial." *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). If a charging document does not state an offense on its face, the document is constitutionally deficient and

must be dismissed without prejudice to the State's right to recharge.

State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995).

We have repeatedly and recently insisted that a charging document is constitutionally adequate only if all essential elements of a crime, statutory and non-statutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense. This "essential elements rule" has long been settled law in Washington and is based on the federal and state constitutions and on court rule.

(Internal citations omitted.) *Id.* at 787-88.

In *Apprendi*, the Court held: "[A]ny fact which increases the penalty for a crime 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); accord *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). These "facts" extending the sentence beyond the maximum otherwise authorized by the jury's verdict are elements of an aggravated version of the crime. *Harris v. United States*, 536 U.S. 545, 557, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2003).

Those facts, *Apprendi* held, were what the Framers had in mind when they spoke of "crimes" and "criminal prosecutions" in the Fifth and Sixth Amendments: A crime was not alleged and a criminal prosecution not complete, unless the indictment and the jury verdict

included all the facts to which the legislature had attached the maximum punishment. Any "fact that . . . exposes the criminal defendant to a penalty exceeding *the* maximum he would receive if punished according to the facts reflected in the jury verdict alone," the Court concluded, would have been, under the prevailing historical practice, an element of an aggravated offense.

(Emphasis and internal citation omitted.) *Harris*, 536 U.S. at 563.²

2. *Powell* established the aggravating factors are elements.

This Court subsequently ruled that the aggravating factors enumerated in RCW 9.94A.535 are essential elements of the underlying offense that must be pleaded in the information and proved beyond a reasonable doubt. *Powell*, 167 Wn.2d at 689-90 (Stevens, concurring) ("I therefore agree with the dissent and would hold the State must charge aggravating factors in the information and prove them to a jury in order to obtain an enhanced

² In light of the decisions in *Apprendi* and *Blakely*, the Legislature enacted RCW 9.94A.537(1), which states:

"At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based."

sentence.”).³ In *Powell*, on remand for resentencing following the decision in *Blakely*, the State provided notice of its desire to seek an exceptional sentence based upon a jury finding of a statutory aggravating factor but failed to include the aggravating factor in the information. A majority of this Court made up of a two judge concurrence (Justices Stevens and J. Johnson) and the three judge dissent (Justices Owens, Sanders and Chambers) ruled that the failure to include the aggravating factor in the information violated the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *Id.*⁴

While the four-justice lead opinion ruled the failure to charge the aggravating factor did not violate constitutional standards, the three-justice plurality specifically stated that the failure to include the aggravating factors in the information was contrary to the Washington and United States Constitutions:

Defendants must be given notice of the nature and cause of the accusation, including *all* essential elements of a crime, *before* they have been convicted, not after. Since aggravating circumstances

³ The three justices dissenting coupled with the concurrence of Justices Stephens and Charles Johnson agreeing with the dissenting justices on this point provided a majority for this proposition.

⁴ The four justice lead opinion written by Justice Alexander ruled the direction in RCW 9.94A.537 was merely discretionary and the constitutional requirement of notice of all essential elements of the offense was not violated since aggravating factors are not essential elements. *Powell*, 167 Wn.2d at 680, 687.

are essential elements of a crime that must be charged in an information, submitted to the jury, and proved beyond a reasonable doubt, in the absence of such notice, I must respectfully dissent.

Powell, 167 Wn.2d at 695 (italics in original)(Owens, J. dissenting).

These justices also agreed the failure to charge the aggravating factors was contrary to the plain language of RCW 9.94A.537(1).

Id.

The two-justice concurrence agreed the failure to include the aggravating circumstances in the information violated constitutional standards:

And since the requirement that aggravating factors be charged in the information inheres in the Sixth Amendment jury trial right (not Fifth Amendment due process as discussed by the lead opinion), it applies to the states and binds us in this case. I therefore agree with the dissent and would hold that the State must charge aggravating factors in the information and prove them to a jury in order to obtain an enhanced sentence.

Powell, 167 Wn.2d at 690 (Stevens, J. concurring).

The concurring justices diverged from the dissenting justices regarding the remedy in light of the unique procedural posture of the case. The original sentence was imposed prior to the decision in *Blakely*. On remand following *Blakely*, the jury found the existence of aggravating circumstances and the trial court imposed

an exceptional sentence. The State had not charged the aggravating factor in the information because it was not statutorily required at the time of the trial. Thus for those sentences imposed after *Blakely*, the concurring justices agreed with the dissenting justices. *Id.* at 690. For those sentences imposed before the *Blakely* decision, the concurring justices agreed with the lead opinion that the aggravating factors need not be charged in the information. *Id.* at 690-91.

3. The remedy for the failure to properly charge the aggravating factor in the information is reversal of the underlying conviction as well as the aggravating factor without prejudice.

Where the State fails to charge an essential element of the offense in the information, the remedy is to reverse the conviction without prejudice to the State filing a new information. See *Vangerpen*, 125 Wn.2d at 791 (if a charging document does not on its face state an offense, the document is unconstitutional and must be dismissed without prejudice to the State's right to recharge).⁵ Here, the

⁵ The *Powell* Court did not have the opportunity to address this issue as a majority of the justices found no error in that case. *Powell*, 167 Wn.2d at 688, 691. *Powell* arose not as a challenge to the underlying conviction because of the failure to allege the aggravating factor in the information, but as a challenge to the State's attempt to impanel a jury on remand to find the aggravating factors despite their not being alleged in the information. *Powell*, 167 Wn.2d at 677-81.

essential elements of the "Good Samaritan" was omitted from the information, thus reversal of the conviction is required.

The Court of Appeals here ruled that given the fact the aggravating factor was an essential element of the offense, it was no different than any other element and must be included in both the information and the jury instructions. *Siers*, 158 Wn.App. at 700. The Court noted that the aggravating factor was an essential element of the offense of "second degree assault against a good Samaritan." *Id.* at 701. Thus, reversal of not merely the aggravated element of the offense, but the entire conviction must be reversed under *Vangerpen*. *Id.*

Take for example a person who is charged with first degree theft, but the State fails to properly charge and prove the amount element such that the State only proves second degree theft. See RCW 9A.56.030, .040. The standard range for first degree theft is 0-90 days and the standard range for second degree theft is 0-60 days. See RCW 9.94A.525(7). If the trial court sentenced the defendant to 40 days, under the plurality view in *Powell* there would be error even though the sentence fit within the standard range for either offense. *Vangerpen*, 125 Wn.2d at 791. The same analysis would apply where the State sought a conviction for first degree

murder but the information failed to charge premeditation, thus charging only second degree murder. Again there would be error under the *Powell* plurality. The same analysis applies equally here.

This remedy is also consistent with decisions from this Court. In *State v. Goodman*,⁶ this Court recognized that, in light of the decisions in *Apprendi* and *Blakely*, the specific type of controlled substance is an element of the offense of possession of a controlled substance which must be included in the information. 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004). This Court came to that conclusion because the type of controlled substance determined the maximum sentence that followed the conviction:

Because the statutory maximum sentence increased depending on which controlled substance Goodman possessed, the identity of that controlled substance was a "fact that increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. Therefore, the prosecution was obliged to allege and prove the substance Goodman possessed was methamphetamine.

*Id.*⁶ The plurality decision in *Powell* relied on *Goodman* in reaching its conclusion. *Powell*, 167 Wn.2d at 693-94 (Owens, J. dissenting).

⁶ In Mr. Goodman's case, his conviction for possession with intent deliver methamphetamine carried a 10 year statutory maximum sentence. *Goodman*,

Similarly, in *McCarty, supra*, this Court held that a third person outside the two parties to the delivery was a necessary element of conspiracy to distribute a controlled substance. 140 Wn.2d at 426. This was because, as the Court noted, delivery of a controlled substance involves two people, so conspiracy to deliver must involve at least three people. *Id.* Thus in a straight-forward application of *Vangerpen*, the failure to allege this element rendered the information constitutionally insufficient. *Id.*

This Court's decision in *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073 (1972) does not alter the required remedy that is reversal of the conviction and aggravating factor. The Court of Appeals rejected the State's argument that the remedy should have been just dismissal of the "Good Samaritan" aggravating factor while leaving the underlying conviction intact:

We are not persuaded by the State's contention that the result in *Frazier* dictates the result in this case. First, *Frazier* was pre-*Blakely*. Second, there is no indication in *Frazier* or its progeny that the court considered or was asked to consider the issues Siers raises here – whether omitting the enhancement from the information vitiates the underlying offense as well as the enhanced sentence. Resentencing was the remedy requested by the appellant. The Court simply gave the appellant the remedy she asked for.

150 Wn.2d at 786. The same offense with any other type of controlled substance carried a five year statutory maximum sentence. *Id.*

Siers, 158 Wn.App. at 698-99 (citation and parenthetical omitted). As noted by the Court of Appeals, the remedy of reversal of only the sentence as opposed to the underlying conviction as well was the remedy requested by Mr. Frazier. *Id.* at 699. Thus *Frazier* no longer dictates a particular result here.

Regardless, relying on this Court's decisions in *Vangerpen*, 125 Wn.2d at 793, and *Kjorsvik*, 117 Wn.2d at 105-06, the Court of Appeals concluded that the remedy was dismissal of the underlying offense without prejudice to the State's right to refile it. This conclusion is the logical extension of this Court's decisions in *Powell*, *Vangerpen*, and *Kjorsvik*. The remedy here is very simple for the State to avoid in the future; charge the aggravating circumstance in the information. This Court should therefore affirm the well-reasoned decision of the Court of Appeals as consistent with this Court's prior decisions and the decisions of the United States Supreme Court.

4. This Court should formally adopt the plurality view in *Powell*. The State has urged this Court reexamine its decision in *Powell* because "neither case (*Apprendi* or *Blakely*) stands for the proposition that the Constitution requires that the State allege

aggravating circumstances in the charging document.” Pet. for Rev. at 12-13. In support of its argument, the State cites only to other *state* court decisions which found no requirement to allege aggravating circumstances in the information. *Id.*

This ignores the fact that *Powell* was also based upon the Washington Constitution, thus citation to cases from jurisdictions other than Washington provides no assistance.

This Court has consistently held that “[t]he doctrine of stare decisis “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” ’ ’ *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006), *quoting Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004), *quoting In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Courts of this State will abrogate the holding of a prior decision only where the party seeking to have the decision overruled has demonstrated that the precedent is both incorrect and harmful. *State v. Kier*, 164 Wn.2d 798, 804-05, 194 P.3d 212 (2008).

The State has failed to demonstrate why the plurality decision in *Powell* is incorrect and harmful. As explained, the State’s ability to the avoid the error in this matter is simple; include

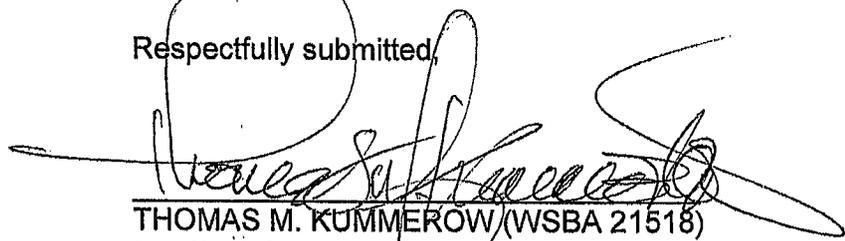
the aggravating factor in the information. Had it done so there would not have been any error. This Court should clearly and concisely restate the holding of the plurality in *Powell*.

E. CONCLUSION

For the reasons stated, Mr. Siers requests this Court affirm the decision of the Court of Appeals reversing his conviction and sentence.

DATED this 11th day of May 2011.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line.

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