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No. 62237-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD DUNCALF,

Appellant.

2009
SUPERIOR COURT OF WASHINGTON
FILED SECTION
11-11-09
50

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. RCW 9.94A.535(3)(y) PERMITTING AN EXCEPTIONAL SENTENCE TO BE IMPOSED IF “THE INJURIES SUBSTANTIALLY EXCEED THE LEVEL NECESSARY TO SATISFY THE ELEMENTS” OF THE CRIME VIOLATES DUE PROCESS VAGUENESS PROHIBITIONS

In State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005, the Court concluded an aggravating factor in support of an exceptional sentence was not subject to a vagueness challenge because the factor did not alter the maximum punishment which could be imposed.

Mr. Duncalf contends, that in light of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the premise upon which Baldwin relied is incorrect and the conclusion is no longer viable.¹ He contends the aggravating factor that he inflicted injuries substantially greater than necessary to prove second degree assault is unconstitutionally vague.

The States responds that because the fact at issue here is merely a sentencing fact, it is not subject to the vagueness doctrine in the same way an “element” of the offense would be. Brief of Respondent at 16-18. The State also contends that because a

¹ This issue is pending before the Washington Supreme Court in State v Stubbs, 81650-6. The Court has not yet set argument in that matter.

jury's finding of an aggravating factor does not require the trial court to impose an exceptional sentence the vagueness doctrine does not apply. Brief of Respondent 17. The State last contends the aggravating factor at issues here is not vague, but fails to articulate any standard that defines what "substantially exceeds" means. Brief of Respondent at 20-23.²

The State's argument on each point is incorrect. The aggravating factors set forth in RCW 9.94A.535 are subject to a vagueness challenge in the same way that every other element of an offense would be. This is true even though a court retains the discretion to impose a standard range sentence despite a jury's verdict finding the existence of aggravating fact. The aggravating factor that Mr. Duncalf inflict injuries greater than that necessary to prove second degree assault is impermissibly vague.

² The State also argues Mr. Duncalf cannot raise a vagueness challenge to the jury instructions because he did not object to the instructions nor propose a clarifying instruction. Brief of Respondent at 18-20. But Mr. Duncalf has never asserted the instructions here were vague. Instead Mr. Duncalf contends "RCW 9.94A.535(3)(y), as applied to Mr. Duncalf, is unconstitutionally vague and violates the Fourteenth Amendment Due Process Clause." Brief of Appellant at 3 (Assignment of Error 2). Because he has not raised such a claim, Mr. Duncalf has not offered a response. Moreover, the State has not and could not argue that an appellant must challenge the jury instruction if he wishes to challenge the vagueness of the statute. See State v. Whitaker, 133 Wn.App. 199, 233, 135 P.3d 923 (2006)(vagueness doctrine "applies to statutes and official policies, not to jury instructions."); review denied, 159 Wn.2d 1017, cert. denied, 128 S.Ct. 375 (2007).

a. Aggravating factors are subject to vagueness challenges in the same way as other elements of the offense are.

The Supreme Court has made clear that facts which increase the maximum penalty, like the jury's special verdict here, are elements of a greater offense. The Court has said

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)] makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. 466 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (Recuenco II). The Court has further explained that once all facts necessary to establishing the maximum punishment have been found by the jury "the defendant has been convicted of the crime; the Fifth and Sixth Amendments have been observed; and the Government has been authorized to impose any sentence below the maximum." Harris v. United States, 536 U.S. 545, 565, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). "[T]hose facts that determine the maximum sentence the law allows,' then, are necessarily elements of the crime." Id. at 565 (citing Apprendi, at 499)

The jury's finding of a special verdict establishes the maximum penalty for the offense; it is thus "necessarily an element[] of the crime." The State has failed to articulate any basis to distinguish one element of a crime from another to support its view that the vagueness doctrine applies to one class of elements but not the other. The State even acknowledges that appellate review of the sufficiency of the proof of aggravating factors mirrors that of every other element of the offense. Brief of Respondent at 10, n.3. Yet the reason for that similarity appears lost on the State. Quite simply there is no meaningful constitutional distinction between elements and aggravators; they are one and the same.

The State's mantra in its brief is the erroneous claim that the only change to the SRA required by Blakely is that a jury and not a judge determine the sentence. See e.g., Brief of Respondent at 17, 23. The State claims "[o]ne thing, and one thing only is different post-Blakely and the resulting statutory amendments . . .the jury now must decide beyond a reasonable doubt the facts supporting an exceptional sentence." Brief of Respondent at 23. Lost on the State is the fact that its dismissive statement actually recognizes two distinct changes; the jury is now the finder of fact and the standard of proof has risen from a mere preponderance of the

evidence to proof beyond a reasonable doubt. In addition, to that RCW 9.94.537(1) now requires the State provide notice of its intent to seek an exceptional sentence.

The State's argument is premised on the mistaken belief that the Supreme Court randomly chose to impose a constitutional dimension upon a "sentencing fact." But that is not what the Court did. Rather, the Court concluded that because a fact which a legislature termed a "sentencing fact" was in fact an element in the traditional sense, that fact is subject to the constitutional requirements which apply to every other element. The Court concluded there is no constitutional distinction between a fact which the legislature chooses to call an "element" and those the legislature chooses to call an aggravator or sentencing factor. Recuenco II, 548 U.S. at 220.

Whether this court chooses to call it an element or a "sentencing factor", the aggravating factor is subject to the same constitutional restrictions that apply to every other element. Thus, the vagueness doctrine applies.

b. An element of an offense is subject to a vagueness challenge even if it does not dictate a specific outcome.
Before Blakely, Baldwin held "the void for vagueness doctrine

should have application only to laws that “proscribe or prescribe conduct” and ... it was “analytically unsound” to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences.” 150 Wn.2d at 459 (quoting State v. Jacobsen, 92 Wn.App. 958, 966, 965 P.2d 1140, review denied, 137 Wn.2d 1033 (1999) (internal quotation omitted)). From this premise, Baldwin concluded that sentencing guidelines “do not define conduct ... nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature[,]” and so found the void-for-vagueness doctrine “[has] no application in the context of sentencing guidelines.” Baldwin, 150 Wn.2d at 459.

The State’s response embraces the result of Baldwin all the while ignoring its reasoning. The State never addresses the significance Baldwin placed upon the erroneous premise that aggravating factors do not alter the maximum penalty for an offense. The incorrectness of that premise is now beyond dispute. Blakely held that aggravating factors in fact do alter the statutory maximum of the offense. 542 U.S. at 306-07.

The State chooses instead to contend that because an aggravating factor does not direct a particular punishment it is not

subject to a vagueness challenge. In Baldwin the Court stated “before a state law can create a liberty interest, it must contain “substantive predicates” to the exercise of discretion and “specific directives to the decision maker that if the regulations’ substantive predicates are present, a particular outcome must follow.”

Baldwin, 150 Wn.2d at 460 (quoting In re Personal Restraint of Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)). The State’s reliance upon this dicta in Baldwin is misplaced.

First, any discussion of a liberty interest is irrelevant to the application of the vagueness doctrine to a penal statute. By definition a penal statute involves the most basic of liberty interests: the freedom from State imposed confinement. Second, because an aggravating factor allows a court to extend the term of confinement beyond that otherwise permitted, it defines the lawfulness of the confinement. By contrast, the parole statutes at issue in Cashaw concerned whether a defendant had a right to be freed prior to the expiration of his lawfully imposed sentence. 123 Wn.2d at 145-47.

In the first scenario a defendant must be afforded the opportunity to challenge the constitutionality of the confinement, e.g. whether it is premised upon a vague statute. In the second scenario, however, since the defendant’s confinement is lawful

there is no constitutional directive that he be permitted to demand something less than what was lawfully ordered, unless he can demonstrate a statutory directive that requires a different outcome.

If a defendant could only raise a vagueness challenge to elements which require a particular result, no such challenge could ever be raised to challenge the elements of an offense in jurisdictions which do not employ determinate sentencing, such as the federal court, where a conviction does not mandate a particular sentence. The same could be said of the element of any felony offense in Washington which does not trigger a mandatory minimum, as a court is always free to exercise its discretion to impose any sentence within the standard range. Certainly the vast majority of misdemeanors would be immune from vagueness challenges because a jury finding as to any element does not require the court to impose a particular sentence, or for that matter does not require the court impose any sentence at all.

The State's argument rests upon the fanciful belief that vagueness challenges came into being only with the advent of determinate sentencing and/or minimum terms. That is plainly not the case. A statute is not immune from a vagueness attack simply because a judge retains discretion despite a jury verdict..

Whether it is because it is an element of a new offense or merely because the aggravating factor in this case increases the maximum punishment, the vagueness doctrine of the Due Process Clause must apply. See Baldwin, 150 Wn.2d at 459; see also, State v. Schmidt, 208 P.3d 214 (Ariz. 2009) (concluding aggravating factor unconstitutionally vague).

c. The aggravating factor is impermissibly vague.

The vagueness doctrine of the due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Id. at 108-09. A “statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites “unfettered latitude” in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct.

518, 15 L.Ed.2d 447 (1966). The vagueness doctrine is most concerned with ensuring the existence of minimal guidelines to govern enforcement. Kolender v. Lawson, 461 U.S. 352, 358, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983); O'Day v. King County, 109 Wn.2d 796, 810, 749 P.2d 142 (1988).

The State asserts the “facts of this case are on the far end of the spectrum of possible injuries that could be inflicted in a second-degree assault case.” Brief of Respondent at 22. The question is not whether a particular prosecutor, or even this Court, is certain what the spectrum of injuries looks like. Instead, the only relevant question is what standard informed the jury when it was tasked with placing the victim’s injuries on this imaginary spectrum of injuries. The State has not identified such a standard because it cannot.

As noted in Mr. Duncalf’s initial brief, Judge Canova told the deputy prosecutor “[y]ou will also need an instruction that defines substantially exceed. That will be the first question or one of the first questions we will get from the jury.” 6/23/09 RP 101. And indeed, the jury inquired “what constitutes ‘substantially exceeds’ the level of bodily injury necessary to constitute ‘substantial bodily injury.’” CP 392. Despite its own recognition of the vagueness of the question, the court declined to provide further instruction.

Because RCW 9.94A.535(3)(y) does not guard against this arbitrary and inherently subjective application it is void for vagueness. Mr. Duncalf's sentence which is predicated on this unconstitutionally vague aggravator must be reversed.

2. BECAUSE THERE IS NO OBJECTIVE DEFINITION OF WHAT CONSTITUTES A SUBSTANTIAL AND COMPELLING REASON THE STATUTES GOVERNING THE IMPOSITION AND REVIEW OF AN EXCEPTIONAL SENTENCE DEPRIVE MR. DUNCALF OF DUE PROCESS.

Because the provisions of the Sentencing Reform Act governing the imposition and appeal of an exceptional sentence are without any meaningful standard governing their application, Mr. Duncalf is deprived of due process and of his right to appeal.

The State responds that a meaningful standard of review exists because a court will examine the length of the sentence for an abuse of discretion. Brief of Respondent at 27. A court abuses its discretion where it relies on untenable grounds or where the resulting sentence "shocks the conscience of the reviewing court." State v. Ritchie, 126 Wn.2d 388, 396-97, 894 P.2d 1308 (1995) (citing State v. Ross, 71 Wn.App. 556, 571-72, 861 P.2d 473 (1993)). But since a sentencing court need not provide an explanation of the length of sentence imposed, a reviewing court

can never know if the length was based upon an untenable ground. Instead, the a reviewing court may only ask whether it shocks the conscience, i.e. does it go too far?

Addressing the Washington Supreme Court's cases reviewing the length of sentences imposed, i.e. employing the same abuse of discretion standard, the United States Supreme Court wondered:

Did the court go *too far* in any of these cases? There is no answer that legal analysis can provide. With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them

(Italics in original). Blakely 150 U.S. at 308. The “shocks-the-conscience” standard is no standard at all. While the State is confident that reviewing a sentence to determine if goes “too far” is meaningful, it fails to point to any standard that this Court may employ to determine how far is too far.

Because of the absence of standards governing the imposition of Mr. Duncalf's sentence, and his inability obtain any meaningful review of the imposition of the sentence, this Court must reverse the sentence imposed.

B. CONCLUSION

Based upon the arguments set forth above, and those in Mr. Duncalf's previous brief, this Court must reverse Mr. Duncalf's sentence.

Respectfully submitted this 12th day of October, 2009.

A handwritten signature in black ink, appearing to read "Gregory C. Link", written over a horizontal line.

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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62237-4-I
v.)	
)	
RICHARD DUNCALF,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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