

NO. 94346-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DAVID MURRAY,

Petitioner.

**SUPPLEMENTAL BRIEF OF RESPONDENT ADDRESSING
BLAKELY V. WASHINGTON AND APPRENDI V. NEW JERSEY**

DANIEL T. SATTERBERG
King County Prosecuting Attorney

KRISTIN A. RELYEA
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. INTRODUCTION

For the first time in his Supplemental Brief to this Court, Murray argued that the aggravating circumstances found by a jury are subject to a due process vagueness challenge under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), contrary to this Court's precedent in State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003). Murray argues that when aggravating circumstances are used to justify an exceptional sentence, they are the functional equivalent to elements of a criminal offense, and thereby subject to a vagueness challenge.

Murray is mistaken. Murray has not argued, nor can he show, that Baldwin is incorrect and harmful, as required to overturn established precedent. Blakely and Apprendi are firmly rooted in the Sixth Amendment right to a jury trial, and did not address, let alone alter, the Fourteenth Amendment due process vagueness doctrine. Murray has not provided any authority to substantiate his claim that aggravating circumstances are the functional equivalent to elements of a criminal offense. Indeed, this Court's precedent is to the contrary. State v. Siers, 174 Wn.2d 269, 271, 274 P.3d 358 (2012). Murray's exceptional sentence should be affirmed.

B. ISSUE PRESENTED

Whether this Court's holding in Baldwin – that the aggravating circumstances are not subject to a vagueness challenge because exceptional sentences are discretionary – remains correct after Blakely and Apprendi?

C. STATEMENT OF THE CASE¹

A jury convicted Murray of three counts of felony indecent exposure with the aggravating circumstances of rapid recidivism and sexual motivation. The trial court imposed an exceptional sentence of 36 months total confinement.

D. SUPPLEMENTAL ARGUMENT ADDRESSING *BLAKELY V. WASHINGTON* AND *APPRENDI V. NEW JERSEY*

Murray seeks reversal of his exceptional sentence, arguing that the rapid recidivism aggravating circumstance is unconstitutionally vague under Blakely and Apprendi. To prevail, Murray must make a “clear showing” that this Court’s established precedent in Baldwin barring vagueness challenges is “incorrect *and* harmful.” State v. Barber, 170 Wn.2d 854, 863-64, 248 P.3d 494 (2011) (emphasis in original).

¹ The facts of this case were previously summarized in the Supplemental Brief of Respondent at pages two to six.

Although Murray argues that Baldwin is incorrect post-Blakely and Apprendi, he has not argued, nor can he show, that Baldwin is harmful.² Having failed to carry his heavy burden of establishing that prong, Murray's claim should be rejected outright.

More fundamentally, Murray's argument that Baldwin is "no longer good law" following Blakely and Apprendi fails. Pet. Supp. Br. at 10. In Apprendi, a decision *predating* Baldwin, the United States Supreme Court considered whether the judge or the jury must determine facts that increase a defendant's maximum sentence beyond a reasonable doubt. 530 U.S. at 469. The court held that the jury must decide, anchoring its decision in the Sixth Amendment right to a jury trial and the Fourteenth Amendment due process guarantee to a jury verdict based on proof beyond a reasonable doubt. *Id.* at 476-78. The due process vagueness doctrine was not discussed, let alone cited in Apprendi.

Shortly thereafter, the court reaffirmed Apprendi in Blakely, reversing an exceptional sentence where the judge, rather than the jury, determined that aggravating circumstances existed that merited an increased sentence. 542 U.S. at 300, 305. Once again, the court rooted its

² "A decision may be 'harmful' for a variety of reasons." State v. Barber, 170 Wn.2d 854, 865, 248 P.3d 494 (2011) (collecting cases and recognizing that "the common thread" was the "detrimental impact on the public interest").

decision in the Sixth Amendment right to a jury trial and made no reference to the due process vagueness doctrine. Id. at 305-08.

Taken together, Apprendi and Blakely changed *who* decided the factual contest (judge or jury) in exceptional sentence proceedings, but did not alter or address *what* was decided. The Sixth Amendment right to a jury trial is undeniably distinct from the Fourteenth Amendment right to sufficiently clear laws that provide adequate public notice and protect against arbitrary state intrusion. State v. Smith, 111 Wn.2d 1, 4-5, 759 P.2d 372 (1988). Murray fails to explain why the Sixth Amendment requirement that a jury determine an aggravating circumstance changed the Fourteenth Amendment due process vagueness analysis, and compels the result that Baldwin is wrong and must be reversed.

Rather, Murray argues that the aggravating circumstances are functionally equivalent to elements of a criminal offense because otherwise the legislature could sidestep the void for vagueness doctrine through “clever drafting” by making an arguably vague fact of an offense an aggravating circumstance. Pet. Supp. Br. at 8. Setting aside the speculative nature of his claim, and its reliance on a crafty and somewhat duplicitous legislature, Murray’s argument falls flat because it ignores this Court’s jurisprudence to the contrary.

In State v. Siers, this Court held that aggravating circumstances are not the functional equivalent of essential elements that must be charged in an information.³ 174 Wn.2d at 271. Murray does not acknowledge Siers, or make any attempt to reconcile it with his argument. Murray cannot explain how aggravating circumstances are essential elements for purposes of vagueness review, but not for purposes of charging.

Murray's analogy further crumbles when the impact of finding an aggravated circumstance is compared to the impact of finding elements. Unlike elements, which dictate punishment, aggravating circumstances permit, but do not require, punishment. When a jury finds that an aggravating circumstance exists, the judge is authorized, although not obligated to impose an exceptional sentence.⁴ RCW 9.94A.535 (providing the court "may" impose an exceptional sentence); RCW 9.94A.537(6) (providing the court "may" impose a sentence above the standard range if "substantial and compelling reasons" justify it).

Conversely, when a jury finds the elements of a crime, then the defendant is automatically subject to punishment. See RCW 9.94A.505(1) ("When a person is convicted of a felony, the court shall impose

³ In reaching this conclusion, this Court reversed its prior precedent to the contrary, finding it incorrect and harmful. State v. Siers, 174 Wn.2d 269, 276-82, 274 P.3d 358 (2012).

⁴ For example, in State v. Siers, the jury found the existence of an aggravating circumstance but the trial court declined to impose an exceptional sentence. 174 Wn.2d at 272-73.

punishment . . .”); RCW 9A.20.021(2) (“Every person convicted of a gross misdemeanor . . . shall be punished); RCW.9A.20.021(3) (same for misdemeanor). Aggravating circumstances are not equivalent to elements because they do not mandate punishment.

Murray’s other attempts to cast doubt on Baldwin are unpersuasive because they mischaracterize and lump together distinct constitutional protections. For example, Murray insists that this Court erred in Baldwin by concluding that the sentencing guidelines do not create a constitutionally protectable liberty interest because Apprendi was “grounded in due process.” Pet. Supp. Br. at 9. Murray’s argument, however, glosses over a critical distinction. Apprendi rested on the due process guarantee ensuring proof beyond a reasonable doubt, which is analytically different than the due process guarantee invalidating unconstitutionally vague laws. Compare id., 530 U.S. at 477-78, 484 (relying on In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)), with Baldwin, 150 Wn.2d at 458 (relying on Papachristou v. City of Jacksonville, 405 U.S. 156, 168, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972) and City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)).

Further, Murray argues that Baldwin is inconsistent with Blakely by selectively quoting a footnote, and then taking it out of context. In

Blakely, the State argued that Apprendi and another case were distinguishable because the enumerated grounds for imposing an exceptional sentence were illustrative rather than exhaustive. 542 U.S. at 305. The Blakely court disagreed, finding the distinction “immaterial” and reasoning:

Whether the judge’s authority to impose an enhanced sentence depends on finding a specified fact (as in Apprendi) . . . or *any* aggravating fact (as here), it remains the case that the jury’s verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.⁸

^{FN 8} Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.

542 U.S. at 305 n.8 (emphasis in original).

Considering the passage in full, it is clear that the Blakely court was concerned about judicial factfinding, and that that constitutional infirmity could not be cured by a judge’s later discretionary decision to impose an exceptional sentence based on whether the judicially-found aggravating circumstance was a substantial and compelling reason to depart from the standard range. The passage has no bearing on the

question presented here, whether discretionary exceptional sentence guidelines are subject to constitutional vagueness challenges.

In sum, Murray's claim fails because he has not made a clear showing that Baldwin is both "incorrect *and* harmful." Barber, 170 Wn.2d at 863-64.

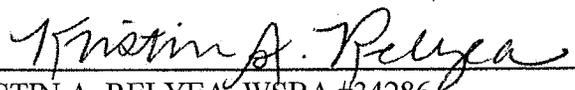
E. CONCLUSION

For the foregoing reasons, the Court should affirm Murray's exceptional sentence.

DATED this 23rd day of October, 2017.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
KRISTIN A. RELYEA, WSBA #34286
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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