

63303-1

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No. 63303-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

QUINTIN DESHAUN RAINES,

Appellant.

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY..... 1

 1. GIVEN THE STATE'S CONCESSION THAT ONE OF THE
 AGGRAVATING FACTORS UNDERLYING THE
 EXCEPTIONAL SENTENCE IS INVALID, RAINES MUST
 BE RESENTENCED..... 1

 2. RAINES MAY ARGUE FOR THE FIRST TIME ON APPEAL
 THAT THE EXCEPTIONAL SENTENCE STATUTE IS VOID
 FOR VAGUENESS IN VIOLATION OF DUE PROCESS 3

 3. THE STATUTE IS IMPERMISSIBLY VAGUE IN VIOLATION
 OF DUE PROCESS 5

B. CONCLUSION..... 7

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)..... 4

State v. Pryor, 115 Wn.2d 445, 799 P.2d 244 (1990)..... 1

State v. Smith, 123 Wn.2d 51, 864 P.2d 1371 (1993)..... 1, 2

Washington Court of Appeals

State v. Crutchfield, 53 Wn. App. 916, 771 P.2d 746 (1989),
overruled on other grounds by State v. Chadderton, 119 Wn.2d
390, 396, 832 P.2d 481 (1992) 2

State v. Hunter, 102 Wn. App. 630, 9 P.3d 872 (2000), rev. denied,
142 Wn.2d 1026, 21 P.3d 1150 (2001)..... 4, 5

A. ARGUMENT IN REPLY

1. GIVEN THE STATE'S CONCESSION THAT ONE OF THE AGGRAVATING FACTORS UNDERLYING THE EXCEPTIONAL SENTENCE IS INVALID, RAINES MUST BE RESENTENCED

In his opening brief, Raines argued the two aggravating factors that the court relied upon to impose his exceptional sentence were invalid. The State concedes that one of the aggravating factors, that the victim was present during the burglary, was invalid. Given the State's concession and the significant disparity between the exceptional sentence imposed and the standard sentence range, Raines must be resentenced.

The rule is that, where one or more of the aggravating factors underlying an exceptional sentence are invalid, the Court of Appeals must reverse and remand for resentencing if "it is unclear whether the trial judge would have imposed the same sentence had he considered only the . . . valid aggravating factors." State v. Smith, 123 Wn.2d 51, 58, 864 P.2d 1371 (1993). That condition is met where the exceptional sentence imposed differs significantly from the standard sentence range: "[R]emand is necessary . . . where some factors are inappropriate and the exceptional sentence significantly deviates from the standard range." State v. Pryor, 115 Wn.2d 445, 456, 799 P.2d 244 (1990); see also State v.

Crutchfield, 53 Wn. App. 916, 931, 771 P.2d 746 (1989), overruled on other grounds by State v. Chadderton, 119 Wn.2d 390, 396, 832 P.2d 481 (1992) (remand required "in light of the great disparity between the 90-month sentence imposed and the 36-month midpoint of the standard range").

Where the length of the exceptional sentence significantly differs from the standard sentence range, remand is necessary to enable the court to reconsider the sentence length, even if the trial court explicitly stated that any one of the aggravating factors relied upon was sufficient to support an exceptional sentence. Smith, 123 Wn.2d at at 58 n.8. In Smith, the trial court imposed an exceptional sentence of 100 months for each of three burglary convictions, to be served consecutively. Id. at 54. The standard range sentence was 43 to 57 months for each offense, to be served concurrently. Id. The Supreme Court held that two of four aggravating factors on which the court relied were invalid. Id. at 58. The court remanded for resentencing, explaining, "[g]iven the great disparity between the presumptive sentence and the exceptional sentence, it is unclear whether the trial judge would have imposed the same sentence had he considered only the two valid aggravating factors." Id. Although the trial court explicitly stated that, "[e]ach of the

above findings of fact is a substantial and compelling reason justifying an exceptional sentence of 100 months on each count to run consecutively," the Supreme Court held that remand was still necessary to enable the trial court to reconsider the sentence length. Id. at 58 n.8.

Similarly, here, this Court cannot be confident that the trial court would have imposed the same sentence had it considered only the single aggravating factor of victim vulnerability. The standard range sentence was 26 to 34 months. CP 10. The court imposed an exceptional sentence of twice that length, or 60 months. Given the significant disparity between the standard range sentence and the exceptional sentence imposed, this Court cannot be confident the trial court would have imposed the same sentence based only on a single aggravating factor. Remand for resentencing is therefore required.

2. RAINES MAY ARGUE FOR THE FIRST TIME ON APPEAL THAT THE EXCEPTIONAL SENTENCE STATUTE IS VOID FOR VAGUENESS IN VIOLATION OF DUE PROCESS

The State contends that Raines may not challenge the vagueness of the jury instructions for the first time on appeal, because he did not propose his own jury instruction defining the aggravating factor of victim vulnerability. SRB at 11. But the

principal issue is whether the statute defining the aggravating factor is impermissibly vague as applied to this case. The case law holds that is an issue that may be raised for the first time on appeal.

In State v. Hunter, 102 Wn. App. 630, 9 P.3d 872 (2000), rev. denied, 142 Wn.2d 1026, 21 P.3d 1150 (2001), Hunter argued for the first time on appeal that a provision of the Sentencing Reform Act was vague in violation of due process. Specifically, Hunter argued that the inclusion of drug fund contributions in the statutory definition of financial legal obligations was vague and failed to provide adequate notice to the citizen of when a drug fund contribution would be imposed and what amount would be imposed. Id. at 637. This Court allowed Hunter to raise the challenge for the first time on appeal. The Court explained, "[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." Id. at 633 (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

Similarly, here, Raines argues that a provision of the exceptional sentence statute, which is part of the Sentencing Reform Act, is impermissibly vague in violation of due process. As

in Hunter, Raines may raise that challenge for the first time on appeal.

3. THE STATUTE IS IMPERMISSIBLY VAGUE IN VIOLATION OF DUE PROCESS

The State contends the statute is not impermissibly vague as applied to this case, because "[t]he jury was able to observe the victim in this case and decide whether she was particularly vulnerable or incapable of resistance." SRB at 15. The State contends the jury could conclude the victim was *particularly* vulnerable because of her advanced age, because the testimony showed Raines deliberately chose her to attempt to rob, and because "a person of ordinary intelligence can see that there is a difference between, as in this case, an athletic male in his twenties and a woman in her seventies. The two persons' ability to resist would be drastically different." SRB at 15-17.

The State essentially misses the point. The question is not whether the evidence was sufficient to support a finding that the victim was vulnerable to a burglary and an assault by Raines with a pellet gun. Instead, the question is whether an ordinary citizen could reasonably conclude, without any frame of reference, that the victim was *particularly* vulnerable, that is, more vulnerable than the *typical* victim of an assault and burglary. Whether the victim was

more vulnerable than Raines himself is not the issue. Whether or not Raines chose the victim due to her advanced age is also not the issue. Instead, the issue is whether an ordinary citizen could conclude that "typical" burglaries do not involve similarly "vulnerable" victims, or that a typical burglar would not choose a victim based upon her "vulnerability."

As explained in the opening brief, although judges may draw upon their experience adjudicating similar cases to decide whether the facts before them are "typical," ordinary citizens have no such basis for comparison. While judges may understand what "particularly vulnerable" means, the term is so imprecise that it carries no commonsense meaning that can consistently be applied by ordinary citizens.

The statutory phrase, whether the victim was *particularly* vulnerable, is impermissibly vague, does not provide adequate notice to the citizen of what conduct is prohibited, and enables arbitrary enforcement. It therefore violates due process and the court erred in relying upon that aggravating factor in imposing the exceptional sentence in this case.

B. CONCLUSION

For the reasons set forth above and in the opening brief, the statutory aggravating factor of particular victim vulnerability is unconstitutionally vague as applied to this case. Given the State's concession that the other aggravating factor relied upon is also invalid, the exceptional sentence must be reversed and the case remanded for imposition of a sentence within the standard range.

Respectfully submitted this 4th day of January 2010.



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

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| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 63303-1-I |
| v. |) | |
| |) | |
| QUINTIN RAINES, |) | |
| |) | |
| Appellant. |) | |

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