

64262-6

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NO. 64262-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL J. ROWLAND,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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I. ISSUE

This Court reduced defendant's offender score to 2 and remanded for re-sentencing. The sentencing court declined to reconsider the offender score or empanel a jury to reconsider the factual findings supporting an exceptional sentence. The court then imposed the same sentence based on the offender score ordered by this Court. Can defendant appeal the court's decisions?

II. STATEMENT OF THE CASE

The facts and procedural history of this case prior to remand are adequately set out in this Court's opinion. In re Personal Restraint of Rowland, 149 Wn. App. 496, 500-01, 204 P.3d 953 (2009).

To that recitation, the State adds: On May 15, 2009, this Court returned this case to the sentencing court for "further proceedings in accordance with the attached true copy of the opinion." CP 56.

Defendant filed a Sentencing Memorandum. CP 39-51. In that, defendant argued that his offender score was 2, and that he must be sentenced to a standard range sentence. CP 39-40. The State filed a Sentencing Memorandum arguing that the factual

findings supporting the exceptional sentence were the law of the case and could not be re-visited by the trial court. CP 52-55.

Defendant then filed a Supplemental Sentencing Memorandum on September 14, 2009, arguing for the first time that the two remaining California drug convictions, even though they were separated by more than two years, should count as only one point, since the probation revocation of the first case was served concurrently with the sentence in the second case. CP 24-26.

On September 16, 2009, the court held the re-sentencing hearing. The victim's brother and sister testified about the pain that resulted from having defendant's sentence reversed and the case remanded for re-sentencing. 9/16 RP 6, 12-13. Defendant told the court "I want to apologize to the family to bring you here again, to go through all this all over again." 9/16 RP 20. He then said to the victim's family, "This is the last time I hope we ever have to see each other again." 9/16 RP 21.

In looking at the issues defendant raised, the court ruled:

I believe that in regards to sentencing you, I sentenced you correctly 18 years ago. The sentencing was affirmed by the Court of Appeals, my sentence was affirmed

The Court of Appeals now has, on your PRP request, has determined that the sentencing score

should be a two rather than a three when I sentenced you because of a change in the law. And this matter comes back before me with the posture that your sentencing score is a two, and that for me to re-sentence you.

* * *

Mr. Rowland, I gave a great deal of thought to the sentence that I imposed when I sentenced you 18 years ago. I see no reason to change that sentence now, not up, not down. And I'm not going to, except the fact that the sentencing score has changed. . . . when I sentenced you, it was the intent to treat you and [your co-accused] as equal in that I was sentencing you to the high end of the range along with 15 years as an exceptional sentence to both of you. That was my intent, and there is no reason to depart from that now.

9/16 RP 23-25.

The court re-sentenced defendant to 347 months, the top of the standard range, plus 180 months for the deliberate cruelty – a total of 527 months. 9/16 RP 25, CP 15.¹

Defendant appeals his exceptional sentence. He argues that the court erred by not re-calculating his offender score as 1, and by imposing an exceptional sentence without a jury finding of deliberate cruelty. Brief of Appellant 5.

¹ The court also sentenced defendant to five months confinement for the taking a motor vehicle without permission. That was a standard range sentence.

III. ARGUMENT

A. THE LAW OF THE CASE REQUIRED THE COURT IN RE-SENTENCING TO USE AN OFFENDER SCORE OF 2 AND THE FACTS FOUND FOR THE EXCEPTIONAL SENTENCE.

The law of the case doctrine “refers to ‘the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand.’” Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992), quoting 15 L. Orland & Tegland, Wn. Practice, Judgments § 380, at 55 (4th Ed. 1986).

In defendant’s first appeal, “he challenged the exceptional sentence on the basis that the finding of deliberate cruelty was neither supported by the record nor legally adequate to justify an exceptional sentence.” Rowland, 149 Wn. App. at 501. This Court affirmed the exceptional sentence. It became the law of the case.

In his personal restraint petition, defendant challenged his offender score. This court ruled it was 2, not 3. Rowland, 149 Wn. App. at 507.

Upon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court[.]”

RAP 12.2 (emphasis added).

The factual findings of deliberate cruelty and that defendant's offender score was 2 are the law of the case.

Defendant relies on State v. McNeal, 142 Wn. App. 777, 175 P.3d 1139 (2008), to argue that the factual basis of the exceptional sentence must be sent to a jury and proved beyond a reasonable doubt. Brief of Appellant 8-9. In McNeal, the State conceded it was error to not empanel a jury to determine if facts existed to support an exceptional sentence, and the Court agreed. 142 Wn. App. at 786. The State does not so concede here.

It is not clear whether this Court considered the exceptional sentence as the law of the case in McNeal before deciding that Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), required a jury finding to support an exceptional sentence. It is clear that this Court expressed grave reservations that Blakely would apply here. Rowland, 149 Wn. App. at 511-12. This Court should now clarify that under the circumstances of this case, the court below was not required to hold a Blakely hearing. See State v. Taylor, 111 Wn. App. 519, 526, 45 P.3d 1112 (2002), review denied, 148 Wn.2d 1005 (2003) (exceptional sentence was the law of the case, and unless the findings were clearly erroneous,

defendant was not entitled to an Apprendi² hearing on remand for re-sentencing).

A jury hearing on the facts supporting the exceptional sentence in this case would be a useless exercise. Under the law of the case doctrine, presumably the court would instruct the jury that the facts showing defendant and his co-accused struck the victim in the head with an ax, stabbed him with a knife 16 times, told him he was dying, and stuffed a stocking cap into his mouth to prevent his calling for help were deliberate cruelty, as a matter of law. At that point, there would be nothing for the jury to decide. The form of having a jury comply with the court's instruction on deliberate cruelty should not overcome the substance that a Blakely hearing would use scarce judicial resources and needlessly put the victim's family through the pain of re-living a loved one's death yet again. See State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (constitutional error harmless if beyond a reasonable doubt the result would have been the same without the error).

As to the calculation of the offender score, defendant challenged the score in his personal restraint petition. This Court

² Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

considered the score and found it was 2. Rowland, 149 Wn. App. at 507. That finding is the law of the case. The re-sentencing court was not at liberty to ignore the law of the case. Lutheran Day Care, 119 Wn.2d at 113.

While the legal argument defendant tried to raise with the re-sentencing court had not been raised before this Court, that fact did not give the court below leave to ignore the holding of this Court. Accordingly, the law of the case precluded the court from reconsidering the offender score.

B. COLLATERAL ESTOPPEL PREVENTED THE RE-SENTENCING COURT FROM CONSIDERING DEFENDANT'S EXCEPTIONAL SENTENCE.

Collateral estoppel (or issue preclusion) "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). This court has long recognized that collateral estoppel applies in criminal cases. Washington courts have adopted the perspective of federal decisions that collateral estoppel in criminal cases is not to be applied with a hypertechnical approach but with realism and rationality.

Before collateral estoppel is applied, affirmative answers must be given to each of the following questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea of collateral estoppel is asserted a party or in privity

with the party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

State v. Tili, 148 Wn.2d 350, 360-361, 60 P.3d 1192 (2003).

Collateral estoppel clearly precludes re-litigation of the exceptional sentence. The identical question was decided in the prior adjudication. There was a final judgment on the merits. The defendant was a party in the prior adjudication. There is no injustice if no Blakely hearing is held.

It would be an injustice if defendant could show that this Court was incorrect, and the factual findings of the sentencing court supporting the exceptional sentence were not supported by the record. Defendant does not even make that argument. As discussed above, it is clear beyond a reasonable doubt that a jury would find deliberate cruelty if the issue was put to it. Holding that collateral estoppels precluded the re-sentencing court from holding a Blakely hearing would not constitute an injustice to defendant.

C. THE COURT'S RE-SENTENCING WAS NOT AN EXERCISE OF THE COURT'S DISCRETION.

Defendant asserts that since there was a re-sentencing, the court below exercised its discretion, thus an appeal of that discretion is available. This issue is controlled by the legal reasoning in State v. Barberio, 121 Wn.2d 48, 84 P.2d 519 (1993).

There, “the trial court made clear in its oral ruling that it was not considering anew its prior exceptional sentence, as to the count which was affirmed.” Barberio, 121 Wn.2d at 51. The Supreme Court then held that the trial court did not independently review the exceptional sentence, there was no basis for an appeal. Id.

Here, as in Barberio, the offender score was lowered on appeal. Here, as in Barberio, the court made it clear that it did not intend to review its exceptional sentence. In Barberio, the court imposed the same length of sentence despite a lowering of the offender score and a reduction in the number of victims. The Supreme Court held that was not an independent review of the sentence. The court here imposed the high end of the standard range plus 15 years for the deliberate cruelty. This Court should find that this was not an independent review of the exceptional sentence.

The Supreme Court relied on this reasoning in State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009). There the Supreme Court said that “Where an error in a defendant’s offender score affects the sentencing range, resentencing is required.” Kilgore, 167 Wn.2d at 41. The Supreme Court did not overrule its decision in Barberio that a re-sentencing where the court does not

independently review the exceptional sentence is an exercise of discretion that is reviewable.

D. WHERE A COURT, ON REMAND, DOES NOT CONSIDER AN ISSUE THAT COULD HAVE BEEN RAISED ON THE FIRST APPEAL, BUT WAS NOT, THIS COURT MAY NOT CONSIDER THAT ISSUE ON APPEAL.

Where an issue that could have been raised in a first appeal was not raised, only “if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.” Barberio, 121 Wn.2d at 50. Here, in the first sentencing, defendant did not raise the issue of whether his two pre-1986 California drug convictions should have been counted separately. 3/12 RP 6, 29. That issue was not raised in the first appeal.

Further, when defendant filed his personal restraint petition attacking his offender score, he could have raised the issue of whether the California drug convictions were properly counted as two points. He did not. Accordingly, defendant should not be allowed to raise this issue at this late point in his litigation. As the Supreme Court said:

Instead of a timely and orderly proceeding to determine the matter on the merits, the State, the Court of Appeals, a department of this Court, and allied staff, have had to deal with a procedural

morass, all of which could have been avoided had the matter been raised when it should have been in the first appeal.

Barberio, 121 Wn.2d at 52.³

Defendant acknowledges that the court did not exercise discretion in considering his offender score. Brief of Appellant 5, 18. Since the issue was not raised in defendant's personal restraint petition, it should not be permitted now.

Defendant argues that there was a material change in the law after he was sentenced that should change his offender score. Brief of Appellant 19-20. That change was the Supreme Court's decision in Personal Restraint of Seitz, 124 Wn.2d 645, 652, 880 P.2d 34 (1994). While defendant is correct, that should not change the result. Seitz was decided in 1994. Defendant filed his personal restraint petition in 2009, fifteen years later. He clearly could have raised this issue then. He did not. He should not be allowed to raise it now.⁴

³ The State moves for a dismissal of this appeal for failure to raise appealable issues. State v. Barberio, 66 Wn. App. 902, 906, 833 P.2d 459 (1992), affirmed, 121 Wn.2d 48 (1993).

⁴ If defendant is now able to raise this issue, Seitz would seem to require holding that his offender score is incorrect.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on June 28, 2010.

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