

65348-2

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No. 65348-2-I

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

STATE OF WASHINGTON,
Respondent,

v.

NICHOLAS ANTHONY PAPPAS,
Appellant.

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

The Honorable Anita L. Farris

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The jury finding that the victim's injuries exceeded the level of bodily harm necessary to satisfy the elements of vehicular assault inhered in the jury's verdict and thus could not support an exceptional sentence above the standard range.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

An exceptional sentence may not be based on circumstances contemplated by the Legislature in setting the standard range for the underlying offense. The Washington Supreme Court has held that a finding of injuries that exceeded those necessary to satisfy the elements of vehicular assault may not be used to enhance a sentence for vehicular assault, as this circumstance is inherent in the "substantial bodily injury" element and the standard range of the offense. Was the imposition of a sentence for excessive injury improper, requiring vacation of the exceptional sentence based on this finding?

C. STATEMENT OF THE CASE

Melanie Thielman and appellant Nicholas Pappas attended the same Alcoholics Anonymous (AA) meeting in Edmonds on August 12, 2008. RP1 97-98. Ms. Thielman accepted Mr. Pappas' offer for a ride on his motorcycle. RP1 115.

Mr. Pappas was piloting the motorcycle with Ms. Thielman as his passenger when he quickly came upon a car driven by Glen Wilhelm. RP2 155. Mr. Wilhelm slowed suddenly and Mr. Pappas quickly passed the car. As the car and motorcycle came upon a curve in the road, the motorcycle failed to turn, instead going straight on the curve and hitting a utility pole. RP1 157. Mr. Pappas was thrown onto the pavement suffering, facial fractures and a fractured elbow. CP 144-45.

Ms. Thielman was thrown further up the embankment behind the utility pole and suffered a severe traumatic brain injury. RP2 22. Since the accident, Ms. Thielman has been cared for in an adult care home, unable to speak, limited in her ability to feed herself, able to move around only by wheelchair and dependent on others for everyday care. RP3 4-11.

Mr. Pappas was charged with vehicular assault under the reckless manner and disregard for the safety of others alternative means. CP 186. The State also gave notice that it sought an exceptional sentence based upon the excessive injuries suffered by Ms. Thielman. CP 186. Following a jury trial, Mr. Pappas was acquitted of the reckless manner alternative means of vehicular assault but convicted under the disregard for the safety of others

prong. CP 122-23. In a special verdict, the jury also found the aggravating factor that Ms. Thielman suffered excessive injuries.

CP 121.

The trial court imposed an exceptional sentence based upon the jury's finding. CP 18-19, 27-28.

I am giving an exceptional sentence of 18 months in the state penitentiary on this case. I'm well aware of the case law indicating anything over double the standard range may be looked at as excessive, but in this case I do not believe it is excessive given the degree of injuries in the case and the finding of the jury.

4/29/2010RP 13.

D. ARGUMENT

THE COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED ON THE VICTIM'S EXCESSIVE INJURIES IS INVALID AS THE FACTOR INHERES IN THE VERDICT FOR VEHICULAR ASSAULT

1. An exceptional sentence cannot be based on factors already considered by the Legislature in setting the standard range for the offense. An appellate court reviews *de novo* the legal justification for a sentence. RCW 9.94A.585(4); *State v. Ferguson*, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001). The reasons supporting the exceptional sentence must be substantial and compelling and must take into account factors not already

considered by the Legislature in computing the presumptive range of the offense. RCW 9.94A.537(6); *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986).¹

The Washington Supreme Court has stated that “factors inherent in the crime – inherent in the sense that they were necessarily considered by the Legislature and do not distinguish the defendant’s behavior from that inherent in all crimes of that type – may not be relied upon to justify an exceptional sentence.” *Ferguson*, 142 Wn.2d at 647-48, citing *State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d 481 (1992). Stated differently, “an enhanced sentence may not be based on those factors the Legislature necessarily considered in setting the sentence range for the *type of offense*.” *Chadderton*, 119 Wn.2d at 395 (emphasis in original). The aggravating circumstance, “[t]he victim’s injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense[,]” was contemplated by the Legislature

¹ After the decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the trial court retains its discretion to determine whether the jury’s findings “are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.537(6). But, the jury must determine the factual basis for the aggravating circumstances, and the trial court is “left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence.” *State v. Suleiman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006).

in setting the standard range for vehicular assault, and inhered in the jury's guilty verdict here.

Here, because the jury made the requisite finding, the issue is whether the trial court committed an error of law in imposing an exceptional sentence based on the severity of Ms. Thielman's injuries. The exceptional sentence should be vacated and the case remanded for resentencing within the standard range.

2. Excessive injuries suffered by the victim were considered by the Legislature in setting the presumptive sentencing range for vehicular assault. Appellate courts have repeatedly stricken exceptional sentences where the alleged "aggravating circumstance" inhered in the jury verdict for the underlying offense. *State v. Dunaway*, 109 Wn.2d 207, 218-19, 743 P.2d 1237 (1987) (planning is inherent in the premeditation element of first degree murder, thus may not be used to justify an exceptional sentence for the crime of first degree murder); *State v. Gore*, 143 Wn.2d 288, 320, 21 P.3d 362 (2001) (same), *rev'd on other grounds*, *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005); *State v. Baker*, 40 Wn.App. 845, 848-49, 700 P.2d 1198 (1985) (planning inherent in verdict for attempted first-degree escape); *Ferguson*, 142 Wn.2d at 648 ("deliberate cruelty" finding inhered in jury's verdict for

assault by intentionally exposing the human immunodeficiency virus (HIV) to another person with intent to inflict bodily harm); *State v. Armstrong*, 106 Wn.2d 547, 551, 723 P.2d 1111 (1986) (burns inflicted on the 10-month-old victim by defendant's throwing boiling coffee on the child and plunging the child's foot in the coffee were injuries accounted for in the offense of second degree assault and could not justify an exceptional sentence).

The rationale underlying these cases is that by defining an offense and assigning a certain seriousness level and sentence range to that offense, the Legislature necessarily took into consideration the potential for variances in conduct. "[T]he idea of a range, rather than a fixed term . . . , is to allow the judge some flexibility in tailoring the sentence to the person and crime before him; the court may impose any sentence within the range that it deems appropriate." *Baker*, 40 Wn.App. at 848.

Under RCW 9.94A.535(3)(y), a jury may find an aggravating factor justifying an exceptional sentence where the State proves beyond a reasonable doubt that:

[t]he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.

To convict Mr. Pappas of vehicular assault under the alternative means found by the jury, the State had to prove that he drove “[w]ith disregard for the safety of others and cause[d] substantial bodily harm to another.” RCW 46.61.522(1)(c). “Substantial bodily harm” is defined as “bodily injury which involves a temporal but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part[.]” RCW 9A.04.110(4)(b).

In *Nordby*, the Supreme Court determined that the seriousness of the injuries suffered by the victim could not justify an exceptional sentence for vehicular assault because the injuries suffered were considered by the Legislature in setting the standard range for the offense of vehicular assault. 106 Wn.2d at 519. In *Nordby*, the Court noted that the element of “serious bodily injury” for a conviction for vehicular assault “was already considered in setting the presumptive term for vehicular assault. It cannot, therefore, be a basis for a sentence outside the presumptive range.” *Id.*

Subsequently in *State v. Cardenas*, relying upon its earlier decision in *Nordby*, the Supreme Court again held that an

exceptional sentence for vehicular assault cannot be based upon the severity of the victim's injuries. 129 Wn.2d 1, 6-7, 914 P.2d 57 (1996) (“[The victim’s] injuries, while severe, are evidently the type of injuries envisioned by the Legislature in setting the standard range. Consequently, the severity of injuries cannot justify an exceptional sentence.”).

The decision in *State v. Flake*, 76 Wn.App. 174, 883 P.2d 341 (1994) fails to provide any support for the exceptional sentence imposed here. In *Flake* the defendant was convicted of vehicular assault. The victim had suffered injuries in a motor vehicle accident that left him a quadriplegic, unable to move from the chin down and unable to feed himself or speak. *Id.* at 177 fn.1. The Supreme Court noted in its decision in *Cardenas*:

Although the Court of Appeals in [*Flake*] upheld an exceptional sentence for vehicular assault based in part on the severity of the injuries, the defendant had expressly conceded not only that the injuries far surpassed those typical of a vehicular assault but that severity of the injuries was a valid factor.

Cardenas, 129 Wn.2d at 7, fn.2, citing *Flake*, 76 Wn.App. at 181 fn.8.

Contrary to *Flake*, Mr. Pappas did not concede that the injuries suffered by Ms. Thielman's injuries surpassed those typical

of a vehicular assault, or that the injuries warranted an exceptional sentence. Further, following *Cardenas* and *Nordby* as this Court must, the injuries suffered by Ms. Thielman were specifically contemplated by the Legislature when it set the presumptive sentencing range for vehicular assault. Accordingly, the excessive injuries factor found by the jury could not support an exceptional sentence.

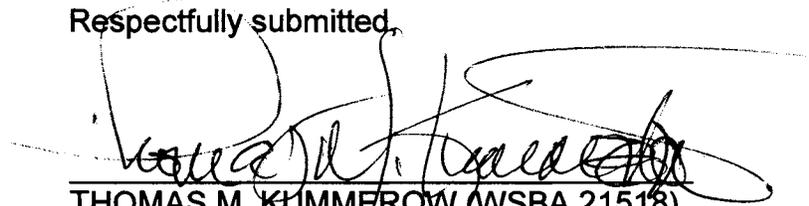
3. Mr. Pappas is entitled to reversal of his sentence and remand for imposition of a standard range sentence. Remand is required when the trial court places significant weight on an inappropriate factor. *State v. Pryor*, 115 Wn.2d 445, 456, 799 P.2d 244 (1990). Since the excessive injuries suffered by Ms. Thielman were the sole aggravating factor upon which the court imposed the exceptional sentence, reversal of the exceptional sentence and remand for resentencing within the standard range is required.

E. CONCLUSION

For the reasons stated, Mr. Pappas requests that this Court reverse his exceptional sentence and remand for imposition of a standard range sentence.

DATED this 11th day of October 2010.

Respectfully submitted,

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

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