

69102-3

69102-3

No. 69102-3-I

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ARTHUR BUZZELLE,

Appellant.

---

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

The Honorable Alan R. Hancock

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In the absence of statutory authority permitting such a procedure, the trial court erred in bifurcating Mr. Buzzelle's guilty plea from fact-finding on aggravating circumstances.

2. The trial court erred in imposing an exceptional sentence based upon aggravating circumstances where the State failed to arraign Mr. Buzzelle on an amended information charging the aggravating circumstances.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court only possesses that authority under the Sentencing Reform Act of 1981 ("SRA") that is conferred by the Legislature. Where a trial court exceeds its statutory authority in imposing sentence, the sentence is invalid.

With very few exceptions, when the State seeks an exceptional sentence based upon aggravating circumstances, the Legislature requires the aggravating circumstances be proven in the same proceeding where guilt is determined. Bifurcated fact-finding is only permitted with regard to a few specified aggravating circumstances, and only if the court

makes certain statutorily-required findings first. Did the trial court exceed its statutory authority in bifurcating the guilt phase from the fact-finding on aggravating circumstances and on the basis of this fact-finding imposing an exceptional sentence?

2. Plea bargains are analyzed under principles of contract law. The State, as the party with the greater power and the drafter of the plea bargain, bears the burden of any lack of clarity or mistake in the agreement. Where Mr. Buzzelle performed his side of the plea bargain by pleading guilty and stipulating to facts, but the State sought an exceptional sentence based upon an illegal procedure, must the exceptional sentence be vacated and this case remanded for resentencing within the standard range?

3. Should this Court conclude that the decision in State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012), holding that aggravating circumstances are not elements and do not need to be formally charged in the information, is contrary to the Sixth Amendment and article I, section 22's essential elements rule?

4. Did Mr. Buzzelle receive constitutionally inadequate notice of the facts that would lead to his increased punishment because the State did not arraign him on an amended information charging aggravating circumstances?

C. STATEMENT OF THE CASE

Appellant Arthur Buzzelle was prosecuted in Island County in connection with his sexual abuse of his daughter, A.B., which began in approximately 2006 when she was eight or nine years old, and concluded in January 2012, when A.B. reported the abuse to her grandmother. CP 120-22. Hoping to obtain a Special Sex Offender Sentencing Alternative (“SSOSA”) Mr. Buzzelle entered a plea agreement with the State. According to the plea agreement, Mr. Buzzelle would plead guilty to one count of rape of a child in the first degree and one count of child molestation in the third degree, and at sentencing the State would allege aggravating circumstances with regard to both of those offenses. 1RP 4-6.<sup>1</sup> The State would seek an exceptional

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<sup>1</sup> The verbatim report of proceedings consists of Mr. Mr. Buzzelle’s guilty plea and sentencing hearings, which are referenced herein as follows:

sentence of a minimum term of 240 months incarceration to life. CP 101.

The State filed an amended information charging the aggravating circumstances but did not arraign Mr. Buzzelle on the amended information. 1RP 5; CP 108-115. Mr. Buzzelle pleaded guilty to the original information charging rape of a child in the first degree and child molestation in the third degree. 1RP 6-11; CP 97-107. In a bifurcated proceeding Mr. Buzzelle waived jury as to the aggravating circumstances and had a bench trial on agreed documentary evidence before the Honorable Alan R. Hancock. CP 21-22, 23-96.

At sentencing, the court denied Mr. Buzzelle's request for a SSOSA, found that each of the aggravating circumstances had been proven, and imposed the 240-month term requested by the State. 2RP 45-49, 52-53. The court separately ruled that each of the aggravating circumstances, on its own, would be a sufficient and independent basis for the sentence. 2RP 49-50. The court

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May 29, 2012 (Guilty Plea)	-	1RP
July 5, 2012 (Sentencing)	-	2RP

entered written findings of fact and conclusions of law in support of the exceptional sentence. CP 19-20. Mr. Buzzelle appeals. CP 1-2.

D. ARGUMENT

1. **The trial court exceeded its statutory authority by bifurcating the stipulated facts trial on the aggravating circumstances from Mr. Buzzelle’s guilty plea, requiring vacation of the ensuing exceptional sentence.**
  - a. In imposing sentence under the SRA, a trial court only possesses the authority granted it by the Legislature.

In fixing trial proceedings and legal punishments, courts only possess the authority conferred upon them by the Legislature. State v. Hughes, 154 Wn.2d 118, 151-52, 110 P.3d 192 (2005), overruled in part on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); In re Personal Restraint of West, 154 Wn.2d 204, 213, 110 P.3d 1122 (2005). A trial court possesses no inherent authority beyond what is contained in the SRA. Thus, where the Legislature has not established a sentencing procedure, the Supreme Court has held that for a trial court “[t]o create such a procedure out of whole cloth

would be to usurp the power of the legislature.” State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007).

- b. There is no statutory authority to bifurcate proceedings with regard to the aggravating circumstances as the trial court did here.

According to statute,

At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

RCW 9.94A.537(1).

RCW 9.94A.537 prescribes strict procedures for the determination of aggravating circumstances. Subsection (4) of the statute stipulates:

Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res gest[a]e of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the

probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

RCW 9.94A.537(4).

In this case, the State alleged that Mr. Buzzelle committed the charged offenses with the following aggravating circumstances:

- Deliberate cruelty (RCW 9.94A.535(3)(a));
- Particularly vulnerable victim (RCW 9.94A.535(3)(b));
- Ongoing pattern of sexual abuse (RCW 9.94A.535(3)(g));
- Domestic violence (RCW 9.94A.535(3)(h));
- High degree of sophistication (RCW 9.94A.535(3)(m));
- Position of trust (RCW 9.94A.535(3)(n));
- Impact on persons other than the victim (RCW 9.94A.535(3)(r)).

CP 112-14.

With regard to all of these but the domestic violence aggravating circumstance, bifurcation of the proceedings is expressly precluded: “[e]vidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury

during the trial of the alleged crime...” RCW 9.94A.537(4).

With respect to the domestic violence aggravating  
circumstance, bifurcation is permitted only

if the evidence supporting the aggravating fact is not part of the res gest[a]e of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury’s ability to determine guilt or innocence for the underlying crime.

RCW 9.94A.537(4).

The word “shall” in a statute is “presumptively mandatory.” State v. Rice, 174 Wn.2d 884, 896, 279 P.3d 849 (2012). In some instances, “shall” may be directory, but the provisions of the SRA are mandatory and articulate the trial court’s sole authority with respect to sentencing. As the Washington Supreme Court recently explained,

[n]oncompliance with a directory statute ‘is attended with no consequences,’ whereas violation of a mandatory statute ‘either invalidates purported transactions or subjects the noncomplier to affirmative legal liabilities.’

Id. at 895-96 (citation omitted).

One of the Legislature’s purposes in enacting the SRA was to promote uniformity in sentencing statewide. See

State v. Johnson, 51 Wn. App. 836, 840, 759 P.2d 459 (1988); State v. Garrison, 46 Wn. App. 52, 728 P.2d 1102 (1986). Trial courts do not possess any inherent authority to devise sentencing procedures, nor do they have the ability to deviate from the prescribed measures set forth by statute. West, 154 Wn.2d at 213-14. Case law makes clear that where the court exceeds its authority in sentencing under the SRA, the court's actions are invalid and void. Pillatos, 159 Wn.2d at 468-69; West, 154 Wn.2d at 213; State v. Mohamoud, 159 Wn. App. 753, 246 P.3d 849 (2011) (rejecting argument that juvenile court's "substantial compliance" with sentencing procedures salvaged the court's dispositional order).

The parties cannot empower the trial court to exceed its sentencing authority via a plea bargain. West, 154 Wn.2d at 213-14. "[A] plea bargaining agreement cannot exceed the statutory authority given to the courts." In re Personal Restraint of Goodwin, 146 Wn.2d 861, 870, 50 P.3d 618 (2002) (quoting In re Personal Restraint of Gardner, 94 Wn.2d 504, 617 P.2d 1001 (1980)); see also State v. Barber,

170 Wn.2d 854, 860, 248 P.3d 494 (2011) (a defendant who has entered a plea bargain with the State is not entitled to specific performance of an illegal sentence).

As the above-cited authorities make clear, Washington appellate courts will not hesitate to invalidate a sentence where it was obtained in excess of statutory authority. Compare Rice, 174 Wn.2d at 895-96. The use of “shall” in RCW 9.94A.537 is mandatory, not directory.

c. The bifurcated proceeding was invalid, requiring vacation of Mr. Buzzelle’s sentence.

The trial court lacked statutory authority to bifurcate Mr. Buzzelle’s plea to the charged offenses from the stipulated facts trial on aggravating circumstances. As noted, where the State alleges the aggravating circumstances contained in RCW 9.94A.535(3)(a) through (y), the evidence must be presented during the trial for the charged crime. RCW 9.94A.537(4). Proof of the aggravating circumstances listed in RCW 9.94A.535(3)(e)(iv), (h)(i), (o), or (t) may only be bifurcated from the guilt proceedings if the court first makes certain specified factual findings. Id.

Here, the trial court did not distinguish between the statutory aggravating circumstances alleged by the State when it conducted a bifurcated fact-finding following Mr. Buzzelle's guilty plea to the underlying charges. With regard to the domestic violence aggravating circumstance, the court did not make any findings that "the evidence supporting the aggravating fact is not part of the res gest[a]e of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and ... that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect." The court simply never considered whether the unusual proceeding was authorized by the SRA.

It was not, and the fact that the parties evidently agreed to the bifurcated fact-finding does not shield it from judicial scrutiny on appeal. West, 154 Wn.2d at 213-14. Because the bifurcated proceeding was not authorized by the SRA, Mr. Buzzelle's ensuing exceptional sentence is invalid.

d. The remedy is resentencing within the standard range.

A plea agreement is a contract. Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); United States v. Manzo, 675 F.3d 1204 (9th Cir. 2012). Under principles of contract law, plea agreements are construed against the drafter – in this case, the State. United States v. Franco-Lopez, 312 F.3d 984, 989 (9th Cir. 2002). The State, as the drafter, “must ordinarily bear the ‘responsibility for any lack of clarity.’” United States v. Transfiguracion, 442 F.3d 1222, 1228 (9th Cir. 2006). Construing plea agreements against the State “makes sense in light of the parties’ respective bargaining power and expertise.” United States v. De La Fuente, 8 F.3d 1333, 1338 (9th Cir. 1993).

Mr. Buzzelle entered a valid guilty plea to crimes charged in a criminal information. Mr. Buzzelle does not appeal or seek to set aside the guilty plea.

The State notified Mr. Buzzelle that it intended to seek an exceptional sentence of 240 months to life. CP 101. The State, however, did not arraign Mr. Buzzelle on an amended

information charging aggravating circumstances<sup>2</sup> or prove the aggravating circumstances in a manner permitted by statute. The State instead sought an exceptional sentence via a bifurcated trial, a proceeding that is not authorized under the SRA.

Mr. Buzzelle performed his side of the bargain by pleading guilty to the offenses charged in the information and stipulating to agreed documentary evidence. In pleading guilty, he gave up a number of important constitutional rights, however he did not give up his right to appeal a sentence outside the standard range. CP 101.<sup>3</sup> The fact that the State mistakenly believed it could empower the court to conduct a bifurcated fact-finding proceeding on aggravating circumstances does not invalidate Mr. Buzzelle's legitimate guilty plea or provide the State with a basis to set the guilty plea aside.

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<sup>2</sup> Under recent authority from the Washington Supreme Court, arraignment on an amended information is not required. State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012). As argued in argument 3, infra, Siers was wrongly decided.

<sup>3</sup> Mr. Buzzelle's statement on plea of guilty provides: "If the court imposes an exceptional sentence after a hearing, either the State or I can appeal the sentence." CP 101.

The Supreme Court's decision in State v. Hagar, 158 Wn.2d 369, 144 P.3d 298 (2006), is instructive. In Hagar, the defendant pleaded guilty to three counts of first-degree theft, and, pursuant to the plea agreement, stipulated to certain facts. At sentencing, contrary to Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 1531, 159 L.Ed.2d 403 (2004), the trial court found that Mr. Hagar's conduct constituted a "major economic offense" and imposed an exceptional sentence. Hagar, 158 Wn.2d at 372.

Mr. Hagar appealed the exceptional sentence, contending that it violated Blakely and the Sixth Amendment requirement that facts essential to punishment be found by a jury beyond a reasonable doubt. Id. at 373. The State contended in response that the plea was indivisible from the stipulation, and that Mr. Hagar could not appeal without unraveling the plea bargain. The Supreme Court disagreed, finding the argument a *non sequitur* to the question whether Mr. Hagar's sentence should be set aside. Id. at 374. The Court noted, "Hagar stipulated [to] certain facts but did not stipulate that the crimes constituted a 'major economic

offense.” Id. The Court held that the sentence based upon judicial fact-finding violated Blakely and remanded for resentencing within the standard range. Id.

Federal authority also supports Mr. Buzzelle’s argument. Cf. Transfiguracion, 442 F.3d at 1229; United States v. Barron, 172 F.3d 1153, 1156-58 (9th Cir. 1999). In both Transfiguracion and Barron, the Ninth Circuit declined the Government’s request to invalidate a plea agreement based upon a mutual mistake of law. The Court in Barron explained:

A plea bargain is not a commercial exchange. It is an instrument for the enforcement of the criminal law. What is at stake for the defendant is his liberty. On rescission of the agreement, the prisoner can never be returned to his “original position”: he has served time by reason of his guilty plea and his surrender of basic constitutional rights; the time he has spent in prison can never be restored, nor can his cooperation in his punishment. What is at stake for the government is its interest in securing just punishment for violation of the law and its interest that an innocent act not be punished at all. The interests at stake and the judicial context in which they are weighed require that something more than contract law be applied.

Barron, 172 F.3d at 1158.

Mr. Buzzelle's stipulation to facts did not constitute an agreement that those facts established statutory aggravating circumstances. CP 23-24. The defect in the procedure does not supply the State with a basis to set aside Mr. Buzzelle's plea agreement. Hagar, 158 Wn.2d at 372-74. Mr. Buzzelle's exceptional sentence should be reversed and this case remanded for imposition of a standard range sentence.

**2. The State's failure to arraign Mr. Buzzelle on an amended information alleging aggravating circumstances violated the Sixth Amendment and article I, section 22 guarantee of notice of facts essential to punishment.**

An accused person has the right under the Sixth and Fourteenth Amendments to have any facts that may increase his punishment proven to a jury beyond a reasonable doubt. Blakely, 542 U.S. at 301; Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI; XIV. In Blakely, the Supreme Court invalidated Washington's exceptional sentencing scheme, which permitted courts to impose sentences in excess of the statutory maximum based upon judicial fact-finding. Blakely, 542 U.S. at 305. In so ruling, the Court reaffirmed

its holding in Apprendi that sentencing factors – facts which may support a punishment in excess of the otherwise-available maximum for the underlying charged crime – are functionally equivalent to the elements of a greater offense. Id. at 304.

The Court has reiterated this basic principle in virtually every case dealing with post-Blakely sentencing. See e.g. Southern Union Co. v. United States, \_\_ U.S. \_\_, 132 S.Ct. 2344, 2348, 183 L.Ed.2d 318 (2012) (holding that fine based upon judicial fact-finding beyond jury verdict violated Sixth Amendment jury trial right, and criticizing the Government for advancing “the rejected assumption that, in determining the maximum punishment for an offense, there is a constitutionally significant difference between a fact that is an ‘element’ of the offense and one that is a ‘sentencing factor’”); United States v. O’Brien, \_\_ U.S. \_\_, 130 S.Ct. 2169, 2175-76, 176 L.Ed.2d 979 (2010) (a fact that increases the prescribed range of penalties to which a defendant is exposed is an element; “judge-found sentencing factors cannot increase the maximum sentence a defendant might

otherwise receive based purely on the facts found by the jury”); Cunningham v. California, 549 U.S. 270, 282, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) (reiterating that “any fact extending the defendant’s sentence beyond the maximum authorized by the jury’s verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights”).

In State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009), a majority of the Washington Supreme Court agreed with this fundamental principle. Powell, 167 Wn.2d at 689-90 (Stephens, J., concurring), and id. at 691-92 (Owens, J., dissenting). In its recent decision in State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012), however, a five-justice majority inexplicably disavowed this axiomatic rule. 174 Wn.2d at 276-77. Specifically, the Court reversed the holding in Powell that a charging document must inform an accused person of all the essential elements of a crime to the extent that the Powell Court found that aggravating circumstances are essential elements.<sup>4</sup> The majority in Siers

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<sup>4</sup> The essential elements rule in Washington requires that all essential elements of a crime, statutory and nonstatutory, be included in

held, “so long as a defendant receives constitutionally adequate notice of the essential elements of a charge, ‘the absence of an allegation of aggravating circumstances in the information [does] not violate [the defendant’s] rights.’” *Id.* at 276.

The Court reached this result by holding that aggravating circumstances under RCW 9.94A.535 are not elements of the offense. *Id.* at 278. The Court thus held that notice was sufficient if it satisfied due process, and merely required that the defendant be supplied with some form of notice before the proceeding in which the aggravating circumstances would be proven. *Id.* at 277.

In a dissent joined by Justices Charles Johnson, Chambers, and Owens, Justice Stephens criticized the majority opinion for being too quick to overrule Powell, stressing,

[A]ny fact essential to the punishment is essential to the charge. The notion that it is permissible for prosecutors to charge only bare-bones crimes in the formal charging document, while amassing aggravators elsewhere, is at odds with the guarantee of an “accusation” notifying the

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a charging document. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Const. art. I, 22.

defendant of its “nature.” To comport with the Sixth Amendment, a defendant must be able to discern—from the charging document alone—his maximum potential sentence. This is evident from the constitutional text, which speaks of a (singular) “accusation.”

Id. at 283-84 (Stephens, J., dissenting).

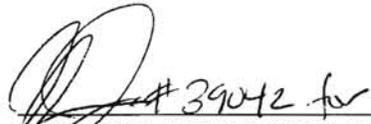
The Siers majority’s effort to parse out aggravating circumstances from elements in order to relieve the State of its burden to provide an accused person with constitutionally-sufficient notice of the facts that will increase his punishment – i.e., the elements of the crime – is a troubling deviation from United States Supreme Court precedent. In this case, the State filed an amended information but did not ever arraign Mr. Buzzelle on the new charges. This Court should conclude that the notice was insufficient under the Sixth Amendment and article I, section 22, and reverse the unlawful exceptional sentence.

E. CONCLUSION

For the foregoing reasons, this Court should reverse and vacate Mr. Buzzelle's exceptional sentence, and remand for resentencing within the standard range.

DATED this 22<sup>nd</sup> day of January, 2013.

Respectfully submitted:

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69102-3-I
v.	)	
	)	
ARTHUR BUZZELLE,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF JANUARY, 2013, I CAUSED THE ORIGINAL **OPENING 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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<input checked="" type="checkbox"/> ARTHUR BUZZELLE 358249 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF JANUARY, 2013.

X \_\_\_\_\_ 

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DIVISION 1  
STATE OF WASHINGTON  
COURT OF APPEALS  
JAN 22 2013  
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