

74364-3

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74364-3  
FILED  
October 18, 2016  
Court of Appeals  
Division I  
State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

PEDRO CRENSHAW,

Appellant.

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

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REPLY BRIEF OF APPELLANT

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RCW 9.94A.535 .....5

1. ADMITTING BLOOD EVIDENCE OBTAINED WITHOUT A WARRANT OR EXCEPTION TO THE WARRANT REQUIREMENT WAS AN ERROR FOR WHICH THE TRIAL ATTORNEY FAILED TO LITIGATE DEEMING HER INEFFECTIVE BECAUSE THE BLOOD EVIDENCE WAS HIGHLY PREJUDICIAL, WHICH RESULTS IN THE ERROR BEING OF MANIFEST CONSTITUTIONAL MAGNITUDE RIPE FOR REVIEW.

The issue of the blood evidence was left unpreserved because trial counsel failed to move to suppress it pursuant to Missouri v. McNeely, 133 S.Ct. 1552, 185 L. Ed. 2d 696 (2013). The State argues the blood evidence is not an issue of manifest constitutional error because the trial record is limited regarding what steps police took to secure a warrant and Mr. Crenshaw failed to establish prejudice. Res. Brief at Pgs. 11-15. The State also argues that failing to move to suppress the blood evidence could have been trial strategy and therefore, trial counsel was not ineffective. Res. Brief at Pgs. 17-18. Last, the State argues that admitting the blood evidence was harmless given the defendant's admission to drinking alcohol prior to driving and his excessive speed, which the State argues caused him to fail to negotiate a curve. Res Brief at Pgs. 18-19. The State argues the remaining untainted evidence would have resulted in a guilty verdict, so any error was harmless. Res. Brief at Pg. 19.

What the State fails to recognize is the testimony of Deputies Monson and Ravenscraft wherein they state their beliefs that warrantless

blood draws are lawful when a vehicular assault is under investigation. RP3 407:10-18; RP4 482:13-483:6; RP4 484:11-15. The Deputies also stated that no second attempt was made to secure the warrant due to their concern with the alcohol dissipating. RP3 407:1-9; RP4 482:13-25. The State's argument that the deputies could have been attempting to obtain additional evidence from the scene, or civilian witnesses and perhaps this additional investigation led to Deputies Monson and Ravencraft to forego the warrant for Mr. Crenshaw's blood holds little weight because evidence relating to one's alcohol level wouldn't be at a crime scene, nor would it be in the hands of civilian witnesses. Res. Brief at Pgs. 12-13.

While the State would like to convince this Court that it is unknown whether a motion to suppress the blood evidence would have prevailed, the McNeely decision clearly shows any such motion would have prevailed because the deputies only opted to forego the warrant due to the passage of time and dissipation of alcohol. RP3 407:1-9; RP4 482:13-25. It is a flawed argument to suggest trial counsel strategized to admit incriminating evidence against her client; evidence which established one of the necessary elements of the offense. Because the blood evidence was so prejudicial, no competent attorney would have failed to move to suppress the blood evidence.

The blood evidence was prejudicial because it was the centerpiece of the State's case against Mr. Crenshaw. The blood evidence also established one of the necessary elements of the offense. Without the blood evidence the State only had the speed Mr. Crenshaw was traveling and the resulting vehicle collision. Being that no testimony could definitively say why the collision occurred, it was a highly circumstantial case and not as cut and dry as the State asserts. As such, the admitting the blood evidence was not harmless because a different result was a near certainty had the blood evidence not been improperly admitted.

2. MR. QUINTANILLA DID NOT SUFFER GREAT BODILY HARM.

The State argues that Mr. Quintanilla's injuries establish that there was enough evidence to prove the aggravating factor because had he not been immediately treated he would have died. Res. Brief at Pg. 23. The State also cites State v. Stubbs, 170 Wn.2d 117, 128-129, 240 P.3d 143 (2010), to establish that the trier of fact must compare the victim's actual injuries against the minimum injury that would satisfy the definition of the charged crime.

Mr. Quintanilla's injuries do not establish that he suffered great bodily harm. The State lists Mr. Quintanilla's injuries in an effort to establish that he suffered great bodily harm as a result of the accident.

Res. Brief at Pg. 21. There is no question that Mr. Quintanilla suffered some level of harm, but that level of harm was not great and it is simply inaccurate to argue that Mr. Quintanilla's is permanently and irreversibly disabled. For example, he has great vision in his eye. RP2 157:5-6. Mr. Quintanilla believed his "brain was all back." RP2 157:11-12. Mrs. Quintanilla agreed testifying: "he is mostly back....". RP2 157:14.

The State is correct, the trier of fact must compare injuries presented during trial to the minimum injury required by law, and in Mr. Crenshaw's trial the State did not present evidence regarding typical injuries and atypical injuries in a vehicular assault case. As such, the trier of fact was unable to establish a baseline from which they could determine which injuries exceeded, or substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense.

The jury's finding that Mr. Quintanilla's injuries substantially exceeded the level necessary to establish the elements of the offense was not supported by sufficient evidence, so Mr. Crenshaw's exceptional sentence should be reversed.

3. RCW 9.94A.535(3)(y) FAILS TO SET FORTH OBJECTIVE GUIDELINES TO GUARD AGAINST ARBITRARY APPLICATION AND ITS VAGUENESS VIOLATES THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

The State argues RCW 9.94A.535(3)(y) is not susceptible to a vagueness challenge, the statute is not vague, trial counsel failed to object to the jury instructions stemming from the statute, and jury instructions are not susceptible to a vagueness challenge. None of these arguments have merit. Missing from the State's responsive briefing is any understanding of the basis in the decision of State v. Blakely, 543 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Indeed, the State doesn't even cite to the Sixth or Fourteenth Amendments.

The aggravating factors set forth in RCW 9.94A.535 are subject to vagueness challenges in the same way that every other element of an offense would be. The Supreme Court has made clear that facts which increase the maximum penalty, like the jury's special verdict here, are elements of a greater offense. The Court has said:

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. 466, 478, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (Recuenco II).

Before Blakely, the Washington Supreme Court held “the void for vagueness doctrine should have application only to laws that “proscribe or prescribe conduct”” and ... it was “analytically unsound” to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences.” State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003) (quoting State v. Jacobsen, 92 Wn.App. 958, 966, 965 P.2d 1140, review denied, 137 Wn.2d 1033 (1999) (internal citation omitted)). The Court reasoned “before a state law can create a liberty interest, it must contain “substantive predicates” to the exercise of discretion and “specific directives to the decision maker that if the regulations’ substantive predicates are present, a particular outcome must follow.” Baldwin, 150 Wn.2d at 460 (quoting In re Personal Restraint of Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)). Relying on this premise, this Court concluded that sentencing guidelines “do not define conduct ... nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature[,]” and so found the void-for-vagueness doctrine “[has] no application in the context of sentencing guidelines.” Baldwin, 150 Wn.2d at 459.

In light of Blakely and its progeny, however, the opposite is true. I.e., if “laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot,” Baldwin, 150 Wn.2d at 460, then an accused person has a liberty interest in laws authorizing exceptional sentences based on factual findings by juries. Blakely plainly held that an aggravating factor which warrants an exceptional sentence under the Sentencing Reform Act (SRA) alters the statutory maximum for the offense. Blakely, 543 U.S. 306-07. It is for that reason that the Sixth and Fourteenth Amendments require the State to plead the aggravators and prove them beyond a reasonable doubt to a jury. Thus, even under Baldwin’s flawed understanding of the application of the vagueness doctrine, the doctrine must apply here because the aggravator increased the maximum penalty for the offense.

After Blakely, this conclusion is inescapable. The Supreme Court has repeatedly made it clear that the right to a jury determination of facts essential to punishment channels sentencing judges’ discretion – not the other way around. Blakely, 543 U.S. at 304-05. The Supreme Court observed, “The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea.” State v. Blakely, 543 U.S. 296, 304, 124, S.Ct. 2531, 159 L.Ed.2d 403 (2004). Because the jury’s verdict alone did not authorize the

sentence, but instead the judge acquired that authority only upon finding some additional facts, the sentence violated the Sixth Amendment. *Id.* at 305; see also *id.* at 305 n. 8 (“Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence.”) (emphasis in original).

The State’s arguments that aggravating circumstances do not define conduct are based on State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), but the State fails to recognize that Baldwin was founded upon the premise that aggravating factors do not alter the maximum penalty for the offense. See Baldwin, 150 Wn.2d 461 (“The guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest.” To the extent that Baldwin was based on the misguided premise that the addition of an aggravating circumstance does not affect the sentencing judge’s discretion, Baldwin must be overruled because if a fact “increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt.” Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003); see also Ring v. Arizona, 536 U.S.

584, 122 S.Ct. 2348, 153 L.Ed.2d 556 (2002). It is clear that aggravating factors are subject to vagueness challenges.

RCW 9.94A.535(3)(y) lacks any objective standards to prevent arbitrary and discriminatory application, nor does it provide notice to Mr. Crenshaw that his offense could be punished more severely than authorized by the standard range. The State has failed to articulate any basis to distinguish one element of a crime from another to support its view that the vagueness doctrine applies to one class of elements, but not the other. This Court should conclude the statute is void for vagueness.

**4. THE IMPOSITION OF A THIRTY-SIX MONTH SENTENCE WAS CLEARLY EXCESSIVE BECAUSE ITS LENGTH SHOCKS THE CONSCIENCE AND THE TRIAL COURT FAILED TO EXERCISE DISCRETION.**

The State argues that a sentence that represents six times the low end of the standard range on one count and three times the low end of the standard range on another count does not shock the conscience because it took into account all the evidence and circumstances of the case. Res. Brief at Pg. 37. The State fails to address the trial court's failure to exercise any discretion, which became evident after the trial court stated "I'm not going to render that verdict a nullity by ignoring it." Res. Brief at Pg. 32. A thirty-six month sentence does shock the conscience because this offense was not so aggravated to merit such a sentence, and the trial

court did not use discretion in imposing an exceptional sentence, which is an abuse of discretion.

A. CONCLUSION

Based on the arguments set forth above, this Court should reverse Mr. Crenshaw's conviction.

Respectfully submitted this 19th day of October, 2016.



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Laura Shaver, WSBA 44087

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

STATE OF WASHINGTON	)	
	)	COA No. 74364-3-I
Respondent,	)	
	)	Sup. Ct. # 14-1-02378-7
vs.	)	
	)	<b>CERTIFICATE OF SERVICE</b>
PEDRO CRENSHAW	)	
	)	
Appellant.	)	
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I, Aleshia Cooke, hereby certify that the following information is true and correct:  
That the Reply Brief of Appellant was filed electronically with the Court of Appeals,  
Division I, on this 18<sup>th</sup> Day of October, 2016. And further, that a true and correct copy  
of the foregoing pleading was served on the following parties on this 18<sup>th</sup> day of October,  
2016:

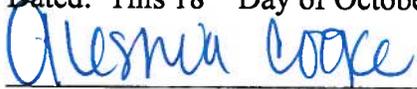
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Aleshia Cooke, Paralegal