

NO. 69311-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ROWLAND,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

In 2011, Michael Rowland challenged the exceptional sentence imposed after a resentencing hearing because the State had never proved the factual basis of the exceptional sentence to a jury beyond a reasonable doubt. The Supreme Court remanded Rowland's case for another resentencing hearing, finding it was premature to decide whether his jury trial rights had been violated.

In 2012, Rowland again received an exceptional sentence based on an aggravating factor that was never proved to a jury beyond a reasonable doubt. This punishment violates Rowland rights to a jury trial and due process of law.

B. ASSIGNMENTS OF ERROR.

1. Sentencing Rowland based on factual determinations made by a judge and not proved to a jury beyond a reasonable doubt violates the Sixth and Fourteenth Amendments as well as article I, sections 3, 21, and 22 of the Washington Constitution.

2. The court lacked statutory authority to impose an exceptional sentence on remand without complying with the procedural requirements of RCW 9.94A.530, RCW 9.94A.535, and RCW 9.94A.537.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

When an appellate court remands a case for resentencing, the prior sentence is vacated. By statute and under the governing constitutional principles, the court may not impose an exceptional sentence on remand unless a jury has made the necessary factual determinations. Was Rowland denied his right to a jury trial and due process of law when the court reimposed an exceptional sentence based on an aggravating factor that was never proved to the jury beyond a reasonable doubt?

D. STATEMENT OF THE CASE.

1. Jury trial and sentencing.

Following a jury trial at which conflicting versions of events were presented, Michael Rowland was convicted of first degree murder under a theory of accomplice liability and based on either the alternatives of felony murder predicated on his participation in a robbery or premeditated intentional murder. Supp. CP \_\_, sub. no. 158 (Instructions 11 & 12). The jury issued general verdict. CP 97.

The prosecution sought an exceptional sentence based on the allegation that the incident involved “deliberate cruelty.” 3/12/91RP 8. Rowland explained that the conflicting explanations of events and lack

of specific jury verdict left the court without any clear indication of the nature and extent of Rowland's participation:

the court is caught in somewhat of a difficult position inasmuch as the testimony presented at trial was in contradiction and the jury was not asked by interrogatory or other means to specify the grounds upon which is reached its conclusion that Mr. Rowland was guilty of murder.

3/12/91RP 18. The jury may have "accepted [Rowland's] version of the events of the evening" and found the co-defendant did "the only acts which caused death," yet convicted Mr. Rowland because he participated in the robbery underlying the felony murder conviction. Id. The jury's verdict did not permit the court to infer Rowland acted with deliberate cruelty. 3/12/91RP 20.

Judge Gerald Knight agreed that "the testimony was certainly disputed as to who initiated what and who said what," although the judge said he personally believed the testimony of Rowland's sister, who was a witness for the prosecution. 3/12/91RP 78. "I don't know" what if anything Rowland said during the incident, but he may have made the statement, "you're dying dude." Id. Under then-applicable statutory rules, the court decided that Rowland and the other participants' conduct constituted the aggravating factor of deliberate

cruelty, “without trying to establish who’s telling me the truth” regarding who did what during the incident. 3/12/91RP 83.

The court sentenced Rowland to 541 months in prison based on the high end of the standard range for an offender score of “3,” plus another 180 months based on the court’s determination that the aggravating factor of “deliberate cruelty” justified a sentence greater than the standard range. CP 111-18.

## 2. Resentencing in 2009.

In 2009, the Court of Appeals remanded Rowland’s case “for resentencing” because his offender score was incorrect, an error the State conceded after Rowland filed a personal restraint petition. In re Pers. Restraint of Rowland, 149 Wn.App. 496, 503, 509, 204 P.3d 953 (2009).

At the resentencing hearing, Judge Knight acknowledged his discretionary sentencing authority. 9/16/09RP 23-26. The judge said, “I very well can sentence you down or up.” RP 24. He heard arguments from the victim’s family seeking a longer exceptional sentence. 9/16/09RP 11, 13, 17. Rowland apologized for the terrible things he had done and assured the court he had been trying to better himself while in prison. 9/16/09RP 21-22. The judge explained he had thought

about the case and considered his options. 9/16/09RP 24. He continued to believe Rowland deserved an exceptional sentence but also thought his sentence should be reduced in accordance with the change in his standard range. 9/16/09RP 24. The judge shortened Rowland's sentence to the high end of the reduced standard range, a difference of 14 months, but again imposed an exceptional sentence based on the judicially-found aggravating factor on which he relied in 1991. 9/16/09RP 25. The judge imposed an exceptional sentence of 527 months imprisonment. 9/16/09RP 25; Supp. CP \_\_, sub. no. 289.

### 3. Resentencing in 2012.

Rowland's sentence was again reversed after the prosecution conceded for a second time that his standard range was incorrectly calculated. State v. Rowland, 160 Wn.App. 316, 331, 249 P.3d 645 (2011), aff'd, 174 Wn.2d 150, 156, 272 P.3d 242 (2012).

The Supreme Court held that the trial court had not necessarily violated Rowland's rights to a jury trial by the trial judge reimposing the exceptional sentence because the judge did not "redecide" the factual justification for the exceptional sentence. 174 Wn.2d at 155. However, the Court ruled that a final decision on the legality of

Rowland's sentence was "premature" because he was entitled to resentencing for the incorrect offender score. Id. at 156.

Judge Knight, who presided at the trial and was the resentencing judge in 2009, had passed away before the 2012 sentencing hearing. CP 15. Judge Richard Okrent replaced him, who had no prior involvement in the case.

Judge Okrent heard from four members of the victim's family, who described the crime, gave the judge pictures of the deceased, the talked about the pain the family suffered in the aftermath of the incident. 9/17/12RP 7-17. The prosecution brought a detective to the sentencing hearing to answer any questions the judge might have about the facts of the case. 9/17/12RP 3.

Judge Okrent determined that Judge Knight had "made an reasoned and understanding decision" when sentencing Rowland to the high end of the standard range along with an exceptional sentence of 180 months. Judge Okrent decided he would not "disturb" Judge Knight's sentence, but imposed a lesser sentence based on the reduced standard range. 9/7/12RP 18. The court imposed a sentence of 333 months, the high end of the standard range, along with 180 months as an exceptional sentence, for a total of 513 months. 9/7/12RP 18.

E. ARGUMENT.

**The court violated Rowland’s right to a fair trial by jury by imposing an exceptional sentence based on facts not found by a jury**

1. Apprendi and Blakely**Error! Bookmark not defined.** bar a court from exceeding the standard range based on factual findings that the jury never made.

A judge exceeds her constitutional authority if she imposes a sentence based on factual determinations that are made by the judge, not the jury, and are not proven beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.435 (2000); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 21, 22. In Apprendi, the defendant was convicted of unlawful possession of a firearm, which had a statutory penalty range of 5 to 10 years. Id. at 470. But the trial court sentenced him to 12 years of imprisonment, based on its own determination that the defendant “was motivated by racial bias.” Id. at 471. The Supreme Court held that any “penalty-enhancing findings” must be proved to the jury beyond a reasonable doubt. Id. at 472, 490.

The Supreme Court extended the reach of Apprendi in Blakely v. Washington, 542 U.S. 296, 304-05, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)**Error! Bookmark not defined.**, where the Court invalidated

this state's exceptional sentencing scheme because it permitted courts to impose sentences greater than the standard range based on facts found by a judge and proven by only a preponderance of the evidence. In Blakely, the defendant pled guilty to a kidnapping offense with a standard range of 49 to 53 months. Id. at 299. The judge imposed a 90-month sentence after it decided that he acted with "deliberate cruelty," a statutorily enumerated aggravating factor. Id. at 300. The Court ruled that any fact increasing punishment beyond the standard sentencing range constitutes an element that must be proved to the jury beyond a reasonable doubt. Id. at 306-07.

Like Mr. Blakely, Rowland received an exceptional sentence based on the court's finding that he acted with "deliberate cruelty," under the now-invalidated exceptional sentencing scheme in effect in 1991. Rowland's sentence was vacated and he was resentenced in 2009 and 2012 because the court had not properly calculated his offender score. The resentencing court determined that the "deliberate cruelty" finding was a reasonable factual determination meriting a sentence far in excess of that authorized by the jury's verdict. 9/7/12RP 19. Because the court exceeded its authority in imposing a sentence above the standard range without any jury determination that the factual

allegations justifying the increased sentence were proved beyond a reasonable doubt, the sentence violates the Sixth and Fourteenth Amendments.

2. By statute, the court must accurately calculate the standard range before it considers whether to impose an exceptional sentence.

The court's sentencing authority is derived solely from statute and is further cabined by the requirements of the constitution. See Blakely, 542 U.S. at 305-06; State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). When imposing any sentence, the court must accurately determine an offender's standard range before it may consider exceeding the standard range by imposing an exceptional sentence. State v. Parker, 132 Wn.2d 182, 187, 937 P.3d 575 (1997); RCW 9.94A.505(2)(a)(i).

[W]hen imposing an exceptional sentence the court must first consider the presumptive punishment as legislatively determined for an ordinary commission of the crime before it may adjust it up or down to account for the compelling nature of the aggravating or mitigating circumstances of the particular case.

Parker, 132 Wn.2d at 187; see also State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) ("A correct offender score must be calculated before a presumptive or exceptional sentence is imposed."); State v.

Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999) (resentencing required when court cited “potentially erroneous offender score” as factor in imposing exceptional sentence).

A court does not have inherent authority to impose an exceptional sentence. Pillatos, 159 Wn.2d at 469 (“no such inherent authority exists” for court to create own procedures to impose sentence above standard range). It would “usurp the power of the legislature” for the court to create a procedure to impose an exceptional sentence that is not authorized by statute. State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005); overruled in part on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

As further evidence of the sentencing court’s authority, the SRA unambiguously dictates the procedures for imposing an exceptional sentence above the standard range. “In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in RCW 9.94A.537.” RCW 9.94A.530(3) (emphasis added).

RCW 9.94A.537(2) applies to any remanded case involving an exceptional sentence:

In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury

to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

(emphasis added.). This procedure is optional only to the extent that the State may not wish to pursue an exceptional sentence in a remanded case. If the State seeks an exceptional sentence, the facts supporting an aggravating circumstance “shall be proved to a jury beyond a reasonable doubt.” RCW 9.94A.537(3) (emphasis added).<sup>1</sup>

“The resentencing provision” contained in RCW 9.94A.537 “applies in cases such as the instant where the defendant's trial began prior to the 2005 amendment and there has been a remand for a new sentencing hearing.” State v. Powell, 167 Wn.2d 672, 679, 223 P.3d 493 (2009). It applies in any case where the defendant is being resentenced but not retried. Id. RCW 9.94A.537(2) describes the circumstances of Rowland’s case: he previously received an exceptional sentence and “a new sentence hearing is required.” The SRA dictates the procedures the court’s must follow but did not follow in Rowland’s case.

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<sup>1</sup> Narrow exceptions to the jury trial requirement for exceptional sentences based solely on criminal history or a stipulation by the parties are not pertinent here. RCW 9.94A.535(2).

3. The court cannot nullify *Blakely*'s mandate by segmenting a single sentence for a single offense into the facts of the exceptional sentence and the facts authorizing the rest of the sentence.

When Judge Knight imposed an exceptional sentence based on his judicial finding that the circumstances of the case demonstrated “deliberate cruelty,” the court increased Rowland’s sentence based a factual determination that was not made by the jury. 3/12/91RP 83-84. In 2009, Judge Knight acknowledged he was not bound by the previously imposed exceptional sentence and could sentence Rowland “down or up.” 9/17/11RP 24. Since Rowland had already been sentenced to the high end of the standard range, the only way a judge could go “up” was to impose a longer exceptional sentence. Although Judge Knight decided Rowland deserved the same exceptional sentence as he had previously imposed, this decision was based upon the judge’s review of the facts of the case.<sup>2</sup>

In 2012, Judge Okrent also exercised discretion when imposing an exceptional sentence. He reviewed the facts of the case and heard argument from the victim’s family about the length of sentence that

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<sup>2</sup> The Supreme Court viewed Judge Knight’s 2009 resentencing as not “redeciding” the exceptional sentence, but Rowland respectfully disagrees with that conclusion. 174 Wn.2d at 155.

should be imposed and the nature of the offense. 9/7/12RP 7-18. Judge Okrent decided that Judge Knight “made a reasoned and understanding decision.” 9/7/12RP 18. Judge Okrent decided to maintain the exceptional sentence Judge Knight had imposed, but again, he exercised his discretion when deciding whether the exceptional sentence should remain the same, and also by reducing the overall length of the sentence.

The resentencing proceeding was not purely technical or ministerial. See State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009). As the Court of Appeals explained in a case similar to Rowland’s, “[o]nce we vacated McNeal’s original sentence, there was no longer a final sentence, the case was no longer final, and the trial court, therefore, erred when it found that Blakely did not apply to McNeal’s resentencing on remand.” State v. McNeal, 142 Wn.App. 777, 787-88, 175 P.3d 1139 (2008); accord State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (when case is “remanded for resentencing,” it means that the “entire sentence was reversed, or vacated . . . [and] the finality of the judgment is destroyed.”).

At the resentencing hearing, witnesses spoke about the case and urged a particular result. 9/7/12RP 7-17. A detective appeared to

answer questions from the court about the case. 9/7/12RP 3. The judge acknowledged he was not bound by Judge Knight's decision. 9/7/12RP 18.

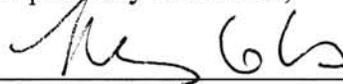
Under these circumstances, Rowland's resentencing must abide by the dictates of Blakely. He received an exceptional sentence based on facts that were never proved to a jury. While Blakely would not retroactively invalidate his sentence, it applied with full force and effect after his earlier sentence was vacated and his case remanded.

F. CONCLUSION.

For the reasons stated above, Mr. Rowland respectfully asks this Court to reverse his sentence and remand the case for further proceedings in compliance with his Sixth and Fourteenth Amendment rights to receive punishment authorized by the jury's verdict.

DATED this 29<sup>th</sup> day of March 2013.

Respectfully submitted,



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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. 69311-5-I
	)	
MICHAEL ROWLAND,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF MARCH, 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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| [X] | MICHAEL ROWLAND<br>976293<br>AIRWAY HEIGHTS CORRECTIONS CENTER<br>PO BOX 2049<br>AIRWAY HEIGHTS, WA 99001 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 29<sup>TH</sup> DAY OF MARCH, 2013.

X \_\_\_\_\_ 

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