IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD AKUNA, Appellant.	No. 39288-7-II UNPUBLISHED OPINION

Armstrong, J. – Richard Akuna appeals the exceptional sentence imposed after he pleaded guilty to second degree rape and first degree assault. The State concedes error and moves to vacate the sentence. Akuna raises additional issues in a pro se statement of additional grounds. RAP 10.10. We vacate the sentence and remand for resentencing.

Facts

The State originally charged Akuna with two counts of second degree rape of a child and one count of felony harassment. Several months later, the State filed an amended information adding two counts of second degree rape and one count of witness tampering. The State subsequently filed a second amended information adding six counts of conspiracy to commit premeditated first degree murder. Finally, pursuant to a plea bargain, the State charged Akuna with one count of second degree rape (count I) and one count of first degree assault (count II).

Akuna pleaded guilty to the two counts in the third amended information. His statement on plea of guilty listed his standard range on count I as 95-125 months and his standard range on count II as 111-147 months. The statement added that the State would recommend a sentence of 250 months with lifetime supervision, no contact with the victims and witnesses, no contact with

children under 16, and registration as a sex offender.

The statement noted that Akuna was pleading guilty pursuant to *In re Pers. Restraint of Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984), and *State v. Hilyard*, 63 Wn. App. 413, 819 P.2d 809 (1991).[1] "I do this in order to settle my case under certain terms and conditions; even if the facts and standard sentence associated with the amended charges would not ordinarily be the same as what is being agreed to in my case." Clerk's Papers (CP) at 76. Akuna admitted in the statement that there was sufficient evidence to support his convictions, and he invited the court to review the probable cause statement and the police reports to establish a factual basis for his plea.

Defense counsel stated during the plea hearing that Akuna was stipulating to consecutive sentences. After the State provided a factual basis for both counts, the court accepted Akuna's plea. Both parties asked the court to impose an exceptional sentence of 250 months, and both indicated that the court was not bound by that recommendation.

The court decided that an additional 5 years was necessary and imposed consecutive sentences of 185 months on count I and 125 months on count II. Defense counsel protested that the parties had stipulated to consecutive standard range sentences that could result in a maximum of 272 months, and that the court had no discretion to impose a longer sentence. "The parties' stipulation was for the consecutive terms which cuts off at 272." Report of Proceedings at 52. The court disagreed and entered the following findings and conclusions in support of the 310-month exceptional sentence:

[1] *Barr* concerned a guilty plea to a lesser charge that was not committed, and *Hilyard* concerned a defendant's stipulation to an exceptional sentence. *Barr*, 102 Wn.2d 265; *Hilyard*, 63 Wn. App. 413.

I. Findings of Fact

A. On February 26, 2009, the defendant entered a plea of guilty to (1) Rape in the Second Degree, with a standard range of 95 months to 125 months in prison, and (2) Assault in the First Degree, with a standard range of 111 months to 147 months in prison.

B. Prior to the entry of pleas of guilty to the two counts, the State and the defendant, through plea negotiations, stipulated and agreed to an exceptional sentence of 250 months, believing justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act. RCW 9.94A.535(2)(a).

C. On April 30, 2009, the Court at the time of sentencing, upon hearing the victim impact statements, the argument of counsel, and the allocution of the defendant, believing justice is not best served by an exceptional sentence of 250 months, imposed an exceptional sentence of 310 months.

II. Conclusions of Law

A. The crimes as committed by the defendant shock the conscience of society.

B. The harm done to the victims by the defendant need[s] to be assuaged by a lengthy term of imprisonment.

C. Justice is best served by imposition of an exceptional sentence of 310 [months], which is an exceptional sentence above the stipulated exceptional sentence of 250 months.

CP at 113.

Akuna appeals, and the State concedes that resentencing is required.

ANALYSIS

I. Sentencing

In Washington, the determination of penalties for crimes is a legislative function. *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). The power of the legislature in that respect is plenary, and subject only to constitutional provisions against excessive fines and cruel and unusual punishment. *Thorne*, 129 Wn.2d at 767.

Under the original Sentencing Reform Act, chapter RCW 9.94A, the legislature gave trial

courts the authority to impose sentences outside the standard range if they found the existence of either aggravating or mitigating factors by a preponderance of the evidence. Former RCW 9.94A.535 (2004); former RCW 9.94A.530(2) (2004). Nonexclusive lists of aggravating and mitigating factors were provided by statute. *See* former RCW 9.94A.535 (2004). The State did not need to give notice of an intent to seek an exceptional sentence and the court could impose one sua sponte.

This procedure was invalidated by the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The Court held that any fact other than that of a prior conviction, which increases the applicable standard range punishment, must be found by a jury beyond a reasonable doubt (unless it is stipulated to by the defendant or the defendant waives his right to a jury finding). *Blakely*, 542 U.S. at 301-03, 310 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). The Washington Supreme Court subsequently held that trial courts had no inherent authority to impanel sentencing juries. *State v. Hughes*, 154 Wn.2d 119, 149-52, 110 P.3d 192 (2005), *abrogated on other grounds*, *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

The legislature responded by amending the SRA to provide for jury determinations of aggravating factors justifying exceptional sentences upward. Laws of 2005, ch. 68; 2005 Final Legislative Report, 59th Wash. Leg., at 289. The amendment had the following effect:

> The list of aggravating factors used to justify an upward departure from the standard sentence range is made exclusive. The aggravating factors list is expanded to include current judicially recognized factors. Four aggravating factors, all based on questions of law, may be used to impose a sentence above the standard range without findings of fact by a jury. The remaining twenty-five

aggravating factors pose questions of fact that must be submitted to a jury.

2005 Final Legislative Report, at 289.

The four aggravating factors that can support an exceptional sentence upward without resort to a jury are listed in RCW 9.94A.535(2):

> The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:
>
> (a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.
>
> (b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.
>
> (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.
>
> (d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

Any other aggravated exceptional sentence must be pursued via the procedure outlined in RCW 9.94A.537: the State must give notice that it is seeking an exceptional sentence upward; the notice must state the aggravating factors on which the requested sentence will be based; and the facts supporting the aggravating circumstances must be proved to the trier of fact beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts. RCW 9.94A.537(1), (3).

The parties argued below, and the trial court agreed, that the exceptional sentencing provisions in RCW 9.94A.535(2)(a) governed Akuna's sentence. *See* RCW 9.94A.589(1)(a) (when defendant is sentenced for two or more current offenses, sentences shall be served

concurrently unless consecutive sentences are imposed under the exceptional sentence provisions of RCW 9.94A.535). Despite that agreement, the court departed from the recommendation of 250 months based on conclusions that Akuna's crimes shocked the conscience and that a longer sentence was necessary to assuage the harm to his victims.

Both parties assert on appeal that the trial court was restricted to imposing the aggravated exceptional sentence to which they stipulated. The parties apparently agree that this conclusion is necessitated by the legislature's reference to "the" exceptional sentence in RCW 9.94A.535(2)(a). As stated, the statute allows a court to impose an aggravated exceptional sentence without a finding of fact by a jury if the "defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds **the exceptional sentence** to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act." RCW 9.94A.535(2)(a) (emphasis added).

There is no case law interpreting this provision. It is well settled, however, that in construing a statute, we are under an obligation to give effect to the legislature's intent. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). Where the statutory language is clear, legislative intent is derived from the language of the statute alone. *Wentz*, 149 Wn.2d at 346.

The language of RCW 9.94A.535(2)(a) clearly indicates that the exceptional sentence to be imposed is the one to which the parties stipulated. Had the legislature used the indefinite article "an" rather than the definite article "the" to modify "exceptional sentence" in the subsection's second clause, a trial court would be free to impose any exceptional sentence it deemed appropriate. The statute's reference to "**the** exceptional sentence," however, limits a

court to imposing the sentence to which the parties stipulated.

The problem here is determining "the exceptional sentence" to which the parties stipulated. Both parties argue on appeal, and the trial court concluded, that they stipulated to an exceptional sentence of 250 months. But the record shows that defense counsel stated several times that Akuna was stipulating to consecutive standard range sentences, and both parties described the 250-month sentence they sought as a recommendation only. In protesting the court's 310-month sentence, Akuna's attorney explained that with the stipulation to consecutive sentences, the trial court had discretion under RCW 9.94A.535(2) to sentence Akuna to no more than 272 months, or the maximum of the combined standard ranges:

> To clarify, a stipulation is a justification for the judge to impose outside the standard range. Mr. Akuna in this case did make a stipulation to an exceptional sentence. That exceptional sentence was to run--standard range of Rape in the Second Degree of 95 to 125 months with consecutive to the Assault in the First Degree with a standard range of 111 months to 147 months.
>
> I think I misspoke earlier, the high end on that would be 272 months. The stipulation was for those to run consecutive.

RP at 51.

Akuna's statement on plea of guilty referred to the State's proposal of 250 months as a recommendation, and neither party corrected the trial court when it informed Akuna during the plea hearing that it was not bound by that recommendation. Consequently, the bulk of the record supports the conclusion that the stipulation was to consecutive standard range sentences rather than a specific 250-month sentence. It is clear, however, that the trial court failed to impose "the exceptional sentence" to which the parties stipulated when, in addition to running the sentences consecutively, it exceeded the standard range on the rape portion of the sentence.

The exceptional sentence imposed is erroneous for an additional reason. The court cited aggravating factors to support its sentence that are not referenced in RCW 9.94A.535(2), which is the only provision that allows a court to impose an aggravated exceptional sentence without a jury's participation.[2] Indeed, even if a jury had been impaneled, it would not have been able to base an exceptional sentence on the two factors the trial court cited because those factors are not included in the exclusive list of aggravating factors set forth in RCW 9.94A.535(3).

We vacate the sentence imposed and remand for the trial court to sentence within the stipulated standard range. Although the parties agree on appeal that a 250-month sentence is appropriate, the trial court has the authority to impose a sentence of up to 272 months if it finds that consecutive standard range sentences are consistent with the interests of justice and the purposes of the SRA. *See* RCW 9.94A.535(2)(a). In the absence of such findings, the court must impose concurrent standard range sentences.

II. SAG Issues

Akuna asserts in his SAG that he never assaulted or forced himself upon anyone, contrary to the assertions of his rape victim in a presentence report, and that his rape charge is supported by only one witness's account. Neither assertion undermines his guilty plea. The type of second degree rape to which Akuna pleaded guilty does not require forcible compulsion. *See* RCW 9A.44.050(1)(b) (requiring sexual intercourse with person who is incapable of consent by reason of being physically helpless). Akuna pleaded guilty to assault in lieu of facing convictions for attempted murder. As both his statement on plea of guilty and the State explained, this was an

[2] Subsections (b)-(d) did not apply because Akuna had an offender score of two and no criminal history. *See* RCW 9.94A.535(2)(b), (c), (d).

informed decision. *See also Barr*, 102 Wn.2d at 269-70 (plea does not become invalid because the accused chooses to plead to related lesser charge that was not committed in order to avoid certain conviction for greater offense). Akuna's assertion that his rape charge is supported by only one witness does not entitle him to relief. *See In re Pers. Restraint of Ness*, 70 Wn. App. 817, 824, 855 P.2d 1191 (1993) (factual basis sufficient to support guilty plea exists if there is sufficient evidence for jury to conclude defendant is guilty).

We remand for proceedings in accordance with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Worswick, A.C.J.

Alexander, J.P.T.