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

STATE OF WASHINGTON,	)	No. 29495-1-III
Respondent,	)	
v.	)	
ROBERT L. DONEY, JR.,	)	UNPUBLISHED OPINION
Appellant.	)	

Kulik, J. — Robert L. Doney appeals, contending that the trial court did not have the authority to impanel a jury in 2010 because RCW 9.94A.537(2) did not apply retroactively and a retroactive application would violate his constitutional rights. We disagree and affirm Mr. Doney's conviction and exceptional sentence.

FACTS

History of Prior Appeal. The State charged Mr. Doney with first degree murder for the slaying of two-year-old V.R. The State later amended the information and charged several aggravating factors supporting an exceptional sentence. On March 16, 2005, after the trial had begun, Mr. Doney pleaded guilty, but he did not admit to the

aggravating factors or waive his right to a jury determination of those factors. In consideration of the United States Supreme Court's decision in *Blakely*,[1] the trial court retained the jury to consider the aggravating factors. The jury returned the special verdicts and found that Mr. Doney showed a lack of remorse, acted with deliberate cruelty, and that the victim was particularly vulnerable. The trial court set the sentencing for May 13 and later continued the date to June 16.

On April 14, one month before sentencing, the Washington Supreme Court ruled in *State v. Hughes*, 154 Wn.2d 118, 126, 110 P.3d 192 (2005) that the proper remedy for a *Blakely* violation was to remand for resentencing within the standard range. The *Hughes* court determined that impaneling a jury on remand would invade legislative authority because the Washington legislature had not created a procedure for a jury to find aggravating factors. *Id*. at 149-52. In response, on April 15, the Washington legislature enacted the Laws of 2005, chapter 68, which allowed trial courts to submit most aggravating factors to a jury.

On May 31, Mr. Doney filed a motion with the trial court to vacate the jury's findings concerning the aggravating factors, based on the court's decision in *Hughes*. In

[1] In *Blakely*, the United States Supreme Court held that an exceptional sentence above the standard range was invalid if the factors supporting the exceptional sentence were not found by a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

July, the trial court granted the motion to vacate the sentence due to procedural irregularities that tainted the sentence. The trial court also found that the Laws of 2005, chapter 68 applied retroactively to Mr. Doney's case and allowed the State to move to impanel a new jury for the consideration of the aggravating factors in the resentencing hearing.

The trial court granted the State's request to impanel a new jury to decide the existence of the aggravating factors. The jury returned special verdict findings on two of the three aggravating factors. The court imposed an exceptional sentence of 420 months on Mr. Doney.

Mr. Doney appealed. While the appeal was pending, the Washington Supreme Court decided *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007). *Pillatos* confirmed the holding in *Hughes* that trial courts do not have the inherent authority to impanel sentencing juries. *Pillatos*, 159 Wn.2d at 469-70. *Pillatos* also held that the Laws of 2005, chapter 68, authorized the trial court to impanel sentencing juries only in proceedings occurring after the legislation became effective on April 15, 2005. *Pillatos*, 159 Wn.2d at 465.

In response to *Pillatos*, the Washington legislature amended RCW 9.94A.537, effective April 27, 2007, adding the subsection that "[i]n 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." RCW 9.94A.537(2) (*See* Laws of 2007, ch. 205, § 2). The legislature included a comment in the legislative history,

> **Intent—2007 c 205:** "In *State v. Pillatos*, 150 P.3d 1130 (2007), the Washington supreme court held that the changes made to the sentencing reform act concerning exceptional sentences in chapter 68, Laws of 2005 do not apply to cases where the trials had already begun or guilty pleas had already been entered prior to the effective date of the act on April 15, 2005. The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing."

RCW 9.94A.537.

In January 2008, this court affirmed Mr. Doney's exceptional sentence, holding that:

> A jury determined Mr. Doney's exceptional sentence, based on two aggravating factors. If this case were remanded, Mr. Doney would again have a jury determine these factors because the new statute—Laws of 2007, ch. 205, § 2—would apply to him. The evidence supporting these factors is overwhelming; however, Mr. Doney has already, arguably twice, received the benefit of the statute. Thus, any error at trial was harmless and we affirm Mr. Doney's sentence.

State v. Doney, 142 Wn. App. 450, 455-56, 174 P.3d 1261, *rev'd*, 165 Wn.2d 400, 198 P.3d 483 (2008).

The Washington Supreme Court reversed the decision of this court on the grounds that the trial court lacked the inherent authority to impanel a jury for the purpose of Mr. Doney's sentencing under *Pillatos*. *Doney*, 165 Wn.2d 400. The Supreme Court also determined that this court should not have addressed the applicability of the 2007 version of RCW 9.94A.537. *Doney*, 165 Wn.2d at 403. The issue of whether the 2007 version of RCW 9.94A.537 applied to Mr. Doney was not ripe for review because no attempt had been made to invoke the statute against Mr. Doney in the trial court. *Doney*, 165 Wn.2d at 403-04. The Supreme Court vacated the sentence and remanded for resentencing. *Id*. at 404.

Current Appeal. On remand, the trial court granted the State's motion to impanel a jury for resentencing. On August 27, 2010, the jury found the aggravating factors of deliberate cruelty and a particularly vulnerable victim. On October 15, the trial court again imposed an exceptional sentence of 420 months based on the aggravating circumstances.

Mr. Doney appeals the 2010 sentence, contending that the trial court did not have authority to impanel a jury because the 2007 version of RCW 9.94A.537 does not apply

retroactively. He also contends that the retroactive application is unconstitutional because the process results in different punishment for defendants who committed the same crime.

ANALYSIS

"A sentencing court's statutory authority under the Sentencing Reform Act of 1981 [(SRA), chapter 9.94A RCW] is a question of law we review de novo." *State v. Mann*, 146 Wn. App. 349, 357, 189 P.3d 843 (2008). Constitutional challenges also receive de novo review. *Id.*

Trial Court's Authority to Impanel a Jury. RCW 9.94A.537(2) states that "[i]n 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." The legislature noted in the 2007 version of RCW 9.94A.537 that "[t]he legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing." Laws of 2007, ch. 205, § 1.

"[I]n general, where a controlling law changes between the entering of judgment

below and consideration of the matter on appeal, the appellate court should apply the new or altered law, especially where no vested rights are involved and the Legislature intended retroactive application." *Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 620, 694 P.2d 697 (1985).

The 2007 amendment to RCW 9.94A.537 applies retroactively. *Mann*, 146 Wn. App. at 361. In *Mann*, this court determined that the Washington legislature clearly stated its intent for the 2007 amendment to apply to "'all cases that come before the courts for trial or sentencing, *regardless of the date of the original trial or sentencing*." *Id*. at 360 (quoting Laws of 2007, ch. 205, § 1). "[T]he 2007 legislation effectively extends the original '*Blakely*-fix' to all exceptional sentence cases that were remanded for resentencing based on the *Blakely* decision." *Id*. at 360-61.

Mr. Doney's contention that the trial court did not have the authority to impanel a jury in 2010 fails. As decided in *Mann*, the legislature intended the 2007 version of RCW 9.94A.537 to apply retroactively. Therefore, when the Supreme Court remanded Mr. Mann's case for resentencing, the trial court had the authority to impanel a jury under RCW 9.94A.537 to determine the existence of aggravating factors.

Separation of Powers. Mr. Doney contends that the legislature violated the separation of powers doctrine by applying RCW 9.94A.537 retroactively.

The separation of powers doctrine guarantees that the three branches of government do not threaten or invade the constitutional authority of another branch. *State v. Elmore*, 154 Wn. App. 885, 905, 228 P.3d 760, *review denied*, 169 Wn.2d 1018 (2010). The legislature and judiciary have distinct functions pertaining to laws; the legislature has the authority to enact laws, while the courts have the authority to interpret those laws. *Id.* Therefore, "legislative clarifications construing or interpreting existing statutes are unconstitutional when they contravene prior judicial interpretations of a statute." *Id.* However, if the legislature's intent is to amend a statute rather than clarify an existing statute, the separation of powers is not violated. *Id*.

In *Mann*, this court determined that enacting the changes to RCW 9.94A.537 did not offend the separation of powers because the legislature was amending RCW 9.94A.537, not clarifying it. *Mann*, 146 Wn. App. at 360. Therefore, based on *Mann*, Mr. Doney's contention fails.

Ex Post Facto and Bills of Attainder Violations. Mr. Doney also contends that the retroactive application of RCW 9.94A.537 violates the prohibition against ex post facto laws and the prohibition against bills of attainder.

Prohibitions against bills of attainder and ex post facto laws can be found in article I, section 10 of the United States Constitution and article I, section 23 of the Washington

Constitution.

"The federal and state ex post facto clauses prohibit enactment of any law which imposes punishment for an act which was not punishable when committed, or which increases the quantum of punishment after the crime was committed." *State v. Schmidt*, 143 Wn.2d 658, 677, 23 P.3d 462 (2001). The retroactive application of RCW 9.94A.537 does not violate the ex post facto clause because it does not increase the punishment to the defendant; the statute "'merely allows a jury, rather than the court, to make the factual determinations supporting exceptional sentences.'" *State v. Applegate*, 147 Wn. App. 166, 174, 194 P.3d 1000 (2008) (quoting *State v. McNeal*, 142 Wn. App. 777, 794, 175 P.3d 1139 (2008)).

"A bill of attainder is a legislative act which applies to named individuals or to easily ascertained members of a group in such a way as to inflict punishment on them without judicial trial." *State v. Scheffel*, 82 Wn.2d 872, 881, 514 P.2d 1052 (1973).

As decided in *Applegate*, retroactive application of RCW 9.94A.537 does not violate the ex post facto clause. Furthermore, the retroactive application also does not create a bill of attainder because the statute does not take away Mr. Doney's right to trial. By contrast, the statute allows for a jury to decide on an exceptional sentence during resentencing.

In sum, when the Supreme Court determined that the trial court lacked the authority to impanel a jury in 2005, the proper remedy was to vacate Mr. Doney's sentence and remand for resentencing. On remand, RCW 9.94A.537 gave the trial court the authority to impanel a jury to decide if aggravating circumstances existed. The application of RCW 9.94A.537 in 2010 did not violate the separation of powers doctrine, ex post facto clause, or the provision against bills of attainder.

Due Process Clause and Equal Protection Clause. "The relevant portions of Laws of 2005, chapter 68 are remedial law, as they relate only to procedures and do not affect substantive or vested rights." *Pillatos*, 159 Wn.2d at 473. Even though a statute is deemed unconstitutional as applied to a set of procedures, it still exists and still gives notice that the conduct is illegal and punishable. *Id.* at 476.

Due process provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Const. art. I, § 3. The treatment of an individual cannot be so arbitrary or unfair that it amounts to a denial of due process. *State v. Handley*, 115 Wn.2d 275, 290 n.4, 796 P.2d 1266 (1990).

"A valid law, administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection." *State v. Rushing*, 77 Wn. App. 356, 359, 890 P.2d 1077 (1995). Before the court will engage in equal protection scrutiny, the

defendant must first establish that he or she is in a class with similarly situated persons. *Handley*, 115 Wn.2d at 289-90. If the defendant can establish that he or she was part of a group of similarly situated persons who received different treatment, the equal protection scrutiny will be invoked. *Id*. at 290. The court will use a rational basis analysis to evaluate the validity of the differential treatment when the classification does not involve a suspect or semisuspect class or threaten a fundamental right. *State v. Bryan*, 145 Wn. App. 353, 358, 185 P.3d 1230 (2008).

Under the rational basis test, the challenging party must show that the classification is purely arbitrary in order to overcome the strong presumption of constitutionality. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996) (quoting *State v. Coria*, 120 Wn.2d 156, 172, 839 P.2d 890 (1992)). The test requires that the "means employed by the statute be rationally related to a legitimate State goal." *Id.*

Equal protection is not implicated when the trial court imposes different sentences on defendants convicted under similar circumstances. *State v. Oksoktaruk*, 70 Wn. App. 768, 777, 856 P.2d 1099 (1993). "Under the SRA, the trial court *may*, in the exercise of its discretion, determine that an exceptional sentence should be imposed in a particular case." *Id*. There is no constitutional requirement that similarly situated defendants in different cases must both receive exceptional sentences or even the same sentence. *Id*.

While the State cannot appeal the length of a standard range criminal sentence, the State can challenge the "'underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision.'" *State v. Murawski*, 142 Wn. App. 278, 283, 173 P.3d 994 (2007) (quoting *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003)).

In *Murawski*, the court determined that the State had the right to appeal the sentencing court's decision not to impanel a jury for resentencing under RCW 9.94A.537 because the State was appealing the procedure behind the imposition and not the length of the sentence. *Murawski*, 142 Wn. App. at 284.

Mr. Doney contends that application of RCW 9.94A.537(2) on remand is fundamentally unfair and violates his right to due process when compared to similarly situated defendants. Mr. Doney maintains that RCW 9.94A.537(2) treats him arbitrarily and unfairly because it allows an exceptional sentence on remand only because an exceptional sentence was given in his original sentence. He argues that if the trial court would have interpreted the law correctly, he would not have received the exceptional sentence and would not be eligible for the same on remand.

Mr. Doney's due process claim fails. RCW 9.94A.537(2) did not change the substantive law. After *Blakely*, an exceptional sentence based on aggravating factors

could still be imposed on a defendant. RCW 9.94A.537 merely changed the process to determine aggravating factors. The trial court's interpretation of the law in determining the procedure to use after *Blakely* was not harsh or unfair treatment and did not violate constitutional requirements.

The decision of the court to impose an exceptional sentence is the triggering event for RCW 9.94A.537(2) to apply. Once the trial court decides to impose an exceptional sentence, RCW 9.94A.537(2) does not treat defendants unfairly or arbitrarily. All defendants who received an exceptional sentence based on aggravating factors are eligible for a jury trial on remand to determine whether the aggravating factors exist. The application of the statute does not violate the due process clause.

For his equal protection violation, Mr. Doney contends that he belongs to a class of persons who pleaded guilty and were charged with aggravating factors after *Blakely* and before the 2005 version of RCW 9.94A.537 went into effect. Mr. Doney contends that the application of RCW 9.94A.537(2) treats him differently from other members of the group. He maintains that the statute subjects him to an exceptional sentence on remand simply because the trial court interpreted *Blakely* to allow the court to impanel a jury to decide the aggravating factors and imposed an exceptional sentence based on the findings. In comparison, RCW 9.94A.537(2) would not allow a exceptional sentence on

remand to a similarly situated defendant in which the trial court decided that it did not have the authority to submit aggravating factors to a jury and, therefore, did not impose an exceptional sentence.

Mr. Doney fails to establish a class of persons subject to unequal treatment. All the members of the group identified by Mr. Doney were subject to an exceptional sentence if the aggravating factors were found to be present because the substantive law regarding exceptional sentences still applied during the period between *Blakely* and the enactment of the 2005 version of RCW 9.94A.537. RCW 9.94A.537 only changed the procedure in submitting aggravating factors. Because all members of the group were subject to the substantive law, the application of RCW 9.94A.537(2) does not violate equal protection. It simply provides a new procedure to verify the convictions under the same substantive law.

Furthermore, Mr. Doney's group is speculative and abstract. Mr. Doney cannot use the decision of the trial court to define a subset of his group that received different treatment at the original trial and on remand. The interpretation of the law by the trial court did not mandate that a jury could or could not decide the aggravating factors. As in *Murawski*, the State had the authority to appeal the trial court's decision not to impanel a jury after *Blakely*. The possibility of having aggravating factors submitted to a jury was

equally available to all defendants.

Even if Mr. Doney were to establish a class of similarly situated persons based on a defendant's eligibility for an exceptional sentence, the application of RCW 9.94A.537(2) to persons who previously received an exceptional sentence is still rationally related to a legitimate state purpose. The purpose of the SRA is to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense." RCW 9.94A.010(1). Permitting the imposition of an exceptional sentence based on aggravating factors is related to this legitimate state interest.

The application of RCW 9.94A.537(2) applies to all defendants who received an exceptional sentence above the standard range based on aggravating factors and where a new sentencing hearing is required. The statute does not violate the equal protection clause.

We affirm the decision of the trial court.

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

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Kulik, J.

WE CONCUR:

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Brown, J. Siddoway, A.C.J.