

FILED
JAN 31, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 29600-8-III
)	
Respondent,)	
)	Division Three
v.)	
)	
RAYMOND CARL HUGHES,)	UNPUBLISHED OPINION
)	
Appellant.)	
)	

Kulik, C.J. — Raymond Hughes was charged with one count of second degree rape of a child and one count of second degree rape. He entered a guilty plea and was sentenced to 102 months. Mr. Hughes appealed. In *State v. Hughes*, 166 Wn.2d 675, 689, 212 P.3d 558 (2009), the Washington Supreme Court concluded that the two convictions violated double jeopardy and that the trial court had the authority to consider the State’s request for an exceptional sentence. On remand, the trial court vacated one of the convictions and imposed an exceptional minimum sentence of 180 months based on the aggravating factors of abuse of trust, victim vulnerability, deliberate cruelty, and invasion of the zone of privacy. In his second appeal, Mr. Hughes contends his

exceptional sentence is improper because the State failed to comply with the notice requirements of RCW 9.94A.537(1). Notice was not required under this statute. And the trial court had discretion to impose an exceptional sentence. Therefore, we affirm the trial court.

FACTS

In April 2004, Raymond Hughes was charged with one count of second degree child rape and one count of second degree rape. Mr. Hughes was the night caregiver for a severely disabled, bedridden, and physically and mentally incapacitated 12-year-old girl. These charges arose after Mr. Hughes forced sexual intercourse on the girl.

Prior to trial, Mr. Hughes brought a motion to dismiss one of the counts based on double jeopardy. The trial court denied the motion. On October 15, 2004, Mr. Hughes entered a guilty plea. The statement of defendant on plea of guilty contained the following language: "State will request an exceptional sentence on both counts." Clerk's Papers (CP) at 6.

The matter was set for sentencing. The State filed a memorandum in support of an exceptional *minimum* sentence. Mr. Hughes argued that the decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) precluded an exceptional sentence. The parties argued the applicability of the *Blakely* decision as well

as the court's authority to convene a jury. The trial court concluded that no exceptional sentence could be considered because it lacked the authority to impanel a jury.

The court sentenced Mr. Hughes on February 18, 2005. The court declined to reconsider its previous ruling about the exceptional sentence. The court imposed a life sentence and set a minimum term of 102 months, the top end of the standard range. The judgment and sentence explained that the State's request for an exceptional sentence was denied based on a "procedural issue not factual insufficiency." CP at 29.

Both parties appealed. Ultimately, the Washington Supreme Court rendered its opinion resolving the *Blakely* issue. The Supreme Court remanded the case to the trial court for vacation of one of the counts and resentencing on the other. *Hughes*, 166 Wn.2d at 689. The Supreme Court also concluded that the trial court could consider the State's request for an exceptional sentence. *Id.*

On remand, Mr. Hughes waived impaneling a jury to address aggravating factors. He also signed stipulated facts relating to these factors.

The trial court resentenced Mr. Hughes on December 2, 2010, and imposed a 180-month exceptional minimum sentence based on the aggravating factors of abuse of trust, victim vulnerability, deliberate cruelty, and invasion of the zone of privacy. Mr. Hughes filed his second appeal.

ANALYSIS

Under RCW 9.94A.535, the trial court is authorized to impose a sentence outside the standard range if the court finds that there are substantial and compelling reasons justifying the exceptional sentence.

At his initial sentencing, Mr. Hughes received a minimum sentence of 102 months. On remand, Mr. Hughes pleaded guilty as charged while acknowledging that the State would be seeking an exceptional sentence. Mr. Hughes had an offender score of 0. The standard range was 78 to 102 months. The maximum was life in prison.

At resentencing, Mr. Hughes waived his right to have a jury determine whether aggravating circumstances existed beyond a reasonable doubt. Mr. Hughes also stipulated that evidence could be considered by the trial court when determining whether the aggravating circumstances existed beyond a reasonable doubt.¹ The court reviewed the stipulated evidence and found it sufficient to establish, beyond a reasonable doubt, the aggravating circumstances of abuse of trust, victim vulnerability, deliberate cruelty, and invasion of the zone of privacy. The court then imposed an exceptional sentence based on these aggravating factors. At resentencing, Mr. Hughes received a 180-month

¹ Mr. Hughes concedes that *Blakely* does not prohibit judicial fact finding to support an exceptional minimum sentence under RCW 9.94A.507 as long as that sentence does not exceed the maximum sentence imposed. Appellant's Br. at 6 (citing *State v. Clarke*, 156 Wn.2d 880, 894, 134 P.3d 188 (2006)).

sentence.

Mr. Hughes contends his exceptional minimum sentence is improper because the State failed to comply with the notice provision of RCW 9.94A.537(1).

This provision reads:

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 was adopted when the legislature amended RCW 9.94A.535 in response to the Supreme Court's decisions in *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *State v. Edvalds*, 157 Wn. App. 517, 531 n.3, 237 P.3d 368 (2010), *review denied*, 171 Wn.2d 1021 (2011). Moreover, in *State v. Powell*, 167 Wn.2d 672, 680, 223 P.3d 493 (2009), the Washington Supreme Court concluded that RCW 9.94A.537(1) did not apply retroactively.

Mr. Hughes was convicted in 2004, several months before RCW 9.94A.537(1) was adopted. In its decision in *Hughes*, the Washington Supreme Court stated:

[W]e conclude that [Mr. Hughes] is not subject to the 2005 amendments to RCW 9.94A.535 because his convictions were entered in 2004 before those amendments became effective. . . . We therefore hold that the trial court

has the authority to consider the State’s request for an exceptional . . . sentence.

Hughes, 166 Wn.2d at 688.

Mr. Hughes’s assignment of error is limited to the argument that the exceptional minimum sentence was improper because of the State’s failure to comply with the notice requirements of RCW 9.94A.537(1).

Because RCW 9.94A.537(1) does not apply here, notice was not required and the trial court retained the authority to impose an exceptional minimum sentence above the standard range.

Therefore, we affirm 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.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Brown, J.