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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. 30508-2-III**
Respondent,	)	
	)	**Division Three**
v.	)	
RAYMOND HERNANDEZ, JR.,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	

Korsmo, C.J. — Although four of Raymond Hernandez's five convictions for first degree child molestation were vacated in an earlier appeal, the trial court again imposed a lengthy exceptional sentence. In this second appeal, Mr. Hernandez challenges the exceptional sentence. We affirm.

PROCEDURAL HISTORY

A jury convicted Mr. Hernandez of five counts of first degree child molestation and also found the presence of two aggravating factors relating to each count: (1) the crimes were part of an ongoing pattern of sexual abuse of the same young victim that involved multiple incidents over a lengthy period of time, and (2) the defendant used a

"position of trust or confidence" to commit the offenses. The offenses were committed against a young neighbor girl whose parents were friends of the defendant and his family. The trial court imposed an exceptional sentence of 594 months by having three of the five convictions served consecutively to each other.

The court had given the jury five identical elements instructions that required the jury to unanimously agree on the same act in order to convict the defendant. On appeal, this court overturned four of the five convictions because the instructions had not required the jury to find that the acts supporting each charge were different. Because double jeopardy principles would prohibit a retrial, this court remanded for resentencing on the remaining count. *See State v. Hernandez*, noted at 158 Wn. App. 1023, 2010 WL 4308572. The exceptional sentence and the two aggravating factors had not been at issue in the first appeal.

On remand, the trial court again imposed an exceptional sentence of 500 months on the basis of the two aggravating factors. The court's written findings state that there were substantial and compelling reasons to impose an exceptional sentence, and that either of the aggravating factors would alone justify the chosen term. Clerk's Papers (CP) at 59. Mr. Hernadez again appealed.

ANALYSIS

Mr. Hernadez argues that the exceptional sentence was not properly supported by

the trial court's reasoning and was not available in light of the first appeal. We disagree with both arguments.

Review of an exceptional sentence is governed by well-settled statutory and case law standards. An exceptional sentence may be imposed if the trial court finds there are "substantial and compelling" reasons to go outside the standard range. RCW 9.94A.535. The trial court must enter written findings of fact and conclusions of law if it does impose an exceptional sentence. *Id.* A nonexclusive list of mitigating factors is recognized by statute. RCW 9.94A.535(1). However, an exceptional sentence above the standard range must be based on a recognized statutory factor. RCW 9.94A.535(2), (3).

Either party may appeal an exceptional sentence. RCW 9.94A.585(2). The statutory scheme for review of an exceptional sentence has long been in place. An exceptional sentence is reviewed to see if either (a) the reasons for the exceptional sentence are not supported by the record or do not justify an exceptional sentence, or (b) the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.585(4). Thus, appellate courts review to see if the exceptional sentence has a factual basis in the record, is a legally justified reason, and is not too excessive or lenient. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). Differing standards of deference or nondeference apply to those three issues. *Id*. An appellate court reviews de novo a trial court's determination that an aggravating factor justifies an exceptional sentence. *Id*. at 94;

RCW 9.94A.585(4).

Despite the fact that the trial court's written findings of fact and conclusions of law state that there are substantial and compelling reasons for imposing an exceptional sentence, Mr. Hernandez argues that the document merely states a legal *conclusion* instead of making a factual *finding* that compelling reasons exist. CP at 59. While we agree that the document expressly states that legal conclusion, we disagree with the argument that the determination of "substantial and compelling reasons" is a factual finding.

Except in a couple of narrow instances that are essentially matters of law, trial judges lack authority to make factual findings that permit an exceptional sentence. *See Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Without considering the implications of *Blakely* to Mr. Hernandez's argument, we reject his characterization of the "substantial and compelling reasons" finding as factual in nature. The legislature has already determined that this finding is a legal conclusion.

RCW 9.94A.535 and .537 govern the process for imposing an exceptional sentence. In both statutes, the trial court is permitted to impose an exceptional sentence if it determines there are "substantial and compelling *reasons*" to do so. RCW 9.94A.535 (emphasis added) (first paragraph), .537(6). In each instance where it recognizes that authority, the legislation also provides that the existence of the aggravating factor is a

factual question for jury determination. RCW 9.94A.535, .537(6). The statutes set up the basic dichotomy—the fact finder determines if facts (the aggravating factors) exist, while the judge determines if those facts are significant reasons for imposing an exceptional sentence. Merely because the statute uses a verb "find" that is related to the gerund "findings" commonly associated with factual determinations does not mean that the legislature mandated judicial fact-finding. Instead, it is well recognized that the process of legal *reasoning* applied to factual determinations constitutes a legal conclusion. *E.g.*, *State v. Anderson*, 51 Wn. App. 775, 778, 755 P.2d 191 (1988). A conclusion of law represents the legal consequences that follow those facts. *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 418, 225 P.3d 448 (2010).

The jury found the two aggravating factors existed. The trial court reasoned that those findings constituted sufficient reasons to impose an exceptional sentence. That was a legal determination. Accordingly, we reject Mr. Hernandez's argument that the determination that compelling reasons existed for an exceptional sentence needed to be denominated as a factual finding rather than a legal conclusion.

The remaining issue is whether the exceptional sentence was justified in light of the outcome of the first appeal. Mr. Hernandez contends that the ongoing pattern of abuse aggravating factor is invalid in light of the vacation of the other four counts of child molestation. He reasons that there can be no ongoing pattern if there is only one count.

He also questions whether the abuse of trust aggravating factor was found for count one. The latter question is easily answered. The jury by special verdict found that each aggravating factor applied to each count. CP at 105, 110 (special verdict forms A, A1). The abuse of trust factor was not dependent upon multiple convictions. The jury's determination that it applied to count one answers Mr. Hernandez's challenge. There is no basis for rejecting the finding.

Mr. Hernandez cites no authority for the proposition that a pattern of abuse finding requires multiple convictions to support it. Nonetheless, we need not further consider his argument because the abuse of position of trust aggravating factor is unquestionably valid. The trial court expressly stated that the exceptional sentence was justified by either aggravating factor alone. CP at 59. An exceptional sentence will be upheld even if some of the aggravating factors are invalidated if the reviewing court is convinced that the trial court would impose the same sentence on the basis of the valid factor. *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). The trial court's declaration that either factor alone justified the exceptional sentence is clear proof that a remand would be unnecessary. In light of this fact, the exceptional sentence is affirmed without further consideration of the challenge to the ongoing abuse aggravating factor.

Affirmed.

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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Korsmo, C.J.

WE CONCUR:

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Sweeney, J.

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Siddoway, J.