State of Washington v. Brian Leroy Siers
No. 63697-9-I

Dwyer, C.J. (dissenting) — The majority opinion finds error where none exists, ignores the absence of prejudice to the defendant stemming from the perceived error, and bestows a total windfall as a remedy: ordering dismissal of a charge against Brian Siers, a man who was constitutionally convicted of assault in the second degree and constitutionally sentenced therefor. I dissent.

I

The relevant facts are easily stated:

1. Siers was charged by information with two counts of assault in the second degree. All necessary elements of those offenses were included in the information.

2. At trial, the jury was asked whether, based on the evidence, the State had also proved beyond a reasonable doubt that the "good samaritan" aggravator, RCW 9.94A.535(w), had been established as to the second count of assault. The jury answered in the affirmative.

3. Siers was convicted on both counts.

4. At sentencing, the State did not request the imposition of an exceptional sentence.

5. The trial court did not impose an exceptional sentence.

6. The trial court referenced the jury's finding on the "good samaritan" aggravator in explaining its decision to impose a sentence of incarceration for

the second count of assault at the high end of the applicable standard range.

II

The majority holds that because the jury was asked to answer whether the "good samaritan" aggravator had been proved, that aggravator became an element of the offense of assault in the second degree. Going further, the majority holds that because that element was not set forth in the information, reversible error exists. Going even further, the majority holds that this error necessitates a remedy and that the only appropriate remedy is dismissal of the charge.

The majority is wrong on all counts.

Siers urges us to focus on the actions of the jury—rather than the trial judge—in analyzing his claim of error. Because the jury made a factual finding, he argues, the fact found must be an element of the crime he was alleged to have committed. The majority hears Siers' entreaty as a siren's song; I hear it as the clanging of warning bells.

By accepting Siers' construction of the question presented, the majority loses sight of the true issue. Here, the trial judge imposed a sentence that was authorized by the jury's findings and the information filed. Nothing more was required. There was no error.

III

Controlling precedent of the United States Supreme Court does not

support the majority's holding.

> Whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.

Harris v. United States, 536 U.S. 545, 565, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002).

In fact,

> [t]he judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury . . . even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element.

Harris, 536 U.S. at 566. Indeed, judges "have always considered uncharged 'aggravating circumstances' that, while increasing the defendant's punishment, have not 'swell[ed] the penalty above what the law has provided for the acts charged.'" Harris, 536 U.S. at 562 (alteration in original) (quoting 1 J. Bishop, Law of Criminal Procedure § 85, p. 54 (2d ed. 1872)).

The Supreme Court's decision in Harris makes it clear that the "good samaritan" aggravator was not an element of the crime Siers was convicted of committing. This is so because a standard range sentence—a punishment authorized by the jury's findings, even in the absence of a finding on the aggravator—was imposed. Because the aggravator was not an element, it did not need to be set forth in the information.

There was no error.

IV

The majority wrongly claims that our Supreme Court's decision in State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009), compels the result it reaches. This is not so.

To dispute the majority's assertion, I will quote exactly the same portion of Justice Stephens' concurring opinion that is quoted in the majority opinion.

> The lead opinion's opinion that aggravating factors are not strictly elements and thus need not be included in the information misses the motivating premise behind the jury trial right. See Blakely [v. Washington], 542 U.S. [296] at 306[,124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)] (noting that the jury right does not turn on the legislative decision to label aggravating factors as "elements" or "sentencing factors"). And since the requirement that aggravating factors be charged in the information inheres in the Sixth Amendment jury trial right (not Fifth Amendment due process as discussed by the lead opinion), it applies to the states and binds us in this case. I therefore agree with the dissent and would hold that the State must charge aggravating factors in the information and prove them to a jury in order to obtain an enhanced sentence. For post-Blakely cases, this is the rule.

Powell, 167 Wn.2d at 689-90 (Stephens, J., concurring).

The majority quotes this passage but does not give meaning to it. The quoted passage provides that "the State must charge aggravating factors in the information and prove them to a jury *in order to obtain an enhanced sentence*." Powell, 167 Wn.2d at 690 (Stephens, J., concurring) (emphasis added). The majority ignores the italicized portion of this quotation. No enhanced sentence was sought or obtained in Siers' prosecution. Thus, the trial judge herein did nothing at odds with the Powell decision. There was no error.

The majority's citation to State v. Frazier, 81 Wn.2d 628, 503 P.2d 1073 (1972), does not alter this analysis. Again, quoting the exact language quoted in the majority opinion, Frazier provides,

> Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered *before the court can impose the harsher penalty*.

Frazier, 81 Wn.2d at 633 (emphasis added).

Again, the majority ignores the italicized language. Here, the court did *not* impose a "harsher penalty." The information filed was sufficient to support the conviction gained and the standard range sentence imposed.

V

The majority opinion finds error where none exists, ignores the absence of prejudice to the defendant arising from the procedures employed, and bestows a windfall—dismissal of a charge of assault in the second degree—to an undeserving defendant.

The information, as filed, supported the convictions entered. The sentences imposed were authorized by the jury's findings. Nothing went wrong here.

I dissent.

Dwyer, C. J.