IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SUNDI MARIE GUNTLY, Appellant.	No. 40982-8-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — On July 1, 2010, Sundi M. Guntly pleaded guilty to five counts of third degree assault of a child (domestic violence) under RCW 9A.36.140(1), RCW 9A.36.031(1)(f), and RCW 10.99.020. The trial court sentenced Guntly to 16 months on each count with the sentences for counts one, two, and three to run concurrently with each other but consecutive to the concurrent sentences imposed for counts four and five. Guntly appeals her sentence, arguing that the trial court had no authority to impose the consecutive exceptional sentence in this case and, even if the trial court had such authority, that insufficient evidence supports the trial court's aggravating factors findings and the imposition of an exceptional consecutive sentence. The State concedes that the trial court lacked authority to impose consecutive sentences on the grounds stated. We accept the State's concession, reverse, and remand to the trial court for correction of the sentence in accord with this opinion.

FACTS

On January 28, 2010, the State charged Guntly with one count of second degree assault of a child (domestic violence) in violation of RCW 9A.36.130(1)(b) and RCW 10.99.020. On June 2, 2010, the State and Guntly negotiated a plea agreement under which Guntly would plead guilty to five counts of third degree assault of a child. Under the plea agreement, the State would recommend a sentence within the standard range, 12 to 16 months, on each count, but Guntly was free to argue for a sentence of 12 months on each count, the low end of the standard sentencing range.

On July 1, 2010, Guntly entered a plea of guilty to five counts of third degree assault of a child. As part of her guilty plea, Guntly made a statement stipulating only to facts sufficient to allow the trial court to accept her guilty plea. In her victim impact statement, K.J.P. stated that she was afraid of Guntly, that she was afraid for her baby brother, and that she hated Guntly for hurting her. As agreed in the plea offer, the State recommended a 16-month sentence on each count. Guntly argued for a 12-month sentence on each count.

The trial court imposed a sentence of 16 months on each count. The sentences for counts one, two, and three were to run concurrently with each other but consecutive to the concurrent sentences imposed for counts four and five. As a result, Guntly was sentenced to serve a total of 32 months in prison. The trial court based its exceptional sentence on its own finding that Guntly "abused a position of trust and inflicted injuries on a defenseless child." Report of Proceedings (RP) at 18. Guntly appeals the trial court's imposition of consecutive sentences.

ANALYSIS

Guntly contends, and the State properly concedes, that the trial court did not have the

authority to impose the consecutive sentences that it did in this case. Guntly argues that the trial court lacked statutory authority to impose consecutive sentences absent a jury finding the aggravating factors supporting Guntly's exceptional sentence. We accept the State's concession and hold that the trial court lacked the authority to impose an exceptional sentence in this case.

At Guntly's sentencing hearing, the trial court stated that "consecutive sentences are not covered by the *Blakely*[1] decision, which requires a jury determination." RP at 18. The trial court's statement was likely based on the recent decisions in *State v. Vance*, 168 Wn.2d 754, 230 P.3d 1055 (2010),[2] and *Oregon v. Ice*, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009).[3] But these cases address the Sixth Amendment right to a jury trial; they do not take into account the statutory limitations imposed on the trial court's sentencing authority.[4]

In most cases, concurrent sentences are presumed and consecutive sentences are considered exceptional sentences. RCW 9.94A.589(1)(a).[5] RCW 9.94A.535

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[1] *Blakeley v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[2] *Oregon v. Ice*, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009), overruled *In re Personal Restraint of VanDelft*, 158 Wn.2d 731, 147 P.3d 573 (2006), *cert. denied*, 550 U.S. 980 (2007), and the Sixth Amendment does not require a jury to make factual determinations supporting the imposition of consecutive sentences. *Vance*, 168 Wn.2d at 762-63.

[3] The Sixth Amendment does not require courts to adhere to the requirements of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 403 (2000), and *Blakeley* when imposing consecutive sentences. *Ice*, 129 S. Ct. 714-15.

[4] In *VanDelft*, the Washington Supreme Court held that sentences imposed under RCW 9.94A.589(1)(a) are presumptively concurrent and, under the Sixth Amendment, the imposition of a consecutive sentence must comply with *Blakeley*. *VanDelft*, 158 Wn.2d at 743. Although, in *Vance*, the court recognized this decision had been overruled by the United States Supreme Court's opinion in *Ice* on Sixth Amendment grounds, it noted that Vance made no claim for relief under independent state grounds. *Vance*, 168 Wn.2d at 762-63 & n.8.

[5] RCW 9.94.589(1)(a) states, in relevant part,

> Except as provided in (b) or (c) of this subsection, whenever a person is to be

[6] and RCW 9.94A.537 govern imposition of exceptional sentences. These provisions require that the State give notice that it is seeking an exceptional sentence and that a jury find the facts supporting the exceptional sentence beyond a reasonable doubt before the trial court may impose an exceptional sentence. RCW 9.94A.535,[7] .537.[8] Except for four very limited circumstances in

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> sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. *Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.*

(Emphasis added.)

[6] We cite to the current version of RCW 9.94A.535 in this opinion since any amendments in recent years are not substantively relevant to this appeal.

[7] RCW 9.94A.535 states, in relevant part,

> The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.
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> . . . .
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> A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section.

[8] RCW 9.94A.537 states in relevant part,

> (1) At any time prior to trial or entry of a 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.
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> . . . .
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> (6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

which the legislature has explicitly granted the trial court the authority to impose an exceptional sentence without a jury, the trial court lacks the authority to impose an exceptional sentence. RCW 9.94A.535(2).[9] Moreover, the legislature has specifically mandated that a jury consider the aggravating factors that the trial court relied on when imposing an exceptional sentence: abuse of a position of trust and a defenseless victim. RCW 9.94A.535(3)(b), (n).

Here, the State never gave Guntly notice that it was going to seek an exceptional sentence. In fact, the State never actually sought an exceptional sentence in Guntly's case. And Guntly was entitled to have the facts supporting the exceptional sentence found beyond a reasonable doubt by a jury. A jury did not find the aggravating factors beyond a reasonable doubt and, absent such verdict, there were no facts to warrant an exceptional sentence. Thus, the trial court exceeded its authority when it imposed consecutive sentences on Guntly.

Guntly also argues, and the State concedes, that there was insufficient evidence to support the trial court's findings of fact. But because the trial court lacked the authority to impose an

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[9] The legislature has made four specific exceptions to the requirement that aggravating factors be considered by a jury:

> (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.
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> (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.
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> (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.
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> (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.

RCW 9.94A.535(2).

exceptional sentence, there is no need for us to decide this issue. Accordingly, we reverse and remand to the trial court for correction of Guntly's sentence in accord 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.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, P.J.

VAN DEREN, J.