Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 79068-0

Title of Case: State v. Davis

File Date: 05/22/2008

Oral Argument Date: 10/09/2007

SOURCE OF APPEAL

Appeal from Spokane County Superior Court

04-1-01828-6

Honorable Jerome J Leveque

JUSTICES

Gerry L. Alexander Signed Majority

Charles W. Johnson Signed Majority

Barbara A. Madsen Majority Author

Richard B. Sanders Signed Majority

Tom Chambers Signed Dissent

Susan Owens Signed Majority

Mary E. Fairhurst Signed Majority

James M. Johnson Dissent Author

Debra L. Stephens Did Not Participate

Bobbe J. Bridge,

Justice Pro Tem. Signed Majority

COUNSEL OF RECORD

Counsel for Petitioner(s)

David L. Donnan

Washington Appellate Project

1511 3rd Ave Ste 701

Seattle, WA, 98101-3635

Counsel for Respondent(s)

Steven J. Tucker

Attorney at Law

1100 W Mallon Ave

Spokane, WA, 99260-2043

Mark Erik Lindsey

Spokane County Prosecuting Attorneys

1100 W Mallon Ave

Spokane, WA, 99260-2043

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)

) No. 79068-0

Respondent,)

)

v.) En Banc

)

ANTHONY D. DAVIS,)

)

Petitioner.) Filed May 22, 2008

_____)

MADSEN, J. -- Shortly after the United States Supreme Court issued

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004),

Anthony Davis was tried and convicted of multiple offenses arising from a domestic dispute involving Bobbi Dewey and her daughter, T.D.B. The State alleged the crimes against T.D.B. were aggravated by her "particular vulnerability." Under then-applicable provisions of chapter 9.94A RCW, the Sentencing Reform Act of 1981 (SRA), the trial court was required to find the existence of that statutory aggravating factor. In view of Blakely, however, the trial court submitted the aggravating factor to the jury by special interrogatory

rather than make the factual determination itself. Based on the jury's response to the special interrogatory, the trial court imposed an exceptional sentence. The Court of Appeals affirmed. State v. Davis, 133 Wn. App. 415, 138 P.3d 132 (2006).

We hold the jury's response to the special interrogatory is void and cannot support Davis's exceptional sentence because the trial court exceeded its authority by delegating its fact-finding duty to the jury. Trial courts may not deviate from the legislatively prescribed exceptional sentencing procedures, whether at trial or on remand. Thus, we vacate Davis's exceptional sentence and remand for resentencing.

FACTS

By amended information, the State charged Davis with two counts each of second degree assault and unlawful imprisonment (against Dewey and T.D.B.), and one count each of harassment, third degree malicious mischief, and violation of a domestic violence criminal protection order. Clerk's Papers (CP) at 2-3. The State alleged the assault and unlawful imprisonment offenses against T.D.B. were

aggravated by her particular vulnerability, "as provided by RCW 9.94A.535(2)(b)."1 CP at 2-3.

1 Former RCW 9.94A.535 (2003) provides: "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." (Emphasis added.) Former RCW 9.94A.535(2)(b) (2003) provides: "The defendant knew or should have known that the victim of the current offense was

The jury found Davis guilty of harassment, malicious mischief, violation of a protection order, the lesser-included offenses of fourth degree assault, and unlawful imprisonment of T.D.B.2

By special interrogatory, the jury found that when Davis unlawfully imprisoned T.D.B., he knew or should have known "the victim was particularly vulnerable and incapable of resistance due to extreme youth." CP at 55.

Based on the jury's response to the special interrogatory, the court imposed an exceptional sentence of 12 months on the unlawful imprisonment conviction or four months above the maximum standard range sentence for that offense. The court imposed a 365-day suspended sentence for each of the gross misdemeanor offenses, consecutive to the felony offenses, for a total term of 24 months. CP at 70.

On appeal, Davis argued the trial court impermissibly altered the sentencing procedures of the SRA by submitting the special interrogatory to the jury.3 The Court of Appeals disagreed. The court held a trial court could submit aggravating factors to a jury during the guilt phase of a trial even though, following State v.

particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health." The legislature further provided the existence of facts supporting an exceptional sentence need not be proved beyond a reasonable doubt, but only by a preponderance of the evidence. Former 9.94A.530(2) (2002).

2 The jury found Davis not guilty of unlawful imprisonment of Dewey.

3 Davis also argued that prosecutorial misconduct requires reversal of his convictions and that insufficient evidence supports the unlawful imprisonment conviction. The Court of Appeals rejected those arguments and they are not at issue here.

Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), it lacked authority to impanel a special sentencing jury for that purpose on remand. Davis, 133 Wn. App. 415.

This court granted Davis's petition for discretionary review on the exceptional sentence issue. State v. Davis, 159 Wn.2d 1019, 157 P.3d 404 (2007).

ANALYSIS

On June 24, 2004, the United States Supreme Court issued its decision in Blakely. Blakely rendered the mechanism for imposing an exceptional sentence under the SRA unconstitutional in certain applications. The legislature responded

to Blakely by enacting Laws of 2005, chapter 68 (2005 amendment), which became effective on April 15, 2005. The 2005 amendment provides a valid procedure whereby juries may be charged with making findings in support of an exceptional sentence. State v. Pillatos, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007). However, the 2005 amendment expressly provides the statute applies only to cases where trial has not yet begun, or a guilty plea accepted, on its effective date. Id. at 474. Davis was tried in January 2005, several months before the effective date of the 2005 amendment, so the statute does not apply to him.

In both Pillatos and Hughes, we rejected the argument that a trial court could deviate from legislatively prescribed exceptional sentencing procedures during the period between Blakely and the effective date of the 2005 amendment. Before the legislature enacted the 2005 amendment, this court held that trial courts

could not impanel sentencing juries, on remand, to find the facts necessary to support an exceptional sentence, because the SRA "explicitly directs the trial court to make the necessary factual findings and does not include any provision allowing a jury to make those determinations during trial, during a separate sentencing phase, or on remand." Hughes, 154 Wn.2d at 149 (emphasis added). Following the enactment of the 2005 amendment, we concluded, consistently with Hughes, that trial courts lack authority during trial to submit special interrogatories to juries in deviation from the SRA's exceptional sentence procedures. Pillatos, 159 Wn.2d at 474.

The State attempts to distinguish Pillatos on the ground it addresses only

the court's authority to impanel a sentencing jury, not a court's authority to submit a special interrogatory to a guilt-phase jury.

Pillatos cannot be read so narrowly. Indeed, we accepted review in Pillatos to address whether juries could be asked to find statutory aggravating factors during trial or at sentencing. Following the enactment of the 2005 amendment, this court expanded review to include the validity and applicability of that legislation.

Pillatos involved the consolidated appeals of four defendants. Two of the defendants were not yet sentenced while two were not yet convicted, including James Metcalf. The State charged Metcalf with second degree murder. Following

Blakely, the State amended the information to add the statutory aggravating factors of "deliberate cruelty" and the victim's "particular vulnerability." Pillatos, 159 Wn.2d at 467. The trial court denied the motion, concluding it lacked the authority to submit those factors to the jury. This court affirmed the trial court's decision. Id. at 480. Thus, in Pillatos, we rejected the use of special interrogatories during the guilt phase of the trial, in deviation from applicable exceptional sentence procedures.

The Court of Appeals, which did not have the benefit of Pillatos when it decided this case, agreed with the State that "Hughes is inapplicable" because it dealt only with a trial court's authority "on remand," while expressly reserving the question "'whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial.'" Davis, 133 Wn. App. at 427 (quoting

Hughes, 154 Wn.2d at 149). The Court of Appeals reasoned that RCW 2.28.150 and CrR 6.16(b) supplied the necessary authority. Davis, 133 Wn. App. at 427.

RCW 2.28.150 provides that "if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws." The Court of Appeals appears to have reasoned that an unconstitutional statute is not a "statute" within the meaning of RCW 2.28.150. Davis, 133 Wn. App. at 427. Thus, following Blakely, there was no longer a procedure "'specifically pointed out by

statute'" for finding facts in support of an exceptional sentence. Id. (quoting RCW 2.28.150).

CrR 6.16(b) authorizes a trial court to submit special interrogatories to juries to make special findings "which may be required or authorized by law." The Court of Appeals agreed with the State that the use of special interrogatories to find aggravating factors was "required" by law, following Blakely. Davis, 133 Wn. App. at 428.

Division One of the Court of Appeals applied the same reasoning in State v. Harris, 123 Wn. App. 906, 922-26, 99 P.3d 902 (2004), overruled by Hughes, 154 Wn.2d 118, in the context of deciding whether trial courts could impanel special sentencing juries to find statutory aggravating factors. Harris was one of the first published cases following Blakely to provide guidance to lower courts pending a legislative solution. In Harris, the court sanctioned the use of special sentencing juries to conform exceptional sentencing procedures to constitutional

requirements. In the court's view, the unconstitutional provisions in the SRA, requiring judicial fact-finding of aggravating factors according to a preponderance of the evidence standard of proof, were severable from the rest of the exceptional sentencing scheme. Once severed, trial courts had authority under RCW 2.28.150 and CrR 6.16(b) to supply procedures necessary to correct the constitutional deficiencies identified in Blakely. Harris, 123 Wn. App. at 923-25.

This court overruled Harris in Hughes, stating:

> [W]e disagree with that conclusion as well as the court's reasoning supporting it -- that because there is nothing in the statute to prohibit the procedure and because trial courts have some inherent authority to imply procedures where they are absent, that we could do so here in the face of legislative intent to the contrary. We reach the opposite conclusion.

Hughes, 154 Wn.2d at 152 n.16.

The State cites to numerous cases where this court has validated a trial court's authority to imply a procedural mechanism for enforcing a defendant's jury trial right. However, these cases all involve situations where the statute was silent or ambiguous with respect to the relevant procedure. State v. Becker, 132 Wn.2d 54, 61, 935 P.2d 1321 (1997) (use of special verdict to determine school drug zone sentence enhancement; statute silent regarding procedure); State v. Rivers, 129 Wn.2d 697, 703, 921 P.2d 495 (1996) (use of special sentencing jury to determine persistent offender status under the "three strikes" law; statute silent regarding procedure); Abad v. Cozza, 128 Wn.2d 575, 588, 911 P.2d 376 (1996) (district court had authority to adopt local rule to implement deferred prosecution statute; statute silent regarding procedure); State v. Frederick, 100 Wn.2d 550, 553, 674

P.2d 136 (1983) (use of special jury to adjudicate habitual offender status; statute silent regarding procedure), overruled in part on other grounds by Thompson v. Dept. of Licensing, 138 Wn.2d 783, 982 P.2d 601 (1999); State v. Courser, 199 Wash. 559, 560, 92 P.2d 264 (1939) (use of jury to adjudicate habitual offender

status; statute silent regarding procedure); State v. Fowler, 187 Wash. 450, 451, 60 P.2d 83 (1936) (use of jury to adjudicate habitual offender status; statute silent regarding procedure); Rogoski v. Hammond, 9 Wn. App. 500, 503-04, 513 P.2d 285 (1973) (trial court had authority to hold a prejudgment attachment hearing; statute silent regarding procedure).

In contrast, in 1981 our legislature made a deliberate decision to adopt a

determinate sentencing scheme, the SRA, which intentionally narrowed judicial discretion. Central to the SRA is a detailed sentencing matrix, which yields a standard range sentence. The sentencing court is bound to impose a standard range sentence unless the statutory requirements for an aggravated or mitigated sentence are established. In Blakely, the United States Supreme Court held that aggravating factors which increase the sentence above the standard range are in the nature of additional elements that must be proved beyond a reasonable doubt. See Blakely, 542 U.S. at 301-02. After Blakely, our legislature was required to make a policy decision about the role of judges in sentencing. It could have rendered exceptional sentences discretionary, as in the analogous federal sentencing scheme. Alternatively, the legislature could have elected to limit judicial discretion, necessitating jury trials on aggravating elements with proof beyond a

reasonable doubt. See United States v. Booker, 543 U.S. 220, 250, 258, 265, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (setting forth these alternatives and inferring

Congress would have given judges discretion in sentencing rather than allocate fact-finding to juries had it known mandatory federal sentencing guidelines were unconstitutional). In light of the policy judgments reflected in the SRA, and its detailed nature, this court has deferred to the legislature to decide on a procedure following Blakely.

As we explained in Hughes, when the legislature provides a detailed procedure, later deemed invalid, courts should refrain from creating a procedure from "'whole cloth'" in order to "'rescue[] a statute from a charge of

unconstitutionality.'" Hughes, 154 Wn.2d at 151 (quoting State v. Martin, 94 Wn.2d 1, 18, 614 P.2d 164 (1980) (Horowitz, J., concurring)); see also Booker, 543 U.S. at 250 (declining to engraft a constitutional jury trial requirement onto the federal sentencing guidelines as plainly contrary to legislative intent). Thus, in Hughes, this court declined to imply a procedure for allowing juries to find statutory aggravating factors on remand. Hughes, 154 Wn.2d at 150 ("'it would be a clear judicial usurpation of legislative power for us to correct [a] legislative oversight'" (quoting Martin, 94 Wn.2d at 8 (refusing to imply a procedure for impaneling a sentencing jury in capital cases where defendant pleads guilty))); see also State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981) (refusing to infer such a sentencing procedure from a general statute where the legislature failed to provide a procedure in a more specific statute relating to death penalty).

Although we limited our holding to the facts of that particular case, our reasoning in Hughes applies with equal force to proceedings at trial. See In re Pers. Restraint of Hall, No. 75800-0 (Wash. Apr. 3, 2008); State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007); Pillatos, 159 Wn.2d 459.4

At the time Davis was tried, the SRA required the judge, not the jury, to find the existence of the statutory aggravating factor at issue, according to the preponderance of the evidence standard of proof. Former RCW 9.94A.530(2) (2002); former RCW 9.94A.535(2) (2003); Hall, No. 75800-8, slip op. at 7, 9. The trial court could neither delegate its fact-finding duty to the jury, nor impose a more demanding standard of proof. Id. at 9. Even though Davis's jury expressly

found, beyond a reasonable doubt, the victim was "particularly vulnerable," that

finding cannot support the imposition of an exceptional sentence under then-existing law.5 See id. at 10 (concluding "it was procedurally impossible" for a jury

4 The dissent's analysis amounts to a reiteration of the Court of Appeals' reasoning in Harris, 123 Wn. App. 906, which we rejected first in Hughes, and again in Pillatos, Womac, and Hall. Although the dissent considers these cases "wrongly decided," it offers no previously unconsidered rationale or legal authority to justify overruling them. Dissent at 5. The dissent attempts to distinguish Pillatos on the ground this case involves "an already impaneled jury, the commonly used procedural mechanism of a special interrogatory, and a valid jury finding (rendered beyond a reasonable doubt)." Dissent at 6. Yet James Metcalf's case, which we decided in Pillatos, presented a nearly identical factual scenario, the only difference being that Metcalf's trial judge denied the State's request for a special interrogatory while Davis's trial judge granted it. Following Pillatos, Davis's trial court lacked authority to delegate its fact-finding duty to the jury by way of a special interrogatory. The fact that Davis's jury was allowed to enter a finding while Metcalf's was not makes no difference.

5 The dissent characterizes our holding as a refusal to allow an exceptional sentence "because one procedure is problematic." Dissent at 4. The dissent fails to recognize the "one procedure" at issue is the only statutorily authorized procedure for imposing an

to make the requisite factual findings in support of an exceptional sentence);

Womac, 160 Wn.2d at 663 (same).

The State argues, however, that even if the trial court erred in submitting the special interrogatory to the jury, the error is harmless in view of the legislature's enactment of Engrossed House Bill 2070, effective April 27, 2007 (2007 amendment). Laws of 2007, ch. 205. That statute allows superior courts, in cases where an exceptional sentence was imposed and where a new sentencing hearing is required, to 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. Anticipating the State's argument, Davis challenges the constitutionality of the 2007 amendment.

The applicability and constitutionality of the 2007 amendment is not properly before this court. See Pillatos, 159 Wn.2d at 478 (declining to decide whether the State must charge aggravating factors in the information as unripe for review). The statute has not been applied to Davis. Considering Davis has already served the exceptional sentence, it appears doubtful the State will invoke the new sentencing procedures on remand. If it does, Davis may challenge the legislation at that time. The trial court should have the first opportunity to pass on its applicability and constitutionality.

CONCLUSION

exceptional sentence based on the victim's particular vulnerability.

Consistent with Hughes, Pillatos, Womac, and Hall, we hold trial courts lacked authority to submit special interrogatories to juries at trial in deviation from legislatively prescribed exceptional sentence procedures, during the period between the Supreme Court's issuance of Blakely and the effective date of the 2005 amendment. We further hold the jury's response to the special interrogatory is void. We vacate Davis's exceptional sentence and remand for resentencing, while expressing no opinion on the applicability or constitutionality of the Laws of 2007, chapter 205.

AUTHOR:

Justice Barbara A. Madsen

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Susan Owens

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Bobbe J. Bridge, Justice Pro Tem.

Justice Richard B. Sanders

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