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Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 77138-3

Title of Case: State v. Hagar

File Date: 10/12/2006

Oral Argument Date: 11/15/2005

SOURCE OF APPEAL

Appeal from King County Superior Court

02-1-08932-8

Honorable Paris K. Kallas

JUSTICES

See the end of the opinion for the names of the signing Justices.

COUNSEL OF RECORD

Counsel for Petitioner(s)

Susan F Wilk

Washington Appellate Project

1511 3rd Ave Ste 701

Seattle, WA, 98101-3635

Counsel for Respondent(s)

Scott Allen Peterson

Attorney at Law

500 4th Ave Rm 840

Seattle, WA, 98104-2371

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
) No. 77138-3

Respondent,)
) En Banc

v.)
)

HOWARD HAGAR,)
)

Petitioner.)

_____) Filed October 12, 2006

C. JOHNSON, J.?This court is asked to determine if a defendant who

pleads guilty pursuant to a plea bargain and who stipulates to "real facts" for sentencing purposes may successfully pursue a Blakely¹ challenge. The Court of Appeals affirmed Howard Hagar's conviction holding he did not make a showing that the plea bargains were divisible from the stipulations, as required by State v. Turley, 149 Wn.2d 395, 402, 69 P.3d 338 (2003). Because we find a Blakely violation occurred during sentencing, we reverse Hagar's sentence and remand to the trial court for sentencing within the standard range.

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

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FACTUAL AND PROCEDURAL HISTORY

On December 16, 2002, Hagar was charged with 4 counts of theft in the second degree and 20 counts of theft in the first degree due to his participation in an embezzlement scheme involving limited real estate transactions with Block 60

Associates, San Telmo Associates, and the Hagar-Obert Partnership. The charges were amended when Hagar agreed to plead guilty to three counts of first degree theft, with each count carrying a standard range of three to nine months and a statutory maximum of 10 years. Hagar stipulated to the facts set forth in the certification for probable cause, the prosecutor's summary, and the facts set forth in an appendix to the agreement. The plea agreement informed Hagar that the State would be seeking an exceptional sentence of 43 months but that the judge would be required to sentence within the standard range unless the judge found substantial and compelling reasons to depart from it. The form also informed Hagar that both he and the State could appeal an exceptional sentence; however, neither party could appeal a sentence within the standard range. On August 1, 2003, the court accepted the plea and sentenced Hagar to a term of 30 months for each count to run

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concurrently and ordered Hagar to pay restitution in the amount of \$494,052. The

judge based the exceptional sentence on his finding that the crimes constituted a

?major economic offense? because they involved multiple incidents per victim; they

involved an actual monetary loss substantially greater than typical for this type of

offense; they occurred over a lengthy period of time; and the defendant abused his

position of trust, confidence, and fiduciary responsibility to facilitate the commission

of the thefts. On August 4, 2003, Hagar timely appealed his sentence to the Court

of Appeals.

Hagar first challenged the constitutionality of the exceptional sentence

statutes as facially invalid. The appellate court properly rejected this argument in

light of its own ruling in *State v. Harris*, 123 Wn. App. 906, 912, 99 P.3d 902

(2004), overruled on other grounds by *State v. Hughes*, 154 Wn.2d 118, 110 P.3d

192 (2005). Hagar next argued his exceptional sentence was illegal because the

underlying facts used to support it were found by a judge, not a jury, and Hagar's

stipulations could not be considered a valid waiver of his Sixth Amendment rights to

have a jury determine those facts beyond a reasonable doubt. The court also

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rejected this argument, reasoning that even if there were no valid waiver of his Sixth

Amendment rights, Hagar had failed to show his plea agreement was divisible.

Because the stipulations were an integral part of the plea agreement, they could not

be challenged apart from the entire agreement itself without a showing of

divisibility. Although Hagar did challenge the entire agreement, stating it rested upon a mutual mistake, the court dismissed the claim for not showing the mistake concerned a direct consequence of the plea. The court affirmed Hagar's sentence.

State v. Hagar, 126 Wn. App. 320, 329, 105 P.3d 65 (2005). This court accepted review of Hagar's appeal. State v. Hagar, noted at 154 Wn.2d 1033 (2005).²

ANALYSIS

Any fact that increases the penalty for a crime beyond the prescribed statutory maximum, besides the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Hagar entered into his plea agreement with the understanding that Washington's sentencing scheme permits a

² We acknowledge the United States Supreme Court opinion in Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) but need not, in this case, address any claim

of harmless error, as it has not been raised or argued to us.

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trial judge to engage in fact finding, and if the judge finds substantial and compelling

reasons, he or she may impose an exceptional sentence beyond the standard range,

but not exceeding the maximum allowed by the statute.

In *Blakely*, the United States Supreme Court clarified its holding in *Apprendi*, stating "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303.

We have determined *Blakely* applies only to convictions or direct appeals that were not final at the time it was announced, and *Blakely* cannot be applied

retroactively on collateral review. *State v. Evans*, 154 Wn.2d 438, 449, 457, 114

P.3d 627 (2005). In addition, this court rejected the argument that the exceptional

sentencing procedures are facially unconstitutional. *State v. Hughes*, 154 Wn.2d

118, 156, 110 P.3d 192 (2005). In *Hughes*, petitioners' exceptional sentences were

vacated and remanded for resentencing within the standard range because the

sentencing judge had engaged in improper fact-finding. Hagar is requesting similar

relief under *Hughes*.

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The Court of Appeals affirmed Hagar's sentence, finding his stipulation to the real facts was an integral part of the plea agreement and was not shown to be divisible. However, whether the stipulation is divisible is irrelevant here because

Hagar need not challenge his stipulation in order to establish that a Blakely violation occurred. State v. Suleiman, No. 76807-2 (Wash. Oct. 5, 2006). Even assuming Hagar's stipulation is valid, the trial court still engaged in improper Blakely fact finding when it found the crimes constituted a "major economic offense."

Hagar stipulated certain facts but did not stipulate that the crimes constituted a "major economic offense." The trial court imposed an exceptional sentence of 30 months, well outside the standard range of three to nine months, based on its finding that Hagar had committed a major economic offense. Hagar's sentence is in violation of Blakely because the exceptional sentence was predicated on an unstipulated fact that was not found by a jury beyond a reasonable doubt.

CONCLUSION

Under Hughes, and Suleiman, exceptional sentences violate Blakely when

they are based on facts not stipulated to by the defendant or found by a jury beyond

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a reasonable doubt. We reverse Hagar's exceptional sentence and remand for

resentencing within the standard range.

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AUTHOR:

Justice Charles W. Johnson

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Tom Chambers

Justice Susan Owens

Justice Barbara A. Madsen

Justice Mary E. Fairhurst

Justice Richard B. Sanders

Justice James M. Johnson

Justice Bobbe J. Bridge