Unpublished Opinion

STATE OF WASHINGTON, Respondent,
v.
COSMO E. VANBUSKIRK, Appellant.

No. 22475-9-III

Court of Appeals of Washington, Division Three, Panel Nine.

Filed: June 2, 2005.

Appeal from Superior Court of Walla Walla County. Docket No. 03-1-00228-1. Judgment or order under review. Date filed: 10/13/2003. Judge signing: Hon. Robert L Zagelow.

Counsel for Appellant(s), William D. Edelblute, Attorney at Law, 200 N Mullan Rd Ste 119, Spokane, WA 99206-6827.

Cosmo Everton Vanbuskirk (Appearing Pro Se), 1482 Wendell Phillips Rd, Sunnyside,, WA 98944.

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KATO, C.J.

Cosmo E. Vanbuskirk appeals the exceptional sentence imposed after his guilty plea to one count of third degree child molestation. We reverse the exceptional sentence and remand for resentencing.

On May 27, 2003, the Walla Walla County Sheriff's Office dispatched a deputy to the Jubilee Youth Ranch to investigate a possible sexual offense involving Mr. Vanbuskirk, who was a counselor at the Ranch, and a student. The student was at the home of Mr. Vanbuskirk, who rubbed his chest and stomach. Mr. Vanbuskirk then slid his hand down inside the student's pants and touched his penis. When the deputy spoke to Mr. Vanbuskirk, he denied touching the student's penis, but admitted rubbing the student's stomach.

The next day, Mr. Vanbuskirk went to the Sheriff's Office and said he had not been truthful during the interview with the deputy. He admitted putting his hand inside the student's pants and touching the student's penis.

The State charged Mr. Vanbuskirk with one count of third degree child molestation. He pleaded guilty to the charge. His standard range sentence was 6-12 months. The court imposed an exceptional sentence of 36 months based on aggravating circumstances. The court found Mr. Vanbuskirk, a counselor in a group home for troubled children, was in a position of trust and the victim, a troubled youth, was particularly vulnerable. The court thus found Mr. Vanbuskirk had abused his position of trust by exploiting the vulnerability of the victim. This appeal follows.

Mr. Vanbuskirk contends the court erred by imposing an exceptional sentence. In Blakely v. Washington, U.S., 124 S. Ct. 2531, 2533, 159 L. Ed. 2d 403 (2004), the U.S. Supreme Court held that a defendant has a constitutional right to have a jury determine whether the factors permitting an exceptional sentence have been proven beyond a reasonable doubt. Violations of Blakely are not subject to a harmless error analysis. State v. Fero, 125 Wn. App. 84, 99-102, 104 P.3d 49 (2005).

Although the parties disagree on the appropriate remedy in this case, we are constrained to follow our Supreme Court's recent decision in State v. Hughes, Wn.2d, 110 P.3d 192 (2005), and remand for resentencing within the standard range.

Mr. Vanbuskirk's exceptional sentence is reversed. The case is remanded for resentencing within the standard range.

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.

SWEENEY, J. and KURTZ, J., Concur.