

HOUSE BILL REPORT

HB 1061

As Reported by House Committee On:
Public Safety

Title: An act relating to sentences involving aggravating circumstances.

Brief Description: Changing provisions regarding the finding of aggravating circumstances.

Sponsors: Representative Goodman.

Brief History:

Committee Activity:

Public Safety: 1/24/13, 2/7/13 [DPS].

Brief Summary of Substitute Bill

- Allows the court to impose an exceptional sentence above the standard range without a finding of fact by a jury if:
 - (1) the defendant has three or more prior unscored misdemeanor or prior unscored foreign criminal convictions for acts similar to the current offense;
 - or
 - (2) the defendant has three or more prior felonies which are unscored because of the time defendant spent conviction-free since release.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Goodman, Chair; Roberts, Vice Chair; Klippert, Ranking Minority Member; Hayes, Assistant Ranking Minority Member; Holy, Hope, Moscoso, Pettigrew, Ross and Takko.

Minority Report: Do not pass. Signed by 1 member: Representative Appleton.

Staff: Sarah Koster (786-7303).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Under the Sentencing Reform Act, sentences for felony offenses are determined by reference to a sentencing grid. The sentencing grid provides a standard range of months for the sentence, based on both the severity, or "seriousness level," of the offense and the convicted person's "offender score," which is based on the offender's criminal history.

There are some circumstances in which prior criminal offenses would not be included in an offender score. Most misdemeanors and foreign offenses which are not clearly comparable to an offense under Washington law are not included in an offender score. Additionally, all convictions except class A felonies and felony sex offenses "wash out" after a period of time in the community post-release without a new conviction. Class B felonies, except sex offenses, wash out after 10 years post-release without any new convictions and class C felonies, except sex offenses, wash out after five years post-release without any new convictions.

If there are substantial and compelling reasons justifying an exceptional sentence, the court can impose a sentence outside the standard sentence range. Exceptional sentences must be for a determinate term and cannot exceed the statutory maximum or a mandatory minimum for the offense.

The Revised Code of Washington provides an illustrative, but nonexclusive, list of mitigating circumstances which the court may consider with regard to imposing an exceptional sentence below the standard range, as well as exclusive lists of aggravating circumstances which the court may consider and aggravating circumstances which a jury may consider in imposing an exceptional sentence above the standard range.

The United States Supreme Court has determined, in reviewing the State of Washington's sentencing scheme, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely v. Washington*, 542 U.S. 296, 301 (2004).

In light of that decision, the Washington Supreme Court has ruled that the determination that a standard sentence range resulted in "too lenient a sentence" is a factual determination that can only be made by a jury. *State v. Hughes*, 154 Wn.2d 118, 140 (2005); *State v. Alvarado*, 164 Wn.2d 556, 567 (2008). In contrast, aggravating factors supporting an exceptional sentence which follow automatically from the offender's criminal history do not require a jury finding. *State v. Mulch*, 171 Wn.2d 646, 658 (2011).

Summary of Substitute Bill:

The court may impose an exceptional sentence above the standard range without a finding of fact by a jury if: (1) the defendant has three or more prior unscored misdemeanor or prior unscored foreign criminal convictions for acts similar to the current offense; or (2) if the defendant has three or more prior criminal convictions which are unscored because of the time a defendant spent conviction-free since release. The bill also eliminates a statutory provision, determined by the Washington Supreme Court to be unconstitutional, which

allows for an exceptional sentence if a court finds that unscored prior offenses result in a presumptive sentence which is "clearly too lenient."

Substitute Bill Compared to Original Bill:

The substitute bill: (1) removes the jury's ability to find that prior convictions which "washed out" resulted in an offender score which was clearly too lenient, constituting aggravating circumstances which justified an exceptional sentence; (2) clarifies that judges can only find that aggravating circumstances exist based on three or more unscored misdemeanors if the misdemeanors are for acts similar to the current convictions; and (3) allows judges to find that aggravating circumstances exist if the defendant has three or more felonies which are unscored because they washed out.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support with amendment(s)) The necessary function of this bill is to fix a statutory provision which has been found unconstitutional; moving consideration of whether unscored prior offenses result in a "clearly too lenient" sentence to the jury allows it to be considered. The constitutional test is that factual findings have to be made by a jury. The problem this bill addresses came about when the Washington Supreme Court determined, perhaps incorrectly, that whether a sentence was 'clearly too lenient' is a factual determination. The bill eliminates the 'clearly too lenient' determination for judges, but replaces it with three or more misdemeanors. The jury is not well-equipped to make the judgment call of 'clearly too lenient;' they usually do not have access to background information which is relevant.

(Opposed) The jury should not be considering the defendant's prior unscored criminal history during the trial, this is prejudicial and a similar law was just struck down by the Washington Supreme Court for that reason. Also, the bill gives judges too much discretion over exceptional sentences, which opens up the possibility of disparate treatment of defendants. The bill has no guidelines on how much an exceptional sentence imposed would be over the range. There should be a provision for wash out of misdemeanors, as there is for felonies, if they will be counted in sentencing.

Persons Testifying: (In support with amendment(s)) Seth Fine, Washington Association of Prosecuting Attorneys.

(Opposed) Ramona Brandes, Washington Defender Association and Washington Association of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying: None.