69849-4

69849-4

NO. 69849-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN W. FOLDS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

The sentencing court incorrectly applied RCW 9.95.011 when it considered the then-current standard range sentence in setting Mr. Folds's minimum term for a 1983 offense.

In 1983, manslaughter was a class B felony with a ten-year maximum sentence and no minimum sentence. When the Sentencing Reform Act (SRA) became effective just a year later, the standard sentencing range for manslaughter with a single offender score point was 36 to 48 months. By 2013, manslaughter in the first degree had increased to a class A felony, and the standard range with an offender score of one had more than doubled to 86 to 114 months.

In 1983, Mr. Folds committed the manslaughter offense to which he later pled guilty. The law of indeterminate sentences applies to pre-1984 offenses and directs that the sentencing court set a minimum term reasonably consistent with the purposes, standards and sentencing ranges of the SRA. This appeal presents the question which sentencing range should a court look to when the time of offense and the time of sentencing are separated by 30 years and a change in classification for the underlying offense. As set forth in Mr. Folds's opening brief, the standard range from the time of offense applies. The time-of-offense range applies because the SRA policy is to apply the

law in effect at the time of the offense; such application here comports with the SRA purpose of consistency among pre-SRA offenders and between pre-SRA and post-SRA offenders; applying a statutory maximum from the time of offense while considering a minimum sentence based on the standards of an unrelated time period lacks reason and fairness; and classification of the underlying offense increased from a B felony at the time of the offense to an A felony at the time of sentencing.

The State's arguments in response are unavailing both on the merits and because the State advocates for the wrong standard of review.

1. RCW 9.95.011 directs the sentencing court to look to the sentencing ranges under the SRA in setting minimum terms of confinement; the question of which sentencing range a court should look to is a matter of law for this Court to decide de novo.

"Appellate review exists to correct legal errors in the imposition of sentences." David Boerner, Sentencing in Washington, App. § 6.24 at 6-34 (1985). Alleged errors of law are reviewed de novo. *State v. Morales*, 173 Wn.2d 560, 567, 269 P.3d 263 (2012) (legal error reviewed de novo); *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (failure to correctly calculate the sentencing range is legal error

subject to de novo review); *In re Pers. Restraint of Locklear*, 118 Wn.2d 409, 412-13, 823 P.2d 1078 (1992) (reviewing as a matter of law whether lack of rehabilitation is a sufficient reason for Board to impose an exceptional sentence).

The error here is subject to de novo review. Mr. Folds does not contend simply that the sentencing court abused its discretion in setting 114 months as the minimum term, as the State attempts to reframe it. Resp. Br. at 9. Rather, Mr. Folds argues that the sentencing court based its discretionary decision on an erroneous interpretation of the statute. RCW 9.95.011 directs that a sentencing "court shall attempt to set the minimum term reasonably consistent with the purposes, standards, and sentencing ranges under chapter 9.94A RCW of the sentencing reform act." RCW 9.95.011(1). This appeal raises the legal question what "sentencing range" the court is to consider: the sentencing range in place closest in time to the commission of the offense or the sentencing range in place at the time of sentencing. The court's application of the wrong sentencing range is a legal error subject to de novo review. *See Parker*, 132 Wn.2d at 189. Moreover, which sentencing range is

authorized by RCW 9.95.011 is a question of statutory interpretation this Court reviews de novo. *Morales*, 173 Wn.2d at 567 n.3.[1]

2. The standard range in effect closest in time to the offense is the appropriate standard range to look to when setting a pre-SRA minimum sentence.

The sentencing court committed legal error when it rejected Mr. Folds's argument to consider the 1984 SRA sentencing range for manslaughter and instead applied the significantly higher 2013 range in setting Mr. Folds's minimum term of confinement. The indeterminate sentencing act directs courts to set minimum terms reasonably consistently with the SRA's purposes, standards, and standard ranges. RCW 9.95.011(1). The standard range the court must consider is the standard range in effect closest to the time of the offense. The time-of-offense standard range is consistent with the SRA's standard that the sentencing law in affect at the time of the offense governs. RCW 9.94A.345.

[1] The 114-month minimum term should be vacated under either standard of review. For the reasons set forth herein and in the opening brief, the sentencing court abused its discretion by refusing to consider the 1984 SRA standard range as part of its reasonable consistency determination and setting his minimum term at the top-end of the 2013 standard range (114 months, more than twice the high-end of the 1984 standard range). *See State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (trial court abuses its discretion if decision is manifestly unreasonable or was reached by applying the wrong legal standard).

Another SRA purpose is to effectuate consistent sentences. *State v. Landon*, 69 Wn. App. 83, 96-97 & n.11, 848 P.2d 724 (1993); *see In re Pers. Restraint of Stanphill*, 134 Wn.2d 165, 170, 949 P.2d 365 (1998). Applying the time-of-offense standard range best accomplishes this goal. First, pre-SRA offenders are treated similarly when the sentencing range in place closest to the time of the offense is consulted. Under such a regime, minimum sentences for offenses committed around the same time are consistent.

Under the State's and the lower court's application, the more arbitrary date of sentencing would dictate which offenders had similar sentences. Such an interpretation would lead to arbitrary and unjust results. For example, consider two offenders who committed the same offense in 1983 and were both prosecuted in 2015. If one of the accuseds pled guilty while the other went to trial, during which period the Legislature passed a change in the standard range, their sentencing courts would look to different standard ranges to guide their minimum terms of confinement. Further, under such a scheme an accused aware of an upcoming effectiveness date for an increase in the standard range might rush a trial date or, worse yet, plead guilty, to ensure the more favorable standard range is considered. To avoid such a disparity, the

sentencing range at the time of the offense, instead of the time of sentencing, should be consulted.

Consulting the time-of-offense standard range also fosters consistency across pre- and post-SRA offender sentences, another purpose of the SRA. *In re Pers. Restraint of George*, 52 Wn. App. 135, 145, 758 P.2d 13 (1988). It is only under such a scheme that all offenders are sentenced based on (or in close proximity to) the law in effect at the time of the offense. As discussed, for post-SRA offenders, that edict is enshrined in RCW 9.94A.345. *See also* RCW 10.01.040 (absent explicit statutory language to the contrary, all offenses committed while a subsequently repealed or amended penal statute was in force must be punished or enforced under former law).

The State argues that Mr. Folds ignores other "purposes" of the SRA. Resp. Br. at 13-14. Ironically, however, it is the State that ignores these three clear purposes of the SRA—creating consistency among pre-SRA offenders and across pre- and post-SRA offenders as well as sentencing offenders to the law in effect at the time of the offense unless the Legislature explicitly directs otherwise. RCW 9.95.011; RCW 9.94A.345; RCW 10.01.040; *Stanphill*, 134 Wn.2d at 172; *George*, 52 Wn. App. at 145.

In his opening brief, Mr. Folds explained that using the 1984 standard range as a guide is also appropriate because it is the time-of-offense statutory maximum that continues to apply. Op. Brief at 13-14. The State argues in response that the 2013 sentencing range is more consistent with the SRA's purposes because it evidences the Legislature's most recent enactment. Resp. Br. at 14-15. For that view to be correct, however, the current statutory maximum should also apply. That was not the case here. The time-of-offense statutory maximum was applied to Mr. Folds; therefore, the time-of-offense standard range also should be considered in setting the minimum term of confinement.

An additional basis demonstrates the need to consider the sentencing range in place at or near the time of offense. The current standard range sentence for manslaughter in the first degree accounts for an increase in the felony's classification. In 1983, at the time of offense, manslaughter was a class B felony. 1975 1st ex. s. c 260 § 9A.32.060. A class B sentence should be imposed. In 1997, the Legislature changed the classification to a class A felony, increasing the penalties. 1997 c 365 § 5. By considering the 2013 sentencing range, the court subjected Mr. Folds to a penalty based on a higher

classification. In fact, the high end of the range imposed on Mr. Folds is more than double the high end of the 1984 sentencing range. The State fails to confront this illogical and inequitable increase.

Finally, the State creates a straw person in order to knock it down. Mr. Folds does not contend that the sentencing court was obligated to sentence him within the 1984 standard sentencing range of 36 to 48 months. *See* Resp. Br. at 10-11. Rather, the indeterminate sentencing scheme directs the court to act "reasonably consistently" with the standard range sentence as well as the purposes and standards of the SRA. RCW 9.95.011(1). In doing so, Mr. Folds's sentencing court looked to the wrong sentencing range, and acted quite consistently with that improper range.

It is indisputable that the 2013 sentencing range strongly influenced the court's imposition of a 114-month minimum term. The court rejected Mr. Folds's argument to act consistently with the 1984 range of 36 to 48 months[2] and rejected the State's argument for a term above the 2013 standard range because it exceeded the standard range. 1/25/13 RP 68-69. Instead, the court imposed the high-end of the 2013

[2] Thus the State's argument that the court considered the 1984 sentencing range is, at most, superficially accurate. Resp. Br. at 15. As explained above, the trial court considered and rejected Mr. Folds's argument for consistency with the 1984 range and imposed a term consistent only with the 2013 range.

standard range sentence as Mr. Folds's minimum term. *Id.* at 70. Mr. Folds is entitled to remand because the sentencing court strived to act "reasonably consistently" with a legally improper standard range.

Notably, the State does not contest that, if the court applied the wrong SRA sentencing range to determine its minimum sentence, vacation of the sentence and remand is the proper remedy. Unless it is expressly clear the court would have imposed same sentence under the guidance of the proper standard range—36 to 48 months—remand is indeed appropriate. *Parker*, 132 Wn.2d at 192. The sentencing court plainly imposed 114 months as the minimum term because it was the high-end of the 2013 sentencing range. 1/25/13 RP 69-70. If the court had considered the 1984 sentencing range of 36 to 48 months, it is far from excessively clear that the minimum term would have been the same, 114 months. This Court should vacate the minimum term and remand for the court to reconsider in light of the appropriate standard range. *See Parker*, 132 Wn.2d at 192.

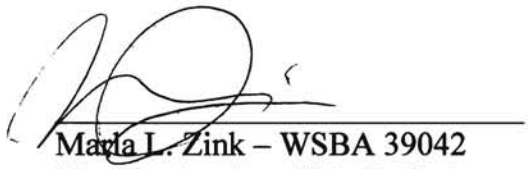
B. CONCLUSION

Mr. Folds's sentence should be vacated and remanded. The court erred when it considered the 2013 sentencing range for a class A

felony in setting the minimum sentence for a pre-SRA, 1983 offense that was a class B felony at the time it was committed.

DATED this 23rd day of December, 2013.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. JOHN FOLDS, Appellant.	)))))))))	NO. 69849-4-I

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I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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