72648-0

FILED
March 27, 2015
Court of Appeals
Division I
State of Washington

NO. 72648-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WEAVER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. The exceptional sentence exceeding the standard range is clearly excessive as a matter of law and untenable as an exercise of discretion.

2. To the extent the court's conclusion of law in support of the exceptional sentence constitutes a finding of fact, it should be disregarded because it is not supported by substantial evidence. CP 133.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

The court's authority to impose an exceptional sentence requires an independent determination that there are substantial and compelling reasons to impose an exceptional sentence and the length of the sentence may not be patently unreasonable based on the circumstances of the case. Mr. Weaver appeared before the court for a resentencing hearing and the court claimed to be independently evaluating the sentence, but the court disregarded Mr. Weaver's present circumstances, including his dire health, and relied on reasons a different judge gave to impose an exceptional sentence nine years earlier, when Mr. Weaver's individual circumstances were far different. Did the court abuse its discretion or misapply the law when imposing an exceptional sentence above the standard range upon a man whose

dramatically deteriorating health made it unlikely he could survive the standard range?

C. STATEMENT OF THE CASE.

This Court recently remanded Oliver Weaver's case for "further proceedings" following an appeal premised on the legality of his sentence. CP 36-37, 55. That appeal stemmed in turn from a resentencing ordered by the Supreme Court, which remanded this case for further proceedings because the prosecution had failed to prove Weaver's criminal history at the original sentencing hearing. *State v. Weaver*, 171 Wn.2d 256, 258, 251 P.3d 876 (2011). These appeals are part of Mr. Weaver's direct appeal from his convictions and sentence, not part of a later collateral attack. *See* CP 37-41 (recounting prior procedural history).

The underlying convictions were entered in 2005, finding Mr. Weaver guilty of one count of second degree rape of a child and one count of second degree rape, both of which rested on the same event and constitute the "same criminal conduct." CP 125-26. The incident at issue occurred in 2002. CP 125.

The jury also entered findings that the victim of the crime was a child and she became pregnant as a result of the incident, which is a

statutory aggravating factor permitting an exceptional sentence. CP 135; RCW 9.94A.535(3)(i).

By the time Mr. Weaver appeared in court for his sentencing hearing in 2014, significant changes had occurred. He is now in a dire medical situation with "rapidly deteriorating" health. CP 140; 2RP 33, 35.[1] As he told the court, "I have run out of time health wise." 2RP 34-35. Among other things, he has pancreatic cancer that is spreading in his body and he has little more than one year to live. 2RP 35. Without more than a bare acknowledgement of this fundamental change in circumstances, the court imposed an aggravated exceptional sentence of a minimum of 250 months with a maximum of life in prison on count I, to run concurrent to the same term imposed for count II. 2RP 37.

Because the resentencing that was ordered was premised on a double jeopardy challenge to count I, the defense did not contest the exceptional sentence imposed on count II. 1RP 15-16.

Pertinent facts are discussed in further detail in the relevant argument section below.

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[1] The verbatim report of proceedings consists of two volumes of transcripts. "1RP" refers to Sept. 4, 2014 and "2RP" refers to Oct. 3, 2014.

D. ARGUMENT.

The court unreasonably imposed an exceptional sentence above the standard range upon a defendant without weighing his terminal illness and its direct effect on the statutory purposes for which an exceptional sentence is authorized

1. A court's sentencing discretion may not be exercised in an unreasonable or untenable fashion.

The Sentencing Reform Act accords discretion to a judge to impose sentences within a legally authorized range. *State v. Hrycenko*, 85 Wn.App. 543, 549, 933 P.2d 435 (1997), *abrogated on other grounds by State v. Gonzales Flores*, 164 Wn.2d 1, 186 P.3d 1038 (2008). This discretion is not unfettered. *Id.* A sentencing court "must articulate its reasons for any exceptional sentence, and review is readily available." *State v. Perez*, 69 Wn.App. 133, 138, 847 P.2d 532 (1993).

A judge imposes a clearly excessive sentence if premised on untenable grounds or untenable reasons. *See State v. Oxborrow,* 106 Wn.2d 525, 531, 723 P.2d 1123 (1986); *see also State v. Ritchie*, 126 Wn.2d 388, 393, 396, 894 P.2d 1308 (1995). The general purpose of the SRA includes the intent to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history" and to be commensurate with the

punishment imposed on other similarly situated offenders. RCW 9.94A.010(1), (3).

To reverse an exceptional sentence, the court must find: (1) "under a clearly erroneous standard," insufficient evidence in the record supports the sentencing court's "reasons for imposing an exceptional sentence"; (2) "under a de novo standard," the sentencing court's reasons "do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient." *State v. France,* 176 Wn.App. 463, 469, 308 P.3d 812 (2013), *rev. denied*, 179 Wn.2d 1015 (2014).

The mandatory procedure giving a court authority to impose a sentence greater than the standard sentence range requires first, that the State prove to the fact-finder there is a statutory aggravating factor from an "exclusive list." RCW 9.94A.535. Second, the court must additionally find "considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6). Thus, the court's decision to impose an exceptional sentence must incorporate consideration of the purposes of the SRA, which includes "[p]romote respect for the law by providing

punishment which is just," to "[p]rotect the public," and to frugally use the state's resources. RCW 9.94A.010(2), (4); RCW 9.94A.537(6).

2. *Mr. Weaver's extraordinary and dire medical condition renders the exceptional punishment imposed clearly excessive.*

In the 13 years since the offense occurred, Mr. Weaver has suffered serious medical issues. "His health is rapidly deteriorating with a myriad of medical issues that are exacerbated by the lack of adequate medical care at DOC." CP 140. He has been diagnosed with pancreatic cancer, stage 3, and given 15 to 16 months to live. 2RP 35. The cancer has spread further since this diagnosis. *Id.*

Mr. Weaver is now 56 years old and the incident for which the court was sentencing him sentence occurred in 2002. CP 125, 131. This resentencing occurred in the course of his direct appeal due to on-going litigation. *See* CP 37. It did not stem from a personal restraint petition or other collateral attack.

Despite being presented with information about Mr. Weaver's dire health circumstances, the sentencing judge imposed an exceptional sentence of more than double the high end of the standard range. 2RP 37; CP 126, 129. It did not mention the requirement that it find substantial and compelling reasons to impose an exceptional sentence

above the standard range. 2RP 37; CP 133 (Conclusions of Law). Rather than entering independent findings to demonstrate the court's exercise of discretion, the judge simply signed her name to the findings entered by the trial judge in 2005, adding that "the exceptional sentence is re-imposed for the above reasons." CP 133.

But "the above reasons" underlying the original imposition of an exceptional sentence by the trial judge did not address the circumstances before the court. CP 133. Mr. Weaver had not only aged, his health circumstances had changed so drastically that cancer was spreading through his body, he was dependent on prison medical assistance, and he had little time left to survive. 2RP 34-35. There had been a dramatic shift in the likelihood that Mr. Weaver presented a danger to the public, that public safety merited an exceptional sentence, or that an exceptional minimum term made "frugal use of the state's and local government's resources," which are among the mandatory considerations the court must apply before imposing an exceptional sentence. RCW 9.94A.537(6); RCW 9.94A.010.

The court did not acknowledge that Mr. Weaver's sentence necessarily requires lifetime parole in the event he is released, thus ensuring he will not be released if he presents a danger to re-offend and

once released, would be subject to conditions and monitoring. CP 129; RCW 9.94A.507(5), (6); RCW 9.25.420 (parole decision premised on "methodologies that are recognized by experts in the prediction of sexual dangerousness, and including a prediction of the probability that the offender will engage in sex offenses if released").

An aggravated sentence above the standard range is premised on individual circumstances. *See, e.g.*, *State v. Hayes*, _ Wn.2d _, 342 P.3d 1144, 1147 (2015) (for an aggravating factor to apply, the SRA requires to that the court "look to the defendant's own misconduct to satisfy the operative language of the statute"); *see also Miller v. Alabama*, _ U.S._, 132 S.Ct 2455, 2465, 183 L.Ed.2d 407 (2012) (mandating consideration of individual circumstances before imposition of life sentence for juveniles, premised on the ability to change).

In the case at bar, the resentencing judge was not the trial judge. 1RP 19. The trial judge was no longer on the bench. *Id.* The new judge did not articulate the reason why she selected the sentence above the standard range beyond the mere existence of aggravating factors as relied on by the prior judge. CP 133. Even though the judge said she was making an independent determination, she gave no example of any independent weight given and signed an order saying she was re-

imposing the sentence solely based on the reasons imposed by the original sentencing judge. CP 133.

"[A] a sentence that outlasts an offender's desire or ability to break the law is a drain on taxpayers, with little upside in protecting public safety or improving an inmate's chance of success after release." Dana Goldstein, "To Old to Commit Crime?" The New York Times, Sunday Review (Mar. 20, 2015).[2] The court did not consider current circumstances when merely reimposing a sentence imposed for reasons found by another judge despite a significant shift in the penal justifications for this sentence. The sentence imposed misapplies the law as required by RCW 9.94A.537(6) and RCW 9.94A.010 and is manifestly unreasonable because is disregards the changes that have occurred which undermine the original justification for the sentence. Mr. Weaver is entitled to a new sentencing hearing and a fairly imposed sentence premised on reasonable application of the sentencing criteria.

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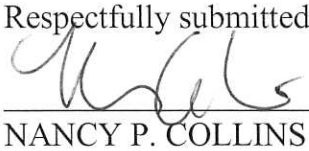
[2] Available at: http://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html (last viewed Mar. 26. 2015).

E. CONCLUSION.

Mr. Weaver's sentence should be vacated and a new sentencing hearing ordered.

DATED this 27th day of March 2015.

Respectfully submitted,



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

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	)	
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	)	NO. 72648-0-I
v.	)	
	)	
OLIVER WEAVER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **OPENING 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X] OLIVER WEAVER 268865 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF MARCH, 2015.

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