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Dec 15, 2015
Court of Appeals
Division I
State of Washington

Supreme Court No. 92622-1
(COA No. . 72648-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

FILED
DEC 21 2015
WASHINGTON STATE
SUPREME COURT

v.

OLIVER WEAVER,

Petitioner.

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

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# PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Oliver Weaver, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Weaver seeks review of the Court of Appeals decision dated November 16, 2015, a copy of which is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

A sentencing court must make an independent decision when a case is remanded for resentencing, based on the individual circumstances of the case and the offender. In 2014, Mr. Weaver appeared in court for resentencing on a count for which he previously received a sentence greater than the standard range, based on an offense that occurred in 2002. In the years intervening between the first sentencing hearing and the resentencing, Mr. Weaver suffered substantial health problems, including invasive cancer, and was not predicted to live much longer. Despite this dire change in circumstances that altered the punitive nature of an exceptional sentence, a new judge relied on the original judge's findings to impose the same sentence

without explaining the reasons for doing so. Should this Court grant review to address whether a court properly exercises its sentencing discretion when it does not impose a sentence based on the offender's current circumstances?

D. STATEMENT OF THE CASE

In 2014, the Court of Appeals 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 this 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, even though the two counts were based on the same criminal conduct. 2RP 37.

[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.

## E. ARGUMENT

**The court unreasonably imposed an exceptional sentence above the standard range upon a defendant without weighing his current circumstances, including a 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's case remains on direct review. CP 37. He is now in his late-50s and the incident for which the court was sentencing him sentence occurred in 2002. CP 125, 131.

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 same 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*, 182 Wn.2d 556, 564, 342 P.3d 1144 (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).

The resentencing judge was not the trial judge and had no familiarity with the case. 1RP 19. The trial judge was no longer serving 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. This Court should grant review to determine whether a substantial change in circumstances of the defendant, such as impending death, is a reason to decline to order an exceptional sentence above the standard range and current circumstances must be considered when imposing an exceptional sentence.

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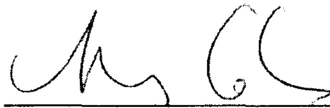
[2] Available at: http://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html (last viewed Dec. 11, 2015).

F. CONCLUSION

Based on the foregoing, Petitioner Oliver Weaver respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 15th day of December 2015.

Respectfully submitted,



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# APPENDIX A

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| STATE OF WASHINGTON, Respondent, | ) | No. 72648-0-I |
| v. | ) | DIVISION ONE |
| OLIVER W. WEAVER, JR. | ) | UNPUBLISHED OPINION |
| Appellant. | ) | FILED: November 16, 2015 |

APPELWICK, J. — Weaver was convicted of rape of a child in the second degree and rape in the second degree. The jury found that Weaver impregnated the victim, an aggravating factor for sentencing purposes. The trial court imposed an exceptional sentence on both counts. At Weaver's third sentencing hearing, the trial court imposed the same exceptional sentence originally imposed. Weaver argues that the trial court did not justify the exceptional sentence, and that the sentence is clearly excessive in light of his changed health conditions. We affirm.

## FACTS

In early December 2002, R.T. was working for Oliver Weaver. State v. Weaver, 140 Wn. App. 349, 351, 166 P.3d 761 (2007), adhered to on remand, noted at 156 Wn. App. 1015, 2010 WL 2165353, reversed by, 171 Wn.2d 256, 251 P.3d 876 (2011). One day, R.T. was cleaning Weaver's home when Weaver

approached her and violently raped her. Id. He threatened R.T., and she was too afraid to report the rape. Id. But, R.T. did disclose the rape two months later when she suspected she was pregnant. Id. Her doctor confirmed that R.T. was pregnant. Id. On the advice of her mother and doctor, R.T. terminated the pregnancy. Id.

Weaver was charged with one count of second degree rape of a child (Count I) and one count of second degree rape (Count II). The jury found Weaver guilty as charged. It also found that R.T. was a child at the time of the offense and that she was impregnated by the defendant. For sentencing purposes, it is an aggravating factor that the offense resulted in the pregnancy of a child victim of rape. Former RCW 9.94A.535(2)(k) (2002). The trial court imposed an exceptional sentence of 250 months to life imprisonment for each count. The court determined that the terms would run concurrently.

Weaver has appealed his conviction and sentence multiple times. Weaver, 140 Wn. App. 349; State v. Weaver, noted at 179 Wn. App. 1001, 2014 WL 231338, review denied, 180 Wn.2d 1015 327 P.3d 55 (2014).. At issue here is Weaver's third sentencing hearing, which took place in October 2014. Only count I was before the trial court at this hearing. After considering Weaver's declining health and the record below, the trial court imposed the same exceptional sentence that the trial court originally imposed.

To clarify what law applied at the time of the third sentencing, the State suggested that the trial court re-sign the original judgment and sentence, rather than enter an entirely new document. The trial court complied in part. It added the date and a signature to the previously entered findings of fact and conclusions of law supporting the original sentence. The court also added a single handwritten sentence to the conclusions of law: "The exceptional sentence of 250 months is re-imposed on count I for the above reasons." The trial court also executed a new judgment and sentence.

Weaver appeals.

DISCUSSION

Weaver contends the trial court erred in imposing an exceptional sentence of 250 months on Count I.[1] He provides several arguments challenging the trial court's reasons for its decision. We understand these arguments as an assertion that evidence in the record does not support the trial court's reasons for imposing an exceptional sentence. We review this question under a clearly erroneous standard. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

Weaver asserts that the trial court failed to make an independent determination that the exceptional sentence was justified. He points to the fact

[1] A court has the discretion to decline to hear an appeal on the basis that it is moot. State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004). A case is moot if the court cannot provide effective relief. In re Pers. Restraint of Mines, 146 Wn.2d 279, 283-84, 45 P.3d 535 (2002). The State contends Weaver's argument is moot, because the convictions have been affirmed and the exceptional sentence of 250 months on count II still stands. It argues that a decision in Weaver's favor would have no practical consequence for Weaver. However, we decline to resolve his claim on mootness rather than on the merits.

that the trial court did not enter new findings and merely signed on to the original findings with a note that the sentence is "re-imposed on count I for the above reasons." But, Weaver's argument ignores evidence of the trial court's independent determination in the record. The court specifically noted that it had "reviewed the entire record" before imposing the exceptional sentence. The court heard defense counsel's request that Weaver be sentenced to only 95 months. And, the court heard Weaver explain his changed health conditions. Then, the court imposed an exceptional sentence of 250 months on count 1, noting that it was "[m]aking an independent determination that that's appropriate."

Weaver also claims the court did not assess his changed circumstances in making this determination. He argues the court should have looked at his terminal illness and little remaining time to live. But, after Weaver spoke about his health conditions, the trial court told him, "I'm sorry to hear that." And, immediately before it announced its ruling, the court told Weaver again, "I'm sorry about your medical situation." The evidence in the record shows that the trial court did consider Weaver's health conditions.

We hold that there is sufficient evidence in the record to support the trial court's reasons for imposing the exceptional sentence. The sentence is not clearly erroneous.

Additionally, Weaver argues that the trial court abused its discretion in imposing a clearly excessive sentence in light of his terminal illness. We apply an abuse of discretion standard to the question of whether the sentence imposed was clearly excessive. State v. Ritchie, 126 Wn.2d 388, 395-96, 894 P.2d 1308 (1995).

A sentencing court abuses its discretion in setting an exceptional sentence only if it relies on an impermissible reason or imposes a sentence which is so long that it shocks the conscience of the reviewing court. Id.

Here, the court relied upon the jury's finding that the victim was a child victim of rape who became pregnant as a result of the offense. Under the Sentencing Reform Act, this is a permissible reason for which to impose an exceptional sentence. Former RCW 9.94A.535(2)(k) (2002).

The only remaining question is whether, considering the record, the sentence is so long that it shocks the conscience. Ritchie, 126 Wn.2d at 396. Weaver asserts that his sentence is clearly excessive due to the fact that he now has pancreatic cancer and little time left to live. But, Weaver cites no authority for the proposition that his deteriorating health makes his exceptional sentence shock the conscience. Assuming his deteriorating health is a factor to be considered, we note his assertion that he had 15 or 16 months to live. If true, any sentence whether extending his incarceration 20 months or 250 months would be a veritable life sentence. Moreover, the unchallenged portion of his sentence imposed a 250 month term independent of the sentence on this count. This undercuts the claim that the sentence shocks the conscience.

Weaver was convicted of the violent rape of a 13 year old girl. Weaver, 140 Wn. App. at 351. R.T. had to disclose the rape when she discovered that she was pregnant. Id. With the help of her mother and doctor, R.T. decided to have an abortion. Id. And, the jury entered a special finding that Weaver impregnated R.T. as a result of the rape. Id. at 352.

In light of these facts, we hold that Weaver's exceptional sentence does not shock the conscience. Therefore, the trial court did not abuse its discretion in imposing such a sentence.

We affirm.

Appelwick, J.

WE CONCUR:

Cox, J.

## DECLARATION OF FILING AND MAILING OR DELIVERY

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Date: December 15, 2015

## WASHINGTON APPELLATE PROJECT

## December 15, 2015 - 4:21 PM

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