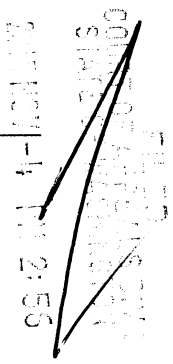
73760-1

73760-1

NO. 73760-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I



STATE OF WASHINGTON,

Appellant,

v.

CLARENCE C. YOUNG, JR.,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

BRIEF OF APPELLANT
(CORRECTED)

DANIEL T. SATTERBERG
King County Prosecuting Attorney

SCOTT A. PETERSON
Senior Deputy Prosecuting Attorney
Attorneys for Appellant

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Statutes

Other Authorities

A. ASSIGNMENT OF ERROR

The trial court committed reversible error when it imposed an exceptional sentence below the standard sentence range in violation of the Sentencing Reform Act of 1981 and decisions of the Washington Supreme Court interpreting that Act.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court err when it imposed an exceptional sentence below the standard sentence range of six months of electronic home detention and six months of work release when defendant's standard sentence range was 51 to 68 months incarceration and when none of the mitigating factors found by the court justified an exceptional sentence below the standard sentence range?

C. STATEMENT OF THE CASE

Clarence Young was convicted of ten counts of securities fraud, RCW 21.20.010, .400, on April 29, 2015, in a scheme that cost 16 victims $1,264,802. CP 106-9.[1] Young was a CPA from 1974 to 1996 when the Washington State Board of Accountancy indefinitely suspended his license for failing to respond to a complaint by one of his clients. Young continued

[1] Clerks papers at page(s) indicated.

to operate his tax consulting business in Kingston, Washington, under the name C.C. Young and Associates. In 2001 Young formed Amigo Vino, LLC, to supply Pinot Noir grapes to hobbyists and small wineries. Amigo Vino lost money every year since its formation. CP 10-34; 52-5.

In 2004 and 2005 Young solicited approximately $7 million dollars from sixteen investors including his friends and tax clients to invest in one of two funds he created, Cautious LLC and West Coast Financial LLC. Cautious and West Coast were "feeder funds" Young used to invest in a hedge fund called Directors Performance Fund, LLC (DPF). The minimum investment in DPF was $1 million so Young needed the feeder funds to pool the money of investors who couldn't afford to invest $1 million. The SEC determined that DPF was an illegal prime bank trading scheme and filed a civil action eventually returning $6.7 million of DPF investment money to Cautious and West Coast. Although Young used most of that money to repay the investors he used about $200,000 of it to fund his vineyard and winery, Amigo Vino. CP 10-34; 52-5.

In 2006 and 2007 Young solicited investments of $2.2 million from sixteen investors, ten of whom had invested in Cautious and West Coast, to invest in another feeder fund he created called Safeguard Capital, LLC. The Safeguard investments are the subject of the criminal charges below. To induce his victims to invest in Safeguard Young told them their investments

would earn a guaranteed return of between 18 and 24 percent with no risk. Investors in Safeguard gathered money to invest from a variety of sources. Steve Kenney took out a second mortgage for $50,000 against his home and invested an additional $200,000 from his 401(k), nearly all of his retirement savings. Debra and Dennis Parsons invested $90,000 of the proceeds from the sale of their Camano Island home. John Jackson invested $330,000 of his retirement fund. His son, James Jackson, invested $14,000 of his retirement savings. James Degroff invested $200,000 from the sale of his home, about 40% of his net worth. His wife, Sharon Hoder-Degroff, invested $328,000 in Safeguard, which was everything she had except for her first husband's social security benefits. CP 10-34; 52-5.

Young invested $1.6 million of the $2.2 million he raised for Safeguard in a hedge fund called Gemstar Capital Group, Inc. He used most of the remaining $600,000 to repay a bank line of credit for Amigo Vino. Between 2006 and 2008 Gemstar paid over $5 million in distributions to Safeguard, a profit of $3.4 million. Instead of distributing the profits to the Safeguard investors Young diverted $4.3 million of the $5 million distribution to Amigo Vino's bank accounts and line of credit. Young did not tell his victims that he had received over $5 million in distributions from Gemstar or that he had spent $4.3 million of that amount on his personal expenses and his vineyard. CP 10-34; 52-5.

As in DPF, the SEC investigated and sued Gemstar, this time for operating an illegal Ponzi scheme. A court-appointed receiver for Gemstar took Young's deposition in an attempt to claw back the $3.4 million in profits paid to Safeguard. In the deposition Young testified that he was the sole investor in Safeguard and that he had spent the profits from Gemstar to develop his vineyard and in another failed hedge fund investment. Young continued to tell Safeguard investors that Safeguard was successful and failed to tell them of the SEC enforcement action against Gemstar. CP 10-34; 52-5.

Between 2008 when the last of his victims invested and 2014 Young lulled them into a false sense of security with various excuses for non-payment. The most common excuse was that because of litigation "out east," their funds were frozen. Young was vague regarding this purported litigation and told some investors that he had been instructed by lawyers not to disclose the details. Young told one investor that the litigation was between the bank holding the investment funds and the manager of the hedge fund. Young told another investor that the Safeguard investment was being held up by an investigation in Toronto. As recently as October 2013, Young gave at least two investors purported valuations of their Safeguard investments showing that they still had

value. As recently as March 2014, Young told investors that their Safeguard funds were coming soon. CP 10-34; 52-5.

Financial analysts at the Washington State Department of Financial Institutions Securities Division obtained bank records for Safeguard and for Young's personal and Amigo Vino bank accounts and determined that investors in Safeguard lost at least $1,264,802:

COUNT	VICTIM	LOSS
1	Steve Kenney	$187,272
2	Robert Hampton	$45,810
3	Culverwell & Associates	$54,607
4	Lisa Culverwell-Stout	$10,000
5	June Brown	$107,373
6-8	Sharon Hoder-Degroff	$61,040
9	Terry Hoder	$9,000
10	James Degroff	$200,000
11	John Jackson	$330,000
12-13	James Jackson	$139,700
14-15	Elworth Stegriy	$120,000
16	Dennis and Deborah Parsons	$0
	TOTAL:	**$1,264,802**

CP 10-34; 52-5.

Deborah and Dennis Parsons, the victims in count 16, sued Young and recovered their $90,000 investment plus costs and attorney's fees. The loss figure of $1,264,802 includes only the victims' initial investments less amounts repaid by Young and does not include the profits earned on their investments in Gemstar that were diverted by Young to pay for his winery and vineyard and used for his personal expenses. If those profits were added

to the victims' losses the total loss to investors as a result of Young's Safeguard scheme approaches $4.7 million. CP 10-34; 52-5.

His standard sentence range under RCW 9.94A.510 after his guilty plea to ten counts of securities fraud was 51 to 68 months based on a seriousness level of III and an offender score of 9. CP 116. At sentencing the court granted Young's request for an exceptional sentence below the standard sentence range of 6 months' work release and 6 months' home detention on the following grounds:

1. Young's medical conditions would make his incarceration particularly difficult given his age;

2. An exceptional sentence would save the State resources necessary to pay Young's medical expenses;

3. Young has the ability to make restitution to his victims if he receives electronic home monitoring because he will be able to continue working;

4. Young has made some restitution payments to his victims prior to his guilty plea;

5. Young is remorseful and wants to repay the victims in full; and

6. Young is 69 years old, has no criminal history, arrest history, or history of disruptive behavior, this case involved no violence, and he poses no threat to the community.

CP 52-63; 121-7; RP 34-7.[2]

[2] Verbatim report of proceedings dated July 10, 2015 at pages indicated.

D. ARGUMENT

Mr. Young's age, health issues, remorse, lack of criminal history, and willingness or ability to repay his victims are not factors supporting an exceptional sentence below the standard sentence range under RCW 9.94A.535(1). In determining whether a factor legally supports a departure from the standard sentence range courts must employ a 2-part test:

> First, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range. Second, the asserted aggravating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.

State v. Alexander, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995). Factors supporting an exceptional sentence downward must relate either to the crime of conviction or the defendant's past criminal record. State v. Law, 154 Wn.2d 85, 110 P.3d 717 (2005). To support an exceptional sentence a factor "must relate to the crime and make it more or less egregious." State v. Fowler, 145 Wn.2d 400, 411, 38 P.3d 335 (2002). Factors of a personal nature do not provide a basis for an exceptional sentence. Law, 154 Wn.2d at 97.

The factors relied upon by the court to impose an exceptional sentence for Mr. Young do not relate to the crimes for which he was convicted or make them less egregious. Nor do they distinguish his crimes from others in the same category. They are either factors that were considered by the legislature in establishing the standard sentence range or of a personal nature and do not constitute legally sufficient mitigating factors supporting an exceptional sentence under RCW 9.94A.535(1).

The Washington State Legislature passed the Sentencing Reform Act of 1981 to address disparities in sentences imposed for offenders committing similar offenses under similar circumstances:

> The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:
>
> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
>
> (2) Promote respect for the law by providing punishment which is just;
>
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
>
> (4) Protect the public;

(5) Offer the offender an opportunity to improve himself or herself;

(6) Make frugal use of the state's and local governments' resources; and

(7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

Judge Inveen's exceptional sentence addresses only the goals stated in (5) and (6) to the exclusion of all of the others. Mr. Young's exceptional sentence does not reflect the seriousness of defrauding sixteen people, most of them retired or elderly or both, out of $1.2 million dollars of their savings for his personal gain. A lenient sentence for an offense of this magnitude does not promote respect for our criminal justice system by providing just punishment. It is grossly disproportionate to sentences imposed on other offenders convicted of similar offenses many of whom have received longer sentences for stealing far less money from fewer victims. And it does not protect the public from others who may be considering a similar offense or reduce the risk of reoffending by other offenders in the community who learn of Mr. Young's sentence.

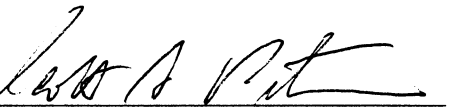
E. CONCLUSION

For these reasons, this court should vacate the judgment and sentence of the trial court and remand the case for resentencing in compliance with the Sentencing Reform Act of 1981 and decisions of the Washington Supreme Court interpreting that Act.

DATED this 4TH day of November, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
SCOTT A. PETERSON, WSBA #17275
Senior Deputy Prosecuting Attorney
Attorneys for Appellant
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, two properly stamped and addressed envelopes containing a copy of the corrected ***Brief of Appellant***, in State v. Clarence C Young, Jr, Cause No. 73760-1, in the Court of Appeals, Division I, for the State of Washington.

Said envelopes were directed to:

Thomas F. McDonough
Attorney for the Respondent
510 Bell Street
Edmonds, WA, 98020

Lisa Mulligan
Mr. McDonough's Co-Counsel
The Law Office of Lisa Mulligan
705 2nd Ave Ste 1300
Seattle, WA 98104

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of November, 2015.

Monicka Ly-Smith
Done in Seattle, Washington

COURT OF APPEALS
STATE OF WASHINGTON
2015 NOV -4 PM 2:56