

No.
COA No. 74618-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA SUE BARROWS,

Petitioner.

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

The Honorable David R. Needy

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER..... 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUE PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED..... 4

The trial court’s failure to exercise discretion, refusing to
consider a FTOW, was error. 4

F. CONCLUSION 6

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005)..... 4, 5

State v. Johnson, 97 Wn.App. 679, 988 P.2d 460 (1999)..... 4

STATUTES

RCW 9.94A.650 5

RULES

RAP 13.4..... 1

A. IDENTITY OF PETITIONER

Cynthia Barrows asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Cynthia Sue Barrows*, No. 74618-9-I (June 12, 2017). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

The sentencing court has broad discretion in deciding to impose a FTOW. Nevertheless, the court abuses that discretion when it categorically refuses to consider a FTOW where the defendant is otherwise statutorily eligible. Is an issue of substantial public interest presented here where the court failed to exercise its discretion where Ms. Barrows was statutorily eligible for a FTOW but the court simply refused to consider a FTOW based solely on the amount of the theft for which Ms. Barrows pleaded guilty?

D. STATEMENT OF THE CASE

On October 28, 2015, Cynthia Barrows pleaded guilty to seven counts of first degree theft and three counts of second degree theft. CP 63-74. The thefts totaled \$233,744.09 over two and one-half years. CP 11-12. Ms. Barrows had no prior criminal history. CP 62.

At sentencing, Ms. Barrows requested a FTOW. CP 11-13; 12/16/2015RP 6-7. The State opposed the imposition of FTOW, relying on facts outside the record:

There have been some other cases in this court recently where we have had somewhat similar circumstances. One was the Island Hospital Foundation case where the defendant received a 36-month sentence. We had a year or so ago an attorney theft from clients where 30 months was the sentence.

And myself just recently, I had a case that pled out two weeks ago to a felony theft where the defendant stole \$5,400 from Anacortes Sports Booster Club. And the amount was only \$5,400, much, much less than the amount we're talking about here. That agreed recommendation was for 60 days with 15 in jail and the remainder on alternatives, and that individual had paid back the entire amount prior to sentencing.

12/16/2015RP 4. Finding Ms. Barrows eligible for a FTOW noting she would be better served staying in the community, the court seizing upon the State's argument and refused to impose a FTOW:

You are probably technically eligible as a first-time offender in that you don't have prior felony history, and

you would probably be better served by staying in the community and probably more restitution would be paid if you stayed in the community. But there are other obligations of the court and the justice system, Ms. Barrows, than just what's best for you and actually what's necessarily best for the victim.

The court has an obligation to be consistent in treating various cases that come before the court, and yours is a very, very large amount of theft and/or embezzlement, and the court feels a very strong obligation to be consistent and send a message, not one that's going to benefit you or help you or your circumstances, but a message to the community that if you're going to engage in this kind of conduct over this period of time with this amount of dollars, the consequences are going to be very severe. Whether or not that deters anyone else, I'm not quite certain, but I feel it's my obligation to be consistent on those cases.

If this were \$3000, I would strongly consider a first offender waiver. But at 2- to \$300,000, I simply cannot in good conscience consider that alternative at this time.

12/16/2015RP 10-11. The court imposed 29 month sentences on the second degree theft, and 45 month sentences on the first degree theft counts, all run concurrently. CP 22; 12/16/2015RP 11-12

The Court of Appeals rejected Ms. Barrows' arguments and affirmed her sentence. Decision at 4-5.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

The trial court's failure to exercise discretion, refusing to consider a FTOW, was error.

In imposing a sentence, the trial court may impose a FTOW, which allows the court to

may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses.

RCW 9.94A.650(2).

Under the RCW 9.94A.650(2) first-time offender option, the trial court has broad discretion to waive a standard range sentence, including refusing to grant the option. *State v. Johnson*, 97 Wn.App. 679, 682, 988 P.2d 460 (1999). “[W]here a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.” *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

The trial court found Ms. Barrows was statutorily eligible for a FTOW, would be better served staying in the community, and more

restitution would probably be paid if she stayed in the community, the court nevertheless drew an arbitrary line over which it would never impose a FTOW, a line on which she fell on the wrong side. The court's rationale for rejecting a FTOW clearly indicated it would only impose a FTOW where the amount of theft was approximately \$3000, but would never impose one where the amount exceeds hundreds of thousands of dollars, regardless of the eligibility of the individual.

The trial court's actions evidenced a refusal to exercise discretion as in *Grayson*, which flatly refused to consider a Drug Offender Sentence Alternative (DOSA) because in its view, the DOSA program was underfunded. 154 Wn.2d at 342-43. The *Grayson* court found the trial court's actions amounted to a categorical refusal to consider a statutorily authorized sentence alternative, which was reversible error. *Id.* The same rationale should apply here.

This Court should grant review and reverse and remand Ms. Barrows' sentence.

F. CONCLUSION

For the reasons stated, Ms. Barrows asks this Court to reverse her sentence and remand for resentencing.

DATED this 7th day of July 2017.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 CYNTHIA SUE BARROWS,)
)
 Appellant.)

No. 74618-9-1
DIVISION ONE
UNPUBLISHED OPINION
FILED: June 12, 2017

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2017 JUN 12 AM 11:10

TRICKEY, A.C.J. — Cynthia Barrows appeals her judgment and sentence for multiple counts of theft. Although she was a first time offender, the trial court refused to grant her request for a first time offender waiver (FTOW) because of the amount of money she stole. Barrows argues that the trial court's denial of her request amounted to a blanket denial of FTOWs for a class of offenders who would otherwise be statutorily eligible. Because the record shows that the trial court meaningfully considered Barrows' request before exercising its discretion to refuse it, we affirm.

FACTS

Cynthia Barrows worked for Lyfebank, a company that helps employers set up health care expense accounts for their employees. Generally, employees submit their medical claims to Lyfebank. Once the expenses are approved, the company transfers the funds from the employees' Lyfebank accounts to the employees' personal accounts.

Barrows made false medical expense claims against client accounts, and had the funds reimbursed to her personal accounts instead of to the clients'

accounts. Over the course of a few years, Barrows stole from 80 different people, making 93 transfers to her own account. She opened several accounts for the sole purpose of depositing the stolen money. In total, she stole over \$230,000.

Barrows pleaded guilty to eight counts of theft in the first degree and three counts of theft in the second degree. Barrows had no prior criminal history.

At sentencing, she requested a FTOW. The State opposed the FTOW. The court denied Barrows' request and imposed a standard range sentence for each count. The court imposed 45 months of confinement for each count of first degree theft and 29 months of confinement for each count of second degree theft, to run concurrently.

Barrows appeals the trial court's denial of her request for a FTOW.

ANALYSIS

First Time Offender Waiver

Barrows argues that the trial court abused its discretion because it categorically refused to consider FTOWs for defendants whose crimes involved significant thefts. Because the record is clear that the trial court meaningfully considered whether to grant Barrows' request for a FTOW, we disagree.

Generally, offenders may not appeal sentences within the standard range for their offenses. RCW 9.94A.585(1). But "an offender may always challenge the procedure by which a sentence was imposed." State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). "[W]here a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to

exercise discretion and is subject to reversal.” Grayson, 154 Wn.2d at 342.

FTOWs are a type of sentencing alternative. The trial court may waive the imposition of a standard range sentence for offenders who have never been convicted of a felony and whose current conviction is not for a violent or sexual offense, driving under the influence, or a crime related to drug dealing. RCW 9.94A.650(1), (2). Instead, the trial court imposes up to 90 days of confinement and up to six months of community custody. RCW 9.94A.650(2), (3).

The trial court has broad discretion in deciding whether to grant an offender’s request for a FTOW. State v. Johnson, 97 Wn. App. 679, 682, 988 P.2d 460 (1999). The court abuses its discretion if “its decision is manifestly unreasonable or is based upon untenable grounds or reasons.” State v. Adamy, 151 Wn. App. 583, 587, 213 P.3d 627 (2009).

Here, Barrows received a standard range sentence after requesting a FTOW. The State strongly opposed the FTOW and made several arguments against granting Barrows’ request. The State pointed out that there had been similar cases recently in which the court sentenced the defendant to 36 months and 30 months. The State contended that it would be inappropriate to give someone who stole close to a quarter of a million dollars “a slap on the wrist.”¹

Barrows argued that she was an ideal candidate for a FTOW, despite the “very high” amount of money she stole, because she pleaded guilty instead of making all her victims come to court and testify and, if the court kept her in the community, she could continue to work with her counselor, hold a job, and make

¹ Report of Proceedings (RP) (Dec. 16, 2015) at 4.

progress on paying restitution.² Barrows addressed the court to express her remorse and echo her counsel's arguments.

The court and the State acknowledged that the court had discretion whether to grant a FTOW. The State argued it was "not appropriate under these facts."³

After listening to both sides and Barrows herself, the court announced its decision. The court noted first that it would "probably be better" for Barrows to stay in the community, and that she had a better chance of paying restitution if she stayed in the community.⁴ But it also explained that it had "an obligation" to treat the cases that came before it consistently, that Barrows' case involved "a very, very large amount of theft and/or embezzlement," and that it wanted to send a "message to the community" that when people "engage in this kind of conduct over this period of time with this amount of dollars, the consequences are going to be very severe."⁵

Summing up its decision, the court said that if "this were \$3,000," it would have "strongly consider[ed] a first offender waiver. But at 2- to \$300,000," it could not "in good conscience consider that alternative" at that time.⁶

The trial court's statements indicate that it thought carefully about Barrows' particular situation, weighed the benefits and disadvantages of granting her request, and finally determined that a standard range sentence was more appropriate than a FTOW because of the seriousness of the offense. Its decision

² RP (Dec. 16, 2015) at 6.

³ RP (Dec. 16, 2015) at 8.

⁴ RP (Dec. 16, 2015) at 11.

⁵ RP (Dec. 16, 2015) at 11.

⁶ RP (Dec. 16, 2015) at 11.

was clearly an exercise of discretion. The seriousness of the offense is a tenable basis for rejecting Barrows' request. Therefore, the court did not abuse its discretion.

Barrows argues that, by refusing to consider a FTOW for any offender convicted of stealing or embezzling a large amount, the trial court impermissibly determined whether to grant a FTWO based on "an arbitrary line."⁷ We reject this argument because Barrows mischaracterizes the trial court's decision and decision-making process. The trial court specifically said that it could not consider the alternative at that time. It did not state or suggest it would never consider a FTOW for any offender who had stolen as much as Barrows.

Appellate Costs

Barrows also asks that no costs be awarded on appeal. Appellate costs are generally awarded to the substantially prevailing party on review. But, when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2.

Here, the trial court found that Barrows was unable to pay the expenses of her appellate review because of poverty or indigency. If the State has evidence indicating that Barrows' financial circumstances have significantly improved since the trial court's determination, it may file a motion for costs with the commissioner.

⁷ Br. of Appellant at 5.

No. 74618-9-1 / 6

Affirmed.

Trickey, ACJ

WE CONCUR:

Dryden

Cappulwick, J

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74618-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: July 7, 2017

WASHINGTON APPELLATE PROJECT

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