

FILED
SUPREME COURT
STATE OF WASHINGTON
1/7/2019 1:54 PM
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COA NO. 34655-2-III

96712-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,


v.

DESHAWN ANDERSON, Appellant.

PETITION FOR REVIEW

STATE'S ANSWER

Respectfully submitted:
SHAWN P. SANT
Prosecuting Attorney


by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

Franklin County Prosecuting Attorney's Office
1016 North 4th Avenue
Pasco, WA 99301
(509) 545-3543

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Defendant/Petitioner.

III. ISSUES

1. Does the petition demonstrate any conflict with a decision of the Washington Supreme Court where the sentencing judge imposed a standard range sentence after considering the Defendant's youth and after finding there was no substantial and compelling reason to depart?
2. Does the petition demonstrate a RAP 13.4(b) basis to review grounds raised in the Statement of Additional Grounds?

IV. STATEMENT OF THE CASE

On November 18, 2014, the Defendant/Petitioner Deshawn Anderson and a companion opened fire on a car occupied by four Florencia-13 gang members. CP 159. The Defendant shot them,

because he believed he had seen them laughing at him. RP 382-83, 1501-02. The next day, the Defendant's cousin was shot and his friend was killed in retaliation. CP 159; RP 389.

On December 3, 2014, the Defendant cousin's wife set up a midnight date with Lorenzo "Richie" Fernandez. RP 391-92. The Defendant called Mr. Fernandez "some random m--f--." RP 1516. He was just someone who drove a recognizable orange Mustang and who had once been associated with Florencia. RP 390, 1516. The Defendant posted on Twitter that people should watch the news for him. CP 159; RP 389-90. Shortly thereafter, when Mr. Fernandez arrived for his date, the Defendant ambushed and killed him. CP 159-60. He did this to show everyone that his friend's death would not go unanswered. RP 1516.

After his arrest, the Defendant confessed to police in a recorded interview that he was only person who shot at Mr. Fernandez. RP 21. He explained that his cousin Kenyatta Bridges went with him, but froze. RPE¹ 32-33.

"I let off eight bullets." "I shot four people, and one of them's dead." Regarding Kenyatta [his co-defendant in the murder] he said, "I told him to unload that 9 into

¹ RPE refers to the transcription of Plaintiff's Exhibit 71, the police interview with the Defendant.

Richie. I wanted to make a message back to my family that I'm not just going to let my cousin get shot for no reason. There was only clip one unloaded. I pressured him. 'Why did[n't] you do it?' That's not him. That's not what he wants to do. That's why there were only eight shells on the ground."

RP 395-96; See also RPE 33, 41, 48.

The Defendant was charged with murder in the first degree with a firearm enhancement, two counts of unlawful possession of a firearm in the first degree, and four counts of assault in the first degree with firearm enhancements. CP 27-28. During the trial a year and a half later, threats of inter-gang violence continued. CP 160 (the victim's family described witness intimidation and harassment by "associates" of Anderson's gang). The jury convicted him on all charges and enhancements. CP 116-27.

The court ordered a presentencing investigation (PSI). CP 158-78. The Defendant was 18 at the time of his offenses, and already had a significant juvenile history spanning three years, with six felonies including a serious violent offense. CP 1, 134, 161. He declined to participate in the sentencing report. CP 161.

The Department of Corrections asked the court to consider the Fernandez family's loss, the nature of the offenses with their

concerted premeditation and ambush tactics, the Defendant's lack of remorse, and his failure to accept responsibility. CP 166. The PSI recommended a mid-range sentence of 1126 months. CP 166-67.

The prosecutor's sentencing memorandum explained the calculation of the sentencing ranges. CP 180-81, 184-86. The prosecutor recommended a sentence within that range "[b]ased on the facts of this case, the severity of the Defendant's actions, and the total lack of remorse from the Defendant." CP 181-82; RP 1575-76.

This particular conviction didn't represent a single isolated incident. They represented two different incidents with five different victims. And the reason that that affected so many people, and ultimately, of course, your Honor heard it affected other people in other ways, too, is these groups retaliated against each other. That's part of the reason why this sentence is so extensive, because [it's] very rare that we have five victims [in] these types of cases.

It also reflects prior criminal history. The defendant had a pretty lengthy juvenile history. He had multiple felony convictions, including a prior violent felony offense of assault in the second degree, which added to his offender score substantially. So that also explains the length of the sentence in this case.

And also you had the illegal use of multiple firearms by a convicted felon, which again added two points to his offender score and ultimately added firearm enhancements to both charges. That again reflects the length of the sentence.

Lastly, of course, you have the most serious count, which is murder in the first degree, which is premeditated murder. And the legislature makes it very

clear that it considers premeditated murder to be a step above a common murder. And I'd suggest to the Court the sentence is appropriate in particular in this case, because this is a particularly heinous premeditated murder. This involved a case where the defendant and several co-conspirators lured the victim to a specific location at a specific time, and then they specifically approached that location for an ambush-style attack on him. They carried out that attack successfully and executed him. And I would say to the Court that it takes a particularly cold-blooded type of individual to be able to carry out the murder in that manner, and I think that this lengthy sentence reflects that, the nature of that particular crime.

RP 1576-77.

The Fernandez family prepared a written statement and his sister addressed the court detailing the family's anguish and devastation in the aftermath. CP 177-78, 181, 188-89; RP 1577-78.

... At that moment I wanted to die with him, my life felt empty as everything was over – my illusions, my happiness, the feelings to continue living stayed inside my broken heart. Now I have a void in my heart that to this day I still cannot fill.

He finally had reached a time in his life when he chose to step away from the gangs to change his lifestyle. I was so happy and proud when he told me "Mom, don't worry I have left that lifestyle and I want to dedicate myself to my daughter to be everything I wasn't."

Although, he was young in age he was a very good father in every extension of the word – he was a Super Dad. He had so many plans and goals, but with that man's malice everything ended. What makes me sad and angry the most is that my granddaughter that is

a little girl of only 5 years of age has had to suffer and continues to suffer because she cries so much. When we are alone an she cries and asks me why did her daddy have to die, that she misses him and wonders if she needs to die in order to see him again. Now she doesn't want to ever get onto an airplane because the first time that she was going, was with an illusion to see her daddy in heaven.

....

CP 177-78.

... he not only took a life. He took my only brother, the only son of my mom. Since that day, my parents have been sick. He not only took my brother's life. He's taken my parents', too. My family is not the same. It [will] never be the same. He left a daughter, who is asking for her dad. Why? Why did he do that? Her daddy was everything for her. She said that -- the little girl told us that she has to die in order to see her dad again.

I don't know if for him it was worth it, but for us it's never going to be the same. My family is torn apart. My parents are sick every day. Every day we have complications with him. My dad, he was a strong man, working man, and now he's always sick. I never seen my dad like this, and it's hard. It's hard, because not only you have to deal with the loss of your brother, but your parents being sick all the time, and a little girl that did nothing to him.

RP 1578.

The prosecutor had advised that if the Defendant asked to deviate from the standard range, the prosecutor would request additional time to respond. RP 182. So warned, defense counsel asked the court to consider her client's age.

Your Honor, these sentencings are always tough, because [there're] not many words that I can say to the Court. In this case the Court has a standard range as indicated on the Judgment and Sentence. We ask the Court to recognize that Mr. Anderson was very young at the time, barely an adult in this matter. He's ultimately going to spend the rest of his life in prison. We ask the Court take that into consideration in sentencing him, and we hold full faith in the Court providing Mr. Anderson with a reasonable sentence.

RP 1579.

When the Defendant and his parents addressed the court, they continued to deny his guilt.

CHERYL LALICKER: ... in my heart I do not believe that he is the one who shot Richie, and I hope that justice will soon be found.

RP 1581.

MICHAEL ANDERSON: He was there, but he's not the one who shot him. And it'll come out ... but he didn't kill him.

RP 1582.

MR. ANDERSON: ... at the end of the day I know that I have never killed nobody. My hands have not killed anybody, and that's just what I would like to say to this Court today and to Richie's family. And that's all I got to say.

RP 1583.

The Honorable Judge Ekstrom, who had presided over the

lengthy trial, explained the sentence.

The evidence in front of this jury showed that on each occasion the defendant came up to unarmed people in cars and unloaded the magazine of that pistol into them, killing one of them, known to his family as Richie Fernandez.

The evidence presented to the jury showed that the first victims in this case, first in time, were selected because of a past grudge. The video footage from the Crazy Moose Casino showed that they did absolutely nothing to Mr. Anderson on November 18th, 2014. Yet he tracked them down and shot them.

On December 3rd he selected Mr. Fernandez because he was identified as part of a group, a group that had killed a member of his family, in retaliation for his earlier actions. Evidence showed that the victim here was tricked and that he was tricked into his own execution because he was part of a group labeled as an enemy, not because he was involved in the earlier retaliation, just because he was labeled part of a group seen as an enemy.

The Sentencing Reform Act defines the purpose of sentencing and indicates that it is to ensure punishment that's proportionate to the seriousness of the offense, and here the legislature has defined the ranges. **Absent a reason to depart, and here there is none**, the legislature determines what is the reasonable bounds. The purpose of sentencing is to promote a respect for the law and provide a punishment that's just. Here, any available sentence will promote a respect for the law. The issue is what sentence within those ranges is just in this circumstance. Punishment should be [commensurate] with that imposed by others similarly situated.

Here the ranges reflect the conduct of the conviction and the prior criminal history. The Court will take into account the specific facts of the offense themselves to address any disparity.

Here the ranges reflect the conduct of the conviction and the prior criminal history. The Court will take into account the specific facts of the offense themselves to address any disparity.

Must protect the public. Here again, any sentence within the range will sufficiently protect the public.

Offering an opportunity to improve [oneself] and making frugal use of the government resources. The sobering fact here is that any legal sentence this Court can impose will likely be a sentence for the rest of your natural life.

Reducing the risk of reoffense. Again any sentence here sufficiently addresses that.

The ranges are set out accurately, and the parties agree. The mandatory minimum sentence here is for -- and this is the absolute minimum before Mr. Anderson can begin accruing good time on his sentence, as the Court calculates it, is 780 months or 65 years. The combined ranges for the standard ranges here are 1,010 months to 1224 months, or 84 years and two months at the bottom, and 103 years and six months at the top.

The recommendation of the department is the middle of that range, a total sentence of 1,126 months or 93 years and ten months. The parties are asking for sentences within the range.

While any of these options are, as I indicated, are almost certainly life sentences, the Court still has an obligation to apply the Sentencing Reform Act. For Count I the range is, including the enhancement, 398 to 510 months.

Here the facts involve substantial planning: Acquiring a different firearm than the one that was used in the prior assault; working in concert with others over a period of time to lure the victim to his death; lying in wait at the scene; approaching from behind to avoid detection; and this wasn't a gunfight. It was an execution.

Given those facts, a sentence at the bottom of the range would be unjust. It wouldn't sufficiently take into account how this offense was committed. For those reasons the Court finds that the department's recommendation in the middle of the range is reasonable.

The sentence will be 454 months.

Count II, the unlawful possession of a firearm on the same date of offense, carries a range of 77 to 102 months. There the weapon charged is the .45 caliber handgun used in December.

There is no information regarding the firearm itself. We have the spent casings. We know nothing about when it was acquired. And its use in Count I is encompassed by the sentence above. For that reason, the Court finds that a sentence at the bottom of the range there of 77 months concurrent with all other counts is appropriate, understanding that because that sentence is concurrent, it has functionally no effect on the overall sentence.

That takes us to Counts III through VI, those being the assaults in the first degree. The offender scores are zero by operation of statute, but they're to be served consecutively to Count I. Here as well, there was planning, shorter in duration, but it doesn't mitigate the severity of the offense. The defendant took steps to avoid detection by using the phone of another individual at the blackjack table to summon his ride, and again approached and emptied his weapon into a vehicle full of, the evidence showed, unarmed individuals. Here as well, **while I am free to reject the department's recommendation, I find that it is, as well, reasonable here.**

The sentence will be the middle of the range, 168 months, each count concurrent to each other and to Count I.

As to count VII, the possession of firearm, the .40 caliber firearm used in November, the range is the same, 77 to 102 months. Here there's evidence that this

firearm was acquired right before the shooting. We know it was of no -- it was procured for and then almost immediately put into use to commit Counts II through VI. These circumstances here make the top of the of range an appropriate sentence, understanding again that by operation of law these run concurrently, and they will not, and so both Count II and Count VII do not affect the final calculation of the range.

The end result is the middle of the range sentence: 1,126 months, or 93 years and 10 months.

RP 1584-88 (emphasis added). “This is what happens when we decide that our opponents are enemies. There follows our ability in our minds to do to them whatever we will.” RP 1589.

V. ARGUMENT

A. THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A STANDARD RANGE SENTENCE.

The Defendant claims that the sentencing court “abused its discretion” by failing to depart downward from the standard range. Petition at 6. The court imposed a standard range sentence. RP 1585-86, 88. “When the sentence given is within the presumptive sentence range then as a matter of law there can be no abuse of discretion and there is no right to appeal that aspect.” *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 724 (1986), *amended*, 105 Wn.2d 175, 718 P.2d 796 (1986). A sentence within the standard

sentence range “shall not be appealed.” RCW 9.94A.585(1). See also *State v. McGill*, 112 Wn. App. 95, 99, 47 P.3d 173 (2002) (the law precludes appellate review of a challenge to the amount of time imposed when the time is within the standard range).

Here the defense made no request for an exceptional sentence. On the contrary, counsel requested a sentence within the range. RP 1579, 1586, ll. 6-7. Therefore, it cannot be said that the sentencing judge ruled on any objection or request. Absent a request or objection, no challenge or claim of error is preserved. “The appellate court may refuse to review any claim of error not raised for the first time in the appellate court.” RAP 2.5(a).

A petition for review will only be accepted if one of four considerations under RAP 13.4(b) is present. The petition claims that the sentencing court made the same error that the judge did in *State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), finding that youth was not a legal basis to depart from the standard range. Petition at 5, 7-8 (the sentencing judge “incorrect[ly] belie[ved] there was no legal basis it could consider to depart from the standard range.”). If this were true, then affirming the decision would represent a conflict under RAP 13.4(b)(1). However, the Court of Appeals has found that this

claim misrepresents the record.

But the record does not support that contention. No one argued at sentencing that the court could not consider Mr. Anderson's youth as a mitigating factor. Mr. Anderson's lawyer argued that he "was very young at the time, barely an adult." RP at 1579. The trial court directly addressed the exceptional sentence option, stating that it had no *reason* to deviate from the standard range, not that it lacked the *legal ability* to do so. See RP at 1585 (stating that Mr. Anderson would get a standard range sentence "[a]bsent a reason to depart, and here there is none"). The court explained its sentence as warranted by the premeditated and wholly unjustified nature of Mr. Anderson's actions.

Unpublished Opinion at 7-8.

The Defendant's youth was before the court by defense counsel's own plea. The judge simply did not find the Defendant's youth to be a substantial and compelling basis for departure. A sentencing court may only depart from the standard range if it finds "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Here, having heard defense counsel's comment about her client's age, the court nevertheless found no reason to depart. RP 1585, II. 1-3. If there is no aggravating or mitigating factor found beyond a reasonable doubt, the court must impose a standard range sentence. RP 1856 (court is obliged to apply the SRA).

The judge explained that in coming to his conclusion he considered:

- The vulnerability of the victims. RP 1584 (“unarmed people in cars”), RP 1587.
- The arbitrary motive. RP 1584 (the assault victims “did absolutely nothing” but “retaliat[e] for his earlier actions” “yet he tracked them down and shot them” and later killed Mr. Fernandez “not because he was involved in the earlier retaliation, just because he was labeled part of a group seen as an enemy”).
- Deceit and premeditation in the murder. RP 1584 (“tricked [Richie Fernandez] into his own execution”); RP 1586 (“working in concert with others over a period of time to lure the victim to his death; lying in wait at the scene; approaching from behind to avoid detection; and this wasn’t a gunfight. It was an execution.”).
- Premeditation in the assaults. RP 1587 (“there was planning, shorter in duration, but it doesn’t mitigate the severity of the offense,” he “took steps to avoid detection by using the phone of another individual”).
- Proportionality. RP 1584 (“proportionate to the seriousness of the offense”).
- Reasons to depart from the standard range. RP 1585 (“absent a reason to depart, and here there is none”).
- A just sentence is one that will promote a respect for the law, is commensurate with others similarly situated, sufficiently protects the public, reduces the risk of reoffense, takes into account the specific facts, offers the offender an opportunity for improvement, and makes frugal use of government resources. RP 1585.
- Criminal history. RP 1585.
- The firearm enhancements regarded different weapons in different incidences. RP 1586 (“acquiring a different firearm than the one that used in the prior assault”), 1588.
- Effective life sentence. RP 1586 (“any of these options are, as I indicated, are almost certainly life sentences”.)

The judge's process demonstrates studied consideration. And his decision was that a mid-range sentence was fair.

Given those facts, a sentence at the bottom of the range would be unjust. It wouldn't sufficiently take into account how this offense was committed.

RP 1586. There was no abuse of discretion in imposing the term of confinement. There is no conflict of case law which would permit review.

B. THE STATEMENT OF ADDITIONAL GROUNDS DOES NOT PRESENT A BASIS FOR REVIEW UNDER RAP 13.4(b).

The Petition does not analyze any claim made in the Statement of Additional Grounds (SAG) under RAP 13.4(b). It states only that the SAG "should be ruled on by this Court." Petition at 11. This is insufficient to permit review.

The State did not address the grounds raised in the SAG in earlier briefing. RAP 10.10(f) (the State is only permitted to address these claims if the court requests additional briefing). However, they are addressed in the Court of Appeals' decision. Unpublished Opinion at 11-15. The discussion amply demonstrates that the claims were without merit.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the petition for review.

DATED: January 7, 2019.

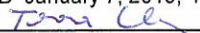
Respectfully submitted:

SHAWN P. SANT
Prosecuting Attorney



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Lisa Tabbut
ltabbutlaw@gmail.com

A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED January 7, 2019, Pasco, WA


Original filed at the Court of Appeals, 500
N. Cedar Street, Spokane, WA 99201

January 07, 2019 - 1:54 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Deshawn Isaiah Anderson
Superior Court Case Number: 14-1-50655-3

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