98097-7
NO. 52260-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARON SHELLEY
Petitioner.

PETITION FOR REVIEW OF THE COURT OF APPEALS DECEMBER 17, 2019 DECISION IN STATE V. SHELLEY COA #52260-8-II

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WASHINGTON CASES

RULES, STATUTES, AND OTHERS

A. IDENTITY OF MOVING PARTY

Petitioner Aron Shelley through his attorney, Lise Ellner, asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Aron Shelley requests review of the Court of Appeals December 17, 2019 ruling. A copy of the decision is attached (Appendix A).

C. ISSUE PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion by failing to recognize its independent discretion to impose an exceptional sentence downward and instead reimposed the original sentence that had been reversed on direct appeal?

D. STATEMENT OF THE CASE

The state charged Aron Shelley with two counts of Assault in the Second Degree-Domestic Violence, one count of Assault of a Child in the Second Degree-Domestic Violence, one count of Felony Harassment-Domestic Violence, and four counts of Violation of a No-Contact Order-Domestic Violence on June 24, 2015. CP 8-9. Mr. Shelley proceeded to a jury trial where he was found guilty of one count of Assault in the Second Degree, Assault of a Child in the Second Degree, Felony Harassment, and two counts of Violating a No-Contact Order. CP 161-177. The jury returned special verdicts finding that all Mr. Shelley's crimes were committed against family or household

members and that he was armed with a deadly weapon at the time he committed the assault charged in Count 1. CP 161-173. The jury acquitted Mr. Shelley of the second count of Assault in the Second Degree and two counts of Violating a No-Contact Order. CP 164, 174-77.

Mr. Shelley requested an exceptional sentence downward at his original sentencing, but the trial court imposed a high-end, standard range sentence of 120 months. CP 323. Mr. Shelley appealed his conviction and sentence. CP 289. In a published opinion, the Court of Appeals affirmed Mr. Shelley's convictions but held that the domestic violence special verdicts related to the Assault of a Child and Felony Harassment counts were invalid as a matter of law because Mr. Shelley did not have a biological or legal parent-child relationship with the victim. *State v. Shelley,* 3 Wn.App.2d 196, 200-01, 414 P.3d 1153 (2018). The Court of Appeals vacated these special verdicts and remanded the case for resentencing with a corrected offender score on Counts 1, 3, and 4. *Shelley,* 3 Wn. App. 2d at 201.

The invalidation of the special verdicts resulted in Mr. Shelley's offender score being calculated at 8 for Count 1, 6 for Count 3, and 5 for Count 4. CP 369. These adjustments lowered Mr. Shelley's sentencing range to 89-114 months because of a possible high-end sentence of 102 months on Count 3 and the 12-month deadly weapon enhancement on Count 1 that must be imposed consecutive to any

other sentence. CP 370. At resentencing the state again requested a sentence at the high-end of the standard range and asked the trial court to impose 114 months. CP 358. Mr. Shelley again requested an exceptional sentence downward. CP 341. The trial court did not consider Mr. Shelley's request and instead adopted the state's recommendation of 114 months so as to not "second-guess" the original sentence:

> [TRIAL COURT]: Now, with respect to the request made by the defense, the defense has made a request for an exceptional downward sentence for several reasons. Of those reasons that the defense has cited, the Court notes both of those reasons were cited to the original sentencing judge and were rejected by that judge. In my view, the appropriate role that I sit here today, it would be inappropriate to second-guess those decisions. . . . I think the appropriate role for this court is to adopt what was done previously . . .".

CP 370; 8/9/18 RP 12-14. Mr. Shelley filed a timely notice of appeal. CP 384.

Division 2 of the Court of Appeals affirmed Mr. Shelley's sentence in an unpublished opinion. The Court of Appeals held that:

> Although the sentencing court chose to impose a sentence similar to that of the original trial court, nothing in the record suggests that the sentencing court believed it was obligated to do so. Rather, the sentencing court acknowledged that the original trial court had the benefit of hearing all the testimony and observing all of the evidence, and concluded that it did not see any reason to deviate from the original trial court's determination that mitigating circumstances did not justify an exceptional downward sentence.

Appendix A at 4.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This court should grant review of the issues in Mr. Shelley's appeal because the Court of Appeals' decision is in conflict with prior decisions of this court. RAP 13.4(b)(1).

When an appellate court remands a case for resentencing, the trial court deciding the new sentence has broad discretion to sentence the defendant within the appellate court's mandate. *State v. Toney,* 149 Wn. App. 787, 792, 205 P.3d 944 (2009). Standard range sentences are subject to appellate review when the trial court refuses to exercise its discretion at all or relies on an improper basis in refusing to consider an exceptional sentence downward. *State v. McFarland,* 189 Wn.2d 47, 56-58, 399 P.3d 1106 (2017) (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)).

A trial court abuses its discretion when it fails to recognize its discretion at sentencing. *McFarland,* 189 Wn.2d at 56-58. A trial court also abuses its discretion if it categorically refuses to consider a sentence below the standard range under any circumstances. *State v. Grayson,* 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (quoting *Garcia-Martinez,* 88 Wn. App. at 330).

The Court of Appeals' decision in Mr. Shelley's case is in conflict with this court's decisions in *Grayson* and *In re Mulholland,* 161 Wn.2d 322, 166 P.3d 677 (2007). In *Grayson,* the defendant requested a Drug Offender Sentencing Alternative (DOSA) at sentencing. *Grayson,* 154 Wn.2d at 336. The trial court denied the defendant's request without considering the DOSA because it did not believe the state had sufficient funding to effectively operate the DOSA program. *Grayson,* 154 Wn.2d at 337.

This court vacated the defendant's sentence and held that while defendants are not entitled to an exceptional sentence downward, "every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *Grayson,* 154 Wn.2d at 342. Because the trial court did not actually consider the defendant's request and instead refused to exercise its discretion based on its belief about DOSA funding, the defendant was entitled to a new sentencing hearing. *Grayson,* 154 Wn.2d at 342.

In *Mulholland,* the trial court sentenced the defendant to consecutive sentences on six counts of assault in the first degree with firearm enhancements. *Mulholland,* 161 Wn.2d at 326. The trial

court expressed discomfort with the long sentence but did not believe it had the discretion to run the sentences concurrent. *Mulholland,* 161 Wn.2d at 333-34. After the defendant's convictions and sentence were affirmed on direct appeal, he filed a Personal Restraint Petition (PRP) alleging that the trial court abused its discretion by failing to recognize its authority to impose an exceptional sentence by running the sentences concurrently. *Mulholland,* 161 Wn.2d at 326-27.

This court agreed and remanded the defendant's case to the trial court for resentencing. *Mulholland,* 161 Wn.2d at 334-35. In doing so, this court held that where an appellate court cannot say whether the trial court would have imposed the same sentence had it known an exceptional sentence was an option, "remand is appropriate." *Mulholland,* 161 Wn.2d at 334 (citing *State v. McGill,* 112 Wn. App. 95, 100-01, 47 P.3d 173 (2002)). This court also found that the trial court's statements at sentencing suggested that it might have imposed the sentences concurrent had it recognized that it had the authority to do so. *Mulholland,* 161 Wn.2d at 334.

The circumstances of Mr. Shelley's resentencing are analogous to those discussed in *Grayson* and *Mulholland.* The trial court never actually considered Mr. Shelley's request for an

exceptional sentence downward. In its remarks at resentencing, the trial court noted that it did not want to deviate from the original sentence because it would be "second-guessing" the original sentencing court's decisions. 8/9/18 RP 13. Based on these comments at Mr. Shelley's resentencing, it is evident that the court mistakenly believed that its "role" in Mr. Shelley's resentencing was limited to re-imposition of the prior sentence without consideration of Mr. Shelley's renewed request for an exceptional sentence and without the exercise of any independent discretion. 8/9/18 RP 12-13.

Division 2's holding is in conflict with *Grayson* and *Mulholland* because it mistakes the trial court's deference to the prior sentence for an exercise of its own discretion. The trial court was free to impose a sentence similar to the original one, but it must come to the decision to do so by exercising its own independent discretion and actually considering Mr. Shelley's requests at his resentencing hearing. *Grayson,* 154 Wn.2d at 342. The trial court did not follow this process at Mr. Shelley's resentencing. Instead, it failed to recognize its discretion and mechanically reimposed the original sentence for the sole reason that the prior trial court thought it was appropriate.

The trial court failed to actually consider Mr. Shelley's request for an exceptional sentence at his resentencing and failed to recognize its discretion to deviate from the original sentence. The trial court's failure to exercise its discretion to consider Mr. Shelley's request warrants remand for resentencing. *McFarland,* 189 Wn.2d at 56-58.

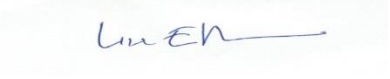
F. CONCLUSION

For the reasons stated herein and in the opening brief, this Court should accept review.

DATED THIS 16th day of January 2020.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



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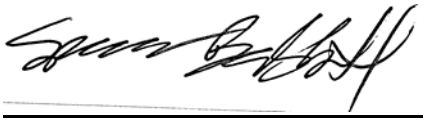

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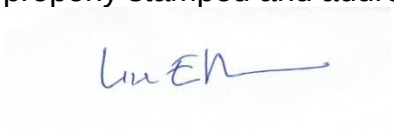
I, Lise Ellner, a person over the age of 18 years of age, served the Thurston County Prosecutor's Office paoappeals@co.thurson.wa.us and Aron Shelley/DOC#359941, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362 on January 16, 2020. Service was made electronically to the prosecutor and to Aron Shelley by depositing in the mails of the United States of America, properly stamped and addressed.



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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

December 17, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ARON DEAN SHELLEY, Appellant.	No. 52260-8-II UNPUBLISHED OPINION

WORSWICK, J. — Aron Shelley appeals his standard range sentence following a resentencing hearing. Shelley argues that the sentencing court abused its discretion by failing to consider imposing an exceptional downward sentence. We disagree and affirm.

FACTS

A jury found Shelley guilty of second degree assault, second degree assault of a child, felony harassment, and two counts of violating a no contact order. In addition the jury found that Shelley committed his crimes against family or household members and was armed with a deadly weapon at the time of the assault.

At sentencing, the trial court calculated Shelley's offender score to be 9 on all counts. The State requested a sentence at the high end of the standard range. Shelley argued for an exceptional sentence downward based on his history of mental health diagnoses. The trial court denied Shelley's request and imposed a high-end standard range sentence of 120 months plus 12 months confinement for the deadly weapon enhancement.

Shelley appealed his convictions and sentence. On appeal, Division One of this court affirmed Shelley's convictions but held that the domestic violence special verdicts were invalid as a matter of law. *State v. Shelley*, 3 Wn. App. 2d 196, 197, 414 P.3d 1153 (2018). Accordingly, the court remanded Shelley's case for resentencing based on a corrected offender score. *Shelley*, 3 Wn. App. 2d at 201.

At the resentencing hearing, Shelley again sought an exceptional sentence downward based on his mental health diagnoses and his good behavior since his convictions. The State requested a high-end standard range sentence. The sentencing court imposed the high end of the standard range sentence—102 months plus 12 months for the deadly weapon enhancement. The sentencing court denied Shelley's motion for an exceptional downward sentence, explaining:

> [I]t's a decision on a resentencing, and oftentimes the judge in the circumstance of a plea doesn't really know or have a good sense of what happened. A judge who sits in a trial is a little more informed as to what an appropriate sentence might be. In this case, the judicial officer who sentenced you initially sat through a trial and heard arguments regarding what the appropriate sentence was and made the decision to do what she did. Now of course the Court of Appeals has come and changed what those ranges should be and have made a legal correction as to those ranges.
>
> As I understand—and I read carefully the Court of Appeals decision. The corrections that the Court of Appeals made had to do with ranges and ranges alone and not so much as to calling into question the judicial decision regarding the sentence, so that's where I start.
>
> Now, with respect to the request made by the defense, the defense has made a request for an exceptional downward sentence for several reasons. Of those reasons that the defense has cited, the Court noted both of those reasons were cited to the original sentencing judge and were rejected by that judge. In my view, the appropriate role that I sit [sic] here today, it would be inappropriate to second-guess those decisions.

Report of Recorded Proceedings (RRP) (Aug. 9, 2018) at 12-13. The sentencing court acknowledged Shelley's arguments for an exceptional downward sentence based on his good conduct since being in prison, but ruled that good conduct following the commission of a crime is not a valid mitigating factor for a downward departure. The sentencing court continued,

> Under the circumstances, however, I think the appropriate role for this Court is to adopt what was done previously with respect to the ranges, of course adjusted downward as requested by the Court of Appeals, which, in my view, means adopting the State's recommendation for high ends together with the enhancement of 12 months for I believe a total of 114.

RRP (Aug. 9, 2018) at 14-15.

Shelley appeals his sentence.

ANALYSIS

Shelley argues that the sentencing court abused its discretion by failing to consider imposing an exceptional downward sentence. We disagree.

In general, a party cannot appeal a sentence within the standard range. *State v. Brown*, 145 Wn. App. 62, 77, 184 P.3d 1284 (2008). The rationale is that a trial court that imposes a sentence within the range set by the legislature cannot abuse its discretion as to the length of the sentence as a matter of law. *Brown*, 145 Wn. App. at 78.

However, a defendant may appeal when a sentencing court has refused to exercise its discretion or relies on an impermissible basis for its refusal to impose an exceptional sentence downward. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). It is error for a sentencing court to categorically refuse to impose an exceptional sentence downward or to mistakenly believe that it does not have such discretion. *McFarland*, 189 Wn.2d at 56.

Therefore, remand is the appropriate remedy when a trial court imposes a sentence without properly considering an authorized mitigated sentence. *McFarland*, 189 Wn.2d at 58-59.

In *McFarland*, our Supreme Court remanded for resentencing after the sentencing court appeared to misunderstand its discretion to impose an exceptional downward sentence. *McFarland*, 189 Wn.2d at 53-55. There, the sentencing court expressed an interest in considering an exceptional downward sentence but stated that "apparently [I] don't have much discretion, here." *McFarland*, 189 Wn.2d at 51 (alteration in original).

Unlike in *McFarland*, the record here shows that the sentencing court understood its discretion to consider an exceptional sentence downward. Although the sentencing court chose to impose a sentence similar to that of the original trial court, nothing in the record suggests that the sentencing court believed it was obligated to do so. Rather, the sentencing court acknowledged that the original trial court had the benefit of hearing all the testimony and observing all of the evidence, and concluded that it did not see any reason to deviate from the original trial court's determination that mitigating circumstances did not justify an exceptional downward sentence.

There is no indication here that the sentencing court refused to exercise its discretion. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Sutton, J.

Cruser, J.

LAW OFFICES OF LISE ELLNER

January 16, 2020 - 10:40 AM

Transmittal Information

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Appellate Court Case Title:	State of Washington, Respondent v. Aron D. Shelley, Appellant
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