NO. 99275-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESSE LEE ALLEN,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. ISSUE

Should this Court deny review where the sentencing court applied the plain language of RCW 9.94A.589(3) and exercised its discretion to run Allen's state sentence consecutive to his previously entered federal sentence, where Allen failed to present evidence that the prosecutor manipulated distinct state and federal charges which were based on physical molestation and production and possession of child pornography, respectively?

B. STATEMENT OF THE CASE

A full statement of the relevant facts was set forth by the court of appeals and in the State's response below. Those facts can be summarized as follows.

Allen sexually abused his girlfriend's six-year-old daughter by rubbing her vagina with his fingers and his penis. Evidence on his phone showed three locations in which Allen created videos of these acts using his cellular telephone. The videos were "many minutes long." RP 3/1/19 25. He was caught when his girlfriend found the videos.

Allen was initially charged in King County Superior Court with first degree rape of a child and first degree child molestation.

P 77. Charges were dismissed when the federal government elected to prosecute Allen for production and possession of child pornography.[1] The case was litigated in federal court, Allen had a federal public defender, he elected to plead guilty to federal charges, and he was sentenced in federal court to a 20-year term with full knowledge that a state prosecution still awaited. He retained separate counsel to handle the state prosecution.

The State of Washington subsequently charged Allen in state court for child molestation, but not for possession of the videos. Although the facts might have supported charges of child rape, and a total of three charges rather than just two, Allen pled guilty after plea negotiations to child molestation.

At sentencing, Allen argued that the court *should not* impose a consecutive sentence. He did not, however, argue that the court *could not,* as a matter of law, impose a consecutive sentence, i.e., the argument he has made on appeal. RP (3/1/19) 24 (Prosecutor: "The State and the defendant agree that this Court has the

[1] There is no state crime directly comparable to the federal crime of *production* of child pornography. Under the most similar state statute, Sexual Exploitation of a Minor (RCW 9.68A.040), the state must prove that the child was posed for pictures. See State v. Root, 141 Wn.2d 701, 9 P.3d 214 (2000). The 6-year-old victim in this case appeared to be sleeping while she was abused, so a jury would likely not find that she was "posed."

discretion to sentence this individual to a consecutive sentence to that federal district court cause number."); at 38 ("So what we're asking the court to do is really kind of simple, and that is just follow what the statutes tell the court to do in this situation, what the *presumption* is.").

The sentencing court found that Allen's crimes were "horrifying," "extremely serious," and "sickening." RP 42. It concluded that "leniency is [not] in any way appropriate" and it imposed a 10-year sentence and exercised its discretion to run that sentence consecutive to the federal sentence. RP (3/1/19) 43. Because Allen never argued that the State had manipulated the prosecution in a manner to render RCW 9.94A.589(3) absurd and, thus, inapplicable as a matter of law, the court did not make any findings as to accusations of manipulation.

Allen appealed his sentence. Issues as to the scope of the appellate record arose even before Allen submitted his opening brief in the court of appeals. He wanted to present only a few documents from the federal court to support a double jeopardy claim. The State objected because supplying only a few documents would present an incomplete picture of litigation in the federal court. The State suggested that Allen could file a

contemporaneous personal restraint petition that would allow both sides to supply all relevant documents. State v. McFarland, 127 Wn.2d 322, 335-39, 899 P.2d 1251 (1995)). The court of appeals denied Allen's motion to supply only a few documents, but instructed Allen to request permission to supplement the record after he had filed his opening brief.

Allen chose not to raise a double jeopardy claim and chose not to file a personal restraint petition. Thus, records from the federal prosecution are not a part of the record on appeal. Allen relied instead on unsupported allegations to argue that the State's manipulation of the proceedings rendered the normal statutory interpretation absurd. The court of appeals rejected his argument.

C. REVIEW SHOULD BE DENIED BECAUSE THIS STATUTE IS CLEAR AND THERE IS NO FACTUAL BASIS FOR ALLEN'S CLAIM THAT THE STATE MANIPULATED THE PROCESS TO MAKE APPLICATION OF THE STATUTE ABSURD

Allen argues that this case presents a special set of circumstances that requires his state sentence to run concurrent to his federal sentence, despite clear language in RCW 9.94A.589(3) that authorizes a consecutive sentence at the court's discretion. He argues that a special interpretation is needed because the State

manipulated the prosecution to engineer a consecutive sentence.[2] He argues that this "raises an issue of substantial public importance warranting review under RAP 13.4(b)(4)." Pet. at 6.

The State respectfully asks this Court to deny review. The circumstances Allen alleges – including deliberate manipulation to subvert statutory principles – are not established by competent evidence and have never been found by any court. Indeed, except for trial counsel's unsworn statements at sentencing, there is no proof of manipulation at all in the record on appeal. If there is no proof of manipulation and malfeasance, then Allen's argument – which is premised on case law disapproving of manipulations of court processes – collapses. Thus, the plain language of the statute should not be ignored. There is no absurdity.

If Allen truly wanted to establish malfeasance on the part of the State, he should have pursued a personal restraint petition, which would have allowed him to support his assertions with facts outside the appellate record. Or, he could have supplied the necessary documents through, as the court of appeals suggested,

[2] Allen uses a variant of the word "manipulate" no fewer than 18 times in his petition. Allen apparently intends the term "manipulate" to suggest its second meaning: "to control or play upon by artful, unfair, or insidious means especially to one's own advantage." MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary (last visited Jan. 28, 2021).

a motion to supplement the record under RAP 9.11. Either procedure would have permitted the State to respond with information relevant to his claims. He chose not to take either course. The current record is, thus, woefully insufficient to support his claims.

1. THE PLAIN LANGUAGE OF RCW 9.94A.589(3) GRANTS THE TRIAL COURT DISCRETION TO IMPOSE A STATE SENTENCE CONSECUTIVE TO A PREEXISTING FEDERAL SENTENCE.

RCW 9.94A.589 contains multiple separate provisions addressing when sentences should rule concurrently or consecutively under different circumstances. Under subsection (1)(a) the legislature made clear that most ordinary sentences imposed on the same date or arising from the same conduct should run concurrently, and that a consecutive sentence could be imposed only if it were an exceptional sentence under RCW 9.94A.535. Subsection (1)(b), dealt with the special situation involving multiple “serious violent offenses” arising from separate and distinct criminal conduct. A very special set of rules applies to that situation, with consecutive sentences *mandated* for the most serious offenses, but not as to non-serious violent offenses.

Subsection (1)(c). Subsection (1)(c) deals with the even more unique situation where an offender is convicted of similar firearms offenses. Like with subsection (1)(b), consecutive sentences are *mandatory*.

Subsection (2) deals with a different scenario. Under subsection (2)(a), when a person under sentence for a felony is thereafter sentenced to another term of confinement, the second sentence *must* be consecutive to the first.

Subsection (3) deals with yet another scenario, but here the sentencing court *has discretion* to impose either concurrent or consecutive sentences. It provides that if a person is sentenced for a second felony case that was not committed while under sentence for another felony, the sentence is presumed concurrent, unless the court expressly states that the sentence should be consecutive. Unlike in subsection (1)(a), however, the court need not find "substantial and compelling reasons" to depart from the range.

There is nothing ambiguous or absurd about these provisions. The statute mandates concurrent sentences in some instances, mandates consecutive sentences in others, and grants discretion to the judge to impose either a consecutive or a concurrent sentence in the situation presented here, i.e., where a

state sentence is imposed after a federal sentence has been imposed, where the state felony was not committed while the offender was under sentence for the federal offense.

Nor is there anything "absurd" about applying those provisions in this case. Child pornography is a federal offense and was properly prosecuted as such. Child molestation and child rape are offenses committed physically against a child and cannot be prosecuted in federal court unless the crimes occurred on federal property or land. When the case came on for sentencing in state court, the federal sentence had already been imposed, so the court had the authority to impose either consecutive or concurrent sentences under RCW 9.94A.589(3). That is precisely what the legislature has authorized.

The court chose to impose a consecutive sentence based on the nature of the offense and based on the defendant's lack of genuine remorse. RP (3/1/19) 42-43. Unfortunately, important sentencing documents considered by the sentencing court were not filed with the clerk.[3] For instance, the defendant had written a letter to Judge Zilly before the federal sentencing. RP (3/1/19) 25-26.

[3] This is yet another example of how the absence of a full record of the federal and state proceedings distort the view of this case.

The state sentencing judge referred obliquely to this letter in his comments, and noted that the defendant's oral statement at the state sentencing evinced some greater degree of remorse, but the judge did not find it sufficient to counteract the other worrisome feature of the defendant's crime and his subsequent behavior. RP (3/1/19) 42-43. Defense counsel's failure to ensure filing of these documents was perhaps not seen as significant because the defendant was not arguing that, as a matter of law, the court was unable to impose a consecutive sentence.

2. THE TRIAL COURT DID NOT ACCEPT ALLEN'S UNSUPPORTED FACTUAL ACCUSATIONS; THEY DO NOT PROVIDE A BASIS TO IGNORE PLAIN STATUTORY LANGUAGE.

Allen argues that the plain language of the statute should not control because the state engaged in malfeasance. He compares the state's conduct to situations like where a defendant absconded sentencing, State v. Moore, 63 Wn. App. 466, 820 P.2d 59 (1991), or where a state deliberately manipulated multiple offenses to ensure a longer sentence. State v. Oppelt, 172 Wn.2d 285, 287, 257 P.3d 653 (2011). Such cases relied on facts showing misconduct.

But those comparisons are inapt because Allen has never supplied any evidence, like documents from the federal case or testimony from either his federal lawyer or his state lawyer, that would be necessary to prove the factual predicate, i.e., that state prosecutors manipulated the case.

There is no evidence as to why the federal case took place first, why the state case did not proceed simultaneously, what plea negotiations occurred in both courts, whether the federal lawyer and the state lawyer were aware of the possibility of a consecutive sentence, what they did with such information, and why they failed to challenge the prosecutor's conduct contemporaneous with the prosecutions. Instead, even though he knew he could present relevant documentation at both the trial court and the court of appeals, Allen has chosen to rely on unsworn assertions and innuendo from his trial lawyer, rather than on evidence.

For example, Allen repeatedly suggests that Prosecutor Gregson manipulated the prosecution in federal and state court to engineer a consecutive sentence in state court. These assertions are not supported by any evidence. Prosecutor Gregson appeared in the state case only once, to enter an order to dismiss charges after federal charges were filed. That is neither surprising nor inappropriate. She never appeared again in the state case over the following years. Counsel of record for the State was Mr. Brian Wynne, who ultimately handled the sentencing hearing.

Allen has no evidence that this case was submitted to federal court simply to force an exceptional sentence in state court. A case can be initiated in federal court in a myriad of ways and for a whole host of reasons. A law enforcement agency might present the case directly to federal and state prosecutors. Federal prosecutors may decide to initiate a case, despite the existence of a state prosecution, because they have a greater capacity to pursue forensic investigation of cellular telephones, or because the investigation might reveal additional crimes, like dissemination of child pornography, or because the federal case will lead to greater punishment. Or, as happened here, prosecution for the "production" of child pornography was not possible. Any of these

reasons would justify prosecution in federal court, none would be improper, and there is simply no evidence in this record as to why this case was filed in federal court.

It is also important to correct some misperceptions in the petition for review that might influence this Court's decision whether to grant review. For example, Allen asserts that the state is "double-dipping" because it gets to count the federal convictions in the state offender score. But convictions stemming from the videos filmed by Allen would have added to Allen's offender score even if they were prosecuted in state court as, for example, depictions of minors engaged in sexually explicit conduct, instead of in federal court as production of pornography. Allen's assertions on this point add no evidence as to the State's motives.

Allen also fails to acknowledge that the child *molestation* cases could not be prosecuted in federal court, at all. He ignores that the state did not simply recharge the same case as it had charged in 2016. In 2016, the State filed one count of first degree rape of a child and one count of first degree child molestation, CP 77, but upon the refiling of the Information in 2018, the State elected to charge two counts of first degree child molestation, CP 1-2, even though the evidence showed that the defendant committed

two counts of child *rape* (involving penetration) and one count of child molestation. Had Allen been prosecuted wholly in state court, and had plea negotiations failed, he would have faced rape charges, not just molestation charges, and a longer sentencing term if convicted of these higher crimes. RP (3/1/19) 41-42. In other words, he would have faced additional and more serious charges.

D. CONCLUSION

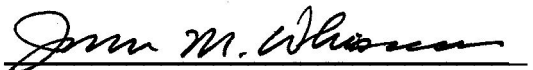
The plain language of this statute gives a trial court discretion to impose a state sentence that is consecutive to the federal sentence. There is nothing absurd about this provision or about its application to this case. Allen has failed to support his accusations of malfeasance with any evidence, and no court has found manipulation or other malfeasance. Had Allen been serious about that claim, and had he wished the matter to be fully considered based on evidence, he would have supplied such evidence in the trial court or in the appellate court pursuant to RAP 9.11, as he was invited by the court of appeals to do.

This case is fact-bound and factually unsupported. It does not present an issue of broad public import as required by RAP 13.4(b)(4). Allen's petition for review should be denied. He can pursue a personal restraint petition if he believes his claim has factual merit.

DATED this 5th day of February, 2021.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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