NO. 31020-5-III

IN THE WASHINGTON COURT OF APPEALS
DIVISION THREE

STATE OF WASHINGTON,

Plaintiff-Respondent,

v.

JASON GRAHAM,

Defendant-Appellant.

APPELLANT'S OPENING BRIEF

Appeal from the Spokane County Superior Court
The Hon. Maryann C. Moreno, Superior Court Judge
No. 02-1-00202-2

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1. Jason Graham assigns error to the entry of the judgment and sentence in this case.

2. The trial court erred as a matter of law when it concluded that its "hands [were] tied" at sentencing and that it lacked a legal basis to impose an exceptional sentence downward.

3. The trial court erred as a matter of law when it concluded that the "multiple offense policy" mitigating factor set forth in RCW 9.94A.535(1)(g) does not apply to multiple serious violent offenses sentenced under RCW 9.94A.589(1)(b).

4. To the extent that the trial court considered the "multiple offense policy" mitigating factor at all, it misstated the prevailing legal standard governing the application of that factor.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court have the discretion to impose an exceptional sentence downward for multiple serious violent offenses sentenced pursuant to RCW 9.94A.589(1)(b)?

2. Does the "multiple offense policy" mitigating factor set forth in RCW 9.94A.535(1)(g) apply to multiple serious violent

offenses which would otherwise be subject to RCW 9.94A.589(1)(b)?

3. Is RCW 9.94A.535(1)(g) ambiguous, and if so, does the rule of lenity require that it be interpreted in the manner most favorable to Mr. Graham?

4. Did the trial court misstate the prevailing legal standard governing the application of RCW 9.94A.535(1)(g)?

5. Where the trial court: (a) clearly expresses a desire to impose a less severe sentence than the presumptive sentence calculated under the Sentencing Reform Act (SRA); (b) concludes that its "hands are tied" and that it must impose a standard range sentence; and (c) is mistaken in its belief that it lacks the discretion to impose an exceptional sentence, does the Supreme Court's decision in *In Re PRP of Mulholland*, 161 Wash.2d 322, 166 P.3d 677 (2007) require reversal and remand for resentencing?

III. STATEMENT OF THE CASE

Procedural History

Jason Graham was convicted by a jury in 2003 of two counts of attempted first degree murder, four counts of first degree assault,

one count of second degree assault, one count of first degree unlawful possession of a firearm, one count of first degree possession of stolen property, and one count of taking a motor vehicle without permission. All of the charges stemmed from a single incident which occurred in January 2002—an incident in which no one other than Mr. Graham himself was injured. On August 18, 2003, the trial court sentenced Graham to a total of 1,225.5 months (102.1 years) in prison. Of that sentence, 33 years consisted of mandatory consecutive firearm enhancements.

Graham appealed, and this Court initially affirmed the judgment. *State v. Jones*, 2006 WL 3479055 (2006). The Washington Supreme Court then granted review and remanded the case for reconsideration in light of *State v. Williams-Walker*, 167 Wash.2d 889, 225 P.3d 913 (2010). *State v. Graham*, 169 Wash.2d 1005 (2010). Thereafter, this Court remanded to the Spokane County Superior Court for re-sentencing. *State v. Graham*, 2011 WL 3570120 (2011). Graham's subsequent petition for review (pertaining to other sentencing issues) was denied. *State v. Graham*, 173 Wash.2d 1011 (2012). This concluded Graham's first appeal.

On June 22, 2012, the trial court re-sentenced Graham to a total of 985.5 months (82.1 years) in prison. CP 67-81. Of this sentence, 13 years consists of mandatory consecutive deadly weapon enhancements.

Graham timely filed this appeal. CP 181-99.

Overview of the Evidence at Trial

In Graham's first appeal, this Court summarized the facts of the case as follows:

> On January 7, 2002, at approximately 1 a.m., Spokane Police Officer Christopher Lewis pulled over a speeding Toyota 4Runner at Scott Street and First Avenue. Officer Lewis stopped his patrol car behind the 4Runner. As he emerged from the patrol car gunfire erupted from inside the 4Runner, shattering the rear window. Officer Lewis dove to the ground and the 4Runner sped away. Officer Lewis chased the 4Runner to a parking area at First Avenue and Division Street, where the 4Runner rolled and came to rest on the driver's side. The passenger door opened and Jeremiah Jones jumped out and fled down some railroad tracks. He soon surrendered to police. Jason Graham then emerged, holding a gun. He paused, looked at Officer Lewis and ran down the railroad tracks.
>
> Officer Aaron Ames responded to the area. He saw Mr. Graham armed with an AK-47 assault rifle. He drew his gun and ordered Mr. Graham to drop his weapon. Mr. Graham continued to hold the AK-47 with both hands, pointed down, and responded that "I am really fucked up" or "I really fucked up" and that he just wanted to leave. When Mr. Graham took off, Officer Ames followed while attempting to maintain

> protective cover. At one point, Mr. Graham turned and raised his weapon slightly as if to point it at Officer Ames. As Mr. Graham fired, Officer Ames retreated for cover while Mr. Graham fled toward the Intermodal Center, a commercial bus and train terminal.
>
> Officer John Stanley of the canine unit arrived to assist. As Officer Stanley drove his patrol car up the entrance ramp and through the covered bus passenger loading area, Mr. Graham stepped out from between two parked vehicles and started shooting at Officer Stanley's car. Officer Stanley accelerated through the passageway and down the exit ramp and joined other officers taking position on that side of the building.
>
> Officer Alan Edwards arrived at the scene and loaded Sergeant Daniel Torok, Officer Kevin Vaughn, and Officer Jason Uberuaga into his patrol car. As Officer Edwards approached the Intermodal Center, gunfire erupted. Sergeant Torok saw Mr. Graham on the ramp, approximately 15 feet above street level, shooting at the patrol car. Officer Edwards and Sergeant Torok each understood that they were in a vulnerable position. Sergeant Torok, Officer Vaughn, and Officer Uberuaga got out of the vehicle and took cover. Sergeant Torok fired a shot at Mr. Graham. Officer Ames also caught up with Mr. Graham and fired. Mr. Graham was hit and taken into custody. Police found Mr. Jones' 9-mm Daewoo pistol in the 4Runner.

State v. Jones, 2006 WL 3479055 (2006) (citations to trial record omitted).

No one other than Graham was injured during these events.

Graham's 2012 Resentencing

At the 2012 resentencing hearing, Graham asked the trial court to impose an exceptional sentence downward of 25 years confinement. Graham argued that an exceptional sentence was legally authorized by the "multiple offense policy" mitigating factor set forth in RCW 9.94A.535(1)(g). Graham also presented voluminous evidence demonstrating his extraordinary rehabilitation during his first 10+ years of incarceration. *See* CP 82-162 (*Defense Sentencing Memorandum and Appendices*); RP 6-11; 15-16; 17-24 (defense presentation at resentencing).

The trial court was "very impressed" with Graham's rehabilitation, and stated that "there's really no doubt in my mind that you've become a changed person since you've been in prison." RP 24-25. Nevertheless, the court concluded that it did not have a legal basis to impose and exceptional sentence:

> Your lawyer has argued one, basically one [mitigating factor] to me, and that is the application of the multiple offense policy. I spent some time with this, because, as your lawyer says, it's not really well defined. It's defined, but in practice it's hard to really—really apply. What I discovered in some—frankly some unpublished opinions out of Division

> III,[1] at least from what I can tell—and I haven't found anything out of any other divisions—is that ***the application of the multiple offense policy to justify a downward departure really doesn't apply to the concurrent/consecutive, the consecutive sentencing provisions for serious violent offenses. [RCW] 9.94A.589(1)(a) talks about when you're scoring an offense and you have other current offenses, if there are too many other current offenses, it might be appropriate to impose an exceptional sentence. But if you look at Subpart B, the multiple offense policy doesn't really apply to Subpart B, because with serious violents you aren't scoring, you aren't taking into consideration the other current offenses.***

RP 26-27 (emphasis supplied).

The trial court then imposed the 82 year sentence described above. In doing so, the court lamented:

> I don't mind saying, Mr. Graham, that ***I don't agree with this sentence. I don't agree with it.*** I'm not suggesting that you don't deserve a punishment. I'm not suggesting that you should be forgiven, that everything you've done since then makes up for your crimes. But without some other mitigating circumstance, ***my hands are tied***. Again, I don't write the laws; the legislature writes the laws. And this type of a scenario was something that was anticipated by the law-writers when they wrote the law. So ***I don't believe that I have a choice but to sentence you within the standard sentence range.***

RP 29 (emphasis supplied).

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[1] The trial court later sent the parties a letter citing the unpublished decisions on which it relied. CP 180.

IV. ARGUMENT

Standard of Review

A sentencing court's determination of whether a legal basis exists to support a departure from the standard range is a question of law which this Court reviews *de novo*. *State v. Law*, 154 Wash.2d 85, 93, 110 P.3d 717 (2005). Likewise, questions of statutory construction—in this case the meaning of RCW 9.94A.535(1)(g)—are also reviewed *de novo*. *State v. Cooper*, ___ Wash.2d ___, 294 P.3d 704, 705 (2013).

A Sentencing Court Has the Discretion to Impose an Exceptional Sentence Downward for Multiple Serious Violent Offenses Which Would Otherwise Be Subject to RCW 9.94A.589(1)(b).

RCW 9.94A.589 governs the calculation of standard ranges and the imposition of concurrent and consecutive sentences in cases where there are multiple current offenses. It provides in relevant part:

> (1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted

> as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.
>
> (b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

In *In Re PRP of Mulholland*, 161 Wash.2d 322, 166 P.3d 677 (2007), the Supreme Court squarely addressed the question of whether the consecutive sentencing provisions of RCW 9.94A.589(1)(b) are subject to a mitigated exceptional sentence. The Court unequivocally held that the answer to that question is "yes," and further held that in the context of a personal restraint petition the trial court's failure to recognize that it had the discretion

to impose an exceptional sentence downward for multiple serious violent offenses constituted a fundamental defect which resulted in a complete miscarriage of justice. *Mulholland*, 161 Wash.2d at 327-34.

The "Multiple Offense Policy" Mitigating Factor Set Forth in RCW 9.94A.535(1)(g) Applies to Multiple Serious Violent Offenses Which Would Otherwise Be Subject to RCW 9.94A.589(1)(b). The Trial Court's Erroneous Belief to the Contrary, Coupled With Its Stated Desire to Impose a Lower Sentence, Mandates Reversal.

A court has the discretion to impose an exceptional sentence below the standard range if it finds that "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g). In Graham's case, the trial court concluded that this mitigating factor applies only to RCW 9.94A.589(1)(a), but not to RCW 9.94A.589(1)(b):

> [T]he application of the multiple offense policy to justify a downward departure really doesn't apply to the concurrent/consecutive, the consecutive sentencing provisions for serious violent offenses. . . [T]he multiple offense policy doesn't really apply to Subpart B. . .

RP 27. The trial court's analysis is incorrect as a matter of law.

Statutory construction "begin[s] with the plain language of the statute. If the plain language is unambiguous, [the Court] need go no further." *Cooper*, 294 P.3d at 706. *See also State v. Delgado*, 148 Wash.2d 723, 727, 63 P.3d 792 (2003):

> When statutory language is unambiguous, we look only to that language to determine the legislative intent without considering outside sources. Plain language does not require construction. When we interpret a criminal statute, we give it a literal and strict interpretation. ***We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.*** We assume the legislature means exactly what it says.

(quotations and citations omitted) (emphasis supplied).

By its plain language, RCW 9.94A.535(1)(g) authorizes an exceptional sentence when the "presumptive sentence" generated by RCW 9.94A.589 for multiple current offenses is "clearly excessive in light of the purpose of [the SRA], as expressed in RCW 9.94A.010." Subsections (1)(a) and (1)(b) of RCW 9.94A.589 both deal with calculating the presumptive sentence when there are multiple current offenses. RCW 9.94A.535(1)(g) does not distinguish between RCW 9.94A.589(1)(a) and RCW 9.94A.589(1)(b). If the legislature had intended to limit the application of RCW 9.94A.535(1)(g) to subsection (1)(a) of RCW

9.94A.589, it would have stated as much. Because the statute is unambiguous, the Court cannot limit its application by adding qualifying language to the statute.

The reasoning in *Mulholland* is controlling. In a situation closely analogous to the one presented here, the issue in *Mulholland* was whether the exceptional sentence provisions of RCW 9.94A.535 apply to both subsection (1)(a) and (1)(b) of RCW 9.94A.589. The specific language in RCW 9.94A.535 which the Court examined is as follows:

> A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations of this section. . .

The State argued that this language applies only to RCW 9.94A.589(1)(a). The Supreme Court rejected this argument based on the plain language of RCW 9.94A.535:

> In our judgment, the State's argument fails because it pays too little heed to the plain language of RCW 9.94A.535. As we have observed above, it provides that exceptional sentences may be imposed when sentencing takes place under RCW 9.94A.589(1). ***Because it does not differentiate between subsections (1)(a) and (1)(b), it can be said that a plain reading of the statute leads inescapably to a conclusion that exceptional sentences may be imposed under either subsection of RCW 9.94A.589(1).***

Mulholland, 161 Wash.2d at 329-30 (emphasis supplied).

The identical principle applies here—because RCW 9.94A.535(1)(g) does not differentiate between RCW 9.94A.589(1)(a) and 9.94A.589(1)(b), the inescapable conclusion is that the "multiple offense policy" mitigating factor applies to both subsections (1)(a) and (1)(b) of RCW 9.94A.589.

Even if 9.94A.535(1)(g) were somehow deemed to be ambiguous or "susceptible to more than one reasonable interpretation, the rule of lenity [would] require[] this Court to adopt the interpretation most favorable to the defendant." *State v. Flores*, 164 Wash.2d 1, 17, 186 P.3d 1038 (2008). *See also In Re PRP of Sietz*, 124 Wash.2d 645, 652, 880 P.2d 34 (1990) ("[T]he rule of lenity applies to the SRA and operates to resolve statutory ambiguities, absent legislative intent to the contrary, in favor of a criminal defendant."); *State v. Breaux*, 167 Wash. App. 166, 273 P.3d 447 (2012) (applying the rule of lenity to resolve ambiguity in RCW 9.94A.589(1)(b) regarding the scoring of multiple serious violent offenses).

The trial court believed that it was prohibited from imposing an exceptional sentence downward. This belief was based on an erroneous interpretation of the application of RCW 9.94A.535(1)(g) to RCW 9.94A.589(1)(b). At the same time, the trial court made it clear that it wanted to impose a lower sentence on Graham:

> I don't mind saying, Mr. Graham, that ***I don't agree with this sentence. I don't agree with it.*** I'm not suggesting that you don't deserve a punishment. I'm not suggesting that you should be forgiven, that everything you've done since then makes up for your crimes. But without some other mitigating circumstance, ***my hands are tied***. Again, I don't write the laws; the legislature writes the laws. And this type of a scenario was something that was anticipated by the law-writers when they wrote the law. So ***I don't believe that I have a choice but to sentence you within the standard sentence range.***

RP 29 (emphasis supplied).

> The record does not show that it was a certainty that the trial court would have imposed a mitigated exceptional sentence if it had been aware that such a sentence was an option. Nonetheless, the trial court's remarks indicate that it was a possibility. In our view, this is sufficient to conclude that a different sentence might have been imposed had the trial court applied the law correctly. Where the appellate court cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option, remand is proper.

Mulholland, 161 Wash.2d at 334 (quotations omitted).

This Court should reverse and remand for resentencing.

To the Extent that the Trial Court Considered Applying the "Multiple Offense Policy" Mitigating Factor At All, the Court's Brief Statements Reflect a Misunderstanding of the Prevailing Legal Standard.

After concluding that the "multiple offense policy" mitigating factor does not apply to RCW 9.94A.589(1)(b), the trial court did go on to make passing reference to those cases that have actually sought to articulate a legal standard for application of RCW 9.94A.535(1)(g):

> There is a discussion within these [Court of Appeals] opinions regarding an analysis of whether they are—***the additional current charges are nonexistent, trivial, or trifling.*** Certainly in a situation where we have someone firing a weapon at an officer, firing on another officer who's driving a motor vehicle, firing on a patrol vehicle containing three other officers, I hate to even use the words "nonexistent, trivial, or trifling."

RP 29 (emphasis supplied). The trial court's brief comments misstate the legal standard that has been applied by the Courts of Appeals in analyzing 9.94A.535(1)(g).

As noted above, RCW 9.94A.535(1)(g) authorizes a downward departure from the presumptive sentence when "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is ***clearly excessive in light of the***

purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g) (emphasis supplied).

Meanwhile, RCW 9.94A.010 describes the purposes of the SRA:

> 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.

The Washington Supreme Court has never interpreted the precise meaning of the phrase "clearly excessive" in RCW 9.94A.535(1)(g). The Courts of Appeals, however, have generally agreed that this mitigating factor will apply if the incremental harm created by the additional offenses is "nonexistent, trivial or trifling." *See, e.g.*, *State v. Sanchez*, 69 Wash. App. 255, 261-62, 848 P.2d

208, *rev. denied*, 122 Wash.2d 1007 (1993) (upholding application of "multiple offense policy" mitigating factor to three counts of delivery of cocaine); *State v. Moore*, 73 Wash. App. 789, 799-800, 871 P.2d 642 (1994) (upholding application of "multiple offense policy" mitigating factor to 14 felony counts of drug trafficking and trafficking in stolen property); *State v. Fitch*, 78 Wash. App. 546, 897 P.2d 424 (1995) (applying *Sanchez* to uphold imposition of exceptional sentence based on "multiple offense policy" mitigating factor); *State v. Calvert*, 79 Wash. App. 569, 583, 903 P.2d 1003 (1995), *rev. denied*, 129 Wash.2d 1005 (1996) (upholding application of "multiple offense policy" mitigating factor to multiple counts of forgery given "the close relationship in time, intent and scheme of the various" crimes); *State v. Smith*, 124 Wash. App. 417, 437, 102 P.3d 158 (2004), *aff'd*, 159 Wash.2d 778, 154 P.3d 873 (2007) (upholding one day sentence for three counts of second degree assault where standard range called for 15-20 months in prison; "The trial court reserves broad discretion to decrease a sentence" pursuant to RCW 9.94A.535(1)(g).).

The trial court misconstrued this line of cases to require a showing that the "additional current charges" themselves are nonexistent, trivial, or trifling. RP 29. But the cases focus on the *incremental harm* which flows from the additional charges, not on whether the crimes themselves are "trivial." This is a subtle but important distinction. Graham has never contended that the serious crimes of which he was convicted are trivial or trifling. What he argued in the trial court was that the minimal incremental harm which flowed from each additional shot he fired justified application of RCW 9.94A.535(1)(g) to impose an exceptional sentence downward.

All ten of the convictions in this case arose from a single incident which lasted no more than a few minutes. The shots fired by Graham during those several minutes resulted in multiple convictions for attempted first degree murder and for first degree assault. But because no one was actually hit (apart from Graham himself), the incremental harm caused by each additional shot fired

by Graham was in fact non-existent.[2] Given the lack of incremental harm engendered by each additional shot, robotic application of RCW 9.94A.589(1)(b) on the specific facts of this case resulted in a sentence which is clearly excessive in light of the stated purposes of the SRA—proportionate and just punishment which sufficiently protects the public while making frugal use of the state's scarce resources. As in *Calvert*, "the close relationship in time, intent and scheme of the various" crimes warranted the exercise of the trial court's broad discretion in applying the "multiple offense policy" mitigating factor. But because the trial court misapprehended the law, it mistakenly believed it lacked the discretion to impose the lesser sentence it clearly thought was appropriate.

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[2] Moreover, Jury Instruction No. 27 allowed the jury to convict Jason of multiple counts of first degree assault based upon a single intent to inflict great bodily harm. Instruction No. 27 reads:

> Under the crime of first degree assault, a person's intent to inflict great bodily harm upon another person transfers to an unintended person. ***An intent against one person is intent against all persons.***

CP 34 (emphasis supplied).

The trial court's misunderstanding of the prevailing legal standard governing application of RCW 9.94A.535(1)(g), coupled with its stated desire to impose a lower sentence, necessitates reversal and remand for resentencing. *See Mulholland*, 161 Wash.2d at 334; *State v. McGill*, 112 Wash. App. 95, 100, 47 P.3d 173 (2002) ("Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law.")

V. CONCLUSION

For the foregoing reasons, this Court should reverse and remand for resentencing.

DATED this 14th day of March, 2013.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Steven Witchley, hereby certify that on March 14, 2013, I served a copy of the attached brief on counsel for the State of Washington and on the appellant by causing the same to be mailed, first-class postage prepaid, to:

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