No. 31206-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

FILED
March 11, 2013
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, Respondent

v.

JOHN H. FRIEDLUND, Appellant

APPEAL FROM THE SUPERIOR COURT

OF STEVENS COUNTY

OPENING BRIEF OF APPELLANT

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B. Mr. Friedlund's 120-month Exceptional Sentence Was Clearly Excessive Under The Circumstances Of This Case.

C. Mr. Friedlund Received Ineffective Assistance Of Counsel.

Issues Related To Assignments Of Error

1. Did the trial court err when it failed to enter the statutorily mandated written findings of fact and conclusions of law to support an exceptional sentence?
2. Is a 120-month exceptional sentence clearly excessive when the standard range is three to nine months and the defendant is approximately 80 years of age?
3. Did Mr. Friedlund receive ineffective assistance of counsel?

II. STATEMENT OF FACTS

John Friedlund was charged by amended information with one count of theft in the first degree, where the State alleged a series of transactions which were part of a common plan or scheme. The State also charged the aggravating circumstances of using a position of trust to facilitate the offense, and a victim who was particularly vulnerable or incapable of resistance. The violation date range was January 1, 2007 to December 31, 2010. CP 88-90. He was also charged with criminal mistreatment in the second degree. The two matters were joined for trial. CP 80.

John Friedlund was a close family friend of Francis Swan and her husband for about 60 years. RP 116, 338. He testified that Mr. Swan and his wife thought of him as a son, and shared their investment and financial information with him. RP 338; 342.

In 2000, after her husband passed away, Ms. Swan called Mr. Friedlund to help her. RP 340. He moved to her home in 2001 when she was 96 years old. RP 341. He was 68 or 69 years old. CP 88.

April 16, 2001, attorney Charles Schuerman prepared a will and power of attorney documents for Ms. Swan. RP 177-79. She named Mr. Friedlund as the primary 'attorney in fact' and

designated a relative as an alternate. RP 179. The attorney did not question Ms. Swan's competence at the time he prepared the documents for her. RP 188.

Over the course of time, Ms. Swan went from being able to join Mr. Friedlund at the table for dinner, to spending most her time in her bedroom. RP 297;311. Mr. Friedlund instructed caregivers to keep her in her bedroom. She was rarely allowed any phone calls or visitors. RP 118;267;303.

Mr. Friedlund brought his belongings to the home. RP 312. After 2004, caregivers described that he stored old newspapers, guns, ammunition, fishing poles and reels, papers, magazines, and garbage in the home. RP 119;298;312. It became so cluttered, with boxes from floor to ceiling, there were only narrow pathways to get around in the home. RP 134;234;298. Mr. Friedlund instructed the caregivers that no one was to touch his possessions. RP 313. Caregivers also alleged that he stored rotten food at the home, ate some of it himself, and directed them to feed it to Ms. Swan. RP 264;301;303. The yard also became more unkempt, with overgrown grass and dog feces littering the yard. RP 119.

In 2006, an independent financial advisor from Edward R. Jones met with Ms. Swan. RP 95. She was 101 years old. He

testified she had difficulty understanding and managing her assets. RP 96. Increasingly dependent on round the clock caregivers, she needed a consistent cash flow to meet the expense. RP 97. Ms. Swan transferred approximately $800,000 into an Edward R. Jones account. RP 97.

The advisor had meetings with Ms. Swan and Mr. Friedlund at his office and in her home, but as she became frailer, he had less contact with her and more contact with Mr. Friedlund. RP 98. At some point, prior to 2007, based on the financial manager's instruction, Mr. Friedlund brought in the power of attorney documentation to substantiate his authority to make financial decisions. RP 98-99.

In 2007, at Ms. Swan's direction, Mr. Friedlund instructed that the assets in the Edward R. Jones account were to be transferred out and placed in a bank account. RP 101. The advisor went to Ms. Swan's home and spoke with her. As a result of that contact, the money was transferred into a joint bank account in the names of Mr. Friedlund and Ms. Swan. RP 105.;345. Mr. Friedlund began to move money from the joint checking account into his personal bank account. RP 138;181.

Between the years of 2004 and 2010, Mr. Friedlund hired, supervised and paid Ms. Swan's caregivers. RP 260;296;308;324. Between 2007 and 2010, the period of alleged violation, the cost for the caregivers was about $200,000. He paid the caregivers and other household expenses from both accounts. RP 260;296; 308;324;351-52. Mr. Friedlund also made numerous purchases with the Swan bank account funds, which he stated were approved by Ms. Swan. Mr. Friedlund testified that all property was appropriated openly and avowedly under a good faith claim of title. RP 336.

He said:

> "…she was bothered, she says, 'We're writing checks out for all the help and everything, and you're doing more than anybody keeping everything organized. You need to get paid.' And I says, 'I'm not gonna write…myself checks.' And, so then she started in, 'Well, then I want you to take our money…' that she always considered our money, buy these different things..." RP 349.

The purchases included two trucks, a horse trailer, hay, an NRA membership, and a car. RP 141-146. He also paid for his prescription medications and doctor bills. RP 143. He testified that she also directed him to make wire transfers of money to

individuals the two of them met on the website "gaysugardaddyfinder.com". RP 239; 33;382;385. He stated that he and Ms. Swan used the website because were both interested in what caused homosexuality. RP 386-87. The wire transfers totaled over $400,000. RP 143-144.

The court gave the following pertinent jury instructions.

Instruction No. 8:

> To convict the defendant of the crime of theft in the first degree, each of the following four elements of the crime must be proved beyond a reasonable doubt: (I) That on or between January 1,2007 to December 31,2010, the defendant (a) wrongfully obtained or exerted unauthorized control over property of another; or (b) by color or aid of deception, obtained control over property of another and (2) That the property exceeded $5,000 in value; (3) That the defendant intended to deprive the other person of the property; and (4) That this act occurred in the State of Washington….
>
> CP 101

Instruction 8-A:

> It is a defense to a charge of theft that the property or service was appropriated openly and avowedly under a good faith claim of title, even though the claim be untenable. The State has the burden of providing beyond a reasonable doubt that the defendant did not appropriate the property openly and avowedly under a good faith claim of title. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty. CP 102.

After a jury trial, Mr. Friedlund was found guilty of one count of first-degree theft, with aggravating circumstances: of using a position of trust to facilitate the offense, and the victim was particularly vulnerable or incapable of resistance. The jury did not reach a verdict on the charge of criminal mistreatment. CP 120-21. Mr. Friedlund had no criminal history. The standard range sentence was three to nine months. The court imposed an exceptional sentence of 120 months. CP 129. Mr. Friedlund was 79 years old at the time of sentencing. He makes this timely appeal. CP 137.

III. ARGUMENT

A. The Trial Court Erred When It Failed To Enter Written Findings Of Fact To Support An Exceptional Sentence.

If a jury finds, unanimously and beyond a reasonable doubt, facts alleged by the State in support of an aggravated sentence, the court may impose a sentence that exceeds the standard range, if it determines that the facts found are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.537(6); *State v. Hyder,* 159 Wn.App. 234, 259-60, 244 P.3d 454, *rev. denied,* 171 Wn.2d 1024 (2011).

Whenever a sentence outside the standard range is imposed, the trial court is required to set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. "Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts…and the public of the reasons for deviating from the standard range." *In re Pers. Restraint of Breedlove,* 138 Wn.2d 298, 311, 979 P.2d 417 (1999). This court reviews whether the trial court's reasons for imposing an exceptional sentence are substantial and compelling, using a *de novo* standard. *Hyder,* 159 Wn.App. at 262.

Here, the trial court did not enter any written finds of fact or conclusions of law. Paragraph 2.4 of the Felony Judgment and Sentence is as follows:

> **Exceptional Sentence:** The court finds substantial and compelling reasons that justify an exceptional sentence above the standard range for Count 1…Aggravating factors were found by the jury by special interrogatory…. Findings of fact and conclusions of law are attached in Appendix 2.4.

CP 128.

By failing to make the required finding that substantial and compelling reasons justified an exceptional sentence, the trial court neglected to fulfill its statutory sentencing obligation under RCW

9.94A.535. Mr. Friedlund respectfully requests this Court to remand for entry of the required written findings. *State v. Hale,* 146 Wn. App. 299, 306, 189 P.3d 829 (2008). The findings and conclusions must be based only on evidence already taken. *State v. Head,* 136 Wn.2d 619, 625, 964 P.2d 1187 (1998). Further, this Court should allow for any necessary supplemental briefing in accordance with *Hale. Hale,* 146 Wn.App. at 304.

B. Mr. Friedlund's 120-month Exceptional Sentence Was Clearly Excessive Under The Circumstances Of This Case.

Generally, a court must impose a sentence within the standard sentence range. *State v. Fowler,* 145 Wn.2d 400, 404, 38 P.3d 335 (2002). It may, however, impose a sentence above the standard range for reasons that are "substantial and compelling." RCW 9.94A.535. An appellate court determines the appropriateness of an exceptional sentence by answering three questions: (1) whether the reasons given by the sentencing judge are supported by evidence in the record, under the clearly erroneous standard of review; (2) whether the reasons justify a departure from the standard range, under *de novo* review, as a matter of law; or (3) whether the sentence is clearly too excessive

or too lenient, under the abuse of discretion standard of review. RCW 9.94A.585(4); *State v. Ferguson,* 142 Wn. 2d 631, 15 P.3d 1271 (2001). A trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Under RCW 9.94A.585(4)(b), a reviewing court may reverse a sentence outside the standard range if the sentence imposed was clearly excessive. The 10-year sentence imposed on Mr. Friedlund meets this requirement.

Mr. Friedlund had no criminal history. The standard range was three to nine months: the court imposed a sentence 40 times that of the low end of the standard range. He was 79 years old at the time of trial, and takes prescription medications for his heart.

A trial court does not abuse its discretion in determining the length of an exceptional sentence unless it relies upon an impermissible reason or imposes a sentence so long that it shocks the conscience of the reviewing court. *State v. Ross,* 71 Wn.App. 556, 568, 861 P.2d 473, 71 Wn.App. 556, 883 P.2d 329 (1993). Under these circumstances, the imposition of the 120-month sentence amounts to a life sentence for Mr. Friedlund. It is clearly excessive, shocking, and an abuse of discretion.

C. Mr. Friedlund Received Ineffective Assistance Of Counsel When Counsel Did Not Investigate Or Present A Defense Of Diminished Capacity.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to counsel. U.S. Const. Amend. VI. A claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed de novo. *In re Pers. Restraint of Brett,* 142 Wn.2d 868, 873, 16 P.3d 601(2001). To establish a claim of ineffective assistance of counsel, Mr. Friedlund must show (1) counsel's performance was deficieint, and (2) the deficient performance prejudiced him. *Strickland v. Washington,* 466 U.S. 668, 687, 1104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

To meet the first part of the test, the representation must have fallen below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Thomas,* 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Prejudice occurs where, but for counsel's deficient performance, there is a reasonable probability the outcome of the proceedings would have differed. *McFarland,* 127 Wn.2d at 335. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Thomas, 109 Wn.2d at 226. If counsel's conduct can be characterized as legitimate trial strategy, the performance is not deficient. *State v. Hendrickson,* 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). However, merely determining that a decision was strategic or tactical does not necessarily satisfy the *Strickland* reasonableness standard. *State v. Grier,* 171 wn.2d 17, 33-34, 246 P.3d 1260 (2011). Mr. Friedlund argues on appeal that he received ineffective assistance of counsel, in violation of his constitutional rights.

According to the International OCD Foundation and the Mayo Clinic, signs and symptoms of compulsive hoarding include: severely cluttered living spaces that threaten the health and safety of those living in the home; inability to discard items, keeping stacks of newspapers, magazines or junk mail; acquiring seemingly useless items, including garbage and rotten food; discomfort letting others touch or borrow items; and limited or no social interactions. Compulsive hoarding may develop along with other mental illnesses, such as dementia. [1]

[1] http://www.ocfoundation.org/uploaded Files/Hoarding; www.mayoclinic.com/health/hoarding.

Here, the State's evidence poignantly established that beginning in 2004, Mr. Friedlund, then 71 years old, displayed most or all of the symptoms of compulsive hoarding, as defined by the American Psychiatric Association[2]. Between 2007 and 2010, when he was 74 - 77 years old, Mr. Friedlund's behavior escalated to a pattern of compulsive hoarding, making purchases of allegedly unauthorized and useless items, transferring large sums of money to strangers, making poor judgments about hygiene and nutrition, and neglecting to pay utility and tax bills; all of which may have been symptomatic of increasing dementia. Defense counsel did not raise the possibility of or seek a clinical evaluation of Mr. Friedlund for a defense of diminished capacity.

A defense of diminished capacity arises out a mental disorder that is demonstrated to have had a specific effect on the individual's capacity to achieve the level of culpability required for a charged crime. *State v. Ferrick,* 81 Wn.2d 942, 944, 506 P.2d 860, *cert. denied,* 414 U.S. 1094, 94 S.Ct. 726, 38 L.Ed.2d 552 (1993), as modified by *State v. Griffin,* 100 Wn.2d 417, 418, 670 P.2d 265 (1983).

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[2] The Diagnostic and Statistical Manual (DSM-5) approved by the American Psychiatric Association added hoarding as a diagnosable psychiatric disorder beginning in 2013.

Under Washington law, intent is the culpable mental state necessary to sustain a conviction for first-degree theft. RCW 9A.56.020. Evidence of the compulsivity of the behavior as rooted in an organic brain disorder, would logically and by reasonable inference establish that Mr. Friedlund was incapable of having the necessary culpable mental state of intention to deprive, due to the diminution of capacity. The failure to either investigate and/or present evidence of diminished capacity fell below the professional objective standard of reasonableness based on all the circumstances.

The second part of the test for ineffective assistance of counsel is whether the defendant was prejudiced by the deficient performance. *McFarland,* 127 Wn.2d at 335. Here, there can be no question but that Mr. Friedlund was prejudiced. He was deprived of a statutorily available defense.

At trial, there was no explanation of how a very close friendship of over 50 years evolved into one senior citizen allegedly taking financial advantage of the other senior citizen. The verdict signaled the jury's disbelief of Mr. Friedlund's reasoning and explanation of his actions. The exceptional sentence imposed by the court indicated its belief that Mr. Friedlund deliberately and

intentionally squandered Ms. Swan's bank account. As the court said, "Your behavior has been predatory, and cruel, and self-serving, and your malignant manipulation of this elderly woman in her vulnerable state where she looked to you for protection is particularly reprehensible." RP 451.

Effective representation required the jury to have been given admissible, competent, and expert testimonial evidence about Mr. Friedlund's escalating mental state. Under the circumstances it was unreasonable not to address the possibility of organic factors: as a defense, diminished capacity would have allowed Mr. Friedlund to show a mental disorder had the specific effect by which his ability to entertain the mental state of intent to deprive was diminished. *State v. Gough,* 53 Wn.App. 619, 622, 768 P.2d 1028, *rev. denied,* 112 Wn.2d 1026 (1989). The outcome of the proceedings would likely have been different.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Friedlund respectfully requests this Court to reverse his conviction and remand for retrial; or in the alternative, to remand for entry of written findings of fact and conclusions of law as required by statute.

Dated this 8th day of March 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant JOHN H. FRIEDLUND, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Brief was sent by first class mail, postage prepaid on March 8, 2013 to: John H. Friedlund, c/o Spokane County Detention Services, 1100 W. Mallon Ave, Spokane, WA 99260; and by email per agreement between the parties to Timothy Rasmussen, Stevens County Prosecutor: trasmussen@co.stevens.wa.us.

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