69849-4

69849-4

NO. 69849-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN FOLDS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ERIN H. BECKER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Statutes

Other Authorities

A. ISSUE PRESENTED

Because Folds committed his crimes before the implementation of the Sentencing Reform Act of 1981, the trial court was required to impose a minimum term "reasonably consistent with the purposes, standards, and sentencing ranges" of the Act. The court examined the former and current standard ranges for Folds's crimes, considered the purposes of the SRA, and selected a minimum term of 114 months as its judgment of the appropriate minimum term for Folds's crimes. Did the trial court appropriately exercise its discretion in setting Folds's sentence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On December 13, 2010, the State of Washington charged the defendant, John Wayne Folds, with one count of Murder in the Second Degree. CP 1. This charge arose out of a homicide that had occurred nearly thirty years earlier, on February 15, 1983. CP 1. Folds ultimately entered a plea of guilty to amended charges of Manslaughter in the First Degree and Attempted Theft in the First Degree. CP 34-37, 47-48.

Because Folds committed his offenses prior to the implementation of the Sentencing Reform Act of 1981 ("the SRA"), the trial court was required to impose an indeterminate sentence, and to select a minimum

term for each offense, guided by the purposes, standards, and sentencing ranges reflected in the SRA. See section C.1, infra. Folds argued that the sentencing court should consider the 1984 standard range for Manslaughter in the First Degree: 36 to 48 months. CP 111-15; 2RP 45-46, 55.[1] The State argued that the court should consider the 2013 standard range: 86-114 months. CP 81-84. Both parties agreed that the court's choice of range on which to base its minimum-term decision rested in the court's sound discretion. CP 114; 2RP 15-18, 42-43, 45-48. The parties disagreed as to what standard the court should use in choosing to run the terms concurrently or consecutively, but again agreed that the decision was a discretionary one. 2RP 18-21, 55-57.

After hearing presentations from both sides, the court fixed Folds's minimum term at 114 months for Manslaughter in the First Degree and 4.5 months for Attempted Theft in the First Degree, largely accepting the State's argument regarding the appropriate minimum sentence.[2] CP 74, 79-80; 2RP 70. However, the court also exercised its discretion to run the

---

[1] The two volumes of the Verbatim Report of Proceedings are referred to as follows: 1RP is the volume including proceedings from March 11 and May 23, 2011, and November 30, 2012; 2RP is January 25, 2013.

[2] Although the State urged the trial court to consider the 2013 standard range of 86-114 months for Manslaughter in the First Degree, it also asked the court to exercise its discretion to impose a minimum term of 120 months on the manslaughter count and 60 months on the theft count, and to run them consecutively for a total of 180 months. CP 84; 2RP 17.

sentences concurrently, accepting Folds's recommendation. CP 75; 2RP 70-71. This appeal timely followed. CP 101.

2. SUBSTANTIVE FACTS[3]

On February 15, 1983, Frank Kuony flew to Seattle for a trade show. While on the plane, Kuony met Folds. When the plane landed, Folds accompanied Kuony while he rented a car and checked in at a Motel 6 in SeaTac at 3:45 a.m.

At 9:30 a.m., the hotel maid discovered Kuony's body in his room. He was lying on his back between the room's two beds. He was covered with stab wounds: six in the head and neck, four in the chest, two in the back, and numerous defensive wounds on his hands. Two ribs were broken. Kuony and the bedding were covered with blood. His belongings had been rifled through and tossed on the floor. Folds was gone.

A forensic reconstruction determined that the attack occurred on both beds in the room. Blood staining was consistent with the attack beginning while Kuony was lying on one of the beds. Castoff blood and spatter appeared on the upper wall and all the way across the room, as well

[3] Because Folds pled guilty prior to trial, this statement of facts is drawn from the Certification for Determination of Probable Cause and documents filed by the State in support of its sentencing recommendation. CP 2-5, 84-88, 97-100. There is significant disagreement between the parties about what actually occurred, resulting in the compromise resolution of Manslaughter in the First Degree. CP 103-05.

as on bedding in a manner consistent with Kuony having been stabbed while he was on the floor.

Kuony's possessions were scattered through the room on top of bedding and clothing, indicating that his killer had rifled through his property after Kuony was already dead or dying. The condition of the bathroom suggested that the killer had cleaned himself up before leaving the room.

At autopsy, semen was recovered from Kuony's mouth. Through DNA testing done in 2010, this semen was matched to Folds. Folds's DNA was also located on cigarettes in the motel room and towels in the bathroom.

Police contacted Folds in 2010 and asked to talk to him about an old case. As he got into the patrol car, he said, "Tell my wife I'm not coming back." He never claimed self-defense while talking with detectives.

C. ARGUMENT

Folds contends that the trial court committed legal error by imposing a minimum term sentence based on the 2013 standard sentencing range for Manslaughter in the First Degree rather than the range in effect

in 1984, closer in time to when Folds committed his offenses.[4] But the SRA standard ranges do not apply to Folds, who committed his crimes before the SRA's effective date. Rather, Folds was subject to an indeterminate sentence. The trial court was required to impose a minimum term after considering the purposes, standards, and sentencing ranges of the SRA. The court here did exactly that. Folds's argument should be rejected.

1. THE TRIAL COURT WAS REQUIRED TO SET A MINIMUM TERM AFTER CONSIDERING THE PURPOSES, STANDARDS, AND SENTENCING RANGES OF THE SRA.

Prior to the legislature's adoption of the Sentencing Reform Act, a person convicted of a felony would have his sentence determined by decisions of the trial court, the board of prison terms and paroles, and the prosecutor. Specifically, the trial court was to fix the maximum term of the defendant's sentence.[5] RCW 9.95.010 (1977). That maximum term was to be the maximum provided by law for the crime, unless the law provided for no maximum term. Id. In the case of Manslaughter in the

---

[4] The parties are in agreement that Folds's standard range for Manslaughter in the First Degree under the 1984 SRA would have been 36-48 months, and 86-114 months under the 2013 SRA. 1983 Wash. Laws ch. 115, §§ 2-4; RCW 9.94A.510, .515, .525(9); Brief of Appellant at 6.

[5] The court also had the power to suspend or defer sentences. RCW 9.92.060 (1977). Because such a sentence is not at issue in this appeal, this power and its appropriate exercise will not be discussed further.

First Degree, the maximum term was 10 years. RCW 9A.20.020(1)(b) (setting the maximum sentence for a Class B felony at 10 years imprisonment); 1975 Wash. Laws 1st Ex. Sess. Ch. 260, § 9A.32.060(2) (designating Manslaughter in the First Degree as a Class B felony).

The defendant would then be transferred to a penal institution, where the board of prison terms and paroles would set the actual duration of the defendant's incarceration. RCW 9.95.040 (1977). This term of imprisonment could not exceed the maximum sentence imposed by the court. Id. In setting the term of imprisonment, the board was to consider the recommendations of the trial court and the prosecutor. RCW 9.95.030 (1977). At any time after the minimum term was fixed, the board could reconsider and alter that minimum term, in consideration of the defendant's prospects for rehabilitation.[6] RCW 9.95.052 (1977).

Further, the trial court in setting the maximum sentence (including whether sentences would run consecutively or concurrently) and the board in setting the minimum sentence could consider all of a defendant's conduct, not just the offenses of conviction. In re George, 52 Wn. App. 135, 140, 758 P.2d 13 (1988) (court); State v. King, 130 Wn.2d 517, 528, 925 P.2d 606 (1996) (board). In short, broad discretion was vested in the

[6] The board could also grant parole. RCW 9.95.110 (1977). Because parole is not at issue in this appeal, the circumstances under which parole could be granted or revoked will not be discussed further.

court and the board of prison terms and paroles to set the actual terms of a convicted person's confinement. Accordingly, such sentences were reviewed for abuse of discretion. State v. Hurst, 5 Wn. App. 146, 486 P.2d 1136 (1971).

In 1981, the legislature drastically changed this sentencing scheme by enacting the SRA. 1981 Wash. Laws ch. 137, codified at RCW 9.94A.010 et seq. The SRA established determinate sentences—to be imposed solely by the trial court, not by the board—based on the seriousness of the offense of conviction and the offender's criminal history. Id. This new sentencing scheme applied to crimes committed on or after July 1, 1984. 1981 Wash. Laws ch. 137, § 28, codified at RCW 9.94A.905.

For crimes committed between the enactment of the SRA and its effective date of July 1, 1984, a hybrid sentencing scheme was employed. The trial court continued to set a maximum term, and the board continued to set a minimum term, as before. However, the board was directed to "consider the standard ranges and standards adopted pursuant to section 4 of this act,[7] and [to] attempt to make decisions reasonably consistent with

[7] Section 4 directed the newly created sentencing guidelines commission to devise recommended standard sentencing ranges, offender scores, protocols for when sentences should be served concurrently or consecutively, and prosecutorial standards. 1981 Wash. Laws ch. 137, § 4. Those standards and sentencing ranges were not enacted until April 1983, and went into effect July 1, 1984. 1983 Wash. Laws ch. 115.

those ranges and standards." 1981 Wash. Laws ch. 137, § 24(2), codified at RCW 9.95.009(2). In 1986, the authority to fix minimum terms for offenses committed before July 1, 1984, was transferred to the courts. 1986 Wash. Laws ch. 224, § 7, codified at RCW 9.95.011. The trial courts were directed "to attempt to set the minimum term reasonably consistent with the purposes, standards, and sentencing ranges" reflected in the SRA. Id.

Folds committed his crimes on February 15, 1983. CP 1. Thus, he offended after the SRA had been adopted by the legislature, but before it was implemented. Further, he committed his crimes prior to the legislature adopting standard sentencing ranges, offense seriousness levels, offender score calculation rules, guidelines for imposing exceptional sentences, and standards governing prosecutorial discretion. 1983 Wash. Laws ch. 115. Nonetheless, Folds insists that he should be sentenced according to the offense seriousness level, offender score calculation, and standard range that would apply if he had committed his offense on July 1, 1984. He is incorrect. The trial court reasonably exercised its discretion in setting his minimum term, after appropriately considering the purposes, standards, and sentence ranges of the SRA.

2. THE TRIAL COURT'S CHOICE OF A MINIMUM TERM IS REVIEWED FOR ABUSE OF DISCRETION.

RCW 9.95.011 provides that the trial court's "minimum term decision is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986." Those decisions were reviewed for abuse of discretion. Hurst, 5 Wn. App. 146. Moreover, the governing statute directs a trial court "to attempt to set the minimum term reasonably consistent with the purposes, standards, and sentencing ranges" of the SRA. RCW 9.95.011 (emphasis added). What is "reasonably consistent" with the often conflicting purposes and standards expressed in the SRA is necessarily a discretionary decision. Thus, decisions setting minimum terms are reviewed for an abuse of discretion. E.g., In re Locklear, 118 Wn.2d 409, 418, 823 P.2d 1078 (1992); State v. Saas, 118 Wn.2d 37, 45, 820 P.2d 505 (1991).

A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Saas, 118 Wn.2d at 45. Said differently, "discretion is abused only where it can be said no reasonable man would take the view adopted by the trial court." Hurst, 5 Wn. App. at 148.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION.

The trial court's choice of Folds's minimum term of incarceration was reasonable. In making its decision, the court was aware that it had broad discretion in imposing a minimum term, and that its discretion was structured by RCW 9.95.011, which it specifically referenced. 2RP 63. It was familiar with both the 1984 and 2013 standard ranges for Manslaughter in the First Degree for a defendant with Folds's criminal history. 2RP 45-46; CP 55-56, 114. In making its ruling, the court discussed both the purposes of the SRA, as articulated in RCW 9.94A.010,[8] and how the court's sentence of a 114-month minimum term was consistent with those purposes. 2RP 64-69.

Folds's arguments as to how the trial court committed legal error in the exercise of its discretion pursuant to RCW 9.95.011 are unpersuasive. First, he claims that, in order to be consistent with the SRA,

---

[8] RCW 9.94A.010 provides:

> 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.

Subsection (7) was added in 1999. 1999 Wash. Laws ch. 196, § 1.

only the standard range closest in time to the offense should be considered. But requiring the trial court to consider only the standard range in effect near the time of the crime presupposes that the minimum term must be chosen from within a standard range. This is not the case. Compare Addleman v. Board of Prison Terms and Paroles, 107 Wn.2d 503, 511, 730 P.2d 1327 (1986), disagreed with on other grounds by State Dept. of Ecology v. Campbell & Gwinn, 146 Wn.2d 1, 43 P.3d 4 (2002) ("The mandate for reasonably consistent decisions does not superimpose exactly the SRA upon the prior system. . . . The Board is making the same types of decisions but it is now required to consider different factors."); Locklear, 118 Wn.2d at 413-14. The statute does not require the court to impose a sentence based on a standard range, let alone any particular standard range.

Instead, the law provides only that the trial court must "attempt" to set the minimum term "reasonably consistent with the purposes, standards, and sentencing ranges" of the sentencing reform act. RCW 9.95.011. Allowing a standard range—from any time period—to dictate the sentencing decision would ignore the statute's mandate that the court consider the purposes and standards of the SRA in addition to the sentencing ranges. If the standard range was the only important consideration, then the words "purposes" and "standards" in RCW

9.95.011 would be unnecessary. Compare George, 52 Wn. App. 135 (allowing trial court to consider uncharged offenses in determining an appropriate minimum term).

Indeed, Folds fails to recognize that, from the SRA's inception, the legislature contemplated that changes to the standard ranges would be necessary in order to make such ranges consistent with the SRA's purposes and the legislature's specific intent to emphasize confinement for violent offenders. 1981 Wash. Laws ch. 137, § 4. The legislature's choice to increase the penalty for Manslaughter in the First Degree reflects its judgment that a stiffer penalty better meets the SRA's articulated purposes. 1997 Wash. Laws ch. 365, § 4 (changing the seriousness level of Manslaughter 1 from IX to XI), § 5 (increasing Manslaughter 1 from a class B to a class A felony); H.R.B. Rep., 1997 Reg. Sess. S.B. 5938 (1997) (finding that penalties for manslaughter are too low); S.B. Rep., 1997 Reg. Sess. S.B. 5938 (1997) (concluding that sentences for manslaughter are disproportionately low in light of the fact that the defendant has taken a life). Thus, the trial court's consideration of the modern standard range for Manslaughter in the First Degree is consistent with the legislature's views of the standards and purposes of the SRA.

Second, Folds suggests that use of only the 1984 standard range furthers the SRA's purpose of assuring that a sentence is "commensurate

with the punishment imposed on others committing similar offenses." RCW 9.94A.010(3). Again, Folds focuses on a single purpose of the SRA, rather than the "purposes" required by the statute. Additionally, use of the 1984 standard range would make Folds's sentence commensurate only with sentences imposed for Manslaughter in the First Degree committed during the period from July 1, 1984, until the penalties increased in 1997. Use of the 2013 standard range makes his sentence commensurate with crimes committed after 1997. Folds makes no argument as to why uniformity with 1984 rather than 2013 better furthers the purposes of the SRA, as the statute requires. Nor does he provide any evidence as to what defendants convicted of manslaughter committed in or before 1983 in fact received as sentences—either before or after the implementation of the SRA—a more apt comparison.[9]

Third, Folds's argument that the SRA demands that "[a]ny sentence imposed under [the SRA] shall be determined in accordance with

---

[9] Folds makes an absurd claim that, had the board of prison terms and paroles addressed his case in 1983, "he likely would have received a fairly short minimum sentence" because he had rehabilitated. Brief of Appellant at 8. First, he presents no data regarding the board's standard practices in 1983 or earlier. Second, had the board handled his case in 1983, Folds would have had no evidence of rehabilitation; he had thirty years of largely law-abiding behavior at the time of sentencing only because he managed to escape detection for thirty years. Indeed, it was this latter fact that, at least in part, animated the trial court's decision to impose a substantial minimum term. 2RP 68 ("And I think the most succinct comment the Court would make is that the passage of 30 years and the intervening good deeds and positive features in the Defendant's life do not erase the fact that although he has taken responsibility today, he took no responsibility at the time Mr. Kuony lay dead or dying in the motel room.").

the law in effect when the current offense was committed" is unavailing. Brief of Appellant at 11, citing RCW 9.94A.345. His sentence was not imposed under the SRA; it was imposed pursuant to RCW 9.95.011, a portion of the chapter governing indeterminate sentences. The law in effect when Folds committed his crimes was not the SRA; in fact, the legislature had not yet enacted the SRA's sentencing ranges, offense classifications, or other substantive sentencing provisions at the time that Folds killed Kuony. 1983 Wash. Laws ch. 115. Indeed, RCW 9.94A.345 itself was not enacted until 2000, 17 years after Folds offended. 2000 Wash. Laws ch. 26, § 2. In short, Folds was sentenced exactly as the law in effect at the time of his crime required.

Fourth, there is no "contradiction" between setting Folds's maximum sentence based on the 1983 maximum but his minimum term based on consideration of the 2013 sentencing guidelines. Brief of Appellant at 14. As Folds correctly argued, a defendant is subject to the penalty prescribed at the time of the crime. State v. Pillatos, 159 Wn.2d 459, 475, 150 P.3d 1130 (2007). Here, that penalty—as described in detail above—was an indeterminate sentence, with the maximum term inflexibly set by statute, but the minimum imposed by the court after consideration of the purposes, standards, and sentencing ranges of the SRA. RCW 9.95.010, .011. Thus, the maximum term was required to be

set at ten years, the maximum sentence for Manslaughter in the First Degree in 1983. The minimum could be any term, up to ten years, that the trial court reasonably believed was consistent with the purposes, standards, and ranges of the SRA. In reaching its conclusion, the court considered both the 1984 and 2013 standard ranges for the crime of manslaughter, as well as the purposes and standards of the SRA. 2RP 45-46, 64-69. As discussed above, the standard range reflects the legislature's view of the purposes of the SRA. There is no inconsistency in considering it.

In sum, Folds's arguments as to why the trial court should have used the 1984 standard range rather than the 2013 standard range as a guide are effectively an ex post facto claim with a new label. The Washington Supreme Court has already explicitly held that current SRA standard range sentences may be used when setting the minimum sentences of pre-SRA offenders without violating the ex post facto clause. In re Stanphill, 134 Wn.2d 165, 949 P.2d 365 (1998). Folds's attempt to disguise his ex post facto argument by claiming that the trial court failed to follow RCW 9.95.011 is incorrect. The trial court followed the directive of RCW 9.95.011, and its exercise of discretion in selecting Folds's minimum term should be affirmed.

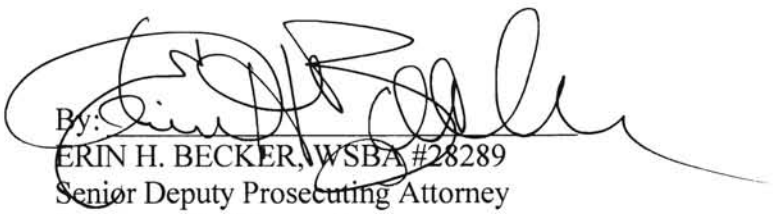
D. CONCLUSION

For all of the foregoing reasons, Folds's sentence should be affirmed.

DATED this 22nd day of October, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By:
ERIN H. BECKER, WSBA #28289
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla L. Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. JOHN W. FOLDS, Cause No. 69849-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 22 day of October, 2013

Name
Done in Seattle, Washington