

FILED
FEBRUARY 2, 2015
Court of Appeals
Division III
State of Washington

NO. 32842-2-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

SALVADOR S. NAVA,

Defendant/Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

1. The trial court exceeded its authority at a resentencing hearing when it assessed a nine hundred and forty-three (943) month sentence on September 25, 2014. (CP 100)

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Does the imposition of a nine hundred and forty-three (943) month sentence exceed a trial court's authority when the maximum penalty for an offense is life imprisonment with possibility of parole?

STATEMENT OF CASE

Salvador S. Nava was charged with one (1) count of first degree murder, four (4) counts of first degree assault and one (1) count of unlawful possession of a firearm first degree pursuant to an Information filed on May 18, 2001. (CP 1)

An Amended Information was filed on January 26, 2009 which changed Count VI to unlawful possession of a firearm second degree. Mr. Nava was convicted of all counts in that Information. (CP 4)

Judgment and Sentence was entered on June 15, 2009. The trial court imposed a mitigated sentence downward of two hundred and twenty (220) months on the first degree murder count. The convictions for first degree assault and unlawful possession of a firearm second degree were ordered to run concurrent with that mitigated sentence. Three hundred (300) months was imposed for firearm enhancements. The total sentence was five hundred and twenty (520) months. (CP 8)

The State filed a Notice of Appeal on June 18, 2009. Mr. Nava filed a *pro se* Notice of Appeal on July 1, 2009. On July 10, 2009 the State filed a cross-appeal. (CP 16; CP 25; CP 27)

The Court of Appeals issued its decision on October 22, 2013. It reversed the trial court's mitigated sentence and remanded the case for resentencing. The Mandate was issued on February 28, 2014. (CP 38; CP 40)

The resentencing hearing was originally scheduled for April 22, 2014. Numerous continuances were granted. The resentencing hearing was finally held on August 19 and September 25, 2014. (CP 89; CP 90; CP 91; CP 92; CP 93; CP 94; CP 95; CP 96)

Judgment and Sentence was entered on September 25, 2014 following the resentencing hearing. Two hundred and seventy-one (271) months was imposed on the first degree murder count. There was a sixty

(60) month firearm enhancement on that count. The conviction for unlawful possession of a firearm was ordered to run concurrent. The four (4) first degree assault counts were ordered to run consecutive with each other and consecutive to the first degree murder conviction. There was a firearm enhancement on each count. The total sentence is nine hundred forty-three (943) months.

Mr. Nava filed his Notice of Appeal on October 20, 2014. (CP 109)

SUMMARY OF ARGUMENT

A sentence of nine hundred and forty-three (943) months (seventy-eight (78) years seven (7) months) for a convicted offender whose date of birth is June 14, 1982 exceeds the maximum sentence allowable for a conviction of a class A felony. Mr. Nava needs to be resentenced to life in prison with possibility of parole.

ARGUMENT

RCW 9A.20.021(1) provides, in part:

Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be

punished by confinement or fine exceeding the following:

- (a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment

Mr. Nava was born on June 14, 1982. He was twenty-seven (27) years old at the time of the initial Judgment and Sentence. RCW 9.94A.540(1)(a) requires a mandatory minimum term of twenty (20) years for the offense of first degree murder. His current sentence also includes three hundred (300) months (twenty-five (25) years) of mandatory time for firearm enhancements. He will be at least seventy-two (72) years old before he can begin receiving earned early release credits. *See:* RCW 9.94A.533(3)(a); *see also:* *State v. Desantiago*, 149 Wn.2d 402, 415-16, 68 P.3d 1065 (2003).

Mr. Nava, being an Hispanic male, has a current life expectancy of seventy-one point six (71.6) years. (*See:* <http://www.ecology.com/2013/04/01/us-life-expectancy-mortality-rates/>; Appendix “A”)

Mr. Nava recognizes that the trial court followed statutory provisions when he was sentenced.

RCW 9.94A.589(1)(b) provides, in part:

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 **All sentences imposed under (b) of this subsection shall be served consecutively to each other** and concurrently with sentenced imposed under (a) of this subsection.

(Emphasis supplied.)

However, a limitation is imposed with regard to firearm enhancements and the standard range sentence. RCW 9.94A.533(3)(g) states:

If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the offense representing the enhancement may not be reduced.

Mr. Nava is not a persistent offender. The firearm enhancements, in and of themselves do not exceed the statutory maximum for the offense. However, when viewed in context with the overall sentence the trial court exceeded its authority and Mr. Nava is entitled to an adjustment in his sentence.

The trial court ordered each assault conviction to run consecutive to one another as well as the first degree murder conviction. *State v. Wil-*

son, 125 Wn.2d 212, 221, 883 P.2d 320 (1994) (applies to consecutive sentences for multiple assaults.)

Mr. Nava contends that due to his current age that the sentence imposed by the trial court exceeds the statutory maximum sentence for these offenses. The statutory maximum for first degree murder and first degree assault is life imprisonment.

Moreover, it is Mr. Nava's position that the sentence violates the purpose of the Sentencing Reform Act of 1981 (SRA). RCW 9.94A.010 provides, in part:

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) ...;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) ...; and
- (7) Reduce the risk of reoffending by offenders in the community.

A sentence exceeding life imprisonment is not just. It is not fair. It violates the purpose of the SRA.

Mr. Nava relies upon two (2) cases to support his position that the appropriate sentence in his case is life imprisonment with possibility of parole.

In *State v. Frampton*, 95 Wn.2d 469, 484, 627 P.2d 922 (1981) the Court held:

The legislature believed and we find the penalty of life imprisonment without hope of parole or release to be substantially different than life with the possibility of parole. This difference violates the principal enunciated in *United States v. Jackson*, 390 U.S. 570, 20 L. Ed.2d 138, 88 S. Ct. 1209 (1968).

We hold the State may not constitutionally seek life imprisonment without possibility of release or parole for those who are found guilty of aggravated first degree murder

Mr. Nava was not found guilty of aggravated first degree murder. The maximum penalty for his offense is life imprisonment.

The *Frampton* Court recognized that there is a difference between life in prison without possibility of parole and life in prison with the opportunity to obtain earned early release credits.

“... [C]ourts may sentence defendants to life imprisonment when convicted of multiple serious violent offenses.” *State v. Whitfield*, 132

Wn. App. 878, 902, 134 P.3d 1203 (2006), *review denied* 159 Wn.2d 1012 (2007).

Mr. Nava asserts that the *Whitfield* case stands for the proposition that a sentencing court has discretionary authority to impose life imprisonment as opposed to a sentence which far exceeds any offender's life expectancy.

RCW 9.94A.729(2) provides:

In the case of an offender convicted of a serious violent offense, or a sex offense that is a class A felony, committed on or after July 1, 2003, the aggregate earned release time may not exceed ten percent of the sentence.

Mr. Nava would be entitled to receive ten (10%) percent earned early release credits once his mandatory minimum sentence and enhancements have been served. As previously indicated he would be seventy-two (72) years old before any earned early release credits could be acquired.

The State may say that Mr. Nava does not have the right to address the issue of his resentencing. The State would be in error.

... [A] defendant "may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding. ..."

State v. Graham, 178 Wn. App. 580, 587 (2013), quoting *State v. Toney*, 149 Wn. App. 787, 205 P.3d 944 (2009).

CONCLUSION

A sentence of nine hundred and forty-three (943) months exceeds the recognized life expectancy of all males over eighteen (18) years of age. As such it also exceeds the maximum sentence for a class A felony.

The appropriate sentence is life imprisonment with the possibility of parole. This sentence would meet the purpose of the SRA.

It does not appear that the trial court or counsel for either side considered that life imprisonment would be an alternative disposition at sentencing. Due to the fact that the trial court was not given the opportunity to exercise its discretion as to that alternative, Mr. Nava's case should be remanded for another sentencing hearing.

DATED this 2nd day of February, 2015.

Respectfully submitted,

s/ Dennis W. Morgan

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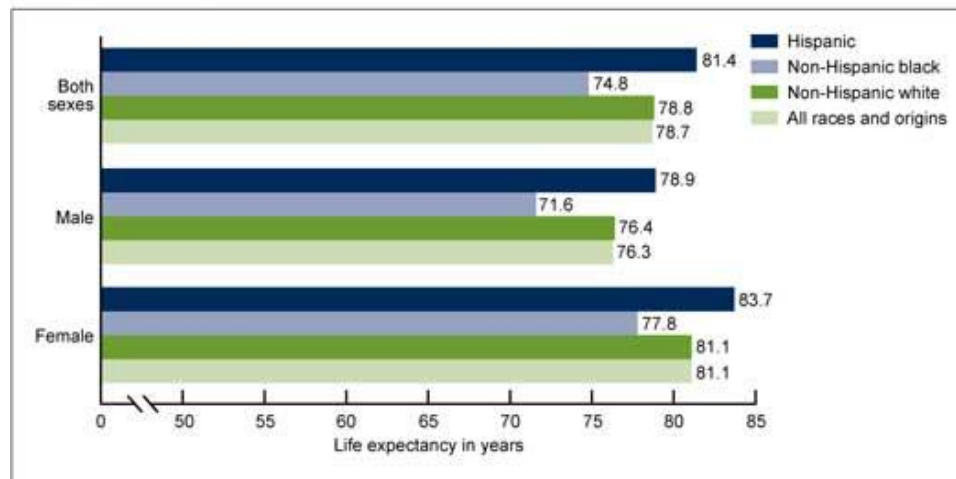
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APPENDIX “A”

Life Expectancy

Life expectancy at birth for the overall U.S. population was 78.7 years in 2011 — unchanged from 2010. Across all races and ethnicities, life expectancy for women (81.1) exceeded that for men (76.3) by nearly five years. Among racial and ethnic groups, Hispanics showed the highest life expectancy (81.4), followed by non-Hispanic whites (78.8) and non-Hispanic blacks (74.8).

Figure 1. U.S. Life Expectancy by Gender and Race/Ethnicity: Preliminary 2011



NOTE: Life expectancies for the Hispanic population are adjusted for underreporting of Hispanic ethnicity but are not adjusted to account for the potential effects of reverse migration.

SOURCE: National Vital Statistics System, Mortality.

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STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	YAKIMA COUNTY
Plaintiff,)	NO. 01 1 00902 3
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
SALVADOR S. NAVA,)	
)	
Defendant,)	
Appellant.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on this 2nd day of February, 2015, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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CERTIFICATE OF SERVICE

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