

NO. 45656-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JASON DELACRUZ, APPELLANT
NELSON HERNANDEZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello, Judge

No. 09-1-02999-9

No. 09-1-02903-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is review of the defendants' lawfully imposed sentences unwarranted when the trial court resentenced each defendant according to this Court's mandate, imposed previously omitted consecutive sentences on several firearm convictions required by statute, and only exercised its discretion in adjusting the length of the standard range sentences which cannot be appealed?
2. Did the trial court properly act within the mandate to vacate the convictions entered for the firearm counts and resentence both defendants when it vacated those counts and imposed standard range sentences, which included consecutive terms for the firearm convictions as required by statute?

B. STATEMENT OF THE CASE.

Defendants Jason Delacruz and Nelson Hernandez burglarized three different homes with several accomplices on June 8 and 9, 2009. CP 31.¹ At the first home, the burglars took various electronics. *Id.* At the second home, the burglars took various electronics and a 20-gauge shotgun. *Id.* At the third home, the home of a Washington State Patrol trooper, the burglars took a safe containing five firearms. *Id.* at 32.

¹ *State v. Hernandez*, 172 Wn. App. 537, 539, 290 P.3d 1052 (2012).

Defendants were charged with two counts of first degree burglary (counts 1, 10); three counts of residential burglary (counts 2, 8, 11); three counts of first degree theft (counts 4, 9, 14); two counts of firearm theft (counts 5, 12); one count of possession of a stolen firearm (count 13); one count of possession of stolen property (count 15); one count of first degree trafficking in stolen property (count 16). *Id.* at 33. Delacruz was charged with two counts of unlawful possession of a firearm in the first degree (counts 7, 17) and Hernandez with unlawful possession of a firearm in the second degree (counts 6, 17). *Id.*

The defendants were convicted as charged as to counts 1-2, 4-5, 8, and 11-17. Delacruz was found not guilty of count 7; Hernandez was found not guilty of count 6. Defendants were found not guilty of count 10. Defendants were also found not guilty of count 9, but guilty of the lesser included theft in the second degree. *Id.* at 34.

At the sentencing hearings, the court merged the convictions for first degree burglary and residential burglary (counts 1, 2) and convictions for first degree theft and possession of stolen property (counts 14, 15). *Id.* Due to their criminal history and offender scores, Hernandez was sentenced to 250 months and Delacruz was sentenced to 300 months. CP 97, CP 21. The court failed to merge the convictions for possession of a stolen firearm and firearm theft based on the third burglary (counts 12 and 13). CP 38. The trial court also neglected to impose consecutive sentences

for each conviction of firearm theft and unlawful possession of a firearm as required by statute. *See* RCW 9.94A.589(1)(c).

This Court affirmed the convictions following defendants' first direct appeal. This Court held, among other things, that: "the defendants' convictions for firearm theft merge with their convictions for firearm possession, thus, we accept the State's concession, vacate those convictions, and *remand for resentencing*." CP at 32 (emphasis added). The original trial court's failure to sentence in accordance with RCW 9.94A.589(1)(c) was not addressed in the first appeal.

For the resentencing, the State submitted a sentencing memorandum alerting the trial court of the statutory language of RCW 9.94A.589(1)(c) requiring that the convictions for theft of a firearm and unlawful possession of a firearm be served consecutively. CP 52, CP 149. Hernandez admitted that the court was required to impose consecutive terms for Counts 5, 12, and 17. HRP 16.² Delacruz indirectly conceded as much by acknowledging that he was unable to find any case law authorizing the court to refrain from imposing consecutive sentences. DRP 24.

The court vacated counts 12 and 13 as directed by the mandate. It then resentenced each defendant as directed and reimposed Hernandez's 250 month sentence and Delacruz's 300 month sentence. CP 65, CP 137.

² The verbatim report of proceedings will be referred to by defendant's last name initial, RP, and page number (HRP # and DRP #).

Acknowledging that he must follow the law, the judge resentenced defendants following the State's recommendations. DRP 32, HRP 17. Including the statutory requirement that counts 5, 12, and 17 run consecutively in accordance with RCW 9.94A.589(1)(c). CP 65, CP 137. The judge reached the same total term of incarceration by increasing the length of each defendant's sentences within the standard ranges and running counts 5, 12, and 17 consecutively as required by RCW 9.94A.589(1)(c). Neither defendant asked the court to consider imposing an exceptional sentence below the standard range for any count. Defendant's filed this consolidated appeal from resentencing.

C. ARGUMENT.

1. THE APPELLATE COURT SHOULD DECLINE TO GRANT REVIEW BECAUSE THE RESENTENCING WAS DONE WITHIN THIS COURT'S MANDATE, THE TRIAL COURT CORRECTLY APPLIED THE LAW, AND THE STANDARD RANGE SENTENCES IMPOSED ARE NOT APPEALABLE.

Review of resentencing by the appellate court following remand is only proper when the trial court exercises *appealable* discretion. See *State v. Barberio*, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993); *State v. Garcia-Martinez*, 88 Wn. App. 322, 329, 944 P.2d 110 (1997); *State v. Toney*, 149 Wn. App. 787, 791, 205 P.3d 944 (2009); RCW 9.94A.585(1). A trial court does not exercise appealable discretion when it follows a mandate issued by a higher court. See *State v. Kilgore*, 141 Wn. App. 817, 829, 172

P.3d 373 (2007). Similarly, a trial court does not exercise appealable discretion when it imposes a mandatory sentence dictated by statute. *Garcia-Martinez*, 88 Wn. App. at 329 (quoting RCW 9.94A.585(1)). Although discretion is exercised in imposing a sentence within the standard range prescribed by the legislature, the length of sentence from that discretionary act is not appealable under RCW 9.94A.585(1).

The trial court did not exercise any appealable discretion when it resentenced the defendants. First, the court acted within the mandate of this Court. It vacated the firearm theft and firearm possession convictions and resentenced the defendants as directed. *See* CP 32. Imposing consecutive sentences for the firearm convictions was expressly required by statute. RCW 9.94A.589(1)(c). The trial court was not empowered to disregard this statutory requirement, thus it was not a discretionary act subject to appeal.

The only discretionary act undertaken by the trial court was the decision to modify the lengths of the sentences on several counts. However, all of the modified sentences were still within the standard ranges, and "[a] sentence within the standard sentence range . . . shall not be appealed." *Garcia-Martinez*, 88 Wn. App. at 329 (quoting RCW 9.94A.585(1)). Therefore, the only discretionary act done by the trial court is not appealable.

Defendants attempt to avoid this procedural bar by claiming the trial court mistakenly believed the consecutive sentence requirement in

RCW 9.94A.589(1)(c) deprived it of the ability to impose exceptional downward sentences below the standard range. This contention lacks support in the record. Defendants' argument is based on the trial court's silence on the topic of exceptional sentences, but the defendants never raised the merits of granting an exceptional sentence. *State v. Grayson* makes it clear, "While no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." 154 Wn.2d 333, 342, 11 P.3d 1183 (2005) (emphasis in original) (citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). Thus, defendants were entitled to raise the possibility of an exceptional sentence; however, the trial court was not obliged to sua sponte raise the possibility before imposing a sentence within the standard range.

2. THE TRIAL COURT DID NOT EXCEED THE MANDATE OF THIS COURT WHEN IT RESENTENCED DEFENDANTS, THEREFORE THIS COURT SHOULD AFFIRM THE SENTENCES.

A mandate remanding a case for "resentencing" "unequivocally" vests the trial court with the power and responsibility to conduct an entirely new sentencing proceeding limited only by other directions expressed by the mandate. *Toney*, 149 Wn. App. at 791. Additionally, "[w]hen a sentence has been imposed for which there is no authority in

law, the trial court has the [p]ower and the duty to correct the erroneous sentence, when the error is discovered." *In re Personal Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (quoting *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955)).

In the first appeal, this Court held that the convictions for firearm possession needed to merge, and mandated the trial court to vacate and "remand for resentencing." CP 32. This order is a broad grant of authority, only rationally interpreted as granting the trial court the authority to impose any lawful sentence. Defendants suggest that absent specific language such as "for further proceedings" or "in any lawful manner," the trial court was limited to a ministerial function. However, inherent in "remand for resentencing" is the power to conduct further proceedings in order to lawfully resentence; mandating that a resentencing be done lawfully in further proceedings would be redundant.

It cannot be presumed that this Court wished to order the trial court to impose an *unlawful* sentence simply because it erroneously did so before. Imposing a *lawful* sentence required imposing the statutorily mandated consecutive sentences in RCW 9.94A.589(c). As the trial court said during resentencing:

[W]e take an oath as judges to follow the law and apply the law So when I resentence, I have to follow the law The fact that this was overlooked for whatever reasons, by

mistake I assume when the sentencing occurred earlier, that can't control what I do now. I have to follow the law.

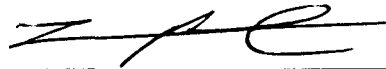
DRP 32. As a matter of judicial policy, it is critical for judges to impose *lawful* sentences, whether at the original sentencing or on remand.

D. CONCLUSION.

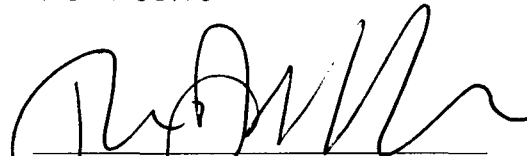
Resentencing according to a mandate from a higher court is not appealable. Nor is imposing a sentence within the standard range appealable. Therefore, this Court should decline to review the defendants' claims. As the trial court did not exceed the mandate of this Court, the sentences of the defendants should be affirmed.

DATED: AUGUST 19, 2014

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Certificate of Service:

The undersigned certifies that on this day she delivered by ^{file} ~~US mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/20/14
Date Signature

PIERCE COUNTY PROSECUTOR

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