No. 95690-1
Court of Appeals No. 34897-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD DYSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner Donald Dyson asks this Court to review the opinion of the Court of Appeals in *State v. Dyson*, 34897-1.

B. OPINION BELOW

Where a sentence is reversed on appeal and the matter is remanded for resentencing, the sentencing court is free to consider new arguments in support of a mitigated sentence. Here, after the matter was remanded for resentencing, the resentencing court believed its authority was limited to simply striking the unconstitutional provisions of the prior sentence but otherwise was required to impose the same sentence. Did the trial court err.

C. ISSUE PRESENTED

Where the trial court mistakenly believed it lacked authority to resentence Mr. Dyson to an exceptional mitigated sentence, is review appropriate under RAP 13.4?

D. STATEMENT OF THE CASE

Donald Dyson previously appealed his convictions and sentence for two counts of first degree assault. Among the issues he raised, was a claim that the trial court violated his Sixth Amendment right to a jury trial when the trial judge, rather the jury, determined the acts could

likely have caused death and thus imposed five-year mandatory minimum sentences on those two counts under RCW 9.94A.540. While it affirmed his convictions, the Court of Appeals found that the judicial factfinding that established the basis for the mandatory minimum sentences violated the Sixth Amendment. The court "vacat[ed] Mr. Dyson's sentence and remand[ed] for resentencing." CP 39.

On remand, but prior to the resentencing hearing, Mr. Dyson was evaluated by Eastern State Hospital, to address whether he was competent. The report submitted to the court by Eastern staff noted that as a child Mr. Dyson suffered significant abuse and trauma at the hands of his father. CP 70-71. The report diagnosed Mr. Dyson as suffering from Posttraumatic Stress Disorder and that he had previously suffered a Traumatic Brain Injury. CP 70. The staff at Eastern concluded Mr. Dyson was competent.

At resentecncing relying in part on the information in the competency report, Mr. Dyson requested an exceptional mitigated sentence. RP 8. Specifically relying on *In re the Personal Restraint of Mulholland*, 161 Wn.2d 322, 327, 166 P.3d 677 (2007), Mr. Dyson asked the court to run the sentences for both convictions concurrently. *Id.* The court refused.

E. ARGUMENT

Despite the vacation of the prior judgment and mandate of the Court Appeals that the trial court resentence Mr. Dyson, the prosecutor argued the trial court was "only empowered" to strike the minimum terms. RP 3.

The trial court too, misconstrued the court's mandate to resentence Mr. Dyson. The trial court stated: "...I am left with following the direction of the court of appeals, which is to remand with instructions . . . to remove the mandatory minimum for each crime. . . . That is the direction I have received, and as part of the system I will follow those directions."

While it is true that the mandate directed the court could not impose the mandatory minimum, the mandate did not bar the court from otherwise resentencing Mr. Dyson. Put another way, the fact that the court directed the trial court to correct the constitutional violation in its prior sentence did not prevent the trial court from otherwise considering the appropriate sentence for Mr. Dyson on remand. The trial court erroneously believed it lacked the authority to consider Mr. Dyson's request for an exceptional sentence.

Generally, a standard range sentence may not be appealed. RCW 9.94A.585(1). That statute, however, does not place an absolute

prohibition on the right of appeal. Instead, the statute only precludes review of challenges to the amount of time imposed when the time is within the standard range. *State v. McGill,* 112 Wn. App. 95, 99, 47 P.3d 173 (2002). A defendant, however, may challenge the procedure by which a sentence within the standard range is imposed. *State v. Mail,* 121 Wn.2d 707, 712-13, 854 P.2d 1042 (1993).

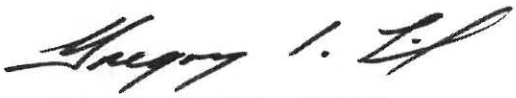
When a defendant has requested a mitigated exceptional sentence, review is available where the court refused to exercise discretion or relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *Mulholland*, 161 Wn.2d at 332 (court's failure to recognize its discretion to impose concurrent sentence was fundamental defect); *State v. Garcia-Martinez,* 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied,* 136 Wn.2d 1002 (1998). As set forth above, the trial court failed to recognize it had the authority to resentence Mr. Dyson, including the ability to impose a mitigated sentence.

This Court should grant review and remand with clear direction to the trial court that is has the authority to resentence Mr. Dyson.

F. CONCLUSION

For the reasons above, this Court grant review, vacate Mr. Dyson's sentence and remand for resentencing.

Respectfully submitted this 19th day of March, 2018.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. DONALD LEE DYSON, JR., Appellant.	)	No. 34897-1-III UNPUBLISHED OPINION

SIDDOWAY, J. — Donald Dyson Jr. appeals a sentence imposed by the trial court following this court's remand for correction of a problem with his sentence. This court had affirmed his convictions for first degree assault but held that mandatory minimum sentences the trial court imposed under RCW 9.94A.540 must be based on a finding by a jury, not the court. *State v. Dyson*, 189 Wn. App. 215, 217, 360 P.3d 25 (2015) (plurality opinion), *review denied*, 184 Wn.2d 1038, 379 P.3d 957 (2016) (citing *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)).

When an appellate court remands for the trial court to enter only a ministerial correction of the original sentence, a defendant has no constitutional right to be present for the correction and no right to raise new sentencing issues. *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009); *State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811

(2011), *aff'd*, 187 Wn.2d 420, 387 P.3d 650 (2017). This court's opinion was arguably ambiguous as to whether we ordered a ministerial correction or authorized a full resentencing. *Dyson*, 189 Wn. App. at 228 (stating "we remand for resentencing with instructions that the trial court remove the mandatory minimum sentences for each crime" and, in the next paragraph, "We vacate Donald Dyson's sentence and remand for resentencing"). At the hearing to address our remand, the trial court allowed Mr. Dyson to be present and to speak.

At the hearing, Mr. Dyson asked the court to impose an exceptional concurrent sentence rather than the standard consecutive sentences it had imposed before. He relied in part on a competency evaluation prepared by Eastern State Hospital staff following our remand, in which staff determined he was competent but observed that he had been diagnosed (by history) with posttraumatic stress disorder and had previously suffered a traumatic brain injury.

Having heard from the lawyers and Mr. Dyson, the trial court struck the mandatory minimum sentences but kept in place the consecutive standard range sentences earlier imposed. Mr. Dyson argues on appeal that the trial court had discretion to grant his request for exceptional sentencing but mistakenly believed otherwise, and refused even to consider his request.

If the court imposes a standard range sentence, the general rule is that it cannot be appealed. *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). A

standard range sentence can be challenged on the basis that the court refused to exercise discretion. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). In such a case it is the court's refusal to exercise discretion that is appealable rather than the sentence itself. *Id.*

By contrast, when a trial court has the authority to conduct a full resentencing on remand but chooses not to exercise its independent judgment at that time, there is no issue to review in an appeal from the resentencing. *State v. Kilgore*, 167 Wn.2d 28, 40, 216 P.3d 393 (2009) (citing *State v. Barberio*, 121 Wn.2d 48, 51, 846 P.2d 519 (1993)). The trial court's actions give rise to no new appealable issues, meaning the defendant's right to appeal in state court was exhausted with issuance of the mandate in the first appeal. *See id.*

Contrary to Mr. Dyson's contention, the trial court did not conclude that it lacked discretion to entertain his request. It announced, instead, that it didn't need to determine whether it had discretion because even if it did, the court would not change the consecutive character of the sentences:

> Even if I were so inclined to review my sentence, even if I thought I had authority to run things concurrently, which I'm not necessarily convinced I do, even if I did, even if I was convinced that this report somehow allows me to open the sentence up and reimpose it, I will just indicate that I am not so inclined to do that. But I believe the sentence that I imposed in light of the evidence that I heard was appropriate at that time in January of 2014, and I believe it still is.

> And in saying that I want everyone to understand I appreciate how long the sentence is but, again, based on what I heard and saw, I thought it was the appropriate sentence to impose. And again, I still do.

Report of Proceedings at 17.

Because the trial court made clear its intention not to exercise any discretion it enjoyed, Mr. Dyson's appeal rights were exhausted with his first appeal. For the same reason, we will not consider the statement of additional grounds that Mr. Dyson filed following the notice of this appeal.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 34897-1III
	)	
DONALD DYSON,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MARCH, 2018, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] DONALD DYSON 758970 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF MARCH, 2018.

X_____

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WASHINGTON APPELLATE PROJECT

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