Supreme Court No. 96856-0

Court of Appeals No. 35288-9-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO HERRERA-CASTRO,

Petitioner.

RESPONDENT'S ANSWER TO (CORRECTED) PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF RESPONDENT

The State of Washington was the Petitioner below and is the Respondent in the appeal.

B. COURT OF APPEALS DECISION

The State asks the court to deny review of the Court of Appeals decision.

C. ISSUES PRESENTED FOR REVIEW

1. What is the scope of permissible action when the trial court is correcting a facially invalid judgment and sentence?

2. Did the Supreme Court overrule *State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999) sub silentio in *State v. McFarland*, 189 Wn.2d 47, 49, 399 P.3d 1106, 1107 (2017)?

3. In order to impose a mitigated sentence must a defendant still show facts that would merit a mitigated sentence?

D. STATEMENT OF THE CASE

A jury found Mr. Herrera-Castro guilty of nine crimes: second degree kidnapping of Ms. Suarez; first degree kidnapping of Luis, Juan, and Mr. Ibarra Suarez; second degree assault of Ms. Suarez, Luis, Juan, and Mr. Ibarra Suarez; and gross misdemeanor harassment of Mr. Ibarra Suarez. The trial court sentenced Mr. Herrera-Castro to standard range sentences, with the sentences to run concurrently except for consecutive sentencing of the three first degree kidnappings. Mr. Herrera-Castro

appealed. The Court of Appeals affirmed in an unpublished decision in *State v. Herrera-Castro*, No. 27244-3-III, 2009 Wash. App. LEXIS 1787 (Ct. App. July 23, 2009).

In November 2016 the Department of Corrections (DOC) contacted the State to assist in reading the judgment and sentence. CP 35. The State concluded that the judgment and sentence reflected a sentence that is invalid on its face, and therefore could not assist DOC in interpreting the judgment and sentence in accordance with applicable law.

The judgment and sentence included: Count 1 kidnapping in the second degree, Count 2 kidnapping in the first degree, Count 3 kidnapping in the first degree, Count 4 kidnapping in the first degree, Count 5 assault in the second degree, Count 6 assault in the second degree, Count 7 assault in the second degree, Count 8 assault in the second degree and Count 12, a misdemeanor harassment count. CP 60-61. The court sentenced Mr. Herrera-Castro to the low end on each count, added the firearm enhancement to the time for each count, but did not break down what part was the firearm count, and found that the assault 2 counts were the same criminal conduct as the kidnapping counts. The court ordered that Counts 2, 3 and 4 run consecutively, as well as the firearm enhancement from Count 1. CP 67-68. In a handwritten notation the sentencing court ordered the firearm enhancements from the assault in the second degree to run

concurrently to each other and to Count 2. CP 68. The court left the "actual months of total confinement" line blank.

The State moved to correct the judgment and sentence under CrR 7.8. It noted that it was collaterally attacking the judgment; the motion was untimely, but the judgment was facially invalid, thus exempt from the time bar. CP 36. The reason the State noted the judgment and sentence was facially invalid is that it ran firearm enhancements concurrently, contrary to law. It also noted that the judgment was unclear, but that fact did not make it facially invalid. *Id.* The trial court granted the State's CrR 7.8 motion and signed a corrected judgment and sentence. CP 126-44.

Mr. Herrera-Castro appealed, challenging the legal financial obligations in his sentence as well as the failure of the trial court to allow allocution. The Court of Appeals primarily affirmed, holding that the hearing was a correction of a facially invalid judgment and sentence, not a resentencing. The Court of Appeals did order the removal of a facially invalid legal financial obligation.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. Untimely collateral attacks based on facial invalidity of the judgment and sentence are limited to correcting the facial invalidity.

The State's motion was an untimely collateral attack under CrR 7.8 on the judgement and sentence based on the fact that the judgment and

sentence was facially invalid. RCW 10.73.090. Notably the Supreme Court has held that a judgment and sentence that is invalid on its face does not open the door for all other possible claims. *In re Adams*, 178 Wn.2d 417, 425, 309 P.3d 451, 454 (2013). Thus any claims regarding legal finical obligations are time barred, unless they are facially invalid. The Court of Appeals did remand for correction of one facially invalid LFO. Mr. Herrera-Castro does not even attempt to show his other LFO's are facially invalid. Thus the Court is without authority to change the LFO's. Because this issue has already been resolved by *Adams* there is no question requiring Supreme Court review.

Mr. Herrera-Castro argues there is no rational basis not to review the financial obligations. However, the finality of sentences, as described in *Adams,* is a rational reason not to open every can of worms in a judgment and sentence when one thing requires correction.

In addition RAP 16.4(d) prohibits relief on this ground. Mr. Herrera-Castro has other adequate relief for his legal financial obligations. RCW 10.01.160(4) allows Mr. Herrera-Castro to petition the court for relief after his confinement, and his needs during confinement are taken care of by DOC. As he has a statutory avenue for relief, a collateral attack on these grounds is impermissible.

2. *State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999), prohibits courts from mitigating firearm enhancements.

Mr. Herrera-Castro confuses firearm enhancements, imposed under RCW 9.94A.533, and sentences for firearm related crimes, imposed under RCW 9.94A.589(1)(c). *State v. McFarland* discusses whether mitigated sentences can apply to the crimes of possession of a stolen firearm/theft of a firearm under RCW 9.94A.589(1)(c). *McFarland* relied on the reasoning of *In re Mulholland*, 161 Wn.2d 322, 328, 166 P.3d 677, 680 (2007). *Mulholland* in turn relied upon language in RCW 9.94A.535, the statute that defines the standards for a mitigated sentence. It states "A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section..." The question in *Mulholland* and *McFarland* is whether mitigated sentences applied just to sentences under RCW 9.94A.589(1)(a), or whether they also applied to sentences under RCW 9.94A.589(1)(b) and (c).

In this case Mr. Herrera-Castro was not sentenced under RCW 9.94A.589(1)(c). Thus *McFarland* is irrelevant to any analysis of his sentence. That subsection simply does not apply. Instead he was sentenced under RCW 9.94A.589(1)(a) for his non serious violent crimes, RCW 9.94A.589(1)(b) for his serious violent crimes (kidnapping 1) and

RCW 9.94A.533 for the firearm enhancements. Notably, Mr. Herrera-Castro was sentenced for his original trial after *Mullholland* was decided. He could have put forward an argument for a mitigated sentence on the serious violent crimes running consecutively then, but did not.

Here Mr. Herrera-Castro appears to argue that he should have been entitled to argue for a mitigated sentence for his firearm enhancements, citing *McFarland.* However, as noted above, *McFarland* said nothing about firearm enhancements. *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608, 613 (1999), overruled in part by *State v. Houston-Sconiers,* 188 Wn.2d 1, 391 P.3d 409 (2017), held that firearm enhancements may not be mitigated based on the language of RCW 9.94A.533. *McFarland* does not address 9.94A.533, and thus does not overrule *Brown.*

Houston-Sconiers does not overrule *Brown* as it regards adults.[1] Justice Madsen, in her concurrence, argues that *Brown* should have been entirely overruled as it regards firearm enhancements. She only gathered the concurrence of one other justice. *Houston-Sconiers* was decided in March of 2017. *McFarland* was decided in August of 2017. It is highly improbable that the Supreme Court sub silentio overruled *Brown* in

[1] It does overrule *Brown* on VIII Amendment grounds in regards to juveniles.

McFarland, when it was expressly invited to do so by two justices only six months earlier, and declined.

Nor does Mr. Herrera-Castro even attempt to make a showing that *Brown* is incorrect or harmful. In the 20 years since Brown was decided the legislature has had every opportunity to overrule it. They have not done so. Thus, Mr. Herrera-Castro cannot seek a mitigated sentence on his firearm enhancements, as the trial court had no authority to impose a mitigated sentence. There is no conflict of cases and no significant question of law that has not been decided, thus Supreme Court review is both unnecessary and inappropriate in this case.

3. Mr. Herrera-Castro does not assert any facts that would entitle him to a mitigated sentence.

In deciding whether to grant a mitigated sentence there are two determinations a court must make as a matter of law before deciding whether to grant a mitigated sentence as a matter of discretion. The first is whether the law allows a mitigated sentence given the criminal statutes violated. This is the question *Brown, Mullholland, Houston-Sconiers* and *McFarland* addressed. The second question is basically a sufficiency of evidence question. Given the facts of the case, is there sufficient evidence to impose an exceptional sentence? Cases that address this issue include *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015); *State v. Ha'mim,*

132 Wn.2d 834, 840, 940 P.2d 633 (1997); State v. Fowler, 145 Wn.2d 400, 38 P.3d 335 (2002), and many others. *See* annotations to RCW 9.94A.535. Indeed, an Appellate Court reviewing an exceptional sentence must evaluate whether the reasons supplied by the sentencing court are supported by the record. RCW 9.94A.585(4)(a). Here Mr. Herrera-Castro has never, in his original sentencing, the hearing to correct his judgment and sentence nor in his appellate briefs, offered a single fact that would justify a mitigated sentence. There have to be some facts in the record to support a mitigated sentence. There are none. Again, this is straightforward law that does not conflict with any case or raise a significant question of law.

4. Mr. Herrera-Castro was not resentenced. There were simply corrections to his judgment and sentence to fix errors.

Mr. Herrera-Castro argues that he should have been entitled to a full resentencing, entitled to argument and reconsideration of everything that went into his sentence. This is simply not the case. The trial court was limited to correcting a facially invalid "concurrent" to a mandatory "consecutive"[2]. This was a ministerial task. The court did not have the ability to consider an exceptional sentence. For that matter, the State did

[2] And, as the Court of Appeals pointed out, a facially invalid LFO.

not have the ability to ask for any other sentence other than the low end of the standard range, which is what the original trial judge imposed.

F. CONCLUSION

Mr. Herrera-Castro was not resentenced. There was a correction to his facially invalid judgment and sentence. Under *Adams* he is not entitled to reopen his whole case. Even if he was, there is no ability for the court to grant a mitigated sentence under *Brown*. There is no important question of law for the Supreme Court to decide. The petition for review should be denied.

DATED: March 11, 2019.

Respectfully submitted:

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CERTIFICATE OF SERVICE

On this day I served a copy of the Respondent's Answer to (Corrected) Petition for Discretionary Review in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Marie Trombley
marietrombley@comcast.net

Dated: March 22 2019.

Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

March 13, 2019 - 9:47 AM

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