

62629-9

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NO. 62629-9-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TROY MCLEOD,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Suffering from paranoia and psychosis, Troy McLeod shot and killed another man because he perceived the decedent was threatening his life. McLeod pleaded guilty and asked for a sentence below the standard range based on the substantial effect his mental illness had on his conduct and his misperception that he was acting in self-defense. The trial court refused to impose a lesser sentence, finding McLeod would not have prevailed on available defenses at trial. Because the trial court misunderstood and misapplied the mitigating factors justifying a sentence below the standard range, McLeod is entitled to resentencing.

B. ASSIGNMENTS OF ERROR.

1. The court misunderstood and misapplied the legal grounds for imposing a sentence below the standard range.

2. The court relied on an incorrect view of the evidence of McLeod's mental illness in refusing to impose a sentence below the standard range.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

The sentencing court must consider a request for a sentence below the standard range and may not deny such a request based on a misunderstanding of the law or an untenable

application of the facts. Here, the court refused to impose a sentence below the standard range, despite finding that McLeod had a severe mental illness that caused him to incorrectly perceive that he was acting in self-defense, because the court did not believe McLeod would have prevailed in any such defense at trial. Did the court improperly refuse to impose an exceptional sentence based on a misunderstanding of the legal criteria used to judge the availability of such a sentence and abuse its discretion?

D. STATEMENT OF THE CASE.

Troy McLeod entered an Alford¹ plea to one count of second degree murder after spending one and one-half years in and out of competency proceedings while awaiting trial. 3/1/07RP 3 (joint motion for competency evaluation); 7/23/07RP 4 (agreed finding McLeod not competent); 9/10/07RP 3-4 (agreed order McLeod not competent); 12/20/07RP 3 (McLeod competent); 4/24/08RP 3 (further competency evaluation ordered); 7/24/08RP 3 (competency agreed); 10/6/08RP 4-8 (guilty plea). The prosecution agreed to recommend a low-end standard range sentence of 123 months based on an offender score of "0." 10/6/08RP 6; CP 115.

¹ Alford v. North Carolina, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

The underlying incident arose during a dispute inside a building where McLeod had been living and working. McLeod had befriended a tenant in the building, and her boyfriend Kevin became jealous of McLeod and threatened to shoot him. CP 98. McLeod took this threat “very seriously” according to the building’s landlord and became fearful he would be shot. CP 100. The landlord noticed McLeod was “edgy” and seemed paranoid or depressed before the shooting. Id.

On January 12, 2006, a friend of another building tenant, Joaquin Taveres, asked McLeod to buy a gun from him because Taveres needed money. 10/31/08RP 28; CP 98. McLeod gave Taveres \$30 and owed him \$20 more for the gun. McLeod’s employer would pay him the following day and McLeod planned on paying Taveres the rest then. 10/31/08RP 29. But Taveres returned to McLeod later the same day to get the rest of the money, and Taveres seemed “agitated and high on drugs.” 10/31/08RP 29. Taveres blew cigarette smoke in McLeod’s face and was upset McLeod did not have the money. Id. Taveres had “his hand on his groin, which made me [McLeod] believe he had a pistol.” Id. McLeod fired a gun five times and killed Taveres, who was unarmed despite McLeod’s perception otherwise.

Taveres had methamphetamine in his blood stream at the time of his death and the police found a cigarette butt close to his body. CP 99. Taveres was driving a car with a broken steering column that may have been stolen. Tavares's friend Horacio Araguz verified that Taveres did not have enough money to buy gas and was trying to sell his possessions for money. CP 99-100.

According to McLeod's mother, McLeod had become increasingly paranoid and extremely fearful and anxious over the last several years. 10/31/08RP 16. He felt people "were out to do him harm," and while some of it seemed based in reality, it "was really exaggerated." Id. As he got older, his symptoms became increasingly severe, and he was at times crippled by anxiety and fears. Id. His mother said, "I sought all kinds of help, but Troy had no insurance so it was very, very difficult to get him into mental health treatment in Washington State." Id.

Dr. Mark McClung interviewed and evaluated McLeod numerous times after his January 2006 arrest. 10/31/08RP 12. McClung diagnosed McLeod with serious psychosis, causing paranoia and severe lapses in judgment and insight. Id. Without regular mental health treatment, he "self-medicated" by using drugs or alcohol but there was no evidence he was under the influence of

any substances at the time of the incident. Id. He suffered from hallucinations and disorganized thought, and his psychosis caused him to misperceive events in a very paranoid way. Id.

Although McLeod entered his plea before Judge Regina Cahan, the court assigned a different judge for sentencing who was unfamiliar with the case or McLeod's history. 10/6/08RP 3, 11. The sentencing judge heard statements from several friends and relatives of Taveres; the prosecution's recommendation of a low end sentence of 123 months; and from McLeod's attorneys, his mother, Dr. McClung, and himself in support of his request for an exceptional sentence below the standard range. The court refused to impose an exceptional sentence, finding that McLeod would not have prevailed on his possible defenses at trial and therefore his case did not justify a lesser sentence. 10/31/08RP 29-35. The court imposed a mid-range sentence of 180 months. 10/31/08RP 36. This appeal timely follows.

Pertinent facts are discussed in more detail in the relevant argument sections below.

E. ARGUMENT.

BECAUSE THE TRIAL COURT FUNDAMENTALLY MISUNERSTOOD THE RULE THAT A "FAILED" DEFENSE JUSTIFYING AN EXCEPTIONAL SENTENCE DOES NOT REQUIRE PROOF THE DEFENDANT WOULD HAVE SUCCEEDED ON THE ISSUE AT TRIAL, THE COURT'S REFUSAL TO IMPOSE A LESSER SENTENCE WAS UNTENABLE, UNREASONABLE, AND BASED ON AN ERRONEOUS APPLICATION OF THE LAW

Troy McLeod was found incompetent to stand trial three times while he spent almost two years in jail awaiting his trial. After his treating psychiatrists found medication to stabilize his mental state, McLeod pleaded guilty. The prosecution recommended McLeod receive the low end of the standard range, while McLeod asked for a sentence below the standard range based on the mitigating factors of "failed" self-defense, "failed" diminished capacity, and the significant impact of a mental disorder in affecting his ability to appreciate the wrongfulness of his conduct and understand his actions.

The sentencing court ruled McLeod was not entitled to a lesser sentence because he would not have prevailed at trial on a self-defense or diminished capacity claim, and his mental illness could not excuse his behavior. Because the court misapplied the

legal standards for measuring whether an exceptional sentence is justified, the sentence imposed must be reversed.

1. A court's sentencing decision requires reversal when it rests on an incorrect understanding of the law. A court's refusal to impose an exceptional sentence below the standard range may be reviewed on appeal when the court "relied on an impermissible basis for refusing to impose an exceptional sentence." State v. Khanteechit, 101 Wn.App. 137, 138, 5 P.3d 727 (2000); RCW 9.94A.585.

A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)); see also State v. Tili, 139 Wn.2d 107, 124, 985 P.2d 365 (1999) (court's failure to articulate a viable basis to find the offender's conduct "separate and distinct" is an abuse of discretion).

Under the SRA, failed defenses may constitute mitigating factors that justify a sentence below the standard range. State v. Jeanotte, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). Factors

favoring the mitigation of the standard range need be established only by a preponderance of evidence. RCW 9.94A.535(1).

RCW 9.94A.535(1) includes a list of “illustrative,” not exclusive, factors that may mitigate in favor of a lesser sentence. The illustrative list contains factors that, had they been established at trial, would have justified or excused the accused person’s behavior. The SRA recognizes that even when such defenses do not or would not have prevailed at trial, circumstances may still justify distinguishing the person’s behavior from that of others convicted of the offense. Put another way, the SRA allows “variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant’s conduct from that normally present in that crime.” State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993) (citing with approval, D. Boerner, Sentencing in Washington, § 9-23 (1985)).

2. The court fundamentally misapplied the law of self-defense in deciding McLeod would not have prevailed at trial. The court found that McLeod’s “failed” self-defense claim could not justify a lesser sentence because McLeod would not have objectively established self-defense at trial. 10/31/08RP 31. The

court's ruling is legally incorrect because it rests on a misunderstanding of the law of self-defense and improperly demands that the defendant must show he would have prevailed at trial to receive an exceptional sentence below the standard range.

In a self-defense case, the jury must decide whether the defendant reasonably believed that force was necessary to defend himself against imminent bodily harm. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). This standard requires both objective and subjective consideration. Id. If jury instructions suggested the jury should only view the claim objectively, they would be fundamentally erroneous and require reversal. See State v. Corn, 95 Wn.App. 41, 49, 975 P.2d 520 (1999); State v. Painter, 27 Wn.App. 708, 712, 620 P.2d 1001, rev. denied, 95 Wn.2d 1008 (1981). The prosecution bears the burden of disproving self-defense beyond a reasonable doubt. Walden, 131 Wn.2d at 473.

The legal standard for self-defense is a well-settled rule in Washington. The fact-finder must view self-defense from the conditions as they appeared to the defendant. Walden, 131 Wn.2d at 474; State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993) ("longstanding rule . . . is that evidence of self-defense must be assessed from the standpoint of the reasonably prudent person,

knowing all the defendant knows and seeing all the defendant sees.”); State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984); State v. Wanrow, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977).

Here, defense counsel explained that a reason they did not take the case to trial was the complexity of expecting a jury to stand in McLeod’s shoes to assess self-defense where it would have to view what he knew and saw from the perspective of his mental illness and distorted perceptions. 10/31/08RP 20. Yet the sentencing judge was also unable to apply this concept.

The court reasoned that McLeod’s account of events was “not reliable” because of his mental illness, and therefore, his claim of self-defense “doesn’t go very far, even as a failed claim.” 10/31/08RP 30. The court explained that Tavares’s behavior, blowing smoke in McLeod’s face and reaching for what McLeod thought was a gun but was not actually any weapon, did not establish failed self-defense. Id. at 31.

The court’s ruling was unreasonable and legally erroneous in its application of self-defense. The court looked only at whether it thought McLeod’s self-defense would have been objectively proven. It refused to view the events from McLeod’s extremely paranoid perspective, because his perspective was “not reliable”

due to his mental illness. It did not acknowledge that the prosecution bears the burden of disproving self-defense, and that the “reliability” of McLeod's viewpoint was beside the point because it clearly affected his perception of the threat and his sincere belief he was acting in reasonable self-defense.

Importantly, the question before the court was not whether the jury would have found McLeod acted in self-defense. The question was whether his claim of failed self-defense distinguished his case from others because his mentally ill, distorted, paranoid view of events caused him to believe he was acting in self-defense. The court focused on whether McLeod's claim of self-defense was objectively reasonable without acknowledging that McLeod need not present a persuasive claim of self-defense to receive an exceptional sentence.

McLeod perceived Taveres was the aggressor and the court did not dispute McLeod's sincerity on this point. McLeod felt Taveres had been bullying him over several encounters. Taveres appeared at 2 a.m., blowing smoke and demanding money from McLeod that McLeod did not have. Tavares had recently taken methamphetamine. McLeod saw Taveres reach for something and McLeod thought it was a weapon, prompting McLeod to shoot at

Taveres five times in a fairly short span. The medical examiner was not sure how Taveres was positioned when shot.

McLeod's perception of Taveres's behavior may well have been grossly distorted. His family explained that he suffered from "really exaggerated fears" of others. 10/31/08RP 16. He feared leaving his house, and even though they understood he was mentally ill, he lacked health insurance and received only minimal, short-term psychiatric treatment. Id. at 14, 16. After the incident, McLeod was found sitting in his truck "confused and disoriented." CP 100.

The court misapplied the law of self-defense and the basic principle governing exceptional sentences below the standard range by erasing the "failed" aspect of the mitigating factor and instead requiring the defense to show McLeod would have presented an objectively reasonable claim of self-defense that would have prevailed at trial. McLeod's significant psychosis and undisputedly distorted thinking certainly set him apart from most people who believe they are acting in self-defense. There was no evidence he shot out of anger or vengeance, as most do who commit intentional murder, but rather he acted based on his distorted thought and paranoid misperception due to an untreated

and serious mental illness. The court's unreasonable and misguided assessment of McLeod's request for an exceptional sentence requires remand for a new sentencing hearing.

3. The court misapplied the legal mitigating factor of serious mental health impairment as a basis for a lesser sentence.

Similarly to its skewed analysis of "failed" self-defense, the court refused to consider McLeod's request for a lesser sentence based on a "failed" diminished capacity or mental health defense for the improper reason that such a defense would not have succeeded at trial. The court also based its erroneous ruling on its misstatement of the evidence presented, incorrectly finding that the forensic psychiatrist McClung disputed McLeod's diminished capacity when in fact McClung said he did not have sufficient information to give an opinion whether McLeod had capacity to understand his actions at the time of the incident. 10/31/08RP 28, 31.

RCW 9.94A.535(1)(e) provides a court may impose a sentence less than the standard range if it finds, "The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." There was no dispute that McLeod suffered from serious mental health problems and that they played a large

role in the incident; as the prosecutor said at sentencing, “no one’s disputing that the defendant suffers from a mental illness.”

10/31/08RP 25. McLeod had no history of violent behavior and no felony convictions whatsoever. The prosecutor did not ask McClung any questions during the sentencing hearing or challenge his conclusions in any way.

More significantly, the court again insisted that a mitigating factor is unavailable unless there is persuasive evidence that the defense would have prevailed, and refused to consider the joint effect of McLeod’s paranoid psychosis along with his belief he was acting in reasonable self-defense. 10/31/08RP 31-32. The court agreed that McLeod “had a loss of appreciation of the wrongfulness of his conduct because of mental illness.” 10/31/08RP 31. But the court incongruously ruled that by firing five shots, McLeod could neither avail himself of self-defense nor a mental defense. 10/31/08RP 32.

The legal justification for a sentence less than the standard range does not require a defendant to show that he would have prevailed on a defense, otherwise, analysis of mitigating factors would be superfluous. Moreover, the list of available mitigating factors is not exclusive and a court may consider other factors, or

the combined effect of various circumstances that distinguish the defendant's actions from others convicted of the same offense. RCW 9.94A.535(1). Defendants who have successful defenses need not seek lesser sentences, because they are not convicted. The mitigating factor analysis arises only for people who do not possess a defense strong enough to prevail but who still have sympathetic circumstances that separate their actions from the person who acted intentionally, willfully, and purposefully.

The court did not dispute McClung's explanation of McLeod's well-documented history of "serious psychiatric syndrome with psychosis," requiring hospitalization at times. 10/31/08RP 12, 30. McClung found McLeod suffered from hallucinations, paranoia, disorganized thought, and severe lapses in judgment and insight. 10/31/08RP 12. He also explained that McLeod had not been properly diagnosed in the past, despite his serious symptoms, because he had never had stable treatment and instead only sporadically saw clinicians who observed his symptoms but did not know the degree to which they affected him. Id. at 12-13. He did not have regular supervision of prescribed medication, or insurance. Id. at 12-13, 16.

McLeod's mother verified McLeod's increasingly serious and unreasonable paranoia and skewed perceptions of reality and her failed efforts to secure help for him. Even when McLeod was seen regularly by doctors at Western State, it took over one year to determine effective medication for him, in their final effort to restore McLeod's capacity during this prosecution. 10/31/08RP 19. Once McLeod was appropriately medicated in July 2008, he was far less psychotic and much better functioning. Id.

Although McClung had numerous interactions with McLeod, he did not meet him until several months after the offense. 10/31/08RP 12. McClung could not attest to McLeod's mental state at the time of the offense and could not give an opinion as to whether he understood his actions at the time of the offense, or whether he understood right from wrong. 10/31/08RP 28. Nonetheless, as demonstrated by the repeated efforts required to attain McLeod's bare capacity to stand trial, he suffered from significant, enduring, and tremendously disruptive mental health problems.

The court's refusal to consider McLeod's mental health problems, causing his very skewed perception of events and corroborated by his mother's explanation of a history of strange

paranoia, either as raising the potential for diminished capacity or mental illness defenses, apparently based on the court's determination that McLeod would not have prevailed on self-defense at trial, misinterprets the statute and denies McLeod his right to proper sentencing consideration.

4. Remand for a new sentencing hearing is required.

When a court misapplies the law or unreasonably disregards the evidence before it, a new sentencing hearing is necessary. Upon resentencing, a new judge should determine the appropriate term. See Santobello v. New York, 404 U.S. 257, 263, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); State v. Ra, 144 Wn.App. 688, 705, 175 P.3d 609, rev. denied, 195 P.3d 88 (2008) (reversing conviction and ordering sentencing before new judge where court's sentencing comments unnecessarily partisan); State v. Aguilar-Rivera, 83 Wn.App. 199, 203, 920 P.3d 623 (1996) (remanding for resentencing before new judge where court inadvertently omitted allocution before pronouncing sentence).

Here, McLeod presented multiple reasons why he should receive a sentence that is less than the standard range, because his personal circumstances substantially distinguished his case from other typical cases. Even the court acknowledged that most

people it sentences for intentional murder “don’t have a diagnosed mental illness.” 10/31/08RP 35. There was no dispute that at the time of the purportedly intentional murder, McLeod suffered from seriously deluded, disorganized, and paranoid thoughts that were so severe that it took one year for the Western State Hospital psychiatrists to find medications that sufficiently stabilized him so that he could understand the proceedings against him. His paranoia and mental illness may not have supplied defenses that would result in his acquittal but not even the prosecution sought excessive punishment for McLeod out of an understanding that he acted out of psychosis and not purposefulness.

But the trial court refused to give even the low-end sentence recommended by the State. After misstating the legal parameters required for an exceptional sentence below the standard range, the court gave McLeod a sentence **five years longer** than that sought by the prosecution. 10/31/08RP 2, 36. The court’s fundamental misunderstanding of the legal criteria for imposing an exceptional sentence renders its sentence unlawful and untenable, and requires resentencing before a different judge.

F. CONCLUSION.

For the reasons stated above, Mr. McLeod respectfully asks this Court to remand this case for a new sentencing hearing before a different judge.

DATED this 17th day of June 2009.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Nancy Collins", written in black ink.

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