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NO. 62629-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TROY McLEOD,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Defendant requested a sentence below the standard sentencing range. Judge Shaffer carefully considered, then rejected, defendant's request. Can defendant then appeal Judge Shaffer's standard range sentence when the court neither refused to exercise discretion at all nor relied on an impermissible basis for refusing to impose a sentence below the standard sentencing range?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant pleaded guilty to murder in the second degree on October 6, 2008. 10/6/08RP 3-11. He was sentenced by Judge Catherine Shaffer on October 31, 2008. 10/31/08RP 2-39.

2. SUBSTANTIVE FACTS

At his sentencing defendant requested an exceptional sentence below the standard sentencing range, 78 months.

10/31/08RP 18. Defendant cited two bases for his request:

The factors that we are relying on are the fact that Mr. McLeod's capacity to appreciate the wrongfulness of his conduct and to conform to the law was

significantly impaired by his mental illness. And that ties in with our second factor of two failed defenses.

10/31/08RP 19.

The two failed defenses were identified as self defense and diminished capacity. 10/31/08RP 20. In response to defendant's request, the State quoted from a report written by defendant's expert, Dr. Mark McClung, a psychiatrist:

Despite the mental illness symptoms, Mr. McLeod was still capable of goal-directed behavior--and in parens working, driving, engaging in conversation, et cetera--at the time of the crime and appears to have been cognizant that his act of the crime was the shooting of another person. Therefore his capacity to form the specific intent for the crime was not significantly impaired by his mental illness.

10/31/08RP 25-26.

The State recommended a sentence at the bottom of the standard sentencing range, 123 months. 10/31/08RP 2.

Judge Shaffer first addressed defendant's failed defenses claim:

But I must say that the fact that Mr. McLeod suffers from mental illness which, among other things, the doctor tells me, results in paranoia and delusions, suggests to me that his perception of Mr. Tavares and his account of this evening is not reliable.

If it's not reliable, then the claim of self-defense doesn't go very far, even as a failed claim, because, if in fact Mr. Tavares did not menace Mr. McLeod--even his version of events has Mr. Tavares at the most

blowing smoke in his face and reaching into his jacket for a weapon that definitely was not there--then I don't really see this as a case of failed self-defense.

To the extent that it's a case of allegedly of failed diminished capacity, the difficulty with that assertion is that any expert evidence I've been given is that Mr. McLeod was capable of forming the intent to commit this offense.

Indeed, he clearly intended to take Mr. Tavares's life. That's the only way to interpret five shots from a shotgun. So I don't see this as qualifying under the second prong events to me.

10/31/08RP 30-31.

Judge Shaffer then addressed defendant's capacity to appreciate the wrongfulness of his conduct claim:

In terms of the first prong, that's a closer question. The defense has asked me to find that Mr. McLeod's ability to appreciate the wrongfulness of his conduct or conform his conduct to legal requirements was significantly impaired by mental illness.

I do agree that he had a loss of appreciation of the wrongfulness of his conduct because of mental illness, because I believe that, due to his mental illness, he wrongfully thought that Mr. Tavares posed some sort of threat. But even if I enter into a delusional state where I visualize Mr. Tavares blowing smoke in Mr. McLeod's face and reaching into his jacket, that does not explain firing two shots apparently into Mr. Tavares chest and then continuing to fire into his body, into his buttocks and his back.

That's well beyond something that is explained by mental illness and the inability to appreciate the wrongfulness of conduct. Not to slice it too fine, but this isn't a single shot from a shotgun.

10/31/08RP 31-32.

Judge Shaffer, in rejecting defendant's request for an exceptional sentence, concluded by stating:

So I don't believe factually that I have substantial and compelling reasons to go below the standard sentencing range on either of the prongs advanced to me, although, as I said, the first prong is closer; but it fails on the facts of this case for the reasons I've stated.

10/31/08RP 32.

A standard range sentence of 180 months was then imposed. 10/31/08RP 36.

C. ARGUMENT

A court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purposes of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. A sentence within the standard sentencing range, under RCW 9.94A.510¹ or 9.94A.517, for an offense shall not be appealed. RCW 9.94A.585(1). This statute precludes appellate review of challenges to the amount of time imposed when the time is within

¹ The sentence in this case was imposed pursuant to RCW 9.94A.510.

the standard range. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989).

Here, as stated above, defendant cannot appeal the length of his standard range sentence. Instead, defendant appeals Judge Shaffer's refusal to impose a sentence below the standard sentencing range because, he asserts, she somehow misapplied the law. This claim is without any merit. As the record clearly shows, Judge Shaffer carefully considered, then rejected, defendant's request.

In State v. Garcia-Marquez, 88 Wn. App. 322, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1997), this court explained when review is appropriate when a defendant requests, but does not receive, a sentence below the standard sentencing range:

Review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; *i.e.*, it takes the position that it will never impose a sentence below the standard range. A court relies on

an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex or religion. Even in those instances, however, it is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence. Conversely, a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling.

88 Wn. App. at 330.

Judge Shaffer did not refuse to exercise her discretion at all in this case. She did not rely on an impermissible basis for refusing to impose an exceptional sentence below the standard range.² Instead, Judge Shaffer carefully considered, then rejected, defendant's request. For that reason, defendant may not appeal his sentence.

² Defendant claims that Judge Shaffer somehow misunderstood the law of self defense. Defendant's Brief, at 8-9. This claim is both incorrect and irrelevant. It is incorrect because there is nothing in the record indicating that Judge Shaffer misunderstood the law of self defense. Instead, she viewed the evidence differently than defendant did. It is irrelevant because once Judge Shaffer exercised her discretion, defendant cannot appeal the basis of her decision. 88 Wn. App. at 330.

D. CONCLUSION

For the reasons stated above, defendant's sentence should be affirmed.

DATED this 21 day of July, 2009.

Respectfully submitted,

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Certification of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney of record for the appellant, at the following address: Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101-3635, containing a copy of the Brief of Respondent, in STATE V. TROY McLEOD, Cause No. 62629-9-I, in the Court of Appeals, Division I, of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Eileen Miyashiro
Done in Seattle, Washington

7/21/09
Date

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