

64339-8

64339-8

NO. 64339-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Appellant,

v.

BRADLEY YOUNG,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

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**BRIEF OF APPELLANT**

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COURT OF APPEALS  
STATE OF WASHINGTON

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
B. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u> .....	2
C. <u>STATEMENT OF THE CASE</u> .....	4
1. CRIME, CHARGES, PRE-TRIAL AND GUILTY PLEA .....	4
2. SENTENCING – SEPTEMBER 19 <sup>TH</sup> .....	7
3. HEARING ON OCTOBER 21 <sup>ST</sup> .....	12
D. <u>ARGUMENT</u> .....	15
1. THE SENTENCING COURT ERRED BY TAKING ADDITIONAL EVIDENCE AND CHANGING ITS DECISION AFTER ACCEPTANCE OF REVIEW BY THIS COURT.....	16
2. A MITIGATED SENTENCE WAS NOT APPROPRIATE AS A MATTER OF LAW OR FACT, AND THE SENTENCE IMPOSED WAS CLEARLY TOO LENIENT.....	19
a. The Court’s Legal Reasons Do Not Justify A Mitigated Sentence As A Matter Of Law .....	20
b. The Court’s Factual Findings Are Not Supported By The Record.....	27
c. The Trial Court’s Sentence Was Clearly Too Lenient.....	30
E. <u>CONCLUSION</u> .....	32

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Inman v. Netteland, 95 Wn. App. 83,  
974 P.2d 365 (1999)..... 17

Olsen Media v. Energy Sciences, 32 Wn. App. 579,  
648 P.2d 493 (1982)..... 17

State v. Allert, 117 Wn.2d 156,  
815 P.2d 752 (1991)..... 20, 22, 25, 27

State v. Altum, 47 Wn. App. 495,  
735 P.2d 1356 (1987)..... 24

State v. Amo, 76 Wn. App. 129,  
882 P.2d 1188 (1994)..... 22

State v. Borg, 145 Wn.2d 329,  
36 P.3d 546 (2001)..... 19

State v. Clark, 76 Wn. App. 150,  
883 P.2d 333 (1994)..... 23

State v. Commodore, 38 Wn. App. 244,  
684 P.2d 1364 (1984)..... 17

State v. Estrella, 115 Wn.2d 350,  
798 P.2d 289 (1990)..... 22

State v. Evans, 80 Wn. App. 806,  
911 P.2d 1344 (1996)..... 23

State v. Fowler, 145 Wn.2d 400,  
38 P.3d 335 (2002)..... 26

State v. Freitag, 127 Wn.2d 141,  
896 P.2d 1254, 905 P.2d 355 (1995)..... 22

<u>State v. Gaines</u> , 122 Wn.2d 502, 859 P.2d 36 (1993).....	23
<u>State v. Grewe</u> , 117 Wn.2d 211, 813 P.2d 1238 (1991).....	27
<u>State v. Hobbs</u> , 60 Wn. App. 19, 801 P.2d 1028 (1990).....	24
<u>State v. Hodges</u> , 70 Wn. App. 621, 855 P.2d 291 (1993).....	22, 26
<u>State v. Hutsell</u> , 120 Wn.2d 913, 845 P.2d 1325 (1993).....	23
<u>State v. Law</u> , 154 Wn.2d 85, 110 P.3d 717 (2005).....	20
<u>State v. Murray</u> , 128 Wn. App. 718, 116 P.3d 1072 (2005).....	21, 22, 25
<u>State v. Paine</u> , 69 Wn. App. 873, 850 P.2d 1369 (1993).....	23
<u>State v. Pascal</u> , 108 Wn.2d 125, 736 P.2d 1065 (1987).....	20, 22
<u>State v. Pennington</u> , 112 Wn.2d 606, 772 P.2d 1009 (1989).....	20
<u>State v. Rice</u> , 98 Wn.2d 384, 655 P.2d 1145 (1982).....	20
<u>State v. Rogers</u> , 112 Wn.2d 180, 770 P.2d 180 (1989).....	24
<u>State v. Sanchez</u> , 69 Wn. App. 255, 848 P.2d 208 (1993).....	24
<u>State v. Schloredt</u> , 97 Wn. App. 789, 987 P.2d 647 (1999).....	24

## Statutes

### Washington State:

RCW 9.94A.500 .....	17
RCW 9.94A.505 .....	19
RCW 9.94A.530 .....	18
RCW 9.94A.533 .....	23
RCW 9.94A.535 .....	19, 22, 23
RCW 9.94A.585 .....	19

## Rules and Regulations

### Washington State:

RAP 2.2.....	17
RAP 6.1.....	17
RAP 7.2.....	16, 17
RAP 7.3.....	18
RAP 8.3.....	16
RAP 9.5.....	17
RAP 9.6.....	17

## Other Authorities

D. Boerner, <u>Sentencing in Washington</u> § 2.5 (1985).....	20
D. Boerner, <u>Sentencing in Washington</u> § 9.6 .....	20

A. ASSIGNMENTS OF ERROR

1. The trial court erred by considering new evidence and announcing a new legal basis in support of an exceptional sentence after review was sought and accepted by this court.
2. The trial court erred in entering the following findings of fact:
  - A.1. "Mr. Young has been diagnosed with post-traumatic stress disorder, anxiety, major depressive disorder recurrent and cocaine dependence all of which existed, according to the DSHS mental health evaluator, before drug abuse began."
  - A.2. "The DSHS mental health evaluator has determined that Mr. Young has "extreme anxiety, paranoia that prevents him from having good concentration and decision making."
  - A.4. "It is clear that Mr. young acted impulsively and was impaired by his . . . diagnoses . . . when he decided to drive the bait car . . ."
  - B. "The court finds that at the time the current offense was committed, the defendant suffered from significant substance abuse and mental health-related issues." (This finding is erroneously called a conclusion of law.)
  - B. "[S]ince the commission of the instant offense, the defendant has taken remedial measures to successfully address these issues." (This finding is erroneously called a conclusion of law.)

3. The trial court erred by imposing an exceptional sentence based on the following conclusions of law:
  - B. “The defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired by his mental health diagnoses including major depressive disorder.”
  - B. “The Court finds that further punishment would not further any rehabilitative purpose and that the defendant and society are better served by the defendant’s participation in the programs considered above.”
  - B. “The court finds that the defendant’s strong family support, combined with the defendant’s efforts noted above, will benefit the defendant and the community beyond any further punishment.”
  - A.4. “The Court finds that this would have constituted a failed mental defense.” (This conclusion of law is erroneously called a finding of fact.)

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. May a trial court consider new evidence to support an exceptional sentence after review has been sought and granted by the Court of Appeals where the new evidence is used to support a new legal theory for the sentence?

2. Did the trial court err in finding that the defendant's capacity to appreciate the wrongfulness of his conduct was impaired at the time of the crime where there was no evidence establishing a connection between the defendant's mental state and the crime?

3. Did the trial court err where it determined that a mitigated sentence would better serve the defendant and society than a standard range sentence, where that conclusion amounted to a simple disagreement with the legislature and where, in any event, no treatment component was included in the sentence?

4. Did the trial court err by concluding that strong family support and efforts at rehabilitation were substantial and compelling reasons to depart from the presumptive sentencing range?

5. Did the trial court err in making findings of fact that were not supported by the evidence, and which, in some instances, were contradicted by the evidence?

6. Did the trial court impose a clearly too lenient sentence when neither treatment nor public safety nor rehabilitation would be served by simply releasing a chronic drug addict to work release without supervision or treatment?

C. STATEMENT OF THE CASE

1. CRIME, CHARGES, PRE-TRIAL AND GUILTY PLEA

The certification for determination of probable cause establishes that on June 5, 2008, Bradley Young and Tia Little stole a Black 2000 Acura Integra automobile that had been parked in the 1100 block of Main Street, Seattle, Washington. The car was a “bait car” that had been parked days earlier at that location. Neither Young nor Little had permission to drive the vehicle. Once they took the car, a silent alarm alerted Det. Hossfeld of the Seattle Police Department that the car had been stolen. Patrol officers confirmed that the car was missing. They also informed Det. Hossfeld that officers were chasing the car on Dearborn Street in Seattle. They stopped the car on Interstate 5 near Columbia Street and arrested both Young and Little. CP 2.

After Young was arrested, Det. Hossfeld reviewed the visual and audio recording made from inside the bait car during the theft.<sup>1</sup> As described by the prosecutor at sentencing, that recording showed Young and Little entering the vehicle and talking “about the

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<sup>1</sup> Bait cars are equipped with high resolution cameras and audio recording devices that capture images and conversations in the car. Such a recording was made in this case but is not available on appellate review because the video was not made a part of the record below. The prosecutor offered to let the judge watch the recording but the judge apparently did not do so. See RP (9/18) 10.

circumstances that led them to find such a [nice] car, and how fortunate it would be if the owner of the car was locked up in . . . prison for a long period of time so that they could have this car.” RP (9/18) 10. They argued whether the car was a “setup” but they showed no hesitation or remorse over taking the car. Id. There is no other information in the record that describes Young’s behavior on that day. No evidence was presented that he was suffering a diminished mental capacity on June 5, 2008.

On June 8, 2008, Young was charged with Theft of a Motor Vehicle. CP 1. The case was continued a number of times over the next year. During that time, Young failed to appear for a case setting hearing on August 19, 2008, and an arrest warrant was issued. CP 5. He was arrested on the warrant on August 27, 2008. CP 6-7. He also failed to appear for an omnibus hearing on June 19, 2009, another warrant issued, and he was arrested on that warrant on June 23, 2009. CP 8-10.

On August 7, 2009, Young pled guilty to Theft of a Motor Vehicle. CP 12-33. He described the offense in his own words in the following way:

In King County, WA, on or about June 5, 2008,  
I intended to deprive another of a motor vehicle &  
wrongfully obtained such property, a 2000 Acura  
Integra, belonging to the Seattle Police Department.

CP 21. Young did not indicate in his plea, and he had not indicated in pre-trial documents, that he was suffering from diminished capacity at the time of the offense.

Young's criminal history included six adult felonies, three juvenile felonies, thirty-two adult misdemeanors, and two juvenile misdemeanors. CP 29-31. His prior felony convictions include two prior attempts to elude a pursuing police vehicle and a juvenile conviction for auto theft. Id. He agreed that this criminal history was accurate and complete. CP 28. Based on this criminal history, it was agreed that Young's offender score was "7" and that his standard range sentence was 22-29 months. CP 32. He agreed that this offender score was correct. CP 28. Young understood that the State would be asking for a sentence in the middle of the standard range, that he could seek a mitigated sentence, but that the State had a right to appeal the grant of a mitigated sentence. CP 16, 28, 33.

## 2. SENTENCING – SEPTEMBER 19<sup>TH</sup>

At sentencing, the State requested a sentence of 25 months. RP (9/18) 2. Young asked the court to impose an exceptional mitigated sentence of 4 ½ months incarceration with credit for time served. CP 82.<sup>2</sup> His counsel argued that an exceptional sentence was legally justified “because Mr. Young has established that he is ready to change his life.” CP 83 (all caps font eliminated). The brief referenced documents from the following people or entities: a social worker from The Defender Association; American Behavioral Health Services (ABHS); Green River Community College; Sound Mental Health; and Sunrise Centers. The documents described Young’s recent efforts to obtain drug and alcohol counseling, mental health treatment, and job training. CP 98-118.

Nina Beach, a social worker and “mitigation specialist” with The Defender Association (TDA), submitted a report and testified at sentencing. CP 90-102; RP (9/18) 12-13. She said that she

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<sup>2</sup> A version of this Defense Sentencing Recommendation was apparently available to the prosecutor and judge at the sentencing hearing. RP (9/18) 2 (“I trust the court has had the opportunity to review Ms. McKee’s presentence report?”). The document was not filed, however, until after the hearing on October 21, 2009. CP 82. The document includes, inter alia, a certification from Renton Technical College, dated September 21, 2009. Because this certification post-dates the September 19<sup>th</sup> sentencing hearing, it would not have been available at the sentencing hearing.

conducted two interviews with Young – one in person and one over the telephone – that apparently consisted of collecting substance abuse and mental health information directly from Young. CP 99. There is no indication that Ms. Beach conducted any psychological testing. She reported that the defendant had substance abuse problems dating back to the time he was 13 years old. CP 100. She noted that “Mr. Young’s longest periods of abstinences from drugs and alcohol tend to be while he is incarcerated. He relapses almost immediately after he is released.” CP 100. Based on a review of other documents, Ms. Beach asserted that Young suffered from several “Major Clinical Syndromes” including: Dysthymic disorder, NOS (severe depression), and dependence on marijuana, alcohol, cocaine, and heroin. CP 101. His “current psychosocial stressors” are listed as “legal issues.” CP 101. There is no mention in this report of post-traumatic stress disorder (PTSD), nor is there a discussion of whether Young’s self-reported substance abuse and/or depression caused him to steal a car on June 5, 2008. Ms. Beach mentioned “mental health issues” at sentencing but she did not say that Young suffered from PTSD. RP (9/18/) 13.

Everyone who addressed the court agreed that Young needed intensive treatment to be safe in the community. Ms. Beach opined in her report that Young “requires intensive outpatient chemical dependency services, intensive case management services, employment and vocational support, all of which are offered through the King County Drug Diversion Court program. CP 102. She mentioned his “. . . 20 year history of being addicted to drugs and alcohol, since the age of 13 . . .” RP (9/18) 12. Young’s mother asked for “intensive drug treatment,” and noted that Young was welcome to come live with her in New Mexico, “if he completes his drug treatment – intensive drug treatment and counseling.” RP (9/19) 13. Young’s son said that Young needed “an intensive drug treatment or rehabilitation program.” RP (9/18) 14. Young personally confirmed his need for treatment. RP (9/18) 16 (“I cannot function normally without the aid of mental-health counseling and medication and drug treatment”).

This need for treatment was also reflected in the written materials submitted by Sound Mental Health. Carol Weber, who is in charge of Reentry Case Management Services, wrote that, although Young enrolled in the Reentry Program in February, 2009 and developed a treatment plan, “it seems he *did not* have the tools

yet needed for relapse prevention.” CP 116 (italics added).

Ms. Weber notes, however, that Mr. Young would be permitted to re-apply: “Upon release from RJC, Reentry can work with Mr. Young to make another treatment plan that will stipulate chemical dependency treatment as a necessary component in his wrap-around care.” CP 116.

The court then imposed sentence, as follows:

I am trying to think of something in the middle, frankly. I think that -- I am not convinced or don't believe that serving time in prison is going to really make things any better. I would like to do something that gave you the opportunity to prove what you are saying, but I also don't think that just releasing you now sends the right message, which is all you have to do is get the court and get the right judge and you get out.

And I am curious -- my thinking is to impose a jail sentence, significant jail sentence as a deviation from the standard range, but to allow that service of the jail sentence to be with either work or educational release. And I was thinking, you know -- I was thinking 10 months of incarceration in jail with credit for the time that you served, which is some credit, with the understanding that if you are eligible, you would be able to get out for work release, if you do get a job -- or education release, if you continue to pursue your education.

RP (9/18) 21-22. The prosecutor then asked the court to state its legal basis for the exceptional sentence. RP (9/18) 23.

So I think my findings, and I will let counsel either correct me or point out that I need to say something additionally.

Basically what I am finding is that the standard range, while legally applicable in this case, is not going to be imposed because I find there are significant factors that exist in this case that while they may not be specified in the list that the legislature gave for a court to consider an exceptional sentence downward, that you have made sufficient efforts -- while after this has happened, after this charge has happened, to obtain and pursue efforts to handle your drug problem, to get control of yourself, in terms of psychological treatment. You understand, hopefully, what it is that is causing you to behave in this manner without -- really without thinking things through, and also that your efforts in terms of the -- to pursue drug treatment on your own, all of which I think are significant factors in your decisions to commit the crimes that you have committed. That will be my basis.

RP (9/18) 23-24.

The court appeared to belatedly realize that no supervision would be available under these circumstances. RP (9/18) 24. The prosecutor confirmed that "he is just going to be let out." Id. The court then said that Young would simply have to rely upon ". . . NA sponsors that you may be in contact with, teachers, your medical care, psychological care..." to assure that he did not relapse.

RP (9/18) 24.

The court then completed the judgment and sentence. CP 51-57. Ten months incarceration, with credit for 153 days

served (about five months), was imposed. Work release was authorized. CP 54. With earned early release credit, Young had very little jail time left to serve, and he was released from custody shortly after sentencing. RP (10/21) 4. The sentence included no requirement for post-release supervision, drug treatment, or mental health counseling. CP 54. Still, the court appeared to believe that it could revoke the sentence at some future time, and said, "it won't take very much for this to be revoked and you to be put in jail for the period of time." RP (9/18) 25.

A hearing was set for October 21<sup>st</sup> to present findings of fact and conclusions of law in support of the exceptional sentence. Id. at 27. Young waived his presence at that hearing. The State filed a notice of appeal on October 16, 2009. CP 59.

### 3. HEARING ON OCTOBER 21<sup>ST</sup>

The parties convened on October 21, 2009, to enter findings of fact and conclusions of law in support of the exceptional sentence. RP (10/21) 2. Counsel of record for the State, Mr. Nielson, was absent due to illness. Id. The defendant was not present. Id. Both counsel had apparently submitted proposed findings. Id. at 3.

Defense counsel began by noting that she had “attached an addendum to the findings which I had not attached at the sentencing, and the reason is we received it after the sentencing.” RP (10/21) 3. That “addendum” was “an evaluation of Mr. Young by DSHS to determine whether or not he qualifies for disability...” RP (10/21) 4. The evaluation was conducted on April 6, 2009 but it was not attached to the presentence memorandum. CP 76. Facsimile printing at the top of the document suggests it was sent to defense counsel on October 9, 2009. CP 73.

Defense counsel told the court that the additional information was being provided because the court’s original sentence would not survive appellate review. She said, “I don’t know if Your Honor’s order for an exceptional downward sentence would – I guess would hold up, if the State appeals this.” RP (10/21) 4. The court asked, “You don’t think it would hold up in any event [?]” RP 4. Counsel responded,

Well based on the findings, the oral findings that the Court made at the time of sentencing, and as Your Honor remembers, he presented information that Mr. Young had done extremely well and had, number one, identified the issues, which very well may have given rise to his poor decisions at the time of the offense, and then also addressed those very issues, including the mental health issues and the drug and alcohol addiction issues.

I think those alone would not sustain -- would not hold up.

RP (10/21) 4-5. Defense counsel then argued that with the new DSHS report and an additional legal conclusion, an exceptional sentence could be supported based on “a failed mental health defense, so we would ask the Court to consider this additional information and incorporate it into the findings.” RP (10/21) 5.

The State objected to this new information and additional legal conclusion. It noted that even the original brief requesting an exceptional sentence was not timely served on the State, and that now an entirely new factual and legal basis was being offered to support the exceptional sentence. RP (10/21) 5-6. The court asked why the State “...wants this person to be in prison...”

RP (10/21) 6. The State responded that the defendant’s extensive criminal history warranted a standard range sentence. RP (10/21) 6-7. The State reiterated its objection to the new alleged psychiatric information. RP (10/21) 8-9. The Court then said, without further discussion:

I am going to sign the proposed findings of fact presented by the defense. I think it supports the defense position and that is the position they adopted at the time of sentencing, so to the extent that it – I think it supplements that, I think it is information that

was referred to during the sentencing, and we will just let everything go from there.

RP (10/21) 9. Neither the trial court nor defense counsel offered evidence to establish a nexus between the defendant's mental condition and the crime. Neither explained how Young's mental condition rose to the level of a "failed mental defense." Written findings and conclusion were filed. CP 69-72.

D. ARGUMENT

The trial court erred in this case by ordering a mitigated exceptional sentence that permitted a defendant with a long history of felony and misdemeanor convictions to walk out of jail, instead of reporting to prison, where the defendant and all his supporters agreed that he would likely reoffend if released, and where the sentence did not – and could not – include provisions for mandatory treatment. The trial court essentially substituted its judgment for that of the legislature, relied on faulty legal reasoning, and relied upon flawed factual findings. There is no substantial and compelling reason to impose an exceptional sentence in this case. Even if legally and factually supportable, the sentence is clearly too lenient. Young's sentence should be reversed and remanded for

imposition of a standard range sentence consecutive to Young's more recent conviction.

1. THE SENTENCING COURT ERRED BY TAKING ADDITIONAL EVIDENCE AND CHANGING ITS DECISION AFTER ACCEPTANCE OF REVIEW BY THIS COURT.

A threshold issue in this appeal concerns the record on which the sentence should be reviewed. The trial court in this case took new evidence after the case had been appealed to this court, provided the State with little or no notice before considering that new evidence, and used that new evidence as a basis to impose the exceptional mitigated sentence on a different legal theory. This was error.

A trial court has very limited authority to act once a case has been appealed. RAP 7.2, entitled Authority of Trial Court After Review Accepted, provides in part as follows:

(a) Generally. After review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule, unless the appellate court limits or expands that authority as provided in rule 8.3.

(b) Settlement of Record. The trial court has authority to settle the record as provided in Title 9 of these rules.

RAP 7.2; Inman v. Netteland, 95 Wn. App. 83, 88-89, 974 P.2d 365 (1999). In an appeal as a matter of right pursuant to RAP 2.2(b)(6), as here, review is accepted upon the filing of a timely notice of appeal. RAP 6.1.

The trial court's authority to "settle the record" is set forth in RAP 9.5-9.6. Simply preparing and signing findings of fact and conclusions of law would be considered settling the record and may be done after review is accepted. State v. Commodore, 38 Wn. App. 244, 250 n.5, 684 P.2d 1364 (1984) (citing Olsen Media v. Energy Sciences, 32 Wn. App. 579, 587-88, 648 P.2d 493 (1982)). The entry of findings and conclusions simply memorializes the court's earlier ruling; it does not "change" a decision being reviewed so as to require approval of the Court of Appeals under RAP 7.2(e), if the revision does not require additional evidence and does not affect the judgment in a substantive manner.

Considering new evidence, however, changes the decision being reviewed, especially where that evidence gives rise to a new legal basis to impose sentence. RCW 9.94A.500 directs that a sentencing hearing be held at which numerous factual matters are to be settled and presentence reports, arguments of the parties, and the views of victims and law enforcement should all be

considered. The court may rely on no more information than is . . . admitted acknowledged, or proved at trial or at the time of sentencing . . . by a preponderance of the evidence.” RCW 9.94A.530(2). A hearing may subsequently be held to formalize findings and conclusions once they have been reduced to writing. But, once the State has filed an appeal, the sentencing court may not entertain new evidence and change the legal basis for its decision, especially where neither the defendant nor the deputy prosecuting attorney of record was present. This practice can only create confusion as to the actual basis for the court’s ruling, and confuse the scope of appellate review. It is also unfair to a party that has relied on the sentencing court’s earlier pronouncements. RAP 7.3 requires that the trial court refrain from changing its decision after review has been granted.

Findings of fact under A.1 , A.2, A.4, and B all depend on the new evidence. CP 69-70. The conclusions of law regarding the defendant’s mental capacity and whether he presented a failed mental defense are similarly dependent on the additional evidence and constitute a new legal basis for the sentence. CP 70-71. Review should be limited to the facts and legal theory presented at the original sentencing hearing.

2. A MITIGATED SENTENCE WAS NOT APPROPRIATE AS A MATTER OF LAW OR FACT, AND THE SENTENCE IMPOSED WAS CLEARLY TOO LENIENT.

Generally, courts should impose a sentence within the standard sentencing range. RCW 9.94A.505(2)(a)(i). A court may, however, impose a sentence below the standard range if there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. Appeal of a sentence outside the standard range is governed by RCW 9.94A.585. "When reviewing an exceptional sentence, an appellate court asks three questions: (1) are the reasons supplied by the sentencing judge supported by the record; (2) do those reasons justify a sentence outside the standard range; and (3) was the sentence clearly excessive or too lenient. The court applies the clearly erroneous standard to the first question, the de novo standard to the second, and the abuse of discretion standard to the third." State v. Borg, 145 Wn.2d 329, 336, 36 P.3d 546 (2001). The sentencing court's decision in this case was deficient under each prong of this analysis. Deficiencies in the legal analysis will be discussed first, deficiencies in the court's factual findings will be discussed second, and the clearly too lenient standard will be discussed last.

a. The Court's Legal Reasons Do Not Justify A Mitigated Sentence As A Matter Of Law.

“The first and overriding principle shaping the [SRA] is retribution, or just deserts.” D. Boerner, Sentencing in Washington § 2.5, at 2-31 (1985); State v. Rice, 98 Wn.2d 384, 393, 655 P.2d 1145 (1982). An exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the same statutory category. D. Boerner, Sentencing in Washington § 9.6, at 9-13; State v. Pennington, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989). “The presumptive sentence ranges established for each crime represent the legislative judgment as to how these interests shall best be accommodated.” State v. Pascal, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987). A trial court's subjective conclusion that the presumptive range does not adequately address rehabilitative concerns or the personal characteristics of the offender is not a substantial and compelling reason justifying a departure. State v. Allert, 117 Wn.2d 156, 169, 815 P.2d 752 (1991); State v. Law, 154 Wn.2d 85, 103 n.14, 110 P.3d 717 (2005) (“Since its enactment, we have regularly and consistently interpreted the SRA, by its terms, to disallow personal

characteristics unrelated to the offense committed to be considered as mitigating factors”).

Here, the trial court appears to have concluded that an exceptional sentence was warranted because prison would solve nothing, because Young suffered from substance dependency and mental illness, because Young’s “remedial efforts” were encouraging, and because Young had strong family support. RP (9/18) 23; CP 71. None of these conclusions are legally sufficient to support a mitigated sentence; they simply illustrate a disagreement with the legislature over how to handle chronic offenders. The reasons are not substantial and compelling reasons to depart from the standard range.

Appellate courts have repeatedly reversed sentences like the one imposed in this case. In State v. Murray, 128 Wn. App. 718, 116 P.3d 1072, 1075 (2005), the Court of Appeals reviewed some of those decisions in the following passage:

A trial court’s subjective conclusion that the presumptive range does not adequately address rehabilitative concerns or the personal characteristics of the offender is not a substantial and compelling

reason justifying a departure. State v. Allert, 117 Wn.2d 156, 169, 815 P.2d 752 (1991); Pascal, 108 Wn.2d at 137-38, 736 P.2d 1065. Neither addictions nor other personal circumstances of defendants have been found to support exceptional sentences downward. See, e.g., RCW 9.94A.535(1)(e) (voluntary use of alcohol or drugs is excluded as a mitigating factor); State v. Freitag, 127 Wn.2d 141, 145, 896 P.2d 1254, 905 P.2d 355 (1995) (the defendant's desire to improve through community service); State v. Estrella, 115 Wn.2d 350, 353-54, 798 P.2d 289 (1990) (willingness to obtain treatment and attempts to gain employment); State v. Amo, 76 Wn. App. 129, 133, 882 P.2d 1188 (1994) (potential loss of parental rights); State v. Hodges, 70 Wn. App. 621, 623, 855 P.2d 291 (1993) ("extraordinary community support" and efforts at self-improvement).

State v. Murray, 128 Wn. App. at 724-25. Similar problems exist with this sentence.

The court erred here in concluding as a matter of law that the defendant's mental state was relevant to this sentence. The court concluded that "the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired pursuant to RCW 9.94A.535(1) by his mental health diagnoses including major

depressive disorder.” CP 71 (lines 10-14).<sup>3</sup> The court’s related conclusion – that “post traumatic stress disorder, anxiety disorder, and major depressive disorder . . . would have constituted a failed mental health defense” – is also unavailable in this case.<sup>4</sup> CP 70 (lines 12-13).<sup>5</sup>

Both conclusions suffer from the same infirmity – there is no proof of a causal connection between the mental condition and the

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<sup>3</sup> Although the court made findings and conclusions that discuss drug impairment, it is unclear whether the court did, in fact, rely on drug abuse as a basis for the sentence. Such reliance would be misplaced. It is well established that voluntary use of drugs or alcohol cannot be a basis to mitigate a sentence. RCW 9.94A.535(1)(e) (voluntary intoxication is specifically exempted). More generally, substance abuse or addiction is not a basis for a mitigated exception. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993); State v. Evans, 80 Wn. App. 806, 911 P.2d 1344 (1996); State v. Clark, 76 Wn. App. 150, 883 P.2d 333 (1994); State v. Paine, 69 Wn. App. 873, 850 P.2d 1369 (1993). Even chronic addiction that causes criminal behavior is not a mitigating factor. State v. Hutsell, 120 Wn.2d 913, 845 P.2d 1325 (1993). Thus, the substance abuse aspect of the court’s findings and conclusions do not support the sentence. If the substance abuse aspects of Young’s history cannot support the exceptional sentence, that leaves only the alleged mental health infirmities.

<sup>4</sup> This conclusion seems to be a mixture of two statutory mitigating factors: the “capacity to appreciate the wrongfulness of his conduct” factor, discussed above, and the factor that provides, “the defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.” RCW 9.94A.533(1)(c).

<sup>5</sup> This assertion is listed as a finding of fact but it is likely a conclusion of law. It does not make sense that the court is asserting that mental health evidence would have constituted a failed mental health defense, as a matter of fact, because no such evidence or defense was ever offered or proposed before plea. And, with absolutely no evidence that the defendant was actually under the influence of mental illness at the time he stole this car, evidence of mental illness would have been wholly irrelevant as a defense.

crime. To prove that mental illness is a mitigating factor for sentencing, a defendant must show that the mental illness actually and *significantly* impaired his conduct on the date of the crime. See State v. Rogers, 112 Wn.2d 180, 770 P.2d 180 (1989) (severe emotional and psychological stress are not mitigating without evidence that defendant's capacity to conform conduct was significantly reduced); State v. Schloredt, 97 Wn. App. 789, 987 P.2d 647 (1999) (facts must establish connection between mental condition and defendant's ability to appreciate wrongfulness of conduct); State v. Sanchez, 69 Wn. App. 255, 848 P.2d 208 (1993) (limited education not relevant unless evidence to show it impaired capacity); State v. Hobbs, 60 Wn. App. 19, 801 P.2d 1028 (1990) (anger and emotional distress are not mitigating without evidence that capacity to appreciate conduct was reduced); State v. Altum, 47 Wn. App. 495, 735 P.2d 1356 (1987) (learning deficiency and dependent personality not sufficient to establish mitigating circumstance where no evidence that capacity to appreciate or control conduct was reduced).

The record here is devoid of any evidence, discussion or expert opinions regarding whether Young stole a car on June 5, 2008 because of his mental condition. The record is also silent as

to the *degree* of any mental impairment. Thus, Young cannot show that his capacity was *significantly* impaired.

Moreover, mental illness combined with substance abuse will not support an exceptional mitigated sentence on this statutory basis unless the mental and/or personality disorders would, independent of the substance abuse, prevent a defendant from conforming his conduct to the law. State v. Allert, 117 Wn.2d at 169 (combined influences of alcohol abuse, depression, severe compulsive personality disorder were not sufficient to support mitigated sentence). To the extent the trial court here treated mental illness as intertwined with substance abuse, the conclusion is flawed.

Second, the court found “that further punishment would not further any rehabilitative purpose and that the defendant and society are better served by the defendant’s participation in the programs considered above.” CP 71 (lines 16-19). As discussed above in the quote from Murray, this conclusion is simply a disagreement with the legislature. Young had 43 prior criminal convictions, including six prior adult felonies. CP 29-31. The legislature has determined that the appropriate sentence under such circumstances is 22-28 months in prison. The purpose of the

sentence is to punish and to deter Young, not to rehabilitate him. The trial court's role is not to attempt to tailor a "better" resolution than the sentence required by legislative directive. If Young is sincere in his stated desire to rehabilitate, treatment is available in prison.

The final legal basis for imposing sentence is prohibited, too. The court concluded that "the defendant's strong family support, combined with the defendant's efforts noted above, will benefit the defendant and the community beyond any further punishment. CP 71 (lines 19-21). Family support does not relate to the crime committed by the defendant and, therefore, does not distinguish the crime from other crimes of the same statutory category. See Hodges, supra, at 626; State v. Fowler, 145 Wn.2d 400, 411, 38 P.3d 335 (2002).

For these reasons, the court's legal conclusions cannot support the exceptional sentence imposed, and the sentence must be reversed.

b. The Court's Factual Findings Are Not Supported By The Record.

The sufficiency of factual findings in support of an exceptional sentence are reviewed under the "clearly erroneous" standard. State v. Allert, 117 Wn.2d at 163. Findings are clearly erroneous if no substantial evidence supports the trial court's conclusion. State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991).

The sentencing court's factual findings contain multiple errors. Because, as argued above, chronic substance abuse is not a valid mitigating factor, the key finding in this case is the court's mental health finding: "Young has been diagnosed with post-traumatic stress disorder, anxiety, major depressive disorder recurrent and cocaine dependence all of which existed, according to the DSHS mental health evaluator, before drug abuse began." CP 69 (lines 22-25). As the State argued above, this finding should not be considered because it was not a part of the original sentencing hearing.

Even if this factual finding is considered, however, it should be rejected. This finding is based on a DSHS report allegedly generated in April, 2009, when Young applied for disability benefits.

CP 73-76; RP (10/21) 4. It appears that the report was based solely on Young's self-report of his mental condition. CP 73. No diagnostic testing was performed and it is unclear whether any clinical judgment was exercised, or whether the DSHS employee simply collected information and filled out the form. Thus, it is unclear to what extent these characterizations can be termed "diagnoses" or "findings" by a mental health provider.

In any event, the trial court's conclusion that PTSD predated drug abuse is contradicted by the record. Ms. Beach reported that Young's chemical dependency struggles date back to the time when he was 13 years old. CP 100. Young was born in April, 1973, so he turned 13 years old in 1986. CP 73. Thus, according to the Beach report, his drug problems began in 1986. The DSHS report says: "CX claims to have severe PTSD from beating he received from the police." CP 73 (section A). The Beach report says that Young was beaten by police, resulting in a fractured skull, in January, 2007. CP 100. Thus, the trial court's finding of fact, that PTSD "existed . . . before drug abuse began" is incorrect by approximately 21 years. It appears that Young's drug dependency issues also predated his other alleged mental infirmities, as none has a genesis in his early teen years.

Further, the credibility of Young's PTSD self-diagnosis is highly suspect. Despite conducting detailed interviews in October, 2008 and January, 2009 with Ms. Beach, the TDA social worker who was expressly preparing a mitigation report for sentencing, Young apparently never mentioned a diagnosis of PTSD. CP 99. Ms. Beach did not list PTSD under the DSM-IV diagnoses. CP 101. Current psychological stressors are listed as "legal issues" but there is no mention of post-traumatic stress. CP 99-102. And, the American Behavioral Health Systems discharge summary, dated December 30, 2008, lists Young's DSM-IV diagnosis as drug dependence; there is no mention of PTSD. CP 104.

There are other defects in the findings. The sentencing court found that "It is clear that Mr. Young acted impulsively and was impaired by his Axis I diagnoses of post-traumatic stress disorder, anxiety disorder, and major depressive disorder when he decided to drive the bait car..." CP 70 (lines 9-13, finding #4). There is simply no evidence, whatsoever, that Young stole a car because of his mental condition. The certification for determination of probable cause and the prosecutor's representations about the bait car video make it clear that the defendant and his accomplice intentionally stole this car and drove it away, eluded police for a

time, and were cavalier, boastful and joyous with their luck in finding the car. Although the prosecutor offered at sentencing to let the court watch the video, the court did not accept the offer.

There is nothing else in the record that would yield evidence about the defendant's mental state on that date. No expert testified that he was under the influence of post-traumatic stress on that date or that some other medical condition caused him to act.

Finally, Young never claimed a mental defense leading up to trial, and his lengthy criminal history includes prior auto thefts, suggesting that stealing this car was simply another instance of criminal conduct, rather than an anomaly triggered by the recent onset of mental illness. Thus, the court's findings are based on self-defeating evidence showing that mental illness did not predate drug abuse. The sentencing court's finding to the contrary is not supported by substantial evidence.

c. The Trial Court's Sentence Was Clearly Too Lenient.

This defendant has a lengthy, lengthy record of prior convictions. His own advocates stressed that he had chronic drug problems and would reoffend immediately upon release. CP 100;

RP (9/18) 12-16. Even if a legal basis existed for a mitigated sentence, and even if the trial court had imposed less prison time in an attempt to fashion a treatment-based sentence in the community, it is arguable whether an exceptional mitigated sentence would be a valid exercise of the court's discretion.

But, the sentencing court here could not have – and did not even attempt to – fashion a treatment-based sentence. Rather, the court simply imposed a 10-month jail sentence, let Young out of jail, put him on work release for the remaining (short) period of time before the 10-month sentence would run, and told him to rely on his friends from N.A. to ensure his sobriety. The “programs considered above” that are mentioned in the conclusion of law are no programs at all. CP 71 (line 19). Young had apparently failed the Sound Mental Health Program, and he was not actually scheduled to participate in any recognized mental health or drug treatment program. Even if scheduled, the court did not impose sentencing conditions to ensure that he actually *obtain* treatment, did not impose supervision of any sort, and did not even set a review hearing date to see whether Young followed through on treatment.

Under the facts and circumstances of this case, with a defendant with 43 prior convictions, this sentence was clearly too

lenient. Not a single purpose of the Sentencing Reform Act was served. The sentence was an abuse of discretion and it should be reversed.

E. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to reverse Young's sentence and remand for resentencing within the standard range.

DATED this 7<sup>th</sup> day of April, 2010.

Respectfully submitted,

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Certificate 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 Washington Appellate Project, the attorney for the respondent, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Appellant, in STATE V. BRADLEY YOUNG, Cause No. 64339-8-I, in the Court of Appeals, Division I, for 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.

U Brame  
Name  
Done in Seattle, Washington

4/7/10  
Date 4/7/10

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