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King County Prosecutor
Appellate Unit

NO. 64896-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

SOU VOEI SAETERN,

Appellant.

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

The Honorable Susan J. Craighead, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it sentenced appellant to two exceptional sentences based on just one aggravating circumstance.

Issue Pertaining to Assignment of Error

The trial court found one aggravating factor to support an exceptional sentence. Yet, it sentenced appellant to both a sentence beyond the standard range and a consecutive sentence. Did the trial court err?

B. STATEMENT OF THE CASE

In three King County Superior Court cases consolidated for appeal, Sou Voei Saetern pleaded guilty to three counts of residential burglary, two counts of attempted residential burglary, and two counts of attempting to elude a pursuing police vehicle. CP 33-44, 162-72, 206-16. His offender score was 17 for burglary and 10 for eluding. Supp. CP __ (sub. no. 84, Findings of Fact and Conclusions of Law, filed 4/21/2010); RP 34-38.¹

¹ There are two volumes of the verbatim report of proceedings. Only one, which covers hearings dated December 23, 2009, January 8, 2010, and February 5, 2010, is pertinent to the appeal. It is referred to as "RP." The Findings and Conclusions are attached as an appendix.

The trial court imposed standard range sentences of 60 months for each count of attempted residential burglary and 24 months for each count of eluding. CP 149-56, 184-92, 239-46. The court imposed exceptional sentences of 96 months for each residential burglary count rather than the standard range of 63 months to 84 months. CP 149-56. The court ran all counts concurrently but for one count of eluding, which ran consecutively. This made for a total term of 120 months (96 plus 24). Id.; RP 67-70.

The court relied on one aggravating factor to support the departures from the presumptive standard range and presumptive concurrent sentencing: that a standard range sentence would leave some current offenses unpunished. Supp. CP __ (sub. no. 84).

C. ARGUMENT

THE TRIAL COURT ERRED BY RELYING ON THE SAME AGGRAVATING FACTOR TO BOTH DEPART FROM THE STANDARD RANGE AND TO RUN SENTENCE TERMS CONSECUTIVELY.

When a trial court departs from the standard range and runs sentences consecutively, it imposes two exceptional sentences. The court must find two aggravating factors before imposing two exceptional sentences. Because the trial court found only one aggravator in Saetern's case, the sentence should be vacated and remanded for correction.

Running presumptively concurrent sentences consecutively amounts to an exceptional sentence. RCW 9.94A.589(1)(a). Consecutive sentences must therefore be supported by an aggravating factor. RCW 9.94A.535; .589; State v. Batista, 116 Wn.2d 777, 785, 808 P.2d 1141 (1991). A sentence term above the standard range is also an exceptional sentence that must be supported by an aggravator. RCW 9.94A.535.

Therefore, where a court departs from the standard range and runs terms consecutively, it imposes two exceptional sentences. Such a "double" exceptional sentence requires at least two aggravating factors. See, State v. Quigg, 72 Wn. App. 828, 845, 866 P.2d 655 (1994) ("In cases of multiple exceptional sentences, only one aggravating factor will not support the imposition of two exceptional sentences."). In other words, the finding of a single aggravating factor will not support both a nonstandard range sentence and an exceptional consecutive sentence. In re Personal Restraint of Holmes, 69 Wn. App. 282, 292-93, 848 P.2d 754 (1993) overruled on other grounds, State v. Calle, 125 Wn.2d 769, 778, 888 P.2d 155 (1995); State v. McClure, 64 Wn. App. 528, 534, 827 P.2d 290 (1992).

In Saetern's case, the trial court departed from the standard range by imposing concurrent 96-month terms for residential burglary. The

court ran those concurrent terms consecutively with the 24-month standard range term for one of the eluding counts. Supp CP __ (sub. no. 84). But the court found only one aggravating factor: the combination of multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. Supp CP __ (sub. no. 84); RCW 9.94A.535(2)(c). The trial court therefore erred.

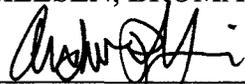
This Court should vacate the sentence and remand for either imposition of a sentence within the 63-month to 84-month standard range for the residential burglary counts, or for concurrent sentencing of the residential burglary and eluding count.

D. CONCLUSION

The trial court erred by imposing two exceptional sentences but finding only one aggravating factor. This Court should vacate the sentences and remand with an order directing the trial court to either impose terms within the standard range or to run the terms concurrently.

DATED this 15 day of July, 2010.

Respectfully submitted,
NIELSEN, BROMAN & KOCH



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APPENDIX

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	No. 09-C-01838-0 SEA
)	
vs.)	
)	
SOU SAETERN,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW FOR
)	EXCEPTIONAL SENTENCE
)	
)	APPENDIX "D" TO JUDGMENT AND
)	SENTENCE

The Court imposes an exceptional sentence above the standard range and orders the sentences to be served consecutively pursuant to RCW 9.94A.535(2)(c) and the facts set forth below.

A. FINDINGS OF FACT

The court makes the following findings of fact:

1. The defendant, Sou Saetern, has a felony offender score of 17 in the crimes of Residential Burglary and Attempted Residential Burglary, and a score of 10 in the crime of Attempting Elude a Pursuing Police Vehicle.
2. Under cause number 09-C-01838-0 SEA, Saetern pled guilty to three counts of Residential Burglary and one count of Attempted Residential Burglary. Under cause number 09-C-04422-4 SEA, Saetern pled guilty to one count of Attempted Residential

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1 Burglary and one count of Attempting to Elude a Pursuing Police Vehicle. Under cause
2 number 09-1-04303-1 SEA, Saetern pled guilty to one count of Attempting to Elude a
3 Pursuing Police Vehicle.

4 3. The defendant did not make any legal argument that the State was precluded from
5 seeking an exceptional sentence.

6 4. This court's decision to adopt these facts and impose the exceptional sentence is
7 recommended by the State and opposed by the defendant.

8 **B. CONCLUSIONS OF LAW**

9 This court adopts the findings of fact set forth above and sentences the defendant to an
10 exceptional sentence above the presumptive range pursuant to RCW 9.94A.535(2)(c). Absent the
11 imposition of an exceptional sentence pursuant to RCW 9.94A.535(2)(c), the operation of the
12 multiple offense policy of RCW 9.94A.589 would result in a sentence that would allow some of the
13 current offenses to go unpunished. This provides a substantial and compelling reason to depart from
14 the presumption that these sentences should run concurrently. The court sentences the defendant to
15 96 months on the three Residential Burglary charges (09-C-01838-0 SEA), 60 months on the
16 Attempted Residential Burglary charges (09-1-01838-0 SEA and 09-C-04422-4 SEA), and 24
17 months on each of the Attempting to Elude charges (09-C-04422-4 SEA and 09-1-04303-1 SEA);
18 each of these sentences are to run concurrently with each other with the exception of Count II of 09-
19 C-04422-4 SEA, which is to run consecutive to all other sentences. The total prison term therefore
20 is 120 months.

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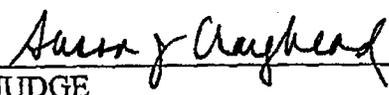
The court finds that there are sufficient facts to support a finding to support an exceptional sentence and the court has the authority to impose an exceptional sentence under RCW 9.94A.535(2)(c).

This court finds that the defendant's sentence in this case is consistent with the purposes of the Sentencing Reform Act and should be enforced accordingly.

DATED this 19th day of April, 2010.



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JUDGE

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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v.)	COA NO. 64896-9-I
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SOU SAETERN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SOU SAETERN
DOC NO. 338077
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JULY, 2010.

x *Patrick Mayovsky*