

NO. 66716-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AARON JOHNSON,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

SEAN P. O'DONNELL  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

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A. ISSUES PRESENTED

1. Whether Johnson, who received an exceptional sentence based on his criminal history, waived any claim that the trial court's reference to uncharged crimes was improper when he did not object to the reference and approved the judgment and sentence?

2. Whether the trial court's imposition of an exceptional sentence would be justified even without reference to uncharged crimes?

B. STATEMENT OF THE CASE

Before entering pleas of guilty in the consolidated cases at issue here, appellant Aaron Johnson had been convicted of 9 adult felonies, twenty-five adult misdemeanors, 8 juvenile felonies, and 5 juvenile misdemeanors, for a total of forty-seven separate convictions. CP 77-80. His first conviction occurred in 1991. CP 79. Over the course of 18 years, which included multiple year long (or more) sentences to jail and prison, Johnson nonetheless averaged approximately 3 convictions per year. CP 77.

Johnson was convicted by way of guilty plea of 9 new felonies and 1 misdemeanor as part of the consolidated cases on

appeal. He stipulated to the "real facts" contained in the individual Certifications for Determination of Probable Cause supporting each charge. CP 22, 76, 132, 224. The State also amended charges and dropped charges in at least two of the cases. See CP 49-55, 56-67, 188-90, 201-34.

Before sentencing, Johnson conceded that his offender score was high. 3RP 7.<sup>1</sup> He also agreed that the State had a legal justification for seeking an exceptional sentence and he was aware that it would do so at sentencing. CP 132.

Johnson pled guilty on September 16, 2010. The Court accepted his guilty pleas to the 9 felonies and 1 misdemeanor as knowing, intelligent and voluntary. 1RP 28-29.

Sentencing occurred on January 7, 2011. Johnson faced an accumulated offender score of at least 22 points, including a point for committing the prostitution offenses in King County cause number 09-1-05920-5 while on a Drug Offenders' Sentencing Alternative (or DOSA). 3RP 4, 8, 15-16.

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<sup>1</sup> There are three transcripts: 1RP - 9/16/10 (plea hearing); 2RP - 12/3/10 (counsel substitution and continuance motion); 3RP - 1/7/11 (sentencing hearing).

Before imposing sentence, the trial court carefully reviewed Johnson's criminal history. 3RP 4, 24-25. Johnson's attorney explained that Johnson entered into the plea because of the "very real possibility that he'd be looking at substantially more time" if he had proceeded to trial. 3RP 17. Through his lawyer, Johnson acknowledged that stealing cars "became normalized" for him in his youth. 3RP 15. Johnson also conceded that in the past, because of the crimes he had committed, he had gotten "off too easy." 3RP 15, 16, 18.

The trial court carefully analyzed Johnson's criminal record before imposing its sentence:

Now, I look at your criminal record for a lot of things. First of all, even if I don't consider the points of the other current offenses, we're talking about a score of 13, very high score for a man who's only 33 years old. I also went back and looked at the types of sentences you've received over the years, all the way back to your juvenile years, and I do that in part to educate myself to make sure that I think about what could someone do differently in juvenile court that might prevent the kind of life of crime that you've spent, and I come away from looking at your criminal history, thinking that you really need a good chunk of time in JRA that you never really got.

In just hearing you speak, I can see that you are a very bright young man and that you have alternatives. I certainly hope that in the future you will pursue those alternatives. But I recognize that each of the three cases that Ms. Love talked about really represented a fraction of what you were actually doing

at the time, as set forth in the various certifications for determination of probable cause, they're just sort of like a snapshot of what was happening, instead of a real reflection of just how many lives you were touching.

And Ms. Young talked about how you weren't thinking of others, and that is absolutely true, whether it's the 13 year-old or whether it's all of these people. I mean, losing a laptop can be absolutely devastating to someone's life, not just their business, it can be -- you know, it could be there -- I had a juror last week talk about how their only copy of their masters thesis was on their laptop when it was stolen. It can be utterly devastating to people. Even though it didn't involve force or violence, no blood was shed, I have to take those kinds of crimes seriously.

And it is very rare that I see a defendant who has as many points, not counting current offenses, over such a long period of time.

And so I think that in this case the State has established substantial and compelling reasons to justify an exceptional sentence up. I'm basing that on the extraordinarily high offender score, keeping in mind all of the uncharged offenses here, and I think that the sentence the State proposes is very fair, in light of -- in light of all of those factors.

3RP 24-25.

On inquiry from the prosecuting attorney, the court further explained why it thought the reasons for imposing an exceptional sentence were substantial and compelling. Judge Craighead specifically ran the two prostitution counts consecutive to one another because "on both of them [the prostitution counts] his

offender score is 22, [and] for all the reasons I placed on the record." 3RP 34.

After making its oral ruling, the court imposed an exceptional sentence of 156 months. 3RP 27. It entered written findings justifying the departure from the standard range: "defendant's current criminal history would result in a standard range sentence that does not recognize and reflect the defendant's offenses and current and past criminal history." CP 86.

Johnson's attorney did not object to the Court's oral findings or its written findings with respect to the imposition of an exceptional sentence. CP 89.

C. ARGUMENT

1. JOHNSON WAIVED ANY CLAIM THAT THE TRIAL COURT'S REFERENCE TO UNCHARGED CRIMES WAS IMPROPER WHEN HE DID NOT OBJECT TO THE REFERENCE AND APPROVED THE JUDGMENT AND SENTENCE.

For the first time on appeal, Johnson claims that the trial court erred in imposing an exceptional sentence. Because Johnson did not object to entry of these findings, this Court should hold that Johnson has waived this claim. Even if the claim is not

waived, the trial court's findings provided a sufficient basis for imposition of the exceptional sentence.

Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The defendant must make a plausible showing that the asserted error had practical and identifiable consequences in the case. Id. Johnson does not address this standard nor can he satisfy it.

Johnson claims, in essence, that the court's oral and written findings did not support its justification for imposing an exceptional sentence because the court was "keeping in mind" other uncharged offenses. He suggests that the court's reference to uncharged offenses is manifest error of a constitutional dimension. He is incorrect.

Here, prior to the court's imposition of sentence, Johnson acknowledged that the State would seek an exceptional sentence based on his criminal history. CP 76. He also admitted that he had "got off too easy" in the past. 3RP 18.

In imposing the exceptional sentence, the trial court's focus was on Johnson's high offender score: "And it is very rare that I see a defendant who has as many points, not counting current offenses, over such a long period of time. And so I think that in this case the State has established substantial and compelling reasons to justify an exceptional sentence up. I'm basing that on the extraordinarily high offender score, keeping in mind all of the uncharged offenses here, and I think that the sentence the State proposes is very fair, in light of -- in light of all of those factors." 3RP 24-25.

The Court's written findings similarly reflect that the defendant's criminal history was so egregious that the multitude of current offenses would not go unpunished with a standard range sentence: "the defendant's current criminal history would result in a standard range sentence that does not recognize and reflect the defendant's offenses and current and past criminal history." CP 86.

In order to reverse an exceptional sentence, the reviewing court must find that (1) under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence, (2) as a matter of law an exceptional sentence is not justified by the reasons, or (3) under an abuse of discretion standard an exceptional sentence is clearly excessive. RCW 9.94A.210(4); State v. Gore, 143 Wn.2d 288, 315, 21 P.3d 262, 277 (2001), *overruled by* State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), citing State v. Halgren, 137 Wn.2d 340, 345, 971 P.2d 512 (1999); State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986).

None of these factors are met here. Both parties acknowledged Johnson's criminal history as part of this plea, providing an ample factual basis for the court to conclude that some current offenses would go unpunished. See, e.g., CP 76; 3RP 8.

The trial court had the discretion as a matter of law, without a finding by the jury, to impose consecutive sentences for two crimes that were otherwise within the standard range. A "trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances: The defendant has committed multiple current offenses and the defendant's high

offender score results in some of the current offenses going unpunished.” RCW 9.94A.535(2)(c).

There is no suggestion that the punishment imposed was clearly excessive in light of Johnson's conduct.

The trial court here imposed the exceptional sentence because of Johnson's staggering criminal history and the fact that a standard range sentence would not reflect the defendant's current offenses and accumulated criminal history. CP 86; 3RP 24-25. While she did not use language identical, for example, to the trial court in State v. Alvarado, 164 Wn.2d 556, 192 P.3d 345 (2008), relied upon by Johnson, Judge Craighead's intent was clear and her basis amply supported in the record, as noted above.

What is consistent between the facts here and Alvarado is that the Alvarado court reached the same conclusion as Judge Craighead, finding that “given his high offender score, some of Alvarado's current offenses would have gone unpunished if a standard range sentence had been imposed.” Alvarado, 164 Wn.2d at 563. Indeed, a trial court is well within its authority to impose an exceptional sentence based on prior convictions. See, e.g., State v. Mutch, 171 Wn.2d 646, 652, 254 P.3d 803 (2011) (“Blakely, Alvarado, and the relevant statutory authority, both at the

time of Mutch's trial and his resentencing hearings, clearly indicate that trial courts are permitted to impose exceptional sentences the principle that the sentencing court could not keep in mind his uncharged based on prior convictions."). Mutch, 171 Wn.2d at 658.

The fact that the trial court, without objection, made a passing reference to Johnson's uncharged crimes in its oral ruling (crimes to which he admitted by stipulating to the real facts contained in the various Certifications for Determination of Probable Cause) does not present a manifest error of constitutional proportions. There is no rule that prohibits a court from "keeping in mind" issues to which the party had previously agreed.

State v. Hagar, 158 Wn.2d 369, 374, 144 P.3d 298 (2006), cited by Johnson for the proposition that a trial court may not rely upon agreed-to facts to support an exceptional sentence, is not on point. While Hagar involved an exceptional sentence resulting from a defendant pleading guilty (as well as a stipulation to real facts), the sentencing court expressly based its exceptional sentence on facts that only a jury could find, not as here, the defendant's criminal history. Hagar, 158 Wn.2d at 371. Judge Craighead detailed in oral and written findings that it relied on Johnson's criminal history as its basis for running two counts consecutive to

one another. Johnson's contention that "there can be no doubt that the sentencing court expressly relied on 'uncharged offense'" in imposing the exceptional sentence is an overstatement. Brief of Appellant at 8.

Johnson also relies on State v. Ferguson, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001), to suggest that a court's reliance on imposing an exceptional sentence "in part on proper grounds and in part on improper grounds" requires resentencing. Johnson is mistaken on that point of law and Ferguson is easily distinguishable from the facts of this case. The trial court in Ferguson imposed an exceptional sentence based on "deliberate cruelty" when the underlying charge contained deliberate cruelty (or its close counterpart) as an element of the crime. The State Supreme Court held that "'factors inherent in the crime -- inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and do not distinguish the defendant's behavior from that inherent in all crimes of that type -- may not be relied upon to justify an exceptional sentence....' An element of the charged offense may not be used to justify an exceptional sentence." State v. Ferguson, 142 Wn.2d at 652-53.

This was the only basis for the Ferguson court to impose the exceptional sentence; there were not other factors considered. Because the trial court used an element of the crime as its basis for imposing an exceptional sentence, the appeal was granted and resentencing ordered. Here, the use of Johnson's criminal history as a basis for an exceptional sentence is well-established law.

2. EVEN WITHOUT THE REFERENCE TO UNCHARGED CRIMES, THE TRIAL COURT HAD A SUFFICIENT FACTUAL AND LEGAL BASIS TO IMPOSE AN EXCEPTIONAL SENTENCE BASED ON JOHNSON'S CRIMINAL HISTORY.

Even if Johnson were correct that the trial court's reference to uncharged crimes was improper in the instant case, "an exceptional sentence may be affirmed, even if some of the justifications for its imposition were improper, so long as the appellate court is confident the trial court would impose the same sentence on remand." State v. Farmer, 116 Wn.2d 414, 432, 805 P.2d 200, 13 A.L.R.5th 1070 (1991), *modified on other grounds*, Wichert v. Cardwell, 117 Wn.2d 148, 812 P.2d 858 (1991).

Taking Johnson's argument at face value, this Court could and should disregard the sentencing court's reference to Johnson's uncharged crimes and still find an ample and sufficient basis for

Judge Craighead to impose an exceptional sentence. Johnson's criminal history, his high offender score, and his admission to the underlying facts surrounding his current offenses all support the trial court's decision to impose an exceptional sentence. State v. Farmer, 116 Wn.2d 432. When the trial court carefully reviewed Johnson's criminal record and specifically based an exceptional sentence on his "extraordinarily high offender score," there can be little if any doubt the judge would impose the same sentence if ordered to resentence Johnson. Under Farmer, this court can easily discern that the principle basis upon which Judge Craighead made her decision to impose the exceptional sentence was proper and that remand would simply produce the same result as affirming his sentence now. Farmer, 116 Wn.2d at 432.

D. CONCLUSION

For the reasons outlined above, the State respectfully requests that Johnson's sentence be affirmed.

DATED this 19<sup>th</sup> day of March, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney



BY \_\_\_\_\_  
SEAN P. O'DONNELL, WSBA #31488  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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 Eric Broman, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. AARON JOHNSON, Cause No. 66716-5-1, 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.

Betty A. Huddleston  
Name

3/19/12  
Date

Done in Seattle, Washington