

67373-4

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No. 67373-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEREMY JERMAINE JACOBS,

Appellant.

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

APPELLANT'S REPLY BRIEF

COURT OF APPEALS
STATE OF WASHINGTON
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A. ARGUMENT IN REPLY

1. MR. JACOBS'S CHALLENGE TO HIS
EXCEPTIONAL SENTENCE IS NOT MOOT

The State contends Mr. Jacobs's challenge to his exceptional sentence is moot because he has served the entire prison term and this Court can no longer provide relief. SRB at 17. To the contrary, the challenge is not moot because the exceptional sentence could have adverse consequences.

A case is not moot if the Court can provide effective relief. Snohomish County v. State, 69 Wn. App. 655, 660, 850 P.2d 546 (1993).

If the case involves a challenge to a sentence in a criminal case, the Court can provide effective relief, even if the defendant has served the sentence, if reversal of the sentence could relieve the defendant of "any resultant liabilities and cleanse his record." State v. Watkins, 61 Wn. App. 552, 555 n.2, 811 P.2d 953 (1991). For instance, the Court can provide effective relief if the sentence could have collateral consequences. State v. Bowen, 51 Wn. App. 42, 751 P.2d 1226 (1988) (appeal of sentence not moot where defendant's medical license hung in the balance). The Court can also provide effective relief if the sentence "could affect future sentencing decisions." State v. Raines, 83

Wn. App. 312, 315, 922 P.2d 100 (1996) (per curiam), superseded by statute on other grounds as stated in State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003).

Here, the Court can provide effective relief because the exceptional sentence could have adverse consequences and vacation of the sentence would cleanse Mr. Jacobs's record. Mr. Jacobs received an exceptional sentence based on the aggravator set forth in RCW 9.94A.535(3)(h)(i) ("The current offense involved domestic violence, as defined in RCW 10.99.020, and . . . [t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time."). CP 231. In support of the sentence, the court found "there has been an extensive history of domestic violence by Jacobs against Crow over a prolonged period of time." CP 39-40. The court found seven specific instances of alleged domestic violence. Id.

The court's findings and the exceptional sentence imposed could have adverse consequences. They could affect the State's future charging decisions and a court's future sentencing decisions. They also carry a social stigma. Reversing the sentence and vacating the court's

findings would relieve Mr. Jacobs of such consequences and cleanse his record. The challenge to the sentence is not moot.

2. THE EXCEPTIONAL SENTENCE MUST BE REVERSED AND VACATED BECAUSE MR. JACOBS DID NOT RECEIVE THE NOTICE REQUIRED BY STATUTE

The State acknowledges the notice Mr. Jacobs received of the exceptional sentence aggravator “d[id] not strictly comply with the statute.” SRB at 18. Yet the State contends no error occurred because Mr. Jacobs did not object, the notice he received was constitutionally sufficient, and Mr. Jacobs was not prejudiced. SRB at 16-20. The State’s arguments are contrary to the well-established principle that a court has no authority to impose a sentence if statutory provisions are not followed.

As stated in the opening brief, it is well-established that a trial court may impose a sentence only as authorized by statute. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002); In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). If statutory provisions are not followed, the defendant may challenge the sentence on appeal, even if he did not object below. Although waiver may be found “where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court

discretion,” a defendant cannot waive the right to challenge “a *legal error* leading to an excessive sentence.” Goodwin, 146 Wn.2d at 874. “When a sentence has been imposed for which there is no authority in law, the trial court has the Power and the duty to correct the erroneous sentence, when the error is discovered.” Carle, 93 Wn.2d at 33 (internal quotation marks and citation omitted). The purpose of allowing belated challenges to legal errors in the sentence is “to preserve the sentencing laws and to bring sentences in conformity and compliance with existing sentencing statutes and avoid permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court.” State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

Here, the State’s failure to follow the statute is a *legal error*. Therefore, Mr. Jacobs may challenge the sentence for the first time on appeal. Because the procedure followed in imposing the sentence was not authorized by statute, the exceptional sentence must be vacated. State v. Davis, 163 Wn.2d 606, 617, 184 P.3d 639 (2008) (vacating exceptional sentence imposed “in deviation from legislatively prescribed exceptional sentence procedures”).

3. MR. JACOBS DID NOT KNOWINGLY,
INTELLIGENTLY AND VOLUNTARILY
WAIVE HIS CONSTITUTIONAL RIGHT TO A
JURY TRIAL ON THE AGGRAVATING
FACTOR

The State contends Mr. Jacobs knowingly, intelligently and voluntarily waived his constitutional right to a jury trial on the aggravating factor because he received notice of the factor, he did not object, and he waived his right to a jury trial on the elements of the substantive offenses. SRB at 16. None of these circumstances demonstrates a knowing, intelligent and voluntary waiver of Mr. Jacobs's constitutional right to a jury trial on the aggravator.

Whether or not Mr. Jacobs received notice of the State's intent to seek an exceptional sentence based on the aggravator is not material. What matters is whether Mr. Jacobs received notice of his *constitutional right to a jury trial* on the aggravator. The State points to nothing in the record that shows Mr. Jacobs received such notice. In fact, the State acknowledges that defense counsel did *not* inform Mr. Jacobs he had a constitutional right to a jury trial on the aggravating factor. SRB at 24.

Similarly, Mr. Jacobs's failure to object does not demonstrate a knowing, intelligent and voluntary waiver. The Supreme Court has

refused to infer a waiver when the record shows less than an affirmative, unequivocal waiver by the defendant. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). Although the court need not engage the defendant in a full colloquy as to the consequences of such a waiver, as is required when a person pleads guilty to a crime, the defendant must still utter a personal expression of waiver. State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). The right may not be waived by the defendant's attorney. State v. Hos, 154 Wn. App. 238, 244, 225 P.3d 389, review denied, 169 Wn.2d 1008, 225 P.3d 389 (2010).

Finally, for the reasons given in the opening brief, Mr. Jacobs's waiver of his right to a jury trial on the elements of the substantive offenses is not sufficient to serve as a waiver of his right to a jury trial on the aggravating factor. In State v. Siers, __ Wn.2d __, 274 P.3d 358 (2012), the Supreme Court recently reaffirmed that aggravated sentencing factors do not function like elements of an offense. There, the court held that aggravating factors, unlike essential elements, need not be charged in the information. Id. at 364.

Because aggravating factors are not equivalent to elements of a crime and do not function in the same manner, a defendant cannot be

presumed to be aware he has a constitutional right to a jury trial on an aggravator simply because he is aware he has a right to a jury trial on the elements of the crime.

In sum, Mr. Jacobs did not knowingly, intelligently and voluntarily waive his constitutional right to have a jury determine the existence of the aggravating factor.

B. CONCLUSION

For the reasons given in the opening brief, Mr. Jacobs's convictions must be reversed because he did not receive the effective assistance of counsel. In the alternative, for the reasons given above and in the opening brief, the exceptional sentence must be vacated.

Respectfully submitted this 19th day of June 2012.


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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] JEREMY JACOBS 3725 124 TH E AVENUE TULSA, OK 74147	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF JUNE, 2012.

X _____ *gml*

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