

NO. 67959-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FRANCE,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZÁLEZ

**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. A trial court may impose an exceptional sentence when a defendant has committed multiple current offenses and his high offender score would otherwise result in some of the current offenses going unpunished. When William France was sentenced on nine counts of Felony Harassment, his offender score was 14. In applying the “officer of the court” aggravator to the first six counts and the “free crimes” aggravator to all nine counts, the court ran three standard range sentences of 60 months consecutively and imposed a sentence of 180 months. Did the court properly find the “free crimes” aggravator applicable to all counts? Even if the court erred in application of the “free crimes” aggravator, is the trial court’s sentence still supported by the “officer of the court” aggravator?

2. A no contact order is properly ordered as a condition of sentence. Here, the trial court signed Appendix H, which prohibits France from having contact with the charged victims and outlines the prohibited means of contact. The Judgment and Sentence incorporates Appendix H in its “No Contact” provision. The court did not order community custody, but a superfluous box was checked that says that conditions of community custody are

contained in Appendix H. Did the court properly order the sentencing condition of no contact with the victims?

B. STATEMENT OF THE CASE

The defendant, William France, was incarcerated in the Department of Corrections (DOC) during October of 2010 through January of 2011. CP 5. During that time period, France made numerous threatening phone calls to victims Anita Paulson and Nina Beach, who worked at "The Defender Association," a public defense firm in Seattle. Id. Paulson had been France's defense attorney in the criminal case for which he was incarcerated. Id. Beach was the firm's social worker, and had worked on France's case as well. Id. France, apparently dissatisfied with their representation, made numerous phone calls leaving messages threatening in graphic detail how he was going to stalk the women, sexually assault them, and then put a bullet in their heads. Id.

Paulson notified her supervisor, Lisa Daugaard, about these phone calls. Id. Daugaard sent France a letter titled "Cease and Desist Directive," informing France that if he did not stop his threatening and harassing phone calls, steps would be taken that may be adverse to him. Id. After receiving this letter, France

began calling Daugaard and began threatening her in the same manner. Id. All three victims feared that France would carry out these threats when released from DOC; they contacted the Prosecutor's Office, which put them in touch with the Seattle Police Department. Id. At least 18 recorded voice messages containing France's threats were provided to the police by the victims. Id.

France was charged by amended information with sixteen counts of Felony Harassment. CP 8-18. The State also alleged that France's conduct during the crimes manifested "deliberate cruelty" to the victims for all sixteen counts, under RCW 9.94A.535(3)(a). Id. The State further alleged that France had committed counts 1-11 against an "officer of the court" under RCW 9.94A.535(3)(x).<sup>1</sup> Id.

The parties entered into a plea agreement whereby the defendant pled guilty to counts 3, 4, 6 (counts against Paulson), counts 7, 8, 9 (counts against Daugaard) and counts 12, 14, 15 (counts against Beach). CP 19-32. The defendant also stipulated to the "officer of the court" aggravators that applied to the six counts committed against Paulson and Daugaard. CP 28-29. In exchange

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<sup>1</sup> Counts 1-11 were all committed against victims Paulson or Daugaard, who are both criminal defense attorneys. Counts 12-16 were committed against victim Beach, the social worker.

for the defendant's pleading guilty to the nine counts, the State agreed to ask for only three 60-month consecutive sentencing terms totaling 180 months, based on the "officer of the court" aggravator on the first six counts and the "free crimes" aggravator (RCW 9.94A.535(2)(c)) for all counts. CP 38. The State also agreed to dismiss the other seven counts and the "deliberate cruelty" aggravator on all counts. CP 32. At sentencing, the court followed the State's sentencing recommendation and imposed a total of 180 months. CP 41.

The imposed sentence can most easily be represented as follows:

Counts 3, 4, 6 Aggravators for "officer of the court" and "free crimes"		Counts 7, 8, 9 Aggravators for "officer of the court" and "free crimes"		Counts 12, 14, 15 Aggravator for "free crimes"
60 months on each count	Consecu- tive to all others	60 months on each count	Consecu- tive to all others	60 months on each count
Concurrent to one another		Concurrent to one another		Concurrent to one another

Id.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN APPLYING THE FREE CRIMES AGGRAVATOR AND PROPERLY EXERCISED ITS DISCRETION BY IMPOSING EXCEPTIONAL SENTENCES.

France claims that the court erred in applying the “free crimes” aggravator to all nine counts and by imposing an exceptional sentence of 180 months. This claim fails for several reasons. First, the plain language of the statute permits the trial court to apply this aggravator to all counts and thus supports the sentence imposed. Second, even if the court erred by applying the “free crimes” aggravator to the last three counts, the same sentence would have been imposed based on the aggravators applicable to the first six counts.

A trial court may exercise its discretion by imposing an exceptional sentence under the provisions of RCW 9.94A.535. A trial court may impose exceptional sentences by lengthening sentences above the standard range, but within the statutory maximum, or by imposing consecutive sentences when concurrent sentences are presumed. State v. Batista, 116 Wn.2d 777, 786-87, 808 P.2d 1141 (1991).

In order to reverse an exceptional sentence, a reviewing court must find either: (a) that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense, or (b) that the sentence imposed was clearly excessive or clearly too lenient. RCW 9.94A.585(4). Because the question of whether a trial court's reasons for imposing an exceptional sentence are supported by the record is a factual determination, an appellate court will uphold those reasons unless they are clearly erroneous. State v. Nordby, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986). The length of the exceptional sentence is reviewed for an abuse of discretion. Batista, 116 Wn.2d at 793.

Here, the defendant stipulated that the “officer of the court” aggravator applied to six of the nine counts to which he pled guilty. The trial court found that the “free crimes” aggravator applied to all nine of the counts, because the defendant’s offender score for each count was a 14. As the defendant stipulated to the “officer of the court” aggravator and agreed to his offender score on all counts, he cannot show that the court’s reasoning for applying either aggravator was clearly erroneous. Likewise, he cannot show that

the court abused its discretion when it imposed a 180-month sentence.

For the first time on appeal, France argues that the “free crimes” aggravator cannot apply to the last three of the nine counts. Because six points of France’s offender score came from prior offenses, France maintains that three of his current offenses were counted in his offender score and thus the court can apply the “free crimes” aggravator to only the remaining six of the nine counts. Essentially, France claims that unless an offender has nine or more *prior* scoreable offenses, the court must impose the free crimes aggravator in a way that yields the most lenient sentence. In making this claim, France ignores the plain language of RCW 9.94A.535(2)(c) and cites no authority that supports his proposition.

The primary case cited by France contradicts his position. State v. Stephens, 116 Wn.2d 238, 803 P.2d 319 (1991). In Stephens, the defendant pled guilty to eight counts of second degree burglary and his offender score totaled 19. Id. at 239. This was based on 14 points from current offenses and five points from prior offenses. Id. at 244-45. Because his standard range was 43 to 57 months based on an offender score of nine or more, the court recognized that the defendant would have been sentenced

the same if he had only committed two of the eight burglaries, and thus found the free crimes aggravator present. Id.

France maintains that this finding meant that “two of the current offenses were being punished while six went unpunished.” App. Br. at 12. Based on France’s reasoning, the trial court in Stephens would have had to designate which two offenses were being counted and could only apply the “free crimes” aggravator to the other six counts. Thus, under France’s theory, the trial court in Stephens would have been able to impose exceptional sentences on only six of the eight burglaries.

In Stephens, the Washington State Supreme Court affirmed a sentence that stands in direct contradiction to France’s argument. According to the court’s recitation of the facts, the court imposed an exceptional sentence based on the fact that “the criminal history for each offense [was] 19.” Id. at 239.<sup>2</sup> Specifically, the court imposed *eight* exceptional sentences of 96 months on each count. Id. Thus, France’s argument that the court can apply the aggravating factor

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<sup>2</sup> The trial court also found that there were multiple victims and that the defendant exhibited a behavioral pattern that made him a danger to the community. However, the Supreme Court held that neither of those factors justified Stephens’s exceptional sentence and thus relied on the defendant’s high offender score to uphold the trial court’s imposition of an exceptional sentence. Stephens, 116 Wn.2d at 24.

to only some counts is wholly unsupported by the case law, as the Supreme Court upheld exceptional sentences on all counts.

Likewise, in State v. Holt, another case cited by France, Division Three upheld the defendant's exceptional sentence based on "free crimes." 63 Wn. App. 226, 817 P.2d 425 (1991). While Division Three did not expressly state that the finding applied to all counts, it is clear from the court's decision that an exceptional sentence was imposed on all counts. Id. at 228. Again, under France's logic, Division Three would have had to overturn the sentence on three of the four counts because the trial court would have had authority to impose an exceptional sentence only on the one count that was going unpunished.

Nor has the application of the "free crimes" aggravator to all counts where some would otherwise go unpunished changed since Blakely.<sup>3</sup> Division Two clearly explained a trial court's application of this aggravator in State v. Brundage, 126 Wn. App. 55, 67-69, 107 P.3d 742 (2005). Following trial, Brundage was sentenced for the following felony convictions: Rape in the First Degree (Rape 1),

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<sup>3</sup> Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (holding that a jury must determine the presence of an aggravating factor except those based purely on prior criminal history).

Rape in the Second Degree (Rape 2) and Unlawful Possession of a Firearm (UPF). Id. at 60.

On the Rape 1 conviction, Brundage's prior offenses resulted in eight offender score points. Id. at 67. The UPF conviction added one point to his offender score, for a total of nine. Id. With an offender score of nine, Brundage's standard range was 240 to 318 months. Id. But with the Rape 2 conviction, his offender score increased to 12. Id. Brundage's standard range remained 240 to 318 months. Id. Thus, if the trial court had imposed a standard range sentence on the Rape 1, the Rape 2 conviction would have gone unpunished.

Conversely, the same result would occur if the court imposed a standard range sentence on the Rape 2 conviction because the inclusion of the Rape 1 would not have changed the sentencing range. Thus, in order to ensure Brundage did not receive a free crime, the trial court had to impose an exceptional sentence.

The trial court imposed exceptional sentences for both rape charges: 498 months for Rape 1 and 400 months for Rape 2, to be served concurrently. Id. at 69. Division Two held that this was a proper application of the "free crimes" doctrine. Id. The court

reasoned that the record supported “a finding that current offenses would go unpunished if the trial court had not imposed an exceptional sentence. Under the clearly erroneous standard of review, then, substantial evidence support[ed] the trial court’s reason, namely, the ‘free crimes’ doctrine, for imposing exceptional sentences.” Id. at 68-69. Thus, even though the court found that only *one* of the counts of rape would go unpunished, it was proper to apply the “free crimes” aggravator to *both* counts of rape pursuant to RCW 9.94A.535(2)(c).

Even assuming, *arguendo*, that France is correct that the court cannot apply the “free crimes” aggravator to all offenses where prior offenses do not amount to at least nine points, the trial court is not required to apply them to the charges that result in the most lenient sentence. France argues that the rule of lenity requires this Court to find that the free crimes aggravator must apply to counts 12, 14 and 15 here because the meaning of the statute is not plain. The plain language of the statute is perfectly clear. The judge may impose an exceptional sentence if “[t]he defendant has committed multiple current offenses and the defendant’s offender score results in some of the current offenses going unpunished.” RCW 9.94A.535(2)(c).

The language of the statute directs that a court may find this aggravator present if *some* current offenses would go unpunished; it does not require the court to find that *all* would go unpunished. The plain language leaves the imposition of the aggravator and the determination of sentence and the structure of the sentence within the sound discretion of the trial judge. If the legislature had intended the result that France seeks here, the language of the statute would have been supplemented to say that the court can impose an exceptional sentence only on those counts that would otherwise go unpunished.

It is clear from the Judgment and Sentence that the trial court here intended to exercise its discretion by sentencing France to 60 months for each of the three victims for a total of 180 months. As the first six counts also had the “officer of the court” aggravator, and because the court held that it would impose the same sentence based on either aggravator (CP 42), the trial judge properly applied the “free crimes” aggravator to the last three counts as a basis for the exceptional sentence.

Further, even if the trial court had not applied the “free crimes” aggravator on any of the counts, the court would have imposed the same sentence. France attempts to forestall this

argument by erroneously relying on the trial judge's oral misstatement at the sentencing hearing that counts "7, 8, and 9 are concurrent to each other, but consecutive to *the previous three counts.*" 2RP 26 (emphasis added).<sup>4</sup> The judge's oral statement is in conflict with the written Judgment and Sentence which indicates that the counts are "concurrent to each other and consecutive to *all others.*" CP 41 (emphasis added). If a court's oral rulings conflict with its written order, the written order controls over any apparent inconsistency. State v. Mallory, 69 Wn.2d 532, 533–34, 419 P.2d 324 (1966). Because the court ordered the first two sets of three counts to be served consecutively to all others, counts 12, 14, and 15 would have run consecutive to the others even if the court had not applied *any* aggravator to those counts.

France incorrectly cites this as a clerical error. As the court specifically noted, "I will follow and impose the exceptional sentences of consecutive sentences of 60 months" (2RP 26), the court's obvious intent was to impose three consecutive terms of 60 months for a total of 180 months. As that ruling is memorialized

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<sup>4</sup> This brief refers to the verbatim report of proceedings in accordance with the system set out in App. Br. at 3 n.2.

by the language of the Judgment and Sentence, this was clearly not a clerical error.

France argues, without merit, that the intent of the court to impose 180 months is not clear. This is directly controverted by the Judgment and Sentence in both the specific provisions of the sentence and the court's clear notation that the "**TOTAL** of all terms imposed in this cause is 180 months." CP 41 (emphasis in original).

Also of note, and in clear support of the court's imposition of the 180-month sentence, is France's failure to argue that the court's structuring of the sentence constituted an abuse of discretion as the sentence imposed was more lenient than it could have been. Assuming that the trial court decided to not apply the free crimes aggravator to *any* of the charges, it could still have imposed a much harsher sentence based on the "officer of the court" aggravator alone. Specifically, the court could have run each of the first six counts consecutively to the final three and imposed a 420-month sentence. Likewise, in applying the "free crimes" aggravator to only two of the last three counts (or to all as it did here), the court could have exercised its discretion by running all nine counts consecutively and imposed a total of 540 months. As France has

failed to show that the court erred in its application of the “free crimes” aggravator or that the trial court abused its discretion, this Court must affirm France’s sentence.

2. THE TRIAL COURT PROPERLY ORDERED NO CONTACT WITH THE VICTIMS AS A CONDITION OF SENTENCE.

France maintains that the court improperly imposed a community custody condition of no contact when it had no authority to impose community custody. France’s argument lacks merit as the court imposed a no contact order as a condition of sentence, not as a condition of community custody. France’s claim is apparently and incorrectly based on an inoperable section of the Judgment and Sentence.

The Sentencing Reform Act of 1981, RCW 9.94A.505(8), authorizes the trial court to impose crime-related prohibitions as a condition of sentence. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Sentencing conditions that do not interfere with a constitutionally protected right are reviewed for abuse of discretion. Id. Here, France does not claim that the court abused its discretion in ordering no contact with the three charged victims. Rather, France’s argument rests entirely on a superfluous check

mark in the Judgment and Sentence. Section 4.5, on page four of the Judgment and Sentence, reads:

NO CONTACT: For the maximum term of 15 years, the defendant shall have no contact with See attached Appendix H[.]

CP 41. Appendix H is entitled “No Contact Order” and contains the names of the three victims and specific prohibitions related to that order.

As there is no community custody associated with Felony Harassment, the court did not order any term of community custody in Section 4.7 and did not mark the Judgment and Sentence accordingly. CP 41, 43. However, in the bottom of Section 4.7 a pre-marked box reads “[a]ppendix H for Community Custody conditions is attached and incorporated herein.” CP 43. As no community custody was imposed per both the court’s oral and written sentence, this pre-marked section is inoperable and superfluous. Further, the title of Appendix H as a “No Contact Order” and the earlier reference to it in Section 4.5, clearly indicate that the court did not impose the order as a condition of community custody. Thus, the no contact order was properly imposed and remains unchallenged as a condition of sentence.

If this Court has concerns that this inoperable provision is confusing, the proper remedy is to remand to strike the statement that reads “[a]ppendix H for Community Custody conditions is attached and incorporated herein.” However, because the provision is inoperable as no community custody was ordered, it is certainly not necessary to do so.

3. A SCRIVENER’S ERROR IN THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

A scrivener’s error in the Judgment and Sentence incorrectly lists the “officer of the court” aggravator as applying to all counts as listed in Section 2.1 (j) (Special Verdict or Findings). France correctly notes that the “officer of the court” aggravator does not apply to counts 12, 14, and 15 and that this was an obvious scrivener’s error. Thus, this Court should remand for the parties to enter an agreed order amending Section 2.1 to say that the “officer of the court” aggravator applies to only counts 3, 4, 6, 7, 8 and 9, and that the “free crimes” aggravator applies to counts 3, 4, 6, 7, 8, 9, 12, 14 and 15.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm France's sentence but remand for correction of the scrivener's error discussed above.

DATED this 13 day of July, 2012.

Respectfully submitted,

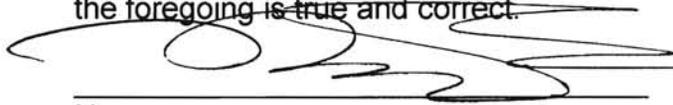
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, 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. WILLIAM FRANCE, Cause No. 67959-7-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.



Name  
Done in Seattle, Washington

07-13-12  
Date