

67959-7

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COA NO. 67959-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FRANCE,

Appellant.

REC'D

AUG 27 2012

King County Prosecutor
Appellate Unit

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COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Steven Gonzalez, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE FREE CRIMES AGGRAVATOR DOES NOT SUPPORT IMPOSITION OF AN EXCEPTIONAL SENTENCE ON THREE OF THE NINE COUNTS.

a. An Exceptional Sentence Based On The Free Crimes Aggravator Cannot Apply To Crimes That Were Punished.

France argued in the opening brief that three of the nine counts are unsupported by the free crimes aggravator because they are in fact punished. Brief of Appellant (BOA) at 8-15. The trial court therefore could not impose an exceptional sentence on those three counts as a matter of law. The State argues it could. Brief of Respondent (BOR) at 1. The State is wrong.

As set forth in the opening brief, only six of the nine counts are supported by the free crime aggravating factor. BOA at 9-14. Because consecutive sentences are a form of exceptional sentence, only those six counts can be ordered to run consecutively based on that aggravator.

"Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a). RCW 9.94A.535 provides, "The court may impose a sentence outside the standard sentence range *for an offense* if it finds, considering the purpose of this chapter, that there are substantial and

compelling reasons justifying an exceptional sentence." (emphasis added).

The plain language of the statute authorizes an exceptional sentence for *an offense* that is supported by substantial and compelling reasons to go outside the standard range. It does not authorize an exceptional sentence for an offense that is not supported by an aggravating factor.

This conclusion is only reinforced by additional language in RCW 9.94A.535, which states "A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6)." RCW 9.94A.585(4) specifies "To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either 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." (emphasis added).

Again, the plain language of RCW 9.94A.585(4) shows the legislature's intent to authorize an exceptional sentence only to those

offenses supported by an aggravating circumstance. If there are no substantial and compelling reasons justify an exceptional sentence for *that offense*, there can be no exceptional sentence as a matter of law for that offense. The plain language of the relevant statutes dictates this result.

The State contends the language of RCW 9.94A.535(2)(c) compels a conclusion that a court can imposed an exceptional sentence on counts that do not go unpunished. BOR at 11-12. The State is mistaken.

RCW 9.94A.535(2)(c) provides "The 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."

This provision does not specify whether a court may impose an exceptional sentence for offenses that do not go unpunished. But particular statutory provisions are not read in isolation divorced from context. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002). Statutes are construed as a whole. State v. Smith, 65 Wn. App. 887, 891, 830 P.2d 379 (1992).

Construing the statutes pertaining to exceptional sentences as a whole, it is apparent that a court may only impose an exceptional sentence for an offense that is supported by substantial and compelling reasons to

go outside the standard range. RCW 9.94A.535(2)(c) must be read in relation to RCW 9.94A.535, which provides "The court may impose a sentence outside the standard sentence range *for an offense* if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." (emphasis added). RCW 9.94A.535(2)(c) must also be read in relation to RCW 9.94A.585(4), which specifies the reviewing court will reverse a sentence outside the standard sentence range if the reasons supplied by the sentencing court "do not justify a sentence outside the standard sentence range *for that offense*." (emphasis added).

If an offense does not go unpunished because it contributes to the offender score before reaching the maximum of score of 9, then the free crime aggravator supplies no valid reason to go outside the standard range for that offense. Even if RCW 9.94A.535(2)(c) or the statutory scheme is ambiguous on this point, the rule of lenity requires resolution of that ambiguity in the defendant's favor. In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999).

The State cites State v. Stephens, 116 Wn.2d 238, 239, 244-45, 803 P.2d 319 (1991), where the Supreme Court upheld the trial court's imposition of a concurrent exceptional sentences for all counts based on the free crimes aggravator. BOR at 7-9. The outcome in that case is best

read as an artifact of the issues the parties chose to litigate. See In re Pers. Restraint of Coats, 173 Wn.2d 123, 138, 267 P.3d 324 (2011) ("Because we are not in the business of inventing unbriefed arguments for parties sua sponte, there certainly was no significance in our not doing so.") (quoting State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)).

No party in Stephens raised the specific issue of whether an exceptional sentence could be imposed for each count based on the free crimes aggravator even though the aggravator did not apply to some of the counts. The Court in Stephens simply held "an exceptional sentence above the standard SRA range may be justified when a defendant's multiple current convictions, combined with his high offender score, would otherwise result in there being no additional penalty for some of his crimes." Stephens, 116 Wn.2d at 240. It framed the issue as follows: "may a defendant being sentenced for multiple current offenses, no one of which would warrant an exceptional sentence, receive *an exceptional sentence* based on the number of crimes committed (and his resulting high offender score)?" Id. at 243-44 (emphasis added).

Neither the parties nor the Court addressed the issue as one related to *multiple* exceptional sentences run *consecutively* and whether the free crime aggravator must apply to each count to support a valid exceptional sentence for that count. This is not surprising, given that Stephens was

sentenced to eight *concurrent* 96-month sentences. Stephens, 116 Wn.2d at 239. Because the sentences ran concurrent to one another, it made no difference to Stephens whether some of those counts were unsupported by an aggravator factor because the amount of prison time he faced remained the same regardless. Stephens had no reason to argue, and in fact did not argue, that some of the offenses, as opposed to all of the offenses, were unsupported by a free crime factor.

Cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994). Moreover, "[i]n cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because the issue was not specifically raised and decided, Stephens does not stand for the proposition that an exceptional sentence may be properly imposed on an offense even though no aggravating circumstance attaches to that offense.

The reasoning of Stephens, however, supports France's argument. In reaching its holding that an exceptional sentence may be justified when a defendant's multiple current convictions and high offender score would

otherwise result in there being no additional penalty for some of his crimes, the Court looked to an overriding purpose of the SRA that sentences should be proportionate to the seriousness of the crime committed and the defendant's criminal history. Stephens, 116 Wn.2d at 244.

It cited its earlier decision in State v. McAlpin, 108 Wn.2d 458, 740 P.2d 824 (1987), where it held a court could consider a defendant's juvenile criminal record in imposing its sentence even though that record was excluded from the presumptive range calculations of the SRA. Stephens, 116 Wn.2d at 244. The Stephens court referenced the observation in McAlpin that "these crimes were not counted in calculating the offender score" and thus "no double penalty would occur as a result of considering them in regard to an exceptional sentence." Id. (citing McAlpin, 108 Wn.2d at 464 ("The court also correctly concluded that the defendant here would not be doubly penalized if these crimes were considered in imposing an exceptional sentence, since they are not part of the standard range calculation.")).

The Stephens court applied the SRA logic to the free crime aggravator: "Similarly, in the instant case, although the crimes were counted in calculating the offender score, most of them had no effect on the sentence because Stephens' score was '9 or more' already. Thus,

Stephens would not be penalized twice if the multiple crimes were considered toward an exceptional sentence." Stephens, 116 Wn.2d at 244.

The corollary is that an offender is penalized twice if an exceptional sentence based on the free crimes aggravator is imposed for offenses that contributed to the standard range calculation. This runs contrary to the proportionality purpose of the SRA, which, according to Stephens and McAlpin, does not seek to penalize an offender twice for the same offense where that offense is already accounted for in calculating the standard range.

The court in France's case could not impose an exceptional sentence on all nine offenses based on the free crimes aggravator without penalizing France twice for three of those offenses because those three offenses are used in calculating the offender score up to the maximum of 9. The imposition of an exceptional sentence on the offenses that are accounted for in the standard range runs contrary to the proportionality purpose of the SRA recognized in Stephens and McAlpin.

The State's citation to State v. Holt, 63 Wn. App. 226, 817 P.2d 425 (1991) is unhelpful. BOR at 9. As in Stephens, no party raised the specific issue of whether an exceptional sentence could be imposed on all counts based on the free crimes aggravator even though the aggravator did not apply to some of the counts. Holt simply contended "an exceptional

sentence cannot be based on an offender score of 12." Holt, 63 Wn. App. at 228. He sought "reversal of an exceptional sentence above the standard range." Id. at 227. The court affirmed. Id.

Holt did not involve imposition of consecutive sentences. Neither the parties nor the court addressed the issue as one related to multiple exceptional sentences run consecutively and whether the free crime aggravator must apply to each count to support a valid exceptional sentence on each count. Because the issue was not specifically raised and decided, Holt does not stand for the proposition that an exceptional sentence may be properly imposed on an offense even though no aggravating circumstance attaches to that offense. Kucera, 140 Wn.2d at 220; Electric Lightwave, 123 Wn.2d at 541; Berschauer/Phillips, 124 Wn.2d at 824.

The State's reliance on State v. Brundage, 126 Wn. App. 55, 107 P.3d 742 (2005) is misplaced. BOR at 9-11. In that case, the offender score was already at "9" for the two rape offenses before taking into account the other rape offense in the offender score. Brundage, 126 Wn. App. at 67. An exceptional sentence on both counts of rape was justified because Brundage was already at the top of the standard sentencing range and therefore the presumptive sentence for the two rape offenses would have remained the same. Id. Neither rape offense contributed to an

offender score leading up to 9. For this reason, there was no double penalty that would offend the proportionality purpose of the SRA.

Brundage is distinguishable. As set forth in the opening brief, France started out with an offender score of 6 based on prior offenses. Each current offense contributed one point to the offender score. Three of the current offenses thus contributed to reaching the maximum of 9 points on the offender grid. France committed nine harassment offenses, yet would receive the same presumptive sentence as if he had committed only three offenses. Three offenses are punished because they are included in calculating the offender score up to the maximum of "9." BOA at 13. This is what separates France's case from Brundage.

The State claims even if the free crime aggravator did not support an exceptional sentence for three of the nine counts, the court was entirely free to select which of the nine counts went unpunished. BOR at 11. The problem is that the court may not act arbitrarily in imposing an exceptional sentence. State v. Jacobson, 92 Wn. App. 958, 968, 965 P.2d 1140 (1998), review denied, 137 Wn.2d 1033, 980 P.2d 1282 (1999); State v. Perez, 69 Wn. App. 133, 137-38, 847 P.2d 532, review denied, 122 Wn.2d 1015, 863 P.2d 74 (1993).

The Sentencing Reform Act does not specify which current offenses should be deemed unpunished when the offender score for all

current offenses is greater than 9 but some of the current offenses are punished. There is no standard for determining which current offenses should be deemed unpunished and which are deemed unpunished. Contrary to the State's assertion, the statute is not plain on this point. The rule of lenity requires the statute be interpreted in France's favor. State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979).

b. The Appropriate Remedy Is Reversal Of The Sentence And Remand For Resentencing.

According to the State, France argues the intent of the court to impose 180 months is not clear. BOR at 14. This is a misstatement of France's argument. The court clearly intended to impose a total of 180 months confinement. That intent, however, is based on erroneously applying the free crime aggravator to counts 12, 14 and 15.

In terms of remedy, the issue is how the court intended to reach the total amount of 180 months confinement. The court stated in its oral ruling that counts "7, 8, and 9 are concurrent with each other, *but consecutive to the previous three counts.*" 2RP 26 (emphasis added). If so, then the total amount of time to which France is subject is 120 months once the exceptional sentences for counts 12, 14 and 15 are reversed. Counts 3, 4 and 6 run consecutive to all other counts, counts 7, 8 and 9 run

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DIVISION ONE**

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 67959-7-1
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WILLIAM FRANCE,)	
)	
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 27TH DAY OF AUGUST 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM FRANCE
DOC NO. 626275
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF AUGUST 2012.

x *Patrick Mayovsky*

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON