

70640-3

70640-3

COA No. 70640-3-I

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

STATE OF WASHINGTON,
Respondent,
v.
SHAYNE ROCHESTER,
Appellant.

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Richard D. Eadie

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

Shayne Rochester served 28 months in prison (including good time reductions on a 37-month term) after being convicted and sentenced to 73 months for a 2009 attempted robbery, which included a 36-month firearm enhancement by accomplice liability, based on him being in a future planned getaway car allegedly for two people who wielded a firearm when they committed an attempted robbery several blocks away. The trial court ordered Shayne to be released from prison on his own personal recognizance after the Court of Appeals reversed the 36-month enhancement per State v. Bashaw.¹ After that time Shayne so successfully improved every aspect of his life and his parenting skills that the Department of Social and Health Services abandoned its Termination petition, and the dependency was defeated – DSHS returned Mr. Rochester's son K.R. to him.

The Bashaw rule was subsequently discarded by the Supreme Court, following the State's successful petition in Mr. Rochester's case. The State, whose Department of Social and Health Services had since returned the child K.R. to the care and

¹State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

custody of his father, then sought to have Mr. Rochester re-incarcerated to serve 36 months of flat enhancement time. Shayne has been fighting the State's campaign ever since, at every turn of which the trial judge who presided over Shayne's trial ordered him to be free from custody, to enable him to continue that fight.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Shayne Rochester's motion for modification of his sentence under CrR 7.8.

2. The trial court, although it desired that Shayne serve no further incarceration, erred in determining that the court had no authority under CrR 7.8 to modify Mr. Rochester's sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court, on Mr. Rochester's subsequent CrR 7.8 motion, have the authority to modify the original judgment by imposing an exceptional sentence?

2. Did the trial court have discretion to strike the 36-month enhancement, under the broad discretion accorded to it under the Rule, which stands in contrast to appellate review of initial sentences, which are subject to *de novo* review?

3. Should Mr. Rochester's case be remanded to the trial court for litigation and consideration of an exceptional sentence, or

for striking of the enhancement, where Judge Eadie desired to modify Mr. Rochester's sentence, but mistakenly did not believe he had the authority or discretion to do so?

D. STATEMENT OF THE CASE

1. Appellate reversal of enhancement. In 2009, a jury convicted Shayne Rochester of complicity to an attempted robbery, and an enhancement based on the principal being armed with a firearm. CP 78, CP 87. The enhancement verdict was obtained by a jury instruction that violated State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010).²

Shayne was sentenced to a term of 73 months, which included 36 months of prison on the firearm enhancement.

On direct appeal, Shayne won reversal of the firearm enhancement based on Bashaw. State v. Rochester, 163 Wn. App. 1024, 2011 WL 4012373 (unpublished opinion of September 12, 2011 in No. 65165-0-I).

2. Trial court releases Shayne Rochester on his own recognizance. The State petitioned for Supreme Court review of

² The conviction was based on testimony that a drug seller was in his home when two women, who were described as possessing a gun or guns, tried to rob him, and evidence that Mr. Rochester was arrested some blocks distant, while sitting in a vehicle.

the decision in Mr. Rochester's case, arguing that Bashaw should be repudiated.

However, following this Court's decision relying on Bashaw, and on the DOC statement that Shayne had served 38 months, the trial court, the Honorable Judge Richard Eadie, ordered that Shayne be released from prison on his own personal recognizance, with appropriate conditions, in order that Shayne be able to fight a DSHS dependency and pending parental rights termination proceeding in Skagit County. CP 38-40.

3. Parental rights case stopped and child dependency successfully ended. The dependency case, involving Shayne's son K.R., was based on deficiencies of the child's mother, and the physical absence of Shayne to be able to parent. Mr. Rochester obtained a stay of the pending Skagit County termination trial a week after his release. Shayne entered King County's CCAP Program and complied with all its requirements as directed for his release on his own recognizance, commenced participation in N.A. drug rehabilitation programs and Child Protective Services parenting programs, maintained uninterrupted sobriety as demonstrated by drug and alcohol testing, and ultimately regained the full care and custody of his son. CP 38-40; CP 44-46.

Judge Richard Eadie presided over Shayne Rochester's original criminal trial in January of 2010, and was the trial court that ordered Shayne to be released on his personal recognizance following this Court of Appeals' decision under State v. Bashaw that reversed the enhancement term of imprisonment.

In 2010, Judge Eadie believed that Mr. Rochester's case presented compelling circumstances and held confidence that the defendant's conduct following release on his recognizance would further the interests of justice. At the CrR 7.8 motion hearings below that are the subject of the present appeal, the witnesses presented by counsel Amanda Kunzi – Elizabeth Skinner of the Department of Social and Health Services, Jonah Idczak of the Children's Administration of DSHS, Lillian Hewko of the Northwest Womens Law Center, along with Mr. Rochester himself – made it clear that Judge Eadie's assessment was prescient. Mr. Rochester devoted himself to the effort to become a proper Title 13 RCW parent in the view of DSHS, and did so successfully – leading to the Department's dismissal of the parental rights termination action. 6/24/13RP at 9-18.

Mr. Rochester's parent-child bond with his young son K.R. has now been repaired and strengthened following a period of disruption, and K.R. is now in the care and custody of the only adult available to parent him.

4. Court reverses *Bashaw* doctrine. Unfortunately, the Supreme Court later granted the State's petition and ordered remand for re-instatement of the firearm enhancement based on State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012). Mr. Rochester's petition for review from the subsequent Court of Appeals decision, arguing that the Court should not have abandoned the only-recently adopted doctrine, was denied, and the mandate issued May 22, 2013.

Mr. Rochester filed a CrR 7.8 motion for relief from judgment, which was briefed extensively by both parties and heard before Judge Eadie on June 24, and July 3, 2013, including the presentation of the testimony of three defense witnesses, Mr. Rochester, and argument of counsel. 6/24/13RP at 9-34.

Mr. Rochester argued that the trial court had discretion under CrR 7.8 to grant relief from the judgment for "any other reason justifying relief from the operation of the judgment." CP 38-53; CP 63-67.

E. ARGUMENT

CRIMINAL RULE 7.8 PROVIDED THE TRIAL COURT WITH THE DISCRETIONARY AUTHORITY TO PROVIDE RELIEF FROM THE ORIGINAL JUDGMENT, INCLUDING BY IMPOSING AN EXCEPTIONAL SENTENCE DOWNWARD OR BY STRIKING THE ORIGINAL SENTENCE FOR THE FIREARM ENHANCEMENT.

1. An exceptional sentence on the base sentence was within the trial court's discretion under CrR 7.8.

(a). Ruling on request for exceptional sentence on base standard range.

Mr. Rochester's counsel primarily asked the trial court to exercise its discretion under CrR 7.8(b)(5) to strike the enhancement. See infra. Additionally, however, counsel asked the court to also consider modifying Mr. Rochester's sentence by determining that the 28 months he had spent in prison were served in part satisfaction of the 36-month enhancement, also under that Rule, which provides that "upon such terms as are just, the court may relieve a party from a final judgment . . . for [a]ny other reason justifying relief[.]" 7/3/13RP at 6-9.

The court questioned counsel Amanda Kunzi regarding the argument that the defendant's sentence could be modified to impose an exceptional term below the standard range of approximately a month, on the base sentence. This would

mean that serving the 36-month enhancement would leave approximately 9 months to serve on the enhancement. 7/3/13RP at 6-7.

Counsel indicated this was an alternative approach to the argument in favor of striking the firearm enhancement. 7/3/13RP at 7.

The court responded by asking whether there was a question of statutory construction in the firearm enhancement statute, with regard to whether the term “consecutive” meant that the enhancement is necessarily served after the base term on which earned early release time can be earned. 7/3/13RP at 9.

The statute in question, then RCW 9.94A.310(4)(e), now in RCW 9.94A.510, provided that

[n]otwithstanding any other provision of law, any and all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provisions.

RCW 9.94A.533(3)(e), applicable here, provides:

Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or

deadly weapon enhancements, for all offenses sentenced under this chapter.

RCW 9.94A.533(3)(e).³ Counsel stated that the statute clearly provided for a minimum term on the enhancement, and that a further term would follow. 7/3/13RP at 9. Ms. Kunzi also noted that if there was ambiguity in a statutory provision, it would then necessarily be construed in the defendant's favor. 7/3/13RP at 9; see In re Charles, 135 Wn.2d 239, 955 P.2d 798 (1998); State v. Roberts, 117 Wn.2d 576, 585, 817 P.2d 855 (1991).

(b). CrR 7.8 permitted modification to provide relief from the original judgment.

Criminal Rule 7.8(b)'s provisions allow for modification of a judgment for any reasons justifying relief from the original sentence, in the interests of justice. State v. Brand, 120 Wn.2d 365, 369, 842 P.2d 470 (1992); State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989).

Here, Judge Eadie indicated that the court very much wished to reduce Mr. Rochester's ordered term of incarceration, but in its ruling, the court stated that under the law it did not

³ Under the statutory mandate and regulations of the Department of Corrections, good time credit is not earned on enhancements. See WAC 137-30-030(2)(a)(ii)(rendering ineligible "offenders serving the mandatory or flat time enhancement portion of their sentences").

believe it had discretion with respect to an exceptional sentence. 7/3/13RP at 21-23, 27.

It's not my prerogative to say what the law – what I want the law to be or what the law might be. So I would just, you know, make it clear to you now, I don't think I have discretion with respect to the exceptional sentence. I just think that under State v. Brown that that is just a clear instruction to me that I do not have any discretion with respect to the exceptional sentence.

7/3/13RP at 21-22. The court at one point seemed to state this was true regardless of “what comes first when you're confined[.]” 7/3/13RP at 22. However, the court had earlier stated, and then later in its ruling specifically concluded, that where a defendant is serving a prison sentence that includes an enhancement, the sentence involves two terms and

the underlying sentence is served first **and then the enhancement[.]**

(Emphasis added.) 7/3/13RP at 22-23. The court stated that under the sentencing statutes, the enhancement terms “would follow rather than precede” the underlying sentence. 7/3/13RP at 23.

(d). There is no rule that an enhancement is served second that precluded the court from modifying the judgment.

No rule that a firearm enhancement term is served second proscribed the ultimate remedy sought by Mr. Rochester, and which the court in the interest of justice, desired to give.

Mr. Rochester had served 28 months of the enhancement period of 36 months. The court could have provided relief by imposing an exceptional sentence below the standard range on Shayne's base sentence, requiring Shayne to serve a remaining 6 months flat time on the enhancement.

The court's ruling that it had no ability to consider an exceptional sentence was based on its determination that a defendant's base sentence is served first. However, the case law uniformly indicates that a mandatory enhancement term is deemed to be served first. In Re PRP of Talley, 172 Wn.2d 642, 650-51 and n. 4, 260 P.3d 868 (2011) (discussing and citing In re King, 146 Wn.2d 658, 663, 49 P.3d 854 (2002)).

The Department of Corrections regulations in the Washington Administrative Code do not support a different rule.

See Chapter 137-30 WAC Department of Corrections "EARNED RELEASE TIME" Sections 30-010 to 30.080 inclusive.

The proposed alternative manner of modification of Mr. Rochester's sentence was permissible. Remand is appropriate for the court to hold a hearing on modification of the original judgment to impose a sentence below the standard range.

2. The trial court had discretion to vacate the enhancement under CrR 7.8(b)(5).

With regard to the firearm enhancement, the trial court stated that it was unfortunately bound and required to render that sentence undisturbed, by State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999). The court concluded that because firearm enhancements are mandatory, it had no discretion to vacate that portion of Mr. Rochester's punishment. 7/3/13RP at 21-22.

(a). *Brown may be superseded.*

However, first, although State v. Brown did state that firearm enhancements are mandatory, other cases allow enhancements to be run concurrently with other sentencing provisions, despite the mandatory language of their particular governing statutes.

In Brown, the defendant was convicted of assault and had an offender score that included a 3 to 9 month standard range, along with a 12 month deadly weapon enhancement under RCW 9.94A.310(4)(b), establishing a “total standard range of 15 to 21 months.” Brown, 139 Wn.2d at 23.

The trial court imposed a total exceptional sentence downward that was itself less than the 12 month period of the enhancement. But the Supreme Court stated that the language of the Hard Time for Armed Crime act, as codified by former RCW 9.94A.310(4)(e), provided that a deadly weapon enhancement is “mandatory” and shall not run concurrently with any other sentencing provisions. Brown, 139 Wn.2d at 26 (citing statute). In Brown, this meant that the 12 month enhancement could not be run in part concurrently with any sentence in the 3 to 9 month base standard range, because compared to the enhancement, the base sentence range was an “other sentencing provision[.]”. Therefore the Brown trial court’s lower-than-12 month sentence could not be statutorily authorized.⁴

⁴ The Brown Court rejected the defense argument that such a rule was contradicted by In Re Charles, in which it was held that this same language,

However, the Brown decision was significantly split, with several current justices stating they would hold that RCW 9.94A.370 provided that enhancements are added to a base sentence to determine a presumptive range, from which the court may depart under the exceptional sentence provisions of RCW 9.94A. Brown, at 36-37 (Madsen, J., dissenting) (citing Washington Sentencing Guidelines Commission, Adult Sentencing Guidelines Manual, at I-16 (1997)).

Additionally, Brown's reasoning is cast into doubt by the Court's later Mulholland decision, which held that sentences for serious violent offenses are *not* required to be served consecutively, if the trial court imposes an exceptional sentence downward, despite the apparently mandatory "consecutive" language of the applicable statute. In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007).

Pursuant to RCW 9.94A.589(1)(b), sentences for multiple serious violent offenses "shall be served consecutively to each

"other sentencing provisions," did not invariably require (when also assessed under the rule of lenity) that two enhancements run consecutively to each other. Brown, at 26-27 (citing In re Charles, 135 Wn.2d 239, 245, 955 P.2d 798 (1998)) Following Charles, the legislature amended the statutes. RCW 9.94A.510(3)(e) (firearm) and RCW 9.94A.510(4)(e) (other deadly weapon); Laws of 1998, ch. 235, § 1.

other.” But in the Mulholland case, the Court held that a sentencing court has the discretion to impose concurrent sentences for separate serious violent offenses -- as an exceptional sentence.

Mr. Rochester argues that the trial court always has the authority under the SRA to impose an exceptional sentence downward, even if the sentence is lower than a presumptive term set by statute. See also Brown, at 25-26 (recognizing court’s power to impose exceptional sentences).

(b). CrR 7.8 modification of judgment generally gives the court discretion to modify a sentence in the interest of justice.

Second, certainly, the trial court when ruling on a CrR 7.8 motion is vested with discretion that would allow Judge Eadie to grant the remedy he desired to grant. Notably, under CrR 7.8, a court’s ruling designed to provide relief from judgment is reviewed only for abuse of discretion. State v. Smith, 159 Wn. App. 694, 698, 247 P.3d 775 (2011).

In contrast, whether the sentencing court has exceeded its statutory authority under the Sentencing Reform Act of 1981, chapter 9.94A RCW (SRA), is an issue of law. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003); see also State v. Amo, 76 Wn. App. 129, 882 P.2d 1188 (1994); State v. Law,

154 Wn.2d 85, 110 P.3d 717 (2005) (both evaluating a trial court's imposition of exceptional sentences below standard range imposed at time of original sentencing; legality of sentence is addressed *de novo*).

Therefore, even if under the SRA, the Brown decision governs an initial sentencing as a matter purely of SRA authority, wherein the standard of review on appeal is *de novo*, the trial court on a proper CrR 7.8 motion may provide relief from the original judgment, in its discretion.

Furthermore, in Mr. Rochester's case, the court below had discretion to provide relief from the firearm enhancement for additional reasons *in toto* -- considering the need of the defendant's child for his sole available parent, and the defendant's circumstances of release for that purpose, followed by successful dismissal of the pending dependency and parental rights termination action.

The court desired to use these reasons to provide relief. The court noted the strong policy implications of the recent Washington legislation establishing the Family Offender

Sentencing Alternative. 7/3/13RP at 22-27.⁵ See 6/24/13RP at 51 (defense discussion of FOSA); and <http://www.doc.wa.gov/community/fosa/default.asp>).

Significantly, the court noted that the State, including the family court, had *intentionally* acted to allow Mr. Rochester to be released based on the Court of Appeals original decision reversing the enhancement, in order specifically that he work to regain the custody and care of his child. 7/3/13RP at 24-25.

⁵ Among many considerations, the court praised Mr. Rochester's obvious and attested-to success in using the fact that he was released in order to fight the dependency and looming termination trial and did so successfully so as to become the proper custodial parent to his son, where the mother was not ever going to be able to parent. 7/3/13RP at 24-26. The court also noted Mr. Rochester's essentially passive complicity in the crime committed, including the firearm possession. 7/3/13RP at 23-24. These factors jibe with the purposes of the SRA, which are set out in RCW 9.94A.010:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to add a new chapter to Title 9 RCW designed to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve him or herself; and
- (6) Make frugal use of the state's resources.

RCW 9.94A.010 (emphasis added).

Judge Eadie's modest assessment of its trial court authority in ruling on a CrR 7.8 motion dissuaded the court from modifying the defendant's sentence in accord with its sense of justice in the particular proceeding. Contrary to Judge Eadie's assessment of any limitations in Criminal Rule 7.8, the trial court in this case did have the authority to do what the trial court in this case desired to do. In this unique context of the interests of justice, the trial court had the authority under CrR 7.8(b) to modify the sentence, including by striking the 36-month enhancement term.

When determining whether the interests of justice allow modification of judgment under CrR 7.8, the extraordinary circumstances the court may consider include fundamental and substantial irregularities that are extraneous to the criminal prosecution in the court or by the State. State v. Aguirre, 73 Wn. App. 682, 688, 871 P.2d 616 (1994).

It is true that a party is not entitled to relief from judgment if the circumstances alleged to justify the relief existed at the time judgment was entered. State v. Zavala-Reynoso, 127 Wn. App. 119, 123, 110 P.3d 827 (2005).

When, however, circumstances arise as a result of a separate court's actions after the imposition of a sentence or order, a motion may properly be entertained under CrR 7.8(b). See State v. Klump, 80 Wn. App. 391, 909 P.2d 317 (1996) (reversal of a federal court sentence that was supposed to run consecutive to a state-ordered sentence was outside state court's control and justified review of state sentence).⁶

Mr. Rochester's case presented a very unique set of circumstances not normally seen. The jury in his criminal trial was instructed in a manner inconsistent with the state of the law at that time. Given the status of the law in 2010, this Court of Appeals reversed Mr. Rochester's enhancement. At the time the State appealed this Court's decision to the Supreme Court, Mr. Rochester had been in custody approximately 28 months. Given that the trial court had sentenced Shayne to 37 months on the conviction, and taking into consideration earned release time authorized by RCW 9.94A.729, the Department of

⁶ Importantly, because the motion before Judge Eadie in this case concerned the vacation of a sentencing enhancement, not the underlying crime, this motion also does not intrude on the Governor's pardoning power. Sentencing enhancements do not constitute separate crimes in and of themselves. Therefore, because Mr. Rochester was asking the trial court to alter his sentence, not forgive him for the underlying crime of which he was convicted, granting that relief would not intrude on the pardoning power, and fell within the court's discretion under CrR 7.8.

Corrections determined Mr. Rochester had completed his sentence for the crime.

The authority of the SRA indeed includes recognition of trial court discretion to consider all these factors. When enacted in 1984, the Legislature stated that the purpose of the Sentencing Reform Act was to structure, but not eliminate, “discretionary decisions affecting sentences.” RCW 9.94A.010; see also State v. Ammons, 105 Wn.2d 175, 713 P.2d 719 (1986).

3. Reversal is required where it is possible that the court would have entered a different ruling if it had not underestimated the power available to it.

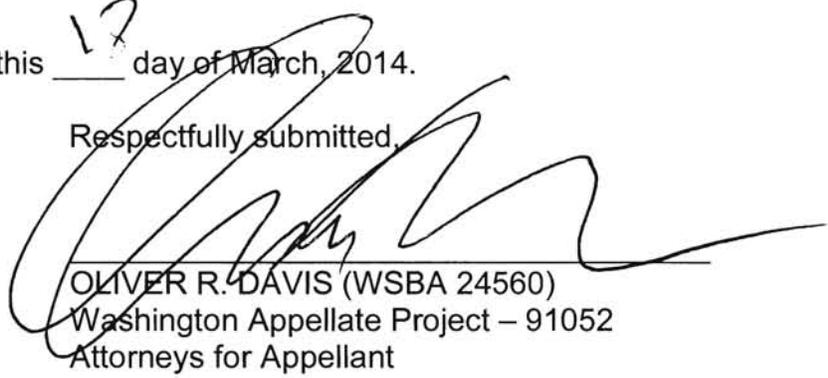
Where the appellate court “cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option,” remand is proper. State v. McGill, 112 Wn. App. 95, 100–01, 47 P.3d 173 (2002). Here, during the several hearings on Mr. Rochester’s CrR 7.8 motion, the court repeated its wish to be able to modify the sentence on the basis that it was fulfilled. 7/3/13RP at 27. This Court should remand to the trial court.

F. CONCLUSION

For the reasons stated, Mr. Rochester asks this Court to remand Mr. Rochester's matter for further consideration of the CrR 7.8 motion.

DATED this 17 day of March, 2014.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70640-3-I
v.)	
)	
SHANE ROCHESTER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **OPENING 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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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF MARCH, 2014.

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