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No. 72328-6-I
King County Superior Court No. 13-1-13139-7 SEA

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

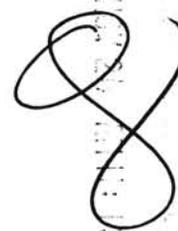
ALI ABUKAR MOHAMED,
Defendant-Appellant.

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

The Honorable Regina S. Cahan, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The trial court erred in excluding evidence of the informant's history of criminal convictions.
2. The lead detective improperly vouched for the credibility of the informant.
3. The trial court mistakenly believed that it did not have the ability to reduce the multiple sentence enhancements.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The informant in this case had a long history of criminal convictions during the time he was working with the police, although his contract prohibited committing crimes. Did the federal Confrontation Clause require admission of the informant's criminal history because it was relevant to his bias and motivation?
2. Did the lead detective improperly vouch for the credibility of the informant when he stated that the informant was "very honest."
3. Did the trial court have the authority to reduce the time on the sentencing enhancements through a Parent Sentencing Alternative, a Drug Offender Sentencing Alternative, and an exceptional sentence?

STATEMENT OF THE CASE

The Seattle Police Department (SPD) investigation in this case started when an informant told his handler, Detective Samuel DeJesus, that a man named “Dime” was selling crack cocaine from his clothing store and trafficking in illegal firearms. RP 94, 98. The informant, Yenny Harris-Carcases, goes by the name of “Jaime.” RP 78. He came to the U.S. from Cuba as a “Marelito,” that is, one of the many incarcerated criminals and mentally ill Cubans that Fidel Castro sent to America in 1980. RP 225, 349. By Jaime’s account, he began work with SPD in 1983. RP 282. For his assistance, Jaime was paid in cash and sometimes with confiscated cartons of cigarettes. Detective DeJesus would also drive him to food banks regularly. RP 231.

Jaime admitted to smoking crack cocaine. RP 284. He acknowledged that the police have “scolded” him for unauthorized drug use. In one case that led to the police closing the investigation. RP 380. In fact, Jaime twice made unauthorized deliveries of crack cocaine during the investigation of Dime. RP 287-88. Jaime also admitted to twice lying to Detective DeJesus in other cases. RP 350. Jaime receives disability payments, apparently for mental health problems. RP 332. He stated: “You know, I do have problems with my mind.” *Id.* He agreed that he takes psychiatric medications and sometimes his memory is poor. RP 338.

He gets reminders to see his psychiatrist but sometimes misses appointments. RP 372-73. He was prescribed the drug Risperdal but stopped taking it. RP 340.¹

Although DeJesus was not particularly interested in low-level drug dealing, he arranged some “controlled buys” from Dime in order to obtain authorization to video and audio record Jaime’s interactions with Dime. RP 98-99. These purported buys took place on April 20, 2012 (RP 293); April 25, 2012 (RP 305); May 9, 2012 (RP 520); November 28, 2012 (RP 320); and February 11, 2013 (RP 191). In each case, Detective DeJesus gave Jaime about \$150 in buy money, and in each case Jaime returned to the detective with a small rock of cocaine. *See* RP 101, 125, 133, 140, 142. Jaime said the cocaine was provided by Dime or someone working at Dime’s direction.

The prosecutor played portions of the recordings in court. The court reporter transcribed much of the recordings as “inaudible.” *See, e.g.,* RP 134-37; 184-87; 202. The prosecutor argued that portions of the recordings referred to drug transactions. Mr. Mohamed maintained that those portions were actually referring to innocent conversations, including

¹ Risperdal is prescribed for the treatment of schizophrenia. *See* http://www.nami.org/Template.cfm?Section=About_Medications&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=51&ContentID=20703

some normal clothing store business. *See, e.g.*, RP 492. He denied selling cocaine, but acknowledged that there was considerable drug activity in the area of the store. RP 474.

Although Detective DeJesus testified that the police searched Jaime and his car prior to each “controlled buy,” Sergeant Allen and Officer Brandon James admitted that it would not be difficult to hide a rock of cocaine somewhere in the car. RP 409; 462.

At first, the police believed “Dime” was Omar Hashim, who was listed in business records as the store owner. RP 96-97. When Jaime was shown a photograph of Hashim, he confirmed that it pictured Dime. RP 253. At some point, Jaime also identified Mr. Mohamed’s brother Tavid as Dime. RP 355; 491-92.

None of the videos show Mr. Mohamed giving cocaine to Jaime. The police never recovered the money Jaime claimed he used for the buys. In fact, they did not bother to keep track of the serial numbers. RP 216. When Mr. Mohamed was arrested, the police found no cocaine in Mr. Mohamed’s business, on his person, or in his car. RP 218.

The police never found evidence of Mr. Mohamed selling weapons. RP 205; 289.

III. ARGUMENT

A. THE TRIAL COURT IMPROPERLY LIMITED IMPEACHMENT OF THE INFORMANT

The prosecutor moved in limine to exclude evidence of the informant's criminal convictions. RP 22. Mr. Harris has the following convictions:

- Burglary 2nd Degree, 1984;
- Assault 4, 1997;
- Assault 4, 2000;
- Violation of No-Contact Order, 2002; and
- Attempted Theft 2nd Degree, 2003.

He also has three convictions for Driving with a Suspended License in the 2nd Degree between 1997 and 2003. Supp. CP² ____ (Dkt. 73 at p. 3).

Mr. Harris signed an informant contract in 1991 in which he agreed to several conditions including the following:

6. I further agree that my association with the Seattle Police Department does not afford me any special privileges and that I do not have the authority to violate any law and will be held responsible if I do so.

² A supplemental designation of clerk's papers is being filed today with the King County Superior Court.

9. Finally, I agree that violation of any of the above enumerated provisions will be grounds for immediate termination and probable criminal charges.

Plaintiff's Pretrial Ex. 1. Defense counsel argued that nearly all the convictions should be admissible because they took place while Mr. Harris was working for the SPD, yet he was never terminated. The Court ultimately excluded the evidence. RP 47. In its view, because convictions were at issue, the only rule that could apply was ER 609. RP 47-48.

Mr. Mohamed concedes that the convictions were inadmissible *under that rule*. But they should have been admitted because the Sixth Amendment confrontation clause guarantees the right to present evidence of a witness's bias or motivation.

"Bias" is a general term incorporating various factors that can cause a witness to fabricate or slant her testimony, such as prejudice, self-interest, or ulterior motives. *See Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice, §§ 607.7 through 607.11 at 320-33 (4th Ed. 1999).

Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.

United States v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984).

The right of a criminal defendant to cross-examine witnesses against him as to their bias in favor of the state is guaranteed by the Sixth Amendment to the United States Constitution. *Davis*, 415 U.S. at 315-316. “[T]he exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *Id.* at 316-17. *See also*, *State v. Spencer*, 111 Wn. App. 401, 45 P.3d 209 (2002), *review denied*, 148 Wn.2d 1009, 62 P.3d 889 (2003); *State v. Roberts*, 25 Wn. App. 830, 611 P.2d 1297 (1980); *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319, *review denied*, 79 Wn.2d 1008 (1971) (“It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility.”); 5A Teglund § 607.7 at 320 (“the defendant enjoys nearly an absolute right to demonstrate bias on the part of the prosecution witnesses”).

Evidence which is inadmissible on other grounds may still be admissible for the purpose of showing bias. *Abel*, 469 U.S. at 55 (although specific instances of conduct inadmissible under Rule 608(b) for purpose of showing “character for untruthfulness,” admissible to show bias); *United States v. James*, 609 F.2d 36, 46-47 (2d Cir. 1979), *cert. denied*, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980); 5A Teglund § 607.10 at 331 (“When acts of misconduct or criminal convictions are

offered to show bias (as opposed to a general tendency towards untruthfulness), the restrictions in Rules 608 and 609 are inapplicable.”)

Here, Mr. Harris had a long history of violating his informant contract by breaking the law. He continued such conduct in this very investigation by making an unauthorized purchase and delivery of cocaine. Yet, he was never sanctioned in any way. To the contrary, the police rewarded him with gifts such as free cartons of cigarettes. This cozy relationship sent a clear message to Mr. Harris that the informant agreement was only for show, and that the police would tolerate all sorts of misbehavior as long as he helped them obtain convictions. Further, that the police failed to enforce the informant agreement reflects poorly on their integrity. Thus, Mr. Mohamed’s Sixth Amendment right to confront witnesses was denied.³

Even if it was within the trial court’s discretion to exclude the evidence initially, the State clearly opened the door when Detective DeJesus testified that Mr. Harris was “completely honest.” *See* section B, below. The defense was entitled to rebut such testimony with Mr. Harris’s history of misconduct.

³ Defense counsel did not specifically cite to the constitution, but the Court should review that issue under RAP 2.5(a).

B. THE STATE'S WITNESS IMPROPERLY VOUCHER FOR THE INFORMANT'S HONESTY

When asked to describe the informant's background, Detective DeJesus stated, among other things that Mr. Harris was "very honest." RP 82. That statement amounted to improper vouching.

"Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity." *United States v. Necochea*, 986 F.2d 1273, 1276 (9th Cir. 1993). *See also, State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996); *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983). Here, the State placed its prestige behind Mr. Harris regarding his credibility. To suggest that someone is "very honest" is no different from saying "I believe he is telling the truth."

Although defense counsel did not object, this Court can review the issue because the comment was "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673, 678 (2012). The experienced detective must have known that the comment was improper.

This error, especially when combined with the exclusion of the informant's criminal history, prejudiced the defense.

C. REMAND IS REQUIRED BECAUSE THE TRIAL COURT WAS MISTAKEN ABOUT THE SENTENCING OPTIONS AVAILABLE

1. Relevant Facts and Procedural History

At sentencing the parties and the Court correctly agreed that the standard range on the delivery charges was 20-60 months on each count, with time running concurrently, plus three 24-month school zone enhancements running consecutively with each other and with the underlying drug sentences. This resulted in a range of 92-132 months. *See* CP 126.

In his sentencing brief, defense counsel noted that the prosecutor had offered before trial a plea to 30-90 days in work release. CP 103. Counsel pointed out that two years had now passed since the offenses, and that Mr. Mohamed had no further criminal allegations. Further, he was making a positive impact in his community through his business. For example, he allowed students with 4.0 grade point averages to shop in his store for free. He also participated in a program to donate clothing to girls who could not afford them. CP 104.

Perhaps more importantly,

Mohamed is a family man with 3 young children. [A.A.], 8 years old, who attends Wing Luke elementary school. His daughter, [F.A.] is four years old and will be attending early start program at Wing Luke elementary school this fall. Mohamed's third child, a girl, [M.A.] is 3 years old. He and his wife alternate caring for her throughout the day.

He cares for his youngest daughter . . . when his wife works as an in-home caregiver . . . His wife, Bibi Ali is pregnant and is due to have a fourth child in mid-September, 2014.

. . . Mr. Mohamed also provides primary subsidence and care for his mother who lives very close to his home. His wife and children rely on Mr. Mohamed as the primary wage earner for their family.

CP 105.

Defense counsel, therefore, recommended a Parenting Sentencing Alternative (PSA) under RCW 9.94A.655. App. A. When such a sentence is granted, the defendant serves twelve months of community custody instead of the standard range sentence. CP 106-108. As another option, defense counsel suggested a Drug Offender Sentencing Alternative (DOSA) under RCW 9.94A.660. CP 114-115; App. B. Defense counsel also argued that the Court could grant an exceptional sentence below the standard range because “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.” CP 114. The gist of his argument was that the police unnecessarily increased the sentence by making repeated buys of small amounts of cocaine. *See*, CP 108-114.⁴ Among other things, defense counsel pointed

⁴ Some of this argument was under the headings of “sentencing entrapment” and “sentencing manipulation.”

out that when asked why he did not arrest Mr. Mohamed after the first buy, Detective DeJesus said “five is better than one.” CP 110.

In his response to the defense sentencing brief, the prosecutor agreed that Mr. Mohamed met the statutory requirements for a DOSA. Supp. CP ___ (Dkt. 74 at p. 4). Regarding a PSA, “[t]he State agrees that the defendant is likely eligible for a PSA, however not every requirement of that statute has been met and certain information is still needed.” Supp. CP ___ (Dkt. 74 at p. 3). Specifically, the Court would be required to “request DSHS to determine whether any open child welfare or other claims of neglect have been substantiated,” and would have the option of requesting a risk assessment from the Department of Corrections (DOC). *Id.* citing RCW 9.94A.655(4). The prosecutor conceded that the Court could order that additional information and set the sentencing over if it was inclined to consider a PSA. *Id.*

The prosecutor maintained, however, that it would be pointless to consider any of the defense options because, in his view, any diminution of the sentence would apply only to the underlying drug offense and not to the 72 months of enhancements. He based this solely on his interpretation of RCW 9.94A.533(6), which sets out the school zone enhancement. Supp. CP ___ (Dkt. 74 at p. 2-3). In view of that legal position, the prosecutor maintained that

[a]s a practical matter, this court should not grant a PSA in this case due to the fact that the defendant will be serving 72 months in prison for the enhancements. The purpose of a PSA would be completely nullified in this case because the defendant will be separated from his family for a period of time while he serves prison time on the enhancements for which he was convicted. Granting a PSA in this case would be in direct conflict of the spirit of a PSA, which is to keep parents in the community to take care of their children and bet better educated on being a parent.

Supp. CP ____ (Dkt. 74 at p. 3-4).

The prosecutor's argument was similar regarding a DOSA.

First, a prison based DOSA would result in the defendant serving 20 months in prison, followed by 20 months on Community Custody. Of course, that would have to be separate from the 72 months of enhancements the defendant will be serving. For this particular range of 20-60 months, the defendant is better off receiving a low end standard range sentence of 20 months, because the required Community Custody for these crimes is only 12 months.

Supp. CP ____ (Dkt. 74 at p. 4).

At the sentencing hearing, the judge accepted the prosecutor's position. When defense counsel began discussing alternative sentences, the judge immediately interrupted to note that she had no ability to reduce the enhancements. RP 593-94. "So, just so you know, I think I have absolutely no discretion on the 72 months." RP 594. When it came time to impose sentence, the judge found it to Mr. Mohamed's credit that he had a large group of supporters in the Somali community. RP 617. The Court noted again, however, that "I have very little discretion in this case."

RP 618. The Court then imposed the minimum term within the standard range, rejecting the prosecutor's request for an additional ten months. *See* RP 584.

2. The Trial Court did Have Authority to Reduce the Time on the Enhancements

In fact, the judge and prosecutor were mistaken. In *Gutierrez v. Department of Corrections*, 146 Wn. App. 151, 188 P.3d 546 (2008), the Court of Appeals held that a DOSA does reduce both the underlying crime and the enhancements. That case, like this one, involved a drug delivery crime with a school zone enhancement. *Id.* at 152-53.

The dispute in *Gutierrez* revolved around the meaning of "standard sentence range."

The prison based alternative shall include:

(a) A period of total confinement in a state facility for one-half of the midpoint of the *standard sentencing range* or twelve months, whichever is greater....

(b) The remainder of the midpoint of the standard range as a term of community custody

Id. at 153, citing former RCW 9.94A.660(5) (emphasis in *Gutierrez*).⁵

RCW 9.94A.533(6) governing drug crime enhancements, provided:

⁵ The relevant language in the current version is not materially different. *See* RCW 9.94A.660(1)(a) and (b).

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

Id. at 154.⁶

The DOC argued that the phrase “standard sentence range” was a term of art referring only to the base range for the underlying crime, prior to any enhancements. *Id.* at 154. The Court disagreed:

First of all, the statutory definition does not suggest the phrase is meant to apply only to unenhanced “base” ranges. “‘Standard sentence range’ means the sentencing court’s discretionary range in imposing a nonappealable sentence.” RCW 9.94A.030(44). This definition does not suggest that it is a term of art for the unenhanced “base” range. Case law on exceptional sentences bears out this approach. Courts have many times dealt with exceptional sentence appeals involving “enhanced” sentences. Uniformly, the enhanced range is considered a standard range term and a departure from that range is an exceptional sentence. E.g., *State v. Silva-Baltazar*, 125 Wn.2d 472, 475, 886 P.2d 138 (1994) (“An enhanced sentence is not an exceptional sentence, which allows the court to sentence outside the presumptive or standard sentencing range.”); *State v. Williams*, 70 Wn. App. 567, 571-573, 853 P.2d 1388 (1993), *review denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994).

Id. at 154-55. Further, “[t]his approach is also consistent with the command of the first sentence of RCW 9.94A.533(6) that the

⁶ Again, there is no material difference with the current statute.

enhancement be *added* to the range rather than treated as a separate sentencing provision.” *Id.* at 155 (emphasis in original). “Courts have routinely interpreted this command, as in the case of other enhancements, as increasing each end of the initial base range by the length specified for the enhancement.” *Id.* (citations omitted). “A sentence range increased by an enhancement is still a standard range sentence.” *Id.* That enhancements must run consecutively to all other sentencing provisions did not affect that they must be added to the base range. *Id.* at 156. Finally, “nothing in the DOSA statute itself suggests that a special rule applies to enhancements.” *Id.*

Another reason supporting the Court’s ruling in *Gutierrez* is that the language used in the school zone enhancement is different from that used in the deadly weapon enhancements. “[W]here the legislature uses certain statutory language in one instance and different language in another, there is a difference in legislative intent.” *In re Det. of Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (citation and internal quotation marks omitted). RCW 9.94A.533(e) states in relevant part:

Notwithstanding any other provision of law, all deadly weapon 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. (Emphasis added).

The school zone enhancement does not contain a similar requirement that the enhancement be served “in total confinement.” Yet, the effect of accepting the State’s argument in this case would be to require that Mr. Mohamed serve his time in total confinement rather than one-half in total confinement and one-half in community custody. Such a result would be clearly contrary to the legislature’s intent, as expressed in the statute.

There does not appear to be any published case expressly addressing the effect of enhancements on a PSA, but the reasoning of *Gutierrez* clearly applies. RCW 9.94A.655(4) states:

If the sentencing court determines that the offender is eligible for a sentencing alternative under this section and that the sentencing alternative is appropriate and should be imposed, the court shall waive imposition of a sentence within *the standard sentence range* and impose a sentence consisting of twelve months of community custody. The court shall consider the offender’s criminal history when determining if the alternative is appropriate.

(Emphasis added.)

As the *Gutierrez* Court held, the “standard sentence range” includes school zone enhancements. Thus, a PSA can waive not only the base sentence for a drug offense, but also the portion of the standard range consisting of school zone enhancements.

Likewise, by the reasoning of *Gutierrez*, a Court can reduce the effect of multiple sentencing enhancements when it properly finds a basis

for an exceptional sentence. RCW 9.94A.535 states that “[t]he court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence . . .” Because the “standard range” includes any school zone enhancements, the base range as well as the enhancements can be reduced.

Here, the defense relied in part on the following statutory mitigating circumstance: “The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.” See RCW 9.94A.535(1)(g). In *State v. Sanchez*, 69 Wn. App. 255, 848 P.2d 208, *review denied*, 122 Wn.2d 1007, 859 P.2d 604 (1993), the Court of Appeals upheld an exceptional sentence downwards under that provision where the police used an informant to make multiple controlled buys to the same drug dealer. The trial court’s observations in that case apply with equal force here:

[W]e could put this score off the top of the chart any time we want to because, obviously, once he has a predisposition to deliver, you send the same purchaser back there, it’s just a question of when do you want to stop.

Id. at 257 (alteration in *Sanchez*). As in this case, each delivery involved a small amount of cocaine. The purchases in *Sanchez* ranged from \$110 to \$150, which is very similar to the purchases in this case. (In fact, the

Sanchez purchases were likely larger since they were made with 1989 dollars. *See Sanchez*, 69 Wn. App. at 256-57.)⁷

The Court found that

the difference between the first buy, viewed alone, and all three buys, viewed cumulatively, was trivial or trifling. All three buys were initiated and controlled by the police. All three involved the same buyer, the same seller, and no one else. All three occurred inside a residence within a 9-day span of time. All three involved small amounts of drugs. The second and third buys had no apparent purpose other than to increase *Sanchez*'s presumptive sentence.

Id.

Here, several of the same factors are involved. All the buys were initiated and controlled by the police; all involved the same buyer and seller, and all involved small amounts of drugs. Some of the factors here are a bit different. In particular, the drug purchases took place over a longer period of time, and the police maintained that there was a legitimate reason to make several purchases. But the *Sanchez* Court did not suggest that an exceptional sentence would be appropriate *only* on the exact fact pattern before it. The overriding concern in *Sanchez* is whether the increased standard range due to multiple offenses led to a sentence that

⁷ As Detective DeJesus testified, “[f]or what we were paying 150 for, that was kind of a small amount we were getting.” RP 157.

was clearly excessive in light of RCW 9.94A.010. That provision reads as follows:

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:

- (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 himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

Here, Detective DeJesus maintained that multiple purchases were necessary because he hoped to prove that Mr. Mohamed was trafficking in illegal weapons. He conceded, though, that he never found evidence of that. That the defendant was *mistakenly* suspected of committing more serious crimes should not affect his punishment. Such a practice is inconsistent with *any* of the seven factors set out above. Likewise, that the

drug buys were made over a relatively long period of time should not affect the result. DeJesus stated that the delays were largely due to his work on more pressing cases. But these delays did not justify a harsher sentence under the .010 factors. Further, as noted above in section C(1), Mr. Mohamed had several other reasons for a reduced sentence that were not present in *Sanchez*: his complete lack of prior criminal history, his good work in the community in the two years between the last offense and the sentencing, his strong community support, and the hardship to his family from losing his help with child care and income.

3. Mr. Mohamed is Entitled to a Remand for Resentencing

To obtain a remand for resentencing, Mr. Mohamed need only show a “possibility” that the Court might have imposed a lesser sentence under a correct understanding of the available options. *In re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677, 683 (2007). “In our view, this is sufficient to conclude that a different sentence might have been imposed had the trial court applied the law correctly.” *Id.* Notably, *Mulholland* was decided on collateral review. To receive relief, he was required to show that “the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” *Id.* at 332 (citation and internal quotation marks omitted). There is no such burden in a direct appeal. Further, in *Mulholland* the defendant did not even request a

reduced sentence in the trial court. *Id.* at 326. The trial court indicated some sympathy towards the defendant but never stated that it would have imposed a lesser sentence if it had the authority.⁸

In *State v. Miller*, 181 Wn. App. 201, 324 P.3d 791 (2014), the defendant had an even weaker argument for remand. Not only did he fail to request an exceptional sentence to run his serious violent offenses concurrently, but the trial court did not even impose the lowest sentence possible within the standard range. *Id.* at 216. Nevertheless, the Court of Appeals could not rule out the possibility that the trial court would impose a concurrent sentence on remand. *Id.* at 218.

Here, the argument for remand is much stronger. The defendant did ask for alternative sentencing, and the Court clearly stated its belief that it had no authority to grant a reduction of the school zone enhancements. The Court was aware that it could grant a PSA or a DOSA *as to the underlying drug sentence*, but the prosecutor persuasively argued that those options would be no favor to Mr. Mohamed if the 72 months of enhancements stood. After making some remarks showing sympathy to Mr. Mohamed's position, the Court imposed the lowest standard range

⁸ In *Mulholland*, the trial court erroneously believed it could not run multiple serious violent offenses concurrently even if grounds existed for an exceptional sentence.

sentence possible. Thus, there is much more than a “possibility” in this case that the trial court will impose a lesser sentence on remand.⁹

IV. CONCLUSION

For the forgoing reasons, this Court should reverse the convictions and remand for a new trial. In the alternative, it should remand for a new sentencing hearing, at which the trial court will consider alternative sentences.

DATED this 21st day of November, 2014.

Respectfully submitted,



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⁹ At the sentencing hearing, defense counsel frankly admitted that he did not research whether a DOSA or PSA could be used to reduce the enhancements. There is no need to raise an ineffectiveness claim, however, in view of the case law holding that remand is required even when the defense made no request at all for a sentence below the standard range.

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

King County Prosecutor's Office
Appellate Unit
516 Third Avenue, W554
Seattle, WA 98104

Mr. Ali Mohamed #376270
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Date 11/21/2014

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01:11:11 03/03/2014
11/21/2014 11:11:11
11/21/2014 11:11:11

RCW 9.94A.655

Parenting sentencing alternative.

(1) An offender is eligible for the parenting sentencing alternative if:

(a) The high end of the standard sentence range for the current offense is greater than one year;

(b) The offender has no prior or current conviction for a felony that is a sex offense or a violent offense;

(c) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(d) The offender signs any release of information waivers required to allow information regarding current or prior child welfare cases to be shared with the department and the court; and

(e) The offender has physical custody of his or her minor child or is a legal guardian or custodian with physical custody of a child under the age of eighteen at the time of the current offense.

(2) To assist the court in making its determination, the court may order the department to complete either a risk assessment report or a chemical dependency screening report as provided in RCW 9.94A.500, or both reports prior to sentencing.

(3) If the court is considering this alternative, the court shall request that the department contact the children's administration of the Washington state department of social and health services to determine if the agency has an open child welfare case or prior substantiated referral of abuse or neglect involving the offender or if the agency is aware of any substantiated case of abuse or neglect with a tribal child welfare agency involving the offender.

(a) If the offender has an open child welfare case, the department will provide the release of information waiver and request that the children's administration or the tribal child welfare agency provide a report to the court. The children's administration shall provide a report within seven business days of the request that includes, at the minimum, the following:

(i) Legal status of the child welfare case;

(ii) Length of time the children's administration has been involved with the offender;

(iii) Legal status of the case and permanent plan;

(iv) Any special needs of the child;

(v) Whether or not the offender has been cooperative with services ordered by a juvenile court under a child welfare case; and

(vi) If the offender has been convicted of a crime against a child.

(b) If a report is required from a tribal child welfare agency, the department shall attempt to obtain information that is similar to what is required for the report provided by the children's administration in a timely manner.

(c) If the offender does not have an open child welfare case with the children's administration or with a tribal child welfare agency but has prior involvement, the department will obtain information from the children's administration on the number and type of past substantiated referrals of abuse or neglect and report that information to the court. If the children's administration has never had any substantiated referrals or an open case with the offender, the department will inform the court.

(4) If the sentencing court determines that the offender is eligible for a sentencing alternative under this section and that the sentencing alternative is appropriate and should be imposed, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of twelve months of community custody. The court shall consider the offender's criminal history when determining if the alternative is appropriate.

(5) When a court imposes a sentence of community custody under this section:

(a) The court may impose conditions as provided in RCW 9.94A.703 and may impose other affirmative conditions as the court considers appropriate.

(b) The department may impose conditions as authorized in RCW 9.94A.704 that may include, but are not limited to:

(i) Parenting classes;

(ii) Chemical dependency treatment;

(iii) Mental health treatment;

(iv) Vocational training;

(v) Offender change programs;

(vi) Life skills classes.

(c) The department shall report to the court if the offender commits any violations of his or her sentence conditions.

(6) The department shall provide the court with quarterly progress reports regarding the offender's progress in required programming, treatment, and other supervision conditions.

When an offender has an open child welfare case, the department will seek to coordinate services with the children's administration.

(7)(a) The court may bring any offender sentenced under this section back into court at any time during the period of community custody on its own initiative to evaluate the offender's progress in treatment, or to determine if any violations of the conditions of the sentence have occurred.

(b) If the offender is brought back to court, the court may modify the conditions of community custody or impose sanctions under (c) of this subsection.

(c) The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody, if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

(d) An offender ordered to serve a term of total confinement under (c) of this subsection shall receive credit for any time previously served in confinement under this section.

[2010 c 224 § 2.]

RCW 9.94A.660

Drug offender sentencing alternative — Prison-based or residential alternative.

(1) An offender is eligible for the special drug offender sentencing alternative if:

(a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533 (3) or (4);

(b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW 46.61.502(6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6);

(c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;

(d) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance;

(e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(f) The end of the standard sentence range for the current offense is greater than one year; and

(g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

(2) A motion for a special drug offender sentencing alternative may be made by the court, the offender, or the state.

(3) If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.

(4) To assist the court in making its determination, the court may order the department to

complete either or both a risk assessment report and a chemical dependency screening report as provided in RCW 9.94A.500.

(5)(a) If the court is considering imposing a sentence under the residential chemical dependency treatment-based alternative, the court may order an examination of the offender by the department. The examination shall, at a minimum, address the following issues:

(i) Whether the offender suffers from drug addiction;

(ii) Whether the addiction is such that there is a probability that criminal behavior will occur in the future;

(iii) Whether effective treatment for the offender's addiction is available from a provider that has been licensed or certified by the division of alcohol and substance abuse of the department of social and health services; and

(iv) Whether the offender and the community will benefit from the use of the alternative.

(b) The examination report must contain:

(i) A proposed monitoring plan, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others; and

(ii) Recommended crime-related prohibitions and affirmative conditions.

(6) When a court imposes a sentence of community custody under this section:

(a) The court may impose conditions as provided in RCW 9.94A.703 and may impose other affirmative conditions as the court considers appropriate. In addition, an offender may be required to pay thirty dollars per month while on community custody to offset the cost of monitoring for alcohol or controlled substances.

(b) The department may impose conditions and sanctions as authorized in RCW 9.94A.704 and 9.94A.737.

(7)(a) The court may bring any offender sentenced under this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence have occurred.

(b) If the offender is brought back to court, the court may modify the conditions of the community custody or impose sanctions under (c) of this subsection.

(c) The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

(d) An offender ordered to serve a term of total confinement under (c) of this subsection

shall receive credit for any time previously served under this section.

(8) In serving a term of community custody imposed upon failure to complete, or administrative termination from, the special drug offender sentencing alternative program, the offender shall receive no credit for time served in community custody prior to termination of the offender's participation in the program.

(9) An offender sentenced under this section shall be subject to all rules relating to earned release time with respect to any period served in total confinement.

(10) Costs of examinations and preparing treatment plans under a special drug offender sentencing alternative may be paid, at the option of the county, from funds provided to the county from the criminal justice treatment account under RCW 70.96A.350.

[2009 c 389 § 3; (2009 c 389 § 2 expired August 1, 2009); 2008 c 231 § 30; 2006 c 339 § 302; 2006 c 73 § 10; 2005 c 460 § 1. Prior: 2002 c 290 § 20; 2002 c 175 § 10; 2001 c 10 § 4; 2000 c 28 § 19.]