

FILED
Dec 30, 2015
Court of Appeals
Division I
State of Washington

NO. 73131-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARCQUES CRAWFORD,

Appellant.

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

The Honorable Andrea Darvas, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated the real facts doctrine by relying on criminal allegations for which the appellant was not convicted to impose sentence for the crimes of conviction.

Issue Pertaining to Assignment of Error

Is resentencing required where the trial court relied on appellant's alleged conduct associated with an unproven charged offense to set sentences terms for the crimes of conviction?

B. STATEMENT OF THE CASE

1. Procedural Facts

On December 6, 2013, the King County Prosecutor charged appellant Marcques Crawford with promoting commercial sexual abuse of a minor (hereafter "promoting") and third degree child rape (hereafter "rape"). CP 1-9. The prosecution alleged that on December 3, 2013, then 30-year old Crawford (d.o.b. 2/7/83) engaged in sexual intercourse with then 15-year old N.J. (d.o.b.3/16/98), and that he also knowingly promoted and profited from her engaging in prostitution. Id.

On August 21, 2014, the information was amended to add one count of delivery of methamphetamine to a minor (hereafter "delivery") and expand the charging period for all offenses to July 1, 2013 through

December 3, 2013. CP 62-63. Another amended information was filed December 1, 2014, to correct minor errors. CP 119-120.

A trial was held August 21, 2014 through December 18, 2014, before the Honorable Andrea Darvas. 1RP¹-20RP.² A jury found Crawford guilty of the rape and delivery, but could not reach a unanimous verdict on the promoting charge and it was dismissed prior to sentencing. CP 156-58, 207; 22RP 11-14.

Sentencing occurred on January 30, 2015. 22RP. The court imposed 18 months for the delivery and 61 months for the rape. CP 208-221; 22RP 22-23. Crawford appeals. CP 229-246.

2. Substantive Facts

a. Evidence at Trial

On December 3, 2013, several law enforcement officers responded to apartment C-110 at the La Mirage apartment in Kent. An anonymous 911 caller claimed a man named "Chris Crawford" was there "prostituting

¹ There are 22 volumes of verbatim report of proceedings referenced as follows: **1RP** - 8/21/14; **2RP** - 8/26/14; **3RP** - 8/27/14; **4RP** - 9/2/14; **5RP** - 9/3/14; **6RP** - 9/4/14; **7RP** - 11/19/14; **8RP** - 11/20/14; **9RP** - 11/24/14; **10RP** - 12/1/14; **11RP** - 12/2/14; **12RP** - 12/3/14; **13RP** - 12/4/14; **14RP** - 12/9/14; **15RP** - 12/10/14; **16RP** - 12/11/14; **17RP** - 12/15/14; **18RP** - 12/16/14; **19RP** - 12/17/14; **20RP** - 12/18/14; **21RP** - 1/16/15; **22RP** - 1/30/15.

² The trial was not actually two and a half months long. Scheduling conflicts resulted in an 11-week recess between September 4, 2014 and November 19, 2014.

kids and possibly had a gun with him." 10RP 25-27, 44; 11RP 3. The apartment belonged to appellant Marcques Crawford. 14RP 23.

When police arrived, Crawford refused them entry, explaining there was no "Chris Crawford" at the apartment. 10RP 30. When police insisted that they were not leaving until they could confirm there was no one inside in need of help, however, Crawford let them in. 10RP 31.

No guns were found. 10RP 37; 11RP 9. And the only other non-law enforcement person at the apartment besides Crawford at the time was complaining witness N.J., who was allowed to leave after she claimed she was not a minor and did not appear to officers to be in any danger. 10RP 33; 11RP 7. When Sergeant Joe Gagner, the ranking officer at the scene, learned of this, however, he had other officers relocate her so he could interview her. 14RP 27-28. Although N.J. was initially uncooperative, Gagner eventually established who she was and that there was a warrant for her arrest, which he chose to execute and have her taken to the police station for further interviewing. 14RP 28-29.

According to N.J., she ran away from home in June 2013 to live with her adult friend, CeCe. 15RP 69-70, 73. N.J. recalled partying with CeCe and other friends that summer, drinking, smoking methamphetamine and marijuana and taking other drugs. 15RP 70-71. N.J. noted CeCe had

a three-year old child at the time who N.J. would babysit when CeCe prostituted herself. 15RP 72-73.

N.J. testified she met Crawford in July 2013 on an online dating site called "Tagged." 15RP 71. N.J. admitted lying on her Tagged profile by claiming she was 18 years old. 15RP 75. She acknowledged Crawford's profile correctly indicated his age. 15RP 77. N.J. also admitted consistently telling Crawford she was 18 years old, at least initially, and that he told her that if she was not at least 18 years old she needed to let him know. 15RP 77, 88-89.

In August 2013, N.J. met up with Crawford and a friend of his at CeCe's place in Seattle, where they drank and smoked methamphetamine. Crawford invited N.J. to stay the night with him, an invitation she accepted. 15RP 82, 84. N.J. denied they had sex that night, however, claiming instead they stayed up smoking methamphetamine and talking all night. 15RP 90.

N.J. recalled Crawford questioning her age that night, stating he "didn't feel like [she] was 18." 15RP 88. Crawford persisted despite her repeated claims she was 18, asking her at one point, "What year were you born?" 15RP 89-90. When it took N.J. a while to respond that it was in "95", Crawford allegedly replied, "That's how I know you're not 18." 15RP 90.

According to N.J., she and Crawford had sex for the first time a couple of days later at his apartment. 15RP 91-92. N.J. also recalled Crawford procuring methamphetamine for them to smoke that night. 15RP 92. N.J. claimed they remained sexually active together thereafter until December 2013. 15RP 95, 97, 99. According to N.J., they also routinely smoked methamphetamine when they got together. 15RP 99. N.J. insisted it was always Crawford who supplied the drug, not her. 15RP 107.

N.J. recalled the first dispute she and Crawford had was in August 2013, after she called him while she was being held in juvenile detention. According to N.J., Crawford told her, "Don't call me from the juvenile phone." 15RP 97.

After being released from juvenile detention, N.J. moved back in with her mother. 15RP 97-98. N.J. claimed Crawford would often pick her up in the early morning hours at her mother's home, and they would hang out, have sex and smoke methamphetamine before she went to high school, which began in the end of August. 15RP 98-99, 102-03, 106. N.J. recalled Crawford praising her for staying in school, and would pick her up after school on occasion. 15RP 103.

N.J. claimed Crawford once saw her school ID, and it was then she allegedly told him she was actually only 15 years old. 15RP 108-09.

Crawford allegedly asked N.J. why she had not been honest from the beginning, told her he still liked her, and explained that they would not be hanging out together as much. 15RP 109. N.J. claimed, however, that they remained just as involved after she told him her true age as they were before. 15RP 109-110.

In early to mid October, N.J. again ran away from home and eventually moved in with Crawford on October 13, 2013, and remained there until December 3, 2013, the day she reported Crawford to 911. 15RP 112. N.J. recalled Crawford picking her up from school on October 13th and complaining to her that her refusal to prostitute herself was a problem. 15RP 113-14. Crawford allegedly told her, "tonight was the night we were going to go out and that's when I was going to go prostituting." 15RP 115. When N.J. tried to refuse, Crawford allegedly told her she would do as he said. Id.

Although N.J. testified Crawford ultimately did not force her into prostitution on October 13th, she claimed he pressured her over the next several days until she gave in and agreed. 15RP 116-129; 16RP 2-11. N.J. estimated that thereafter she earned Crawford approximately \$3,500 prostituting herself. 16RP 38.

N.J. recalled that on December 3, 2013, she and Crawford went grocery shopping together, and Crawford was telling N.J. how she needed

to get away from him because she was bringing out the worst in him and that he feared he might end up really hurting her. 16RP 43. N.J. claimed this made her fearful. 16RP 44.

N.J. also recalled seeing and talking to one of her aunts who was also at the store. Id. When N.J. told Crawford that one of her aunts claimed to know him, Crawford allegedly replied that her aunt "was a little slut that he knew in the day." This comment "pissed off" N.J. 16RP 45.

When they got back to Crawford's apartment from the grocery store, Crawford told N.J. to bring in all the groceries without his help. 16RP 46. N.J. used this as an opportunity to report Crawford to law enforcement by calling 911. 16RP 46-47. When law enforcement showed up at the apartment shortly thereafter, N.J. pretended she had no idea why they had come. 16RP 49.

b. Sentencing

Sentencing was held January 30, 2015. 22RP. By agreement, the promoting charge was dismissed. 22RP 13-14. The prosecutor then recommended high-end standard range sentences of 20 months for the rape and 68 months for the delivery. 22RP 15. The prosecutor argued high-end sentences were appropriate in light of how close the jury was in convicting on the promoting charge (allegedly 9-3 in favor of guilt), how "conservatively charged" the incident was (they could have charged

multiple counts of each) and that it would be appropriate punishment "considering the overarching behavior of the defendant." 22RP 15-16. Defense counsel objected to the court's consideration of the hung jury verdict or any facts not specific to the crimes of conviction in entering sentence. 22RP 15, 17-18

In response, the court asked whether it was appropriate to consider the 9-3 vote to convict on promoting, noting, "Certainly the jury didn't acquit -[,]" but also noting it had no personal knowledge of how the jury voted on that charge. 22RP 15. The prosecutor replied by noting the rules of evidence do not apply at sentencing and the court should be willing to accept the representations of counsel on such matters. Id.

When defense counsel urged the court to limit its sentencing consideration to the facts associated with the crimes of conviction, the court noted it had heard evidence on the promoting charge as well. 22RP 17. Defense counsel argued further that by pleading "not guilty" to the charge and the subsequent dismissal of the charge made it inappropriate to consider any of the associated facts for that charge in sentencing Crawford, citing to the "real facts doctrine." Id. The court then noted, "But this is not a plea, this is a trial where I listened to all the evidence just as the jury did." Id.

Ultimately, defense counsel and Crawford both asked the court to impose low-end standard ranges sentence in light of Crawford's limited criminal history. CP 204-06; 22RP 19-21.

The court rejected the recommendations of the parties and instead imposed 18 months for the rape and 61 months for the delivery. CP 211; 22RP 22-23. In imposing these sentences the court explained to Crawford:

The crimes you were convicted of are really serious, though, and it's really important - I realize you disagree with a lot of the facts and it's your right to do that, but the actions that you took, even if I only considered the crimes that you were convicted of, really had a profound effect on [N.J.'s] life. And that's true even if she was already addicted to meth when she met you, that was true even if she was involved in various sexual activities before she met you. The law makes these things a crime because even though we recognize that young people sometimes get themselves in way over their heads and in an awful lot of trouble and in really dangerous, scary situations, we still do everything that we can in the law to try to protect them. And there isn't really anything the Court can do that's going to make all this right, but I think it's really important that you acknowledge, if only to yourself, that you played a significant role in harming this young woman. And you don't have to admit it to yourself, I can't make you do that, but going forward, you're going to get out - I got to sentence you to something, you're going to get out - and then you've got choices to make as to what road to walk after that, and what kind of relationship you're going to have with other people, including women in your life, going forward.

22RP 21-22.

C. ARGUMENT

THE TRIAL COURT VIOLATED THE REAL FACTS DOCTRINE BY RELYING ON UNPROVED ALLEGATIONS OF PROMOTING TO IMPOSE SENTENCES FOR THE RAPE AND DELIVERY.

The trial court relied on the unproved promoting allegation to set the terms of sentence for the rape and delivery. This violated the real facts doctrine and remand for resentencing is therefore necessary.

A court's sentencing authority is limited; it may impose only those sentences authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). The real facts doctrine is codified under RCW 9.94A.530(2), which provides:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537.³¹ Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all

³ RCW 9.94A.537 sets forth the proceeding for proving aggravating factors for purposes of an aggravated exceptional sentence, and therefore is inapplicable here.

relevant evidence regarding criminal history, including criminal history not previously presented.

The real facts doctrine reflects the principle that a sentence should be based only on "the actual crime of which the defendant has been convicted, his or her criminal history, and the circumstances surrounding the crime." State v. Houf, 120 Wn.2d 327, 333, 841 P.2d 42 (1992). "Defendants will be held accountable for what they have been convicted of, but not for crimes that the prosecution either could not or chose not to prove." State v. Tierney, 74 Wn. App. 346, 350, 872 P.2d 1145 (1994) (quoting State v. McAlpin, 108 Wn.2d 458, 466, 740 P.2d 824 (1987)); accord State v. Benefiel, 147 Wn.2d 1014, 61 P.3d 1093, 1093 (2002)(The "doctrine prohibits a court from relying on facts that constitute the elements of a more serious crime that the State did not charge or prove."). When a court violates this doctrine at sentencing, "the action of the court is void." State v. Phelps, 113 Wn. App. 347, 355, 57 P.3d 624, 628 (2002) (quoting State v. Theroff, 33 Wn. App. 741, 744, 657 P.2d 800 (1983)).

The decision in State v. Morreira, 107 Wn. App. 450, 27 P.3d 639, 642 (2001), is instructive. Morreira was charged with first degree assault for allegedly using his car to run over another person, but entered an Alford plea to second degree assault with a deadly weapon. 107 Wn. App.

at 453-54. Despite a standard range of only 15-20 months, the trial court imposed a 100-month aggravated exceptional sentence based on a finding of deliberate cruelty.⁴ Id. at 454. The sentence was reversed, however, because the court failed to hold an evidentiary hearing to litigate disputed facts and because it relied on misdemeanor charges that were ultimately dismissed. Id. On remand, the required hearing was held and the court imposed the same aggravated exception sentence, this time based on a finding Morreira's acts constituted a "'premeditated and deliberate attempt to run over and kill the victim,' and concluded that the assault was 'more egregious than that typically seen in an assault with a deadly weapon case.'" Id. at 455.

The sentence was once again reversed on appeal, this time because the trial court's findings in support of the aggravated exceptional sentence included a finding equivalent to "an intent to inflict great bodily harm," which is a required element for first degree assault, but not second degree assault, which requires no intent to cause actual harm. Id. at 459-60. By relying on factual findings inconsistent with the crime of conviction, the

⁴ The decision in Morreira predated the decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which ended the practice of fact-finding by trial courts at sentencing in all but a few areas set forth in RCW 9.95A.537.

court again violated the real facts doctrine and remand for resentencing was again required. Id. at 460.

Although the sentence imposed against Crawford falls within the standard range for his crimes of conviction, the real facts doctrine still applies. See RCW 9.94A.530(2)("In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, . . .") (Emphasis added)). And just as in Morreira, the record here in several ways shows the trial court erroneously relied on factual allegations relevant to the unproved charge of promoting to set the terms of sentence for Crawford's crimes of conviction.

For example, the prosecution's request for top of the range sentences for both convictions was based on what it characterized as, "the overarching behavior by the defendant, given the results on [the promoting charge]. It was a hung jury, 9 in favor to convict, and 3 in favor to acquit at that point." 22RP 15. And although defense counsel objected and the trial court questioned whether it could consider the prosecutor's representation of a 9-3 jury split in favor of conviction, it never ruled it could not. 22RP 15-16. To the contrary, when defense counsel reiterated the objection to "considering things outside the real facts[.]" the court

simply noted that it heard the evidence as to the promoting charge and the jury did not find Crawford "not guilty" of that charge. 22RP 17.

And when defense counsel asserted it is "inappropriate to consider those facts that are unrelated to the crimes in which he was convicted[,]" the court questioned whether there was any supporting authority for such a limitation. 2RP 17. When defense counsel replied that the "real facts doctrine requires the Court to only consider the facts relevant" to the crimes of conviction, the trial court responded, "But this is not a plea, this is a trial where I listened to all the evidence just as the jury did." Id. At the very least this implies the court was under the erroneous assumption that the real facts doctrine only applies to guilty pleas, which is clearly incorrect. See RCW 9.94A.530(2), supra.

Additionally, the court's oral pronouncement of sentence similarly indicates it took into account factual allegations relevant only to the promoting charge when it sentenced Crawford for the rape and delivery. For example, in addressing Crawford directly the trial court stated, "I realize you disagree with a lot of the facts and it's your right to do that, but the actions that you took, even if I only considered the crimes that you were convicted of, really had a profound effect on [N.J.'s] life." 22RP 21. By noting Crawford "disagree[s] with a lot of the facts and it's your right to do that," the implication is that the court believes to the contrary.

Similarly, the statement, "even if I only considered the crimes that your were convicted of," indicates the court did consider the alleged facts associated with the promoting charge. 22RP 21 (emphasis added). Otherwise, such a statement would be completely superfluous.

Likewise, the court's references to N.J. possibly being "involved in various sexual activities before she met [Crawford]" is a not so veiled reference to evidence N.J. may have prostituted herself before meeting Crawford, and thereby another indication of the court's erroneous consideration of the promoting allegations for sentencing purposes. 22RP 21.

Finally, the court refers to "choices" Crawford will need to make, including "what kind of relationship you're going to have with other people, including women in your life, going forward." 22RP 21-22. Had the court been focused solely on the crimes of conviction, this comment might instead have referenced Crawford's bad choice of having sex and doing drugs with under-aged girls, but instead it refers to his relationship with women in general. Although this comment could mean a lot of things, given the context in which it was made, the most logical interpretation is that it is a reference to his treatment of women as mere objects to profit from, which was what he was alleged to have done under the promoting charge.

The prosecution urged the court to consider the allegation or promoting, including the hung jury in favor of conviction. Defense counsel appropriately objected, arguing the real facts doctrine precludes such consideration. In light of the court's apparent misconception that the real facts doctrine only applies in the context of guilty pleas, coupled with the court's specific comments discussed above, there is little doubt that the sentence terms imposed were the product of improper consideration of factual allegation associated with an unproved crime in violation of the real facts doctrine. Therefore, as in Morreira, remand for resentencing is required.

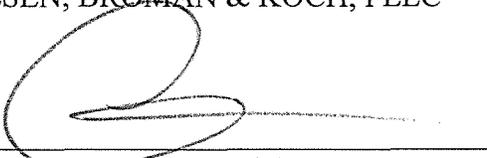
D. CONCLUSION

For the reasons stated, Crawford requests that this Court reverse his judgment and sentence and remand for resentencing.

DATED this 30th day of December, 2015.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 73131-9-I
)	
MARCQUES CRAWFORD,)	
)	
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 30TH DAY OF DECEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARCQUES CRAWFORD
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 COYTOE RIDGE CORRECTIONS CENTER
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 CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF DECEMBER 2015.

x *Patrick Mayovsky*