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December 18, 2015
Court of Appeals
Division I
State of Washington

No. 73359-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ZULAIN ANGELL,

Appellant.

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

The Honorable Joseph P. Wilson

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred as a matter of law at sentencing when it held that Ms. Angell had presented no legally cognizable basis for an exceptional sentence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Ms. Angell Zulain was charged with eluding a police vehicle, and second degree assault (assault with a deadly weapon), as a result of an unfortunate incident with a Snohomish County Sheriff's Deputy who stopped her. During the stop, the officer reached into her vehicle and unlocked her door, because he felt Angell had not rolled down her window adequately or shut off her engine in order to talk to him. CP 87-88; 1RP 35-41. Ms. Angell, frightened and yelling "help!" and "rape!", drove away while the officer was grabbing her hair, and the center pillar of the car pushed the Deputy back and away from the vehicle toward the roadway, as it departed at a high rate of speed. 1RP 35-41, 2RP 136-40.

At sentencing, the trial court desired to sentence below the standard range but erroneously concluded that duress and the totality of Ms. Angell's mitigating circumstances did not permit the court to impose the exceptional sentence it desired to give. Did the court err as a matter of law at sentencing when it held there was no

legally cognizable basis for an exceptional sentence, thus permitting Ms. Angell to appeal even though she was given a standard range sentence?

C. STATEMENT OF THE CASE

1. Facts. Two days before Christmas of 2013, Deputy Dusevoir made a decision to Terry-stop Ms. Zulain Angell late at night in the Mill Creek-Bothell area, following a dispatch report of a car driving suspiciously near mailboxes in another part of the neighborhood. CP 84-85; 1RP 25-27. The deputy later determined that Ms. Angell had nothing to do with the reported conduct. 1RP 61.

The trial testimony indicated that the deputy and Ms. Angell perceived the deputy's attempt to stop her very differently. After Deputy Dusevoir spotted Ms. Angell stopped at a red light at an intersection, he activated his lights and signals once she proceeded to drive after the light turned green. 1RP 28-29. Ms. Angell then drove approximately 100 yards and stopped in an area where the road was "long and straight." 1RP 31 (testimony of Dusevoir).¹

¹ The parties aggressively litigated whether Ms. Angell had somehow acted strangely in driving for 100 yards before stopping, with the defense pointing out that Ms. Angell felt scared and did not want to stop in a darkened or unsafe area of the roadway. 1RP 29, 113-15; 2RP 219-21. However, ultimately, the deputy admitted that Ms. Angell had simply driven for a short distance while the

However, Deputy Dusevoir became concerned after approaching Ms. Angell's driver's side window, because when the deputy told her to roll her window down more than the several inches she had, she initially refused. 1RP 31-32. Ms. Angell eventually rolled her window further down 6 to 8 inches, but she hesitated before obeying the deputy's order that she put her vehicle in "park" and/or shut it down. 1RP 31-33; 2RP 134. Deputy Dusevoir therefore reached into the car through the window, unlocked the door, and attempted to put a "hold" on Ms. Angell.² 1RP 34.

As the deputy grabbed at Ms. Angell, she was screaming "stop!", "help!", and "rape!" 2RP 139. The deputy never assured Angell that he was a police officer, and when he had first approached her vehicle, he had never simply asked her for her identification, or stated why he was stopping her. 2RP 136-39.

As Deputy Dusevoir continued attempting to grab Ms. Angell using (in his words) an "arm bar" technique and a "hair hold," she

road took an "S-curve," and then she did stop, in an area where the road was "long and straight." 1RP 29-31.

² Deputy Dusevoir testified that Ms. Angell might have tried to reach toward the middle of the car for something furtively; he later admitted that this seeming conduct was possibly wholly unintentional, and in any event occurred after the deputy opened the door and attempted to grab her. 1RP 34-35. 2RP 136-38.

was able to squirm out of his grasp. Then she put her car in drive and “took off with me kind of still in the car.” 1RP 38-39. The pillar of the car door struck the deputy’s shoulder and he went back to his vehicle, got in, and chased Ms. Angell further. 1RP 39-42. The deputy stated that Ms. Angell drove off at a high rate of speed, and that she skidded into an intersection during the subsequent “chase.” 1RP 46. (Ms. Angell testified she thought that she was about to be attacked by someone who was not really an officer. 3RP 224-27). After performing repeated “PIT” maneuvers on Angell’s car and disabling it near a shopping mall, the deputy used a taser and then pepper spray to subdue Ms. Angell. 1RP 56-60.

A number of bystanders were looking on, and they heckled during the arrest, and told police that they were upset by the treatment of the woman being arrested. 2RP 175, 181-83, 191.

2. Sentencing. After verdict, Ms. Angell executed a waiver of speedy sentencing based on the court and the parties’ desire to seek out possible sentencing alternatives. 1/14/15RP at 331-33; Supp. CP ____ (Sub # 34 (minutes of 3/11/15RP)). However, at sentencing, the trial court determined it did not have statutory authority to impose the downward departure sentence it desired to

order. 4/9/15RP at 6-7. Ms. Angell was instead given a standard range term of 6 months incarceration, and she appeals. CP 14, 41.

D. ARGUMENT

THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT NO LEGAL BASIS HAD BEEN PRESENTED TO JUSTIFY THE EXCEPTIONAL SENTENCE DOWNWARD IT DESIRED TO IMPOSE.

1. Appeal of the standard range sentence is permissible.

Under the rule of RCW 9.94A.585, when the sentence imposed on a convicted defendant is within the standard range, such as Ms. Angell's 6-month sentence, there is no right to appeal the sentence. State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719, 718 P.2d 796 (1986); see RCW 9.94A.585. Thus, if a trial court has contemplated an exceptional sentence, concluded correctly that there is no legally applicable basis for an exceptional term, or that there is no factual basis adequate to satisfy the legal requirements of the mitigating factor(s), the court has exercised its discretion, and the defendant may not appeal. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

However, appellate review may be taken where the sentencing judge has relied on a mistake in determining application or non-application of the SRA's sentencing law. See State v.

Schloredt, 97 Wn. App. 789, 801-02, 987 P.2d 647 (1999); State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); Ammons, 105 Wn.2d at 183.

2. Ms. Angell sought an exceptional sentence of one month on tenable grounds; the trial court ruled no legally available bases for a downward departure had been presented.

For her conduct, Ms. Angell was sentenced to 6 months prison. 4/9/15RP at 6-7; CP 14-24. Prior to sentencing, seeking to mitigate the harshness of the expected term, Ms. Angell's counsel had presented a motion for an exceptional sentence below the standard range, asking that the court order that Ms. Angell serve only 1 month, rather than a sentence within the 6 to 12 month standard range for the crime of assault. CP 28-32.³

Ms. Angell presented the following statutory bases for an exceptional sentence, briefly described:

- Ms. Angell committed the unfortunate crime of assault under duress, see RCW 9.94A.535(1)(c); and
- Ms. Angell was entitled to an exceptional sentence under the totality of the circumstances.

CP 29-31; 4/9/15RP at 4-5. Counsel pointed out correctly that Deputy Dusevoir was certainly not injured in the incident; see 1RP

³ The motion is attached as Appendix A.

38-39, and in particular explained that the facts showed the escalation of the incident was a result of the duress Ms. Angell felt she was under after being stopped in the particular manner by the officer, including late at night and in a frightening, secluded area. CP 30.

A downward departure would have been proper. Duress is a valid mitigating factor. Analysis of the .535 mitigating factor of duress closely tracks analysis of the duress defense established by RCW 9A.16.060. State v. Rogers, 112 Wn.2d 180, 183–84, 770 P.2d 180 (1989). This statute creates a defense when the actor "participated in the crime under compulsion by another who by threat or use of force created an apprehension [of] grievous bodily injury[.]" RCW 9A.16.060(1)(a).

Further, certainly, an exceptional sentence downward might be justified by a combination of factors that are "not in and of themselves" grounds for an exceptional sentence. See State v. Fowler, 145 Wn. 2d 400, 404-05, 38 P.3d 335 (2002). The sentence deviation that the sentencing court in this case wished to impose on Ms. Angell need only to have been premised on reasons that "distinguish the defendant's crime from others in the same category." State v. Gaines, 122 Wn.2d 502, 509, 859 P.2d 36

(1993) (citing State v. Grewe, 117 Wn.2d 211, 216, 813 P.2d 1238 (1991)).

In this case, counsel began the sentencing hearing by urging the court to keep in mind the fact that the court and the parties' shared hope from earlier, that Ms. Angell would be able to be eligible for confinement alternatives, a hope that was dashed because she went to school in Pierce County; Ms. Angell lived there with her father while attending college. 4/9/15RP at 4-5;⁴ see 1/14/15RP at 332-33 (post-verdict discussion between court and counsel; order setting out sentencing to allow screening for alternatives including Electronic Home Monitoring); CP 25-27 (State's motion noting no opposition to sentencing alternatives administered by defendant's county of Pierce, if this was allowable per King County rules).

It was also noted by defense counsel at sentencing that Ms. Angell had chosen to invoke her right to trial because she believed she was not guilty of the serious crime charged. 4/9/15RP at 5. This belief was not unreasonable considering the facts at trial, and the court later endorsed its reasonableness. The court desired to

⁴ Ms. Angell had extensive support from family and friends in the courtroom. 4/9/15RP at 4; see Supp. CP ____, Sub # 35 (minutes of April 9, 2015).

impose a downward departure, and although the court indicated it did not believe the totality of the circumstances or duress fit the facts, the court noted that it had sat through trial, and stated:

But it is clear in my mind given the totality of the circumstances as I know them that if I had the authority I would go below the standard range. I think that would be appropriate. But I don't believe that I have the authority. I think that the Sentencing Reform Act has in many ways taken discretion away from judges to deal with cases like this. They have determined, because I have cases that come in front of me of second degree assault where I have injuries which would call for the standard range. And the legislature in their infinite wisdom has determined that I don't get to look at what I personally believe should be an appropriate sentence, they ask me to look at these things, frankly, in a vacuum and try to treat all people basically the same that come in front of me unless there's a legal basis to go up or down. And it's got to be fairly significant, it's got to be supported by the evidence in order to make those decisions. I just don't see it, frankly, in this case, which is unfortunate. You have been a good citizen all the way up to this time, no criminal charges. Your behavior as determined by the jury was wrong regardless of what your belief was. That's what this is all about, though, submitting it to a jury of our peers and getting an up or down vote.

4/9/15RP at 6-7. However, counsel's presentation to the court had noted that the court was entitled, under the SRA's guidelines, to impose a downward departure based on any factor mitigating the crimes, that would be legally valid under the SRA's policies and

guidelines. 4/9/15RP at 4; CP 28-31; see State v. Akin, 77 Wn. App. 575, 584, 892 P.2d 774 (1995).

3. The trial court did possess the authority it desired to wield. The trial court could have imposed an exceptional sentence downward. First, the fact that the jury found Ms. Angell guilty did not preclude the imposition of a downward departure sentence. Following conviction, RCW 9.94A.535(1) presents a list of “illustrative,” not exclusive, factors that may militate in favor of a lesser sentence. The SRA allows “variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime.” State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993) (citing with approval, D. Boerner, Sentencing in Washington, § 9-23 (1985)). Factors favoring the mitigation of the standard range need be established only by a preponderance of the evidence. RCW 9.94A.535(1). Courts have recognized that the list of mitigating factors is not exclusive, and reasons for a sentence are proper if they relate to the crime and make it more, or less, egregious. State v. Akin, supra, 77 Wn. App. at 584.

In this case, Ms. Angell's less venal conduct could be considered as a mitigating factor among several, because her participation was "significantly out of the ordinary for the crime in question." State v. Nelson, 108 Wn.2d 491, 501, 740 P.2d 835 (1987) (accomplice context). Courts do consider the relatively lesser participation of persons in a crime, and the same principles of lenity should apply where a person may have engaged in conduct resulting in a verdict of guilt, but with far less victim impact than typical for a person committing that offense. Cf. State v. Alexander, 125 Wn.2d 717, 731 and n. 25, 888 P.2d 1169 (1995) (noting that the focus of such an inquiry is on the defendant's role as compared to other parties who participated in the same crime).

Here, to this particular judge, Ms. Angell's standard range sentence even at the low end reasonably appeared to be excessive considering the comparative circumstances of other perpetrators of second degree assault, specifically as to injuries caused. 4/9/15RP at 6-7. The court could have employed the mitigating factors to order the downward departure it desired to give. See also RCW 9.94A.535(1)(g) (an exceptional sentence can be imposed where 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 the SRA).

In addition, in general, the trial court's determination of lesser culpability of the crime as committed by this particular defendant would be reviewed and would risk reversal only if it were *clearly erroneous*. State v. Allert, 117 Wn.2d 156, 163, 815 P.2d 752 (1991); see State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991) (where substantial evidence supports the court's finding, it will not be disturbed). And the short sentence the trial court desired to impose on Zulain Angell would not be deemed too lenient. See RCW 9.94A.585(4); State v. Alexander, 125 Wn.2d at 722.

4. This Court should remand for re-sentencing. In this case, the trial court erred when it rejected the defense argument regarding viable mitigating factors. The trial court's declination to impose an exceptional sentence below the standard range requires reversal because the court relied on an untenable legal assessment of the SRA. State v. Schloredt, 97 Wn. App. at 801-02; State v. Herzog, 112 Wn.2d at 423; Ammons, 105 Wn.2d at 183; see also State v. Khantechit, 101 Wn. App. 137, 138, 5 P.3d 727 (2000); RCW 9.94A.585. The sentencing court also could be said to have abused its discretion by using the wrong legal standard, and as a

result not exercising discretion. See State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). This Court should reverse the sentence and remand the case for full legal and factual appraisal of the mitigated sentencing reasons that the trial court desired to employ in Ms. Angell's case.

E. CONCLUSION

Based on the foregoing, Zulain Angell requests that this Court reverse the trial court.

DATED this 18 day of December, 2015.

Respectfully submitted,

s/ OLIVER R. DAVIS.

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

STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	
)	NO. 73359-1-I
)	
ZULAIN ANGELL,)	
)	
Appellant-Cross-respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF DECEMBER, 2015, 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 DECEMBER, 2015.

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