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12-22-15
Court of Appeals
Division I
State of Washington

COA NO. 73721-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

AUNARAY LUCKETT,

Appellant.

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

The Honorable Thomas J. Wynne, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in failing to consider appellant's request for an exceptional sentence downward.

Issue Pertaining to Assignment of Error

Whether the court abused its discretion in failing to consider appellant's request for an exceptional sentence downward, where the court actually stated on the record it would not consider the request?

B. STATEMENT OF THE CASE

The State charged Aunaray Lockett with violation of a no-contact order, elevated to a felony due to two previous no-contact order violations. CP 59-60.

1. Trial

Jacqueline Nelson, the protected party named in the no-contact order, is Lockett's mother. Ex. 3; 2RP¹ 26, 30-31. On June 12, 2014, police responded to a residence after a neighbor reported screaming and possible shots fired. 1RP 22-23. Upon arrival, police heard screaming from inside. 1RP 24, 46, 67. Nelson opened the window, peered out, and then closed the window. 2RP 25-27. Within seconds, Lockett opened the

¹ The verbatim report of proceedings is referenced as follows: 1RP - one volumes consisting of 6/9/16, 6/10/15; 2RP - one volume consisting of 6/17/15, 6/25/15.

window, climbed onto the roof and began to sprint. 2RP 27-28. He went back inside after an officer illuminated him with a light and shouted "police." 2RP 28. Lockett resumed screaming. 2RP 32, 47. Police entered the residence, made contact with Nelson, and arrested Lockett. 2RP 33, 50. Lockett was talking incoherently. 2RP 33. An officer believed he was intoxicated or high. 2RP 33. Police determined no gunshots had been fired. 2RP 34.

Nelson did not testify at trial. The parties stipulated that Lockett had two prior convictions for violating provisions of a no-contact order. 2RP 84-85. The jury convicted and found Lockett and Nelson were members of the same family or household by special verdict. CP 32-33.

2. Sentencing

At the initial sentencing hearing, Nelson told the court that she tried to get the no-contact order lifted and that her son needs psychological help as well as drug and alcohol dependency classes. 2RP 3. Upon being questioned by the judge, she acknowledged that she invited her son over to the residence on the night in question. 2RP 3-4.

The State requested a standard range sentence. 2RP 5-6. Ms. Rancourt, Lockett's attorney, moved for an exceptional sentence downward to 12 months plus one day on the basis that (1) Nelson invited the contact and (2) Lockett's low level of mental functioning contributed

to the offense. CP 30-31; 2RP 6-8. The sentencing hearing was continued for a mental evaluation after Luckett started acting erratically in the courtroom. 2RP 8-13.

The sentencing hearing resumed the following week, by which time the evaluation was done and the parties were ready to proceed. 2RP 14. Ms. Canary, standing in for Ms. Rancourt, reiterated the request for an exceptional sentence downward on the basis that Nelson was a willing participant. 2RP 14-15. Counsel also referenced Luckett's mental health issues. 2RP 15. The court noted the evaluation indicated no competency issue and expressed his belief that Nelson's conduct at the prior hearing, which caused the courthouse to be shut down due to the security response, was prompted by drug use. 2RP 15-16.

The State maintained its position that a standard range sentence was appropriate because Luckett was on community custody at the time of the offense and it would be in the interest of community safety. 2RP 16. Luckett told the court 43 months was a long time and asked for a year and a day. 2RP 16.

The court then addressed Luckett: "I heard from your mother last week. I was considering what Ms. Rancourt was asking the Court to do when it became apparent to the Court that you had a problem." 2RP 17. The Court continued: "I don't think I can consider the request of Ms.

Rancourt at this time for an exceptional sentence downward. I'm going to provide for a standard range sentence of 43 months confinement." 2RP 17. The judgment and sentence reflects a standard range sentence of 43 months confinement. CP 16. Luckett appeals. CP 1-12.

C. ARGUMENT

THE COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER LUCKETT'S REQUEST FOR AN EXCEPTIONAL SENTENCE DOWNWARD.

Luckett challenges the procedure by which the court failed to grant an exceptional sentence downward. Remand for resentencing is required because the record does not show the court considered Luckett's request for an exceptional sentence.

"The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). A trial court may thus impose an exceptional sentence downward based on the mitigating factor that "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a). "The 'willing participant' factor is applicable where both the defendant and the victim engaged in the conduct that caused the offense to occur." State v. Hinds, 85 Wn. App. 474, 481, 936 P.2d 1135

(1997) (citing David Boerner, Sentencing in Washington, § 9.12, at 9-21 (1985)).

At sentencing, defense counsel requested an exceptional sentence downward based on the mitigating circumstance that Nelson, the victim, was a willing participant in the crime because she invited her son to come over to the residence. CP 30-31; 2RP 6-8, 14-15. In response to the court's question, Nelson acknowledged she invited Lockett over. 2RP 3-4. There was a factual basis to show Nelson was a willing participant or a provoker of the no-contact order violation under RCW 9.94A.535(1)(a). Although consent is not a defense to violation of a no-contact order, a court may consider the victim's willing participation as a basis for a sentence below the standard range. State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008), aff'd, 169 Wn.2d 571, 238 P.3d 487 (2010).

In sentencing Lockett, the court stated "I was considering what Ms. Rancourt was asking the Court to do when it became apparent to the Court that you had a problem," but then said "I don't think I can consider the request of Ms. Rancourt at this time for an exceptional sentence downward. I'm going to provide for a standard range sentence of 43 months confinement." 2RP 17. The court did not consider on the record whether there was a basis to impose a sentence outside the standard range, nor did it decide such a basis was either factually or legally insupportable.

A defendant generally cannot appeal a standard range sentence. RCW 9.94A.585(1); State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). But a defendant "may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements." State v. Osman, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006).

"While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). "The failure to consider an exceptional sentence is reversible error." Grayson, 154 Wn.2d at 342.

Here, the court actually stated "I don't think I can consider the request of Ms. Rancourt at this time for an exceptional sentence downward." 2RP 17. That was reversible error under Grayson. A trial court abuses its discretion when it fails to meaningfully consider a possible mitigating circumstance. State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359, 366-67 (2015).

A trial court also abuses its discretion when it gives no reason for its discretionary decision. State v. Hampton, 107 Wn.2d 403, 409, 728 P.2d

1049 (1986). The trial court here did not articulate why it would not consider Lockett's request for an exceptional sentence downward.

In contrast, where a trial court considers the facts of the case and concludes that there is no factual or legal basis to impose an exceptional downward sentence, it has exercised discretion and the trial court's ruling is not appealable. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002); see State v. Hender, 180 Wn. App. 895, 902, 324 P.3d 780 (2014) ("Contrary to the trial court in Grayson, our trial court exercised its discretion and stated reasons on the record for denying a DOSA sentence.").

In other words, there is nothing to appeal if the trial court considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually or legally insupportable and then imposed a standard range sentence. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998). Appellate courts have thus upheld a trial court's denial of an exceptional sentence downward where the record shows the trial court expressly considered the request and found no factual or legal basis to impose it. Garcia-Martinez, 88 Wn. App. at 325, 330-31; State v. Khantechit, 101 Wn. App. 137, 139-41, 5 P.3d 727 (2000).

The record in Lockett's case does not show the court actually considered whether there was a basis to impose a sentence outside the standard range. The court did not decide the willing participant mitigator was either factually or legally insupportable. Instead, the court declared it would not consider the request at all.

Lockett requests remand for resentencing so that the trial court may meaningfully consider his request for an exceptional downward sentence, determine on the record whether the request is factually and legally supportable, and then exercise its discretion in imposing an appropriate sentence.

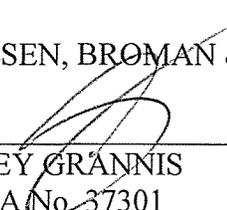
D. CONCLUSION

For the reasons set forth, Lockett request remand for resentencing.

DATED this 22nd 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. 73721-0-1
)	
AUNARAY LUCKETT,)	
)	
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 22ND 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] AUNARAY LUCKETT
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SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF DECEMBER, 2015.

X *Patrick Mayovsky*