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Court of Appeals
Division I
State of Washington

NO. 73721-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

AUNARAY M. LUCKETT,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

Did the trial court categorically refuse to exercise its discretion when under the facts and circumstances of this case, it declined to impose an exceptional lower sentence?

II. STATEMENT OF THE CASE

The defendant, Aunaray Lockett, was charged with violation of court order (domestic violence) with the aggravating factor that he was on community custody at the time he committed this offense; the offense was elevated to a felony based on the defendant having had at least two prior convictions for violating the provisions of a no contact order. 1 CP 59. After a one day trial, the jury found the defendant guilty as charged. The defendant's offender score was determined to be "5." The standard range was 33-43 months confinement. 1 CP 15. The court sentenced the defendant to 43 months confinement. 1 CP 16; 2RP 17¹.

Prior to trial, the defendant stipulated that he was on community custody at the time of this incident. He also stipulated to having two convictions for violation of protective orders prior to

¹ For clarity, the trial verbatim report of proceedings, one volume consisting of 6/19/15 and 6/20/15 will be referred to as 1RP and the sentencing verbatim report of proceedings, one volume consisting of 6/17/15 and 6/25/15 will be referred to as 2RP.

the date of this incident. 1 CP 43, 51-52; 1RP 6-7.

Three Everett Police officers testified at trial. The officers testified that on June 12, 2014 at about 1:36 a.m., they responded to a possible shots fired call at 1127 – 74th St. S.E., the Everett residence associated with the defendant and his mother, Ms. Nelson. Each officer testified to having been at the residence multiple times in the past. The officers said that they were very familiar with the defendant and Ms. Nelson and were able to identify them by sight. 1RP 26-27, 29, 31-32, 45-46, 63-65, 77.

When the officers arrived they heard screaming coming from the residence. Two of them saw Ms. Nelson look out a window. The defendant then climbed out the same window and began running along the roof. The officers illuminated him with their flashlights and one told him to jump the few feet down to the ground. Instead, the defendant re-entered the house through the window. Multiple officers responded and executed a dynamic entry into the house with guns drawn to remove the defendant. Ms. Nelson was located in a room on the second story of the house. The defendant was taken into custody. He was rambling incoherently. The officers testified they thought he might be drunk or on drugs. 1RP 22-28; 31, 33, 38, 46-51, 65, 67-76, 79, 81.

Ms. Nelson was the protected party in a domestic violence no contact order issued out of Everett Municipal Court. The protective order prohibited the defendant from contact with Ms. Nelson or coming within 150 feet of her residence, 1127 – 74th St. S.E., Everett. The order was issued and signed by the defendant, the prosecuting attorney, and the judge on April 11, 2012. The order had an expiration date in 2017. 1RP 29-33.

The jury convicted the defendant of violation of a court order-DV and answered the special verdict form yes, the defendant and Ms. Nelson were members of the same family or household. 2 CP ___ & ___ (sub 44 Verdict Form A; sub 45 Special Verdict Form A1); 1RP 107.

In its sentencing memorandum the State provided a copy of the defendant's criminal convictions in the appendix A. It showed a history of domestic violence offenses beginning with a conviction for second degree assault in 2007. The State requested the court impose the high end of the range of 43 months based on the defendant's 6 prior domestic violence related convictions and the defendant's blatant disregard for the law. 2 CP ___ (sub 48 State's Sentencing Memorandum); 2RP 5-6, 16.

In his sentencing memorandum, the defendant requested the court consider imposing an exceptional sentence downward of one year and a day. The defendant argued two bases for the court to deviate from a standard range sentence; the invited nature of the contact and an unsupported assertion that the defendant had a lower than average intelligence. CP 30-31; 2RP 6-8.

At the initial sentencing hearing on June 17, 2015, Ms. Nelson was present. The court specifically asked her if she had invited the defendant to her residence. She answered, "He is my only child, my only son. I have no other children." The trial court then asked, "So that's true?" Ms. Nelson responded, "Yeah. I mean, I love him dearly, you know what I mean? I have my own issues, too, you know what I mean?" Ms. Nelson's responses were equivocal, emphasizing that she loved the defendant very much and only wanted what was best for him. 2RP 3-4.

During this hearing, the defendant began acting out. In the middle of the hearing, the defendant began to walk away. The court ordered him to come back. The defendant complied, but then began rambling incoherently. The court stated there was a question as to the defendant's mental status that day and that he was behaving erratically. The court ordered the defendant be taken

into custody and ordered an initial evaluation as to his mental status be performed at the jail before they proceeded with sentencing. The sentencing was set over to June 25, 2015, for the court to receive that initial report. It took half a dozen marshals and security personnel to take the defendant into custody. The defendant's behavior prompted a closure of the entire courthouse. 2RP 8-11, 15-16.

On June 25, 2015, the sentencing judge stated that at the time he ordered the evaluation, he believed the defendant was high on drugs, but because of possible mental health issues in the past, he wanted the mental health evaluation by a qualified professional before proceeding to sentencing. The evaluation took place and the report indicated the defendant had no signs of mental health issues or competency issues. The report did indicate the defendant agreed he needed drug and/or alcohol treatment. The sentencing judge stated that he still believed the defendant's behavior was prompted by drug use. 1 CP 24-28; 2RP 15-16.

The defendant apologized for his behavior at the prior sentencing hearing. He stated he loved his mom a lot. He also commented that the high end of the range was a really long time.

He said he would be happy with a year and a day. He did not apologize for the conduct that led to his conviction. 2RP 16-17.

The trial court sentenced the defendant to the high end of the range. 1 CP 16; 2RP 17.

III. ARGUMENT

1. There Is No Evidence The Court Categorically Refused To Impose An Exceptional Sentence Below The Standard Range.

A trial court abuses discretion when it refuses categorically to impose an exceptional sentence below the standard range under any circumstances. The failure to consider an exceptional sentence is reversible error. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183, 1188 (2005).

The defendant's argument relies on cases that contend that a trial court abuses its discretion by categorically denying a request for an exceptional sentence. However, the defendant's assertion that the trial court did this is not supported by the record. There is nothing in the record suggesting that the trial court refused to consider the defendant's request for exceptional sentences due to a defendant exercising the constitutional right to a jury trial, or the nature of the offense or any other categorical reason.

To the contrary, the record shows that in this case, the trial court did consider the defendant's request for an exceptional

sentence downward. The trial court indicated that it had reviewed the defendant's motion for an exceptional sentence. The defendant asserted as one basis for an exceptional lower sentence that the contact had been invited and made unsupported assertions to that effect in its sentencing brief. The trial court was obviously considering that basis when it questioned the protected party, Ms. Nelson, at the first sentencing hearing. However, Ms. Nelson's equivocal responses would not be sufficient to support that claim. The defendant, as the moving party, had the burden of proving the facts sufficient to support his basis for an exceptional sentence. He failed to do so here.

The defendant also asserted a lower than normal intelligence. Again, although the defendant's attorney alluded to a WSH report potentially from 2011 or early 2012, no report or any other documentation or testimony was provided by the defendant to support this basis. The court requested a mental health evaluation and delayed the sentencing at least in part for the purpose of obtaining a preliminary report. Again, the record indicates this report showed the assertion was not supported.

After pursuing both bases put forth by the defendant, the court exercised its discretion and sentenced the defendant to the

high end of the standard range. In issuing its decision, the trial court said it was considering the request but now did not feel it could consider it. 2RP 17. The intervening event was the completion of the defendant's mental health evaluation. The court clearly considered both bases put forth by the defendant for an exceptional sentence downward and was now exercising its discretion to deny that request. This was not an abuse of discretion as the defendant had not provided sufficient proof to support a factual basis for the court to deviate from a standard range sentence. Furthermore, the court's sentence shows the court exercised its discretion and based on the facts and circumstances of this case, it found that this was not a case to lenity but one that warranted imposition of the high end of the standard range. Had the court been persuaded that lenity was appropriate in this case, it would have imposed the low end of the range.

The defendant asserts that the court must give reason for not imposing an exceptional sentence, citing to State v. Hampton, 107 Wn.2d 403, 728 P.2d 1049 (1986). Hampton involved an appeal from an order forfeiting a bail bond after the bonding company successfully returned the defendant for sentencing. Id. at 405. While, in this case, the court's rationale could have been

more clearly expressed, it was not required to spell out a detailed justification for its determination. State v. Hays, 55 Wn. App. 13, 15, 776 P.2d 718 (1989). Like the SSOSA sentence considered in Hays, there is no requirement that the trial court actually impose a mitigated exceptional sentence. State v. Bunker, 144 Wn. App. 407, 422, 183 P.3d 1086, 1093 (2008) aff'd, 169 Wn.2d 571, 238 P.3d 487 (2010). A standard range sentence is the presumed sentence. The trial court is required to set forth the reasons for its decision is when the court departs from the sentencing guidelines. RCW 9.94A.535. So long as the sentencing court's decision is not "manifestly unreasonable," it does not abuse its discretion. State v. McDougal, 120 Wn.2d 334, 354, 841 P.2d 1232 (1992). Here, where there was no reason supported by fact to depart from a standard range sentence, the trial court's decision cannot be manifestly unreasonable.

Where a trial court has considered the facts and has concluded that there is no basis for an exceptional sentence, it has exercised discretion, and a defendant may not appeal such a ruling. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

The trial court here considered the facts and concluded that there was no basis for an exceptional sentence; thus, it exercised its discretion. Accordingly, the defendant may not appeal from that ruling.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on March 15, 2016.

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THE STATE OF WASHINGTON,

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DECLARATION OF DOCUMENT
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AFFIDAVIT BY CERTIFICATION:

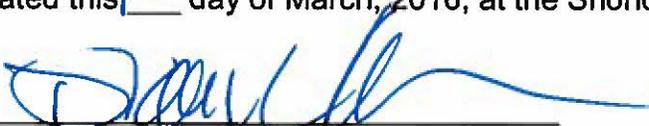
The undersigned certifies that on the 15th day of March, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

REPLY BRIEF OF RESPONDENT-CROSS-APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Casey Grannis, Nielsen, Broman & Koch, grannisc@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 15th day of March, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office