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NO. 73822-4-I

Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

MONIQUE S. HOWARD,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. After a jury found the defendant guilty of first degree robbery with a deadly weapon enhancement, the court imposed a mid-range sentence of 36 months for the robbery and a mandatory 24 months for the weapon enhancement. Did the sentence improperly punish the defendant when there is no evidence that the sentence was harsher because she exercised her right to a trial?

2. The sentencing court imposed the mandatory 18 months of community custody for this violent offense which was also a crime against a person. Is a statutory scheme unambiguous when it describes a three-tiered system of community custody with some time for offenders who commit crimes against persons, more for offenders who commit violent crimes against persons, and the most for those who commit serious violent crimes against persons?

II. STATEMENT OF THE CASE

On November 28, 2014, the defendant punched and robbed a cab driver as her accomplice held a knife to his throat. CP 18, 19. The defendant and her companion, Billy Motshepe, had taken a cab from Seattle to Everett. 2 RP 20, 23. When they arrived in Everett, the defendant exited and stood at the driver's door while Motshepe pulled a knife and held it to the driver's throat. Motshepe

yelled to the defendant, "Get the money! Get the money!" At the same time, the defendant opened the driver's door, attacked the driver, and yelled back to Motshepe, "Get the wallet, get the wallet, get the man." 2 RP 28, 29-31.

Restrained by his seat belt and Motshepe's knife, the driver could not free himself. He gave Motshepe his cash. The defendant reached into the driver's pocket, took his wallet, and punched him. 2 RP 31-33.

Courtney Farrell happened to be driving by and saw the defendant leaning into the cab as Motshepe restrained the driver. 2 RP 45. She called out, "What's up?" 2 RP 47. The defendant stood up, said, "He took my things," and leaned back in. The driver yelled, "Help! Call 911!" 2 RP 47-48, 60.

The robbers fled down an alley as Farrell and the defendant followed. 2 RP 49. Police arrived and found all four within blocks of each other. 2 RP 69, 3 RP 37. Motshepe had the driver's cell phone and backpack; the defendant had Motshepe's knife. 2 RP 75, 76, 3 RP 3.

The defendant told several versions of events. She first said she had been shopping and was locked out of her house. She had no shopping bags with her. 3 RP 5-6.

The defendant next said she and Motshepe took a cab to Everett. When she got out, she saw Motshepe struggling with the cab driver and leaned in to help him. Afterwards Motshepe handed her a knife without explanation. 3 RP 23-24.

Her last version of events to police was that Motshepe had the driver in a head lock so she decided to pull the driver off of him. In response, the driver handed her papers which she took and later dropped on the ground. She denied having taken or even seen a wallet. Told the driver said she had taken his wallet, the defendant said, "Check the alley," which the officer understood as her admitting she knew where the wallet was. A K-9 track for the wallet was unsuccessful. 3 RP 34-35.

On December 18, 2014, the State charged the defendant with first degree robbery. CP 64-65. In March 2015, it amended the information to add a deadly weapon enhancement. CP 59-60.

The trial took place in July 2015. The driver, Farrell, several officers, and the defendant testified. The defendant retold the last version of events she had told the officers. 3 R 42-48. She said that telling Farrell the driver had her things meant that she had left her duffel bag in his cab. 3 RP 48. She said she had no idea there had been a robbery or a knife. She acknowledged she had lied so

Motshepe would not get into trouble for the assault. 3 RP 47, 48, 54, 56-7.

The jury found the defendant guilty of first degree robbery with a deadly weapon enhancement. CP 17, 18. Sentencing was held two days later. 2 RP 109-10.

At sentencing, the State recommended a mid-range sentence of 36-months (standard range 31-41 months), the mandatory 24 months for the deadly weapon enhancement, and the mandatory 18 months of community custody. Its mid-range recommendation was based on the defendant's lack of criminal history. 4 RP 2, CP 8.

Defense asked for a low-end sentence because of the two-year weapons enhancement. Defense said the State's pre-trial plea bargain would have allowed the defendant to plead guilty without the enhancement. Defense said it was possible that Motshepe still plead without the enhancement since he had not yet gone to trial. 4 RP 3-4. There was no discussion of the length of time the State had offered to recommend on either case. The defendant said she was not a violent person or a criminal but was in the wrong place at the wrong time. 4 RP 4.

The trial court found the defendant not credible and that her version of events “found very little traction with me”. The court said that the time for equity with the codefendant had passed when she decided not to plead guilty and the deadly weapon enhancement was added. The court agreed with the State and imposed a mid-range sentence. The court specifically said that the mid-range sentence it imposed was “not to punish you for choosing trial.” 4 RP 5.

III. ARGUMENT

A. THE MID-RANGE SENTENCE DID NOT PUNISH THE DEFENDANT FOR EXERCISING HER RIGHT TO TRIAL.

Generally a party cannot appeal a standard range sentence. RCW 9.94A.585(1); State v. Williams, 140 Wn.2d 143, 146, 65 P.3d 1214 (2003); State v. Sandefer, 79 Wn. App. 178, 181, 900 P.2d 1132 (1995). An error of constitutional magnitude, such as punishing a defendant who exercises her right to trial, may be reviewed despite the SRA. Sandefer, at 181.

Engaging in plea bargaining does not impact a defendant’s right to trial. Nor does granting sentencing concessions to defendants who plead guilty. “The imposition of a longer sentence after trial than originally offered in a rejected plea bargain, without more, does not establish an impermissible

penalty.” Id. A defendant who “voluntarily chooses to reject or withdraw from a plea bargain... retains no right to the rejected sentence...” but, “assumes the risk of receiving a harsher sentence.” If that were not the law, “all incentives to plead guilty would disappear.” Id. at 181-82.

Before Sandefer went to trial, the State had offered him two plea bargains, one with a low-end recommendation and one with a mid-range recommendation. Sandefer, 79 Wn. App. 178. After trial, the State and defense both recommended longer sentences. The defendant complained about the severity of the recommendations considering the rejected plea bargains. The trial court explained why it was imposing a high-end sentence:

I frequently ... in sentencing within the standard range give a defendant a more lenient sentence if the defendant has entered a plea of guilty... [so that victims] don't have to go through this experience...

Mr. Sandefer, if you entered a plea of guilty, I very possibly would have given you a more lenient sentence towards the lower end of the range... You didn't, and I'm not going to give you that break.

Id. at 180.

The reviewing court found no constitutional violation. The court's remarks did not show that Sandefer was penalized for exercising his right to trial. Instead, they were a fair response to the

defendant's objection to the higher recommendations. They merely explained why Sandefer could no longer demand the benefit of the bargain he had rejected. Id. at 184.

Likewise, there is no evidence of a constitutional violation in the present case. Here, the 24-month sentence enhancement was not punishment for going to trial but was mandated by statute. RCW 9.94A.533(4)(b). The only area where the court had discretion in sentencing was on the underlying crime of first degree robbery where the standard range was 31-41 months.

There is absolutely nothing in the record to suggest the court imposed a longer sentence on the robbery after trial than it would have had the defendant entered a plea. The record shows that the State's original plea bargain was for a standard range sentence on the first degree robbery. That is exactly the sentence imposed after trial.

The sentence imposed reflected the crime and enhancement for which the defendant was found guilty. The court specifically stated that the longer sentence arose not from the defendant's exercise of her right to trial but rather from the 24-month sentence enhancement required following the jury's verdict:

The avenue for equity [with the co-defendant should he plead] was passed when you declined the offer to simply plead to the underlying robbery without the deadly weapon enhancement. I recognize that that will impose some substantial time because of the jury's finding with respect to that.

4 RP 5. Nothing in the record even suggests that the sentence on the first degree robbery was harsher based on the defendant's exercise of her trial rights.

The defendant's reliance on State v. Richardson, 105 Wn. App. 19, 19 P.3d 432 (2001), is misplaced. There, the trial court first said it did not intend to impose costs. After it learned that the defendant had rejected a favorable plea offer, the court did impose costs, solely for that reason. Id. at 21. That was error. Id. at 23.

Nothing like that occurred in the present case. The court did not ask about plea negotiations and did not increase the sentence because negotiations had failed. Due process is not implicated every time a judge comments on a defendant's right to go to trial. Sandefur, 79 Wn. App. at 182-84.

Federal courts agree that to find a violation the record must show that a harsher sentence was imposed following a breakdown in negotiations.

Accordingly, once it appears in the record that the court has taken a hand in plea bargaining, that a

tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty.

U.S. v. Stockwell, 472 F.2d 1186, 1187-88 (9th Cir. 1973) (emphasis added); accord U.S. v. Medina-Cervantes, 690 P.2d 715 (1982) (“accused may not be subjected to more severe punishment simply because he exercised his right to stand trial.”)

That reasoning applies to the present case where the record does not show the court taking a hand in plea bargaining, does not show anything but a standard range sentence having been discussed, and does not show a harsher sentence following a breakdown in negotiations. Rather, the record shows that the court sentenced the defendant based solely on the facts of her case, her history, and the jury’s verdict on both the underlying crime and the weapons enhancement.

The court in Sandefur discussed and distinguished most of the cases on which the defendant now relies. Sandefur at 182 fn.4, citing Commonwealth v. Bethea, 474 Pa. 671, 379 A.2d 102 (1977). The Oregon court failed to recognize the “delicate distinction between rewarding defendants who plead guilty and not punishing those who stand trial.” Id. Cases where a judge merely mentions a

trial are different from cases where “a judge’s comments clearly indicate that the judge penalized the defendant for going to trial.” Id. at 182, fn.9, citing, U.S. v. Medina-Cervantes, 690 F.2d 715-16 (9th Cir.1982) (judge remarked defendant had a lot to lose at trial); Johnson v. State, 247 Md. 536, 336 A.2d 113, 115 (1975) (defendant who pleads guilty and is honest probably gets a more moderate sentence).

That reasoning applies here. The record shows that the court sentenced the defendant as it did not because she went to trial but because she was convicted of both first degree robbery and the weapons enhancement. The defendant’s claim must fail.

B. THE COURT PROPERLY IMPOSED THE MANDATORY 18 MONTHS OF COMMUNITY CUSTODY ON THIS VIOLENT OFFENSE.

The defendant argues that her community custody term is too long because of an ambiguity in RCW 9.94A.701. However, the statute is not unambiguous.

A sentence imposed contrary to the law may be raised for the first time on appeal. State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990). On appeal, a defendant who does not object at trial may challenge a sentence imposed in excess of statutory authority because “a defendant cannot agree to punishment in

excess of that which the Legislature has established.” In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). “Questions of statutory interpretation are questions of law subject to de novo review.” State v. Franklin, 172 Wn.2d 831, 836, 263 P.3d 585 (2011). .

The court’s objective in interpreting a statute is to determine legislative intent. State v. Jones, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). The court must give effect to the plain meaning of the statute when it can be determined from the text. Id. The statute and all of its provisions must to be read as a whole and in relation to one another. State v. Merritt, 91 Wn. App. 969, 973, 261 P.2d 958 (1998). No statute should be construed in a way that renders a portion meaningless. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 169 (2005). Only when the statute’s language is subject to more than one reasonable interpretation is it ambiguous. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

The community custody statute is not ambiguous because, read as a whole, it is susceptible to only one reasonable interpretation. RCW 9.94A.801 establishes a three-tiered system of supervision dependent upon the severity of the offense.

On the bottom tier are all “crimes against persons,” a term defined in the statute setting out evidentiary standards for prosecutors. RCW 9.94A.411(2). There are 49 enumerated “crimes against persons” ranging from second degree theft and perjury up to and including robbery, kidnapping, rape, manslaughter, and murder. Id. An offender who commits one of those crimes is subject to up to one-year of community custody. RCW 9.94A.801(3)(a).

The second tier is for “violent offenses”. Violent crimes are a subset of crimes against persons. Compare RCW 9.94A.411(2) and RCW 9.94A.030(55). The “violent” subset includes all class A and an enumerated list of class B felonies such as second degree manslaughter, second degree kidnapping, and second degree robbery. RCW 9.94A.030(55). An offender who commits a violent offense is subject to 18 months of community custody. RCW 9.94A.801(2).

The third and highest tier is for sex crimes and “serious violent crimes”. Serious violent crimes are a subset of violent crimes. Compare RCW 9.94A.030(55) and RCW 9.94A.030(46). Those who commit “serious violent crimes” or sex crimes are subject to three years of community custody. RCW 9.94A.801(1).

Thus, the statute outlines a scheme that requires at least some supervision for any crime against persons, a longer term for a crime against persons that is also violent, and the longest for a crime against persons that is also seriously violent. That is the only reasonable interpretation. To read the statute otherwise would render the sections on violent and serious violent crimes meaningless. The claimed ambiguity exists only if the court reads each provision in isolation and not as a whole. That is an incorrect application of the rules of statutory construction.

The legislative intent to set up a three-tiered system for the offenders sentenced to prison is not made ambiguous by comparison to the one-tiered system established for offenders sentenced to jail. Compare RCW 9.94A.702(1). There, too, the legislature used some of the same, specific classifications and unambiguously required the same term of community custody for each. It was no less unambiguous when it required, on prison sentences, varied terms based on the severity of the offense.

Nor does the modifying language regarding community custody “for a violent offense that is not considered a serious violent offense” cause ambiguity. See RCW 9.94A.701(2). Because the terms “violent offense” and “serious violent offense”

are so similar, and because virtually every serious violent crime is also a violent crime, the legislature took the added step of clarifying which term should apply.

The rule of lenity applies to the SRA. State v. Roberts, 911 Wn.2d 576, 585, 817 P.2d 855 (1991). But the rule only applies if the court cannot ascertain legislative intent. Id. Since the legislative intent is ascertainable through the plain language of all of the provisions of the statute, the rule does not apply.

C. THE DEFENDANT SHOULD BE REQUIRED TO PAY COSTS ON APPEAL.

The authority to recover costs stems from the legislature. State v. Nolan, 141 Wn.2d 620, 627, 8 P.3d 300 (2000). The Rules of Appellate Procedure (RAP) direct courts of appeal to determine costs after filing a decision that terminates review (except for voluntary withdrawals). RAP 14.1(a). The panel of judges deciding the case has discretion to refuse costs in the opinion or order. RAP 14.1(c) and RAP 14.2.

Ability to pay is not the only relevant factor. State v. Sinclair, ___ Wn. App. ___, ___ P.2d ___ (2016)(72102-0-1). The court may consider whether the defendant will have the ability to pay if and when the State attempts to sanction a failure to pay. State v.

Blank, 131 Wn.2d 230, 246-47, 930 P.2d 1213 (1997). If a defendant is unable to repay costs in the future, the statute contains a mechanism for relief. Id. at 250.

The trial court later signed an *ex parte* indigency order. Supp. CP __ (sub.no. 58, Order of Indigency). The order stated only that the defendant lacked the funds to pursue her appeal. Id. The only financial information provided the court was that the defendant had no assets, no liabilities, and no expenses. Supp. CP ____ (sub.no. 53, Motion and Declaration). The order reflected only the defendant's ability to financially launch an appeal, not any ability to repay debt in the future.

But the trial court also imposed legal financial obligations with payments set at \$25 a month to begin on August 31, 2015. CP 11. The court specifically found that the defendant should be able to get a paying job at Purdy. CP 11; 4 RP 7. And, in fact, the defendant has made small payments toward her legal financial obligations every month since then. Supp. CP __ (sub.no. __, Financial Summary).

The defendant is only 22 years old and testified that she was working until she was incarcerated. 3 RP 39-40. Even if she serves every day of her 60-month sentence, she will be only 27

years old when she is released. There is no reason to believe she will not be employed and working for decades to come.

The present case is very different from Sinclair where the defendant was 66 years old and sentenced to a minimum of 280 months in custody. ___ Wn. App. at ___. Here, the defendant is young, will be released while still in her 20's, and is employable, not only at Purdy but also likely upon her release as she was before her incarceration. It is noteworthy that the defendant has not addressed whether she is, in fact, employed at Purdy or if she has been found to be an indigent defendant. No deductions will be made if the defendant is an "indigent inmate." See RCW 72.09.111(1).¹

There is little basis in the record for this court to deny the imposition of appellate costs. The request should be denied.

IV. CONCLUSION

The trial court's sentence did not punish the defendant for exercising her right to trial. The community custody statute is not ambiguous and the trial court correctly imposed an 18-month term

¹ An inmate is 'indigent' if she has less than a ten-dollar balance of disposable income in her institutional account on the day a request is made to utilize funds and during the thirty days previous to the request." RCW 72.09.015(15).

of community custody. The request to deny imposition of appellate costs should be denied.

Respectfully submitted on February 11, 2016.

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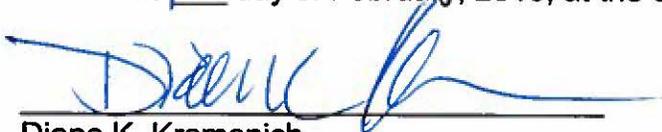
The undersigned certifies that on the 11th day of February, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Mary Swift, Nielsen, Broman & Koch, swiftm@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 11th day of February, 2016, at the Snohomish County Office.



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