

No. 74205-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

TIMOTHY J. FERNANDEZ,

Respondent.

FILED
Jul 14, 2016
Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE WESLEY SAINT CLAIR

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUE PRESENTED.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....6

The mitigated sentence imposed on Mr. Fernandez was a proper exercise of discretion justified by the nonviolent nature of his actions and was not clearly too lenient considering personal characteristics and circumstances of the offense in light of the policy goals of the SRA.....6

1. The court’s findings of fact are supported by substantial evidence in the record7

2. The fact that Mr. Fernandez did not endanger the work release facility, its employees or other inmates, justifies a downward departure from the presumptive range8

a. The nonviolent nature of Mr. Fernandez’s actions is a factor not necessarily considered by the legislature in establishing the standard sentence range10

b. Mr. Fernandez’s nonviolence is a substantial and compelling factor that distinguishes his offense from others in the same category12

3. Mr. Fernandez’s sentence is not clearly too lenient considering factors relating to Mr. Fernandez and his offense in light of the policy goals of the SRA.....15

D. CONCLUSION.....19

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Alexander, 125 Wn.2d 717, 888 P.2d 1169 (1995).....8, 10, 11, 12, 15, 17

State v. Branch, 129 Wn.2d 635, 919 P.2d 1228 (1996)17

State v. Fowler, 145 Wn.2d 400, 38 P.3d 335 (2002).....8, 10, 17

State v. Gaines, 122 Wn.2d 502, 859 P.2d 36 (1993).....9, 17

State v. Graham, 181 Wn.2d 878, 337 P.3d 319 (2014).....16

State v. O’Dell 183 Wn.2d 680, 358 P.3d 359 (2015).....13

State v. Oxborrow, 106 Wn.2d 525, 723 P.2d 1123 (1986).....17

State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1308 (1995).....6, 18

State v. Smith, 123 Wn.2d 51, 864 P.2d 1371 (1993).....10, 12

Washington Court of Appeals Decisions

State v. Bedker, 74 Wn. App. 87, 871 P.2d 673 (1994).....16, 18

State v. Burkins, 94 Wn. App. 677, 973 P.2d 15 (1999).....7, 8, 9, 15

State v. Calvert, 79 Wn. App. 569, 903 P.2d 1003 (1995)10

State v. Creekmore, 55 Wn. App. 852, 783 P.2d 1068 (1989)18

State v. Evans, 80 Wn. App. 806, 911 P.2d 1344 (1996)16

State v. Halsey, 140 Wn. App. 313, 165 P.3d 409 (2007)17

State v. Harding, 62 Wn. App. 245, 813 P.2d 1259 (1991).....9

State v. Harmon, 50 Wn. App. 755, 750 P.2d 664 (1988).....18

<i>State v. Ramires</i> , 109 Wn. App. 749, 37 P.3d 343 (2002).....	9
<i>State v. Statler</i> , 160 Wn. App. 622, 248 P.3d 165 (2011).....	12
<i>State v. Vaughn</i> , 83 Wn. App. 669, 924 P.2d 27 (1996).....	15, 16

United States Supreme Court Decisions

<i>Graham v. Florida</i> , 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).....	13
--	----

Statutes

RCW 9.94A.010.....	13, 17
RCW 9.94A.535.....	6, 11, 12
RCW 9.94A.585.....	15

Other Authorities

Andrew Ozaki, <i>Nebraska prison escape aided by failure to follow procedures</i> , KETV 7, (Jun. 13, 2016), http://www.ketv.com/news/nebraska-prison-escape-aided-by-failure-to-follow-procedures/40033028	14
<i>Guard, inmate injured in Ohio prison escape</i> , WDTN 10, (Sep. 17, 2014), http://wdtn.com/2014/09/17/guard-inmate-injured-in-ohio-prison-escape/	14
<i>H.B. 1227</i> , House Criminal Justice & Corrections Committee (Jan. 29, 2001), http://www.tvw.org/watch/?eventID=2001011059	10, 11
H.R. 57, H.B. 1227 Bill Report (Wash. 2001).....	10
Joshua Berlinger, <i>New York prison break timeline</i> , CNN, (Jun. 30, 2015), http://www.cnn.com/2015/06/26/us/new-york-prison-break-timeline/index.html	14

Second of three escaped Elba Work Release inmates back in custody, WSFA 12, (Sep. 19, 2015),
<http://www.wsfa.com/story/29687335/second-of-3-escaped-elba-work-release-inmates-back-in-custody>15

Victoria Prieskop, *Prison error nearly killed innocent man*,
Courthouse News Service, (Jul. 5, 2016),
<http://www.courthousenews.com/2016/07/05/prison-error-nearly-killed-innocent-man.htm>15

A. ISSUE PRESENTED

Timothy Fernandez had a history of addiction when he was transferred to work release to complete his sentence for identity theft and a drug conviction. After leaving the facility with a job search pass, he “got high” and did not return. Mr. Fernandez plead guilty to escape and the Honorable Wesley St. Clair imposed a mitigated sentence below the standard range.

The Sentencing Reform Act (SRA) gives judges the discretion to impose exceptional sentences based on mitigating factors where the presumptive sentence is clearly excessive in light of the goals of the SRA. The mitigating factors must be supported by substantial evidence and justify departure from the standard range; a factor may not have been necessarily considered by the legislature in establishing the standard range and must be substantial and compelling so as to distinguish the offense from others in the same category. The imposed sentence may not be clearly too lenient. The trial court imposed an exceptional sentence based on a finding that Mr. Fernandez did not inflict or threaten violence in the commission of his escape. In determining the exceptional sentence, the trial court considered the policies and goals of the SRA, the circumstances

of the crime, and Mr. Fernandez's history. Did Judge Saint Clair act within his discretion and is the sentence inappropriate?

B. STATEMENT OF THE CASE

On April 30, 2015, Mr. Fernandez, who has a history of drug abuse, relapsed while on a job search pass from the Reynolds Work Release program. 10/22/2015 RP 20; CP 3. He failed to return at the appointed time. CP 3. A warrant was issued and he was arrested and charged with escape in the first degree, CP 1, 3.

Mr. Fernandez pled guilty to escape in the second degree pursuant to a plea agreement. CP 9. His criminal history used to calculate the offender score consisted of three prior violations of the Uniform Controlled Substances Act (VUCSA), identity theft in the second degree, and out of state convictions for grand larceny and possession of an imitation controlled substance. CP 43. Because Mr. Fernandez's offender score was 6, the presumptive sentencing range was 22 to 29 months. CP 10, 43.

Judge Saint Clair accepted Mr. Fernandez's change of plea. 10/22/2015 RP 14. The judge expressed frustration and consternation with the severity of the sentencing range derived from his criminal history.

10/22/2015 RP 18-19. The prosecuting attorney directed the judge to the language from the SRA. 10/22/2015 RP 19.

Substantial and compelling reasons to go outside of that range. Outside could be above or below. I would encourage the court to look at Mr. Fernandez's criminal history. It's nonviolent. It's VUCSA and identity theft. We're bound by the constraints of the legislature, and Mr. Newcomb has worked very hard on the defendant's behalf to get him the best deal that he can.

10/22/2015 RP 19.

Judge Saint Clair noted he had a "visceral reaction to this particular case"; he told Mr. Fernandez, "were I to sentence you to 22 to 29 months, I couldn't look in the mirror." 10/22/2015 RP 17, 20. Mr. Fernandez admitted he made a mistake and described his reentry plans: "My ERD right now is December 24th, which is the day before Christmas. My housing got approved at a church. It's in Sea-Tac under... Pastor Galia and Pastor Bob." 10/22/2015 RP 20.

Judge Saint Clair initially suggested a sentence of six months confinement. 10/22/2015 RP 21. After a discussion of the amount of time Mr. Fernandez had already served, Mr. Fernandez noted that the church where he would be staying in during his reentry process had transportation from the facility to prevent relapse. 10/22/2015 RP 22.

In response to Mr. Fernandez's information about his reentry plans, Judge Saint Clair then suggested a shorter sentence of 20 days. 10/22/2015 RP 22. Defense counsel suggested three reasons supporting such a sentence: 1) the "significant penalty extracted by way of revocation on the underlying offense," 2) "the loss of the ability to engage in work release in the future," and 3) "the nature of the offense...does not involve any type of endangerment to others or safety of the facility." 10/22/2015 RP 26. In support of the proposed sentence, the judge made the following statement:

It doesn't engender or make our public safer by imposing this what from my perspective is a draconian response to someone who is suffering from a medical condition that we have determined by legislation to be criminalized...And as well is where our institutions have failed to address the medical condition when he was incarcerated before, nor provide the appropriate services for it. Then to me, it is in – it's actually in contradiction to looking to create a safer public environment by not addressing it, and it is almost cruel, the process that is in place. And this is specific to this case.

10/22/2015 RP 26.

In a second hearing the following week, defense counsel presented a draft order including findings of fact and conclusions of law incorporating Judge Saint Clair's oral statements from the sentencing hearing. CP 47-48. The written findings were as follows:

I. Findings of Fact

1. Mr. Fernandez pled guilty to Escape 2 after having walked away from work release. He was gone approximately two months.
2. The underlying offences that Mr. Fernandez was held on were non-violent offences, to wit Identity theft 2 and Vuca Possession of cocaine.
3. Both counsel for the State of Washington and counsel for defendant, Jonathan Newcomb, presented the same agreed upon recommendation of 22 months at sentencing. Defense counsel adhered in full to the plea agreement.
4. Mr. Fernandez's escape by walking away from Reynolds Work Release did not endanger the work release facility, its employees or other inmates.
5. Mr. Fernandez, as a direct result of his escape, lost his "good time" via a Department of Corrections hearing and will not be eligible for future work release placements with DOC including on the current escape charge.

II. Conclusions of Law

The court finds that there are substantial and compelling reasons to impose an exceptional sentence on Mr. Fernandez for the crime of Escape 2 under this cause, to wit,

1. The underlying offences that Mr. Fernandez was held on and escaped from were non-violent offences, to wit Identity theft 2 and VUCSA Possession of cocaine.
2. Mr. Fernandez's escape by walking away from Reynolds Work Release did not endanger the work release facility, its employees or other inmates.
3. Mr. Fernandez, as a direct result of his escape, lost his "good time" via a Department of Corrections hearing and will not be eligible for future work release placement with DOC including on the current escape charge.

The court finds that an exceptional sentence is legally justified and warranted and thus imposes an exceptional sentence of 30 days,

with credit for time served. The court further incorporates all oral statements as well.

CP 47-48.

Judge Saint Clair imposed a mitigated sentence of 30 days with credit for time served and mandatory financial obligations. 10/26/2015 RP 36. The court orally summarized: “In this particular case, the court does find, and continues to find, that a standard range of 22 to 29 months for an escape from Reynolds Work Release as described in this instance is not an appropriate use of resources.” 10/26/2015 RP 35-36.

C. ARGUMENT

The mitigated sentence imposed on Mr. Fernandez was a proper exercise of discretion justified by the nonviolent nature of his actions and was not clearly too lenient considering personal characteristics and circumstances of the offense in light of the goals of the SRA.

“The purpose of the SRA is to structure, but not eliminate, discretionary trial court decisions.” *State v. Ritchie*, 126 Wn.2d 388, 397, 894 P.2d 1308 (1995). The SRA provides for departures from presumptive sentences where there are “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. Reviewing courts evaluate exceptional sentences according to a three-prong test: 1) whether the “reasons given [are] supported by substantial evidence in the record,” 2) whether “the reasons justify a departure from the standard range,” and 3)

whether “the sentence is not clearly too [lenient].” *State v. Burkins*, 94 Wn. App. 677, 697, 973 P.2d 15 (1999).

The trial court properly exercised its discretion in imposing an exceptional sentence on Mr. Fernandez based on the nonviolent nature of the actions for which he pled guilty to escape in the second degree. Further, the court did not abuse its discretion by imposing a 30-day sentence because it does not “shock the conscience” in light of the benign circumstances of Mr. Fernandez’s offense properly considered by the trial court in light of the policy goals of the SRA.

1. The court’s findings of fact are supported by substantial evidence in the record.

The court’s factual findings are reviewed for clear error. *Burkins*, 94 Wn. App. at 697. Judge Saint Clair’s findings are supported by the record.

First, Mr. Fernandez pled guilty to escape in the second degree after walking away from work release, as described in Finding 1. CP 9, 47. He was gone for approximately two months. 10/22/2015 RP 17; CP 47.

Second, the underlying offenses upon which he was held were for VUCSA and identity theft—described by the State as “nonviolent”—as described in Finding 2. 10/22/2015 RP 16, 19; CP 47.

Third, counsel agreed upon a recommendation of 22 months. CP 13, 47. Mr. Fernandez's counsel did not violate the plea agreement. 10/22/2015 RP 19; CP 47.

Fourth, Mr. Fernandez's actions were non-violent, as described in Finding 4. 10/22/2015 RP 24, 26; CP 47. He never posed a threat to the work release facility, its employees, or other inmates. 10/22/2015 RP 24, 26; CP 47.

Fifth, Mr. Fernandez lost his good time and will not be eligible for work release, as described in Finding 5. 10/22/2015 RP 24, 26; CP 47. Loss of good time and ineligibility for work release exacerbate the severity of the sentence. 10/22/2015 RP 17.

2. *The fact that Mr. Fernandez did not endanger the work release facility, its employees or other inmates, justifies a downward departure from the presumptive range.*

The SRA contains a non-exclusive list of mitigating factors justifying a downward departure from the presumptive range. *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). Mitigating reasons are reviewed de novo. *Burkins*, 94 Wn. App. at 697. In "determining whether a factor legally supports departure," the courts use a two-part test. *State v. Alexander*, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995). Mr. Fernandez's nonviolence justified departure because 1) "the legislature did not consider

it in establishing the standard range,” and 2) “it is sufficiently substantial and compelling to distinguish the offense in question from others in the same category.” *Burkins*, 94 Wn. App. at 700.

The court need not apply this test to all of the trial court’s findings because “an exceptional sentence may be upheld on appeal even where all but one of the trial court’s reasons for the sentence have been overturned.” *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). When a reviewing court finds that fewer than all of the trial court’s findings justify an exceptional sentence, “remand is unnecessary if the reviewing court is confident that the trial court, after limiting its consideration to the proper factors, would impose the same sentence.” *State v. Harding*, 62 Wn. App. 245, 250, 813 P.2d 1259 (1991). The record need not specifically state that any factor “standing alone would justify the court’s imposition of an exceptional sentence.” *State v. Ramires*, 109 Wn. App. 749, 767, 37 P.3d 343 (2002). The focus on nonviolence illustrated by Judge Saint Clair’s findings of fact and conclusions of law suggests that the peaceful nature of Mr. Fernandez’s actions alone justified a downward departure from the presumptive sentence; the remaining findings are relevant to the third prong of review that asks whether the sentence is clearly too lenient, *see infra*.

a. *The nonviolent nature of Mr. Fernandez's actions is a factor not necessarily considered by the legislature in establishing the standard sentence range.*

A sentence may not be based on a mitigating factor “necessarily considered by the Legislature in establishing the standard sentence range,” such as “criminal history and the seriousness level of the offense.” *Alexander*, 125 Wn.2d at 725 (quoting *State v. Smith*, 123 Wn.2d 51, 57, 864, P.2d 1371 (1993)); *Fowler*, 145 Wn.2d at 405.

Although violence is often considered by the legislature in determining the classification of the offense for purposes of sentencing, the legislative history of the amendment to the escape statute belies such a limited view. *See State v. Calvert*, 79 Wn. App. 569, 581, 903 P.2d 1003 (1995). HB 1227 subsumed the previously separate failure to return provision into the escape provisions in order to close a loophole that prevented conviction of those who failed to return to a county jail (the escape provision did not cover failure to return, but failure to return applied only to state facilities). H.R. 57, H.B. 1227 Bill Report (Wash. 2001); *H.B. 1227*, House Criminal Justice & Corrections Committee (Jan. 29, 2001), <http://www.tvw.org/watch/?eventID=2001011059>.

During oral testimony before the House Criminal Justice and Corrections Committee, Rep. Jack Cairnes expressed his concern that

failing to return would be treated “the same or nearly the same as a violent escape.” *Id.* Tom McBride of the Washington Association of Prosecuting Attorneys answered that the “difference in the severity of these offenses” is based on whether “you’ve been convicted of a felony either as a juvenile or as an adult,” in which case escape in the first degree is appropriate, or “you’ve been charged but not yet convicted,” in which case escape in the second degree is appropriate. *Id.* While acknowledging that Rep. Cairnes’s point was “well-made,” Mr. McBride noted that Washington law does not take into account the violence used in escaping. *Id.*

The prosecutor suggests that because the “method of Fernandez’s escape” is included in the general category of escape for which the legislature determined the presumptive sentencing range, it cannot be a mitigating factor. Brief of Appellants, pg. 14-16. But if satisfying the elements of the offense precludes an exceptional sentence, the SRA mitigation provision is rendered meaningless. RCW 9.94A.535 “expressly permits for departure from the standard range, notwithstanding the fact a defendant has been properly convicted of a crime.” *Alexander*, 125 Wn.2d at 728 (finding that an extraordinarily small amount of cocaine falling within the statutory range may be used as a mitigating factor). The

legislature did not differentiate based on the level of violence used to escape, so nonviolence is an appropriate mitigating factor.

b. Mr. Fernandez's nonviolence is a substantial and compelling factor that distinguishes his offense from others in the same category.

Nonviolence justifies departure from the presumptive sentence for escape because: 1) it is a “substantial and compelling” factor in light of the purposes of the SRA, and 2) it “distinguish[es] the crime in question from others in the same category.” RCW 9.94A.535; *Alexander*, 125 Wn.2d at 725 (quoting *Smith*, 123 Wn.2d at 57); see *State v. Statler*, 160 Wn. App. 622, 640, 248 P.3d 165 (2011) (“the fact that no victims were seriously injured in the crime” was a factor supporting an exceptional mitigated sentence).

Nonviolence is a substantial and compelling reason justifying a downward departure because a mitigated sentence is consistent with the penological purposes of the SRA:

- 1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- 2) Promote respect for the law by providing punishment which is just;
- 3) Be commensurate with the punishment imposed on others committing similar offenses;
- 4) Protect the public;

- 5) Offer the offender an opportunity to improve himself or herself;
- 6) Make frugal use of the state's and local governments' resources; and
- 7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010. These goals are aligned with those identified by the United States Supreme Court: retribution, deterrence, incapacitation, and rehabilitation. *Graham v. Florida*, 560 U.S. 48, 50, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). All of these aims are best achieved by a mitigated sentence because Mr. Fernandez neither harmed nor threatened to harm persons or property. CP 47, 48; 10/22/2015 RP 24, 26. His peaceful actions weaken the retributive rationale and render a standard sentence disproportional. *C.f. State v. O'Dell* 183 Wn.2d 680, 695-6, 358 P.3d 359 (2015) (holding that youth may diminish a defendant's culpability, justifying a sentence below the presumptive range). The mitigated sentence ordered by Judge Saint Clair promotes respect for the law and maintains consistency by ensuring that violent offenders are punished more harshly, thereby deterring the use of force. Mr. Fernandez's choice to reject the use of threats or aggression negates the need for incapacitation because the public requires heightened protection from violent offenders, not peaceful ones. Likewise, greater rehabilitation is needed for violent offenders than those like Mr. Fernandez. The

penological goals of sentencing are not served by imposing a standard range sentence in this case; to do so would be a staggering waste of state and county resources. Mr. Fernandez's reentry preparations, rather than a lengthy sentence, will reduce his risk of reoffending. All of these factors support Judge Saint Clair's conclusion that nonviolence justifies an exceptional mitigated sentence pursuant to the SRA. CP 48.

Mr. Fernandez's actions distinguish his offense from most others in the same category—escapes from state or county custody. The range of methods used to escape from custody is wide, and escapes from most types of custody would require harm or the threat of harm to persons or property. *E.g.*, *Guard, inmate injured in Ohio prison escape*, WDTN 10, (Sep. 17, 2014), <http://wdtn.com/2014/09/17/guard-inmate-injured-in-ohio-prison-escape/> (guard injured in escape required sutures); Joshua Berlinger, *New York prison break timeline*, CNN, (Jun. 30, 2015), <http://www.cnn.com/2015/06/26/us/new-york-prison-break-timeline/index.html> (escapees used power tools and firearms in flight from prison, planned to murder civilian); Andrew Ozaki, *Nebraska prison escape aided by failure to follow procedures*, KETV 7, (Jun. 13, 2016), <http://www.ketv.com/news/nebraska-prison-escape-aided-by-failure-to-follow-procedures/40033028> (escaped prisoners injured civilians in car

accident, assaults). Escapes from work release or furlough—even those previously classified as “failure to return”—may involve threats, property damage, or injury. *E.g.*, Victoria Prieskop, *Prison error nearly killed innocent man*, Courthouse News Service, (Jul. 5, 2016), <http://www.courthousenews.com/2016/07/05/prison-error-nearly-killed-innocent-man.htm> (prisoner on work detail hit a man on the head with a pickaxe and stole his truck); *Second of three escaped Elba Work Release inmates back in custody*, WSFA 12, (Sep. 19, 2015), <http://www.wsfa.com/story/29687335/second-of-3-escaped-elba-work-release-inmates-back-in-custody> (prisoner who left work release location charged with assault in connection with his escape). Yet Mr. Fernandez exhibited peaceful behavior that is in sharp contrast to the high risk and great danger posed by most escapes. *See* 10/22/2015 RP 24, 26.

3. *Mr. Fernandez’s sentence is not clearly too lenient considering factors relating to Mr. Fernandez and his offense in light of the policy goals of the SRA.*

An exceptional sentence based on a valid mitigating factor supported by the record is reviewed for abuse of discretion. *Burkins*, 94 Wn. App. at 701. A sentence is “clearly too lenient,” as described in RCW 9.94A.585(4)(b), if “no reasonable person would take the position adopted by the trial court” or the length of the sentence “shocks the conscience.” *Alexander*, 125 Wn.2d at 731; *Burkins*, 94 Wn. App. at 701 (quoting *State*

v. Vaughn, 83 Wn. App. 669, 681, 924 P.2d 27 (1996)). “Reviewing courts have ‘near plenary discretion to affirm the length of an exceptional sentence, just as the trial court has all but unbridled discretion in setting the length of the sentence.’” *Id.* (quoting *State v. Bedker*, 74 Wn. App. 87, 101-02, 871 P.2d 673, *review denied*, 125 Wn.2d 1004, 886 P.2d 1133 (1994)).

Sentencing judges may consider factors other than those that justify a downward departure, such as drug addiction, in “fashioning the length and terms of the exceptional sentence once the court identifies a valid mitigating factor to support the sentence itself.” *State v. Evans*, 80 Wn. App. 806, 824, 911 P.2d 1344 (1996). Judge Saint Clair properly considered the non-violent nature of the primary and underlying offenses, Mr. Fernandez’s apparent drug abuse problems, his loss of good time, and his prospects for successful reentry. 10/22/2015 RP 16, 17, 20, 22, 24, 26. In light of the goals of the SRA, each of these factors warrants leniency.

Sentencing judges must “examine each of [the SRA] policies” to determine whether an exceptional sentence will: 1) ensure proportionate punishment, 2) promote respect for the law, 3) maintain consistency in sentencing, 4) protect the public, 5) support offender rehabilitation, 6) conserve resources, and 7) reduce recidivism. *State v. Graham*, 181 Wn.2d

878, 887, 337 P.3d 319 (2014); RCW 9.94A.010. Judge Saint Clair found that extended incarceration of Mr. Fernandez was a poor use of state resources, would not “engender or make our public safer,” and was grossly disproportionate to the specific offense in this case. 10/22/2015 RP 20, 26; 10/26/2015 RP 35-36; CP 47-48. He exercised his discretion to impose a 30-day sentence. 10/26/2015 RP 36. “By permitting judges to tailor the sentence in this manner, we ... promote proportionality between the punishment and the seriousness of the offense and respect for the law.” *Alexander*, 125 Wn.2d at 727-28. “Consideration of the human being in the context of the crime is at the heart of judging.” *Gaines*, 122 Wn.2d at 527 (Madsen, J., dissenting). Judges are “highly trained professionals who, having the parties before them, are in the best position to dispense justice.” *Id.*; see *Fowler*, 145 Wn.2d at 416-17 (Madsen, J., dissenting).

A 30-day sentence imposed for failing to return to work release does not “shock the conscience,” especially in light of the additional punishment inflicted by Mr. Fernandez’s loss of good time. 10/22/2015 RP 17, 24, 26. The courts have upheld numerous sentences that are much farther outside the presumptive range. See *State v. Halsey*, 140 Wn. App. 313, 325-26, 165 P.3d 409 (2007); e.g., *State v. Branch*, 129 Wn.2d 635, 650, 919 P.2d 1228 (1996) (affirming 48-month sentence, more than 16 times the standard range sentence of 90 days); *State v. Oxborrow*, 106

Wn.2d 525, 535–36, 723 P.2d 1123 (1986) (upholding a 15-year sentence, 15 times the standard range); *Bedker*, 74 Wn. App. at 92 (sentence of 180 months, compared to standard range of 72 to 96 months, was not clearly excessive); *State v. Creekmore*, 55 Wn. App. 852, 864, 903 P.2d 1003 (1989) (upholding 720-month despite a standard range of 144–192 months); *State v. Harmon*, 50 Wn. App. 755, 761–62, 750 P.2d 664 (1988) (upholding a 648-month sentence where the standard range was 250 to 333 months).

Regardless, no comparison to the presumptive sentence is inherent in the process of reviewing the trial court’s determination for abuse of discretion. Exceptional sentences are not tied to the presumptive range. *Ritchie*, 126 Wn.2d at 397.

Use of the word ‘exceptional’, by definition, implies a deviation from the norm. Had the Legislature intended to tie the length of exceptional sentences to standard sentences or to correlate the length of exceptional sentences with the standard range of that crime or more serious crimes, it could have easily so provided.

Id.

Judge Saint Clair did not abuse his discretion by imposing a 30-day sentence after considering factors related to Mr. Fernandez and the policy goals of the SRA.

D. CONCLUSION

The trial court based Mr. Fernandez's exceptional sentence on a valid mitigating factor—nonviolence—that is supported by the record. The sentence is not clearly too lenient in light of the circumstances of the offense and the policy goals of the SRA. Mr. Fernandez respectfully requests his sentence be affirmed.

Dated this 14th day of July, 2016.

Respectfully submitted,

s/ Gregory C. Link

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

STATE OF WASHINGTON,)	
)	
Appellant,)	
)	
v.)	NO. 74205-1-I
)	
TIMOTHY FERNANDEZ,)	
)	
Respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF JULY, 2016, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** 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:

<p>[X] JAMES WHISMAN, DPA [paoappellateunitmail@kingcounty.gov] [Jim.Whisman@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>() () (X)</p>	<p>U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL</p>
<p>[X] TIMOTHY FERNANDEZ (NO CURRENT ADDRESS) C/O COUNSEL FOR RESPONDENT WASHINGTON APPELLATE PROJECT</p>	<p>() () (X)</p>	<p>U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED</p>

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF JULY, 2016.

X _____ 

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