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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 36598-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,

v.

JOSEPH BERLANGA, Respondent.

RESPONDENT'S BRIEF

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I. ISSUES ON APPEAL

1. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT FOUND THAT MR. BERLANGA'S MEDICAL CONDITION AND CONSTANT NEED OF EXPENSIVE MEDICAL CARE CONSTITUTED GROUNDS FOR AN EXCEPTIONAL SENTENCE OF ONE DAY BELOW THE STATUTORY MINIMUM TO BE SERVED AS HOME DETENTION?

II. STATEMENT OF THE CASE

On May 7, 2007, 62-year-old Joe Berlanga pled guilty to one count of unlawful possession of a controlled substance with intent to deliver and one count of possession of a firearm in the second degree. CP 9. Mr. Berlanga had no prior drug offenses and his offender score was one. CP 9. Pursuant to the agreement, the prosecutor agreed to recommend a sentence of 12 months plus one day, the minimum of the standard range for count one, with 3 months concurrent on count two. CP 11.

Mr. Berlanga submitted documentation to the court of his severe medical condition. He was being treated for complications from a liver transplant (his second), hepatitis C, and an implanted cardiac device. CP 15-19. Mr. Berlanga required daily immunosuppression medications for the transplant, which makes him vulnerable to viruses and diseases. CP 15-19. In addition, Mr. Berlanga required quarterly surgery to clear

obstructions in his digestive system caused by the liver transplant (“periodic ERCP for biliary obstruction”). CP 15-19.

Dr. Sangik Oh, Mr. Berlanga’s physician, opined that Mr. Berlanga “needs a close medical follow-up for his existing medical problems.” CP 15. Dr. Anne Larson opined that Mr. Berlanga has “developed a long-term complication following transplant which requires frequent physician visits and interventions with medication changes.” CP 16. Further, Dr. Larson stated that “Post-transplant patients are immunosuppressed and in prison/jail may be exposed to illnesses (i.e., hepatitis, HIV, tuberculosis) which could significantly compromise their long-term survival.” CP 16.

Mr. Berlanga was sentenced to 14 months on count one, to be served through electronic home monitoring and three months concurrent on count two. CP 32. The State then asked the court to reconsider the sentence, arguing it was not in conformance with State law. CP 43-44; RP 6/27/07 4. Following argument, the court entered an order vacating the Judgment and Sentence entered on June 4 and entering a new judgment and sentence. CP 54.

The trial court found that Mr. Berlanga’s “medical condition and continuing need for multiple surgeries over an extended period of time” constituted grounds for an exceptional sentence down from the standard range. CP 56. Based on the circumstances, and “considering the purposes

of the Sentencing Reform Act, the trial court found that “[i]mposing no further incarceration in the Department of Corrections is an appropriate sentence on Counts I and II.” CP 56. Accordingly, the trial court concluded that “[a]n exceptional sentence below the standard range of 12 months on Electronic Home Monitoring is appropriate in this case.” CP 57. The Judgment and Sentence filed on June 27 sentenced Mr. Berlanga to 12 months on count one and 8 months on count two, to be served concurrently, and to be served through home detention (RCW 9.94A.180, .190). CP 64.

The State subsequently appealed the June 27 Judgment and Sentence.

III. ARGUMENT

ISSUE 1: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT MR. BERLANGA’S MEDICAL CONDITION AND CONSTANT NEED OF EXPENSIVE MEDICAL CARE CONSTITUTED GROUNDS FOR AN EXCEPTIONAL SENTENCE OF ONE DAY BELOW THE STATUTORY MINIMUM TO BE SERVED AS HOME DETENTION.

The trial court in this case sentenced Mr. Berlanga to one day less than the mandatory minimum and ordered that the sentence be served through in-home detention. The State has challenged this exceptional sentence below the standard range.

A trial court may impose a sentence outside the standard range if it finds “substantial and compelling reasons” to do so. RCW 9.94A.535.

“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). An exceptional sentence may be reversed only if (1) the trial court’s reasons for imposing the exceptional sentence are not supported by the record; (2) as a matter of law, those reasons do not justify an exceptional sentence; or (3) the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.585; *State v. Alexander*, 125 Wn.2d 717, 722, 888 P.2d 1169 (1995).

The trial court’s decision is reviewed to determine if the findings of fact are supported by the record and if the factual findings justify the exceptional sentence. *State v. Allert*, 117 Wn.2d 156, 163, 815 P.2d 752 (1991). A finding of fact is clearly erroneous only if it is not supported by a preponderance of the evidence. *See State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991); RCW 9.94A.535(1). The second prong, whether factual findings justify an exceptional sentence, is a legal issue that is reviewed de novo. *Allert*, 117 Wn.2d at 162. Finally, the length of an exceptional sentence is reviewed for abuse of discretion. *Alexander*, 125 Wn.2d at 731. A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *Alexander*, 125 Wn.2d at 732 n. 28.

In this case, the trial court's mitigating factor, severe medical condition, was supported by the record by a preponderance of the evidence. Mr. Berlanga's medical condition was severe, ongoing, and potentially life threatening. CP 15-19. The record shows that he required ongoing medical care, frequent surgeries, and expensive medical treatment. CP 15-19. Further, the uncontroverted evidence established that sending Mr. Berlanga to prison or jail would be a virtual death-sentence due to his anti-rejection medication (immuno-suppressing). CP 16.

Mr. Berlanga's medical condition was a legitimate factor to consider in reducing his sentence. Although severe medical condition is not a mitigating factor enumerated in the non-exclusive list included in the statute, RCW 9.94A.535(1), it is still a legal reason to reduce the mandatory minimum by one day and diverge from the default sentence by ordering that the sentence be served through in home detention.

The Legislature contemplates that even the Secretary of the Department of Corrections may alter a standard sentence to accommodate an offender's serious medical condition. RCW 9.94A.533 provides that: "[W]hether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary

medical placement when authorized under RCW 9.94A.728(4).” Under RCW 9.94A.728(4):

(4)(a) The secretary may authorize an extraordinary medical placement for an offender when all of the following conditions exist:

(i) The offender has a medical condition that is serious enough to require costly care or treatment;

(ii) The offender poses a low risk to the community because he or she is physically incapacitated due to age or the medical condition; and

(iii) Granting the extraordinary medical placement will result in a cost savings to the state.

(b) An offender sentenced to death or to life imprisonment without the possibility of release or parole is not eligible for an extraordinary medical placement.

Sentencing under this medical exception includes electronic home monitoring. RCW 9.94A.728(4)(c). Certainly, if the Secretary of DOC can commute a sentence to be served by electronic home monitoring and for less than a mandatory minimum, it should be permissible as grounds to reduce the sentence to one day below the standard range to be served via in home detention.

The State argues that the Statute did not permit the court to order electronic home monitoring because ordinarily home detention is unavailable to drug offenders. RCW 9.94A.680(1) provides that, for

sentences of one year or less, “One day of partial confinement may be substituted for one day of total confinement.” “Partial confinement” is defined as “confinement for nor more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes . . . home detention, . . .” RCW 9.94A.030(32). “Home detention” is defined as “a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance.” RCW 9.94A.030(27). RCW 9.94A.734 provides that “Home detention may not be imposed for offenders convicted of . . . any drug offense,” other than “possession of a controlled substance under RCW 69.50.413.” RCW 9.94A.734(1).

Although RCW 9.94A.734(1) provides that home detention is not available to drug offenders, that statute merely describes the standard sentencing options, just as the standard range is defined by statute. This is not a standard sentence, it is an exceptional sentence. Therefore, RCW 9.94A.535 controls. As such, the court can diverge from the normal requirements of the sentencing statute so long as the court finds mitigating circumstances that are supported by the record. That was the case here.

Thus, under RCW 9.94A.535, when reviewing a court's imposition of an exceptional sentence, the court may reverse only if it finds the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.585, *State v. Alexander*, 125 Wn.2d 717, 722, 888 P.2d 1169 (1995). From the evidence presented, it appears that Mr. Berlanga met the requirements of RCW 9.94A.728(4) for an extraordinary medical placement. This 62 year-old man had no prior drug offenses and posed a low risk to the community. CP 54. He required constant and expensive medical care. CP 15-19. And, incarcerating him with others was a life-threatening situation for him. CP 16. Therefore, the trial court sentenced him to home detention. CP 56-57. Mr. Berlanga did not get off without paying his debt to society—he was convicted and is serving his sentence (all but one day the minimum). Rather, having him serve his term as home detention saved the State many thousands of dollars each year while meeting the purposes of the SRA. This sentence was not clearly too lenient.

The State cites a Division III case, *State v. Fuller*, 89 Wn. App. 136, 947 P.2d 1281 (1997), for the proposition that the court in this case was not permitted to order electronic home monitoring for Mr. Berlanga. First, *Fuller* is merely persuasive authority and does not control here. Further, in *Fuller*, the trial court declined to exercise its discretion to

depart from the standard set by Former RCW 9.94A.734(1) (now RCW 9.94A.680). The appellate court therefore was in the position to determine if the record supported the trial court's decision. By contrast here, the trial court has exercised its discretion and it is for this court to determine if the court's decision was clearly erroneous, or if the sentence was clearly too lenient.

Further, *Fuller* is distinguishable from this case in that in *Fuller*, all but one month of his sentence was a deadly weapon enhancement. The *Fuller* court held that "Under RCW 9.94A.310(4)(e), the court has no discretion and must impose total confinement for the deadly weapon enhancement." 89 Wn. App. at 142. This was required, the court reasoned, because the language of the enhancement statute itself is to be applied "[n]otwithstanding any other provision of law." 89 Wn. App. at 141. It was this language, the court reasoned, that put the firearm enhancement above the language of the exceptional sentence statute. By contrast, the home detention statute at RCW 9.94A.734 does not take precedence over other sentencing provisions. By *Fuller's* reasoning, absent express language to the contrary, the exceptional sentencing provision in RCW 9.94A.535 controls.

The trial court's sentence of twelve months to be served through electronic home monitoring must be affirmed because: (1) the trial court's

reasons for imposing the exceptional sentence are supported by the record;
(2) as a matter of law, those reasons justify an exceptional sentence; or (3)
the sentence imposed is not clearly too lenient.

IV. CONCLUSION

The trial court properly exercised its discretion in this case by imposing an exceptional sentence of twelve months of home detention for Mr. Berlanga. The record supports the trial court's findings that Mr. Berlanga has "a medical condition (liver failure and other gastrointestinal problems)" and "continuing need for multiple surgeries over an extended period of time." Further, the trial court did not abuse its discretion in finding the presence of a mitigating factor that justified an exceptional sentence. That exceptional sentence was not clearly too lenient. Therefore, Mr. Berlanga asks that this court affirm the trial court's sentence.

DATED: October 29, 2007

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CERTIFICATE OF SERVICE

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