

NO. 36598-7-II

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,

v.

JOSEPH BERLANGA, Respondent.

RESPONDENT'S SUPPLEMENTAL 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

The facts of the case are set forth in Respondent's Brief and are hereby incorporated by reference.

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.

Respondent's brief sets out in full Mr. Berlanga's argument that the trial court did not abuse its discretion in setting an exceptional sentence downward for Mr. Berlanga and ordering that he serve his sentence via electronic home monitoring.

The Court has directed the parties to brief "the effect of RCW 9.94A.734(1)(c) on a trial court's discretion when imposing an exceptional sentence." The answer to this question is that the exceptional sentence

provision trumps all other provisions of the SRA, unless the legislature specifically excludes that provision from consideration for an exceptional sentence.

In this case, the trial court 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 record supports the findings of fact 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.

The SRA provides that a court may depart from the standard sentencing guidelines when:

The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

RCW 9.94A.535. RCW 9.94A.010 indicates that the purposes of the SRA are:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

(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 him 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.

(Emphasis Added). In this case, the trial court departed from the standard guidelines because of Mr. Berlanga's need for frequent, expensive treatment and the fact that jail or prison, for him, was a virtual death sentence. Therefore, the court ordered an exceptional sentence downward of one day less than the minimum sentence and ordered that the sentence be served via electronic home monitoring. This modified sentence served all of the SRA purposes highlighted above.

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. RCW 9.94A.535 unambiguously sets out the grounds for departure from the standard guidelines. 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.

When the Legislature intends for another provision of the SRA to trump 9.94A.535, it knows how to say it. For example, the deadly weapon enhancement provision, RCW 9.94A.310(4)(e), provides:

Notwithstanding any other provision of law, any and all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provision.

(Emphasis added). Nothing in the language of RCW 9.94A.734(1) indicates that it is anything other than the explanation of the ordinary rule. As such, RCW 9.94A.535 sets out the exception to that ordinary rule.

Thus, under RCW 9.94A.535, when reviewing this court's imposition of an exceptional sentence, the Appeals 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). 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. Having Mr. Berlanga 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 and it serves the cause of justice.

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. Mr. Berlanga asks that this court affirm the trial court's sentence.

DATED: March 19, 2008

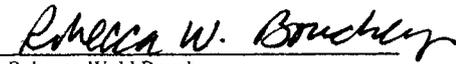
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CERTIFICATE OF SERVICE

I certify that on March 19, 2008, I caused a true and correct copy of this Respondent's Supplemental Brief to be served on the following via prepaid first class mail:

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