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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON NO. 37471-4-II
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DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN TOLBERT HOBBS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Roger Bennett, Judge

APPELLANT'S OPENING BRIEF

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82-11-1-08
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that there was a factual basis to support the aggravating factor of rapid recidivism.

2. The trial court erred in imposing an exceptional sentence.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. The jury found facts to support an aggravating sentencing factor in that John Hobbs committed his current offense after having been recently incarcerated. Before the trial court can rely on this factor to impose an exceptional sentence, it must find that the recent incarceration is tantamount to rapid recidivism. When the State failed to produce evidence that Mr. Hobbs was a rapid recidivist, did the trial court improperly impose an exceptional sentence?

C. STATEMENT OF THE CASE

1. Procedural Facts

John Tolbert Hobbs was charged by an amended information with two crimes: possession of a stolen motor vehicle¹

¹ RCW 9A.56.068

(count I) and driving on a suspended license in the third degree² (count II). CP-4. The amended information also listed an aggravating factor that Mr. Hobbs committed the current offense shortly after being released from incarceration. CP 3.

Prior to taking trial testimony, the court heard a CrR 3.5 hearing. 2RP 72-86. At the hearing, Mr. Hobbs did not challenge the admissibility of the statements the State sought to offer at trial. 2RP 85. Findings of Fact and Conclusion of Law on the hearing were entered. CP 132-34.

Mr. Hobbs did not testify at his jury trial held on February 13, 2008. 2RP³ 188.

The jury found Mr. Hobbs guilty on both charges.

In a bifurcated trial, and after the jury had returned its guilty verdicts, the State presented testimony from a probation officer to support the recent incarceration aggravating sentencing factor it specified on the amended information.⁴ After the testimony, the jury was asked, by special interrogatory, to unanimously respond to

² RCW 46.20.342(1)(c)

³ There are three volumes of verbatim which are referenced in Appellant's Brief as follows:

“1RP” – contains volumes I-VII (all pre-trial hearings)

“2RP” – volume VIII (trial)

“3RP” – volume IX (sentencing)

⁴ RCW 9.94A.525(3)(t)

the following question: "Did the defendant commit the offense shortly after being released from incarceration?" CP 42. The jury returned the special interrogatory with the answer, "Yes." CP 42.

Prior to sentencing, the State submitted a sentencing memorandum. CP 45-131. Included in the memorandum were documents supporting each of Mr. Hobbs' prior offenses. CP 45-131. One prior offense was from Washington. CP 92-111. The remaining offenses were from Oregon. CP 45-91, 112-31. Mr. Hobbs did not object to the inclusion of the Oregon convictions in his offender score. 3RP 256-57. The trial court concluded that Mr. Hobbs' offender score was 9 and his standard range on the felony was 43-57 months. 3RP 252-53, 260. The court sentenced Mr. Hobbs to a 50-month midpoint of the standard range sentence and added 8 more months, exclusively for the aggravating factor, for a total of 58 months. 3RP 260; 141-143. On the suspended license charge, the court imposed a maximum sentence of 90 days concurrent with the felony. 3RP 261; CP 136.

Hobbs filed a timely notice of appeal challenging all aspects of his judgment and sentence. CP 156-173.

2. Trial Facts.

On August 28, 2007, Avery Camacho (hereafter "Avery") worked the swing shift at a Vancouver Blockbuster store. 2RP 100. At the end of his work day, he tried to return to his truck that he had left parked nearby, but found that the truck was missing. 2RP 102-05. He had left the locked truck in the parking lot where he typically parked. 2RP 103. No one had permission from Avery to take the truck. 2RP 112-13. Avery called the police the next day to report the truck stolen. 2RP 106. Although Avery's parents held the title to the truck, they had given the truck to Avery a year earlier. 2RP 125, 139. The police didn't take an actual stolen vehicle report until September 5. 2RP 129.

About a week later, on September 14, Avery's mother, Denise Camacho, was driving to work in Vancouver when she found herself behind Avery's truck. 2RP 141-42. Mrs. Camacho called 911 and with the assistance of a dispatcher, guided the police to the truck. 2RP 142-49. The truck pulled over when the police pulled in behind it. 2RP 91. Mr. Hobbs was the driver and only occupant of the truck. Mr. Hobbs told the police that he recently purchased the truck from a Hispanic guy whose name he did not know, that he did not have a bill of sale, and that he would

not have driven the truck if he had known it was stolen. 2RP 93. Hobbs' privilege to drive was suspended in the third degree. 2RP 94-96.⁵

The cab of the truck held Avery's personal items such as pay stubs and a backpack containing CDs. 2RP 115. Wiring underneath the truck's steering column had been pulled down. 2RP 113.

3. Bifurcated trial for sentencing facts.

To prove the aggravating factor of recent incarceration, the State called Mr. Hobbs' former Department of Corrections (DOC) probation officer, Jerrie Bennett. Ms. Bennett supervised Mr. Hobbs on an unspecified felony conviction from an Oregon interstate transfer and on a Washington misdemeanor. 2RP 240. On April 30, 2007, she arrested Mr. Hobbs for violating unspecified terms of his probation. 2RP 241. After a hearing on May 17, Mr. Hobbs was sanctioned to 34 days with credit for time served. 2RP 242. After serving that sentence, Mr. Hobbs was transferred to Klickitat County for non-payment on a taking a motor vehicle

⁵ Mr. Hobbs actually stipulated to a certified abstract of his driving record as Exhibit 4. I have not designated the exhibit for this Court's review but I reviewed it. It does confirm Mr. Hobbs' driving status as suspended in the third degree.

without owner's permission conviction. 2RP 241-42. He was released on July 6. 2RP 243.

D. ARGUMENT

- 1. The mere fact that Mr. Hobbs committed the current offense shortly after being released from incarceration does not, by itself, constitute a substantial and compelling reason justifying imposition of an exceptional sentence upward. The trial court must make findings as to why this fact is sufficiently substantial and compelling to warrant imposing an exceptional sentence. And in this, the trial court failed.**

Under RCW 9.94A.535(3)(t), *Aggravating Circumstances – Considered by a Jury – Imposed by the Court*, a court may impose an aggravated sentence where:

[t]he defendant committed the current offense shortly after being released from incarceration.

This aggravating factor requires that two things must be found: the defendant had been released from incarceration, and the current offense was committed shortly thereafter. In addition, the sentencing judge has the responsibility to determine whether the facts alleged and found are sufficiently substantial and compelling to warrant imposing an exceptional sentence. See *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 2538 n. 8, 159 L. Ed 2d 403 (2004). RCW 9.94A.535; RCW 9.94A.537(5).

An exceptional sentence above or below the standard range may be imposed for substantial and compelling reasons. RCW 9.94A.535; RCW 9.94A.537(5); *State v. Jackson*, 150 Wn.2d 251, 273, 76 P.3d 217 (2003). Washington courts may consider an exclusive statutory list of aggravating factors that support an exceptional sentence upward, including a reason such as committing the current offense shortly after being released from incarceration. RCW 9.94A.535(3)(t). Generally, “[a]n exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the same statutory category.” *State v. Pennington*, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989). An exceptional sentence will be reversed on appeal if the reviewing court finds that the reasons relied upon by the sentencing court are not supported by the record under a clearly erroneous standard; that these reasons do not justify an exceptional sentence under a de novo standard of review; or that the sentence is clearly excessive or too lenient under an abuse of discretion standard. *Jackson*, 150 Wn.2d at 273-74; *Pennington*, 112 Wn.2d at 608; RCW 9.94A.585(4).

Here, the trial court made the following written findings of fact and conclusions of law relevant to this aggravating factor:

I. FINDINGS OF FACT

The jury returned a "Yes" verdict on the enhancement of committing the offense shortly after the release from incarceration under RCW 9.94A.535(3)(t), specifically being released on July 6, 2007, with the offense occurring 70 days later on September 14, 2007.

II. CONCLUSIONS OF LAW

An exceptional sentence is appropriate in the case and the court imposes one.

CP 155. The trial court did nothing to bolster its findings through anything it said at sentencing. In fact, the court said nothing about the aggravating factor at sentencing other than to speculate that the term "recent" might be vague. 3RP 258. The court specified no substantial and compelling reasons to base an exceptional sentence on this factor. Nor did it cite any circumstance distinguishing this crime of possession of a stolen vehicle from other crimes of the same statutory category. That the court imposed a 50-month sentence, the middle of the standard range of 43-57 months, and then added an extra 8 months as the exceptional portion, confirms that the court saw nothing exceptional about Mr. Hobbs' crime.

“Recent incarceration” is simply another term for “rapid recidivism.” *State v. Saltz*, 137 Wn. App. 576, 584, 154 P.3d 282 (2007). To establish this aggravating factor, a sentencing court must take into account, “the various similar offenses and the heightened harm or culpability that pattern indicates.” *State v. Hughes*, 154 Wn.2d 118, 142, 110 P.3d 192 (2005), *overruled in part on other grounds by Washington v. Recuenco*, 548 U.S. 2112, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

“Rapid recidivism” has been recognized as a valid aggravating factor in at least three cases: *State v. Butler*, 75 Wn. App. 47, 53-54, 876 P.2d 481 (1994) (defendant committed robbery just 12 hours after being released from serving a robbery sentence); *State v. Hughes*, 154 Wn.2d 118 (flagrant disregard for the law shown by commission of the exact crime against the same victim less than three months from release; and *State v. Saltz*, 137 Wn. App. 576 (similar nature of the crime against the same victim occurring one month after release).

The facts of Mr. Hobbs’ case stand in stark contrast to the facts of *Butler*, *Hughes*, and *Saltz*. Prior to his September 14 arrest for the current offense, Mr. Hobbs was being supervised on a felony interstate transfer from Oregon and on a Washington

misdemeanor by probation officer Jerrie Bennett. On either or both matters – it is unclear from the testimony – Mr. Hobbs was obliged to comply with certain unspecified conditions of probations, some of which might have been ordered by the sentencing court and some of which were imposed by the Department of Corrections. On April 30, Ms Bennett arrested Mr. Hobbs for violating unspecified conditions and he was taken into custody. Later, on May 17, a hearing officer found Mr. Hobbs in violation of unspecified conditions, and released him with credit for time served. Mr. Hobbs was immediately transferred to Klickitat County for a non-DOC, non-payment case. On July 6, Mr. Hobbs was released from Klickitat County. Other than being told that Mr. Hobbs' case in Klickitat County was a "payment" case, there was no information as to why Mr. Hobbs was incarcerated there. Given the information provided, it is well within reason that Mr. Hobbs was incarcerated only and ultimately not actually punished for anything. These facts are hardly the type of recidivism that met with approval in *Butler*, *Hughes*, and *Saltz*.

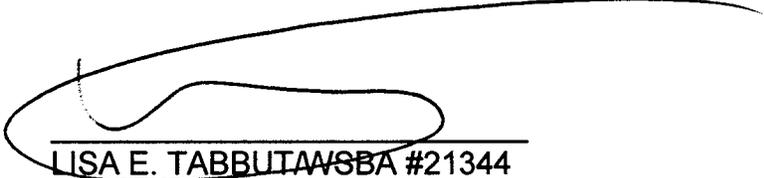
Although a jury must evaluate the credibility of witnesses and evidence and decide disputed issues of fact, it is the responsibility of the sentencing judge to determine whether facts

alleged and found are sufficiently substantial and compelling to warrant imposing an exceptional sentence. See *Blakely*, 124 S. Ct. at 2538 n. 8; RCW 9.94A.537(5). Under the facts of Mr. Hobbs' case, the trial court failed to make any finding why the facts were sufficiently substantial and compelling to warrant imposing an exceptional sentence.

E. CONCLUSION

This Court must reverse Mr. Hobbs's sentence and remand for imposition of the 50-month standard range sentence.

Respectfully submitted this 11th day of September, 2008



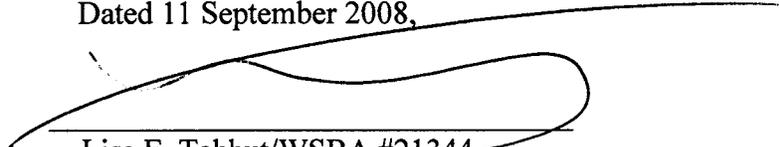
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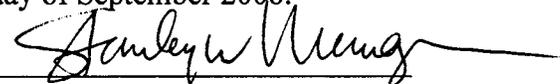
and that said envelope contained the following:

- (1) APPELLANT'S BRIEF
- (2) AFFIDAVIT OF MAILING (PA only)

Dated 11 September 2008,


 Lisa E. Tabbut/WSBA #21344
 Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 11th day of September 2008.


 Stanley W. Munger
 Notary Public in and for the
 State of Washington
 Residing at Longview, WA 98632
 My commission expires 05/24/12

