

PILSE
COURT OF APPEALS
DIVISION II

NO. 38103-6-II

CS DEC 23 PM 12: 23

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

STATE OF WASHINGTON
BY CM
DEPUTY

STATE OF WASHINGTON,

Appellants,

vs.

YAUNNA L. STATELY,

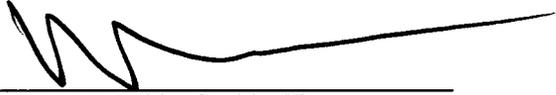
Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY

BRIEF OF RESPONDENT

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STATEMENT OF CASE

Procedural History

Ms. Stately was originally charged by information with Vehicular Homicide while under the influence of intoxicating liquor. The State later amended the information and charged Ms. Stately with Vehicular Homicide by disregard for the safety of others. ("Disregard"). RCW 46.61.520(1)(c). Ms. Stately pled guilty to the amended information on April 14, 2008. She was sentenced on June 30, 2008. Both parties submitted presentence reports to the trial court. (See *Sent. Report of Def. Ex. 1.*) Findings of Facts and Conclusions of Law were entered on July 28, 2008.

The trial court found that Vehicular Homicide by Disregard, under the "terminology" of the "violent offense" definition, is not a violent offense. RCW 9.94A.030(54). *Rec. of Proceedings*, June 30, 2008, at 7-10. Accordingly, the court sentenced Ms. Stately as a First Time Offender. (See *Find. of Fact Concl. of Law Ex. 2.*)

The court also entered, in the alternative, an exceptional sentence below the standard range. *Rec. of Proceedings*, June 30, 2008, at 7, 10. Mitigating circumstances were stated on the record June 30, 2008. Written findings were entered on July 28, 2008.

FACTS AND CIRCUMSTANCES

The sterile facts cited by the State, were before the court and are in the State's declaration. However, at sentencing, the court had before it other facts and circumstances it considered.

Namely, Ms. Stately and the her friend and passenger, (the victim) Melissa Colean, were 17 at the time of the incident. Both had been drinking. Both decided that Ms. Stately was in a better position to drive Melissa's vehicle. A letter from Melissa's grandmother, who was raising her, was submitted to the court at sentencing. *Rec. of Proceedings*, June 23, 2008, at 1-2. The court considered the circumstances of the crime, as well as, Melissa's family's wish that Ms. Stately not be prosecuted when sentencing, in the alternative, below the standard range. *Rec. of Proceedings*, June 23, 2008, at 7.

ISSUE(S) PRESENTED FOR REVIEW

1. **Whether Vehicular Homicide committed by disregard for the safety of others is a violent offense.**
2. **If Vehicular Homicide committed by disregard for the safety of others is a violent offense, did the court state valid mitigating factors to go below the standard sentence range.**

ARGUMENT

1. **Vehicular Homicide committed by disregard for the safety of others is not a violent offense.**
 - a) Two of the three ways to commit the crime Vehicular Homicide constitute violent offenses; the third does not.

Vehicular Homicide by Disregard is not a violent offense. Although there is a conflict with the definition of "violent offense" in

that class A offenses are included in the definition, 9.94A.030(54) expressly excludes Vehicular Homicide committed with the disregard for safety of others. To illustrate, section xiv of this statute states the two alternatives of Vehicular Homicide that are considered to be a violent offense:

“when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.62.502, or by the operation of any vehicle in a reckless manner.”

RCW 9.94A.030(54)(a)(xiv).

Changes have been made to the classification of Vehicular Homicide. As noted by the State Vehicular Homicide is no longer a class B offense. However had the intent been to include the disregard alternative in the definition of violent offense, the legislature would surely have removed (a)(xiv). In other words, by simply stating that any class A felony is violent offense, the legislature, could have accomplished the result sought by the State; i.e., that all the alternatives are violent offenses. Because Vehicular Homicide by Disregard is not listed along with the other alternatives in 9.94A.030(54)(a)(xiv), it is expressly excluded. This alternative is therefore not a violent offense.

Few Washington cases have addressed the above stated issue.

A footnote in *State v. Ferguson*, 76 Wash. App. 560, 565, 886 P.2d 1164 (1995) provides guidance. Although the *Ferguson* court addressed whether vehicular homicide by disregard could be a lesser

included offense of vehicular homicide, the court noted in footnote 7 that:

“RCW 9.94A.320 provides that vehicular homicide by the DWI and recklessness means has a seriousness level of 8, but that vehicular homicide by disregard for the safety of others (aggravated negligence) has a seriousness level of 7. This difference results in a lower standard sentence range for the aggravated negligence means. See RCW 9.94A.310. Moreover, vehicular homicide by the DWI and reckless-ness means is a “violent” offense, but vehicular homicide by aggravated negligence is not. See RCW 9.94A.030(36). Thus, a person convicted of the aggravating negligence means is eligible for “first time offender” status, but a person convicted of the other two means is not. See RCW 9.94A.030(20)(a); RCW 9.94A.120(5).”

Ferguson, 76 Wash. App. at 565.

RCW 9.94A.320 has been recodified as RCW 9.94A.515. The seriousness level for Vehicular Homicide, by being under the influence of intoxicating liquor or any drug now has a seriousness level of 9. The seriousness level for Vehicular Homicide, by the operation of any vehicle in a reckless manner is 8 and the seriousness level for Vehicular Homicide, by disregard for the safety of others is still 7. It follows that this difference still results in a lower standard sentence range for vehicular homicide by disregard. When combined with the language still present in the definition of “violent offense,” vehicular homicide by disregard is not a violent offense.

Thus, while Vehicular Homicide is now a class A felony, the definition pertaining to the alternatives of Vehicular Homicide considered to be a violent offense has not changed. Therefore, Ms. Stately is eligible for first time offender status because she pleaded

guilty to Vehicular Homicide with disregard which has been and still is expressly excluded from the definition of RCW 9.94A.030(56)(a)(xiv).

The trial court correctly held that the language of RCW 9.94A.030(56) makes vehicular homicide by disregard is a nonviolent offense. It stated: "I am finding under the statute, I believe that it's a nonviolent offense under the terminology utilized." *Rep. of Proceedings*, June 30, 2008, at 8. The trial court further elaborated: "I believe under the terminology under that exceptional statute, that it is a nonviolent offense under that statutory narrow framework portion." *Id.* at 8-9. The court's ruling allowed for it to sentence Ms. Stately under the first time offender option found in RCW 9.94A.650.¹

2) If Vehicular Homicide by disregard for the safety of others is a violent offense, the court stated valid mitigating factors to go below the standard sentence range.

a) The court did not find age alone to be a mitigating factor.

The trial court, stated four mitigating factors for sentencing Ms. Stately below the standard sentencing range. Those mitigating factors are:

- i. The defendant's capacity to appreciate the wrongfulness of her conduct was significantly impaired, due to her age (under 18), at the time of the incident. RCW 9.94A.535(e).

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"In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentencing range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses." RCW 9.94A.650(2).

ii. The defendant's capacity to conform her conduct to the requirements of the law was significantly impaired, due to her age (under 18) at the time of the incident. RCW 9.94A.535(1)(e).

iv. The express desire of the victim's family that the defendant not be prosecuted. 9.94A.535(1).

iv. The defendant's lack of criminal history. 9.94A.535(1).

Find. of Facts Concl. of Law, July 28, 2008 (see attached).

Further, the court in its oral ruling of June 23, 2008 stated: "I believe that this is exceptional, and I am finding that, based on her previous history, her age, *circumstances of the crime*, the desires of the family of the victim, and with the discretion of the court." *Rep. of Proceedings*, June 23, 2008, at 7. (Emphasis added).

b) Mitigating factors i and ii are factors for which age is relevant and were properly applied by the trial court.

Although the Sentencing Reform Act (SRA) does not specifically list age as a statutory mitigating factor it does include a factor for which age is relevant. *State v. Ha'mim*, 132 Wash.2d 834, 846, 940 P.2d 633 (1997)(citing 9.94A.390 recodified as 9.94A.535). The court held that age would justify a downward departure from the standard range where the defendant's age significantly impaired his or her capacity to appreciate the wrongfulness of the criminal conduct or to conform his or her conduct to the requirements of the law. *Id.*

Notably, in *Ha'mim*, the trial court, in its findings, listed *only* the defendant's age as a mitigating factor. *Id.* at 838.² Here, the trial court considered not only Ms. Stately's age, but additional evidence and the circumstances of the crime. The court took all of this into account and applied it, at her sentencing, to the illustrative mitigating factors listed in RCW 9.94A.535 for which age is relevant. *Ha'mim*, at 846. The trial court did, in part, rely on age as a mitigating factor; however, it went further than the trial court in *Ha'mim*.

At sentencing, the trial court had before it Ms. Stately's age, evidence that she and her passenger had both been drinking, the decision that both decided Ms. Stately should drive, and the wishes of Melissa's family as the "circumstances of the crime." On these facts, the court held that both her capacity to appreciate the wrongfulness of her conduct and her capacity to conform her conduct to the requirements of the law were significantly impaired. As a result, the court found that age, when applied to these two illustrative factors, is related to the crime and Ms. Stately's culpability for the crime. *State v. Law*, 154 Wash.2d 85, 110 P.3d 717 (2005).

Contrary to the State's allegations, the trial court did not find age alone to be a mitigating factor.

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"The Court finds as a mitigating factor that the defendant is young, being only 18 years old at the time of this offense."

CONCLUSION

Vehicular Homicide by Disregard is expressly excluded from the definition of "violent offense". The trial court properly held that Vehicular Homicide by Disregard is a nonviolent offense when it sentenced Ms. Stately as a First Time Offender.

In the alternative, the court not rely on Ms. Stately's age alone when it sentenced her below the standard sentencing range. The mitigating factors were decided by the court after considering the evidence and circumstances of the case. Thus, the court properly he the mitigating factor of age when applied to the illustrative factors in RCW 9.94A.535 justified a downward departure from the standard range as Ms. Stately's age significantly impaired her capacity to appreciate the wrongfulness of the criminal conduct or to conform her conduct to the requirements of the law.

For the reasons stated above, this court should uphold the trial court's decision to sentence Ms. Stately as a First Time Offender or in the alternative uphold the court's decision to sentence Ms. Stately below the standard sentencing range.

Respectfully submitted,
HAGEN & ASSOCIATES, P.S.
Attorney for Respondent



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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY Ch
DEPUTY

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

STATE OF WASHINGTON,

NO. 38103-6-II

Appellant,

DECLARATION OF MAILING

vs.

YAUNNA L. STATELY,

Respondent.

I, Linda Barr, do hereby declare as follows:

That she is an assistant in the offices of HAGEN & ASSOCIATES, P.S., Attorneys at Law, 110 W. Market, Ste. 202, Aberdeen, Washington; that on December 22, 2008, she placed in the United States Mail at the Post Office in Aberdeen, Washington, postage prepaid, an envelope by first class mail, addressed to:

Washington State Court of Appeals
Division II
David Ponzoha, Court Clerk
950 Broadway, Suite 300
Tacoma, WA 98402-4454

and to:

Grays Harbor County Prosecutor
Gerald R. Fuller
102 W. Broadway, Room 102
Montesano, WA 98563

AFFIDAVIT OF MAILING - 1

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1 which envelopes contained Brief of Respondent.

2 I declare under penalty of perjury under the laws of the United States and the State
3 of Washington that the above is true and correct.

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AFFIDAVIT OF MAILING - 2

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