

COA NO. 39381-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DRAPER,

Appellant.

**FILED**

OCT 21 2009

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

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

The Honorable Richard Bosey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing an exceptional sentence.
2. The trial court erred in failing to enter written findings of fact and conclusions of law justifying an exceptional sentence, in violation of RCW 9.94A.535.
3. The trial court erred in failing to enter written findings of fact and conclusions of law after a bench trial, in violation of CrR 6.1(d).

Issues Pertaining to Assignments of Error

1. The trial judge identified the basis for the exceptional sentence as "unpunished criminal history for the current crime in the overall scheme of things." 3RP<sup>1</sup> 22. Must the sentence be vacated because the court failed to identify a statutory aggravating factor capable of lawfully supporting an exceptional sentence?
2. RCW 9.94A.535 requires entry of written findings of fact and conclusions of law justifying an exceptional sentence. Is remand required for entry of written findings and conclusions in support of the exceptional sentence?

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<sup>1</sup> The verbatim report of proceedings are identified as follows: 1RP - 2/27/09; 2RP - 3/2/09; 3RP - 5/8/09.

3. CrR 6.1(d) requires entry of written findings of fact and conclusions of law after a bench trial. Is remand required for entry of written findings and conclusions?

B. STATEMENT OF THE CASE

Michael Draper drove a woman to a hotel room, where Centralia police were conducting an undercover controlled buy of methamphetamine. 2RP 20-24, 28. Draper quickly drove away after police seized the woman in the entryway of the hotel room. 2RP 24-25. He weaved through traffic with police in pursuit and eventually crashed his car. 2RP 42-44. Draper jumped out and police apprehended him after a short chase. 2RP 44-45. After being charged with attempting to elude a pursuing police officer and possession of methamphetamine with intent to deliver, Draper did not appear for a scheduled court hearing. CP 40-42; 2RP 74-77. The State amended the information to include a charge of bail jumping. CP 33-34. Following a bench trial, the court acquitted Draper of the drug charge and convicted him on the eluding and bail jumping charges. 2RP 112. The court sentenced Draper to 29 months confinement on the eluding offense, 60 months on the bail jumping offense, and ordered both sentences to run consecutive to one another and concurrent with other offenses for which he was convicted under separate cause numbers. CP 17-18; 3RP 17-22.

C. ARGUMENT

1. THE TRIAL COURT DID NOT IDENTIFY A VALID AGGRAVATING FACTOR TO JUSTIFY IMPOSITION OF AN EXCEPTIONAL SENTENCE.

The trial court did not articulate a proper basis for imposing an exceptional sentence on Draper. The exceptional sentence must therefore be vacated and the case remanded for resentencing to a non-exceptional sentence.

The trial court stated the sentences under both counts for which Draper was convicted under this cause number would run consecutive to one another. 3RP 20. This is an exceptional sentence. RCW 9.94A.535; RCW 9.94A.589(1)(a).

At the sentencing hearing, defense counsel asked the basis for the consecutive sentence under cause number 223-8. 3RP 22. The prosecutor said "Essentially unpunished criminal history for current crimes." 3RP 22. The trial judge then said "It's unpunished criminal history for the current crime in the overall scheme of things." 3RP 22. The judgment and sentence does not indicate any reason why an exceptional sentence was imposed. CP 15, 18. In fact, the judgment and sentence, in running the sentences of both counts consecutive to one another, did not show any recognition that such a sentence was exceptional. CP 15.

The Legislature has identified four aggravating factors that may be considered by the trial court and used to impose an exceptional sentence without a jury finding that the factor exists:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

RCW 9.94A.535(2).

The trial judge did not identify any of these aggravating factors to impose an exceptional sentence in this case. The judge stated the basis for the sentence was "unpunished criminal history for the current crime in the overall scheme of things," but there is no such aggravating factor. "Unpunished criminal history" is not the same as the unpunished "current offenses" identified as an aggravator in RCW 9.94A.535(2)(c). The State

gave pre-trial notice that it sought an exceptional sentence under RCW 9.94A.535(2)(c), but the trial court did not identify that statutory provision to justify the exceptional sentence. Indeed, the prosecutor seemed to be under the misapprehension that a bail jumping conviction runs consecutive to the underlying conviction as a matter of law, without regard to whether aggravating factors support an exceptional sentence. 3RP 5.

To the extent the judge's remark about "unpunished criminal history" is an oblique reference to the unscored "criminal history" in RCW 9.94A.535(2)(b) or criminal history omitted from the offender score in 9.94A.535(2)(d), those factors are inapplicable because there is nothing in the record to show Draper has any criminal history left unscored or omitted from the offender score.

Draper's exceptional sentence cannot stand. The remedy is remand for resentencing within the standard range because the aggravating factor identified by trial court is insufficient to justify an exceptional sentence. State v. Ha'mim, 132 Wn.2d 834, 847, 940 P.2d 633 (1997).

2. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS AND CONCLUSIONS JUSTIFYING AN EXCEPTIONAL SENTENCE.

Remand is required even if the trial court accurately identified an appropriate aggravating factor. The trial court must enter written findings of fact and conclusions of law supporting an exceptional sentence. Its

failure to do so here necessitates remand for entry of written findings and conclusions.

Consecutive sentences for two or more current, non-violent offenses are exceptional sentences and "may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.535; RCW 9.94A.589(1)(a); In re Pers. Restraint of VanDelft, 158 Wn.2d 731, 738-39, 147 P.3d 573 (2006). RCW 9.94A.535 requires that "[w]henver a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law."

"An exceptional sentence may be imposed only where the trial court finds substantial and compelling reasons, set forth in written findings and conclusions, which support an exceptional sentence." State v. Gore, 143 Wn.2d 288, 315, 21 P.3d 262 (2001). A trial court imposing an exceptional sentence has an independent statutory duty to make findings that show the sentence imposed is consistent with the goals of the Sentencing Reform Act. In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 300, 979 P.2d 417 (1999).

The fact that leaving some current offenses unpunished may be a substantial and compelling reason justifying an exceptional sentence does not relieve the sentencing court of its duty to enter findings of fact and

conclusions of law explaining the reasons for the sentence. See Breedlove, 138 Wn.2d at 310 ("The fact that a stipulation may be a substantial and compelling reason justifying an exceptional sentence does not relieve the sentencing court of its duty to enter findings of fact and conclusions of law which explain the reasons for the sentence."). RCW 9.94A.535 "requires a trial court to enter written findings of fact and conclusions of law to justify its imposition of *any* sentence outside the standard range. The statutory language is clear and the trial court must enter findings and conclusions justifying its exceptional sentence." State v. Hale, 146 Wn. App. 299, 306, 189 P.3d 829 (2008).

"Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range." Breedlove, 138 Wn.2d at 311. Furthermore, "[t]he purpose of the requirement of findings and conclusions is to insure the trial judge has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made." In re Det. of LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). Sufficiently detailed findings give the reviewing court some basis for distinguishing between well-reasoned conclusions

arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts and their application to the law. Nelbro Packing Co. v. Baypack Fisheries, L.L.C., 101 Wn. App. 517, 532-33, 6 P.3d 22 (2000) (addressing findings required for certification of final judgment under CR 54(b)).

The remedy for a trial court's failure to issue findings of fact and conclusions of law is remand for entry of findings and conclusions supporting the exceptional sentence. Breedlove, 138 Wn.2d at 311, 313.

3. THE COURT ERRED IN FAILING TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE BENCH TRIAL.

CrR 6.1(d) requires the trial court to enter written findings of fact and conclusions of law after a bench trial. State v. Head, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). The case must be remanded to the trial court for entry of written findings and conclusions.

Written findings are essential to permit meaningful and accurate appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); State v. Mewes, 84 Wn. App. 620, 621-22, 929 P.2d 505 (1997). Equally important, written findings "allow the appealing defendant to know precisely what is required in order to prevail on appeal." State v. Smith, 68 Wn. App. 201, 209, 842 P.2d 494 (1992). "A court's oral

opinion is not a finding of fact." State v. Hescock, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). Rather, an oral opinion is no more than a verbal expression of the court's informal opinion at the time rendered and "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." Head, 136 Wn.2d at 622 (quoting State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)). The court's factual findings must separately address each count and adequately identify the factual basis relied upon to support each element of each count. Head, 136 Wn.2d at 623. "An appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." Id. at 624. Remand for entry of written findings of fact and conclusions of law as required by CrR 6.1(d) is the remedy for an initial failure to make written findings. Id. at 623.

D. CONCLUSION

For the reasons stated, this Court should reverse the exceptional sentence and remand for entry of a sentence within the standard range. In the event this Court declines to do so, then the case should be remanded for entry of written findings and conclusions justifying the exceptional sentence and conviction.

DATED this 16<sup>th</sup> day of October 2009.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 39381-6-II
	)	
MICHAEL DRAPER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16<sup>TH</sup> DAY OF OCTOBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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x *Patrick Mayovsky*

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