

WASHINGTON STATE COURT OF APPEALS, DIVISION II

State of Washington
Respondent

v.

MATTHEW V. PRICE

Appellant

41612-3-II

On Appeal from the Superior Court of Grays Harbor County

10-1-00301-3

The Honorable Gordon Godfrey

REPLY BRIEF

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II. ARGUMENTS IN REPLY

1. The Court should strike those portions of the Respondent's Brief that are not supported with citations to sworn testimony.
2. The State failed to prove that Mr. Price's statements in the Jefferson County Jail were not obtained in violation of the Fifth Amendment and Miranda.
3. The court violated Double Jeopardy principles and erroneously applied the burglary anti-merger statute in convicting Appellant for burglary with intent to commit both theft and possession of the stolen goods.
4. The evidence was insufficient to prove possession of stolen property.
5. The sentencing court misinterpreted the same criminal conduct statute.
6. The State failed to prove the existence of prior criminal history.
7. The sentencing court violated the Sixth Amendment and the Sentencing Reform Act by imposing an exceptional sentence based solely on an independent, non-jury finding that unscored misdemeanors rendered the standard range clearly too lenient.
8. The sentencing court abused its discretion in refusing to consider a DOSA sentencing alternative.
9. The sentencing court lacked jurisdiction to impose an exceptional sentence because the State failed to provide pretrial notice of its intention to seek an exceptional sentence as required by the Sentencing Reform Act.

III. SUMMARY OF THE FACTS

In the small hours of July 24, 2010, Tony's Short Stop, a Shell station and convenience store in Montesano, Washington, was burglarized. RP 35. An individual named Michael Simpson broke in and stole around \$3,000 comprising mainly scratch lottery tickets and cigarettes. RP 35, 150, 152.

Appellant Matthew V. Price also was charged and tried separately to a jury for second degree burglary and second degree possession of stolen property. The State alleged that Price, either as a principal or as Simpson's accomplice, entered the store unlawfully with intent to commit theft in violation of RCW 9A.52.030(1) and RCW 9A.08.020. Count 1, CP 3. In addition, the State charged Price, either as a principal or as Simpson's accomplice, with possessing stolen property worth more than \$750, contrary to RCW 9A.56.160(1)(a) and RCW 9A.08.020. Count 2, CP 3-4.

Price admitted being present but claimed he tried repeatedly to talk Simpson out of committing burglary. RP 113, 115, 117. He denied entering the store or actively participating in the crime. Viewing the evidence and reasonable inferences in favor of the conviction, however, the jury could have found either that Price acted as a lookout while Simpson did the burglary as sole principal, or that Price was one of two

figures caught on surveillance video inside the store during the burglary and was therefore a principal. RP 86, 150.

Price argued unsuccessfully that the burglary and possession of stolen property charges merged for double jeopardy purposes and that the burglary anti-merger statute did not apply. RP 23; SRP 2-3.¹

Alternatively, he asserted that the burglary and possession constituted the same criminal conduct for sentencing purposes. SRP 2.

Price admitted that, after the burglary and theft were completed, he accepted a small amount of lottery tickets and cigarettes from Simpson in payment of a \$40 debt. RP 122. He asked the jury to convict him solely of 3rd degree possession of stolen property, a gross misdemeanor. (RCW 9A.56.170(1) & (2). RP 166.

The jury was instructed that mere presence and knowledge of criminal activity were not enough for conviction as an accomplice. Instruction 4, CP 59. They were also instructed that second degree possession of stolen property necessarily includes third degree possession of stolen property as a lesser included offense. Instruction 16, CP 63.

The jury found Price guilty of second degree burglary and second degree possession of stolen property. CP 69-70.

¹ SRP denotes the Sentencing transcript.

At sentencing, Price asked to be considered for a DOSA alternative sentence because he had committed his crimes while under the influence of methamphetamine. SRP 2, 4. The court categorically refused to discuss DOSA. SRP 3.

The State claimed, with no supporting evidence, that Price had a significant prior criminal history, including numerous misdemeanors. The court calculated Price's offender score as 5 on Count 1 and 4 on Count 2. Accordingly, the standard range was 17 to 22 months on Count 1 and 3-8 months on Count 2. CP 97.

Besides accepting the State's unsupported allegations regarding criminal history, the court made an independent finding that unscored misdemeanors rendered the standard range sentence "clearly too lenient." CP 97; SRP 7. The court lamented the passing of "the good old days" when Price's misdemeanor record would have qualified him as a habitual criminal, "and you'd have been doing life. Man, you'd have been doing so many lives by now you would have never got out." SRP 6-7.

The court also expressed dismay that Price would be eligible for what the judge called the "Blue Light Special," whereby the Legislature has empowered the Department of Corrections (DOC) to grant up to fifty

percent earned release time.² “You know, he’ll be out before you get the Court of Appeal’s decision back.” SRP 7.

Accordingly, the court imposed concurrent exceptional sentences of five years on both Counts. CP 97; SRP 7.

IV. **ARGUMENT**

1. ARGUMENT ON APPEAL MUST BE SUPPORTED BY CITATION TO SWORN TESTIMONY, NOT PHOTOGRAPHS OR VIDEO.

As a preliminary matter, the Respondent’s Brief includes several statement of alleged facts supported solely by reference to trial exhibits without citation to supporting sworn testimony. *See*, citations to exhibit 37 at Brief of Respondent (BR) 1; citations to exhibits 17, 18, 22, 26, 28, 30, 32, 35 at BR 3. The State asks this Court to view videos and photographs and to conclude that each exhibit portrays what the State claims it portrays. But this is the exclusive province of the jury.

Documents, photographs, and videos must be authenticated. ER 901(a). One method of authentication is by the testimony of a witness with knowledge that the photograph or video shows what the State claims it shows. ER 901(b)(1). Citing to an exhibit on appeal instead of the related sworn testimony puts this Court in the position of making findings

² RCW 9.94A.729(3)(c).

of fact, contrary to well settled law. *See, e.g., Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010) (Appellate courts do not find facts.)

The Court should disregard the exhibits.

2. THE STATE DID NOT MEET ITS BURDEN TO PROVE PRICE'S CUSTODIAL STATEMENTS WERE ADMISSIBLE.

Price moved to suppress statements he made to the Montesano police while he was incarcerated in the Jefferson County Jail on an unrelated matter. At the CrR 3.5 hearing, the State failed to establish that the statements to Montesano officers were not tainted by prior Miranda violations by Jefferson County personnel. It was error for the court to neglect to include in its Miranda inquiry the circumstances of Price's custody from the outset.

Wash. Const. art. 1, § 9 provides that “[n]o person shall be compelled in any criminal case to give evidence against himself[.]” This constitutional guarantee receives the same interpretation that the United States Supreme Court gives the Fifth Amendment. *State v. Gocken*, 127 Wn.2d 95, 105, 107, 896 P.2d 1267 (1995). The State bears the burden of proving by a preponderance of the evidence that a defendant's confession was voluntary. *State v Braun*, 82 Wn. 2d 157, 162, 509 Pd 742 (1973). Washington courts “liberally construe the right against self-incrimination.”

State v. Easter, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996). The standard of proof to establish a knowing and intelligent waiver of the right to remain silent is rigorous. *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004).

The State argues it was sufficient to show that Montesano officers recited *Miranda* warnings, and that this shifted the burden to Price to prove that the Fifth Amendment was compromised before the Montesano officers arrived. BR 4. This is not the test. If a suspect is in custody, self-incriminating statements are presumed to be involuntary and to violate the Fifth Amendment, until the State shows otherwise. *State v. Earls*, 116 Wn.2d 364, 378-79, 805 P.2d 211 (1991). The burden is on the State, not the accused, to demonstrate not only that the police fully advised the suspect of his rights and that he understood those rights, but also that he waived those rights knowingly, intelligently and voluntarily. *State v. Reuben*, 62 Wn. App. 620, 625, 814 P.2d 1177, *cert denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991). The State must prove the voluntariness of the waiver by a preponderance of the evidence. *Earls*, 116 Wn.2d at 379.

Here, the State could not meet this burden without at least a superficial inquiry as to what transpired before the Montesano officers

arrived at the Jefferson County Jail. Instead of presuming that Price's statements were involuntary until proven otherwise, the court presumed that nothing of Fifth Amendment significance had happened before the Montesano interrogation. The State simply did not bother to inquire.

This error cannot be deemed harmless unless the untainted evidence is so overwhelming as necessarily to lead to a finding of guilt. *State v. Ng*, 110 Wn.2d 32, 38, 750 P.2d 632 (1988), citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986); *see Reuben*, 62 Wn. App. at 626-27. Here, without Price's admissions, the untainted evidence consisted primarily of unsupported allegations by Simpson's girlfriend — who had an incentive to implicate Price because her plea deal included an agreement to testify against him. RP 68. This leaves ample room for reasonable doubt.

The remedy is to reverse and remand for a new trial. *See State v. Valdez*, 82 Wn. App. 294, 298, 917 P.2d 1098, *review denied*, 130 Wn.2d 1011, 928 P.2d 416 (1996).

3. CONVICTING PRICE OF POSSESSION OF STOLEN PROPERTY VIOLATED DOUBLE JEOPARDY.

Price was convicted and sentenced on Count I, unlawfully entering or remaining in a building with intent to commit theft, and also on Count

II, possession of the fruits of the theft. This was error. Multiple convictions can withstand a double jeopardy challenge only if each is a separate unit of prosecution, which may be an act or a course of conduct. *State v. Allen*, 150 Wn. App. 300, 313, 207 P.3d 483 (2009).

First, the State erroneously invokes the burglary anti-merger statute by mischaracterizing Price's argument. Price does not dispute that he could be convicted for both burglary and theft. Rather, he argues that theft and possessing the fruits of the theft are two separately punishable crimes to which the burglary anti-merger statute does not apply because theft and possession of the loot constitute a single unit of prosecution for double jeopardy analysis.

The number one consideration is whether the Legislature intended to authorize multiple punishments or whether the culpable conduct comprised a single unit of prosecution. *State v. Williams*, 156 Wn. App. 482, 493, 234 P.3d 1174, *review denied*, 245 P.3d 773 (2010). The test is simple: where the State necessarily proves one offense in order to prove another offense, the Legislature did not intend two convictions. The two acts constitute a single offense and are one and the same for double jeopardy purposes. *In re Personal Restraint Petition of Burchfield*, 111 Wn. App. 892, 46 P.3d 840 (2002).

In the course of committing theft of property, Price would necessarily have come into possession of the stolen property. Moreover, the State cannot prove property was stolen without proving theft. Thus, a burglary of which the underlying crime is the intent to commit theft is indistinguishable from a burglary with intent to possess stolen property.

This is consistent with the principle of statutory interpretation that offenses described in the same chapter of the RCW are presumed to constitute a single unit of prosecution. *State v. Calle*, 125 Wn.2d 769, 779-80, 888 P.2d 155 (1995). Here, the Legislature included theft and possession of stolen property in the same chapter of the RCW. RCW 9A.56.020(1)(a) (theft,) and RCW 9A.56.140(1) (possessing stolen property.) Therefore, the offenses presumptively merge — not with the burglary, but with each other — and the Legislature is presumed not to have intended separate punishment.

It is well-established by case law that a person convicted of theft cannot also be convicted of receiving or possessing the stolen goods. *State v. Melick*, 131 Wn. App. 835, 840-41, 129 P.3d 816 (2006); *State v. Hancock*, 44 Wn. App. 297, 300-01, 721 P.2d 1006 (1986). One person cannot both take from another and give possession to himself. *Melick*, 131 Wn. App. at 843. Accordingly, where both taking and possession are charged and two convictions result, the sentencing court should vacate one

of the convictions. *See Melick*, 131 Wn. App. at 843-44; *Hancock*, 44 Wn. App. at 301-02. “It is hornbook law that a thief cannot be charged with committing two offenses — that is, stealing and receiving the goods he has stolen. [T]aking and receiving ... constitute one transaction in life and, therefore, not two transactions in law.” *State v. Flint*, 4 Wn. App. 545, 547, 483 P.2d 170 (1971), quoting *Milanovich v. U.S.*, 365 U.S. 551, 558-59, 81 S. Ct. 728, 5 L. Ed. 2d 773 (1961), Frankfurter, J. dissenting.

The *Milanovich* rule applies equally to accomplices. One who participates in the taking either as a principal or an accomplice engages in a single transaction and therefore commits a single offense. Accordingly, the jury must be told that the taking and possession constitute a single transaction and only one crime. *Milanovich*, 365 U.S. at 555.

Lenity: Even if the intent of the Legislature with regard to the unit of prosecution were not clear, the Court would resolve the ambiguity in favor of Mr. Price to avoid allowing the State to turn a single transaction or course of conduct into multiple offenses. *State v. Leyda*, 157 Wn.2d 335, 343, 138 P.3d 610 (2006), citing *State v. Tvedt*, 153 Wn.2d 705, 710-11, 107 P.3d 728 (2005).

The remedy is to reverse both convictions, because the jury was not instructed that it could return a guilty verdict on one count or the other but not both. *See, Milanovich*, 365 U.S. at 555. Under the same

circumstances in *Milanovich*, the Court set aside both convictions because there was no way of knowing whether a properly instructed jury would have found the defendant guilty of one, both, or neither of the charged offenses. The same is true here. To presume either that the jury would have rendered a verdict of guilty on the greater offense or that the court would have imposed an exceptional sentence on that count alone would usurp the functions of both the jury and the sentencing judge. *Milanovich*, 365 U.S. at 555-556.

The Court should reverse Price's convictions for second degree burglary and second degree possession of stolen property and remand for a new trial.

4. THE BURGLARY AND POSSESSION WERE
SAME CRIMINAL CONDUCT FOR
SENTENCING PURPOSES.

The *Milanovich* principle is embodied in the SRA in the "same course of conduct" provisions of RCW 9.94A.400(1)(a). The State does not respond to Price's argument that, even if proved, the criminal acts constituted the same criminal conduct for sentencing purposes.

RCW 9.94A.400(1)(a) requires multiple current offenses that encompass the same criminal conduct to be counted as one crime in determining the offender score. *State v. Tili*, 139 Wn.2d 107, 118, 985 P.2d 365 (1999). In this context, "same criminal conduct" means "two or

more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.400(1)(a). This reflects the intent of the legislature to limit the consequences of multiple convictions arising out of the same criminal act. *Tili*, 139 Wn.2d at 119, quoting *Calle*, 125 Wn.2d at 781-82.

RCW 9.94A.400(1)(a) Trumps Burglary Anti-Merger. Even where the burglary anti-merger statute applies, the more specific sentencing statute, the court must apply RCW 9.94A.400(1)(a) to other crimes that encompass the same course of criminal conduct. *State v. Tresenriter*, 101 Wn. App. 486, 495-96, 4 P.3d 145 (2000), quoting *State v. Simonson*, 91 Wn. App. 874, 960 P.2d 955 (1998). This reflects the rule of statutory construction that the terms of a specific statute control over those of a conflicting general statute. *Tresenriter*, 101 Wn. App. at 495.

At minimum, the Court should remand with instructions to vacate the second degree possession of stolen property conviction and adjust Price’s offender score for the purpose of fixing the standard range.

5. THE EVIDENCE WAS INSUFFICIENT TO CONVICT PRICE OF SECOND DEGREE POSSESSION OF STOLEN PROPERTY.

The State does not address Mr. Price’s contention that the evidence was insufficient to sustain a conviction for possession of stolen property

even if the State could lawfully convict and punish him for that offense in addition to theft.

Of course, the Court will view the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Accordingly, solely for the purposes of his sufficiency challenge, Price admits the truth of the State's evidence and all inferences reasonably to be drawn from it.

The State sought to convict Price of possession of loot valued at over \$750 based solely on his having requested a share in the fruits of the crime after Simpson completed the theft and left the building. The State alleged that Price was an accomplice to Simpson because he aided or encouraged Simpson's possession of the stolen property when he asked Simpson or Ms. Stutesman to share some of the proceeds. But it is undisputed that this did not occur until after the burglary and theft were completed. Accordingly, even if true, this is insufficient to establish guilt as an accomplice. Accomplice liability attaches solely to conduct occurring before or during the crime, not after it is completed. *See, State v. Robinson*, 73 Wn. App. 851, 872 P.2d 43 (1994) (reversed, because when the principal got back into defendant's car after stealing a purse, the robbery was complete.)

The appropriate remedy is to dismiss with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). “Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

6. THE STATE CONCEDES IT FAILED TO PROVE PRICE’S CRIMINAL HISTORY.

The trial record contains no proof (by certified copies or otherwise) of any prior convictions, either felony or misdemeanor. And Price did not stipulate to any criminal history. The sentencing court imposed an exceptional sentence based on the State’s unsupported and unstipulated claim that Price had unscored misdemeanors.

The Respondent concedes that the State failed to meet its burden to prove the existence of prior offenses for sentencing purposes. BR 8-10. Either the State must produce a preponderance of evidence proving the existence of prior criminal history or the defendant must affirmatively acknowledge State’s summary of the alleged history. *State v. Hunley*, 161 Wn. App. 919, 927-28, 253 P.3d 448 (2011) (overruling RCW 9.94A.500(1)). Passive acquiescence to the State’s unsupported

allegations of criminal history does not waive the right to appeal an erroneous sentence. *Id.*

Here, Price did not acknowledge any criminal history, and the State did not provide certified copies of alleged prior judgments and sentences. Therefore, at minimum, the Court should remand for resentencing and entry of proof of criminal history.

7. THE STATE CONCEDES A BLAKELY³ VIOLATION.

The court made an independent determination that prior misdemeanors rendered Price's standard range "clearly too lenient." The State concedes this was error because only a jury can make that finding. BR 7-8. Unless the defendant consents to judicial fact-finding, a sentencing court's finding that a presumptive sentence is "too lenient" taints an exceptional sentence based on that factor. BR 10.

The "clearly too lenient" factor associated with unscored misdemeanors involves a factual determination that can be made only by a jury. *State v. Alvarado*, 164 Wn.2d 556, 566-67, 192 P.3d 345 (2008). It is a factual determination, rather than a legal one. *State v. Saltz*, 137 Wn. App. 576, 581, 154 P.3d 282 (2007). *See, also, State v. Hughes*, 154 Wn.2d 118, 137-40, 110 P.3d 192 (2005), abrogated on other grounds by

³ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Since the judge's exceptional sentencing finding is unsupported by any evidence or argument, this Court should vacate the exceptional sentence and remand for resentencing within the standard range.

8. THE STATE CONCEDES A DOSA ERROR.

Price asked the sentencing court to consider a DOSA sentencing alternative because he committed crimes when he was under the influence of methamphetamine. SPR 2-4. The State asserted that, if Price had a drug problem, the best treatment was a five-year "inpatient" stint in prison. CP 77, SRP 2. The court apparently agreed and summarily refused to consider DOSA. SRP 3. This was a manifest abuse of discretion.

A sentencing court's decision to deny a DOSA is reviewable in the context of a challenge to the procedure by which sentence was imposed. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005).

Where a defendant's drug addiction status is not clear, the SRA instructs the court to order a presentencing evaluation to determine the pros and cons of a DOSA sentence. RCW 9.94A.660(4) & (5). Every defendant is entitled to ask the sentencing court to consider a sentencing alternative for which he satisfies the preliminary eligibility requirements

and to have the judge actually consider his request. *Grayson*, 154 Wn.2d at 342. It is reversible error for the court to refuse categorically to grant an alternative sentence “under any circumstances.” *Id.* at 330.

Here, as in *Grayson*, the court abused its discretion by summarily refusing to exercise the discretion vested by statute and categorically refusing to consider whether a DOSA sentence was appropriate, even though Price clearly met the foundational requirements of RCW 9.94A.660(1). *Grayson*, 154 Wn.2d at 338.

Moreover, the evidence strongly suggests that Price was under the influence of some disorienting substance or condition during the events leading to the current charges. He had absolutely no sense of the passage of time, insisting that he wandered around for five hours and visited a Chevron station at 8:45 a.m. before finally leaving the scene at 9:00 a.m. RP 124-25, 126. (In fact, a surveillance video timer malfunctioned and substituted an ‘8’ for a ‘3’ in the hours column. RP 142.) Price was actually at the Chevron at 3:45 a.m. and drove away shortly thereafter. A Tony’s employee discovered the theft and called the police at around 5:00 a.m. RP 30.

Instead of ordering an evaluation, the court allowed the prosecutor to determine Price’s addiction status with no hearing and no opportunity to respond. SRP 2. The court then followed the State’s recommendation to

ignore the Legislature's enactments for drug-related crimes and substitute the policy suggested by the prosecutor that long-term incarceration is the best treatment. SRP 2.

If the Court's disposition of this case includes resentencing, Mr. Price joins the State in asking the Court to permit the sentencing court to correct the DOSA error on remand. BR 10.

9. THE COURT LACKED JURISDICTION TO IMPOSE AN EXCEPTIONAL SENTENCE BECAUSE THE STATE FAILED TO PROVIDE STATUTORILY-REQUIRED NOTICE.

The State does not address Price's jurisdictional challenge based on the lack of notice of the State's intent to seek an exceptional sentence. This Court reviews de novo all challenges to the court's statutory authority under the SRA. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). And procedural errors, such as lack of proper notice, are reviewed de novo as questions of law. *State v. Harris*, 114 Wn.2d 419, 441, 789 P.2d 60 (1990).

The SRA requires the State to notify the defense pretrial of its intent to seek an exceptional sentence:

At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the State may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

RCW 9.94A.537(1). As a matter of first impression, Price contends that this provision makes notice a jurisdictional prerequisite without which the sentencing court lacks authority to impose an exceptional sentence.

The Sentencing Reform Act is strictly construed, which means the trial court's sentencing authority is limited to that expressly found there. That is, the court must strictly follow the statutory provisions, otherwise, the sentence is void. *State v. Phelps*, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002), quoting *State v. Theroff*, 33 Wn. App. 741, 744, 657 P.2d 800, *review denied*, 99 Wn.2d 1015 (1983).

This is consistent with the general rule that statutory notice requirements implicate the power of the court to act. Examples of situations in which proper statutory notice is deemed a jurisdictional condition precedent include unlawful detainer. RCW 59.12.030; *Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007). Also, a properly filed notice of appeal is jurisdictional in this Court. RAP 5.1(a); *State v. Olson*, 74 Wn. App. 126, 128, 872 P.2d 64 (1994).

In some circumstances, substantial compliance with notice requirements is sufficient to preserve jurisdiction. *Matter of Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980) (RCW 51.52.110). That is not the case here. The court's power to incarcerate Price for five years on a

standard range sentence of a few months is subject to strict interpretation of the law codified in the SRA.

The remedy is to vacate the exceptional sentence and remand for sentencing within the standard range.

V. **CONCLUSION**

Mr. Price asks this Court to reverse his convictions, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this 8th day of October, 2011.

Jordan McCabe

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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Reply Brief to:

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