

NO. 41660-3-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM BARROW, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Katherine Stolz
No. 10-1-03981-5

Respondent's Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to preserve any claim of error with the court's imposition of a standard-range sentence where he did not object below, and has not shown that any alleged error is manifest?
2. Has defendant failed to show that the trial court violated the appearance of fairness doctrine where she imposed a standard-range sentence, and considered and responded to defendant's statements at the time of sentencing?

B. STATEMENT OF THE CASE.

1. Procedure

On September 20, 2010, the State filed an information charging defendant, William Barrow, with one count of failure to remain at an injury accident, and one count of driving while license suspended in the third degree. CP 1-2. On November 19, 2010, after reviewing the forensic psychology report, the Superior Court found defendant competent to stand trial. CP 11-12; RP-11/19/2010 3¹. The State filed an amended

¹ Because the transcripts are not consecutively numbered, the State will refer to the record of the competency proceeding on November 19, 2010 as RP-11/19/2010; the record of the plea and sentencing proceedings on December 10, 2010 as RP; and the record of the restitution hearing as RP-02/10/2011.

information on December 10, 2010, which removed the charge of driving while license suspended as a part of a plea agreement. CP 31-33.

Defendant entered an *Alford*² plea to the charge of failure to remain at an injury accident on December 10, 2010. CP 34-42, RP 3. During colloquy, the court reviewed the plea agreement and statement of defendant on plea of guilty with defendant. RP 3-8. Defendant acknowledged that he entered his plea knowingly, intelligently and voluntarily, and that he was aware of the rights he was giving up. RP 7. Defendant also stated that he understood that the court did not have to follow the parties' sentence recommendation. CP 34-42, RP 6. Defendant stipulated to his criminal history, which included a conviction for leaving the scene of an accident in which a death was involved in from 2008, and ten other driving offenses. CP 43-45. Defendant also stipulated to his offender score of six, as well as the standard range for his current offense.³ CP 43-45, RP 5. The State recommended a mid-range sentence of 38 months, and defendant recommended a low end sentence of 33 months. CP 34-42, RP 8-9. The court heard from the victim's wife, read the victim's impact statement, and heard from defendant. CP 59-60, RP 11-13. The court also reviewed defendant's written statement. CP 91-92.

² *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); adopted by Washington in *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

³ For defendant's offender score of 6, the standard sentencing range is 33-43 months. CP 46-58.

In his statement to the court at the time of sentencing, defendant stated:

“I wasn’t leaving the scene at all. I was moving my truck down where it belongs... I do have respect for the law because – ask my daughter, would I help her out on getting her license back? It was only about 34 days, I would have had all mine back.”

RP 13. Defendant wrote in his statement to the court that in February of 2008, he “lost 3 ½ years of [his] life – because of someone else[‘s] alcohol issue!” CP 91-92. Defendant also wrote regarding this victim, “I help[ed] save this person[‘s] life. Maybe the law does not see it this way.” *Id.* The court responded to defendant’s statements by saying:

“You don’t have a license. You’re not supposed to be driving, Mr. Barrow. You should know that by now. You have an extraordinarily lengthy history of alcohol-related offenses. You’ve, apparently, killed someone else in the past with your driving which ought to clue you in that, perhaps, you shouldn’t be driving, whatsoever. I don’t think you have any respect for the law, and I think you left the scene.”

RP 13.

After considering defendant’s criminal history, and the statements at sentencing, the court sentenced defendant to 43 months, the high end of the standard range. RP 14.

2. Facts⁴

On September 17, 2010, defendant was driving a truck, traveling westbound on South 64th Street. CP 3. Edgar Phillips was riding a bicycle eastbound on 64th Street at the time. CP 3. Defendant turned onto I Street, striking Mr. Phillips with his truck. CP 3, 4-6. Mr. Phillips was thrown from his bicycle and landed on the sidewalk, while his bicycle remained lodged under defendant's truck. *Id.* Witnesses at the scene watched defendant get out of his truck, and remove the bicycle from under it. *Id.* Defendant also spoke with Mr. Phillips, saying, "you look ok." *Id.* Defendant then got back in his truck and left the scene of the accident. *Id.* Mr. Phillips was transported to the hospital by medical responders. *Id.* Mr. Phillips' legs were swollen, and his back was severely scraped. *Id.* Police located defendant and his vehicle a few blocks away. CP 3. Defendant acknowledged having been in the collision, but told the police, "He looked fine." CP 3. Police conducted a records check, which revealed that defendant's driver's license was suspended in the third

⁴ Defendant entered an *Alford* plea and stipulated that the court could review the police reports and the statement of probable cause in order to find a factual basis for the plea. The facts in this section are taken from those documents.

degree, and an outstanding warrant for driving while license suspended in the third degree. CP 3, 4-6.

C. ARGUMENT.

1. DEFENDANT IS PRECLUDED FROM APPEALING HIS STANDARD RANGE SENTENCE.

A standard range sentence cannot be appealed. RCW 9.94A.030(48); *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993); *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719 (1986). As a matter of law, no sentence within the range that the court deems appropriate can be an abuse of discretion. *Mail*, 121 Wn.2d at 710, quoting *Ammons*, 105 Wn.2d at 183. Defendant acknowledged that he knew the sentencing court was not bound by either the State's recommendation, or by defense counsel's, and that he could not withdraw his plea once it was accepted, or appeal the sentence. CP 34-42; RP 6, 8. The court then sentenced defendant to a high-end, standard range sentence. CP 46-58; RP 14.

The sentencing judge is under no obligation to explain her reasoning to imposing any sentence within the standard range. *Mail*, 121 Wn.2d at 714. In *Mail*, the defendant sought review of his sentence and a resentencing because the court had relied on previous convictions to impose a high end sentence, rather than the State's recommended middle of the range sentence. As in that case, while the defendant "cloaks his argument in 'procedure', the ultimate object of this petitioner in seeking

resentencing is to receive a lower sentence within the standard range.” *Id.* at 714. Defendant may not appeal the court’s imposition of his standard range sentence.

The appearance of fairness doctrine does not implicate a constitutional right. *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *see also City of Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978) (“Our appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally based”). By failing to raise the claim of a violation of the appearance of fairness doctrine at the trial court level, defendant waives the claim on appeal. *State v. Morgensen*, 148 Wn. App. 81, 91, 197 P.3d 715 (2008)(applying the waiver doctrine to an appearance of fairness claim). Defendant did not make any objection at the trial court alleging a violation of the appearance of fairness doctrine, nor did he raise any issue at his restitution hearing⁵ on February 10, 2011, and has therefore waived the issue on appeal.

2. THE TRIAL COURT DID NOT VIOLATE THE APPEARANCE OF FAIRNESS DOCTRINE BY IMPOSING A HIGH-END STANDARD RANGE SENTENCE.

Criminal defendants have a due process right to a fair trial by an impartial judge. Wash. Const. art. I § 22. “The law goes farther than

⁵ The parties agreed to restitution on this case in exchange for the dismissal of the charge for driving while license suspended. RP-restitution 2.

requiring an impartial judge; it also requires that the judge appear to be impartial.” *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, *opinion amended by* 837 P.2d 599 (1992), *quoting State v. Madry* 8 Wn. App. 61, 70, 504 P.2d 1156 (1972); *see also State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). The test for determining whether the judge’s impartiality might reasonably be questioned is an objective test that assumes that ‘a reasonable person knows and understands all the relevant facts.’ *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)(*quoting In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2nd Cir. 1988). However, “[w]ithout evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.” *Swenson*, 158 Wn. App. at 818, *quoting Post*, 118 Wn.2d at 619. The perceived bias must result from an actual personal interest in the outcome. *Post*, 118 Wn.2d at 619. The personal interest must be real; it is the resulting bias that can be merely perceived. *See id.* at 618 (trial court’s sentence based on report prepared by a DOC employee defendant had sued did not violate the appearance of fairness).

An appellate court presumes that the judge acts without bias or prejudice. *In Re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010), *citing Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945 (1993). “It is not evidence of actual or potential bias for a judge to point out to a defendant the harm caused to a victim by his or her criminal conduct.” *State v. Worl*, 91 Wn. App. 88, 97, 955 P.2d 814 (1998).

Here, defendant cannot meet his burden of showing actual or perceived bias. The court responded to defendant's own statement during the colloquy in which he told the court that he had respect for the laws, and that only 34 days remained on the suspension of his license. RP 13. The court responded by telling the defendant that his license was still suspended which meant he was not permitted to drive at all. RP 13. She also noted that the defendant had previously been involved in an accident in which the victim died, and had left the scene there as well. RP 13. The court noted that the victim in that hit-and-run incident had died. RP 13. In defendant's written statement he blamed the victim in that case for his jail time, stating, "I lost 3 ½ years of my life – because of someone else[‘s] alcohol issue!" CP 91-92. The court did not demonstrate bias by pointing out that defendant had killed someone previously in a hit-and-run, especially given the defendant's contention that he was not leaving the scene, his failure to take responsibility for his actions, and his statements that he respected the law.

Although not required to do so, the court reasoned that defendant had multiple driving under the influence convictions, as well as a previous failure to remain at an injury accident in which the victim had been killed. RP 13-14. Witnesses to the accident had asked defendant to stay at the scene, but he had left anyway, after telling the victim "oh you don't look hurt." RP 13. Defendant also had a number of driving while license suspended convictions, and had been driving without a valid license at the

time of this accident as well. CP 3, 43-45. The court did not violate the appearance of fairness doctrine in sentencing defendant within the standard range.

Defendant argues that the court violated the appearance of fairness by citing only Mr. Barrow's criminal history in determining that a high end sentence was appropriate. Appellant's brief at 3-4. This argument fails for two reasons. First, the court did not cite only defendant's criminal history in her decision. RP 13-14. She pointed to defendant's failure to recognize that although he would be eligible to have his license reinstated in the following month, he was still driving without a license or insurance at the time of the accident. RP 13. She referred to defendant's failure to take responsibility for his actions as a reason to believe the high end was appropriate. RP 14. In offering an explanation for the high-end sentence, the court did not demonstrate any personal interest in the outcome of the case. Second, "the determination of a defendant's criminal history is distinct from the determination of an offender score." RCW 9.94A.030(11)(c). Thus, while the defendant's criminal history is used to calculate his offender score, and therefore the standard range of his sentence, the court is not precluded from using the specifics of the defendant's prior convictions, or any unscored history in determining the sentence that is appropriate. "'Standard sentence range' means the sentencing court's discretionary range in imposing a nonappealable sentence." RCW 9.94A.030 (48). In creating a standard range, rather than

an exact standard sentence, the legislature left the discretion of where in the range defendant's sentence should fall to the courts.

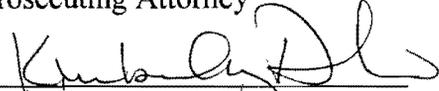
Defendant has failed to show that the trial court demonstrated any actual or potential bias during sentencing.

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that the Court affirm defendant's sentence.

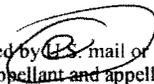
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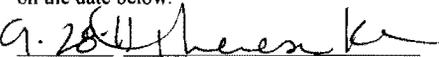
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