

NO. 42926-8-II

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

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IN RE THE PERSONAL RESTRAINT OF  
TOMMY LEE CROW, JR.,

STATE OF WASHINGTON,  
Respondent,

v.

TOMMY LEE CROW, JR.,  
Petitioner.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
CAUSE NO. 08-1-00585-6

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HONORABLE WM. THOMAS MCPHEE, Judge

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RESPONDENT'S SUPPLEMENTAL BRIEF

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A. STATEMENT OF SUPPLEMENTAL ISSUES

1. Considering the evidence presented at trial in the light most favorable to the State, whether there was sufficient evidence for a reasonable juror to find beyond a reasonable doubt that the defendant committed the offense of murder in the second degree against a victim, David Miller, who was acting as a Good Samaritan.

2. Should this court determine that there was not sufficient evidence to support the Good Samaritan aggravator in this case, whether the record clearly shows that the sentencing court would have imposed the same total period of confinement even if the court had only considered the other aggravating circumstance of deliberate cruelty.

3. Whether the defendant has shown that there was consideration by the court of the defendant's potential good time credit, in determining the length of the defendant's exceptional sentence, that constituted a fundamental defect resulting in a complete miscarriage of justice.

B. SUPPLEMENTAL STATEMENT OF THE CASE

Defendant Tommy Lee Crow Jr. was convicted by jury verdict of Count I, murder in the second degree, wherein the victim was David Miller; Count II, murder in the second degree, wherein the victim was Norman Peterson; and Count III, arson in the second degree. By special verdict, the jury found that in Count I, the defendant committed the crime of murder in the second degree upon a victim, David Miller, who was acting as a Good Samaritan. The jury also found that in Count II, the defendant committed the crime of murder in the second degree upon

victim Norman Peterson with deliberate cruelty.

The State argued to the jury that the victim of Count I, David Miller, had been acting as a Good Samaritan at the time of his murder. Miller had previously reported to police information he had concerning those responsible for assaulting a person named Scott Cover, who was a transient like Miller. In this way, Miller had become a potential witness against the individuals responsible for this assault. Miller did this for the sake of others living in the transient community where he lived, recognizing that his decision to come forward with this information placed him at great risk of being harmed. Ultimately, defendant Crow and his accomplices, Bryan Eke and Christopher Durga, realized that someone had “snitched” to the police about this assault, figured out it was most likely Miller, and killed Miller for this reason.

In his Supplemental Brief pursuant to his Personal Restraint Petition, the defendant does not dispute that evidence was presented at trial to support this sequence of events. The victim of the assault, Scott Cover, testified that in early March 2008, he had been staying at a transient camp with David Miller. RP 395. On one evening at the camp, he recalled defendant Crow and Bryan Eke standing over him and Cover was

begging that these individuals quit hitting him. Then Eke handed a baseball bat to Crow, who proceeded to hit Cover with the bat on Cover's back and legs. RP 398. After being hit, Cover crawled into his tent and tried to cover up. RP 409. A clean-up crew came by and found Cover and got him help. Cover had two broken legs, was in a hospital for six or seven days, and in a nursing home for another three months. RP 412.

Justin Van Horn was another homeless individual who camped out in the same area as Miller and Cover. In early March 2008, he heard about Cover's injuries and visited Cover in the hospital. RP 340-341. Another transient named Karen Schaeffer was present, and Van Horn heard Cover ask Schaeffer to let Crow, Eke, and Durga know that Cover had not ratted them out. RP 341, 361, 442. Later that same day, Crow and Eke came to Van Horn's camp. Crow told Van Horn that he had broken Cover's legs, and that Van Horn was next, that they knew where Van Horn's camp was and that Van Horn would be put in to the hospital along with Cover. RP 344-345, 375.

In early March 2008, Terence Stroman was also living as a transient in the same area in Olympia where David Miller was living. Stroman heard about the injuries inflicted upon Scott Cover. RP 457-458.

About a week later, Stroman had a discussion with David Miller concerning what had happened to Cover. RP 460. Miller revealed that he had broken up the fight in which Cover had been injured and so was an eyewitness to who had injured Cover. RP 461. Stroman advised Miller to report his information to the police. However, Miller was unwilling to do this at that time. RP 461-462.

Stroman had several additional discussions with Miller about this. Stroman continued to encourage Miller to come forward with this information. RP 463. Stroman argued that Miller should do this not only for his own protection, but also for the protection of others who might otherwise get hurt in the future. RP 464. Miller initially would groan, seeming to indicate he did not want to do this, but knew that he needed to do it. RP 464. By the last conversation they had about this, Miller was more willing to see it through and come forward. RP 465.

On March 18, 2008, Olympia Police Officer Bryan Henry arrested David Miller on a warrant. RP 621-622. Miller provided Henry with information about the earlier assault on Scott Cover. RP 623. Miller asked that the people responsible for what happened to Cover be caught for what they had done, and he expressed great concern for his own safety and that

of others who lived in the same area. RP 623-624.

On March 27, 2008, Officer Henry had contact with Christopher Durga, one of the persons Miller had indicated was involved in the assault on Cover. Henry told Durga he had received information about an assault on Cover, that Durga was involved, and that a baseball bat had been used, but Henry did not mention Miller's name. RP 631. Durga admitted he had a bat which he had found, and handed it to Henry, but denied being involved in the assault. RP 631-632. Henry advised Durga to expect detectives would be questioning him further about the assault. RP 633.

Quickly thereafter, Durga contacted Crow and Eke concerning the visit from Officer Henry. They began questioning people on the street to try and uncover who the snitch was. RP Vol. 7, 1122-1123. In the late evening of March 27, 2008, Crow met with Durga and Eke at their camp and discussed what to do about this situation. Crow was angry, expressing certainty that Miller was the snitch, and talked about how the best way to get rid of a body was to burn it. RP Vol. 6, 1135-1137, 1141.

On the early morning of March 28, 2008, Crow went to Miller's camp, accompanied by Eke and Durga. Norman Peterson was also at the camp. At that camp, Crow accused Miller of being the snitch and struck

him in the face. Durga then choked Miller. RP Vol. 6, 1147-1153, 1155. Both Miller and Peterson were murdered, Miller because of being the snitch, and Peterson because he was a witness to the murder of Miller.

### C. SUPPLEMENTAL ARGUMENT

1. Viewing the evidence in the light most favorable to the State, there was sufficient evidence presented for a reasonable juror to have concluded beyond a reasonable doubt that David Miller was in the process of aiding imperiled persons at the time he was murdered, and therefore was acting as a Good Samaritan at that time, and indeed was murdered for that reason.

The defendant contends that the evidence presented at the trial of this case was not sufficient to prove beyond a reasonable doubt that victim David Miller was acting as a Good Samaritan at the time he was murdered. RCW 9.94A.535(3) sets forth an exclusive list of aggravating circumstances that can support a sentence above the standard range if such an aggravating circumstance is determined by procedures set forth in RCW 9.94A.537. One of those procedures is a unanimous verdict by a jury that the aggravating circumstance has been proved beyond a reasonable doubt. RCW 9.94A.537(3). The following is one of the aggravating circumstances listed in RCW 9.94A.535(3):

The defendant committed the offense against a victim who was acting as a good Samaritan.

RCW 9.94A.535(3)(w).

This particular aggravating circumstance was not specified in the Sentencing Reform Act prior to 2005. However, the statutory list of aggravating circumstances prior to 2005 was merely illustrative, not exclusive. State v. Hillman, 66 Wn. App. 770, 775, 832 P.2d 1369 (1992). In Hillman, supra, the Washington Appellate Court had approved the application of a “Good Samaritan” aggravating circumstance in a case where the victim had come to the aid of Hillman, and Hillman had responded by murdering the victim. Hillman, 66 Wn. App. at 775-776. In State v. Hooper, 100 Wn. App. 179, 185, 997 P.2d 936 (2000), the Court of Appeals had affirmed the trial court’s imposition of an exceptional sentence in part based upon Hooper having targeted the victims because they had reported to the police Hooper’s assaultive actions towards others. In including a “Good Samaritan” aggravator in an exclusive list of aggravating circumstances for sentencing purposes in 2005, the Washington Legislature sought to “codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances”. Laws of 2005, Ch. 68, S. 1.

In the present case, the trial court instructed the jury that “[a] Good Samaritan is a person who comes to the aid of an injured, stranded, or otherwise imperiled person”, based upon Washington Pattern Jury Instruction 300.32. CP 85. The jury found by special verdict that this aggravating circumstance had been proved. At the sentencing hearing, the court noted the following concerning victim David Miller:

. . . He stepped forward in a community that has few people to step forward on its behalf. And I suspect that he did so recognizing the potential consequences to him. It was an act of extraordinary bravery, in my estimation, and the exceptional sentence that I’ve imposed here reflects that determination.

RP 1483-1484.

The defendant does not contend that the instruction given to the jury erred in setting forth the “Good Samaritan” aggravating circumstance. Rather, the defendant contends that the evidence in this case was not sufficient to prove the aggravating circumstance pursuant to that instruction. In reviewing a jury’s special verdict finding that an aggravating circumstance was present, the appellate court must review the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the presence of the aggravating circumstance beyond a reasonable doubt. State v. Chantabouly, 164 Wn.

App. 104, 143, 262 P.3d 144 (2011).

The defendant argues that there is an implicit requirement that the victim's actions taken as a Good Samaritan be contemporaneous with his being victimized, and that this requirement was not met in this case. However, in making this argument, the defendant is far too limiting in his characterization of how David Miller could reasonably be viewed as having acted as a Good Samaritan in this case. The defendant focuses on the fact that Miller talked to Officer Henry about the assault on Cover ten days before his murder in arguing that Miller was not acting as a Good Samaritan at the time he was murdered. In other words, the defendant argues that Miller could only have been viewed as acting as a Good Samaritan 10 days earlier. However, this ignores the fact that Miller's disclosure launched a police investigation in which Miller continued to be a potential witness against Cover and his accomplices. As a "snitch", Miller was very much a perceived threat to Crow on March 28, 2008, the day of Miller's death. In being willing to step forward against Crow's violence, Miller made himself a potential target, and that was as real on March 28, 2008 as it was on March 18, 2008, when he told Officer Henry what he had seen. Therefore, Miller's actions as a Good Samaritan were

contemporaneous with his becoming a victim in this case.

The defendant further argues that Miller did not come to the aid of anyone who was imperiled. However, the jury could reasonably have found otherwise, and could have reasonably determined that the community of homeless people camping out in the vicinity of where Miller was staying were imperiled by the potential violence of Crow and his cohorts. The jury had the evidence of what these men had done to Scott Cover. The jurors also had the evidence of what Crow had threatened to do to Justin Van Horn. Terence Stroman, another member of this community, had testified about his fears for the continued safety of those in this community. From Stroman's testimony, it is clear that Miller was afraid to come forward as a witness, but was persuaded by Stroman's arguments that he needed to do so for the protection of others in that community.

Finally, the defendant argues that appellate cases concerning the "Good Samaritan" aggravating circumstance show that the aggravator only applies when a particular, specific person is helped out of his or her predicament, as opposed to someone acting on behalf of a larger group. However, no such limitation has ever been placed upon the Good

Samaritan aggravator by the Washington appellate court.

Hillman, supra, and Hooper, supra, remain the only cases wherein the appropriateness of the “Good Samaritan” aggravator has been discussed in the context of a sentencing under the Sentencing Reform Act. The defendant refers to Butzberger v. Foster, 151 Wn.2d 396, 89 P.3d 689 (2004). However, that case concerned whether an individual’s underinsured motorist insurance policy covered a deceased rescuer who had tried to rescue the named insured from an overturned vehicle. The defendant also refers to State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012). However, while that was a criminal case in which the “Good Samaritan” aggravator was alleged, the issue on appeal was only whether the State committed error in failing to allege the aggravator in the charging document, where sufficient notice of the aggravator was provided by other means. The defendant also cites State v. McCreven, 170 Wn. App. 444, 284 P.3d 793 (2012). However, while this was also a criminal case in which the “Good Samaritan” aggravator was alleged, that aggravating circumstance was not an issue on appeal.

Thus, Hillman and Hooper are the two cases in which the Washington appellate court has considered the proper substance of a Good

Samaritan aggravating circumstance for criminal sentencing purposes. Neither in Hillman nor in Hooper did the Washington appellate court hold that a “Good Samaritan” aggravator cannot apply when a community of individuals is at risk. Moreover, common sense dictates that if a person places himself in danger to protect an individual who is perceived to be imperiled, and that person thereby qualifies as a Good Samaritan under the sentencing aggravator, there is no good reason why the same should not apply to a person who places himself in danger to protect a community of persons who are perceived as imperiled.

In Hooper, supra, the “Good Samaritans” were individuals who contacted police in order to aid persons they perceived to be imperiled by the actions of the defendant, and the defendant’s retaliation against these Good Samaritans because they chose to do this was a sufficient basis for an exceptional sentence. “The court’s reasoning is sound. Permitting a court to deviate from the standard range under these circumstances supports the policy of encouraging witnesses to intervene when they observe violent crimes.” Hooper, 100 Wn. App. at 185. Is that not true in the present case as well?

In RCW 7.69.010, concerning the rights of victims and witnesses,

the following is stated:

In recognition of . . . the civic and moral duty of victims, survivors of victims, and witnesses of crimes to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state . . .

RCW 7.69.010. Surely this civic and moral duty of witnesses of crimes to come forward with information, when a continuing danger to others is perceived, is properly part of what the “Good Samaritan” aggravator is intended to encompass, along with other acts done to assist persons imperiled. The defendant contends that while David Miller may have been acting as a good citizen when he was murdered, he was not acting as a Good Samaritan, and therefore there is no basis for an exceptional sentence based upon what Miller suffered for having the courage to come forward and report the violence committed by the defendant. The State contends that a person can be both a good citizen and a Good Samaritan, and that the facts of this case, examined as they must in the light most favorable to the prosecution, provide a good example of that.

2. Even if this court found there was not sufficient evidence to support the Good Samaritan aggravator in this case, a re-sentencing would not be appropriate, since the sentencing judge stated unambiguously that he would have imposed the same total sentence in this case even if either

of the aggravating circumstances relied upon had been present without the other being present.

The sentencing court in this case imposed the top of the range for Count I, which was 265 months in prison, and imposed an additional 95 months for the “Good Samaritan” aggravating circumstance for a total of 360 months. County II was required to run consecutive to Count I. On Count II, the court again imposed the top of the sentencing range, which in this case was 220 months, and added 80 months based on the aggravating circumstance of deliberate cruelty, for a total of 300 months for Count II. The total for both counts was 660 months. RP 1482. The court also made the following finding:

In addition to the sentence – the time for the sentence that I’ve imposed, I will make the finding that the total sentence that has been imposed here would be justified by either of these aggravating circumstances in the absence of the other. For the reasons explained by Mr. Powers which I find compelling, they have been divided between the two, not equally, but nearly so. However, if only one existed and not the other, I cannot see that a different sentence would be justified under these circumstances.

RP 1484.

The defendant contends that the above finding by the court is ambiguous and leaves in doubt what total sentence the court would impose should this court find that there was insufficient evidence to support the

“Good Samaritan” aggravator, as the defendant has argued. However, the State disputes this claim. There is nothing ambiguous about what the sentencing court stated here. The court clearly determined that the same total sentence would be the just sentence even if only one of the two aggravating circumstances was present, and in this regard the court made no distinction between the two. The court repeated this finding by saying that if only one of the aggravating circumstances was present, and not the other, there would be no basis for a sentence different from what the court ordered.

The defendant argues that the sentencing court viewed the Good Samaritan aggravator as the more serious of the two aggravating circumstances. There was an indication by the sentencing court that the two aggravators were given slightly different weights in determining the total confinement imposed. RP 1483-1484. However, there was only a 15-month difference between the amount added based on the Good Samaritan aggravator compared to the amount added for the other. In addition, in the above quote, the sentencing court referred to the additional confinement imposed beyond that provided for in the standard sentencing ranges as having “been divided between the two, not equally, but nearly

so”. RP 1484. This contradicts the defendant’s argument that the sentencing court viewed the Good Samaritan aggravator as substantially more important than the deliberate cruelty aggravator.

Even when a basis relied upon by the sentencing court in imposing an exceptional sentence has been determined to be error, the appellate court has repeatedly refused to remand for re-sentencing when the record has been clear that the sentencing court would have imposed the same sentence based upon only the remaining ground or grounds not in error. State v. Fisher, 108 Wn.2d 419, 429-430, 739 P.2d 683 (1987); State v. Zatkovich, 113 Wn. App. 70, 78, 52 P.3d 36 (2002); State v. Hooper, 100 Wn. App. 179, 188, 997 P.2d 936 (2000); State v. Burkins, 94 Wn. App. 677, 700, 973 P.2d 15 (1999); State v. Negrete, 72 Wn. App. 62, 71, 863 P.2d 137 (1993). Therefore, even if this court were to find that there was insufficient evidence to support the application of the “Good Samaritan” aggravator in this case, the record would support the total exceptional sentence imposed in this case based upon the deliberate cruelty aggravating circumstance.

3. The defendant has not shown that the sentencing court relied upon the potential good time credit that this defendant might receive in determining the length of the exceptional sentence in this case, nor has the defendant shown that any consideration of the defendant’s potential

good time credit by the sentencing court constituted a fundamental defect resulting in a complete miscarriage of justice, and therefore there are no grounds for a re-sentencing in this case.

The defendant seeks to vacate his sentence and be re-sentenced by claiming that the sentencing court considered his possible earned early release (good time) credits in determining the length of his exceptional sentence. Based on this claim, he argues that the court violated RCW 9.94A.728 and RCW 9.94A.729(1)(a) in deciding the length of his sentence.

“Personal restraint petitions are not a substitute for direct review.” In re Personal Restraint of Dalluge, 162 Wn.2d 814, 817, 177 P.3d 675 (2008). Collateral attacks are limited, but not so limited as to prevent the consideration of serious and potentially valid claims. In re Personal Restraint of Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990). A petitioner claiming purported non-constitutional error “must establish that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” In re Personal Restraint of Fleming, 129 Wn.2d 529, 532-534, 919 P.2d 66 (1996).

At one point during the sentencing hearing, the court asked the prosecutor what good time credit the defendant might receive in regard to

his sentence, and the prosecutor responded that the maximum he could receive would be ten percent. RP 1451. Thereafter, the court imposed an exceptional sentence on each count, and explained the bases for that decision, but in the course of doing so did not cite the potential good time as a factor in the court's decision. The only additional reference to good time credits during the hearing was a brief statement by the court that, as a result of the sentence imposed, the defendant would serve a full 50 years of incarceration even with good time credit. RP 1483.

Nevertheless, the defendant contends that this court should find the sentencing court used the potential good time credit as a basis for determining the length of the defendant's total exceptional sentence based on the fact that the State recommended total incarceration of 600 months, whereas the court imposed total incarceration of 660 months, which was 10 percent more than the State's recommendation. However, the court's determination of the appropriate sentence was not so simple or straightforward.

For Count I, the State recommended an exceptional sentence that was 35 months higher than the standard range, and for Count II, recommended a sentence that was 80 months higher than the standard

range. The court, on the other hand, chose to treat each aggravator more equally in imposing additional time, without going lower than the 80-month additional penalty recommended for Count II. At the same time, the Court wanted to give slightly greater weight to the Good Samaritan aggravator. Thus, the court imposed 95 additional months for Count I and 80 additional months for Count II. Given these considerations, the record does not establish that the court gave any weight to the potential good time credit in determining what total confinement to impose.

The defendant cites several cases to support his claim that any consideration of good time at sentencing constitutes error. However, those cases focus on a sentencing court's consideration of good time credit in determining whether to impose an exceptional sentence on an adult or juvenile defendant. State v. Sledge, 133 Wn.2d 828, 844-846, 947 P.2d 1199 (1997); State v. Fisher, 108 Wn.2d 419, 430 n. 6, 739 P.2d 683 (1987); State v. Buckner, 74 Wn. App. 889, 898-899, 876 P.2d 910 (1994), *reversed on other grounds*, 125 Wn.2d 915, 919 (1995); State v. Bourgeois, 72 Wn. App. 650, 659-661, 866 P.2d 43 (1994). Therefore, those cases are distinguishable. In the present case, surely there can be no doubt that the court determined to impose exceptional sentences based

upon the aggravating circumstances found by the jury, not based on potential good time credit.

Furthermore, a re-sentencing is not necessarily mandated when a court does consider available good time in determining the length of an exceptional sentence. In State v. Wakefield, 130 Wn.2d 464, 925 P.2d 183 (1996), the sentencing court imposed an exceptional sentence based upon several aggravating circumstances, but also considered the potential good time in determining the length of that exceptional sentence. The State Supreme Court ruled re-sentencing was not necessary since the trial court would in all probability impose the same sentence given the other circumstances in the case. Based on the remarks of the sentencing court in the present case, as discussed above, the same analysis would apply here.

D. CONCLUSION

For the reasons cited above, the State asks that this court affirm the sentences imposed in the present case.

DATED this 8<sup>th</sup> day of April, 2013.

Respectfully submitted,



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DEPUTY PROSECUTING ATTORNEY

# THURSTON COUNTY PROSECUTOR

**April 08, 2013 - 2:21 PM**

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