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STATE OF WASHINGTON

46035-1

Case No. ~~46035-II~~

COURT OF APPEALS OF THE STATE OF  
WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON, *Respondent*,

v.

JACQUELINE RAY  
*Appellant.*

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REPLY BRIEF OF APPELLANT

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## **I. STATEMENT OF ISSUES**

B. Does a challenge to the fairness of the sentencing hearing create a basis to challenge to a sentence within the standard sentencing range?

C. Was the sentencing court permitted to consider assertions of fact by the victim's family members that amounted to a greater offense?

## **II. STATEMENT OF FACTS**

The Defendant provided a statement of facts in her opening brief, will incorporate them into the reply brief, and will not resubmit them here. This section is only a response to the State's assertion of fact.

On January 10, 2014 the Defendant withdrew her plea and entered a guilty plea to one count of second degree murder admitting that she "knowingly aided [her] co-defendants in the assault of Leon Baucham, [her] co-defendants caused the death of Leon Baucham while using a firearm. CP 31-41.

At no point in the plea agreement did the Defendant agree to waive her right to appeal a sentence she believed to be based on the consideration of inappropriate assertions of fact and commentary by the court. CP 18-21. The plea agreement generally required the Defendant to plead Guilty to First Degree Murder, but would be permitted to withdraw her plea and enter a guilty plea to second degree murder if she cooperated in the prosecution of her co-defendants. *Id.* She was even permitted to ask for any lawful sentence. *Id.* The plea agreement did not ask her to

agree to waive her right to appeal a sentence she believed to be the product of an unfair hearing. *Id.*

In challenging her sentence, the Defendant provided a transcript of the entire sentencing hearing. Verbatim Reports January 10, 2014 and February 21, 2014

### **III. ARGUMENT**

#### **A. A CHALLENGE TO THE FAIRNESS OF THE SENTENCING HEARING CREATES A BASIS TO ALLOW A CHALLENGE TO A SENTENCE WITHIN THE STANDARD SENTENCING RANGE. THE DEFENDANT PROVIDED EVIDENCE OF POTENTIAL OR ACTUAL BIAS IN THE TRANSCRIPTS AND HER BRIEF CITING TO THEM.**

In its brief, the State asserts that the Defendant, as a part of the plea agreement, waived her right to appeal a standard range sentence. *Br.Res.* At 5. However, it only cites to a plea agreement that does not contain such a provision, and to a statement of defendant on plea of guilty which was not part of the plea agreement. *Id.* Here, the Defendant is challenging the validity of the sentence by asserting that she was provided an unfair hearing.

The State correctly asserts the general rule in its briefing that a sentence within the standard range may not be appealed. *Br.Res.* at 6. However, a challenge is permitted “when the court refuses to exercise its discretion or relies on an impermissible basis for refusing to impose an

exceptional sentence below the standard sentencing range. *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998).

A court refuses to exercise discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances... A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex, or religion.

*Id.*

As was stated in the Respondent's opening brief, one of the comments the court made was that the Defendant Slandered Mr. Baucham after his death by alleging a history of domestic violence against his wife as a justification for premeditated murder, and such was "offensive to this Court's sense of justice in every way." Br.App. at 6 citing the Verbatim Report at 41. Before the Defendant was even able to make her argument the Court already announced its refusal to consider RCW 9.94A.535(1)(h) (a continuing pattern of abuse against the defendant's child enacted by the victim), which was the basis of Defendant's request for an exceptional sentence. CP 72-86. It also seems to have announced its refusal to consider it ever as a basis for an exceptional downward sentence.

The Court's refusal to consider the Defendant's request for an exceptional sentence even before she asked for it and statement that the

idea that it could be a justification for the crime convicted of was an abuse of discretion which is an exception to the general rule that a sentence within the standard range may not be appealed.

Next the State asserts that the Defendant's failed to provide which facts the trial court considered that were probative of a more serious crime, as well as which "more serious crime" the facts allegedly supported. Br.Res. at 8. The State will recall that the Defendant cited in her opening brief on page 8 that the sentencing court referred to the Defendant's crime as premeditated murder. The Defendant was convicted of Second Degree Murder. CP 32-41. Second Degree Murder is defined by Statute:

- (1) A person is guilty of murder in the second degree when:
  - (a) With intent to cause the death of another person but *without premeditation*, he or she causes the death of such person or of a third person; or
  - (b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant...

RCW 9A.32.050(1) emphasis added. First Degree Murder is defined as

- (1) A person is guilty of murder in the first degree when:
  - (a) *With a premeditated intent* to cause the death of another person, he or she causes the death of such person or of a third person; or
  - (b) Under circumstances manifesting an extreme indifference to

human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or (c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants: Except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant...

RCW 9A.35.030 emphasis added. It certainly seems that the sentencing court had been considering that the Defendant had acted with premeditation when that was not an element of her crime.

The State also asserts that the non-objection to this commentary served as an acknowledgement of the information by citing *State v. Phelps*. Br.Res at 8. However, the defendant in *Phelps* was determined to have acknowledged the facts asserted in the plea statement, not that of the sentencing judge. *State v. Phelps*, 113 Wn.App. 347, 358, 954 P.2d 290 (1998). The defendant in *Phelps* stipulated to facts provided in the certification for probable cause. *Id.* at 351. In the present case the assertion of the idea that the murder was premeditated did not appear in the relevant plea form like it did in *Phelps*.

Next, the State asserts that the Defendant failed to assert any facts that would amount to an error justifying review. Br.Res. at 9 The

Defendant will not repeat its brief rather one need only look at pages 4-6 of Defendant's opening brief for a recitation of the commentary that the Defendant asserts amounted to evidence of prejudice. The sentencing judge's comments can be used as evidence of potential bias. In the present case, the Court stated that it "does not disagree on a factual basis that the seven elements of what you describe as sin have been committed by [the Defendant]." Verbatim Report at 16. Those sins were listed as "a proud look", "a lying tounge", "a heart that deviseth wicked imaginations", "feet that be swift to running to mischief", "a false witness that speaketh lies", and "he that soweth discord among bretheren. Verbatim Report at 13-14. This certainly seems that the sentencing court adopted a belief in the Defendant's character to lie and devise wicked imaginations prior to hearing from the Defendant.

There is ample evidence to determine that actual or potential bias existed. Furthermore, there is ample evidence that the sentencing court considered evidence that it should not have and had considered this to be a sentence for first degree murder. The Court completely foreclosed the possibility that the defendant had a factual argument for an exceptional sentence. The Defendant was not afforded a fair hearing and should be granted a re-sentencing hearing to consider an exceptional sentence.

B. THE COURT WAS NOT PERMITTED TO CONSIDER THE ASSERTIONS OF FACT AMOUNTING TO THE GUILT OF THE DEFENDANT BEYOND WHAT HAD BEEN PLED AND PROVEN.

The State asserts that RCW 9.94A.500 forecloses the Defendant's assertion that the sentencing court should not have considered certain assertions of fact by the victim's family members. Br.Res. at 11.

However, the relevant portion of the statute reads

The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, *and allow arguments* from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

RCW 9.94A.500, emphasis added. The statute requires the court to hear argument from the victim's family—not the facts amounting to guilt as they see it.

The Real Facts Doctrine provides:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present

and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

RCW 9.94A.530(2). When read together with RCW 9.94A.500, in order for a court to comply with both provisions of the statute, it is not permitted to consider assertions of fact amounting to a greater crime, but is still required to hear the victims' arguments as to what a sentence should be.

In the present case, the sentencing court adopted the assertions that this was a premeditated murder, when such had not been pled or proven.

The State also asserts that the real facts doctrine would prohibit the consideration of Defendant's sentencing memorandum if it also would prohibit the testimony of the victim's family. However, a reading of the statute would dictate otherwise. The statute only requires a hearing when the defendant asserts the facts asserted, not when the state does.

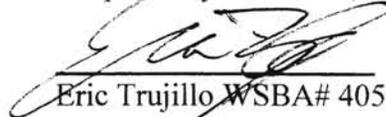
Furthermore, the defendant is not required to object to assertions of fact by the victim's family members. Acknowledgement is the non-objection to facts provided in the presentence report and criminal history. It is not the failure to object to the assertions of fact made by the victim's family.

#### IV. CONCLUSION

Despite the assertions from the State, the Defendant provided the statements from that sentencing court that it believes violated the real facts doctrine and showed the court's bias. For the reasons set out above, the Defendant respectfully requests that the Court of Appeals hold that the sentencing court violated the real facts doctrine when it heard, commented upon, and considered facts that were probative of a more serious offense, and were not found by a trier of fact nor admitted by the defendant during the sentencing hearing. Additionally, the Court should hold that the appellant's due process right to a fair sentencing was violated, because the sentencing court improperly commented on statements made by the State's witnesses, thus revealing his prejudice against the appellant, and order a new sentencing hearing before a different judge.

Dated: December 15, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of December, 2014, a true and correct copy (though improperly formatted) of the foregoing document was forwarded to the following parties, individuals, or their counsel of record via:

- Legal Messenger
- U.S. Mail *Jacqueline Ray, Appellant*
- Facsimile (as previously agreed upon)
- E mail (as previously agreed upon)
- Hand Delivery ~~Kathleen Proctor~~, *Pierce County Prosecutor's Office*  
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, WA this 15<sup>th</sup> day of December, 2014

  
Eric Trujillo