

NO. 46106-4-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

RUSSEL A. FORD,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE GORDON GODFREY, JUDGE (retired)

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BRIEF OF RESPONDENT

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## **RESPONDENT'S COUNTER STATEMENT OF THE CASE**

The State is satisfied with the statement of the factual and procedural history in appellant's brief.

### **RESPONSE TO ASSIGNMENTS OF ERROR**

- 1. The sentencing court erred when it imposed an aggravated exceptional sentence without making findings justifying such a sentence.**

Judge Gordon Godfrey (retired) imposed an aggravated exceptional sentence upon Defendant based upon findings which do not justify an exceptional sentence. There are facts in the record which do justify an exceptional sentence, but Judge Godfrey made no findings based upon those facts. However, failure to make written findings can be harmless error. To the extent that Defendant was prejudiced, his remedy is to be resentenced.

#### **Standard of review.**

In weighing the justifying reasons stated by the trial court for imposing an enhanced sentence, an appellate court makes an independent inquiry into whether the reasons given warrant the imposition of an exceptional sentence as a matter of law, are substantial and compelling, and consist of factors other than those

which are necessarily considered in computing the presumptive range.

*State v. Hicks*, 77 Wash. App. 1, 5, 888 P.2d 1235, 1237-38 (1995) (citing

*State v. Smith*, 123 Wash.2d 51, 55, 864 P.2d 1371 (1993).)

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense...

RCW 9.94A.585(4).

**The findings made by Judge Godfrey do not authorize imposition of an exceptional sentence.**

Judge Godfrey imposed an aggravated exceptional sentence based upon findings that a) the five counts Defendant pled guilty to were all separate criminal conduct, b) because of the egregious nature of Defendant's criminal conduct, and c) because Judge Godfrey believed Defendant to be on community custody at the time of the conduct. The sentence was two eight month sentences for counts one and two, Attempting to Elude a Pursuing Police Officer, concurrent with three consecutive 24 months sentences for counts three, four and five, Motor Vehicle Theft. Clerk's Papers at 51, 54. The total confinement ordered was seventy two months. *Id.* Defendant's standard range for all crimes

was 14 – 17 months<sup>1</sup> for counts one and two, and 43 to 57 for counts three, four and five. CP at 53.

The reasons given by Judge Godfrey do not justify an aggravated exceptional sentence, as they are all necessarily considered in computing the presumptive range. With a few exceptions not relevant here, consecutive sentences may only be imposed as exceptional sentences. *See* RCW 9.94A.589(1)(a). A sentencing court may impose an aggravated exceptional sentence without a finding of fact by a jury in four circumstances, which are enumerated in RCW 9.94A.535(2). These circumstances are, briefly, a stipulation by the defendant to an exceptional sentence, a clearly too lenient sentence given prior unscored misdemeanor and out-of-state convictions, multiple current offenses and a high offender score which results in some current criminal charge going unpunished, and a clearly too lenient sentence give a defendant’s “washed out” criminal history. *Id.*

The court opined that it was not bound by the presumption of concurrent sentences required by RCW 9.94A.589 because the five counts

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<sup>1</sup> The judgment & sentence lists the standard range as 3 to 8 months. This is erroneous. *See* RCW 9.94A.510 (showing a Level I crime with an offender score of 7 results in a range of 14 – 18 months.) Judge Godfrey’s intent appears to have been to sentence Defendant to the top of the standard range on each count, and run the sentences consecutively.

were all separate criminal conduct. VRP 3/25/14 at 8. In a later hearing, specifically addressed to a higher court, the court also indicated that an exceptional sentence was justified by the egregious nature of Defendant's behavior, because Defendant was on supervision for a felony at the time,<sup>2</sup> and because the conduct was in several separate incidents. VRP 3/25/2013 at 16-19. Clearly, none of these findings are applicable to the four circumstances in RCW 9.94A.535(2), and in fact are all factors used in computing the presumptive range. Judge Godfrey erred by imposing an exceptional sentence based on those findings, and therefore the sentence was not authorized by law.

**Defendant's offender score does justify an exceptional sentence.**

Despite the trial court's error there are sufficient facts in the record to justify an exceptional sentence without a special finding by a jury. Pursuant to RCW 9.94A.535(2)(c) if "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished" and exceptional sentence is justified. This is sometimes known as the "free crimes" aggravator. *See*

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<sup>2</sup> There is no evidence that Defendant was on community custody during any of the incidents, and the plea agreement does not indicate Defendant was on community custody. CP at 31.

*State v. France*, 176 Wn. App. 463, 468-69, 308 P.3d 812, 816 (2013)  
*review denied*, 179 Wn.2d 1015, 318 P.3d 280 (2014).

In the instant case Defendant was convicted of five current offenses. CP at 53. This obviously satisfies the “multiple current offenses” prong of the statute. However, if a standard range sentence had been imposed, counts one and two would go unpunished due to Defendant’s high offender score. This may not be obvious because the less serious crimes, which go unpunished, are counts one and two.

Counts three, four, and five were Theft of a Motor Vehicle convictions. CP at 17-18. Defendants offender score was calculated to be 11 for each count. Three of those points come from Defendant’s prior convictions. The remaining eight points came from the other current offenses, because current and prior Theft of a Motor Vehicle convictions count as three points pursuant to RCW 9.94A.525(20). The result is Defendant’s offender score goes to eleven for purposes of counts three, four, and five. Therefore, the standard range is 43 – 57 months. However, had Defendant been convicted only of three counts of Theft of a Motor Vehicle his offender score would have been 9,<sup>3</sup> and his standard range

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<sup>3</sup> Three points for past convictions, six for the other two current counts of Theft of a Motor Vehicle. *Supra*.

would still have been 43 – 57 months. Therefore, counts one and two did not add any additional punishment and are “free crimes.” Judge Godfrey did not make these findings, however, a “...court's failure to enter mandatory written findings and conclusions is harmless.” *State v. Bluehorse*, 159 Wn. App. 410, 423, 248 P.3d 537, 543 (2011) (citing *State v. Hickman*, 157 Wash.App. 767, 771 n. 2, 238 P.3d 1240 (2010).)

**Defendant’s claim that a legal sentence is a remedy unavailable to the State is erroneous. Defendant’s remedy is a legal sentence.**

Defendant opines that Judge Godfrey committed two errors: 1) running the sentences consecutively, and 2) imposing a downward exceptional sentence. Defendant further claims that, because the State did not appeal the downward exceptional sentence, the State cannot seek relief, so Defendant must be resentenced to 24 months.

This argument is nonsense. There was only one error of law: imposing an aggravated exceptional sentence based on findings that did not legally justify it. There is no evidence in the record to suggest Judge Godfrey meant to impose a mitigated exceptional sentence, and every indication that the sentence was meant to be more severe than the standard range. The exceptional sentence was structured as three shorter sentences run consecutively to one another, but this does not mean that a downward

exceptional sentence was imposed. “The trial court has ‘all but unbridled discretion’ in fashioning the structure and length of an exceptional sentence.” *France* at 470 (citing *State v. Halsey*, 140 Wash.App. 313, 325, 165 P.3d 409 (2007).) Defendant’s sentence was fifteen months longer than the standard range. It is an aggravated exceptional sentence.

Two wrongs do not make a right. To the extent Defendant received an illegal sentence his remedy is a legal sentence, not another illegal sentence, as is proposed by Defendant. Defendant’s argument has no merit and this court should reject it.

## CONCLUSION

An exceptional sentence was imposed based on findings made by Judge Gordon Godfrey. These findings do not justify an exceptional sentence. However, Defendant's offender score means that some of his conduct has gone unpunished, which does justify an exceptional sentence. The sentencing judge did not make these findings, but they are supported by the record. Failure to make written findings and conclusions can be harmless error. To the extent it is not harmless error, Defendant's remedy is to be resentenced.

DATED this 4<sup>th</sup> day of December, 2014.

Respectfully Submitted,

BY: s/ Jason Walker  
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# GRAYS HARBOR COUNTY PROSECUTOR

**December 04, 2014 - 4:05 PM**

## Transmittal Letter

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