

NO. 49006-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CORY LEWIS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jack Nevin, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant received ineffective assistance of counsel during sentencing.

2. The trial court erred in not making findings sufficient to permit appellate review when denying defendant's motion for a downward departure from the standard range sentence.

3. The trial court erred when it ordered a mental health evaluation as a condition of community custody without first complying with statutory requirements.

4. The trial court erred when it ordered appellant to pay a criminal filing fee despite finding he did not have the ability or likely future ability to pay discretionary legal financial obligations (LFOs).

Issues Pertaining to Assignments of Error

1. At the sentencing hearing, defense counsel made a motion for a downward departure from a standard-range sentence. Counsel did not brief the issue and failed to provide any notice. More importantly, he failed to inform the trial court of compelling case law relevant to the facts and circumstances of the case. Given the trial court's bench-trial findings, defense counsel's failure to inform the court of this authority was prejudicial. Did appellant

receive ineffective assistance of counseling at sentencing?

2. A sentencing court's denial of an exceptional sentence below the standard range is subject to appellate review to determine whether there was an impermissible basis for refusing to impose an exceptional sentence. Here, the trial court provided no insight as to why it denied appellant's motion for a downward departure. Instead, it simply stated it saw "no basis" for such a departure. Is remand necessary so the trial court may enter findings sufficient to permit meaningful appellate review?

3. Under RCW 9.94B.080, the trial court must make a specific finding that an offender is a mentally ill person as defined in RCW 71.24.025 before ordering a mental health evaluation and recommended treatment as a condition of community custody. It did not do so here. Must this condition be vacated due to the trial court's lack of statutory authority?

4. The trial court found that appellant did not have the ability to pay discretionary LFOs. Under the plain language of the statute, the criminal filing fee authorized under RCW 36.18.020(2)(h) is a discretionary LFO. Despite this, the trial court ordered appellant to pay the criminal filing fee because it believed the fee was mandatory. Was this error?

B. STATEMENT OF THE CASE

1. Procedural Facts

On January 27, 2015, the Pierce County prosecutor charged appellant Cory Lewis with one count of second degree murder and unlawful possession of a firearm. CP 1-2, 12-13. Following a bench trial in Pierce County Superior Court, Lewis was convicted as charged. CP 51-60.

The trial court sentenced Lewis to a standard range sentence of 300 months confinement. CP 33. It also ordered as a condition of community custody that Lewis undergo a mental health evaluation and treatment. CP 35.

The State asked that the defendant pay the following LFOs: \$500 victim's penalty assessment; \$100 DNA fee; \$200 criminal filing fee; and a \$1500 assigned counsel fee. RP 4-28-16 18. The trial court concluded Lewis did not have the ability or likely future ability to pay discretionary LFOs and refused to order the \$1500 fee. Id. at 31; CP 31-32. Believing all the other fees to be mandatory, however, it ordered Lewis to pay \$800 in LFOs. Id.

2. Substantive Facts

In November 2013, Cory Page and Lewis became roommates. RP (3-17-16) 37. Lewis and Page had a mutual

friend, Mookie, who had been renting a room in the same residence as Page. RP (3-17-16) 12-13. However, after Page became angry and tried to choke Mookie, Mookie moved out and Lewis moved in. RP (3-17-16) 12-13.

Page had a history of anger problems reaching back to his childhood. RP (3-7-16) 17; RP (3-16-16) 35-39, 45, 48-49, 54, 56. He would "go off" on people for no good reason. RP (3-16-16) 39. He admitted to his therapist that he felt anger and fury a lot, often "going from 0 to 60." RP (3-16-16) 48-49. He reported himself as violent and aggressive. RP (3-16-16) 49. Page's anger management problems led to his being expelled from Tacoma Community College. RP (3-16-16) 45. He was also fired from his job due to a confrontation at work. RP (3-16-16) 52.

One day in September 2014, Page became irate that Lewis and his children ate all the cheese in the house. RP (3-17-16) 16. After the children left, Page followed Lewis into another room, belligerently yelling at him. RP (3-17-16) 17. Page provoked a fistfight in which Lewis engaged to defend himself. RP (3-17-16) 17. Lewis ended up having to go the hospital by ambulance and was treated for a dislocated shoulder. RP (3-17-16) 17. After this,

Lewis stopped having his kids come over to the house and began looking for a new place to live. RP (3-17-16) 18.

On December 8, 2014, Lewis arrived home and went to his room to work on his music. RP (3-17-16) 21. Page called Lewis into his room and began to yell and belittle him for no apparent reason. Page cursed at Lewis, calling him a "little bitch." RP (3-17-16) 23. Lewis did not understand what had set Page off. RP (3-17-16) 24. Page wanted to get into another fistfight with Lewis, but Lewis said he did not want to. RP (3-17-16) 25.

At one point, Page picked a gun up from off his bed and started waiving it around. RP (3-17-16) 23. He eventually pointed the gun directly at Lewis. RP 25. As Lewis went into the hallway, Page said "I'll clap you right now." RP (3-17-16) 25. Lewis interpreted this to mean that Page would shoot him. RP (3-17-16) 25.

Page continued to get into Lewis' face, spitting on him as he went back to his room. RP (3-17-16) 26. Page paced back and forth, screaming at Lewis and saying he could do whatever he wanted to Lewis. RP (3-17-16) 26. Page followed Lewis back to his room and demanded Lewis return some clothing that Page had given Lewis. RP (3-17-16) 26. Page continued to waive his gun.

RP (3-17-16) 27. After he pointed the gun at Lewis, Lewis quickly gave the clothing back. RP (3-17-16) 26.

After Page left Lewis' room, Lewis grabbed his own gun and went in the hallway to leave. RP (3-17-16) 27. In order to leave the residence, however, he had to pass by Page's bedroom door. RP (3-17-16) 28. As Lewis left his room, he saw Page facing away just inside the doorway entrance of Page's room. RP (3-17-16) 29. Page began to turn back toward Lewis. RP (3-17-16) 29. Lewis testified he feared Page was going to shoot him and fired two shots at Page, which eventually resulted in Page's death. RP (3-17-16) 30, 32-33; RP (3-15-16) 95.

Lewis left the residence in a panic and did not return until December 11, 2015. RP (3-17-16) 30, 33. In the meantime, he threw the gun away in Snake Lake. RP (3-17-16) 31. After he returned to the apartment, Lewis called 911 and reported that he had come home to find his roommate lying on the floor possibly dead. RP (3-3-16) 46-47. When police came to investigate, Lewis denied knowing anything about Page's death. RP (3-7-16) 26-29.

Police found Page dead on the floor. RP (3-3-16) 48. Page's gun was found on the floor next him. RP (3-3-16) 49. Eventually, police identified Lewis as a suspect. RP (3-9-16) 120.

When Lewis came to the station to retrieve a computer police had collected via a search warrant, they asked if he would take a polygraph, to which Lewis agreed. RP (2-29-16) 68; RP (3-9-16) 118.

After the polygraph was concluded, police decided Lewis was not free to go and interviewed him more. RP (2-29-16) 90. Eventually, Lewis admitted to shooting Page and provided a detailed statement. RP (3-9-16) 121-35; Ex. 175, 177. Lewis also showed officers where he had dropped the gun in the lake. RP (3-10-16) 13. Police later retrieved the gun. RP (3-9-16) 12-14.

A trial, Lewis asserted he acted in self-defense. RP (3-21-16) 87-92, 116. The trial court determined, however, that at the time of the shooting Lewis did not have a reasonable belief of imminent danger of harm, injury, or death because any threat had ended when Page left Lewis' room. CP 57; RP (3-24-16) 16-18.

At sentencing, defense counsel moved for an exceptional sentence downward on the ground that Page had to a significant degree provoked the incident. Defense counsel requested Lewis be sentenced to only 15 years total, which was less than half of the 31 year sentence the State sought, but counsel provided only limited argument in support of this motion. RP (4-28-16) 16, 25-27.

Defense counsel failed to provide any briefing, essentially springing the request on the court in the middle of the sentencing and omitting any relevant authority. RP (4-28-16) 25-27. The trial court denied the motion, stating only that there was “no basis” for it. RP (4-28-16) 28.

C. ARGUMENT

I. LEWIS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

The trial court has authority to depart downward from the standard sentence range where the facts show the victim, to a significant degree, provoked the incident. RCW 9.94A.535(1)(a). As shown below, the record supports the legal and factual availability of this mitigating circumstance in Lewis’ case. Unfortunately, the record also shows defense counsel failed to adequately present the issue, omitting relevant authority that should have been provided to the trial court. This constituted ineffective assistance of counsel.

The Sixth Amendment of the United States Constitution guarantees defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to counsel is constitutionally

guaranteed at all critical stages of a criminal proceeding, including sentencing. Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987) (“Sentencing is a critical stage of the proceedings, at which a defendant is constitutionally entitled to be represented by counsel.”).

To demonstrate ineffective assistance of counsel, an appellant must show that the attorney's performance was deficient and that the deficiency was prejudicial. State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). Deficient performance is that which falls below an objective standard of reasonableness. In re Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). The reasonableness of counsel's conduct is judged “on the facts of the particular case, viewed as of the time of counsel's conduct.” Strickland, 466 U.S. at 690. Prejudice occurs if, but for the deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

Counsel's failure to base his argument on clear statutory grounds and supporting case law that could have justified the trial court's imposition of an exceptional sentence downward has been

found to constitute deficient performance. State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002), State v. Hernandez–Hernandez, 104 Wn. App. 263, 266, 15 P.3d 719 (2001).

Under RCW 9.94A.535(1), the court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. One statutorily enumerated mitigating factor is that, “[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.” RCW 9.94A.535(1)(a).

Defense counsel moved for an exceptional sentence in part based on this statutory factor, but he failed to prepare briefing on the matter, essentially springing this on the Court in the middle of the sentencing hearing. RP (4-28-16) 25-26. More importantly, defense counsel failed to inform the trial court of relevant authority establishing that: (1) even when a defendant’s response is disproportional to the victim’s provocation, a sentence may be mitigated under this statutory factor; and (2) verbal provocation resulting in a physical injury may still justify an exceptional sentence downward under the provocation mitigating factor. Id.

In a case raising issues similar to those here, Samuel Whitfield moved for an exceptional sentence downward following

his conviction, on the ground that the victim through her insistent confrontational words ultimately provoked a violent response via a brutal assault. State v. Whitfield, 99 Wn. App. 331, 333-34, 994 P.2d 222(1999). The trial court departed from the standard range, but the State appealed. Id.

Division One of this Court upheld the mitigated sentence. It rejected the State's argument that words cannot to a significant degree provoke a physical assault under the provocation factor. It also rejected the State's claim that an exceptional sentence is not appropriate unless the defendant's response is proportional to the victim's provocation. It concluded that provocation need not be proportional and even verbal provocation could support a downward departure under RCW 9.94A.535(1)(a). It explained that reasonableness in the use of force was not a determinative issue under the provocation mitigating factor. Id. at 335-38.

The proportionality and reasonableness issues in Whitfield were also present in Lewis' case where there was evidence that Page provoked the incident to a significant degree. The record includes evidence that Page had anger management problems, was prone to angry outbursts, had grabbed his former roommate by the throat, and had previously engaged Lewis in a fist fight simply

because Lewis ate all the cheese (sending Lewis to the hospital with a separated shoulder). RP (3-16-16) 35-39, 45, 48-49, 54, 56; RP (3-17-16) 14-18.

Lewis testified that Page had been the aggressor and provoked the incident. He testified that prior to the shooting Page: (1) called Lewis into his room and berated him for no apparent reason; (2) taunted that he could kill Lewis if he wanted to; (3) followed Lewis into his room and berated him again while waiving a gun around; (4) pointed the gun directly at Lewis; and (5) placed him in fear for his life. RP (3-17-16) 23-30, 33.

Based on this record, the trial court found that, just prior to the shooting, Page was agitating the defendant with inappropriate conduct. RP (3-24-16) 16-18. It found that shortly before the incident, Page was attempting to provoke a fistfight but Lewis refused to fight him. Id. It also found Page was verbally offensive, and he had a gun in his hand while agitating Lewis. Id.

The trial court ultimately concluded that self-defense was not available to Lewis because any imminent threat ended when Page left the bedroom and he did not reasonably fear for his life. Id. However, just because the trial court found there was not an imminent threat that Page intended to inflict death or great personal

injury, this did not preclude a mitigated sentence under RCW 9.94A.535(1)(a). See Whitfield, 99 Wn. App. at 337-38 (holding that failure to show reasonable use of force did not limit mitigation due to victim provocation). The court emphasized that Page only wanted to engage in a fistfight, and that was not enough of a threat to justify the shooting. Id.

Despite a record underscoring the trial court's consideration of the disproportionate use of force (fistfight compared to gunshot), defense counsel never cited Whitfield to the Court in her last minute request for a mitigated sentence. Given this record, it was deficient performance for defense counsel not to cite Whitfield and make it an essential part of a more zealous advocacy for the mitigated sentence Lewis was requesting.

As for prejudice, this case is similar to State v. McGill, 112 Wn. App. at 95, in which Division One reversed due to ineffective assistance of counsel. Although there was a factual record and case law supporting a downward departure in McGill's case, his attorney did not move for an exceptional sentence or cite the relevant authorities that would have supported it. McGill, 112 Wn. App. at 101-102. Division One recognized McGill's ineffective assistance argument was based on his counsel's failure to cite

relevant case law to the trial court and use it to argue for an exceptional sentence down. Id. at 102.

The State asked the trial court to reject McGill's ineffective assistance argument. However, Division One held: "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority." McGill, at 102. Because the appellate court could not say the trial court would have imposed the same sentence had it been informed of the relevant case law, remand was required. McGill, 112 Wn. App. at 100-101.

Remand is likewise required here. Defense counsel failed to cite relevant authority to inform the court of the parameters of its decision-making authority. As in McGill, it is not possible to say with certainty the trial court would have imposed the same sentence had it known of the holding in Whitfield. In fact, given the trial court's findings as to Page's provocative behavior leading up to the shooting, there is a reasonable probability the trial court would have mitigated the sentence downward if it known about Whitfield. RP (3-24-16) 16-18.

The trial court placed significant emphasis in its findings on the fact that Lewis' shooting of Page was disproportionate to Page's desire to get into another fistfight. Whitfield instructs that a

mitigated sentence under RCW 9.94A.535(1)(a) is still available even when a defendant's response to provocation is disproportionate to the victim's provocation. Hence, there is a reasonable probability that had defense counsel used Whitfield to advocate for a mitigated sentence, the outcome here would have been different.

In sum, as in McGill, remand for reconsideration of Lewis' motion for a mitigated sentence is necessary so that Lewis may be provided effective assistance of counsel in making that motion and the trial court may exercise properly informed discretion.

II. REMAND IS NECESSARY SO THE TRIAL COURT MAY ENTER FINDINGS SUFFICIENT TO PERMIT APPELLATE REVIEW OF ITS DENIAL OF A DOWNWARD DEPARTURE FROM THE STANDARD RANGE.

Appellate review of a sentencing court's denial of a request for an exceptional sentence below the standard range is limited to circumstances where the sentencing court refuses to exercise its discretion at all or relies on an impermissible basis for refusing to impose an exceptional sentence. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a

sentence and to have the alternative actually considered.” State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). The sentencing court’s failure to consider an exceptional sentence authorized by statute or reliance on an improper basis is reversible error. Id.

Although the trial court recognized and exercised its discretion under RCW 9.94A.535, the record is devoid of any reasons supporting its decision. The total sum of the court’s analysis is: “I simply don’t find there is any basis here.” RP (4-28-16) 28. From this, there is no way this Court can determine whether the trial court relied on an improper basis when it denied Lewis’ motion.<sup>1</sup> As such, the Court’s findings are not adequate to permit meaningful appellate review. Hence, at the very least, this Court should remand with an order for the trial court to provide a basis for its decision.

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<sup>1</sup> For example, the trial court might have taken the position that a downward departure is available only when the defendant’s use of force is proportional to the victim’s provocation. Given its findings that Page was only provoking a fistfight, it might have then concluded that Lewis’s response was disproportional and there was therefore no basis for a downward departure. However, as explained above, this analysis would be wrong under Whitfield.

III. THE TRIAL COURT ERRED WHEN IT ORDERED A MENTAL HEALTH EVALUATION AS A CONDITION OF COMMUNITY CUSTODY WITHOUT FIRST DETERMINING WHETHER LEWIS WAS A MENTALLY ILL PERSON.

This Court should strike the mental health evaluation and treatment condition of Lewis' sentence because the trial court failed to make a statutorily required finding to support that condition. See, State v. Shelton, 194 Wn. App. 660, 676, 378 P.3d 230, 239 (2016) (accepting State's concession of error regarding the trial court's failure to make a determination that defendant was a mentally ill person as required by statute).

"[I]f legal or erroneous sentences may be challenged for the first time on appeal." State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). A trial court commits reversible error when it exceeds its sentencing authority. State v. C.D.C., 145 Wn. App. 621, 625, 186 P.3d 1166 (2008).

The trial court exceeded its statutory authority when it ordered Lewis to participate in a mental health evaluation and follow recommendations. RCW 9.94B.080 provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and

to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment may be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

Emphasis added. Thus, for a mental health community custody condition to be valid, the trial court must make an express finding that an offender is a mentally ill person as defined in RCW 71.24.025. State v. Jones, 118 Wn. App. 199, 209, 76 P.3d 258 (2003).

Here, when ordering Lewis to participate in a mental health evaluation and recommended treatment, the sentencing court did not make a specific finding that Lewis is a mental ill person as defined by statute. CP 35; RP (4-28-16) 32. As such, it lacked authority to impose mental health treatment as a condition of Lewis' sentence. Accordingly, this Court should vacate this community custody condition and remand for resentencing.

IV. THE CRIMINAL FILING FEE IS NOT MANDATORY AND THUS SHOULD NOT HAVE BEEN ORDERED IN THIS CASE.

The statutory language of RCW 36.18.020(2)(h) supports a conclusion that the criminal filing fee is a discretionary LFO. RCW 36.18.020(2)(h) does not directly set forth a mandatory fee, providing only that: "Upon conviction ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars." Emphasis added.

By directing only that the defendant is "liable" for the criminal filing fee, the Legislature did not create a mandatory fee. Blacks Law Dictionary recognizes the term "liable" encompasses a broad range of possibilities – from making a person "obligated" in law to imposing on a person a "future possible or probable happening that may not occur." Blacks Law Dictionary 915 (6th ed.1990). Thus, at best, the statutory language is ambiguous as to whether the fee is mandatory or discretionary. Under the rule of lenity, the statute must be interpreted in appellant's favor. State v. Jacobs, 154 Wn. 2d 596, 601, 115 P.3d 281, 283 (2005). Consequently, the filing fee is a discretionary LFO.

This conclusion is further supported by the fact that the Legislature clearly knows how to authorize an unambiguous and

mandatory fee, but it did not do so in this statute. The language in RCW 36.18.020(2)(h) differs markedly from that in statutes directly authorizing mandatory fees. For example, the Victim's Penalty Assessment is recognized as a mandatory fee, with its authorizing statute providing: "When any person is found guilty in any superior court of having committed a crime...there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035. The statute is unambiguous in its command that such a fee shall be imposed.

Likewise, the statute authorizing the DNA-collection fee is also unambiguous in its mandatory nature, requiring: "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." RCW 43.43.7541. Yet, the Legislature failed to use this direct language in the statute at issue here.

Appellant recognizes that this Court's decision under State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013) states the filing fee is mandatory. However, Lundy provides no rationale and no analysis of the statutory language supporting this conclusion. Additionally, there is a split of authority within this Court as to whether the filing fee is mandatory or discretionary. Compare,

Lundy, 176 Wn. App. 96, 102-03, with State v. Schechert (unpublished), 2016 WL 2654604 \*3, n. 5 (stating the criminal filing is discretionary).

Given the statutory language of RCW 36.18.020(2)(h), this Court should decline to follow Lundy and instead hold the criminal filing fee is a discretionary LFO. In so holding, this Court should order that the criminal filing fee order be vacated because the trial court, applying State v. Blazina, 182 Wn.2d, 344 P.3d 680 (2015), found Lewis was does not have the ability to pay discretionary fees. RP (4-28-16) 31.

D. CONCLUSION

For the reasons stated above, this Court should remand for resentencing so Lewis may receive effective assistance of counsel in requesting a mitigated sentence. Alternatively, it should remand to require the trial court to enter the basis for its decision to deny Lewis' request for a downward departure. Additionally, it should remand so that the mental health treatment and criminal filing fee provisions in the sentence may be stricken.

Dated this 5<sup>th</sup> day of January, 2017

Respectfully submitted

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