

No. 49179-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JANET L. GLEASON,

Appellant.

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

The Honorable Richard L. Brosey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

In its response, the State argues that the sentencing court properly relied on information that the residential burglary of the house of elected Lewis County Prosecuting Attorney Jonathan Meyer was committed as an act of revenge when it imposed an exceptional sentence and denied the defense motion for sentencing under the Drug Offender Sentencing Alternative (DOSA). Brief of Respondent (BR) at 12-16. The State argues that the court did not abuse its discretion by denying DOSA and that it was entitled to rely on the statement of the elected prosecutor regarding the burglary of his house. BR at 13.

The State concedes the consecutive sentence imposed for bail jumping in cause no. 16-1-00251-2 is an exceptional sentence and that the case should be remanded for resentencing within the standard range. BR at 9-11.

1. The sentencing court erred by denying DOSA based on an allegation that was not proven, acknowledged, nor admitted

The court erroneously denied the request for DOSA based on the unproven allegation and the sentencing judge's belief that the burglary of the prosecutor's house was committed as an act of revenge.

The real facts doctrine is embodied in RCW 9.94A.530(2),

which states in relevant part:

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 use of the phrase “any sentence” in RCW 9.94A.530(2) shows that the real facts doctrine applies even if a defendant is sentenced within the standard range. Ms. Gleason submits that the doctrine applies in the consideration of a sentence under DOSA.

The State finds fault with counsel’s failure to object to Mr. Meyer’s victim impact statement to the court that the burglary “was revenge, pure and simple.” BR at 17. When a defendant fails to object to information presented at sentencing, that information is deemed acknowledged. See *State v. Handley*, 115 Wn.2d 275, 283, 796 P.2d 1266 (1990). The State’s contention that she did not voice her objection is incorrect; Ms. Gleason denied that the burglary was an act of revenge. RP at 15. Although Ms. Gleason was not formally challenged with the claim that the burglary was revenge, but it was clearly on the mind of Judge Brosey at sentencing. During allocution she was asked by Judge Richard

Brosey “[y]ou’re telling me you didn’t know whose house it was?” RP at 15. In response, Ms. Gleason denied that she knew it was Mr. Meyer’s house, and by implication that it could not have been as an act of revenge, as speculated by Mr. Meyer during his victim impact statement. RP 16-17. In response to the court’s accusation, Ms. Gleason stated: “I absolutely did not know. I could not even tell you what Mr. Meyers looked like until I came to jail on that charge and then I seen it in the phone book, his picture in the phone book. I honestly did not know.” RP at 15.

Because she had already denied that she knew it was Mr. Meyer’s house, and by implication that the burglary could not have been committed as revenge for prosecution of her son, further objection by counsel would have been (1) redundant, and (2) risked aggravating a judge from whom defense counsel wished to receive a DOSA.

The sentencing court relied on the unproven allegation of revenge to deny the motion for DOSA. RP at 18. This violated the real facts doctrine and remand for resentencing is therefore necessary. “The real facts doctrine requires that sentences be based upon the defendant’s current conviction, his criminal history, and the circumstances of the crime.” *State v. Coats*, 84 Wn.App. 623, 626, 929 P.2d 507 (1997) (citing *State v. Tierney*, 74 Wn.App. 346, 350, 872 P.2d 1145 (1994)); *State v. Houf*, 120 Wn.2d 327, 333, 841 P.2d 42 (1992). Under the clear

terms of the statute, the sentencing court may not consider facts probative of a more serious crime unless the defendant stipulates to those facts. While counsel did not formally object, Ms. Gleason implicitly denied the allegation contained in the Risk Assessment Report which contains a statement by a co-defendant that Ms. Gleason knew that the residence belonged to the prosecuting attorney and that the burglary was committed in retaliation for prosecuting her son.

The real facts doctrine does not preclude consideration of misbehavior that does not rise to the level of a crime, or enhance another crime. *State v. Reynolds*, 80 Wn.App. 851, 859, 912 P.2d 494 (1996). However, failure to object to the allegation that the burglary was committed as revenge against an elected official extends only to the facts supporting the charged crime of residential burglary. Here, Mr. Meyer's victim impact statement implies that he viewed the burglary not only as an act of revenge for the prosecution of her son, but that it was an attack on the court system as a whole and his role as a public servant in the system. Mr. Meyer told the court that:

I had never thought that the sanctity of my home would be violated simply because I was doing my job.

...

But to come to my home and do it is not only an attack on me, an attack on my entire family, but an attack on the entire system.

RP at 16-17.

The real facts doctrine prohibits trial courts from imposing a sentence based on facts that would elevate the degree of the charged crime or facts that compose the elements of an additional, unproven crime. *State v. Wakefield*, 130 Wn.2d 464, 475–76, 925 P.2d 183 (1996). Here, the additional facts tend to support a charge of intimidating a public servant, codified at RCW 9A.76.180,¹ and therefore is outside the scope of what the sentencing court may consider.

Judge Brosey clearly relied on the assertion that the burglary was an act of revenge when he denied the request for DOSA, stating “I can’t remember, quite frankly, another case where by all indications the burglary was committed as a result of a desire to extract revenge for something that was done by the victim. And that puts this burglary in a whole other category which, quite frankly, I have not seen in all the years that I’ve been an attorney and a judge.” RP at 18-19.

Because Judge Brosey relied on facts that had not been proven or acknowledged as a basis for denying the DOSA, that denial was in error.

¹RCW 9A.76.180

(1) A person is guilty of intimidating a public servant if, by use of a threat, he or she attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant.

(2) For purposes of this section “public servant” shall not include jurors.

(3) “Threat” as used in this section means:

(a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(b) Threats as defined in RCW 9A.04.110.

(4) Intimidating a public servant is a class B felony.

Although Ms. Gleason was not charged with the offense of intimidation of a public servant, the court explicitly viewed the crime as “a whole other category[,]” to be differentiated from other residential burglaries. RP at 18. Therefore, the trial court relied to no small extent on facts more similar to intimidation of the Class B felony of intimidation of a public servant, in violation of the real fact so doctrine. See, *State v. Morreira*, 107 Wn.App. 450, 460, 27 P.3d 639 (2001) (trial court violated real facts doctrine at sentencing by relying on facts establishing intent element of more serious crime).

Accordingly, Ms. Gleason is entitled to a new hearing on her request for a DOSA.

B. CONCLUSION

The Court should accept the State's concession of error, and reverse and remand this matter for sentencing within the standard range, including consideration of Ms. Gleason's motion for DOSA.

DATED: April 27, 2017.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

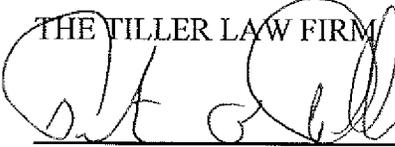
PETER B. TILLER-WSBA 20835
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CERTIFICATE

I certify that I sent by JIS a copy of the Reply Brief of Appellant to Clerk of Court of Appeals and to Ms. Sara Beigh, Deputy Prosecuting Attorney, and mailed copies, postage prepaid on April 27, 2017, to appellant, Janet Gleason:

Ms. Sara Beigh Lewis County Prosecutors Office 345 W Main St. Fl 2 Chehalis, WA 98532-4802 appeals@lewiscountywa.gov	Mr. Derek M. Byrne Clerk of the Court Court of Appeals 950 Broadway, Ste.300 Tacoma, WA 98402-4454
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DATED: April 27, 2017.

THE TILLER LAW FIRM


PETER B. TILLER – WSBA #20835
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