

NO. 49791-3-II

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

STATE OF WASHINGTON, Respondent

v.

TIMAR AKEEM DEGRAFFE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-00957-5

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court did not engage in unlawful judicial fact finding.**
- II. **\$11,639.05 in court costs should be stricken.**
- III. **The State does not intend to seek a cost bill.**

STATEMENT OF THE CASE

The State agrees with DeGraffe's recitation of facts but adds the following factual statement for this Court's consideration.

At sentencing, the trial court gave the following remarks:

THE COURT: Thank you, Mr. Degraffe.

I'll just repeat what I started to say there, and I appreciate the statement from Mr. Degraffe. I was preambing by stating that it's not often that the Court is asked or put in the position to exercise its discretion in such a wide range of possibilities. Again, the history here is that there was a movement -- and I suppose it was in the '80s which took a lot of that discretion out of the hands of judges, put it in the hand of the legislature and the prosecutors in terms of the way cases are charged, aggravators, enhancements, et cetera. So it's a case that I consider very carefully, and I appreciate the arguments and the factual information brought to the Court's attention.

I've done a lot of thinking about this case since the jury trial. What really stands out in my mind is the incredible contrasts of the participants in this particular crime. In the one hand, we have participant with an extensive criminal record who was recently released from state custody, and less than two weeks made a -- and I'll be charitable here and call this a bad decision -- but made a very fateful

decision to walk into a financial institution armed with a knife.

Even if you didn't intend to use that knife to harm somebody, clearly the decision to go into that bank armed as such was an open invitation to violence of any kind. And frankly, Mr. Degraffe, you're probably lucky that you weren't shot dead by law enforcement intervening in the process.

So, on the one hand, I have somebody who has a demonstrated track record and criminal record of disregard for the property rights and for the safety of other human beings and the citizens of this community. The record there is profound. And the fact that this happens after recently being released from incarceration is especially troubling to the community and to the Court, all for \$2,000, which may seem like a lot of money, but in the value of life and the value of everything else that we value and treasure and make precious in life is incredibly small. And I'm certainly -- I'm certain that Mr. Uptmor, in this case, comparing the numbers of the money stolen versus the harm committed, it's really impossible to square that circle.

So, on the one hand I have this example of behavior in the community, and on the other hand I have an example of somebody who put his own life at risk, not for his own safety, not for his own property, but for the safety and property of complete strangers. It's because of that reason that this crime so specifically shocks the conscience of this community that somebody who would rise to intervene to be if not a statutory Good Samaritan would be the functional equivalent of a Good Samaritan and would be harmed in this way is -- it's one of the more bothersome and troubling factual cases that's ever been presented during my four years on the bench here.

Because of that, I have to seriously consider all of the competing rights and interests in this particular proceeding, and what's really jumping out at me is one of community safety. We have demonstrated track record; we have a very

violent crime committed recently after being released from incarceration.

And I credit Mr. Peterson who performed excellent legal work on your behalf so that a jury was unable to convict on the assault 1 and on the attempted murder. But ultimately, this Court has to exercise its discretion in a manner that tries to weigh all those competing interests. This Court will not shy away from exercising that discretion under these circumstances.

It will be the judgment and sentence of this Court that, on the assault 2 charge, there will be a sentence of the 70 months which includes the standard range, plus the aggravator enhancement. The range on the robbery 1 will be 150 months. They will be consecutive. There will be credit for the time served. Standard costs, fines, and fees, restitution to be left open, I presume, for the statutory 180 days?

RP 436-39.

In imposing an exceptional sentence in this case, the trial court entered the following written findings of fact and conclusions of law:

Findings of fact:

The defendant was convicted of Robbery in the First Degree.

This robbery occurred 10 to 11 days after the defendant's release from prison.

The defendant was released from prison following an approximately 18-month sentence for Felony Harassment – Death Threats.

1.1 The robbery in this case involved the defendant robbing a bank with a large knife, menacing a bank teller,

stabbing a bank customer who tried to intervene, and nearly killing that individual in the process.

1.2 The victim of the stabbing suffered two episodes of cardiac arrest following the stabbing, spent three weeks in a coma, has long-term debilitating injuries as a result, has been implanted with a pacemaker as a result of the stabbing, and stands a continued risk of death from the injuries he sustained in the course of trying to prevent the robbery.

1.3 A jury unanimously found that the defendant committed the robbery shortly following his release from incarceration.

Conclusions of Law:

2.1 Ten to eleven days from the date of release from an approximately 18-month prison sentence is a very short period of time for purposes of applying the aggravating factor justifying an exceptional sentence in this case.

2.2 The defendant committed a serious violent offense within days of being released from prison.

2.3 The facts of this case as found by the jury, present a compelling circumstance to justify an exceptional sentence above the standard range.

CP 114-15.

ARGUMENT

I. The trial court did not engage in unlawful judicial fact finding.

DeGraffe claims that the trial court engaged in judicial fact finding in imposing the exceptional sentence in this case because it observed, in

robbery. It is true that the trial court said that the victim, while not a Good Samaritan in the statutory sense, was “the functional equivalent of a Good Samaritan” insofar as he was stabbed while trying to stop an armed robbery. RP 438. But to equate that brief, accurate observation with unlawful judicial fact finding strains credulity.

By statute, a trial court must find there are substantial and compelling reasons for imposing an exceptional sentence. RCW 9.94A.535, *State v. Hale*, 146 Wn.App. 299, 306-307, 189 P.3d 829 (2008). The trial court’s finding on this point is a legal conclusion which is reviewed de novo. *Hale, supra*, at 306-307. DeGraffe complains that in considering whether substantial and compelling reasons exist for imposing an exceptional sentence, which necessarily involves looking at the egregiousness of the defendant’s conduct as a whole, the trial court considered the harm DeGraffe brought on an innocent party who was merely intervening in an effort to stop him. But DeGraffe’s actions toward the victim make his rapid recidivism even worse than it would have been had no one been hurt during the commission of this crime, or had the crime been less serious. The absence of a specific finding by the jury of the Good Samaritan aggravator as to the lesser included offense of assault second degree does not preclude the trial court recognizing that a mere

eleven days after being released from prison, DeGraffe was prepared to stab an innocent person in an effort to get away with armed robbery.

Appellate review of an exceptional sentence is governed exclusively by RCW 9.94A.585(4), and provides that an appellate court may not reverse an exceptional sentence unless it finds either that the reasons supplied by the sentencing court are not supported by the record which was before the trial judge or the reasons do not justify a sentence outside the standard range for that offense, or that the sentence imposed is clearly excessive or clearly too lenient. The role of the trial court is to determine whether the aggravators found by the jury provide a substantial and compelling reason to impose an exceptional sentence. DeGraffe posits that this part of the trial court's inquiry is extremely limited; that the trial court is prohibited from considering aspects of the case that are not solely confined to the facts which necessarily formed the basis of the jury's finding on the special verdict. But DeGraffe cites no case that establishes such a strict limitation. It is a fact of this case that the victim was stabbed by the DeGraffe while trying to intervene in DeGraffe's commission of an armed robbery, and that DeGraffe assaulted the victim in this fashion a mere eleven days after being released from prison. Recognition of this evidence, which was put before the jury in its consideration of the case, does not constitute unlawful judicial fact finding. DeGraffe's contention

lacks merit and the State respectfully asks this Court to affirm his exceptional sentence.

II. \$11,639.05 in court costs should be stricken.

DeGraffe challenges discretionary costs for the first time on appeal. Although DeGraffe does not itemize the financial obligations to which he objects, and generally bemoans the amount of restitution he was ordered to pay, the only costs imposed in this case for which a finding of ability to pay is required are the \$7920 in attorney fees and the \$3791.05 in defense costs.

It is important to clarify into which category each legal financial obligation falls, because they are frequently described as “costs” when only some of them meet that definition. The holding in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), applies only to costs under RCW 10.01.160. *Blazina* at 837-38. “Costs” include discretionary attorney’s fees, but they do not include restitution, the mandatory victim assessment or the mandatory DNA collection fee. In considering a motion to remit under RCW 10.01.160, the court must first determine which legal financial obligations are costs and which are non-costs. Fines and restitution are not costs. Regarding fines, see generally RCW 10.01.170, RCW 9.92.070, RCW 10.82.010, *State v. Clark*, 191 Wn.App. 369, 362 P.3d 309 (2015). Regarding restitution, it is not a cost and cannot be

remitted under RCW 10.01.160(4). See RCW 9.94A.753(4). The victim assessment is a penalty rather than a cost. See RCW 7.68.035 (1) (a). (See also RCW 10.82.070(1), distinguishing costs from penalties.) Likewise, the DNA collection fee is a fee, not a cost. Further, it is not subject to remission. See RCW 43.43.7541 (“Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law.”) The criminal filing fee, like the DNA fee, is a fee rather than a cost. Although termed a criminal filing fee, this fee only becomes due (and mandatory) after conviction. See RCW 36.10.020; *State v. Lundy*, 176 Wn.App. 96, 308 P.3d 755 (2013).

As noted above, the only costs at issue in this case are the defense preparation and attorney costs. They total \$11,639.05. DeGraffe is correct that the record is devoid of any inquiry into his ability to pay these costs, either now or in the future. DeGraffe is correct that the finding of ability to pay in the future must be stricken. The ordinary remedy for this error is to remand the matter to the trial court for proper consideration of the defendant’s ability to pay. The State, however, would be content with this Court simply striking the \$11,639.05 in costs. The State does not believe it could support the imposition of these costs at a hearing on this matter. The State believes such a hearing would be a waste of the Superior Court’s

time. As the proponent of the costs below, the State now withdraws the request for costs.

III. The State does not intend to seek a cost bill.

The State has no intention of seeking a cost bill because the State prefers that any money that could be contributed by DeGraffe toward legal financial obligations should be devoted first and foremost to restitution.

CONCLUSION

The State asks this Court to affirm the exceptional sentence, and to strike discretionary court costs from the judgment and sentence.

DATED this 1st day of August, 2017.

Respectfully submitted:

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