

No. 50082-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

BIJON PRICE

BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

TABLE OF CONTENTS

A. Assignment of Error.....	1
B. Statement of Facts.....	1
C. Argument.....	11
D. Conclusion.....	15

TABLE OF AUTHORITIES

Cases

<i>State v. Allert</i> , 117 Wn.2d 156, 815 P.2d 752 (1991).....	12
<i>State v. Clemons</i> , 78 Wn.App. 458, 898 P.3d 324 (2000).....	9, 14
<i>State v. Duke</i> , 77 Wn.App. 532, 892 P.2d 120 (1995).....	11
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005).....	11
<i>State v. Hinds</i> , 85 Wn.App. 474936 P.2d 1135 (1997).....	9, 14
<i>State v. Pascal</i> , 108 Wn.2d 125, 736 P.2d 1065 (1987).....	13
<i>State v. Whitfield</i> , 99 Wn.App. 331, 994 P.2d 222 (1999).....	12, 13, 14

A. Assignments of Error

Assignments of Error

The sentencing court erred by concluding as a matter of law it was precluded from considering a mitigated exceptional sentence.

Issues Pertaining to Assignments of Error

1. May a defendant appeal from a standard range sentence when the sentencing court erroneously finds as a matter of law that a mitigated exceptional sentence is not permitted?
2. After making findings of facts that the victim and his accomplices initiated the contact as a ruse to rob the defendant, but was unable to find on disputed evidence whether they were armed with a firearm, the sentencing court concluded it was precluded as a matter of law from imposing a mitigated exceptional sentence. Should this case be remanded for the sentencing court to exercise its discretion based upon a correct understanding of the law?

B. Statement of Facts

Bijon Price was charged by original Information with one count of first degree assault (with a firearm enhancement) and first degree unlawful possession of a firearm. CP, 1. The allegation was that on December 22, 2015, Mr. Price, a convicted felon, shot into a vehicle driven by Michael

Allen and hit him in the temple, with the bullet exiting near his left eye. CP, 3. Although Mr. Allen was initially listed in critical condition, he survived the injury. CP, 3. Also in the vehicle were witnesses Faye Reynolds and Luciano Romero. CP, 3.

The case was called for trial on March 6, 2017. A First Amended Information was filed. CP, 5. It was clear in the early stages of the trial that the State was having difficulties. Mr. Allen's memory of the incident, for instance, fluctuated greatly over time, from no memory at all when interviewed by law enforcement, to remembering more later. TRP, 3 (March 6, 2017). Mr. Allen also had his own legal problems, causing him to be in the Pierce County Jail at the commencement of the trial, having just started a 87 month prison sentence. TRP, 4 (March 6, 2017). Ms Reynolds was described by defense counsel as a "poor woman [who] has no definition of the truth." TRP, 46 (March 6, 2017). Mr. Romero, who goes by the gang names of Lil Miko and Lil Devil, was possibly in possession of a firearm on December 22, 2015, which would be a felony for him given his felony criminal history. TRP, 45, 64 (March 6, 2017).

One of the ways the State proposed to address its proof problems was to grant immunity to its three primary witnesses: Michael Allen, Faye Reynolds and Luciano Romero. TRP, 4 (March 6, 2017). The Court

indicated a willingness to do as requested and appointed counsel for each of the witnesses to assist with that process. TRP, 6 (March 6, 2017).

Later that day, Mr. Romero appeared with his attorney, James White. TRP, 64 (March 6, 2017). Mr. White represented that he had gone over the immunity motion and order with his client and that his client understood it. TRP, 65 (March 6, 2017). Mr. Romero refused to sign the order. TRP, 65 (March 6, 2017). The next day, Ms. Reynolds appeared with her attorney, Mr. Doherty. TRP, 100 (March 7, 2017). Mr. Doherty indicated he went over the immunity motion and order with his client. TRP, 101 (March 7, 2017). Mr. Allen appeared with his attorney, Mr. Maltby. TRP, 102 (March 7, 2017). Mr. Maltby indicated he believed his client understood the immunity motion and order, but Mr. Allen was refusing to sign it. TRP, 104 (March 7, 2017).

On the third day of trial, the parties announced they had reached a plea agreement. TRP, 114 (March 8, 2017). The State filed a Second Amended Information charging one count of first degree assault (dropping the firearm enhancement) and one count of unlawful possession of a firearm in the first degree. TRP, 114 (March 7, 2017). It was clear at the time of the plea that the defense would be requesting a mitigated exceptional sentence. TRP, 116 (March 7, 2017). After the appropriate colloquy, the Court found the plea to be knowingly, intelligently, and

voluntarily made and found him guilty as charged in the second amended information. TRP, 128 (March 7, 2017). Sentencing was set over to the next day.

Mr. Price's statement about the incident was as follows:

On December 22, 2015, in the state of Washington, I knowingly possessed a firearm after having previously been convicted three times for the serious offense of second degree burglary. On that same date, and in the state of Washington, I intentionally fired the firearm into a car that Michael Allen was driving with Faye Reynolds in the right-rear seat and Luciano Romero in the left-rear seat. In firing my gun into the car, I do not acknowledge that I intended to inflict great bodily harm, *i.e.*, bodily injury that creates a probability of death. As to that element, I maintain my innocence but I nevertheless wish to plead guilty to the charge of first degree assault because I wish to accept the State's plea offer, and I, after full consultation with my counsel, believe there is a substantial likelihood that I would be convicted of the current charges if this matter proceeded to trial. My gunshot hit Allen in the head and in fact inflicted great bodily harm. In firing the gun into the car, I assaulted Allen, Romero and Reynolds by putting all three in an immediate and reasonable apprehension of harm.

While the State does not agree with this position, I maintain that under RCW 9A.535(1)(a), Romero, Reynolds and Allen were, "[t]o a significant degree, the victim was an initiator, willing participant, aggressor or provoker of the incident." I maintain that the three were trying to steal from me and that Romero had what appeared to be a firearm that he displayed toward me in a threatening manner. However, I do acknowledge that, as I stated to Detective Martin, I "fucked up" up because my actions were not necessary for self-defense as their car was driving off when I fired my gun.

CP, 27.

At sentencing, the State recommended 156 months in prison SRP, 11. The standard range was 129 to 171 months. CP, 62.

Mr. Price, through his counsel Brian Hershman, presented the following facts, most of which were undisputed, in support of the mitigated exceptional sentence. This incident germinated in the mind of Faye Reynolds. SRP, 14. Ms. Reynolds was romantically involved with Mr. Price, but “curiously” decided to enlist the aid of Michael Allen and Luciano Romero. SRP, 14. In the words of Mr. Hershman, “I don’t get it.” SRP, 14.

The plan was to use a ruse of buying Mr. Price’s computer in order to rob him. SRP, 14. Although the parties disputed the purchase price of the computer, there was evidence that the computer was going to be exchanged for “heroin,” which was really coffee grounds packaged to look like heroin. SRP, 14.

The three would-be robbers showed up at the agreed meeting place with Mr. Allan in the driver’s seat and Ms. Reynolds and Mr. Romero in the back seat, with Ms. Reynolds on the passenger side. SRP, 14. The front passenger seat was empty, which Mr. Price found to be suspicious TRP, 22 (March 6, 2017). All three occupants had been using heroin all day and were highly intoxicated. SRP, 15.

There was some dispute whether Mr. Romero had a firearm with him in the backseat. Mr. Price told law enforcement he saw a gun. TRP, 22 (March 6, 2017). Ms. Reynolds said Mr. Romero had a gun next to his left thigh. SRP, 15. Mr. Romero denied having a gun, but he also claimed not to remember the incident. SRP, 16. Mr. Romero is also a convicted felon and prohibited from possessing firearms, which would be a motivation to deny possessing the firearm. SRP, 33.

The vehicle was an SUV, meaning Mr. Price was looking at about eye level into the vehicle as it approached. SRP, 17-18. Mr. Price tried to open the passenger door to get into the car and negotiate the deal, but found the door locked. TRP, 22 (March 6, 2017). He then turned his direction to Ms. Reynolds and handed her the computer to look at. SRP, 18. Ms. Reynolds took the computer and tries to turn it on, which was the signal for Mr. Allen to drive away. SRP, 18. But Mr. Allen, probably because he was so high on heroin, missed the signal and everyone sat there for three to four seconds with nothing happening. SRP, 18.

During this delay, Mr. Price realized he was being robbed and pulled out his firearm with the intent of firing across the car. SRP, 18. Just as he prepares to fire, Mr. Allen starts moving the car forward. SRP, 18. The vehicle movement forces Mr. Price's arm, which is inside the vehicle, to point forward. SRP, 19. The bullet, instead of shooting through the

vehicle, shoots in the direction of the driver's seat, and hits Mr. Allen in the head. SRP, 18.

Based upon these facts, the defense argued the victim was, to a significant degree, the initiator, willing participant, aggressor or provoker of the incident. SRP, 20. He cited *State v Hinds, infra* and *State v Clemens, infra*.

In response, the State argued that, in order to find the mitigating factor applies, the Court "has to be convinced that there was a gun in that car and has to be convinced that Mr. Price shooting into that car with that gun was necessary." SRP, 24. The prosecutor conceded he did not know whether Mr. Romero had a firearm or not. SRP, 24. The prosecutor went through the various accounts from the witnesses, which were both internally inconsistent and inconsistent with each other and concluded, "I don't believe the evidence says convincingly what happened that night." SRP, 30. The prosecutor emphasized that the burden was on the defense, as the proponent of the exceptional sentence, to prove what happened. SRP, 30. The prosecutor concluded his remarks by saying:

Is it possible that Mr. Romero had a gun that night? Possibly. Conveniently enough, no one in the car, even Ms. Reynolds, says that gun was ever pointed at Mr. Price. Is it possible there was a gun? Maybe. Is it possible that that gun was pointed at Mr. Price? Maybe. Is it also just as equally possible that this whole gun was invented to justify the fact that someone shot into a car; that he was pissed off because his computer was being stolen? Also entirely

possible. The burden here falls on the defense to convince the Court of this narrative to justify the departure, and it's a dramatic departure in such a serious case. And I don't believe that that burden has been met here, so that's why the State's opposed to a departure from the range, and I have no further comments on the matter.

SRP, 31.

In response, Mr. Hershman argued that the presence or lack thereof of the firearm was a “red herring.” SRP, 31. The more fundamental issue is whether the victim was an initiator, willing participant, aggressor or provoker of the incident. SRP, 31-32. In analyzing that question, Mr. Price was conceding that he used “disparate force” in responding to the danger presented. SRP, 32.

Having heard the presentations, the sentencing court found by a preponderance of the evidence that the scenario was a “set up” to steal Mr. Price’s computer and the fact that Mr. Romero was in the back seat rather than the front passenger seat was for the purpose of assisting in the taking. SRP, 41-42. The court found credible Mr. Price’s assertion that he did not intend to kill anyone. SRP, 60. But the sentencing court could not conclude by a preponderance of the evidence that Mr. Romero was in possession of a firearm. SRP, 41. The court found that none of the witnesses was “terribly credible.” SRP, 42. In the absence of credible evidence of a firearm, the sentencing court concluded that the elements of

being an “initiator, willing participant, aggressor or provoker” were not met. SRP, 42. She, therefore, concluded as a matter of law that she was required to impose a standard range sentence.

The court imposed a sentence at the bottom of the standard range, 129 months. SRP, 61; CP, 65. She waived all court costs except the mandatory fees. SRP, 61.

C. Argument

Mr. Price argues the trial court misapplied RCW 9.94A.535 when it denied his request for an exceptional sentence. As a threshold matter, however, this Court must determine whether this issue is reviewable. Generally, sentences within the standard range are not appealable. RCW 9.94A.585(1). *State v. Duke*, 77 Wn App. 532, 892 P.2d 120 (1995).

But defendants may always challenge the procedure by which a sentence is imposed. *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005). In *Grayson*, the Court said, “The failure to consider an exceptional sentence is reversible error. Similarly, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.” *Grayson* at 342 (citations omitted). Mr. Price contends the

sentencing court refused to consider an exceptional sentence in his case based upon a misunderstanding of the applicable law.

The second issue is how to treat the sentencing court's findings of fact. The court made two oral findings of fact in this case. The court first found by a preponderance of the evidence that Mr. Price was lured to the location as a "set up" for a robbery. But, in its second finding of fact, the court could not find, based upon the conflicting information, that Mr. Romero had a firearm. Although Mr. Price disagrees with this second finding, there is substantial evidence for this finding in the record and it is a verity on appeal. *State v. Allert*, 117 Wn.2d 156, 815 P.2d 752 (1991).

Having found that Mr. Price was set up for a robbery by the victim and his two accomplices, the sentencing court nevertheless refused to consider an exceptional sentence based upon its misunderstanding of the law. Clearly, someone who lures an innocent person to a location with the intent to rob him is an initiator, willing participant, aggressor or provoker of the incident. But, despite the fact the sentencing court made this finding, it refused the exceptional sentence because it believed the absence of credible evidence of a firearm in the possession of the victim or his accomplice precluded such a sentence. This was error.

In *State v. Whitfield*, 99 Wn App. 331, 994 P.2d 222 (1999) the trial court imposed a mitigated exceptional sentence finding by her

“insistent behavior,” the victim was a provoker in the assault. The State appealed, arguing that “nonthreatening words” are insufficient as a matter of law to justify a mitigated exceptional sentence. The State also argued that an exceptional sentence is justified only when the defendant’s response to the provocation is proportional to the provocation itself. The Court of Appeals disagreed on both points and affirmed the sentence.

Similarly, in *State v. Pascal*, 108 Wn.2d 125, 736 P.2d 1065 (1987), the defendant received a mitigated exceptional sentence after being convicted of first degree manslaughter. At sentencing, the defendant presented substantial evidence that the victim was a domestic violence abuser and she suffered from battered woman syndrome. The Court said,

Here, the defendant at trial claimed that she killed Kieffer in self-defense and that she suffered from battered woman's syndrome. Although this defense failed and she was convicted of manslaughter, the trial judge in performing his sentencing function could evaluate the evidence of these mitigating factors and find that her actions significantly distinguished her conduct from that normally present in manslaughter. The trial court properly considered these factors.

Pascal at 137.

Like the appellants in *Whitfield* and *Pascal*, Mr. Price has never argued that his actions constituted anything other than first degree assault. Like Mr. Whitfield, Mr. Price concedes that his response to the danger

posed by the victims was disproportionate. As Mr. Hershman argued at the sentencing hearing, “Let’s take the gun out of the picture for a moment and just say he wrongfully fired into a vehicle. We still get the willing initiator, participant, provoker of this incident. Did he use disparate force under that scenario? Yeah, but that’s not what we are here to argue. We are here to argue whether under [RCW 9.94A.535] there is a basis under the law to depart downward. You might take disparate force into account how you sentence him, but that’s not the threshold consideration about whether we depart from the standard range, so that’s point one.” SRP, 31-32. The fact that Mr. Price’s used “disparate force” in reaction to the robbery was what made him guilty of the first degree assault, the charge for which he was convicted. But that did not preclude the court from imposing a mitigated exceptional sentence.

The two cases cited by the defense in the trial court are in accord with the *Whitfield* case. In *State v. Hinds*, 85 Wn.App. 474936 P.2d 1135 (1997), in a prosecution for vehicular homicide, the Court held that the 44-year-old female who gave alcohol to a minor and then allowed him to drive her car was an initiator in the offense. In *State v. Clemons*, 78 Wn.App. 458, 898 P.3d 324 (2000) the Court affirmed a mitigated exceptional sentence for a 18-year-old boy who had consensual sex with a

14-year-old girl, finding that she was a willing participant to the criminal act.

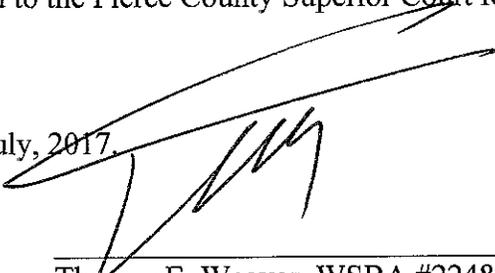
Although it is not entirely clear from the sentencing court's findings why the court considered the alleged presence of the firearm the pivotal issue, it appears the court was finding that absent the firearm, Mr. Price was precluded from acting in self-defense. But Mr. Price was not arguing self-defense. He was arguing that Mr. Allen and his two accomplices initiated and provoked an attempted robbery, causing him to pull a firearm and fire it, an act that albeit disproportionate to the danger posed would nevertheless have been unnecessary but for Mr. Allen's initial actions.

The appropriate remedy in this case is for this Court to remand to the sentencing court. On remand, the sentencing court would be free to exercise its discretion in favor of either a mitigated exceptional sentence, or a standard range sentence.

D. Conclusion

This Court should remand to the Pierce County Superior Court for resentencing.

DATED this 10th day of July, 2017.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant

THE LAW OFFICE OF THOMAS E. WEAVER

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