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Court of Appeals
Division II
State of Washington

NO. 50129-5

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WILLIAMS, II,

Appellant.

Appeal from Pierce County Superior Court
Honorable Bryan Chushcoff
No. 14-1-05086-2

REPLY BRIEF OF APPELLANT

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I. REPLY

A. Respondent is incorrect that the State was not implicitly advocating for an exceptional sentence.

Appellant challenges the State's representations at sentencing that Appellant was subject to "aggravating" factors. *See* Opening Brief of Appellant. Respondent argues that the prosecutor mentioned aggravating factors merely for the purpose of explaining why the crime charged was in the second degree, and to rebut Appellant's request for a downward deviation. *See* Brief of Respondent ("BR") p. 13. In fact, by mentioning the aggravating factor the prosecutor was effectively advocating for an exceptional upward sentence, despite the plea agreement for a standard range sentence. The State's representations were so effective the sentencing court believed it was required to determine whether a finding of an aggravating factor should be made:

THE COURT: Sure. That's an aggravating circumstance under the same statute potentially.

See, VRP 136.

THE COURT: Well, I think I can reconcile at least the legal part of this in terms of whether something is mitigating circumstance or an aggravating circumstance.

See, VRP 154

In their brief, Respondent states:

Defendant claims that the State improperly advocated for an aggravating factor that would result in an upward sentence. 5 Brf. of App. at 6-8. However, in context, it is clear that the State was not advocating, implicitly or explicitly, for an exceptional sentence upward, but rather was responding to defendant's argument in support of his request for an exceptional sentence downward.

[...]

RCW 9.94A.535(3)(1), however, expressly provides that it is an aggravating factor if, "[t]he current offense is ... trafficking in the second degree and any victim was a minor at the time of the offense." Here defendant pleaded guilty to trafficking in the second degree *aggravated* by the circumstance that any victim was a minor at the time of the offense. CP 234, 236-245.

[...]

The State did not ask the court to find the aggravating factor supported an exceptional sentence upward. Rather, the State argued that the aggravating factor cited above effectively eliminated the persuasiveness, if any, of the mitigating circumstance relied on by defense. *See also*, RP 135-36. The State therefore did not breach the terms of the plea agreement by arguing in support of its high-end sentencing recommendation.

See BR pp. 12-13.

Respondent imputes a justification for the prosecutor's statements where there was none. It is far too generous to say that the prosecutor merely attempting to explain the Fourth Amended Information;¹ the actual intent and effect was to convince the court that Appellant ought to be subjected to an exceptional *upward* sentence rather than downward. At the very least, the prosecutor should have made it abundantly clear to the sentencing court that the State was not asking for a finding of aggravating factors for an exceptional sentence. As is evident, the court appeared confused as to its role at the hearing. Contrary to the argument of Respondent, this is very similar to sentencing hearing that occurred in *State v. Sledge*, 133 Wn.2d 828; 947 P.2d 1199 (1997).

¹ "[A]nd the crime was aggravated by the following circumstance: pursuant to RCW 9.94A.535 (3)(1) the current offense is trafficking in the first degree or second degree and any victim was a minor at the time of the offense." CP 234

B. Respondent is incorrect that the sentencing in this matter did not constitute an evidentiary hearing. A surprise, live witness was sworn in without apparent notice to the parties.

Respondent states in their brief:

Here, the State did not insist upon an evidentiary hearing. *See* RP 42-43, 72. The parties had different sentencing recommendations. CP 239, 253, 296; RP 44, 99, 116. While the State did call one witness at sentencing - Detective Washington - that witness was not examined on aggravating factors supporting an exceptional sentence. Rather, the witness testified regarding human trafficking in general. *See* RP 75-80.

Respondent summarizes *Sledge* well: “Despite the agreement, the State insisted on an evidentiary hearing with live witnesses,[...]” BR p. 13.

Detective Washington was sworn in:

THE COURT: This is a sentencing matter. Does anybody want me to swear him in?

MR. GREER: I would like you to, yes, sir. I believe the real-facts doctrine requires that.

See VRP 75.

Detective Washington testified in general about the horrors of child trafficking. VRP 75-81. Defense counsel in turn challenged this witness:

Q. But your expertise is based on your training and experience; is that correct?

A. Yes, it is.

Q. The training we are not allowed to see.

A. There is training material, again, that I sent to the prosecutor at his request. Again, as I stated before, career enhancement training we are not required to track.

Q. So you also testified just a few moments ago about adolescent vulnerability. Now, you are not an expert in adolescent behavior?

A. I am not.

Q. You are not an expert in adolescent brain development?

A. I am not.

See VRP 82.

The sentencing hearing in this matter thus became an evidentiary hearing. “*Black's Law Dictionary* defines [an evidentiary hearing] as ‘[a] hearing at which evidence is presented, as opposed to a hearing at which only legal argument is presented.’ BLACK'S LAW DICTIONARY 738 (8th ed.2004).” *State v. Hughes*, 154 Wn.2d 118, 154; 110 P.3d 192, 211 (2005).

No notice appears to have been given about this witness, or that this sentencing hearing would suddenly become an evidentiary hearing. While the witness may not have testified about aggravating factors explicitly, the conduct of the State taken as a whole constituted an undercut of the pleas agreement. This is precisely what happened in *Sledge supra*.

II. CONCLUSION

For the reasons above and those stated in Appellant’s Opening Brief, this matter should be remanded for re-sentencing.

Respectfully submitted this 1st day of November, 2017.

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I declare under penalty of perjury under the laws of the State of Washington that on the date below I personally caused the foregoing document to be e-filed with the Clerk of the Court of Appeals as follows:

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