FILED
Court of Appeals
Division II
State of Washington
11/20/2017 1:13 PM

No. 50243.7-II

(Pierce County Superior Court No. 16-1-02910-0)

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

STATE OF WASHINGTON

Respondent,

v.

RODERICK BARRINGTON,

Appellant.

APPELLANT'S OPENING BRIEF

VICTORIA M. JOHNSTON, WSBA #35993
CHAD FREEBOURN, WSBA #35624
Roberts | Freebourn, PLLC
1325 W. 1st Ave., Ste. 303
Spokane, Washington 99201
(509) 381-5262
Appellate Counsel for Petitioner

RODERICK BARRINGTON
TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR 1

III. STATEMENT OF THE CASE 2

VI. ARGUMENT 4

A. The sentencing court failed to do a comparability analysis, and erred in calculating Mr. Barrington's offender score as a '5', then imposed a sentence based upon that offender score 4

B. The Sentencing Court erred in refusing to exercise discretion in determining whether to impose an exceptional sentence below the standard range as requested by defense counsel..... 8

VII. CONCLUSION 9

TABLE OF AUTHORITIES

Page

Washington State Supreme Court Cases

In re Pers. Restraint of Canha, 101 Wn. App. 866, 874, 6 P.3d 266 (2017) 4, 5

In re Pers. Restraint of Goodwin, 146 Wn. 2d. 861, 50 P.3d 618 (2002) 3, 4

In re Pers. Restraint of Lavery, 154 Wn. 2d 249, 255-57, 111 P.3d 837 (2005) 5

State v. Grayson, 154 Wn. 2d 333, 111 P.3d 1183(2005) 8

State v. McCraw, 127 Wn. 2d 281, 289, 898 P.2d 828 (1995) 4

State v. Morley, 134 Wn. 2d 588, 952 P.2d 167 (1998) 4, 5

State v. Mutch, 171 Wn. 2d 646, 653, 254 P.rd 803(2011) 4

State v. Ross, 152 Wn. 2d 220, 232, 95 P.3d 1225 (2004) 4

State v. Tili, 148 Wn. 2d 350, 358, 60 P.3d 1192 (2003) 3

Washington Court of Appeals Decisions

State v. Garcia-Martinez, 88 Wn. App. 322, 944 P.2d 1104 (1997) 8

State v. Gill, 103 Wn. App. 435, 13 P.3d 646 (2000) 7

State v. McGill, 112 Wn. App. 95, 99, 47 P.3d 173(2002) 8

Washington State Statutes

RCW § 9A.56.020 6

RCW § 9A.56.050 7

RCW § 9.94A.525(3) 4

RCW § 9.94A.530(1)(a) 3

RCW § 9.94A.585(1) 8

Other Statutes

Amended Code of Virginia 1950, Section 18.291 5

I. INTRODUCTION

The Sentencing Reform Act (SRA) requires a trial court to hold a sentencing hearing and make a finding regarding a defendant's criminal history. The finding of the court becomes the 'offender score' pursuant to the Sentencing Reform Act. Where 'out of state' convictions are concerned, a sentencing court must do a comparability test to determine whether an 'out of state' conviction becomes part of an offender's countable criminal history before sentencing can be imposed.

When the Court is presented with a motion from either party for an exceptional sentence or for a sentence above or below the standard range, the sentencing court must make a ruling as to whether substantial and compelling reasons support the courts imposition of the exceptional sentence.

II. ASSIGNMENTS OF ERROR

1. The sentencing court failed to do a comparability analysis, and erred in calculating Mr. Barrington's offender score as a '5', then imposed a sentence based upon that offender score.

2. The Sentencing Court erred in refusing to exercise discretion in determining whether to impose an exceptional sentence below the standard range as requested by defense counsel.

III. STATEMENT OF THE CASE

The Defendant, Mr. Roderic Barrington, was convicted of First Degree Robbery while armed with a firearm by jury verdict on February 17, 2017. CP 14-15[1]. Subsequent to the jury's verdict the defendant came before the trial court for sentencing after defense counsel had filed a motion seeking an exceptional sentence downward. CP 74-77. Defense counsel argued for purposes of mitigation that the sentence was clearly too excessive noting the defendant's limited criminal history, the victim was the aggressor or provoker of the incident, and that the defendant had no predisposition for the criminal behavior. CP 75.

At a sentencing hearing the parties offered 'Stipulation of Prior Record and Offender Score.' CP 81-83. The 'Judgement and Sentence' entered April 14, 2017 reflects the sentencing court calculating the offender score of the defendant at a '5.' CP 87. With an offender score of '5' the court imposed 57 months as well as a 60-month firearm enhancement for a term of confinement of 117 months. CP 87. In calculating the defendant's offender score the State provided two 'out of

[1] The Clerk's Papers consist of 163 pages and be referenced a 'CP'

state' convictions from Virginia that impacted the score. CP 101-102. The sentencing court did not do a comparability analysis of the two 'out of state' Virginia convictions. Additionally, after hearing arguments regarding the motion for an exceptional sentence below the standard range, the trial court imposed a standard range sentence. RP 461[2] No findings of fact or conclusions of law were entered.

IV. LAW AND ARGUMENT

A. The sentencing court failed to do a comparability analysis, and erred in calculating Mr. Barrington's offender score as a '5', then imposed a sentence based upon that offender score.

"A correct offender score must be calculated before a presumptive or exceptional sentence is imposed." *State v. Tili,* 148 Wn. 2d 350, 358, 60 P.3d 1192 (2003). The offender score establishes the standard range term of confinement for a felony offense. *RCW* § 9.94A.530(1)(a). A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *In re Pers. Restraint of Goodwin,* 146 Wn. 2d. 861, 868, 50 P.3d 618 (2002). A sentence based on a miscalculated offender score is a fundamental defect that inherently results in a miscarriage of justice. *Id.* Whenever a sentence is invalid on its face, the defendant can challenge the illegal sentence at any time. *Id.*

[2] The transcript of the proceedings consists of seven volumes, so counsel will refer to them by 'RP'

Moreover, even if a defendant agreed to an offender score at sentencing he can challenge the offender score at sentencing for the first time on appeal. *Id.* A sentence is invalid on its face where an error of fact or law exists within the four corners of the Judgement and Sentence. *State v. Ross,* 152 Wn. 2d 220, 232, 95 P.3d 1225 (2004). This Court reviews the sentencing court's calculation of the offender score *de novo. State v. McCraw,* 127 Wn. 2d 281, 289, 898 P.2d 828 (1995), *State v. Mutch,* 171 Wn. 2d 646, 653, 254 P.rd 803 (2011)

The SRA also requires that prior out of state convictions be classified "according to the comparable offense definitions and sentences provided by Washington law. *Ross,* 152 Wn. 2d at 229. (*citing RCW* § 9.94A.525(3)). "To do so, we have stated that the sentencing court must compare the out-of state offense with the elements of a potentially comparable Washington crimes." *Id.* To compare offenses, the Court uses a two part test. (citations omitted). First, the court analyzes legal comparability by comparing the elements of the offense to the most comparable Washington offense. *In re Pers. Restraint of Canha,* 101 Wn. App. 866, 874, 6 P.3d 266 (2017) (*citing State v. Morley,* 134 Wn. 2d 588, 605-606, 952 P.2d 167 (1998)). If the crimes are legally comparable, the analysis ends there and the crime is included in the offender score. *Id.* If the crime is not legally comparable, the sentencing court should engage in

a factual comparability analysis. *Id.* (*citing In re Pers Restraint of Lavery,* 154 Wn. 2d 249, 255-57, 111 P.3d 837 (2005)). Offenses are factually comparable when the defendant's conduct in the prior out of state jurisdiction giving rise to the crime would have violated Washington law. *Id.*

In this case, the sentencing court did not do a comparability analysis, just accepted certified copies or prior convictions provided by the state. RP 441-42. Included in the certified copies of prior convictions provided by the state were two convictions from the Commonwealth of Virginia. CP 101-02. Even a cursory comparability review of the charging document for 'Statutory Burglary,' from the Virginia reveals that this conviction counts in the defendant's offender score. CP 108. However, calculated in the defendant's offender score is a 'grand larceny' from the Commonwealth of Virginia occurring January 3, 2014.[3] CP 110. The charging document references Section 18.2-95(ii) of the Code of Virginia of 1950 as amended.[4] CP 110. According to the 'Conviction and

---

[3] The charging document reads, 'On or about the 3rd day of January, 2014 in the county of Bedford, Virginia, RODERIC ANDRE BARRINGTON JR., did unlawfully and feloniously, take, steal, and carry away property belonging to Camille Little, valued at $200.00 or more in violation of the provisions of Section 18.2-95(ii) of the Code of Virginia of 1950 as amended.

[4] 18.2-95. Grand larceny defined; Any person who (i) commits larceny from the person of another of money or other thing of value of $5 or more, (ii) commits simple larceny not from the person of another of goods and chattels of the value

Sentencing Order' the court imposes restitution of $500 to the victim in the case. CP 102.

The record is unclear as to how the state deemed the 'grand larceny' from January 2014 a felony point, absent the 'felony' designation in the Virginia records. Regardless, no meaningful comparability analysis was done. In doing a comparability analysis, there is no comparable 'larceny' statute in Washington so a 'legal' comparability analysis is precluded.

Larceny is defined by *Merriam Webster,* "as the unlawful taking of personal property with intent to deprive the rightful owner of it permanently."[5] In Washington, the only reasonably factually comparable statute is *RCW* § 9A.56.020[6]. There is no value element

---

of $200 or more, or(iii) commits simple larceny not from the person of another of any firearm, regardless of the firearm's value, shall be guilty of grand larceny, punishable by imprisonment in a state correctional facility for not less than one nor more than twenty years or, in the discretion of the jury or court trying the case without a jury, be confined in jail for a period not exceeding twelve months or fined not more than $2,500, either or both. (underline added)

[5] *Merriam Webster Dictionary,* Second Edition, 1882.

[6] *Revised Code of Washington* §9A.56020 Theft—Definition, defense.

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

in the Commonwealth of Virginia except that the property be worth more than $5. However, in Washington there is a value prong for purposes of establishing degrees of theft. For example, *RCW* § 9.56.050 is the statute for Theft in the Third Degree[7]

In doing a factual comparability analysis here, the sentencing court should have concluded that the 2014 conviction from Virginia was a misdemeanor. For purposes of calculating an offender score based on a prior out-of-state conviction, the best evidence of a prior conviction is a certified copy of the judgement; however, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history. *State v. Gill,* 103 Wn. App. 435, 448, 13 P.3d 646 (2000). Reviewing the conviction documents provided by the State at the sentencing hearing (CP 101-115) the defendant was ordered to pay $500 in restitution to the victim rising from the larceny charge. The only

---

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.(underline added).

[7] *Revised Code of Washington,* §9.56.0505 Theft in the third degree:

(1) A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value, or (b) includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates.

(2) Theft in the third degree is a gross misdemeanor.

factually comparable crime in the State of Washington is Theft in the Third Degree. Accordingly, the defendant's criminal history has been miscalculated and the case should be remanded for resentencing consistent with an appropriate comparability analysis.

B. The Sentencing Court erred in refusing to exercise discretion in determining whether to impose an exceptional sentence below the standard range as requested by defense counsel.

When a defendant has requested a mitigated exceptional sentence, review is available where the sentencing court refused to exercise discretion or relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Garcia-Martinez,* 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied,* 136 Wn. 2d 1002 (1998). Additionally, 'while no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court such a sentence and to have alternatives considered. *State v. Grayson,* 154 Wn. 2d 333, 342, 111 P.3d 1183 (2005). Generally, a standard range sentence may not be appealed. *RCW* § 9.94A.585(1). This statute only precludes challenges to the amount of time imposed when the time is within the standard range. *State v. McGill,* 112 Wn. App. 95, 99, 47 P.3d 173 (2002). A defendant may challenge the procedure by which a sentence within the standard range is

imposed, including the improper consideration of the availability of an exceptional sentence. *State v. Mail,* 121 Wn. 2d 707, 712-13, 854 P.2d 1042 (1993).

Here, the courts consideration of the mitigating factors is not considered in the sentencing court's ruling. RP 460-61. The summation of the sentencing court's ruling "I have to do something here that really does protect society. This Legislature has spoken. I know I have some discretion here. I don't think it would be appropriate to exercise any lower than the standard range" RP 461. Nowhere in the record does the sentencing court consider whether the sentence should be mitigated based on the provocation of the victim, and the excessive nature of the offense based on the defendant's individual traits proffered in support of the exceptional sentence downward. Accordingly, this court should remand this case to the sentencing court for an appropriate consideration of the mitigating factors offers by the defendant.

V. CONCLUSION

Based on the foregoing, Mr. Barrington asks this Court to remand for resentencing. The sentencing court failed to do an adequate comparability analysis for Mr. Barrington's prior out of state convictions. Additionally, the sentencing court failed to address the mitigation factors

proffered by defendant so remand is appropriate. Therefore, defense counsel respectfully requests remand.

RESPECTFULLY SUBMITTED this 20th day of November, 2017.

ROBERTS | FREEBOURN, PLLC

s/ Victoria M. Johnston

Victoria M. Johnston, WSBA #35993
Chad Freebourn, WSBA #35624
ROBERTS | FREEBOURN, PLLC
1325 W. 1st Ave., Ste. 303
Spokane, WA 99201
Phone: (509) 381-5262
Facsimile: (509) 473-9026
victoria@robertsfreebourn.com
Attorneys for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 20th day of November, 2017, a true and correct copy of the foregoing document was served by the method indicated below and addressed to the following:

Michelle Hyer Pierce County Prosecutor 930 Tacoma Ave., S Rm 946 Tacoma, WA 98402-2102 Email: PCpatcecf@co.pierce.wa.us	COA Notification U.S. Mail Facsimile Email	[X] [ ] [ ] [ ]
Roderick Barrington DOC #392613 Washington State Penitentiary – Unit F 1313 N. 13th Ave. Walla Walla, WA 99362-1065	COA Notification U.S. Mail Facsimile Email	[ ] [X] [ ] [ ]

DATED this 20th day of November, 2017 at Spokane, Washington.

ROBERTS | FREEBOURN, PLLC

s/ Victoria M. Johnston

Victoria M. Johnston, WSBA #35993
Chad Freebourn, WSBA #35624
ROBERTS | FREEBOURN, PLLC
1325 W. 1st Ave., Ste. 303
Spokane, WA 99201
Phone: (509) 381-5262
Facsimile: (509) 473-9026
victoria@robertsfreebourn.com
Attorneys for Appellant

ROBERTS FREEBOURN

November 20, 2017 - 1:13 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50243-7
Appellate Court Case Title:	State of Washington, Respondent v. Roderic Barrington, Appellant
Superior Court Case Number:	16-1-02910-0

The following documents have been uploaded:

- 0-502437_Briefs_20171120131251D2080811_7693.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was Opening Brief Barrington.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us
- chad@robertsfreebourn.com

Comments:

Sender Name: Lauren Sterrett - Email: lauren@robertsfreebourn.com
Filing on Behalf of: Victoria M Johnston - Email: victoria@robertsfreebourn.com (Alternate Email:)

Address:
313 W. Riverside Ave.
Spokane, WA, 99201
Phone: (509) 381-5262

Note: The Filing Id is 20171120131251D2080811