

FILED
Court of Appeals
Division II
State of Washington
3/13/2018 2:10 PM
NO. 50243-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RODERIC BARRINGTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 16-1-02910-0

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant waived the right to appeal the sentencing court's inclusion of his out-of-state conviction in his offender score calculation, where defendant affirmatively acknowledged the existence and comparability of the prior conviction.
2. Whether the sentencing court properly exercised its discretion in denying defendant's request for an exceptional sentence below the standard range, where the court meaningfully considered and rejected the mitigating factors offered by defendant.

B. STATEMENT OF THE CASE.

1. PROCEDURE

On July 18, 2016, the Pierce County Prosecuting Attorney's Office charged RODERIC BARRINGTON (hereinafter "defendant") with one count of Robbery in the First Degree with a firearm enhancement.¹ CP 164-165. The case proceeded to trial before the Honorable Garold

¹ The State later filed an amended information which charged defendant as a principal or an accomplice. CP 37. *See also*, RP 14.

Johnson. RP² 1. The jury found defendant guilty as charged. RP 426; CP 14-15.

Before sentencing, defendant filed a motion requesting an exceptional sentence below the standard range based on three alleged mitigating circumstances. CP 74-77. Defendant acknowledged his criminal history resulted in an offender score of “5” with a standard range of 57 to 75 months, plus an additional 60 months for the firearm sentencing enhancement. CP 74.

Sentencing was held on April 14, 2017. RP 440-65; CP 84-97. Defense counsel acknowledged that he reviewed the certified copies of defendant’s prior convictions and “that the calculation the [S]tate has made based on those points is accurate for the SRA.” RP 442-43. *See* CP 100-140. Defense counsel also acknowledged defendant’s offender score and corresponding standard range. RP 448. Defendant’s criminal history included two out-of-state convictions. CP 81-83, 100-140. Defense counsel went on to argue that mitigating circumstances justified an exceptional sentence below the standard range. RP 445-53.

The court denied defendant’s request for an exceptional sentence and imposed a standard range sentence of 57 months, plus the 60 month

² The verbatim report of proceedings is contained in seven (7) consecutively paginated volumes and will be referred to by “RP.”

firearm enhancement, for a total of 117 months in the Department of Corrections. RP 461; CP 84-97. Defendant filed a timely notice of appeal. CP 166.

2. FACTS

On May 17, 2016, just after midnight, police responded to the report of an armed robbery at an apartment complex located at 9020 South Hosmer in Tacoma, Washington. RP 116-17, 124, 178-79. Earlier, René Ramirez Acosta and his girlfriend, Maria Castaneda-Bitsue, were asleep in their apartment when Castaneda-Bitsue heard the sound of Acosta's vehicle – a Honda Civic – stuttering outside. RP 135, 137, 160, 178-79. Castaneda-Bitsue woke up Acosta, who looked out the bedroom window and saw two people in his vehicle. RP 137, 160, 179. Acosta ran outside and screamed at the two individuals, who ran off towards the side of the apartment complex. RP 140.

Acosta also observed an occupied Honda approximately ten feet from his vehicle. RP 139, 163. He approached the vehicle and asked the male occupant, later identified as defendant, what he was doing. RP 140, 169-70, 174-76. Defendant responded by pointing a shotgun at Acosta and telling him to get back inside. RP 141-42, 179-81.

The two individuals seen in Acosta's vehicle returned and pointed guns at Acosta as well. RP 142. Acosta retreated to his apartment and

Castaneda-Bitsue contacted police. RP 142-43, 181. Acosta later observed that his stereo was missing from his vehicle. RP 143, 181. A bullet and shaved key were recovered from the scene. RP 121-22.

Police later contacted defendant, who admitted he possessed the shotgun the night of the incident, pointed it up in the air, and yelled at people to “get the fuck away from him.” RP 103-04, 247-51, 265-66. Defendant described the shotgun as a pump action, shortened barrel shotgun. RP 248. *See also*, RP 301. He told police that he and his two companions went to Tacoma to buy heroin, and he brought the shotgun for protection. RP 107, 258-59, 262, 266. Defendant said his companions returned to the vehicle and they fled the area. RP 251-52.

Defendant did not testify during trial and did not call any witnesses. RP 308, 315.

C. ARGUMENT.

1. DEFENDANT WAIVED THE RIGHT TO APPEAL THE COMPARABILITY OF HIS OUT-OF-STATE CONVICTION.

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the standard range sentence is established by the current offense seriousness score and the defendant’s offender score. RCW 9.94A.530(1);

State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999).³ The defendant's offender score is based on the defendant's criminal history, including prior convictions. RCW 9.94A.525; *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The sentencing court's calculation of a defendant's offender score is reviewed de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

Where the defendant's prior offenses are the result of out-of-state convictions, RCW 9.94A.525(3) provides that such offenses "shall be classified according to the comparable offense definitions and sentences provided by Washington law." A sentencing court properly includes an out-of-state prior conviction in a defendant's offender score only if the out-of-state conviction is comparable to a Washington conviction. *State v. Arndt*, 179 Wn. App. 373, 378, 320 P.3d 104 (2014). Whether an out-of-state conviction is comparable to a Washington offense generally involves a factual determination. *Id.* at 378; *State v. Hickman*, 116 Wn. App. 902, 907, 68 P.3d 1156 (2003).

The key inquiry for determining comparability of an out-of-state conviction is whether the defendant could have been convicted under a Washington statute for the same conduct. *State v. Thieffault*, 160 Wn.2d

³ *Ford* superseded by statute on other grounds, Laws of 2008, ch. 231, § 4, as recognized in *State v. Cobos*, 182 Wn.2d 12, 15-16, 338 P.3d 283 (2014).

409, 414-15, 158 P.3d 580 (2007). A comparability analysis covers (1) “legal comparability,” and (2) “factual comparability.” *Arndt*, 179 Wn. App. at 378-79. For “legal comparability,” the court will compare the elements of the out-of-state crime to the relevant Washington crime to determine if they are “substantially similar.” *Thiefault*, 160 Wn.2d at 415. If the elements of the two statutes are not identical, or if the foreign statute is broader than the Washington definition of the particular crime, then the trial court must determine whether the offense is factually comparable. *Id.*; *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). Determining factual comparability involves analyzing whether the defendant’s conduct underlying the out-of-state conviction would have violated the comparable Washington statute. *Thiefault*, 160 Wn.2d at 415.

Generally, the State bears the burden of proving the existence and comparability of a prior out-of-state conviction by a preponderance of the evidence. *State v. Birch*, 151 Wn. App. 504, 516, 213 P.3d 63 (2009) (quoting *Ross*, 152 Wn.2d at 230). However, a sentencing court can properly include a defendant’s out-of-state conviction in a defendant’s offender score if the defendant affirmatively acknowledges the existence and comparability of the prior conviction. *Ross*, 152 Wn.2d at 233 (citing

Ford, 137 Wn.2d at 482-83).⁴ See also, RCW 9.94A.530(2) (“the trial court may rely on no more information than is...admitted, acknowledged, or proved in a trial or at the time of sentencing.”). Thus, when the defendant affirmatively agrees to the comparability of a prior out-of-state conviction, the trial court can rely on that agreement for sentencing purposes.

In *State v. Hickman*, 116 Wn. App. 902, 904, 68 P.3d 1156 (2003), this Court held that “a defendant who stipulates that his out-of-state convictions are comparable to Washington offenses waives the opportunity to challenge comparability on appeal.” There, the defendant pleaded guilty to two felony drug offenses and stipulated that his out-of-state prior conviction was equivalent to a class B felony conviction under Washington law. *Id.* at 904. On appeal, Hickman claimed the sentencing court lacked authority to include the out-of-state conviction in his offender score, because the State failed to prove comparability. *Id.* at 905. This Court rejected Hickman’s argument, finding his stipulation “resolved the factual issue of whether his Oregon conviction was equivalent to a Washington class B felony conviction.” *Id.* at 907. Thus, Hickman

⁴ “Accordingly, since Hunter affirmatively acknowledged at sentencing that his prior out-of-state convictions were properly included in his offender score, we hold the sentencing court did not violate the SRA nor deny him due process.” *Ross*, 152 Wn.2d at 233.

“waived his right to appeal the sentencing court’s inclusion of his out-of-state conviction in his offender score calculation.” *Id.*

Here, as in *Hickman*, defendant affirmatively acknowledged the existence and comparability of his out-of-state conviction.⁵ First, defendant acknowledged his criminal history resulted in an offender score of “5” in his sentencing motion. CP 74-77. This offender score was calculated using defendant’s out-of-state convictions, including defendant’s Virginia conviction for grand larceny. *See* CP 81-83. At sentencing, defendant acknowledged reviewing the certified copies of his prior convictions and “that the calculations the [S]tate has made based on those points is accurate for the SRA.” RP 441-43; CP 100-140. Defendant’s agreement resolved the factual issue of whether his Virginia convictions were equivalent to Washington felony convictions. *See Hickman*, 116 Wn. App. at 907. The sentencing court thus properly included defendant’s out-of-state prior convictions in his offender score. *Ross*, 152 Wn.2d at 233.

Defendant appears to rely on *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002), in support of his position that he may raise this claim of error for the first time on appeal. *See* Brf. of App.

⁵ Defendant only challenges his out-of-state conviction for grand larceny in this appeal. *See* Brief of Appellant at 5.

at 3-4. In *Goodwin*, the court recognized that a defendant cannot agree to punishment in excess of that established by the legislature and held that “in general a defendant cannot waive a challenge to a miscalculated offender score.” 146 Wn.2d at 873-74. However, the *Goodwin* court also recognized limitations to this general rule. *Id.* at 874. “While waiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.” *Id.* (emphasis in original).

This Court in *Hickman* considered and rejected the argument that *Goodwin* allowed the defendant to raise the issue of comparability for the first time on appeal. 116 Wn. App. at 905-07. The court reasoned,

[B]efore the sentencing court can rule for the defendant and find that the statutes are not comparable, it must first make a factual determination. Because the doctrine of waiver applies where the alleged error involves a factual dispute, a defendant who stipulates that his out-of-state conviction is equivalent to a Washington offense has waived a later challenge to the use of that conviction in calculating his offender score.

...

Here, unlike a stipulation to an offender score that included juvenile offenses that “washed out” as a matter of law, *Hickman* did not agree to a punishment in excess of the court’s statutory authority.

Id. at 907. See also, *State v. Hunter*, 116 Wn. App. 300, 301-02, 65 P.3d 371 (2003) (holding that a defendant can waive the right to appeal the

determination of comparability because “[n]othing in *Goodwin*...supports the proposition that the sentencing court must undertake a comparability determination despite the defendant's affirmative agreement with the State’s classification.”); *Ross*, 152 Wn.2d at 230-32.

Here, unlike in *Goodwin*, defendant did not agree to a punishment in excess of the court’s statutory authority. Rather, defendant resolved the factual issue of whether his Virginia convictions were comparable to Washington offenses. By agreeing that defendant’s relevant criminal history, which included his Virginia convictions, resulted in an offender score of five (5) points, defendant thereby agreed his out-of-state convictions were comparable to Washington offenses and properly included in his offender score. *See* RP 441-43, 448; CP 74-77. Defendant thus waived the opportunity to challenge comparability on appeal, and this Court should affirm defendant’s sentence.

However, should this Court disagree and find defendant did not waive his right to appeal the sentencing court’s inclusion of his Virginia conviction for grand larceny in his offender score calculation, then the

State agrees this Court should remand the matter for the sentencing court to conduct a comparability analysis of the out-of-state conviction.⁶

Defendant was convicted in 2014 of grand larceny under Virginia Code § 18.2-95(ii). CP 101-115. That statute provides,

Any person who... (ii) commits simple larceny not from the person of another of goods and chattels of the value of \$200 or more... 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.

“Larceny” is a common law crime defined as the wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently. *See Creamer v. Commonwealth*, 64 Va. App. 185, 205, 767 S.E.2d 226 (2015).

The State agrees with defendant that “larceny” is comparable to “theft” under Washington law. *See* Brf. of App. at 6. RCW 9A.56.020(1)(a) provides that “theft” means “[t]o wrongfully obtain or

⁶ Because the sentencing court did not perform a comparability analysis below, this Court can either (1) remand for the superior court to conduct the comparability analysis, or (2) perform the comparability analysis and remand to the superior court for any necessary resentencing. *See Matter of Canha*, 189 Wn.2d 359, 368, 402 P.3d 266 (2017). For the reasons set forth below, remand for the superior court to conduct the comparability analysis is appropriate given the available record.

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.” Under Washington law, it is a felony offense to commit theft of property or services exceeding \$750 in value. *See* RCW 9A.56.030; RCW 9A.56.040.

Because grand larceny under Virginia Code § 18.2-95(ii) concerns the wrongful taking of goods “the value of \$200 or more,” the Virginia statute is broader than the Washington definition of felony theft, and therefore, the court must determine whether the offense is factually comparable. *Thiefault*, 160 Wn.2d at 415; *Morley*, 134 Wn.2d at 606. This involves analyzing whether the defendant’s conduct underlying the Virginia conviction would have violated the comparable Washington statute. *Thiefault*, 160 Wn.2d at 415.

This determination cannot be made based on the available record. The certified records of defendant’s out-of-state conviction for grand larceny do not indicate the value of the goods taken. *See* CP 101-115. Although defendant was ordered to pay \$500 in restitution, this does not resolve the value of the original theft, as some or all of the stolen property may have been recovered, and the basis for the restitution is not provided in the sentencing paperwork. CP 102, 114.

Accordingly, if defendant did not waive the issue of comparability, then this Court should remand for the superior court to conduct a comparability analysis regarding defendant's conviction for grand larceny. At the hearing, the State may submit additional evidence that the 2014 Virginia conviction is factually comparable to a Washington conviction. RCW 9.94A.530(2); *State v. Calhoun*, 163 Wn. App. 153, 257 P.3d 693 (2011).

2. THE SENTENCING COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S REQUEST FOR AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE.

Under the Sentencing Reform Act of 1981 (SRA), a sentencing court must generally impose a sentence within the standard range. RCW 9.94A.505(2)(a)(i); see *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014). However, "[t]he court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). Such mitigating circumstance include, "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident" and "[t]he defendant, with no apparent predisposition to do so, was induced by others to participate in the crime." RCW 9.94A.535(1)(a), (d). See also, RCW 9.94A.010. The mitigating circumstances listed in

RCW 9.94A.535(1)(a) are not exclusive reasons for imposing an exceptional sentence.

The SRA provides that a standard range sentence “shall not be appealed.” RCW 9.94A.585(1). “However, this prohibition does not bar a party’s right to challenge the underlying legal conclusions and determinations by which a court comes to a particular sentencing provision. Thus, it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies.” *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003) (internal citations omitted).

A sentencing court’s decision to deny an exceptional sentence is reviewed for abuse of discretion. *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. *State v. Adamy*, 151 Wn. App. 583, 587, 213 P.3d 627 (2009) (citing *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981)).

A defendant may not appeal the imposition of a standard range sentence unless the court categorically refuses to exercise its discretion or denies an exceptional sentence based on impermissible reasons. *State v. Grayson*, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005); *McGill*, 112 Wn. App. at 99-100. A court abuses its discretion when it denies an

exceptional sentence based on an incorrect belief that it is not authorized to grant the sentence. *State v. O'Dell*, 183 Wn.2d 680, 696-97, 358 P.3d 359 (2015). The failure to consider an exceptional sentence authorized by law is an abuse of discretion subject to reversal. *Grayson*, 154 Wn.2d at 342. However, “[w]hen a court has considered the facts and concluded there is no legal or factual basis for an exceptional sentence, it has exercised its discretion, and the defendant cannot appeal that ruling.” *McGill*, 112 Wn. App. at 100.

Here, defendant challenges his standard range sentence on the basis that the trial court failed to properly exercise its discretion by failing to appropriately consider the mitigating factors offered by defendant at sentencing. Brf. of App. at 9. The record does not support defendant’s claim. Rather, the record demonstrates that the sentencing court properly considered and denied defendant’s request for an exceptional sentence.

During sentencing, defense counsel argued for an exceptional sentence below the standard range. RP 445-53. He claimed mitigating circumstances under RCW 9.94A.010 and RCW 9.94A.535(a) and (d) justified an exceptional sentence. RP 445, 449-50; CP 74-77. The State argued against the reasons cited by defense as mitigating circumstances. RP 455-59.

The court heard the testimony at trial and heard the arguments by counsel for the State and defense during sentencing. *See* RP generally. In its ruling denying defendant's request for an exceptional sentence below the standard range, the court discussed defendant's prior criminal history as well as the facts of the particular case, which the court found "very troubling" RP 260-61. The court specifically noted,

Now, I'm looking at this prior history and I'm thinking, I wonder how persuasive he was in King County. I wonder how persuasive he was in Bedford County. I wonder how apologetic he was then...Here he is again.

A shotgun, a sawed off shotgun with a pistol grip. This is something that, you know, you have children, that was a doggone apartment complex. You see why the Court is f[r]ustrated?

...

And yet you show up with a drug deal with a shotgun at the very least. And then you pull it on people.

...

It's really hard to be sympathetic. On the other hand, you seem like a very decent guy. Tells me there might be two personalities here, a guy could commit a crime like that, and a guy presents himself pretty doggone persuasive.

I have a duty to protect society. I have a duty to be sure that the events that happened here do not happen again. I have a duty not to be persuaded by just your very great tone...to just placate and move on.

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 460-61.

The court's ruling demonstrates that it appropriately considered and denied defendant's request for an exceptional sentence. By referencing defendant's convictions from King and Bedford counties, the court considered defendant's criminal history and whether his standard range in this case was clearly excessive. RP 460. *See* CP 74, 81-83, 100-140. By referencing the facts of the case and defendant's actions showing up to a drug deal at an apartment complex with a sawed off shotgun and pulling it on people, the court considered whether defendant was induced by others to participate in the crime and whether the victim to a significant degree was an aggressor or provoker of the incident, and the court rejected those arguments. RP 260-61; CP 75. Moreover, the court also expressly acknowledged that it had the discretion to impose a sentence below the standard range. RP 461.

Because the court determined that an exceptional sentence was not justified by any mitigating circumstances, it was not authorized by the SRA to impose an exceptional sentence downward. Thus, the sentencing court's denial of defendant's request for an exceptional sentence downward was not based on a mistaken belief that it lacked statutory authority to grant his request, nor was it based on the court's failure to consider an exceptional sentence authorized by law. The court's colloquy

at sentencing shows that is meaningfully considered and rejected the mitigating factors offered by defendant.

Because the court considered the facts and concluded there was no basis for an exceptional sentence, it exercised its discretion, and defendant cannot appeal that ruling. *McGill*, 112 Wn. App. at 100. The court did not abuse its discretion in imposing a standard range sentence. Therefore, this Court should affirm defendant's sentence.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's sentence.

DATED: March 13, 2018

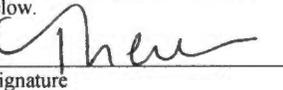
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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PIERCE COUNTY PROSECUTING ATTORNEY

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Superior Court Case Number: 16-1-02910-0

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