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Court of Appeals
Division II
State of Washington
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NO. 50335-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JULIEN BROUSSARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Michael Schwartz

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred in imposing an exceptional sentence under RCW 9.94A.535(2)(c) where Mr. Broussard had only one crime that would go unpunished, not *some* current offenses that would go unpunished as required by statute.

B. ISSUE RELATED TO THE ASSIGNMENT OF ERROR

When a person's high offender score results in some of the current offenses going unpunished, the trial court has discretion to impose an exceptional sentence under the "free crimes" aggravator, RCW 9.994A.535(2)(c). The plain language of the statute does not allow for an exceptional sentence on this basis where only one crime would go unpunished. Did the trial court err in applying this basis for an exceptional sentence?

C. STATEMENT OF FACTS

Julien Broussard entered a guilty plea to one count of Promoting Prostitution in the First Degree (Count II) and one count of Assault in the Second Degree (Count III).¹ CP 48-57. Mr. Broussard entered a stipulation to his prior record and offender score. CP 58-59.

On Count II, the trial court found that Mr. Broussard's offender score was 9+ (actual score 12), the standard range was 108-144 months, and the statutory maximum was 120 months, which reduced the standard range sentence to 108-120 months. CP 95 (Finding of

¹ The first information charged three counts. CP 1-2 (Information 12/07/2015). The State later agreed to dismiss Count I. CP 45-46 (Amended Information 11/14/2016).

Fact II). On Count III, the trial court found that the offender score was 9+ (actual score 12), and the standard range was 63-84 months, and the statutory maximum was 120 months. CP 95 (Finding of Fact II). The trial court sentenced Mr. Broussard to 120 months on Count II and 63 months on Count III, to run *consecutively* to each other, for a total of 183 months. CP 95 (Finding of Fact IV) (emphasis in original).

Mr. Broussard appeals the imposition of this exceptional sentence. CP 97.

D. ARGUMENT

MR. BROUSSARD'S EXCEPTIONAL SENTENCE WAS NOT AUTHORIZED UNDER THE PLAIN LANGUAGE OF THE STATUTE.

Under the Sentencing Reform Act, when a person is sentenced on two or more offenses at the same time, the sentences on each count must be served concurrently. RCW 9.94A.589(1)(a). Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a). The trial court decided to impose an exceptional sentence under RCW 9.94A.535(2)(c), known as the "free crimes" aggravating factor. RP Vol. III 50-52 ; CP 95 (Finding of Fact III).

Generally, a court must impose a sentence within the standard sentence range. *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). However, a person may be sentenced outside the standard

range if there are “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535.

When a person has multiple current offenses that result in an offender score greater than nine, further increases in the offender score do not increase the standard sentence range. RCW 9.94A.510; *State v. Alvarado*, 164 Wn.2d 556, 561–63, 192 P.3d 345 (2008).

When there are multiple crimes that could go unpunished, courts may impose an exceptional sentence under RCW 9.94A.535(2)(c), the “free crimes” aggravator.

The Legislature gives courts discretion to impose an exceptional sentence in the case of the “free crimes” aggravator, which is triggered when the defendant’s high offender score combines with multiple current offenses resulting in “some of the current offenses going unpunished.” RCW 9.94A.535(2)(c); *State v. France*, 176 Wn. App. 463, 469, 470, 308 P.3d 812 (2013).

Appellate review of an exceptional sentence is dictated by statute. RCW 9.94A.585(4). Reversal of an exceptional sentence is required if: (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient. *France*, 176 Wn.

App. at 469 (citing RCW 9.94A.585(4)). In this case, de novo review is appropriate since the trial court's reasoning does not justify departure from the standard range and because this is an issue of statutory construction. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015).

1. The plain language of the statute provides that the "free crimes" aggravator applies only when "some of," or more than one, current offenses would otherwise go unpunished.

Courts have a duty to ascertain the legislature's intent in construing the "free crimes aggravator." *France*, 176 Wn. App. at 470 (citing *Lake v. Woodcreek Homeowner Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010)). Statutory interpretation begins with the statute's plain meaning. *France*, 176 Wn. App. at 471. Where a statute is plain on its face, "the court must give effect to that plain meaning as an expression of legislative intent." *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). In an unambiguous statute, a word is given its plain and obvious meaning. *Id.* at 10 (citing *Addleman v. Bd. of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986)). If a statute's meaning is unambiguous, the inquiry ends. *France*, 176 Wn. App. at 470.

A court determines a statute's plain language by examining the statute in which the provision is found, related provisions, and the larger statutory scheme as a whole. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). The "free crimes" aggravator applies

when “the defendant has committed multiple current offenses and the defendant’s high offender score results in *some* of the current offenses going unpunished.” RCW 9.94A.535(2)(c) (emphasis added).

Here, the plain meaning of the statute states that it applies only in cases where some of the current offenses would go unpunished absent the exceptional sentence. “Some” is an ordinary word, and this court can thus look to its dictionary definition. *Alvarado*, 164 Wn.2d at 562. (“When a term has a well-accepted, ordinary meaning, we may consult a dictionary to ascertain the term’s meaning.”). The word “some” when followed by “of,” functions as a quantifier.² As a quantifier it means, “a few of them but not all of them.”³ “A few” is used to indicate a small number of people or things.⁴ A small group of things is necessarily more than one thing.

Analysis of the use of quantifiers in the Sentencing Reform Act shows the Legislature used the quantifier “some of,” differently than “one or more.” *State v. Mathers*, 193 Wn. App. 913, 919, 376 P.3d 1163 (2016) (“where the legislature uses different language within a provision, a different intent is indicated.”). For example, the legislature describes “one or more crimes” in RCW 9.94A.730, “one or more of the facts” in RCW 9.94A.537, and “one or more violent acts” in RCW

² COLLINS ENGLISH DICTIONARY, available at https://www.collinsdictionary.com/us/dictionary/english/some_1 (last accessed 11/09/2017).

³ COLLINS ENGLISH DICTIONARY, available at https://www.collinsdictionary.com/us/dictionary/english/some_1 (last accessed 11/09/2017) (description of “some” as quantifier).

⁴ COLLINS ENGLISH DICTIONARY, available at <https://www.collinsdictionary.com/us/dictionary/english/few> (last accessed 11/09/2017) (definition of “a few.”)

9.94A.562. By contrast, like in RCW 9.94A.535(2)(c), “some of” is used to describe a plurality in RCW 9.94A.589: “if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.” (emphasis added).

A plain reading of the statute then necessarily leads to the conclusion that RCW 9.94A.535(2)(c) does not apply when only one crime would go unpunished, because the Legislature did not employ the quantifier “one or more.” Because the plain language of the statutory provision is unambiguous, the court’s inquiry should end here. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). And because this court is required to “assume that the Legislature meant exactly what it said and apply the statute as written,” RCW 9.94A.535(2)(c) may only apply in instances where more than one crime would go unpunished. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (citing *In re Recall of Pearsall–Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000)).

2. Mr. Broussard received an exceptional sentence based on only one crime that would go unpunished under RCW 9.94A.535(2)(c).

The trial court erred in finding that the RCW 9.94A.535(2)(c) applied to Mr. Broussard, where only one offense, and not “some of” his current offenses would have gone unpunished as required by statute. The trial court stated in its Findings of Fact that:

Because of the defendant's maximum offender score on Count II, which was the more serious offense to which he pled guilty, he would effectively go unpunished on Count III if the court imposed a standard range sentence on each count, to run concurrently with each other, as ordinarily contemplated by the SRA. Therefore, the court finds an aggravating factor exists in this case, which is that defendant committed multiple current offenses and his high offender score results in one of the current offenses going unpunished, set out in RCW 9.94A.535(2)(c), is applicable in this case.

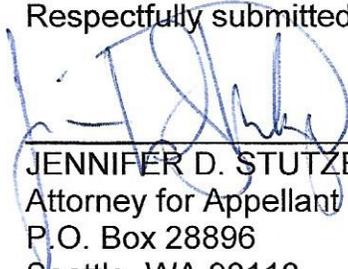
CP 95 (Finding of Fact III). The trial court imposed this exceptional sentence where only one offense, Count III (Assault in the Second Degree) would go unpunished if the court had not imposed an exceptional sentence. CP 94-96; RP Vol. III 50-52. Where an exceptional sentence is not legally justified by the aggravating factor, reversal is required. *State v. Davis*, 182 Wn.2d 222, 232, 340 P.3d 820 (2014). Reversal of Mr. Broussard's exceptional sentence is thus required where the trial court erred in imposing an exceptional sentence under RCW 9.94A.535(2)(c). A plain reading of this statute did not permit its application because Mr. Broussard's offender score resulted in one offense to go unpunished, and not "some of" his current offenses as required by statute.

E. CONCLUSION

Based on the foregoing facts and authorities, Mr. Broussard respectfully asks this Court to reverse the trial court's imposition of an exceptional sentence where it was not authorized by statute.

DATED this 9th day of November, 2017.

Respectfully submitted,



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DIVISION TWO**

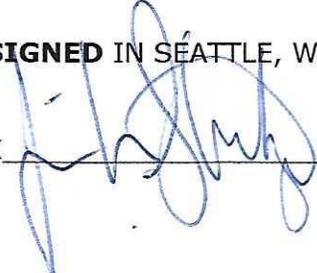
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
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v.)	NO. 50335-2-II
)	
JULIEN BROUSSARD,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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