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NO. 50397-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALBERT SMITH,

Appellant.

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

The Honorable Kevin D. Hull, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. In imposing the exceptional sentence, the trial court relied on an erroneous understanding of Smith's criminal history and an erroneously calculated offender score. Is remand for resentencing required?

2. Does the State's argument regarding RCW 9.94A.535(2)(c) ignore the current statute's plain language?

3. Does the State's brief fail to address two arguments raised in the Brief of Appellant?

B. ARGUMENT IN REPLY

1. THE TRIAL COURT RELIED ON AN ERRONEOUS UNDERSTANDING OF SMITH'S CRIMINAL HISTORY AND AN ERRONEOUSLY CALCULATED OFFENDER SCORE IN IMPOSING AN EXCEPTIONAL SENTENCE. THUS, REMAND FOR RESENTENCING IS REQUIRED.

The trial court relied on an erroneous understanding of Smith's criminal history based on the State's failure of proof. The trial court also relied in part on an erroneously calculated offender score in imposing an exceptional sentence. Under Washington law, remand for resentencing is required.

The State acknowledges that Smith's offender score was incorrectly calculated, Brief of Respondent (BOR) at 28, but then argues that the trial court would have pronounced the same sentence in any event. BOR at 27, 29-30 (citing State v. Fleming, 140 Wn. App. 132, 138, 170 P.3d 50, 53

(2007), disapproved of on other grounds by State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009)). In Fleming, this Court stated that “[a] trial court may determine that nine convictions exist and then stop calculating, so long as the court is not considering the imposition of an exceptional sentence based on reasons related to the offender score.” Fleming, 140 Wn. App. at 138.

The State’s claim is incorrect and its reliance on Fleming misplaced. In imposing the exceptional sentence, the trial court fixated on Smith’s criminal history, which the State now acknowledges that it failed to prove, and therefore his offender score. See Brief of Appellant (BOA) at 40 (citing court’s remarks at 2RP 20-21).

The State also criticizes Smith’s reliance on State v. Phillip Arthur Smith, 123 Wn.2d 51, 58, 864 P.2d 1371 (1993), overruled on other grounds by State v. Hughes, 154 Wn.2d 118, 128, 110 P.3d 192 (2005). This is puzzling for two reasons.

First, the State relies on Smith earlier in its own briefing. Compare BOR at 19-20 (arguing Smith is relevant even though case was decided pre-Blakely¹) with BOR at 26 (stating same case has “dubious vitality,” in part because it was decided pre-Blakely).

¹ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Second, it is also puzzling because Smith is consistent with the case the State wants this Court to rely on. The State even acknowledges that Smith applies a “well-worn rule.” BOR at 26.

In Smith, the Court invalidated two of four reasons offered to support the exceptional sentence. Even though the trial court indicated it would have imposed the sentence based on *any one of the four findings*, Smith, 123 Wn.2d at 58 n. 8, the Supreme Court remanded, stating it could not conclude with certainty that the trial court would impose the same sentence on remand without the invalid aggravators. Id. at 58.

The State advances State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993) as the controlling case. Yet the State fails to mention that in Gaines, the reviewing court remanded for resentencing because it was unclear whether the trial court would have imposed the same exceptional sentence but for the consideration of an erroneous factor. Id. at 512.

As in Gaines, this Court cannot conclude with certainty that the trial court would have imposed the same sentence had it not considered invalid aggravating factors. For the reasons stated in the opening brief, remand is required.

2. THE STATE'S RELIANCE ON *SMITH* IS MISPLACED, AS THAT CASE DOES NOT INVOLVE AN ANALYSIS OF THE CURRENT STATUTE'S PLAIN LANGUAGE.

As mentioned above, the State relies on Smith to argue that RCW 9.94A.535(2)(c)² may support an exceptional sentence even where there are only two current offenses. But that case analyzes a prior statute, which employed different language. The State's reliance is, therefore, misplaced.

As the State acknowledges, Smith interpreted a pre-Blakely version of the Sentencing Reform Act. BOR at 19-21. The provision in question allowed a trial court to impose an exceptional sentence where "[t]he operation of the multiple offense policy of [former] RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010." Former RCW 9.94A.390(2)(f), cited in Smith, 123 Wn.2d at 55.

But, while the State clearly wishes the current statute used the same language as the prior statute, it does not. And, where a statute is plain on its face, "the court must give effect to that plain meaning as an expression of legislative intent." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The plain language of the current statute

² RCW 9.94A.535(2)(c) allows a trial court to impose an exceptional sentence where the accused "has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."

demonstrates that the legislature did not intend for a trial court to impose an exceptional sentence where only one count failed to increase the standard range. Because the trial court erred in imposing consecutive sentences³ where the plain language of this provision was not satisfied, this Court should reverse and remand for resentencing.

3. THE STATE FAILS TO ADDRESS TWO OF THE APPELLANT'S ARGUMENTS.

Finally, the State's brief fails to address two arguments raised in the Brief of Appellant. First, the State fails to address the argument that *prior* convictions constituted same criminal conduct. BOA at 34-37. Second, the State fails to address the argument that resentencing must occur before a different judge. BOA at 40-42.

Where, as here, a respondent fails to respond to arguments made by the appellant, it concedes those issues. See In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it.").

This Court should rule in Smith's favor on these issues.

³ The court found that Smith's "high offender score results in crimes going unpunished if sentenced concurrently." CP 193 (third finding in support of exceptional sentence).

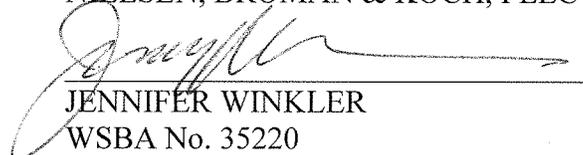
C. CONCLUSION

For the reasons set forth above and in Smith's opening brief, this Court should grant the requested relief.

DATED this 5th day of January, 2018.

Respectfully submitted,

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