

NO. 50451-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

RACHELLE D. CABE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00444-1

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion when it *expressly* ordered Cabe's 51 month sentence to be served consecutively with the Kitsap County sentence that Cabe was currently serving when the court has unfettered discretion under RCW 9.94A.589(3) to order consecutive sentences as long as it does so expressly?
2. Whether the record establishes that the court ordered the sentence to be served consecutively under a mistaken belief that it had no other option?
3. Whether the record supports an equally plausible theory that the court had its own understanding of the sentencing statutes and sentenced Cabe accordingly?

II. STATEMENT OF THE CASE

On Dec. 9, 2015, the State filed an information under the current cause, Clallam County Superior Court cause no. 15-1-00444-1 (hereinafter "Clallam cause"), charging Cabe with the crime of Burglary in the Second Degree. CP 97-98.

On May 13, 2016, as a resolution of the Clallam cause, Cabe entered a Drug Court Contract waiving her trial rights in return for dismissal of the charge upon successful completion of drug court. CP 78-81. Cabe was

released from custody on May 25, 2016. RP 73. Subsequently, a Drug Court Bench Warrant was issued June 9, 2016. RP 71, 72.

Meanwhile, on Jan. 26, 2017, Cabe was sentenced under Kitsap County Superior Court cause 16-1-01305-6 (hereinafter "Kitsap cause") to a term of 51 months confinement for having committed Burglary in the Second Degree and Theft in the Second Degree on Oct. 8, 2016. CP 115, 116, 124.

On Feb. 17, 2017, while serving her sentence for the Kitsap cause, Cabe filed a Request for Speedy Trial for the Clallam cause. CP 65. A Certificate of Offender Status was sent with Cabe's request for Speedy Trial showing that Cabe was received in the Washington Corrections Center for Women on Jan. 30, 2017 and was there serving the 51 month sentence under the Kitsap cause. RP 66 (This conviction was not listed in the criminal history section of the judgment and sentence for the Clallam cause).

Subsequently, on Mar. 10, 2017, the Clallam County Superior Court entered an order for Remand from Drug Court and an order to transport Cabe to Clallam County for a stipulated trial to be held Mar. 23, 2017. CP 58, 59, 60. On Mar. 23, 2017, the Clallam County Superior Court held a stipulated bench trial and found Cabe found guilty of having committed the crime of Burglary in the Second Degree committed on Sept. 21, 2015. CP 37, 57, 97-98. Cabe was sentenced to 51 months prison. CP 41, 45, 52.

At the sentencing hearing, the State requested the trial court to impose

the 51 month sentence consecutively to the 51 month sentence from the Kitsap cause which Cabe was currently serving:

Ms. Cabe, unfortunately, at a very young age, picked up a lot of burglaries and as we know the SRA makes burglaries exponentially more on the point system than anywhere else and when I first encountered Ms. Cabe, she had a burglary of a store and I gave her the opportunity at a misdemeanor because I thought, wow, that's a lot of time on it, on something like this and then she came back within months so that's the reason we gave her the opportunity in Drug Court and yet, again, we're here. Ms. Cabe's in Drug Court and then picks up another offence out at Kitsap. She has one, two, three, four, four burglary convictions and one possession of a controlled substance. That makes her offender score nine. Seriousness level, three. Standard range of 51 to 68 months. The State is asking that she be imposed 51 months on Count I and that it be served consecutively to the Kitsap County case [16-1-01305-6.]¹

RP 32-33.

Cabe's defense attorney agreed that the low end of the range should be imposed but did not give a position regarding whether it should be concurrent or consecutive with the Kitsap County sentence:

I agree that 51 months is the low end of the standard range. I'd ask the Court to impose such a sentence. I believe my client is already serving a lengthy sentence out of Kitsap County as well. If that's imposed consecutively that will be longer.

RP 34.

Cabe asked for leniency explaining the difficult situation with her child and that "I made one mistake in Drug Court, wasn't able to make it

¹ The State concedes that the reference to Kitsap County cause 15-1-01176-4 was erroneous as that sentence was already served (*see* CP 115) and that the parties were actually addressing Kitsap County cause 16-1-01305-6 which Cabe was currently serving. CP 66.

back here and I'm being terminated because I picked up a new charge in another county which I mean I didn't expect to happen, I didn't plan on it happening." RP 36. Ms. Cabe requested the court to run the sentence concurrently with the 51 month sentence from Kitsap County:

I would just ask that the Court would run it concurrent with the 51 months I'm already doing in Kitsap County. I've looked into it when I was in Purdy. I went to a couple different law library appointments, they said that is something that is possible. They told me just to ask the Court to have a little bit of leniency in that aspect, just explain that I'm trying to get into the parenting program. There's only 20 positions in the prison so it's a very, it's kind of a hard program to get accepted into.

RP 37.

The State replied:

Your Honor, all I would do is direct the Court's attention to 9.94A.589 with regard to consecutive versus concurrent cases. Ms. Cabe's one mistake is not one mistake. Ms. Cabe's one mistake started with a criminal trespass in 2012, a bail jumping in 2013, a DW(inaudible) in 2012, making false statements in 2011, criminal trespass 2011, Theft 3 2011, Assault 4, 2012, Theft 3, 2012, Theft 3, 2012, Obstructing Law Enforcement Officer, 2013, Criminal Trespass, 2013, Assault 4, 2014, Criminal Trespass, 2014, Theft 3 times 4, 2015, 2016, 2016, 2017. Four burglaries in 2013. POCS in 2015. This is not one mistake, this is a continual pattern of criminal misconduct and if I could count misdemeanors, her score would be a 9 plus and more time. The State's reading of her criminal history, she was under sentence at the time she was convicted and therefore it shall be consecutive . . . So I'm asking the Court to run that consecutively.

RP 40-41.

The trial court commented that:

I'd like to tell you that I had better news but I don't really so I think *the way I read the law* we're kind of - I don't have a whole lot of options here and I'm going to run them one after the other or consecutive 51 months, I'll waive the attorney fee. I don't feel good about it but it's one of these things when things play out this way that's what occurs. . . .

RP 42 (emphasis added).

The judgment and sentence for Clallam cause shows that the 51 month term of confinement was ordered to be served consecutively with the sentence entered on Dec. 8, 2015 under Kitsap County Superior Court cause no. 15-1-01176-4, Possession of a Controlled Substance, Heroin, committed on Oct. 9, 2015. CP 45, 103, 112. The judgment and sentence does not refer to the 51 month sentence under Kitsap County cause 16-1-01305-6.

Cabe points out that this was erroneous as the cause which all parties were referring to in relation to consecutive and concurrent sentencing was the sentence she was currently serving under Kitsap County Superior Court cause no. 16-1-01305-6. Br. of Appellant at 7-8.

III. ARGUMENT

A. THE COURT PROPERLY EXERCISED ITS COMPLETE DISCRETION TO RUN THE SENTENCE CONSECUTIVE TO THE KITSAP COUNTY CAUSE BECAUSE IT EXPRESSLY ORDERED SO.

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by

any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

RCW 9.94A.589(3).

“A sentencing court is granted broad discretion in choosing whether to impose a consecutive sentence. The judge need only order that the sentences be served consecutively; no reason for the decision is required.” *State v. Mathers*, 77 Wn. App. 487, 494, 891 P.2d 738 (1995) (citing *State v. Linderman*, 54 Wn. App. 137, 139, 772 P.2d 1025, review denied, 113 Wn.2d 1004, 777 P.2d 1051 (1989)); see also *In re Long*, 117 Wn.2d 292, 302, 815 P.2d 257 (1991)(citing *State v. Kern*, 55 Wn. App. 803, 780 P.2d 916 (1989)) (“In enacting [former] RCW 9.94A.400(3), the Legislature left to the trial court the determination of whether a concurrent or consecutive sentence should be imposed for cases within the category of the subsection. Under the plain language of RCW 9.94A.400(3), the trial judge need not specify the reasons for imposing consecutive sentences.”); *State v. Champion*, 134 Wn. App. 483, 487, 140 P.3d 633 (2006) (quoting *State v. Grayson*, 130 Wn. App. 782, 786, 125 P.3d 169 (2005)).

“Under [former] RCW 9.94A.400(3), the trial court is granted total discretion to choose whether to impose a consecutive sentence. It requires only that the judge ‘expressly orders that they be served consecutively.’”

State v. Linderman, 54 Wn. App. 137, 139, 772 P.2d 1025 (1989) (citing *State v. Huntley*, 45 Wn. App. 658, 726 P.2d 1254 (1986)). “Neither the statute nor the official comments thereto require that the trial judge specify any reason whatsoever behind such a decision, let alone that the reasoning conform to any particular policy.” *Id.* at 139.

Here, the court expressly ordered that the 51 month sentence run consecutively with the 51 month sentence Cabe was currently serving in Kitsap County. RP 42. There was no abuse of discretion.

B. THE RECORD DOES NOT ESTABLISH THAT THE COURT MISUNDERSTOOD THE LAW OR FAILED TO EXERCISE DISCRETION WHEN IT EXPRESSLY ORDERED THAT THE SENTENCE RUN CONSECUTIVE TO THE KITSAP COUNTY CAUSE.

Cabe argues that the court only ordered that her sentence run consecutive to the Kitsap cause Cabe was currently serving because it did not understand the law and it erroneously adopted the prosecutor’s incorrect position on RCW 9.94A.589(3). RP 10, 11. This argument fails because it is based upon pure speculation regarding the thought process of the judge which is not reviewable on direct appeal because it is not on the record.

The record does not establish Cabe’s claim, especially considering that the facts on record at sentencing support other equally plausible possibilities.

The court stated:

I'd like to tell you that I had better news but I don't really so I think *the way I read the law* we're kind of - I don't have a whole lot of *options* here and I'm going to run them one after the other or consecutive 51 months, I'll waive the attorney fee. I don't feel good about it but it's one of these things when things play out this way that's what occurs. . . .

RP 42 (emphasis added).

This could easily mean any number of things. First, the Court did not, on the record, either adopt the State's position or state that the prosecutor was correct or that Cabe and Cabe's counsel were incorrect. Rather, the Court specifically referred to "*the way I read the law.*"

Additionally, Cabe's counsel's statement: "*If that's imposed consecutively that will be longer,*" (RP 34) strongly suggests his position was that concurrent sentencing was a *possibility* and consecutive sentencing was not a foregone conclusion or required as a matter of law. Cabe herself informed the court that the sources in the law library in prison informed her that concurrent sentences were possible. There is no reason why the court's understanding of the law could not have been in accord with Cabe and Cabe's counsel's understanding.

Further, when the court stated "when things play out this way that's what occurs," the court may have been referring to Cabe's extensive and continual criminal history. *See* RP 40–41. A court need not feel good about

doling out a sentence it believes is appropriate when there is a resulting hardship to the defendant.

Moreover, the court could have found a basis for an exceptional sentence as the conviction resulted from a stipulated bench trial. But it is also very plausible that the court could have felt an exceptional sentence *below* the sentence range was not justified based on Cabe's extensive history which further limited the court's options. In that situation, maybe it made sense to the court to impose the low end of the standard sentence range but run it consecutive to the Kitsap sentence that Cabe earned with yet another Burglary charge while Cabe was in Drug Court on the Clallam cause.

The problem with *all of the above arguments* is that they are merely suppositions based on speculation. What the presiding judge actually knew or did not know in relation to the court's sentencing options is not on the record and may not be considered on direct appeal.

Where . . . the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. *State v. Crane*, 116 Wash.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); *State v. Blight*, 89 Wash.2d 38, 45–46, 569 P.2d 1129 (1977). *Accord State v. Stockton*, 97 Wash.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in the brief but not included in the record cannot be considered on appeal).

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Cabe's position *assumes* that the trial court had no independent knowledge or position about how the law under RCW 9.94A.589 operates

even though the court indicated its understanding was based on, “*the way I read the law.*” The record simply does not establish that the court did not understand the law and therefore adopted an erroneous interpretation leading it to believe it had no authority to run the sentences concurrently.

Therefore, the Court should affirm the sentence.

C. THE COURT SHOULD AFFIRM THE SENTENCE BECAUSE THE RECORD SUPPORTS A PLAUSIBLE THEORY THAT THE TRIAL COURT SENTENCED CABE ACCORDING TO ITS OWN UNDERSTANDING OF THE SENTENCING REFORM ACT.

It is the Court’s duty to affirm a judgment if it can be sustained on any theory. *Vacca v. Steer, Inc.*, 73 Wn.2d 892, 895 441 P.2d 523 (1968) (citing *City of Kirkland v. Steen*, 68 Wn.2d 804, 810, 416 P.2d 80 (1966)); *State v. Carroll*, 81 Wn.2d 95, 101, 500 P.2d 115 (1972) (citing *Peterson v. Hagan*, 56 Wn.2d 48, 351 P.2d 127 (1960).

Here, as argued above, it is equally plausible that the court had its own correct understanding of the law and sentenced Cabe accordingly.

Therefore, Cabe cannot establish the court abused its discretion and the sentence should be affirmed.

IV. CONCLUSION

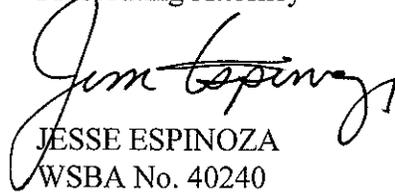
The court expressly ordered that Cabe’s sentence be served consecutively to the Kitsap County sentence Cabe was currently serving.

Therefore, the trial court did not abuse its discretion. Further, the record does not establish that the trial court abused its discretion by running the sentence consecutive to the Kitsap cause due to a mistaken the belief it had no other option. Finally, the record supports an equally plausible theory that the trial court had its own understanding of the law and sentenced Cabe accordingly.

Therefore, this Court should affirm the sentence.

Respectfully submitted this 10th day of October, 2017.

MARK B. NICHOLS
Prosecuting Attorney

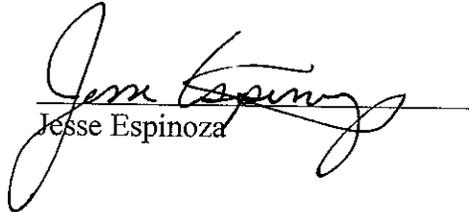
A handwritten signature in black ink, appearing to read "Jesse Espinoza", is written over the typed name and title of the Deputy Prosecuting Attorney.

JESSE ESPINOZA
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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to John A. Hays on October 10, 2017.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

CLALLAM COUNTY PROSECUTING ATTORNEY'S OFFICE

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