FILED
Court of Appeals
Division II
State of Washington
9/12/2018 2:19 PM

NO. 50664-5-II

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

STATE OF WASHINGTON, Respondent

v.

DARIN RICHARD VANCE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00704-9

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (564) 397-2261

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RESPONSE TO ASSIGNMENTS OF ERROR

I. The Silver Platter Doctrine is alive and well in Washington and applicable to this case

II. The trial court properly denied Vance's request for a SSOSA sentence

III. The trial court did not err in sentencing Vance to a standard range sentence

IV. The search warrant was sufficiently particular

STATEMENT OF THE CASE

The State agrees with Vance's statement of the case. Where appropriate, the State included additional facts within the argument section below.

ARGUMENT

I. The Silver Platter Doctrine is alive and well in Washington and applicable to this case

Vance argues the trial court erroneously denied his motion to suppress evidence by finding that the "Silver Platter Doctrine" applied. Vance argues that the "Silver Platter Doctrine" should not be utilized in our State and that the different agencies involved in his case are inextricably intertwined so as to make the doctrine inapplicable. The

"Silver Platter Doctrine" has been upheld and utilized by our Supreme Court and our Court of Appeals, and it is applicable in this case. Vance's claim fails.

In reviewing a trial court's decision on a suppression motion, this Court determines whether substantial evidence supports any challenged findings of fact, and whether the findings of fact support the trial court's conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Any unchallenged findings of fact are treated as verities. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The conclusions of law are then reviewed de novo. *Garvin*, 166 Wn.2d at 249. The trial court denied Vance's motion to dismiss based on the "Silver Platter Doctrine," finding the evidence obtained by a federal agent during his investigation of Vance was admissible as the federal agent was not an agent of the state, was not acting in cooperation with the state during his investigation, and had followed federal law. CP 1429-35.

The "Silver Platter Doctrine" allows evidence that was lawfully obtained under the laws of another jurisdiction to be admitted in courts in Washington, even if the manner of discovery of the evidence, had it occurred in Washington, would have violated Washington law. *State v. Mezquia*, 129 Wn.App. 118, 132, 118 P.3d 378 (2005). To be admissible under this doctrine, the evidence must have been: 1) lawfully obtained by

the foreign jurisdiction; and 2) the Washington State officers must not have acted as agents or have cooperated or assisted the foreign jurisdiction. *Id.*

Vance does not argue the evidence was not lawfully obtained by federal agents – the foreign jurisdiction involved here. Therefore, the issue under our prevailing case law is whether FBI Agent Burney was an agent of Washington State officers, or whether Washington State officers cooperated or assisted Agent Burney in his investigation in this case. Vance argues the FBI and the Washington State officers worked together as part of a coordinated investigation into all cases involving depictions of minors engaged in sexually explicit conduct, and as such, the "Silver Platter Doctrine" does not apply. Vance's application of the doctrine is overly broad and would render any foreign jurisdiction's investigation part of a joint investigation involving Washington State officers if any officers are members of any of the same groups as the foreign officers. This is simply not the standard for application of the "Silver Platter Doctrine."

To determine whether FBI agent Burney was acting as an "agent" for Washington State officers, or whether Agent Burney's actions were part of a joint investigation he conducted along with Washington State officers, it is necessary to consider the specific facts involved in this case, and look to examples from our Courts on when contact, exchange of

information, and cooperation between state and foreign jurisdictions results in an agency relationship. In *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), the Washington Supreme Court considered whether a defendant's recorded statement to police in California was properly admitted at his criminal trial in Washington, when the recording would not have been admissible had it been done in Washington. There, the defendant had been arrested in California on suspicion of a violent sex offense, assault, and robbery, and while he was speaking with California officers, he confessed to murdering a woman in King County. *Brown*, 132 Wn.2d at 546-48. Over two days, the defendant had three total conversations with California police officers; all three were recorded without the defendant's knowledge or consent. *Id.* at 548. During the first interview, the defendant told the California officers to tell King County police to come down and talk with him. *Id.* at 588. After the first interview, California police contacted King County officers and informed them of what the defendant had told them. *Id.* at 589. King County police located the vehicle the defendant had described to California police and found the victim's dead body in the trunk. *Id.* After this, King County police asked the California officers to get a statement from Brown. *Id.* The California officers told Brown about King County's request and he said he

was willing to cooperate, and then gave the confession, the recording of which was admitted at trial. *Id.*

On review, the Supreme Court considered whether the evidence was lawfully obtained by California officers and whether that allowed admission of the recording at trial despite it not having been obtained in accordance with Washington law. *Id.* at 585. The Court discussed that the "'key element of the silver platter doctrine requires that the officers of the federal jurisdiction not act as agents of the forum state jurisdiction nor under color of state law.'" *Id.* at 587 (quoting *State v. Gwinner*, 59 Wn.App.119, 125, 796 P.2d 728 (1990), *rev. denied*, 117 Wn.2d 1004, 815 P.2d 266 (1991)). The Court adopted the *Gwinner* Court's analysis of factors to consider in determining whether federal agents were acting as agents of the Washington state officers. *Id.* Those factors include: "'antecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers....'" *Id.* (quoting *Gwinner*, 59 Wn.App. at 125). However, "'mere contact, awareness of ongoing investigations or the exchange of information may not transmute the relationship into one of agency.'" *Id.* (quoting *Gwinner*, 59 Wn.App. at 125). In applying those factors, the Supreme Court found that the California police were merely acting with the "cooperation and assistance" of King County officers, and therefore did not have an agency relationship

with King County. *Id.* at 589. Important to this conclusion was the Court's finding that King County only asked California officers to get a statement from Brown and they did not tell the California officers what to ask or how to conduct the interview. *Id.* Therefore, the California officers were working independently when they obtained Brown's confession. *Id.* Additionally, the Supreme Court noted that there would be no state interest advanced by the suppression of the recorded statement obtained by the California officers as no state actors violated his privacy interests. *Id.* at 590.

Gwinner, supra, presents a case in which Division I of the Court of Appeals analyzed whether evidence obtained by a foreign jurisdiction was admissible in a defendant's trial despite the fact that the way the foreign jurisdiction's officials obtained the evidence would have violated Washington state law. There, a Washington state officer gave federal agents information about the defendant, who was suspected of trafficking cocaine. *Gwinner*, 59 Wn.App. at 121. The Washington officer told an agent with the Drug Enforcement Administration (DEA)'s task force that an informant had told him that Gwinner would be trafficking cocaine through Sea-Tac airport, that he would be arriving on a certain date and time, that he would have four baggies of cocaine, and that he drove a blue Nissan truck with California license plates. *Id.* DEA agents found

Gwinner's truck in the parking garage at the airport based on the information from the Washington officer. *Id.* DEA agents then followed Gwinner from the arrival gate out to the parking garage, and then approached him and asked to talk to him. *Id.* Gwinner agreed to a search of his bag in which the agents found cocaine. *Id.* Upon his arrest, the agents searched his truck during an inventory search pursuant to federal law. *Id.*

The Court in *Gwinner* found the search of the vehicle to be lawful under federal law, but noted it did not conform to Washington state law. *Id.* at 123-34. In addressing whether the evidence obtained by the DEA agents' search of Gwinner's vehicle was properly admitted into evidence at Gwinner's state criminal trial, the Court relied on the "Silver Platter Doctrine," noting that state laws do not control federal action, and that no state interests would be advanced by "disallow[ing] the transfer of evidence from federal to state authorities when the evidence was lawfully obtained by the former." *Id.* at 125 (citing *State v. Mollica*, 114 N.J. 329, 554 A.2d 1315 (1989)). Noting that the key element to a proper transfer of evidence from federal agents to State agents was that the federal agents not have acted as agents of Washington State, the Court considered whether the Washington officer's telephone call sharing information about Gwinner worked to make the DEA agents agents of Washington State. *Id.*

at 125-26. The Court found that the Washington officer only transferred information to federal agents; the Washington officer did not request the federal agents search Gwinner's vehicle and had no knowledge that the search would occur. *Id.* at 126. Based on this, the Court concluded that there was no agency relationship between the state and federal officers and the federal officers were not acting as agents of Washington State. *Id.* The Court again noted that no legitimate state interest in protecting privacy rights would be advanced by the suppression of the evidence obtained by federal agents. *Id.* The Court stated, "suppression would not deter our state officers from unlawful conduct, since we are not examining the conduct of state officers." *Id.*

In Vance's case, FBI Agent Burney was not working as an agent of Washington State or under the color of state law when he conducted his investigation. The trial court properly found the evidence admissible at trial because the state received the information from Agent Burney on a "silver platter." From the evidence it is clear that the FBI worked wholly independently from the Vancouver Police Department and the Digital Evidence Crime Unit (DECU) investigators in this case. CP 256-58; RP 52-55. No state actors were even aware of Agent Burney's investigation or actions in the case until Agent Burney forwarded the information to them. CP 256-58; RP 52-55. This case falls squarely under the reasoning and

holding in *Brown, supra* and *Gwinner, supra*. In *Brown, supra* the Supreme Court found that even though Washington state officers had asked California officers to obtain a statement from the defendant, they did not have any role in how the statement was obtained, what questions were asked, or whether the statement was recorded. *Brown*, 132 Wn.2d at 589. In that case, the King County officers were more involved in the California officers' investigation than the DECU investigators were in Agent Burney's investigation into Vance's distribution of depictions of minors engaged in sexually explicit conduct. They were at least aware of it, and asked California officers to ask the defendant about the crime committed within Washington's jurisdiction. *Id.* DECU investigator Maggi Holbrook was not even aware of any investigation Agent Burney was doing prior to receiving the information he forwarded. CP 256-58; RP 52-55. Likewise, the state officer involved in *Gwinner, supra,* also engaged in more cooperation with foreign agents than the DECU investigators did in Vance's case by transferring exact information to federal agents which lead to a federal investigation. Even that exchange of information seen in *Gwinner, supra*, did not occur in Vance's case.

Vance argues that DECU's existence as an inter-agency law enforcement unit, and its participation in nation-wide law enforcement groups, acts to create an agency relationship between DECU and the FBI.

Even though the Vancouver Police Department and the Clark County Sheriff's Office are part of nation-wide groups that share information regarding depictions of minors crimes, they did not have an agency relationship with the FBI, there was no antecedent mutual planning or joint investigation of Vance, and no assistance was given to Agent Burney in this investigation from Washington officers. CP 256-58; RP 52-55. If being members of the same nation-wide associations or sharing of information on crimes with other jurisdictions created an agency relationship or equaled mutual planning, assistance, or joint investigation, then all law enforcement in our country would be agents of one another and the "Silver Platter Doctrine" would be rendered inoperable. All law enforcement share information on those convicted of crimes, and of details of crimes themselves, through national databases. Simply sharing information or having a similar mission to combat crime does not make two jurisdictions' officers partners. Vance attempts to turn the nation-wide, and in fact, world-wide effort to identify and prosecute those who create, possess, and distribute depictions of minors engaged in sexually explicit conduct into a nefarious, inter-agency conspiracy to thwart defendants' privacy rights. But there was simply no evidence of any pre-planned choice to use Agent Burney's federal authority to obtain information in violation of Vance's privacy rights. Just as in *Brown,*

supra, no state interest would have been advanced by the suppression of the evidence obtained from Agent Burney that was then used by state actors to obtain a search warrant of the defendant's house. There was no misconduct of state officers to punish in an attempt to prevent recurrence, and Agent Burney violated no law in his investigation, conducted from another state during his routine job duties as an agent for the FBI. The "Silver Platter Doctrine" clearly applies to Vance's case and the trial court properly found that the evidence was admissible as there was no state action that worked to violate Vance's privacy rights.

II. The trial court properly denied Vance's request for a SSOSA sentence.

Vance claims the trial court improperly failed to rule on his equal protection and privileges and immunities argument in which he claimed the 2004 amendment to the SSOSA statute violated equal protection. However, the trial court properly denied Vance's request for a SSOSA sentence as Vance does not qualify for such a sentence as he had no established relationship with the victim of the offense. The 2004 amendment to the statute to require a relationship with the victim does not violate equal protection and Vance's claim that it does should be denied.

Under the SRA, a superior court judge does not have unlimited discretion to sentence. *State v. Handley*, 115 Wn.2d 275, 289, 796 P.2d

1266 (1990). Instead, the court has discretion within the statutory guidelines. *See State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). "The SRA requires courts to apply sentencing guidelines equally to all offenders without 'discrimination as to any element that does not relate to the crime of the previous record of the defendant.'" *State v. Osman*, 157 Wn.2d 474, 481, 139 P.3d 334 (2006) (quoting RCW 9.94A.340). As an initial matter, in *State v. Willhoite*, 165 Wn.App. 911, 268 P.3d 994 (2012), *rev. denied*, 174 Wn.2d 1006, 278 P.3d 1112 (2012), Division I of this Court found that the plain language of RCW 9.94A.670(2) clearly requires that a defendant have an established relationship with the victim in order to be eligible for a SSOSA sentence. *Willhoite*, 165 Wn.App. at 915. In the years since the *Willhoite* decision, the legislature has not amended RCW 9.94A.670(2) to allow offenders who have been convicted of depictions crimes to be sentenced under the sex offender sentencing alternative. We can therefore assume the legislature has chosen not to allow those convicted of depictions crimes to be sentenced under the alternative. The legislature has the power to define crimes and to set the range of punishments for those crimes. Simply making an offense which Vance believes is less serious or objectionable than other offenses not eligible for a certain sentencing alternative does not violate equal protection. Vance is not a member of a protected class and his belief that

the sentence the legislature sets forth is too harsh for his conduct does not create a capricious and unreasoned decision by the legislature to set forth the types of sentences allowed for certain crimes.

Equal protection requires that similarly situated individuals receive similar treatment under the law. *See* U.S. Const. amend XIV, sec. 1; Wash. Const. art. I, sec. 12. While equal protection provides for equal application of the law, it does not provide for equality among individuals or classes of individuals. *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). In determining whether there has been an equal protection violation, if the classification of individuals does not affect a fundamental right, pertain to a suspect class, or affect both a liberty right and apply to a semi-suspect class, then courts apply the rational basis test for review of legislative classifications. *State v. Harner*, 153 Wn.2d 228, 235-36, 103 P.3d 738 (2004). Under the rational basis test, a legislative classification will be "upheld unless the classification rests on grounds wholly irrelevant to the achievement of legitimate state objectives." *Id.*

"A party challenging the application of a law as violating equal protection principles has the burden of showing that the law is irrelevant to maintaining a state objective or that it creates an arbitrary classification." *Simmons*, 152 Wn.2d at 458. "Rational basis review is a highly deferential standard, and it is the rare classification that is found unconstitutional

under this standard." *Harris v. Charles*, 171 Wn.2d 455, 466, 256 P.3d 328 (2011) (citing to *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998)). In a review of a defendant's equal protection claim due to his statutory ineligibility for DOSA, Division I of this Court determined that rational basis review was the appropriate level of review to apply. *State v. McNeair*, 88 Wn.App. 331, 339, 944 P.2d 1099 (1997). Vance also agrees rational basis is the appropriate level of review for his equal protection claim.

Under rational basis review, a classification does not violate the Fourteenth Amendment to the U.S. constitution if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993). Furthermore, legislative enactments are strongly presumed to be constitutional. *Id.* at 319. Exclusion of an offender from a sentencing alternative based on certain criteria is a rational classification by the legislature. In *State v. Welty*, 44 Wn.App. 281, 726 P.2d 472, *rev. denied*, 107 Wn.2d 1002 (1986), the Court of Appeals found the legislature had determined that rehabilitation of *certain offenders* was a proper goal despite the SRA's overall goal of uniformity in sentencing. *Welty*, 44 Wn.App. at 283-84. And the Court also found that the

legislature must believe that successful rehabilitation was more likely for first offenders than for repeat offenders. *Id.*

In *McNeair*, the Court of Appeals addressed an equal protection claim by a defendant who was ineligible for DOSA due to statutory requirements that certain VUCSA offenders not have prior felony convictions. *McNeair*, 88 Wn.App. at 340-41. There the Court stated,

> The Legislature appears to have made the decision that the potential for successful rehabilitation is greater for those who have not committed prior felonies. Such a classification is rational in light of the goal of maximizing the potential for successful rehabilitation of those drug offenders to which the statute applies.

Id. at 341. In considering the eligibility requirements of DOSA, the Court found the DOSA provision involved "implicitly indicates that the Legislature balanced competing objectives and made a choice to exclude prior felons from the sentencing alternative." *Id.* at 342.

The reasoning and holding in *McNeair* is applicable to Vance's equal protection claim. Given that legislative enactments are presumed constitutional, and it is appropriate to infer rational bases for legislative choices, it is clear that the SSOSA requirement that an offender have a relationship to the victim is rationally related to a legitimate state interest. One of the main reasons SSOSA was enacted was to encourage reporting of sex crimes, "especially in the case of intrafamily abuse." *State v.*

Jackson, 61 Wn.App. 86, 92, 809 P.2d 221 (1991). Encouraging the reporting of crime is a legitimate state interest and allowing a class of offenders who are known to and have an established relationship with the victim to receive an alternate to prison rationally promotes that state interest. Victims of depictions offenses do not know all the perpetrators against them, and cannot report most cases of possession or distribution of depictions. There is no one to whom the SRA needs to encourage reporting of such crimes and therefore the exception to a standard sentence range is not needed for depictions cases. Under the very deferential standard of rational basis review, it is clear the legislature has a plausible and legitimate basis for excluding offenders who did not know their victims from SSOSA as there is generally no need to encourage such victims to report the crimes perpetrated against them. There would be no feelings of guilt associated with reporting a crime which may see a family member sentenced to a long prison sentence, nor would there be familial pressure or other such influences related to the length of a potential sentence that would cause victims with unknown perpetrators to be hesitant to report crimes committed against them. The SSOSA statute's eligibility requirements promote a legitimate state interest and therefore Vance's equal protection claim is without any merit.

As there is no merit to Vance's equal protection claim, nothing would be achieved by remanding the matter to superior court as he requests for the trial court to rule on the equal protection claim. The trial court properly applied the SRA's provisions and found that Vance was not eligible for SSOSA. Accordingly, the trial court properly declined to consider a sentence for which an offender had no right to have considered.[1] The trial court did not err; Vance's equal protection rights were not violated. This claim should be denied.

III. The trial court did not err in sentencing Vance to a standard range sentence

Vance claims the trial court erred in sentencing him to a standard range sentence instead of finding the standard range sentence was clearly excessive and giving him an exceptional sentence downward. The trial court properly exercised its discretion in sentencing Vance, and the trial court's sentence should be affirmed.

Vance's appeal of the length of his standard range sentence is not appealable. RCW 9.94A.585(1) prohibits appeal of a standard range sentence. The statute states, "A sentence within the standard sentence

[1] One important question is whether Vance has any right to a SSOSA sentence. *See State v. Watson*, 120 Wn.App. 521, 532, 86 P.3d 158 (2004). While *eligible* defendants have a right to have the sentencing court fairly consider imposing a SSOSA sentence, *ineligible* defendants do not, and, a probationary sentence like SSOSA is a "privilege[] not a right." *Id.* (citing *State v. Davis*, 43 Wn.App. 832, 835, 720 P.2d 454, *rev. denied*, 106 Wn.2d 1017 (1986)).

range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed." RCW 9.94A.585(1). This prohibition on appealing a standard range sentence has been upheld time and time again by our appellate courts. In *State v. Garcia-Martinez*, 88 Wn.App. 322, 944 P.2d 1104 (1997), Division I of this Court affirmed a trial court's imposition of a standard range sentence despite the defendant's request for an exceptional downward sentence. The Court discussed former RCW 9.94A.210(1) which was recodified as RCW 9.94A.585(1). *Garcia-Martinez*, 88 Wn.App. at 329.

> It is the legislature's prerogative to determine the presumptive sentence ranges for each crime. Those ranges are presumed constitutional.

Id. Additionally, the Court discussed that this statute prohibits an appellate challenge to the amount of time imposed in a standard range sentence, but does allow a defendant to appeal the procedure by which a sentence was imposed. *Id.* (citing *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) and *State v. Mail*, 121 Wn.2d 707, 713, 854 P.2d 1042 (1993)). Thus if a trial court imposed a standard range sentence because of a defendant's race, gender or religion, a defendant could permissibly appeal the constitutionality for the basis of the imposition of the sentence. *Id.* at 329-30. So when a defendant asks for a sentence below the standard range and the trial court imposes a standard range sentence instead, appellate

review is "limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *Id.* at 330. If the trial court were to make sweeping statements such that no person possessing depictions could ever warrant an exceptional sentence downward, or if the trial court denies or refuses to consider the requested exceptional sentence due to the defendant's race, gender or religion, then that would constitute an impermissible basis for declining to impose an exceptional sentence below the standard range. *Id.*

Garcia-Martinez had asked the trial court to impose an exceptional sentence downward, arguing there was a basis to enter a mitigated sentence based on the facts of his case, similar to Vance's current argument. *Garcia-Martinez*, 88 Wn.App. at 330-31. The Court of Appeals noted that the trial court considered Garcia-Martinez's request for an exceptional sentence downward, but found that the nature of the defendant's involvement in the criminal activity and the amount of drugs was typical and therefore did not warrant a lesser sentence. *Id.* at 330-31. This Court found that was "an appropriate exercise of sentencing discretion." *Id.* at 331. Where a trial court has "considered the facts and has concluded that there is no basis for an exceptional sentence," the court

"has exercised its discretion, and the defendant may not appeal that ruling." *Id.* at 330.

Our Supreme Court has affirmed the validity of the ban on appeals of standard range sentences. In *State v. Friederich-Tibbets*, 123 Wn.2d 250, 866 P.2d 1257 (1994), the Supreme Court affirmed the trial court's imposition of a standard range sentence based on the prohibition against appealing a standard range sentence in former RCW 9.94A.210(1) (now codified as RCW 9.94A.585(1)). *Friederich-Tibbets*, 123 Wn.2d at 251-52. In *Friederich-Tibbets*, the trial court noted the existence of several potentially mitigating factors, like that the defendant cooperated, appeared genuinely remorseful, had matured and made substantial and significant changes to his life and lifestyle, that he had been crime-free for two years prior to sentencing and had a steady job and had successfully completed treatment. *Id.* Additionally, the trial court indicated it believed both the public and the defendant would benefit from a work release sentence as opposed to a standard range sentence. *Id.* at 252. However, despite those findings, the trial court found that there were no substantial and compelling mitigating factors sufficient to justify an exceptional sentence below the standard range. *Id.* The Supreme Court affirmed the trial court in a short opinion indicating that the statute barred an appellate challenge

to the trial court's refusal to impose a sentence below the standard range. *Id.*

Most recently, this appellate ban was affirmed last month in an unpublished decision from Division III of this Court. In *State v. Pineda*, 2018 WL 3949588 (August 16, 2018),[2] the defendant alleged on appeal that the trial court erred as a matter of law and thus abused its discretion by finding him ineligible for a FOSA sentence. *Pineda*, slip op. at 2. The Court noted RCW 9.94A.585(1)'s prohibition against appealing a standard range sentence, and our Supreme Court precedent indicating that all that can be challenged is a trial court's failure to follow a mandatory procedure at sentencing. *Id.* (citing *Friedrich-Tibbets*, 123 Wn.2d at 252, and *Mail*, 121 Wn.2d at 712). In reviewing the sentencing hearing, the Court found the trial court properly exercised its sentencing discretion and did not categorically refuse an alternative sentence. *Id.* Thus the Court did not need to review the defendant's appellate claim. *Id.*

The trial court at Vance's sentencing considered the facts and concluded there was no legal or factual basis for an exceptional sentence. It therefore exercised its discretion and the defendant may not appeal this ruling. *State v. McGill*, 112 Wn.App. 95, 100, 47 P.3d 173 (2002) (citing

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[2] GR 14.1 allows for citation to unpublished opinions of the Court of Appeals issued on or after March 1, 2013. Such opinions are not binding authority and may be accorded as much persuasive value as this Court sees fit.

Garcia-Martinez, 88 Wn.App. at 330). Specifically regarding Vance's arguments and request for an exceptional sentence below the standard range, the trial court stated,

> I heard the arguments. Read all the materials on the – before the last hearing. The additional materials that have come in. I went back and I frankly have struggled with this sentencing probably more than almost any sentencing I've had to do since I've been sen – doing sentencing.
>
> . . .
>
> I want to make it clear on the record I think *Graham* gives me the ability to consider this. And I have. But I think when I take a look at – when the legislative sent a loud, clear message – when they changed the unit of prosecution.
>
> . . .
>
> I think when it comes down to this that clearly excessive is where I get hung up on. We're within the standard range. This is different than a *Graham* case that has all the stacking – and took out – what I would do – be doing is just – pretty much in every case that comes before me – saying they're clearly excessive. The legislature had it wrong. I need to reduce it.
>
> I'm not prepared to go there....

RP 209-10. The trial court's discussion and comments on sentencing show the trial court considered Vance's arguments for a mitigated sentence and therefore exercised its discretion and did not refuse to exercise its discretion or fail to recognize its ability to exercise its discretion. When the trial court indicated that if it were to find a standard range sentence

was clearly excessive in Vance's case, then it would be doing that in every case that came before it, it is clear the trial court found the facts involved in Vance's case, and any potential mitigating circumstances, were typical and nothing unusual or warranting of special treatment.

The trial court recognized its discretion and appropriately considered the defendant's arguments, the materials he presented, and applied those to whether the standard range sentence would result in a sentence that was clearly excessive. The trial court found no special reason why Vance's case merited a sentence below the standard range based on the legal authority presented by both Vance and the State. Pursuant to RCW 9.94A.585(1) and case law interpreting and applying that statute, Vance is precluded from appealing the standard range sentence imposed here as the trial court recognized it had discretion and exercised it, thereby providing Vance with the sentencing procedure to which he was entitled. The trial court's sentence should be affirmed.

IV. The search warrant was sufficiently particular

Vance argues in his supplemental brief that the search warrant obtained by law enforcement to search his house and seize computers and electronic or digital storage devices was not particular enough to satisfy the Fourth Amendment to the U.S. Constitution and Art. I., sec. 7 of the Washington State Constitution. However, the search warrant in this case

described the places to be searched and the items to be seized with particularity and satisfies the constitutional requirements. Vance's claim that the evidence obtained from the search warrant should be suppressed fails.

This Court reviews whether a search warrant contains a sufficiently particularized description of the items to be searched and seized de novo. *State v. Perrone,* 119 Wn.2d 538, 549, 834 P.2d 611 (1992). The Fourth Amendment to the U.S. Constitution requires that search warrants particularly describe the place to be searched and the persons or things to be seized. "Particularity is the requirement that the warrant must clearly state what is sought." *U.S. v. Towne*, 997 F.2d 537, 544 (9th Cir. 1993) (quoting *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 856-57 (9th Cir. 1991)). The purpose of this requirement is to prevent general searches and the seizure of property not covered by a warrant due to an officer's mistaken belief the property falls within the issuing magistrate's authorization. *Perrone*, 119 Wn.2d at 545 (citations omitted). Particularity is also required to prevent the issuance of warrants based on loose, vague or doubtful facts. *Id.* Essentially, particularity in search warrants prevents officers from rummaging through an individual's belongings with no real articulated purpose and narrows an officer's discretion in executing the search warrant. *Id.* at 546. A search

warrant's description of the place to be searched and property to be seized is sufficient if "it is as specific as the circumstances and the nature of the activity under investigation permits." *Id.* at 547.

However, the degree of specificity required in a search warrant will vary depending on the circumstances of the case and the types of items involved. *Id.* at 546. For example, in instances where the search implicates items protected by the First Amendment, a greater degree of particularity is required. *Id.* at 547.

Vance claims the search warrant at issue in his case lacks the particularity required to satisfy the U.S. and Washington constitutions. He claims the search warrant gave the officers executing it "unbridled discretion to seize devices and search those devices." Supp. Opening Brief of Appellant, pp. 4-5. To support his claim Vance relies on *State v. McKee*, 3 Wn.App.2d 11, 413 P.3d 1049 (2018). In *McKee*, police applied for and obtained a search warrant to search the defendant's cell phone based on probable cause that there were images and/or videos of the defendant engaging in sexual conduct with minors on the phone, including sexual exploitation of a minor and dealing in depictions of a minor engaged in sexually explicit conduct. *McKee*, 3 Wn.App.2d at 17-18. The search warrant allowed the police to search the defendant's cell phone to include

> ...images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/[I]nternet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence of the above listed crimes.

Id. at 19. The search warrant further authorized law enforcement to make a complete copy of the phone's contents, otherwise known as a "physical dump." *Id.* In reviewing this case, the Court analyzed whether the warrant violated the particularity requirement of the Fourth Amendment to the U.S. Constitution by authorizing unlimited search of broad categories of data stored on the defendant's cell phone. *Id.* at 25. The Court noted that the search warrant cited to the crimes under investigation, but did "not use the language in the statutes to describe the data sought from the cell phone." *Id.* at 26. And while "'use of a generic term or a general description is not per se a violation of the particularity requirement'" if a more particular or precise description of the items is not available at the time officers seek the warrant, a warrant will often be found to be overbroad or lacking in particularity if the description of the items to be searched and seized *could* have been more described with more particularity. *Id.* at 27 (quoting *Perrone*, 119 Wn.2d at 547).

The *McKee* Court considered "'"whether the warrant sets out objective standards by which executing officers can differentiate items

subject to seizure from those which are not."'" *McKee*, 3 Wn.App.2d at 28 (quoting *U.S. v. Mann*, 389 F.3d 869, 878 (9th Cir. 2004) (quoting *U.S. v. Spilotro*, 800 F.2d 959, 963 (1986))). Based on this standard, the Court found that the search warrant obtained in McKee's case was "not carefully tailored to the justification to search and was not limited to data for which there was probable cause." *Id.* at 29. The search warrant allowed police to search and seize data and information from the defendant's cell phone whether it was connected to the crimes for which there was probable cause or not. *Id.* By allowing police to search *any and all* images, videos, documents, etc., the warrant was not narrow enough to constrict the officers' search to only items that related to the crimes under investigation, and allowed a general search of his phone "without regard to whether the data is connected to the crime." *Id.* The search warrant in *McKee* was essentially limitless with regards to the defendant's cell phone; there was "no limit on the topics of information for which the police could search" and there was no temporal limitation either. *Id.* (quoting *State v. Keodara*, 191 Wn.App. 305, 316, 364 P.3d 777 (2015)). Because there was no objective standard or guidance for the police in executing the warrant it violated the particularity requirement of the Fourth Amendment. *Id.*

In coming to its holding, the *McKee* Court relied on the Supreme Court's holding in *State v. Besola*, 184 Wn.2d 605, 359 P.3d 799 (2015).

There, the Supreme Court considered whether a search warrant to investigate the crime of "possession of child pornography," which allowed search for

> 1. Any and all video tapes, CDs, DVDs, or other visual and or audio recordings;
> 2. Any and all printed pornographic materials;
> 3. Any photographs, but particularly of minors;
> 4. Any and all computer hard drives or laptop computers and any memory storage devices;
> 5. Any and all documents demonstrating purchase, sale or transfer of pornographic material

was sufficiently particular. *Besola*, 184 Wn.2d at 608. The materials sought by the police in *Besola* were materials protected by the First Amendment and therefore required a heightened degree of particularity. *Id.* at 611 (citing *Perrone*, 119 Wn.2d at 548). The Court analyzed the term "child pornography" and reaffirmed its prior finding from *Perrone* that it is too general of a term, it's not defined by statute, and more particular descriptions could be used. *Id.* at 612-13. The Court noted that the warrant allowed for seizure of items that were legal to possess, such as adult pornography or photographs of children not engaged in sexually explicit conduct. *Id.* at 613. The Court held that the description of the items in the search warrant in *Besola* "could easily have been mad more particular by adding the precise statutory language—'depictions of a

minor engaged in sexually explicit conduct,'" *Id.* (referring to RCW 9.68A.050). The warrant therefore lacked sufficient particularity. *Id.*

In addition, the *Besola* Court considered whether reference at the beginning of the search warrant to the depictions of a minor statute as the crime under investigation was sufficient to circumscribe the list of items to be seized, thus making it sufficiently particular. *Id.* at 614. However, the search warrant only listed the citation of the depictions statute and did not use the actual language of the statute, and the citation was not used in the description of the materials sought by the search warrant. *Id.* Therefore, reference to the statute was not sufficient to render the warrant sufficiently particular when the language of the statute was not used and the reference to the statute did not describe the materials sought. *Id.* at 614-15.

As the Court noted in *Besola*, the determination of whether a warrant is sufficiently particular often depends on the specific language in the search warrant. *Id.* at 616. The search warrant obtained in this case, unlike the warrants in *Besola, supra*, *Perrone, supra*, and *McKee, supra* did describe the items to be searched and seized with sufficient particularity. The search warrant authorized in Vance's case indicated that there was

> ...probable cause for the issuance of a Search Warrant to search for evidence of the crime(s) of: RCW 9.68A.050

> Dealing in depictions of a minor engaged in sexually explicit conduct and RCW 9.68A.070 Possession of depictions of a minor engaged in sexually explicit conduct....

CP 3. The search warrant then allowed the search of:

a. Any computer or electronic equipment or digital data storage devices that are capable of being used to commit or further the crimes outlined above, or to create, access, or store the types of evidence, contraband, fruits, or instrumentalities of such crimes;
b. Any computer or electronic equipment or digital data storage devices used to facilitate the transmission, creation, display, encoding, or storage of data, including word processing equipment, modems, docking stations, monitors, printers, plotters, encryption devices, and optical scanners that are capable of being used to commit or further the crimes outlined above, or to create, access, process, or store the types of evidence, contraband, fruits, or instrumentalities of such crimes.
c. Any magnetic, electronic, or optical storage device capable of storing data, such as floppy disks, hard disks, tapes, CD-ROMs, CD-Rs, CD-RWs, DVDs, optical disks, printer or memory buffers, smart cards, PC cards, memory calculators, electronic dialers, electronic notebooks, personal digital assistants, wireless devices, and cell phones capable of being used to commit or further the crimes outline above, or to create, access, or store the types of evidence, contraband, fruits, or instrumentalities of such crimes;
d. Any documentation, operating logs, and reference manuals regarding the operation of the computer equipment, storage devices, or software;
e. Any applications, utility programs, compilers, interpreters, and other software used to facilitate direct or indirect communication with the computer hardware, storage devices, or data to be searched;
f. Any physical keys, encryption devices, dongles, or similar physical items that are necessary to gain access

to the computer equipment, storage devices, or data; and

g. Any passwords, password files, test keys, encryption codes, or other information necessary to access the computer equipment, storage devices, or data.

h. All records, documents, programs, applications or materials created, modified, or stored in any form, including in digital form, on any computer or digital device, that show the actual user(s) of the computers or digital devices including the web browser's history; temporary Internet files; cookies, bookmarked, or favorite web pages; email addresses used from the computer; MAC IDs and/or IP addresses used by the computer; email, instant messages, and other electronic communications; address books; contact lists; records of social networking and online service usage; and software that would allow others to control the digital device such as viruses, Trojan horses, and other forms of malicious software;

i. Once seized, any and/or all seized items are authorized for transfer to the Vancouver Washington Police Department/Clark County Sheriff's Office Digital Evidence Cybercrime Unit (DECU) at 2800 Stapleton Road, Vancouver, Washington, or to any qualified law enforcement digital evidence processing lab, for the examination, analysis, and recovery of data from any seized items to include: graphic/image files in common formats such as JPG, GFI, PNG, or in any other data format in which they might be stored, pictures, movies files, emails, spreadsheets, databases, word processing documents, Internet history, Internet web pages, newsgroup information, passwords, encrypted files, documents, software programs, or any other data files, whether in allocated or unallocated space on the media, whether fully or partially intact or deleted, that are related to the production, creation, collection, trade, sale, distribution, or retention of files depicting minors engaged in sexually explicit acts/child pornography.

CP 4-6. Unlike *Besola, supra*, and *Perrone*, *supra*, the warrant in Vance's case did not allow for seizure of any and all images of pornography, or any and all images of children, but rather limited every category of item to be searched and seized to only types of items that could store, create, access, depictions of minors engaged in sexually explicit conduct as specifically referenced and referred to in the above-listed crimes in the search warrant. And unlike *Besola*, and *Perrone*, the search warrant did not list the crime under investigation as one relating to "child pornography," a term our Supreme Court has found lacks sufficient particularity, but rather this search warrant referred to the actual crimes as those involving "depictions of minors engaged in sexually explicit conduct." CP 3-6. And the only types of images or other digital evidence allowed to be searched for and seized were those "of files depicting minors engaged in sexually explicit acts/child pornography." CP 6. The warrant here was sufficiently particular.

The search warrant authorized in Vance's case is similar to the one authorized in *State v. Friedrich*, ___ P.3d ___, 2018 WL 4023300 (Div. 3, August 23, 2018). In *Friedrich*, the search warrant "consistently qualified the 'records, documents, and visual depictions' to be searched for and seized as ones containing, or pertaining or relating to, 'visual depictions of minors engaged in sexually explicit conduct, as defined in RCW

9.68A.011 and Title 18, United States Code, Section 2256.'" *Friedrich*, slip op. at 7. The search warrant in *Friedrich* used the vague term "child pornography" only once, and the Court found that based on the references to "visual depictions of minors engaged in sexually explicit conduct," and references to the statute, the warrant was sufficiently particular and that the defendant's attack was "hypertechnical." *Id.* A reviewing Court must construe the language of a warrant in a "commonsense, practical manner, rather than in a hypertechnical sense." *Perrone*, 119 Wn.2d at 549. As with the defendant in *Friedrich*, Vance's claim here is a hypertechnical attack on the search warrant, comparing it to the all-encompassing warrants authorized in *Perrone, supra*, and *Besola, supra*, wherein the term "depictions of minors engaged in sexually explicit conduct" was never used and the items to be searched and seized were not limited to items that would show violations of the depictions statutes. Just like in *Friedrich*, the search warrant here referenced "child pornography" only once, and here it was immediately preceded by the specific and particular language of the depictions statute including the term "sexually explicit conduct." CP 6.

Division I of this Court has also found language similar to that used in the search warrant in Vance's case sufficiently particular. In *State*

v. Martinez, 2 Wn.App.2d 55, 408 P.3d 721 (2018), the Court found that a warrant that allowed search for

> [a]ny photographs, pictures, albums of photographs, books, newspapers, magazines, and other writings on the subject of sexual activities involving children, pictures and/or drawings depicting children under the age of eighteen years who may be victims of the aforementioned offenses, and photographs and/or pictures depicting minors under the age of eighteen years engaged in sexually explicit conduct as defined in RCW 9.68A.011(3)

was sufficiently particular. *Martinez*, 2 Wn.App.2d at 66. The Court noted that the language of the warrant did not use the overbroad term "child pornography" and instead uses the language "sexually explicit conduct." *Id.* This, the Court found, "provides law enforcement with an objective standard to determine what should be seized." *Id.* The search warrant in Vance's case similarly referenced "sexually explicit conduct" and therefore provided law enforcement with an objective standard to determine what should be seized.

The search warrant authorized and upheld by the trial court in Vance's case is far from the overbroad warrants from *Perrone, supra* and *Besola, supra*. As in *Friedrich, supra,* and *Martinez, supra*, all the evidence allowed to be obtained is constrained to that which contains or relates to or shows depictions of minors engaged in sexually explicit conduct. CP 3-6. In addition, the search warrant did not allow for a search

or seizure of anything and everything contained within a media storage device or computer like the warrant in *McKee, supra* did, nor did it authorize a "physical dump" like the warrant in *McKee, supra*. All the items to be searched and seized were specified as those evidencing the crimes under investigation, possession and dealing of depictions of minors engaged in sexually explicit conduct, and to items that contained such depictions. *McKee, supra* is not comparable to the search warrant here.

Thus as in *Friedrich*, *supra,* and *Martinez, supra,* the search warrant in Vance was sufficiently particular. The purposes of the particularity requirement were satisfied in this search warrant. There was little discretion for the officers of what they were allowed or not allowed to search or seize, and there were specific limitations placed on the warrant so that was not a general warrant which allowed unfettered rifling through an individual's belongings looking for anything and everything. The warrant here complied with our Supreme Court's holding in *Perrone, supra* and with the dictates of *Besola, supra*, and *McKee, supra*, and most importantly, with the requirements of the Fourth Amendment to the U.S. constitution and Article I, sec. 7 of the Washington constitution. Accordingly, Vance's claim fails and the trial court's denial of Vance's motion to suppress should be affirmed.

CONCLUSION

Vance's claim the trial court erred in suppressing his motion to suppress should be denied as the "Silver Platter Doctrine" applies in this case and permitted admission of the evidence obtained by the FBI into evidence at Vance's state criminal trial. The trial court also properly denied to suppress the evidence obtained from the search warrant as the warrant was sufficiently particular. Additionally, the trial court properly denied Vance's request for a SSOSA sentence and an exceptional sentence below the standard range. Vance's convictions and sentence should be affirmed.

DATED this 12th day of September, 2018.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____ 39710 for
RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

September 12, 2018 - 2:19 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50664-5
Appellate Court Case Title:	State of Washington, Respondent v. Darin Vance, Appellant
Superior Court Case Number:	11-1-00704-9

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