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No. 50951-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

MIN SIK KIM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY
The Honorable John Hickman

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. *Mr. Kim's Issues Are Properly Considered on Appeal*

The State does not dispute the fact that the trial judge erred when he refused to consider the video simply because there was a jury in another case that was deliberating at the time of Mr. Kim's sentencing hearing. The State does not dispute that it was improper for the deputy prosecutor to offer her own opinions as to what the video recording revealed without there being an evidentiary hearing. Nor does the State disagree that the trial judge orally gave a legally insufficient reason for not imposing as low of an exceptional sentence as requested. Finally, the State does not dispute that Mr. Kim was on electronic home detention ("EHD") prior to sentencing and the trial judge would have given him credit for time served on home detention but for the existence of changes to the statute in 2015.

Instead, the State seeks to keep Mr. Kim, the victim of violent crime, separated from his family and locked behind barbed wire and concrete walls for 100 months, simply because of technicalities. The State's arguments are without merit and Mr. Kim should not be denied access to justice.

a. **Once a Judge Makes a Final Ruling, There is No Further Requirement to Take Exception**

Although the State complains that Mr. Kim’s attorney did not object to the judge’s rulings, there is no requirement for an attorney to except to a judge’s ruling *after* the ruling is made. *See* CR 46 (“Formal exceptions to rulings or orders of the court are unnecessary. . .”).¹ Parties must object to the admission of evidence proffered by another party, ER 103(a)(1), but there is no requirement that one must argue with a judge who has already made a final ruling excluding evidence. ER 103(a)(2) simply requires that the substance of the evidence “be made known” or “was apparent from the context.”

Generally, once a judge makes a final ruling, no further exceptions are required. *See State v. Powell*, 126 Wn.2d 244, 256-57, 893 P.2d 615 (1995). In *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005) – relied on by the State, BOR at 4 n.5 – our Supreme Court recognized as much. In *Grayson*, the defendant sought a drug offender sentencing alternative (“DOSA”) as part of his sentence for delivery of cocaine. The judge denied the motion. Rather than stating the reason was anything particular to the defendant and his

¹ *See* CrR 8.6 (“CR 46 shall govern exceptions to rulings and orders in criminal cases.”).

criminal history, the judge ruled that the main reason for denying a DOSA was the lack of state funding for the DOSA program. When the *prosecutor* asked the judge if there were other reasons for not imposing a DOSA, the judge stated, “I’m not going to give a DOSA, so that’s it.” *Id.* at 336-37. Although there was no objection by the defendant, and no request for an evidentiary hearing on the issue of whether there truly was no funding available for DOSAs, Mr. Grayson raised the issue on appeal.

The Supreme Court recognized that the judge’s decision to grant or not grant a DOSA sentence was usually not reviewable on appeal, but then held: “[A]n offender may always challenge the procedure by which a sentence was imposed.” *Grayson*, 154 Wn.2d at 338 (emphasis added).² In *Grayson*, the issue was whether the judge’s decision was based on evidence outside the record. Had the defendant objected, the Court held that he would have been entitled to a hearing if the judge’s decision was based on “adjudicative facts.” The basis for such a hearing was not just the Sentencing Reform Act of 1981 (“SRA”), which the State currently argues is the only basis for procedural requirements of sentencing hearings. *See* BOR at 4-6.

² *See also State v. Goldberg*, 123 Wn. App. 848, 852, 99 P.3d 924 (2004) (“[A] defendant may appeal a standard range sentence if he alleges a constitutional violation.”).

Rather, the Court specifically identified the constitutional underpinnings of the statute:

The purpose of RCW 9.94A.530(2) is to prevent ex parte contact with the judge, sua sponte investigation and research by a judge, and sentencing based on speculative facts. *Underlying this statutory procedure is the principle of due process.* The court should consider only adjudicative evidence that the parties in an adversarial context have the opportunity to scrutinize, test, contradict, discredit, and correct.

Grayson, 154 Wn.2d at 340 (internal quotations omitted) (emphasis added).

In *Grayson*, the Court recognized that the defendant did not object to the trial judge's ruling and did not ask for an evidentiary hearing.

Nonetheless, that failure was not necessarily fatal:

Here Grayson failed to request a hearing on the issue of whether or not there was adequate funding for DOSA. We recognize that Grayson did not have much time to formulate an objection. There may be a case where the failure to immediately object might not be fatal to a challenge to the sentence. This may be such a case because when the prosecutor suggested enriching the record with specific reasons that Grayson was not a suitable candidate for a DOSA, the judge vigorously interrupted midsentence with the statement, "I'm not going to give a DOSA, so that's it." RP at 153. Under these circumstances, a party may be relieved of the duty to object.

Id. at 341.

Similarly, here, the trial judge made very specific rulings about the procedures he was going to follow during the sentencing hearing: "I want you

to have the opportunity to call someone to speak on your behalf, if you could just pick one person.” RP (6/23/17) 7. This was a final ruling. The defense could do no more at this point other than risk contempt.

The trial judge also clearly ruled, “Counsel, I’m not going to have time to review this tape” because of the deliberating jury with a question. RP (6/23/17) 13. He invited the attorneys to add their own personal opinions as to what the video would add in addition to the certification of probable cause: “And is there any other point that you want to make that you would say, Judge, if you’re not going to view it, here’s what we’re concerned about as to what showed in the tape?” RP (6/23/17) 14. The prosecutor then did what the judge told her to do, and gave her opinions about the video: “I see a very angry man, and I see a man that’s taking out his anger about what happened to his wife against a shoplifter. . . . But when we looked at these videotapes, it was clear to us that it was not an appropriate use of deadly force under the laws of the state,” to which the judge stated “[t]hat’s well said.” RP (6/23/17) 14-15.

While perhaps Mr. Kim’s attorney could have objected during the prosecutor’s presentation, not only had the judge just invited the prosecutor

to give her opinions about the video, but normally lawyers are not supposed to object during the other side's sentencing argument:

But, objections during legal argument to the court are rare, viewed with disfavor, or not even permitted by many judges. Traditionally, legal arguments flow from opening, to response, and then reply. Traditionally, it is trial counsels' function in legal argument to the court to mention facts in the record, suggest favorable inferences, and then argue how the law applies.

State v. Goldberg, 123 Wn. App. 848, 853, 99 P.3d 924 (2004).

Here, after the prosecutor gave her opinions, Mr. Kim's attorney pursued the "traditional course,"³ and did not interrupt the prosecutor, but then immediately stated that, although he did not disagree with much of what the prosecutor had said, there were disputes over the facts:

I would only add that there were some disputed issues with a witness who said there was a struggle about the firearm as they were fighting on the ground. So I just wanted to add that to the Court since you're not reviewing the video and since it was recited. I think that information should be available to the Court as well.

RP (6/23/17) 16.

Under these circumstances, where counsel states that there are disputed facts, but the judge had already ruled that he was not going consider

³ See *State v. Goldberg*, 123 Wn. App. at 853 (not ineffective for attorney not to object during prosecutor's sentencing argument).

the evidence, no further exception was required to preserve review of the procedures by which the judge in this case sentenced Mr. Kim. The judge made his rulings and they were final.

The cases the State relies on do not change this analysis. In *State v. Mail*, 121 Wn.2d 707, 854 P.2d 1042 (1993), the defendant attempted to appeal a standard range sentence, having not objected to factual statements contained in a presentence investigation report (“PSI”), despite RCW 9.94A.585(1)’s prohibition on such appeals.⁴ In contrast, here, the judge imposed an exceptional sentence and thus an appeal was specifically authorized by RCW 9.94A.585(2) – “A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state.” Moreover, the issue is not the failure to object to the admission of evidence against Mr. Kim, but rather was the trial court’s final ruling refusing to consider evidence offered by both parties.

State v. Garza, 123 Wn.2d 885, 872 P.2d 1087 (1994), similarly does not apply. In that case, there was an exceptionally long sentence imposed, but, as in *Mail*, there had been no objection to the facts contained in the PSI.

⁴ RCW 9.94A.585(1) states: “A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed.”

The issue was not, as here, the failure to except to a final ruling by the judge not to consider evidence at all.

Ultimately, the source of the problem was the conduct of the judge, who was simply too busy to give full consideration to Mr. Kim’s case. Once the judge made final rulings that he was not going to consider evidence, no further objection was required.

b. Because the Issues Involve the Length of an Exceptional Sentence, this Court Has the Power to Review the Procedures Used to Set the Sentence, Even if Raised for the First Time on Appeal

Mr. Kim was the beneficiary of an exceptionally low sentence, but the sentence was not as low as it should have been.⁵ In this regard, one could argue that the sentence was “clearly excessive” under RCW 9.94A.585(4) and that the judge should have imposed a lesser sentence in light of the evidence that should have been considered.⁶

⁵ The State’s argument that somehow Mr. Kim “invited” the error because he asked for an exceptionally low sentence makes no sense. BOR at 5. Contrary to *In re Breedlove*, 138 Wn.2d 298, 312-13, 979 P.2d 417 (1999), where the defendant agreed as part of a plea bargain to an exceptionally long sentence of 20 years, Mr. Kim never asked for a 100-month sentence – he asked for 24 months. RP (6/23/17) 11. Nor did Mr. Kim ask the judge not to consider proffered evidence. There is no “invited error” here.

⁶ The video which the State has designated to this Court actually is mitigating – it shows how Mr. Mason was not just a “shoplifter” who secretly concealed items and tried to walk out the door undetected when he was shot, but rather violently entered the store and jumped over the counter, and then struggled with Mr. Kim after he was apprehended.

Certainly, there is a value in insuring regularity and consistency as to the length of exceptional sentences:

The SRA was meant to bring proportionality and uniformity to what had been a highly discretionary sentencing scheme. . . . Its purpose was to “[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history” and that such punishment be “commensurate with the punishment imposed on others committing similar offenses.” RCW 9.94A.010(1), (3).

State v. Hayes, 182 Wn.2d 556, 561-62, 342 P.3d 1144 (2015). Moreover, the Court construes the exceptional sentence provisions of the SRA with the aim to “funnel judicial discretion and to establish consistency and uniformity in sentencing.” *Id.* at 566.

Given this premium on sentencing conformity, our Supreme Court has allowed for many sentencing issues to be raised for the first time on appeal. *See, e.g., State v. Mendoza*, 165 Wn.2d 913, 919-20, 205 P.3d 113 (2009) (prior convictions for sentencing range calculation); *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008) (community custody conditions of sentence); *State v. Ford*, 137 Wn.2d 472, 475-78, 973 P.2d 452 (1999) (classification of out of state convictions for offender score calculation).⁷

⁷ Both *Mendoza* and *Ford* were superseded by statute on other grounds. *See State v. Jones*, 182 Wn.2d 1, 6-11, 338 P.3d 278 (2014).

The issues in this case are no different and involve the procedures by which the judge decided the length of an exceptional sentence. Where the record is not disputed that the judge refused to consider proffered evidence due solely to time constraints and where the judge invited the attorneys to comment about their opinions as to what they saw on the excluded evidence, the issues are properly raised on appeal even if counsel did not argue with the judge's ruling below.

In *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014), the Court reaffirmed prior rulings that some unpreserved sentencing errors “may be raised for the first time on appeal because sentencing can implicate fundamental principles of due process if the sentence is based on information that is false, lacks a minimum indicia of reliability, or is unsupported in the record.” *Id.* at 6. Here, Mr. Kim specifically raised in his opening brief the constitutional dimensions of a trial court's refusal to consider evidence, AOB at 13-14, and bases his current claims, not just on a violation of the SRA, but also on due process, compulsory process and cruel (and unusual) punishment. U.S. Const. amends. VI, VIII & XIV; Const. art. I, §§ 3, 14 & 22. Thus, even

without exception to the judge’s final rulings, Mr. Kim can raise these issues on appeal under RAP 2.5(a)(3).⁸

c. **The Written Findings Do Not Conflict with the Judge’s Oral Ruling**

The State concedes, as it must, that the trial judge misunderstood the nature of the case and orally explained his decision not to impose 24 months on the incorrect assumption that Mr. Kim had intentionally killed Mr. Mason: “I don’t believe 24 months, Counsel, in all fairness, would reflect a just sentence for the deliberate taking of a life.” RP (6/23/17) 19. Mr. Kim actually pled guilty to unintentionally causing Mr. Mason’s death while trying to stop a crime at his own store. CP 30.

Despite agreeing that the sentencing judge erred, the State seeks to avoid review by claiming that the trial judge’s misunderstanding of the charge for which he was imposing sentence was not incorporated into the written findings and then indirectly blames Mr. Kim’s trial counsel for having

⁸ RAP 2.5(a) also allows a party to raise a claim of error not raised below by that party, but which was raised by another party “on the same side of the case.” Because “[d]efendants are among the people the prosecutor represents,” *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011), this rule could easily be used to allow for review where the prosecutor seeks admission of evidence and the defendant does not object, but the judge simply does not have the time to review it. *See* RAP 1.2(a) & (c) (rules to be liberally interpreted and can be waived or altered).

prepared the written findings. BOR at 11-13. The State's arguments should be rejected.

To begin with, the fact that a party prepares written findings of fact and conclusions of law to memorialize the judge's rulings does not waive a claim of error. *See Gamboa v. Clark*, 180 Wn. App. 256, 266, 321 P.3d 1236 (2014), *aff'd*, 183 Wn.2d 38, 348 P.3d 1214 (2015). Thus, Mr. Kim cannot be said to have waived or invited any error because his attorney submitted written findings and conclusions that reflected what the court did at the sentencing hearing.

Moreover, the findings and conclusions that were submitted in support of the 100-month exceptional sentence do not conflict with the oral ruling. While the findings reflect the trial court's reasons for the decision to depart downward, the only mention of the duration is as follows:

8. The court imposed an exceptional sentence downward of 100 months

...

5. The court imposes an exceptional sentence downward of 100 months.

CP 75-76.

It is correct that “[a] court’s oral opinion is not a finding of fact.” *State v. Hescok*, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). Yet, a reviewing court can look to a trial court’s oral ruling to interpret its written findings: “An appellate court is permitted to use the trial court’s oral decision to interpret findings of fact and conclusions of law if there is no inconsistency.” *State v. Moon*, 48 Wn. App. 647, 653, 739 P.2d 1157 (1987).⁹

Here, since there are no written findings or conclusions explaining the duration of the exceptional sentence, it is entirely appropriate for a reviewing court to look at the sole reason explicitly stated by the judge on the record as to why he was not going to sentence Mr. Kim below 100 months – a reason that the State concedes is improper. Under these circumstances, the State’s objection to consideration of a clear judicial error should be rejected.

⁹ *Accord: Goodman v. Darden, Doman & Stafford Assocs.*, 100 Wn.2d 476, 481, 670 P.2d 648 (1983) (“The trial court did not make a written finding that the parties intended to look solely to the corporation for performance. Thus we may look to the oral decision to clarify the theory on which the trial court decided the case.”); *State v. Hinds*, 85 Wn. App. 474, 486, 936 P.2d 1135 (1997) (“A trial court’s findings of fact and conclusions of law must be read as a whole. [Footnote omitted] A reviewing court may resort to the trial court’s oral decision to interpret findings and conclusions if there is no inconsistency.”).

d. **The State Waived Its Objections to Issues Regarding Whether Mr. Kim Was Confined For Over a Year Prior to Sentencing**

The State complains that there is no record regarding the actual conditions of confinement suffered by Mr. Kim prior to sentencing and thus there is an inadequate record for review. BOR at 14-15. However, when the issue arose below, the judge specifically ruled that “it’s my understanding that home electric detention is the same as being in jail.” RP (6/23/17) 20. When the prosecutor objected based upon the new statute, the judge ruled that “[i]f it is allowed by law, I will grant it.” *Id.*

The State failed to raise any questions about the nature of confinement imposed on Mr. Kim pending trial and pending sentencing. Rather, the following exchange occurred:

MS. PROCTOR [prosecutor]: Your Honor, I don’t have the statutory cite with me, but for violent offenses, you cannot get credit for time served on electronic home monitoring.

THE COURT: Okay. Then I can’t give credit for time served, Counsel.

RP (6/23/17) 22.

Thus, there was a ruling, uncontested by the State below, that Mr. Kim’s electronic home detention was “the same as being in jail.” The State

did not object to this ruling, nor did the State cross-appeal. The State's only objection was that there was a new statute (RCW 9.94A.505) that prevented giving someone credit for time served on pre-sentencing electronic home detention. The State's belated objections about the nature of the deprivation of Mr. Kim's liberty, raised for the first time on appeal, should not be considered. *See State v. Garza*, 123 Wn.2d at 890. If the State did not think Mr. Kim was subject to "confinement" prior to trial that met the definitions of "partial confinement" and "home detention," as set out in RCW 9.94A.030(8), (29) & (36), the State should have made that objection in the trial court.

Alternatively, if the Court agrees substantively with Mr. Kim but has questions about the nature of the confinement, then the matter should be remanded for further fact-finding. This is particularly the case in light of the need for a remand for a full sentencing hearing, a hearing at which the judge has undivided attention and can allow for the full development of the record by the parties.

2. *Mr. Kim's Sentencing Rights Were Violated*

The State argues that Mr. Kim's rights at sentencing were not violated. The State concentrates on the fact that former CrR 7.1(a)(1) has

been repealed, and thus disputes the applicability to the current case of *State v. Peterson*, 97 Wn.2d 864, 651 P.2d 211 (1982), *limited on other grounds* by *State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997). BOR at 6-7.

Mr. Kim did not limit his argument in his opening brief simply to a criminal rule. Rather, his argument included citations to the common law right to allocution, AOB at 15, which is tied to the general historic requirement that judges consider evidence from a wide array of sources before exercising discretion in sentencing. AOB at 16. Next, Mr. Kim argued that he had a right to submit evidence in support of his request for an exceptional sentence pursuant to RCW 9.94A.535(1), and that there be an evidentiary hearing pursuant to RCW 9.94A.530(2) if there are disputes as to the evidence (which there were in this case). AOB at 17. Finally, Mr. Kim argued that he had a right under the due process, compulsory process and cruel (and unusual) punishment provisions of the Sixth, Eighth and Fourteenth Amendments and article I, sections 3, 14 and 22, to put on evidence. AOB at 13-14. The State's failure to respond to these substantive arguments should be seen as a concession of error.¹⁰

¹⁰ See *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 862, 292 P.3d 779 (2013) (failure to cite to authority is concession that argument lacks merit); *In re J.J.*, 96 Wn. App. 452, 454 n.1, 980 P.2d 262 (1999) (failure to mention issue in reply is a concession); *United States v. Real Property Known as 22249 Dolorosa Street*, 190 F.3d (continued...)

The State suggests that it was proper for the judge to restrict the admission of “cumulative” evidence by Mr. Kim’s friends and family, and disputes the power of in-person pleas for mercy, stating that a parent’s impassioned plea for their son should not influence a sentencing judge. BOR at 7-9.¹¹ The State’s argument is cruel and uncaring, if not downright silly.

While the State would rather hide away the human costs of mass incarceration, arguing that it is improper for a judge to be influenced by tears, the reality is that a relative’s or friend’s plea for mercy have a place in a discretionary sentencing system. As the late United States District Court Judge Edward Devitt (D. Minn., 1955-1981) once wrote, “[i]f we judges could possess but one attribute, it should be a kind and understanding heart.” E. Devitt, “Ten Commandments for the New Judge,” 47 *ABA Journal* 1175 (1961). There is nothing wrong with criminal sentencing being based partly upon the reaction to a plea for mercy and such a sentencing decision is not a

¹⁰(...continued)
977, 983 (9th Cir. 1999) (failure to defend position on appeal is implicit concession of error).

¹¹ The State also suggests that in the face of a final ruling that Mr. Kim could only put forward one person to give a plea on his behalf, Mr. Kim should have made an “offer of proof.” BOR at 8. This is a frivolous argument. If after being told to only call one person, Mr. Kim’s attorney called three other family members or friends to the podium to address the court, but stated their pleas for mercy were only “offers of proof,” there would certainly be a parallel contempt proceeding along with this appeal.

traditional factual determination, but rather is an emotional one. *See Kansas v. Carr*, 577 U.S. ___, 136 S. Ct. 633, 642-43, 193 L. Ed. 2d 535 (2016) (mercy is not a factual determination and is “largely a judgment call”); WPIC 31.07 (allowing “mercy” to be considered a mitigating factor in a capital sentencing). This is not just the case in the capital context, and an impassioned plea for mercy clearly has a role in conventional sentencing as well. *See State v. Goldberg*, 123 Wn. App. at 853 (“Under difficult facts and faced with the trial judge’s standard range sentencing discretion, defense counsel’s choice of a mercy argument was strategic and tactical, involving an art, not a science.”).

If the shoe was on the other foot, and the defense had objected to emotional pleas by Mr. Mason’s family to impose the maximum sentence, there is no question but that the defendant would lose and the prosecutor would be arguing that it would be improper for the decedent’s mother to have cried in court in front of the judge. To be sure, *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), is a capital case, but its lesson is that one cannot divorce emotion completely from sentencing. *See Payne*, 501 U.S. at 826 (majority) (proper to admit poignant testimony by grandmother about how a baby missed his mother) & 831-832 (O’Connor,

J., concurring) (describing how emotional testimony that young victim cried for his parents did not cross the line); *State v. Gentry*, 125 Wn.2d 570, 620, 888 P.2d 1105 (1995) (testimony about a surviving family’s grief is permissible); *People v. Zamudio*, 43 Cal. 4th 327, 364-68, 75 Cal. Rptr. 3d 289, 181 P.3d 105 (2008) (issue is whether testimony was *unduly* emotional).

Usually, it is the prosecutor who wishes to present highly emotionally charged evidence *to jurors* even, but the law allows for such a presentation. *See, e.g., State v. Gregory*, 158 Wn.2d 759, 849-55, 147 P.3d 1201 (2006), *overruled on other grounds State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014) (upholding emotional testimony in sentencing); *State v. Whitaker*, 133 Wn. App. 199, 227, 135 P.3d 923 (2006) (upholding admission of gruesome photographs at trial).¹² The State’s usual response is to claim that the defense is trying to “sanitize” the crime. Here, it is the State which wants to “sanitize” the facts and avoid consideration of a parent’s emotional plea

¹² *See also Lanham v. Commonwealth*, 171 S.W.3d 14, 32 (Ky. 2005) (fact that jurors saw crying family members when crime scene photos were shown was “not the sort of emotional outburst that would inflame the jury’s passions, and thus it did not rise to the level of error.”).

against the extended incarceration of a contributing member of society who unintentionally killed a violent criminal in his own store.¹³

In many senses, the judge's refusal to consider evidence in this case was tantamount to a "structural error" – an error that infected the entire proceeding, thereby depriving the defendant of "basic protections," without which "no criminal punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (internal citations and quotations omitted). Certainly, a biased tribunal should always result in reversal. *See Bracy v. Gramley*, 520 U.S. 899, 117 S. Ct. 1793, 138 L.Ed.2d 97 (1997) (judge who accepted bribes on either side of defendant's case); *Cartalino v. Washington*, 122 F.3d 8 (7th Cir. 1997) (judge who was bribed by acquitted co-defendant). *See also Gomez v. United States*, 490 U.S. 858, 876, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (decision by an unauthorized tribunal is grounds for automatic reversal).

¹³ As an example of how sanitized the State wants this case to be, one need only look at the State's discussion of the "facts":

Without any lawful excuse, appellant intentionally shot another person, causing the death of that person. CP 11, CP 13-32. This conduct resulted in appellant' conviction for murder in the second degree. CP 60-73.

BOR at 3.

Here, the judge may not have been biased and certainly had jurisdiction, but he failed to exercise his mandated duties to consider evidence at a sentencing hearing – not because of a specific evidentiary objection to the evidence, but because he simply did not have the time to give full consideration to the case before him.¹⁴ Mr. Kim essentially had no judge at all, which was tantamount to structural error. The judgment should be reversed.

3. *Because the Legislature Still Includes Electronic Home Detention in its Definition of “Confinement,” Mr. Kim’s Constitutional Rights Were Violated*

The State wants to deny Mr. Kim credit for served on pre-sentencing confinement, arguing that Laws of 2015, Chapter 287, § 10, does not violate equal protection, due process or double jeopardy. BOR at 18-20. What the State ignores is that while the Legislature adopted a statute that denies certain people credit against their sentences for time served in electronic home detention, the Legislature never amended or changed the definition of “confinement” in RCW 9.94A.030, which includes electronic home detention for all categories of felons (not just those singled out for special treatment in

¹⁴ “This failure to exercise discretion is itself an abuse of discretion subject to reversal.” *State v. O’Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015).

RCW 9.94A.505) in the definition “confinement.” RCW 9.94A.030(8) & (36).

This failure to change the statute is fatal to the State’s argument. Not only does the SRA’s definition of “confinement” that includes EHD take this case out of the category of cases controlled by *Harris v. Charles*, 171 Wn.2d 455, 256 P.3d 328 (2011) – which only addresses misdemeanor cases, not felonies – but the continued legislative decision to define “confinement” to include EHD reveals the punitive nature of EHD in this case. The State may not like the fact that the Legislature considers EHD – for all defendants, whatever crime they are charged with -- to be equivalent to jail time, but until the Legislature amends the statute and changes the definition of “confinement” to exclude EHD, the State’s position must be rejected.¹⁵

Accordingly, Mr. Kim should get credit for the “confinement” the trial judge recognized he served prior to sentencing. Such credit is required under the due process, equal protection and double jeopardy provisions of the Fifth and Fourteenth Amendments and article I, sections 3, 9 and 12.

¹⁵ The Legislature could amend RCW 9.94A.030 to define “confinement” only to include full, not “partial” confinement. The State could then amend RCW 9.94A.505 so that a person gets credit for time served for all “confinement,” but also credit for time served for EHD for only specified categories of individuals. This could conceivably cure the problem.

B. CONCLUSION

For the foregoing reasons, and those set out in the opening brief, the Court should reverse the judgment and remand either for a new sentencing hearing or to give Mr. Kim credit for time he spent in confinement on EHD prior to sentencing.

Dated this 4th day of April 2018.

Respectfully submitted,

s/ Neil M. Fox
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Attorney for Appellant

STATUTORY APPENDIX

CR 46 provides:

EXCEPTIONS UNNECESSARY Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

CrR 8.6 provides:

EXCEPTIONS UNNECESSARY CR 46 shall govern exceptions to rulings and orders in criminal cases.

ER 103 provides in part:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

RAP 1.2 provides in part:

(a) Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b). . . .

. . .

(c) Waiver. The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c).

RAP 2.5 provides in part:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

RCW 9.94A.030 provides in part:

(8) "Confinement" means total or partial confinement.

...
...

(29) "Home detention" is a subset of electronic monitoring and means a program of partial confinement available to offenders wherein the offender is confined in a private residence twenty-four hours a day, unless an absence from the residence is approved, authorized, or otherwise permitted in the order by the court or other supervising agency that ordered home detention, and the offender is subject to electronic monitoring. . . .

...

(36) "Partial confinement" means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention, electronic monitoring, or work crew has been ordered by the court or home detention has been ordered by the department as part of the parenting program, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, electronic monitoring, and a combination of work crew, electronic monitoring, and home detention.

WPIC 31.07 provides in part:

A mitigating circumstance is a fact about either the offense or about the defendant which in fairness or in mercy may be considered as extenuating or reducing the degree of moral culpability, or which justifies a sentence of less than death, although it does not justify or excuse the offense.

You may consider as mitigating circumstances any of the following factors that you find to be supported by the evidence . . .

. . .

[The appropriateness of the exercise of mercy is itself a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.]

CERTIFICATE OF SERVICE

I, Neil Fox, certify and declare as follows:

On April 4, 2018, I served a copy of the REPLY BRIEF OF APPELLANT on counsel for the Respondent by filing a copy through the Portal and thus a copy will be delivered electronically.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of April 2018, at Seattle, Washington.

s/ Neil M. Fox

WSBA No. 15277

LAW OFFICE OF NEIL FOX PLLC

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