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Court of Appeals
Division II
State of Washington
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No. 51000-6-II

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

State of Washington,

Respondent,

v.

Kennith C. Bowens,

Appellant

OPENING BRIEF OF KENNITH C. BOWENS

Appeal from Pierce County Superior Court, 17-1-009890

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Introduction

The trial court determined it could not grant an exceptional sentence based on the victim's willing participation. That was error.

Kennith C. Bowens was prosecuted for violating a pretrial no-contact order. The contact that Bowens was convicted of was consensual. It had to be consensual because, to have the contact, Bowens' wife had to go through an elaborate process of applying to receive video calls, scheduling times for video calls, and then accepting the calls. To facilitate contact, Bowens' wife frequently changed her number and used a fake identity so that the Clark County jail could not block the calls. Bowens tried to hide his identity by using other inmates' accounts, and Bowens' wife registered to receive calls from those accounts. That there were five changes here also shows willing participation. Bowens' wife did not just set up a single appointment, but made several appointments, through many numbers and hidden identities. Plainly, there was a factual basis for Bowens' request at sentencing for a downward departure from the Guidelines based on willing participation by the victim.

The trial court, however, ruled that it could not consider Bowens' wife's willing participation as a factor justifying an exceptional sentence. That is contrary to both the statute and the case law. This case should be remanded for resentencing with instructions that the trial court consider whether the willing participant factor sufficiently supports a downward departure.

Assignments of Error

1. The trial court failed to properly analyze Bowens' request for an exceptional downward departure because it did not believe it could enter an exceptional sentence based on the willing participant factor.
2. Trial counsel was ineffective for failing to cite the proper authority that gives the the court power to impose an exceptional sentence based on the willing participant doctrine.

Issues Pertaining to Assignments of Error

1. In order to have video calls with Bowens, Bowens' wife repeatedly changed her number and arranged to accept calls from various other prisoner's accounts. She was a willing a participant. Did the trial court err when it ruled that it could not consider a downward departure based on the factor of willing participation?
2. Trial counsel failed to cite the proper authority to inform the trial court that it could impose an exceptional sentence based on the willing participant doctrine. Was that failure ineffective assistance of counsel?
3. Was the trial court's ruling —that it did not have discretion to depart downward from the standard sentencing range based on the willing participation of the victim—an abuse of discretion warranting remand for resentencing?

Statement of the Case

A jury found Kenneth Bowens guilty of five counts count of violating a domestic violence court order (RCW 26.50.110(5)) and one count of tampering with a witness, domestic violence (RCW 10.99.020/9A. 72.120(1)(b)). CP 139. On September 15, 2017, he was sentenced to 60 months imprisonment on the charges for violating a no-contact order, and a concurrent 51-month sentence on the tampering charge. CP 142.

Video calls from the jail

The underlying charges were based on four video calls and one traditional phone call, all made from the jail. Video from the video calls was presented at trial.

Video calls require that the person outside the jail be registered with the jail video call service. RP 125, 141. Four of the counts were based on video calls. For these, “the video chats – the person on the outside or inside can schedule it – but they both have to be present.” RP 197. The parties have to “schedule it in advance so each party knows what time . . . to be there.” RP 197. The person on the outside of the jail has to accept an invitation and call in at the agreed time. RP 198. If the person on the outside does not want to accept, they can not show up or even cancel the appointment. RP 201.

When deputies would block her number, Bowens' wife would get another number so that she could receive calls from Bowens. RP 125; 195. She acquired "multiple phone numbers through texting apps." RP 196; 202. She even used a fake name, Jim Bass, to hide her identity from the jail. RP 194. Bowens sometimes used other people's accounts as well, so his wife had to arrange to accept calls from those other accounts. RP 63; 67.

While the audio of the videos is not completely transcribed, the dialog that is transcribed is consensual, with discussion of, among other things, Bowens' wife's pregnancy with Bowens' child. RP 160-162. The state emphasized to the jury that Bowens' told his wife "I love you baby." RP 163. The state also noted that Bowens asked for a kiss and told his wife she was beautiful. RP 164.

On another call, Bowens asks what his wife is going to tell the prosecutor or victim advocate, and his wife replies "Well, I love you." RP 172.

Bowens was in jail for violating an earlier no contact order, although that case was dismissed and the no contact order dissolved. RP 392. If that previous order had not been entered against the wishes of Bowens' wife, Bowens would not have been jail and any contact with his wife would have been permissible. Perhaps recognizing the lack of violence and acceding to Bowens' wife's request for continued contact, the trial court here refused the state's request for a post-conviction no-contact order between Bowens and his wife. RP 395-96. The trial court also rejected the state's request for

anger management classes and participation in the Domestic Violence Perpetrator Program. RP 394.

Sentencing

At sentencing, the alleged victim, Bowens' wife, testified against placement of a no-contact order, stating that "I am in no way afraid of Kenneth and I have no need for a No Contact Order. However I am afraid of the impact of not being able to have contact for – contact for his guidance, support and emotional well-being as a partner and father. Without it we all suffer beginning with our unborn daughter." RP 386. She also told the Court that she "never wanted [a] No Contact Order to begin with." RP 387. The court decided not to enter a no-contact order. RP 395-96.

Bowens' counsel requested an exceptional sentence. RP 387. Counsel based the request on two factors from RCW 9.94A.535(1): (a) "To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident;" and (g) that the "operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RP 387-88. This appeal focuses on the willing participation question.

The trial court said it needed to employ a "two-part test" to determine whether an exceptional sentence could apply. RP 391. The trial court did not consider whether Bowen's wife was a "willing participant,"

but stated that “Most of the – most of the exceptional downwards – the case law on it – most of the exceptional downwards was where the victim was an aggressor in the case.” RP 392.

Defense counsel then reiterated that Bowens was arguing on the basis of his wife being a “willing participant.” RP 392. Counsel emphasized that “in order to set up these calls both parties have to arrange for it and – and then it has to be approved.” RP 392.

The trial court noted that it could “not base an exceptional sentence on factors necessarily considered by the legislature in establishing a standard range.” RP 393. The court then concluded that “We clearly don’t have that here. I—we can’t even get past the first one.” RP 393. The trial court thus found that it could not consider the willing participant factor in evaluating whether to impose an exceptional sentence.

Argument

A. Standard of review

“Whether a particular factor can justify an exceptional sentence is a question of law,” which the court of appeals reviews “de novo.” *State v. O’Dell*, 183 Wn.2d 680, 688, 358 P.3d 359 (2015).

B. Whether a person was a “willing participant” is a factor that can justify an exceptional sentence

A trial court abuses its discretion when it categorically refuses to exercise its discretion to impose an exceptional sentence below the standard range “ ‘under any circumstances.’” *State v. Grayson*, 154 Wn .2d

333, 342, 111 P.3d 1183 (2005) (quoting *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997)). “While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *Grayson*, 154 Wn.2d at 342. Thus, the “failure to consider an exceptional sentence is reversible error.” *Id.*

One of the possible factors that a trial court may use to justify an exceptional downward sentence is if to “a significant degree, the victim was [a] . . . willing participant.” RCW 9.94A.535(1)(a). The trial court may exercise its discretion to consider this mitigating factor in imposing a sentence for violation of a no-contact order. *State v. Bunker*, 144 Wn.App. 407, 421, 183 P.3d 1086 (2008) (rejecting the State’s argument that because consent is not a defense to the crime of violating a no-contact order the trial court is prohibited from considering the victim’s willing participation in the crime when sentencing the defendant); *aff’d on other grounds*, 169 Wn.2d 571 (2010).

C. The trial court erred when it decided it could not consider the “willing participant” factor in determining whether to impose an exceptional sentence

The trial court erred as a matter of law when it found that whether Bowens’ wife was a willing participant was “necessarily considered by the legislature in establishing a standard range.” RP 393. Instead, whether the victim was a willing participant is a factor the court considers when

determining whether the grant an exceptional sentence. RCW 9.9A.535(1) (a).

Although Bowens raised the “willing participant” factor, the trial court found that “we clearly don’t have” a factor that could justify an exceptional sentence, because willing participation was “necessarily considered by the legislature in establishing the standard range.” RP 393.

As this Court recently wrote in an unpublished decision, “there is a reasonable probability the sentencing court would have imposed an exceptional downward sentence had it known [victim’s] willing participation constituted a mitigating factor explicitly contemplated by the Legislature in RCW 9.94A.535,” and thus “resentencing is required.” *State v. Hecker*, 192 Wn. App. 1036 (2016), review denied, 186 Wn.2d 1004, 380 P.3d 444 (2016) (unpublished).

The trial court here stated that willing participation was “necessarily considered by the legislature in establishing a standard range [sentence].” RP 393. The court further demonstrated its confusion on the law when it indicated that “willing participation” was not important in appellate cases: “most of the exceptional downwards – the case law on it – most of the exceptional downwards was where the victim was an aggressor in the case. And that’s kind of what they key on.” RP 392. In fact, failing to consider willing participation as factor justifying an exception sentence is reversible error. *Bunker*, 144 Wn. App. at 421-22; *Hecker*, 192 Wn. App. 1036 (unpublished). The trial court erred when it conflated the willing participation and aggressor factors.

This case can be distinguished from a different, recent, unpublished, case from this Court. In *Ames*, the trial court initially held, as the court did here, that the willing participant factor could not justify an exceptional sentence. *State v. Ames*, 190 Wn. App. 1044 (2015) (unpublished). But in *Ames*, defense counsel was able to cite *Bunker* and correctly inform the trial court of its sentencing power; fully aware of its power, the court denied the request for an exceptional sentence. *Id.* at *3.

The state may argue that the trial court did consider willing participation as a mitigating factor, because the trial court stated that “her answering the phone is really all we’ve got as mitigating factors.” RP 394. But the court made that statement after saying that “clearly” there were no factors present that had not already been considered by the legislature. RP 393-94. The trial court announced the wrong legal standard and wrongly determined that it could not consider willing participation. At that point, it had erred and it never corrected the error. The court’s further statement was made under the mistaken impression that the willing participant factor was not an independent factor to consider when determining whether to impose an exceptional sentence. The court’s statement about Bowens’ wife answering the phone applies the wrong legal standard to the facts, and thus can be distinguished from *Ames*, where the court was properly informed of the correct legal standard before engaging in its analysis.

The court did not consider whether Bowens’ wife’s acts—setting up appointments to talk, using a fake identity and multiple numbers to get around restrictions on contact, registering to receive calls from other

inmates' accounts to help Bowens evade detection—demonstrated that she was a willing participant, and further failed to consider whether her willing participation was a sufficient basis to grant an exceptional sentence. That was error that requires a new sentencing.

D. Counsel was ineffective and the record permits review on direct appeal

As in *State v. Hecker*, 192 Wn. App. 1036 (2016), review denied, 186 Wn.2d 1004, 380 P.3d 444 (2016) (unpublished), the failure of trial counsel here to properly inform the court of its power to consider willing participation was ineffective assistance of counsel. If trial counsel had cited *Bunker*, as counsel did in *Ames*, there would be no need for remand.

To show ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient, and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). This Court can review a claim of ineffective assistance of counsel on direct appeal when the record is sufficient to evaluate the claim. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

As this court wrote in the unpublished opinion in *Hecking*, “there is a reasonable probability the sentencing court would have imposed an exceptional downward sentence had it known [victim's] willing participation constituted a mitigating factor explicitly contemplated by the Legislature in RCW 9.94A.535,” and thus “resentencing is required.”

E. No costs of appeal should be assessed

The trial court found Bowens indigent. CP 157-58. He is presumed indigent throughout the appeal. RAP 14.2; RAP 15.2. He requests that the Court not assess costs against him.

Conclusion

The sentence should be vacated and the case remanded for a new sentencing.

Respectfully submitted on March 1, 2018

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Certificate of Service

On March 1, 2018, I served all parties by electronic service, and served a paper copy by U.S. mail to

Kennith C. Bowens #307603
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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated March 1, 2018 in Seattle, Washington. s/

Harry Williams IV, WSBA #41020

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Conclusion

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Respectfully submitted on February 28, 2018

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Appendix A

1 appellate review to go down? And I - I apologize - unless I'm
2 missing something - but I'm just not - other than just personal to
3 him - he's the one that made the calls from the jail. It's not like
4 she was of - of - an aggressor in -in that respect.

5 TL: Well - no - a willing participant I think - accepted -

6 Judge: Most of the - most of the exceptional downwards - the
7 case law on it - most of the exceptional downwards was where the
8 victim was an aggressor in the case. And that's kind of what they
9 key on.

10 TL: - right. And that's one of the factors - and what I'm
11 focusing on is willing participant and - and my - my point in that
12 Your Honor is that in order to set up these calls both parties have
13 to arrange for it and - and then it has to be approved.

14 Judge: And these are - they start out at District Court No
15 Contact Orders I think.

16 TL: Well I'm talking about - no. I'm talking about the ones
17 in the jail. Well it's based on the case that was dismissed.

18 Judge: Right.

19 TL: Yeah. That - that - that's -

20 Judge: Right. That's right.

21 TL: - were dismissed - yeah.

22 Judge: That reminds me - yeah.

23 TL: Yeah. That - that - that's how it originated and that -
24 that was -

25 Judge: Didn't he have a District Court No Contact Order as well?

1 KB: Restraining Order.

2 Judge: Restraining Order.

3 KB: That's all and it got dismissed.

4 JR: There was a - she had petitioned the court -

5 Judge: Yeah.

6 JR: - for a Civil Protection Order and he vio - allegedly
7 violated the one on the Residential Burglary which was the case
8 that was ultimately dismissed.

9 TL: Right.

10 JR: It would have been a temporary order at that time. And I
11 just - if I remember correctly my recollection is that she just
12 didn't go forward any longer with seeking to have it permanent - it
13 was a temporary.

14 TL: There was an issue with service Your Honor - that could
15 lend -

16 JR: That's correct.

17 **COURT'S COMMENTS ON REQUEST FOR EXCEPTIONAL SENTENCE**

18 Judge: Okay. So here's the law, okay? Here's the law as I
19 understand it. In - in doing this analysis of an exceptional down
20 or up I've got to consider two factors. The first factor:

21 *"The trial court may not base an exceptional*
22 *sentence on factors necessarily considered by the*
23 *legislature in establishing a standard range."*

24 We clearly don't have that here. I - we can't even get
25 past the first one. The second one is the mitigating factors of

1 her answering the phone is really all we've got as mitigating
2 factors - she answers the phone so:

3 *"The mitigating factor must be sufficiently*
4 *substantial and compelling to distinguish this crime*
5 *from others in the same category."*

6 And I can't get there either. So under the law the
7 appellate review would send it right back for re-sentencing. So
8 your request for an exceptional sentence downwards is denied.

9 **SENTENCE**

10 Judge: Sixty months.

11 JR: Is that going to be sixty months on each Count Your
12 Honor?

13 Judge: Yes.

14 JR: And regarding his ability to pay just so I can fill that
15 out Your Honor?

16 Judge: None.

17 JR: And -

18 Judge: Tampering fifty-one months.

19 JR: - and then regarding the State's request for anger
20 evaluation and Domestic Violence Perpetrator Program do you want me
21 to check those boxes? Is the court ordering them?

22 Judge: I - I don't think so. No.

23 JR: Okay. I'll remove those Your Honor.

24 Judge: The - the bigger question for me now - I mean the
25 exceptional sentence issue was - was a huge question. But probably

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