

FILED
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

REPLY BRIEF OF KENNITH C. BOWENS

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

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Introduction

The trial court ruled that it could not consider whether to give Bowens a downward departure based on Bowens' wife's willing participation. That was error.

While not conceding the merits, the State posits that the trial court's ruling was "not a paragon of clarity" and that the ambiguous ruling should be held against Bowens. The State is wrong: the trial court's ruling was both clear and erroneous. The trial court meant what it said when it ruled that "we don't have that here," after Bowens tried to argue that the victim's willing participation could warrant a downward departure.

Even if the State was correct, and the trial court's ruling on whether it could make a downward departure was ambiguous, that would still require remand for a new sentencing. When this Court cannot determine from the record the sentencing court's reasoning, the case must be remanded for a new sentencing. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575, 579 (1997)(holding that remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway).

The State makes another argument: Bowens cannot show prejudice because he cannot show a "possibility" that the trial court would have made a downward departure. *State v. McFarland*, 189 Wn.2d 47, 58, 399 P.3d 1106 (2017). But there are indications in the record that the trial court might depart downward, such as the trial court's refusal to enter a no-

contact order. RP 395-96. Regardless, this Court recently rejected the State's position, holding that "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 App. 1036 (2016), review denied, 186 Wn.2d 1004, 380 P.3d 444 (2016) (unpublished).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 case should be remanded for resentencing.

Argument

A. The parties agree on the applicable law and the key section of the transcript, but Bowens is correct that the court failed to consider the willing participation doctrine

The parties have no serious disagreement on the standard of review or the applicable cases. The parties also agree that the key part of the transcript is found at RP 392-94. The State does contest that the willing participant factor must be considered by the sentencing court when properly raised and when there is a factual basis, and the State does seriously not contest that Bowens made a showing on willing participation. State br. at 17-20 (arguing that Bowens properly raised the willing participant factor while arguing that Bowens' counsel was not ineffective).

The case thus boils down to whether the sentencing court meant what it said when it said "we clearly do not have" any factor that was not already contemplated by the legislature in establishing a standard range. RP 393. Bowens has the better argument on that central issue.

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.*

The parties differ as to what the trial court meant when it said that the question of whether Bowens’ wife was a willing participant was “necessarily considered by the legislature in establishing a standard range.” RP 393. Bowens argues that whether the victim was a willing participant is a factor the court considers when determining whether to grant an exceptional sentence. RCW 9.9A.535(1)(a). The State argues that the Court was “not a paragon of clarity” but nonetheless properly considered the factor. State br. at 12.

The critical passage covers just a couple of pages of transcript. Those pages are attached as Appendix A to Bowens’ opening brief.

Bowens argued that “what I’m focusing on is willing participant . . .” RP 392. The trial responded that “It’s not like she was of—of—an aggressor—in that respect.” RP 392. Bowens’ counsel began again to explain that Bowens was asserting the “willing participant” doctrine. RP 392. The trial court responded that “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 is kind of what they key in on.” RP 392. Again, Bowens tried to explain that he was arguing a different factor than aggressor: willing participant. RP 392.

The trial court then explained that it must consider two factors in determining whether to impose an exceptional downward sentence. RP 393.

The court recited the black letter law: “The trial court may not base an exceptional sentence on factors necessarily considered by the legislature in establishing a standard range.” *See, e.g., State v. O’Dell*, 183 Wn.2d 680, 690, 358 P.3d 359 (2015); RP 393.

Next, the trial court stated that “We clearly don’t have that here. I—we can’t even get past the first one.” RP 393. This statement permits only two conclusions, either of which require remand for resentencing. Either the trial court did not distinguish between the “aggressor” and “willing participant” doctrines—and declined to consider a departure because Bowens’ wife was not an aggressor—or it decided that the willing participant doctrine could not apply as a matter of law. Whichever of the two conclusions the trial court came to, the trial court’s ruling was wrong.

The only possible counterargument is that the court’s statements on RP 394 somehow change the analysis. On RP 394, the court said that the alleged victims’ “answering the phone is really we’ve got as mitigating factors—she answers the phone . . .” RP 394. For three reasons, this statement was also error.

First, as argued in the opening brief (pages 9-10), this statement occurred after the sentencing court made an error of law. Having defined the wrong legal standard (willing participant factor was already considered by the legislature), the sentencing court's findings of facts are necessarily infected by that error. Indeed, the court did not use the phrase "willing participant," further underscoring that it was not applying the correct legal standard.

The State concedes that court "does not reference the 'willing participant' doctrine." State br. at 13. Standing alone, of course, that would not be error. But here, where the court did not go through a willing participant analysis and, in fact, stated that it did not have a factor on which it could depart from the guidelines, the failure to name the "willing participant" factor by name reinforces the record that the court did not consider that factor.

Second, the court's finding that "her answering the phone" was the only evidence would not matter if, as the record indicates, the trial believed that only the "aggressor" factor was at issue.

Third, the finding that answering the phone was the only evidence was clearly erroneous, and follows from the failure to apply the correct legal standard. It is, of course, common that a protected party simply answers the phone although the caller is prohibited from making contact, and that is a violation of law. But the record here showed so much more. Bowens' wife:

- Set up appointments to talk;

- Set those appointments up using a fake identity;
- She used multiple numbers to get around restrictions on contact;
- And she registered to receive calls from other inmates' accounts to help Bowens evade detection.

Opening brief at 2-4. She had to work hard and use deception to keep in contact with Bowens.

The court's failure to consider this evidence stems from its incorrect legal analysis: because it failed to understand that the willing participant doctrine could justify a downward departure, it failed to seriously consider the evidence in support of that factor. That was error requiring resentencing.

B. Counsel was ineffective for failing to cite crucial case law

Bowens' ineffective assistance claim is simple: there was on-point, recent authority and counsel failed to cite it. Proper citation would more than likely have prevented the sentencing court's error. 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 case law on willing participation was ineffective assistance of counsel.

C. No costs of appeal should be assessed

The state's brief did not indicate that it would seek costs, and Bowens respectfully renews his request 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 May 14, 2018

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Certificate of Service

On May 14, 2018, I served all parties by electronic service, and served a paper copy by U.S. mail to

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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 May 14, 2018 in Seattle, Washington.

s/Harry Williams IV, WSBA #41020

LAW OFFICE OF HARRY WILLIAMS LLC

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