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Court of Appeals
Division II
State of Washington
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NO. 51444-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DENISE PANGELINAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Kevin D. Hull, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The 96-month sentence is clearly excessive under the Sentencing Reform Act (SRA).

2. Because Ms. Pangelinan is indigent, she is entitled to have the \$200 filing fee stricken from her legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An exceptional sentence is clearly excessive if it is based on untenable grounds. The sentencing court imposed an exceptional sentence of 96 months because the injuries exceeded those of other vehicular assault cases. When Ms. Pangelinan's exceptional sentence is not proportionate to the seriousness of the offense and her criminal history, and is based on untenable grounds, should it be reversed?

2. An indigent appellant does not have to pay a \$200 filing fee imposed by the trial court. Ms. Pangelinan is indigent and the trial court imposed the \$200 filing fee. Should the fee be stricken?

C. STATEMENT OF THE CASE

See Statement of the Case in Appellant's Brief, joined case *State v. Denise Pangelinan*, No. 50010-8-II.

D. ARGUMENT

Issue 1: The length of Ms. Pangelinan's exceptional sentence is not proportionate to the purposes of the Sentencing Reform Act.

Ms. Pangelinan's exceptional sentence is not proportionate to her criminal history and the seriousness of the offense. The length of the sentence fails to serve the purpose of the Sentencing Reform Act (SRA). Her sentence should be reversed and remanded for imposition of a proportionate sentence.

A sentencing court has discretion to determine the length of an exceptional sentence. *State v. Bluehorse*, 159 Wn. App. 410, 433-34, 248 P.3d 537 (2011). However, a trial court abuses its discretion if the sentence imposed is "clearly excessive." *Id*; RCW 9.94A.585(4)(b). A sentence is clearly excessive if it is based on untenable grounds. *Bluehorse*, 159 Wn. App. at 434.

When imposing an exceptional sentence, the court must consider the purpose of the Sentencing Reform Act. RCW 9.94A.535; RCW 9.94A.537(6).

The legislature intended the Sentencing Reform Act to structure a sentencing court's discretion and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
 - (2) Promote respect for the law by providing punishment which is just;
 - (3) Be commensurate with the punishment imposed on others committing similar offenses;
 - (4) Protect the public;
 - (5) Offer the offender an opportunity to improve himself or herself;
 - (6) Make frugal use of the state's and local governments' resources;
- and
- (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

The court's 96-month sentence is 1066% percent higher than the nine-month top end of the standard range and is 400% higher than the agreed upon 24-month exceptional sentence. CP 5, 22; RP 3/25/16 at 54.

Ms. Pangelinan had no criminal history. CP 23. She faced a standard range of 3-9 months on the vehicular assault. CP 23.

The court articulated its intent to punish Ms. Pangelinan far beyond both the standard range and the agreed exceptional sentence upward because of the injuries sustained by Mr. O'Connor. RP 3/25/16 at 52-54. Despite Mr. O'Connor's lasting injuries, the length of the court's

exceptional sentence in light of the injuries must still be proportionate to the seriousness of the offense and the offender's criminal history. RCW 9.94A.010(1); CP 23.

By contrast, an offender with a like vehicular assault conviction and a maximum offender score of 9 or more points would have a standard sentence range of 64-84 months. RCW 46.61.522(1)(b); RCW 9.94A.525. Washington State Adult Sentencing Guidelines (2015).

The court noted it was not sentencing Ms. Pangelinan to the maximum sentence of 120 months in part because she had no criminal history. RP 3/25/16 at 54. But the court's 96-month sentence is in no way proportionate to the SRA. The court's sentence was only 12 months greater than that for an offender with a maxed out offender score of 9 or more points, and was 87 months greater than the high end of Ms. Pangelinan's standard range sentence of 9 months on an offender score of zero. Washington State Adult Sentencing Guidelines (2015).

The sentence also does not further the SRA's goal of protecting the public because there is no evidence of Ms. Pangelinan's risk of recidivism. RCW 9.94A.010(7). The lengthy prison term does not offer Ms. Pangelinan an opportunity to improve herself. RCW 9.94A.010(5). It does not frugally use state resources. RCW 9.94A.010(6). Finally, although the sentence

incapacitates Ms. Pangelinan while she is confined, it does nothing to reduce the risk she will reoffend once she returns to the community. RCW 9.94A.010(7).

Because the sentence length rests on the court's desire to severely punish Ms. Pangelinan, it does not promote the purposes of the SRA. The sentence does not promote proportionality, or promote respect for the law by providing punishment which is just. RCW 9.94A.010(1), (2). Singling out and making an example of one offender cannot result in punishment commensurate with the sentences imposed on others committing similar offenses. RCW 9.94A.010(3).

The sentence here is clearly excessive because it was imposed on untenable grounds. The sentence must be vacated and the case remanded for a new sentencing hearing. *Bluehorse*, 159 Wn. App. at 433-34.

In imposing the sentence, the court focused on Mr. O'Connor's injuries and its desire to punish Ms. Pangelinan. The court noted the charging document indicated an assault. "This was an assault." RP 3/25/16 at 52. In reality, the charging document reflected Ms. Pangelinan drove under the influence of liquor or any drug and caused substantial bodily harm to another. CP 14. The court also noted, "The damage you caused far exceeds a two-year prison recommendation." RP 3/25/16 at 53-54. The

court wanted to inflict severe punishment on Ms. Pangelinan because Mr. O'Connor's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. RCW 9.94A.535(y). CP 108.

The length of an exceptional sentence must reflect the extent of the defendant's criminal history and the circumstances of the offense, not on a desire to inflict pain on the defendant for injuring another. The court seems to want to send a message to other potential offenders.

In imposing an exceptional sentence to "ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense" the court must also factor in Ms. Pangelinan's criminal history. Ms. Pangilinan had no criminal history. CP 23.

The court's sentence does not take into account Ms. Pangelinan's criminal history and does not promote the purpose of the SRA. The sentence does not ensure proportionality or promote respect for the law by providing punishment which is just. RCW 9.94A.010(1), (2).

No tenable grounds support the trial court's imposition of a 96-month exceptional sentence on Ms. Pangelinan's guilty plea to a single count of vehicular assault. The sentence should be reversed and her case remanded for resentencing. *Bluehorse*, 159 Wn. App. at 433-34.

Issue 2: The Washington Supreme Court's recent decision in *State v. Ramirez* requires this court to vacate the order requiring Ms. Pangelinan to pay a \$200 criminal filing fee.

At Ms. Pangelinan's March 25, 2016 sentencing hearing, the court found Ms. Pangelinan indigent and unable to pay discretionary legal financial obligations. The court struck the discretionary \$1105 attorney fee from the financial obligations on Ms. Pangelinan's judgment and sentence. RP 3/25/16 at 55; CP 27.

The court required Ms. Pangelinan to pay the \$200 filing fee. CP 27.

The trial court also found Ms. Pangelinan indigent on appeal. CP 115-16. As noted, Ms. Pangelinan is serving a 96-month sentence in the Department of Corrections. CP 22. She is also obligated to serve 18 months of community custody after her incarceration. CP 24.

In September 2018, the Washington Supreme Court decided *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). *Ramirez* held the amendments to the Legal Financial Obligations (LFO) statutes passed as House Bill (HB) 1783 apply prospectively to all cases pending on direct appeal. *Id.* at 747.

Under those amendments, a trial court may no longer impose discretionary LFOs upon indigent persons. RCW 10.01.160(3). Likewise, a

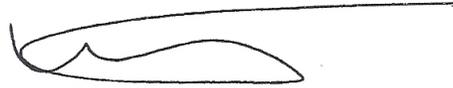
sentencing court may no longer order an indigent person to pay the \$200 criminal filing fee. Laws of 2018, ch. 269, § 17; *Id.* at 748.

Because Ms. Pangelinan is indigent, the sentencing court is prohibited from ordering her to pay the \$200 criminal filing fee under HB 1783. Ms. Pangelinan asks the court to order the \$200 filing fee stricken from her judgment and sentence.

E. CONCLUSION

Ms. Pangelinan's case should be remanded for resentencing and to strike the \$200 filing fee.

Respectfully submitted March 27, 2019.



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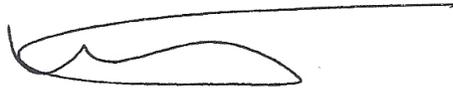
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I filed the Brief of Appellant to (1) Kitsap County Prosecutor's Office, at kcpa@co.kitsap.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Denise Pangelinan/DOC#389861 Mission Creek Corrections Center for Women, 3420 NE Sand Hill Road Belfair, WA 98528.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed March 27, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Denise Pangelinan, Appellant

LAW OFFICE OF LISA E TABBUT

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