

**No. 50010-8-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

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**BRIEF OF APPELLANT**

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### **A. ASSIGNMENTS OF ERROR**

1. Defense counsel's failure to object to "facts" to impose an exceptional sentence upward which were not stipulated to in Ms. Pangelinan's guilty plea, but instead found by the court at a sentencing hearing, denied Ms. Pangelinan effective assistance of counsel.

2. The trial court abused its discretion at sentencing by using "facts," neither stipulated to nor found beyond a reasonable doubt, to impose an exceptional sentence upward against Ms. Pangelinan.

3. The sentencing court acted without authority in ordering forfeiture of all seized property referenced in the discovery as a condition of Ms. Pangelinan's sentence.

### **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether defense counsel was ineffective when he failed to object to the sentencing court's reliance on "facts" presented at sentencing, but not stipulated to by Ms. Pangelinan in her guilty plea, when the "facts" were used to impose an exceptional sentence 72 months longer than the agreed sentence requested by the state and Ms. Pangelinan?

2. Whether the sentencing court abused its discretion when it relied on "facts," neither stipulated to by Ms. Pangelinan nor found beyond

a reasonable doubt, to impose an exceptional sentence upward of 96 months from a standard range of only 3-9 months?

3. Whether the sentencing court acted without authority when it ordered all seized property referenced in the discovery be forfeited as a condition of Ms. Pangelinan's sentence?

### **C. STATEMENT OF THE CASE**

The state charged Denise Pangelinan with a single count of vehicular assault alleging she was under the influence of an intoxicant and caused substantial bodily harm to another person. CP 1-2. The state also claimed in a special allegation, an aggravating factor that the accident victim's injuries substantially exceeded the level of bodily harm to satisfy the elements of vehicular assault. CP 1-2.

Ms. Pangelinan agreed to plead guilty as charged and join in a recommendation with the state to recommend a 24 month exceptional sentence. CP 5-10. Ms. Pangelinan's standard range was 3-9 months. CP 12. She had no criminal history. CP 12.

In her statement of defendant on a plea of guilty, Ms. Pangelinan provided a factual statement to support the plea:

On or about 11/19/15 in Kitsap County I did operate a vehicle while under the influence of an intoxicating drug and caused substantial bodily harm to another. Additionally, the victim's

injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.

CP 18-19.

The plea statement included the following boilerplate language at section 6(h)(iv):

The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

CP 14.

No written or oral stipulated facts accompanied Ms. Pangelinan's guilty plea. RP 3/7/17 at 4-5. The court accepted the plea and set the matter over so the injured person, Clancy O'Connor, and his family could be present at the sentencing hearing. RP 3/7/16 at 5-6.

At the start of the sentencing hearing, the state reiterated it was standing by its 24 month exceptional sentence recommendation. RP 3/25/16 at 4. The court noted it had read the February 4 Victim Impact Statement saying Mr. O'Connor's leg had been amputated and he lost his eyesight because of the accident. RP 3/25/16 at 3; Supplemental Designation of Clerk's Papers.

The court heard from one of Mr. O'Connor's nurses, from family and friends, and from Mr. O'Connor himself. RP 3/25/16 at 5-50. They spoke about the current and anticipated future impact of Mr. O'Connor's injuries on him and his family. RP 3/25/16 at 5-50. Ms. Pangelinan did not object to the sentencing hearing or to anything that was said. RP 3/25/16 at 3-57.

The court held under the circumstances it could not follow the 24 month agreed sentencing recommendation and instead imposed an exceptional sentence of 96 months. CP 21-24; RP 3/25/16 at 51-54. The court said the ripple effect of what Ms. Pangelinan caused was devastating. RP 3/25/16 at 52. Mr. O'Connor would not have the pleasure of observing soccer games, little league games, plays, prom, or weddings. There would be no more going to work and having coffee in the shop with his buddies. The court anticipated depression and significant financial impacts. RP 3/25/16 at 53.

The court made additional statements in imposing its sentence.

It's unusual – well, it's not – judges typically follow recommendations of the lawyers when it comes to sentencing. It's somewhat rare and unique that a judge would not do that. I can't, in good conscience, impose a 24-month sentence, Ms. Pangelinan. The damage that you have caused far outweighs a two-year prison recommendation.

And that – you know, I am not being critical of the recommendation in and of itself. It's just not in the cards. It doesn't reflect accurately what has occurred.

RP 53-54.

So Ms. Pangelinan, I am not going to impose the maximum sentence because you don't have any criminal history. That is about the only thing that jumps out at me as to why I shouldn't impose 120 months or ten years, which is the maximum sentence, but I am going well above what is being recommended. It's obvious that what has been recommended isn't just, and I can't, in good conscience, follow the recommendation.

I am imposing 96 months. And it's not to be harsh, Ms. Pangelinan. It's because the aftermath of what you have done clearly demonstrates that what is being presented to me in terms of an agreement is insufficient.

RP 54-55.

As a condition of her sentence, the court ordered all property referenced in the discovery forfeited to law enforcement. CP 27-28.

On November 14, 2016, new counsel for Ms. Pangelinan filed a Motion to Withdraw Guilty Plea, and later a Declaration in Support of Defendant's Motion. CP 32-54. The motion argued that the exceptional sentence imposed was beyond the stipulation of the parties, the trial court erred in not entering written findings and conclusions to support the exceptional sentence, trial counsel had not effectively represented Ms.

Pangelinan in resolving her charge, and the 96 month sentence was grossly disproportionate to the standard range. CP 36-47.

The court, on its own initiative, responded to the defense motion by entering written findings of fact and conclusions of law to support the exceptional sentence.<sup>1</sup> CP 104-08.

The Findings of Fact include:

Findings of Fact 10:

[As] as result of the Defendant driving while impaired the victim lost a leg (it was amputated during his stay at the hospital). The victim also lost his eyesight and is now permanently blind.

Conclusion of Law 3:

RCW 9.94A.535(y) states an exceptional sentence may be appropriate when “the victim’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.” The Defendant agreed that the facts and circumstances of her offense justified a departure from the sentencing guidelines and constitute a basis to impose a sentence above the standard range.

Conclusion of Law 4:

“[T]he effects [of an offense] on the victim may be used to justify an exceptional sentence if they are significantly more serious than the usual case.” *State v. Tunnell*, 51 Wn. App. 74, 279.

Conclusion of Law No. 5:

As a result of Defendant’s crimes, the victim suffered both the amputation of his leg, and is now permanently blind. The victim’s injuries far exceed substantial bodily harm. An exceptional sentence of 96 months is an appropriate reflection of the damage caused by the Defendant’s crime.

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<sup>1</sup> CrR 7.2(d)

CP 106-08.

The court heard and denied Ms. Pangelinan's post-trial motions. RP 2/10/17 at 2-40. Ms. Pangelinan appeals all portions of her March 25, 2016, sentencing and the court's February 10, 2017, denial of her motions.

CP 109.

#### **D. ARGUMENT**

**Issue 1. Defense counsel's failure to object to the sentencing court's use of "facts" not stipulated to by Ms. Pangelinan at her plea to impose a sentence six years longer than the agreed exceptional sentence denied Ms. Pangelinan effective assistance of counsel.**

**a. The constitutional guarantee of effective assistance of counsel applies to sentencing.**

Ineffective assistance of counsel happens at sentencing when counsel does an act that falls below constitutional standards of a reasonable attorney and the defendant suffers harm because of the failure. Both elements of ineffective assistance of counsel occurred . Defense counsel failed to object to the sentencing court's improper reliance on unstipulated facts and Ms. Pangelinan received six more years in prison than she and the state agreed to. Ms. Pangelinan is entitled to a resentencing hearing.

The Sixth Amendment to the United States Constitution and article I, section § 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *See* U.S. Const. Amend. VI; Wash. Const. art. I, § 22. This Court reviews ineffective assistance of counsel claims de novo. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). Effective assistance of counsel is required at sentencing. *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013).

Washington has adopted *Strickland v. Washington's* two-pronged test for evaluating whether a defendant had constitutionally sufficient representation. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). Under *Strickland*, the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim. *Strickland*, 466 U.S. at 687; *Estes*, 188 Wn.2d 2d at 457-58.

Washington courts indulge a strong presumption that counsel's representation was reasonable. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Representation is not deficient if counsel's conduct can be characterized as legitimate trial strategy or tactics. *Id.* at 863. Defense counsel's lack of objection to the sentencing court's use of unstipulated

facts in imposing the lengthy exceptional sentence was not a legitimate tactic or strategy.

**b. Defense counsel's failure to object to the use of facts not stipulated to by Ms. Pangelinan was unreasonable and harmful.**

Because of the plea agreement to a 24 month exceptional sentence, Ms. Pangelinan, as was her right, restricted the use of facts for sentencing. RCW 9.94A.537(3). Ms. Pangelinan stipulated only to the statutory language of the aggravating factor pled in the Amended Information: "Additionally, the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." CP 19. RCW 9.94A.535(3)(y). Ms. Pangelinan specifically did not stipulate to Mr. O'Connor's amputation, blindness, or the long term personal impacts of his injuries.

RCW 9.94A.537(3) provides authority for Ms. Pangelinan's scrupulous restriction of facts in her plea.

The factors supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factors must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulated to the aggravating facts.

Because of the fact limitation Ms. Pangelinan built into her guilty plea, the sentencing court's freedom to find facts to support an exceptional sentence was severely restricted. Instead, and without objection, the court relied on information provided by the Victim Impact Statement and statements made at sentencing, none of which were stipulated to by Ms. Pangelinan. The court's oral ruling and its mandatory written findings and conclusions to support the exceptional sentence are rife with "facts" not stipulated to by Ms. Pangelinan but found by the court to support its sentence. CP 5-10; RP 3/25/16 at 51-54. In its oral ruling, the court noted,

The ripple effect that -- -- of what you have caused is devastating. Mr. O'Connor lost a leg. Quite frankly, as serious as this is, that almost seems to be the least of the problems. He is not going to see again. He has grandchildren.

So, you know, as the kids mentioned, soccer games, little league, plays, proms, weddings, he won't have the pleasure of observing those things that we all probably take for granted more than we should, so that is out.

He doesn't get to go to work and visit his buddies at work and have coffee in the shop with his buddies. There is going to be -- you know, I don't think it's avoidable -- some long-lasting depression as a result of this. He is a strong guy. He is not going to let his emotions bring other people down, but there is no way to abide it.

The financial impacts are significant. . . . But you placed this family, in its entirety, of being in a position where, you know, maybe

instead of going to Disneyland next year with the kids, they have to pay a medical bill.

...

[B]ut Mr. O'Connor is going to undoubtedly continue to suffer in more ways than – in more ways than may be obvious – that may be obvious, I should say.

The “facts” relied on by the court but not stipulated to by Ms.

Pangelinan at her plea are highlighted by italics below.

The Findings of Fact included the following:

Findings of Fact 10:

[As] as result of the Defendant driving while impaired *the victim lost a leg (it was amputated during his stay at the hospital). The victim also lost his eyesight and is now permanently blind.*

Finding of Fact 14:

The Court commented on the *severe impact her crime had on the victim and in particular, the fact that the victim was now permanently blind.* The Court imposed an exceptional sentence of 96 months.

Conclusion of Law No. 5:

As a result of Defendant's crimes, *the victim suffered both the amputation of his leg, and is now permanently blind.* The victim's injuries far exceed substantial bodily harm. *An exceptional sentence of 96 months is an appropriate reflection of the damage caused by the Defendant's crime.*

CP 106-08.

The court erred in considering any fact not stipulated to by Ms.

Pangelinan. The court accepted Ms. Pangelinan's factless plea. It did not have to do so. “If the court determines [the plea] is not consistent with

the interests of justice ... the court shall, on the record, inform the defendant and the prosecutor that they are not bound by the agreement and that the defendant may withdraw the defendant's plea of guilty if one has been made and enter a plea of not guilty." RCW 9.94A.431(1). Had the court been concerned about the lack of a factual basis for an exceptional sentence, the court could have rejected the guilty plea. What the court could not do is use facts not stipulated to by Ms. Pangelinan to support an exceptional sentence.

Defense counsel never objected to the sentencing court's reliance on facts not stipulated to by Ms. Pangelinan. RP 3/25/16 at 51-54. The duty to provide effective assistance includes the duty to research statutes. *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015). Failing to conduct research falls below an objective standard of reasonableness where the matter is at the heart of the case. *Kyllo*, 166 Wn.2d at 868. In *Crawford*, the court found deficient performance when defense counsel knew her client had an extensive criminal record but failed to conduct additional research to ascertain whether her client was at risk of a third strike. *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006). And in *State v. Aho*, the court found deficient performance where reasonably adequate research would have

prevented the possibility of conviction based on acts predating the relevant statute's effective date. *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

Here, a review of the statute, RCW 9.94A.537(3), by defense counsel would have revealed the trial court could only rely on facts stipulated to by Ms. Pangelinan at her plea to impose an exceptional sentence. Defense counsel should have objected to the sentencing court's "facts" to protect Ms. Pangelinan from that court believing it had a factual basis to impose a 96 month exceptional sentence.

The failure of defense counsel, and the resulting 96 month exceptional sentence consequent satisfies the second prong of deficient performance, i.e., that counsel's poor performance was prejudicial. *Estes*, 188 Wn. 2d at 463.

Only by going beyond the stipulation after hearing from Mr. O'Connor, a nurse, family, and friends, at sentencing, did the court decide the agreed 24 month sentence was not adequate. The court's written findings and conclusions include many facts not stipulated to by Ms. Pangelinan. Defense counsel's failure to object to the court's oral ruling and reliance on facts not stipulated to was error and denied Ms. Pangelinan her right to effective assistance of counsel.

**c. On remand, Ms. Pangelinan’s sentencing should be heard by a different judge.**

A party may seek reassignment of the sentencing judge for the first time on appeal, which is usually done where the sentencing judge “will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue.” *State v. McEnroe*, 181 Wn.2d 375, 386-87, 333 P.3d 402 (2014). Where review of facts in the record shows the judge's impartiality might reasonably be questioned, the appellate court should remand the matter to another judge. *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). The sentencing court’s outrage over the injuries is evident in his ruling. Ms. Pangelinan’s case should be resentenced by a different judge.

**Issue 2. The trial court abused its discretion in relying on facts not stipulated to impose an exceptional sentence.**

An offender may always challenge the procedure by which a sentence was imposed. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). A discretionary sentencing decision made under the SRA must be reviewed for abuse of discretion or misapplication of law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990). A trial court abuses its discretion if its decision is “manifestly unreasonable,” based on

“untenable grounds,” or made for “untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *State v. Williams*, 176 Wn. App. 138, 141, 307 P.3d 819 (2013).

Here, the trial court misapplied the law because it relied on facts not stipulated to or found by a jury beyond a reasonable doubt. “If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.” RCW 9.94.537(3). As argued in Issue I, Ms. Pangelinan did not stipulate to the facts found by the trial court at sentencing and used to justify the 96 month exceptional sentence. Therefore, the court’s reliance on the “facts” to support the exceptional sentence is in error and requires remand for resentencing.

**Issue 3. The sentencing court acted without authority when it ordered forfeiture of all property mentioned in the discovery.**

The sentencing court acted without statutory authority in ordering forfeiture of all property referenced in the discovery as a condition of Ms. Pangelinan’s sentence. *State v. Roberts*, 185 Wn. App. 94, 96, 339 P.3d 995 (2014). A trial court has no inherent power to order forfeiture of property for a criminal conviction. *State v. Alaway*, 64 Wn. App. 796, 800, 828 P.2d 591 (1992). The authority to order forfeiture of property as part of a judgment and sentence is purely statutory. *Id.* This Court reviews de novo

whether the trial court has statutory authority to impose a sentencing condition. *State v. Armendariz*, 160 Wn.2d 106, 156 P.3d 201 (2007).

Here, there was no statutory authority cited when the trial court ordered forfeiture of “all seized property referenced in the discovery” as it relates to any of Ms. Pangelinan’s property. CP 27-28. There was no discussion on the record regarding forfeiture. RP 3/25/16 at 51-56. Contrary to *Roberts*, and without statutory authority, the court simply ordered: “[x] forfeit all seized property referenced in the discovery to the originating law enforcement agency unless otherwise stated.” CP 27-28.

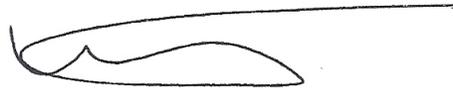
This court must vacate the forfeiture order.

**E. CONCLUSION**

Ms. Pangelinan's exceptional sentence should be reversed because of both ineffective assistance of counsel and the sentencing court's abuse of discretion in adopting unstipulated facts in imposing an exceptional sentence.

At resentencing, the order to forfeit property should also be stricken.

Respectfully submitted September 15, 2017.



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LISA E. TABBUT/WSBA 21344  
Attorney for Denise Pangelinan

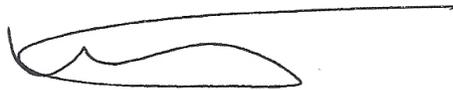
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Kitsap County Prosecutor's Office, at [kcpa@co.kitsap.wa.us](mailto: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 September 15, 2017, 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**

**September 15, 2017 - 1:35 PM**

**Transmittal Information**

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