

FILED
Court of Appeals
Division II
State of Washington
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NO. 51484-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DARRELL BERRIAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello

No. 13-1-03133-9

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court remand for the trial court to clarify whether it was exercising its discretion in imposing a consecutive sentence?

B. STATEMENT OF THE CASE.¹

In this case, Darrell Berrian, hereinafter “defendant” committed the attempted robbery in the first degree and unlawful possession of a firearm in the first degree on July 7, 2013, charged under #13-1-02707-2. CP 176-234; 509-522. Approximately two months later, he committed assault in the first degree on September 5, 2013. That offense was charged under #13-1-03133-9 and is the subject of this appeal.

On February 14, 2014, the defendant was sentenced on the attempted robbery and firearm case. CP 509-522. On September 12, 2014 the defendant was sentenced on the assault in the first degree case at bar. *Id.* In his first direct appeal, this court granted him a resentencing because a prior conviction from Georgia was erroneously counted as one point instead of ½ of a point. CP 489-491.

¹ The petitioner has filed multiple collateral attacks on this cause number. Because they are not germane to the issue before the court in this appeal, the State will not address them further.

On February 16, 2018, he was resentenced on that case following remand. During resentencing, the sentencing court erroneously held, in part:

Okay. Mr. Berrian, I see no good reason to run your sentence concurrent with an entirely separate case. I'm not going to do that. **The presumption is that it's going to be consecutive**, and that's what I'm going to do.

RP 11-12 (emphasis added).

The defendant was then sentenced to 198 months consecutive to his other case, #13-1-02707-2. CP 509-522.

C. ARGUMENT.

1. THIS COURT SHOULD REMAND FOR THE SENTENCING COURT TO EXERCISE ITS DISCRETION IN SENTENCING THE DEFENDANT TO A CONSECUTIVE SENTENCE.

Revised Code of Washington 9.94A.589 governs the imposition of concurrent and consecutive sentences. In this case, the defendant committed all of his crimes in 2013. He was then sentenced first on #13-1-02707-2. RCW 9.94A.589(3) applies to the defendant's case. It states in relevant part:

...[W]henver a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentences which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced

unless the court pronouncing the current sentence expressly orders that they be served consecutively.

In this case, the defendant was being sentenced for an offense that was not committed while he was under another sentence—he committed all of his crimes before sentencing on either one. In 2006, Division III addressed this identical issue in *State v. King*, 135 Wn. App. 662, 145 P.3d 1224 (2006). In *King*, the defendant was arrested for several felonies. *Id.* at 666. On his way to jail, the defendant made a threatening statement to the arresting officer. *Id.* During the trial on those felony charges, the defendant made a separate threat to the same officer and was charged with a separate count of witness intimidation. *Id.* at 666-668. The sentencing court gave the defendant consecutive sentences pursuant to RCW 9.94A.589(2)(a). *Id.* at 675. On review, however, the court held that RCW 9.94A.589(2)(a) did not apply because the defendant was not “under sentence” for his original charges when he committed the new offense. *Id.* The court held that, while the sentencing court certainly had absolute discretion to impose consecutive sentences, there was no presumption that he do so. *Id.* In fact, the court held that per RCW 9.94A.589(3), the sentences are presumptively consecutive. *Id.* The court remanded for the sentencing court to exercise its discretion.

Similar facts are present in the case at bar. In this case, the defendant was not “under sentence” at the time he committed assault in the first degree. As the defense concedes in its opening brief, the sentencing court retains the discretion to impose consecutive sentences. Brief of Appellant, page 5. The sentencing court has the discretion to impose the same sentence previously imposed. The State agrees, however, that it was error for the sentencing court to apply a *presumption* of consecutive sentences. Because the sentencing court was acting under the mistaken impression that the stator presumption was to impose consecutive sentences, this court should remand for the sentencing court to exercise its discretion.

D. CONCLUSION.

This court should remand for the sentencing court to exercise its discretion in imposing the sentence in this case consecutive to #13-1-02707-2.

DATED: July 30, 2018

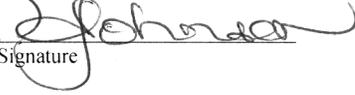
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The undersigned certifies that on this day she delivered by ^{File}~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/30/18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

July 30, 2018 - 10:36 AM

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