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Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

PETER ABARCA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01045-4

BRIEF OF RESPONDENT

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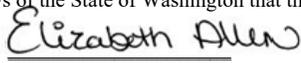
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TABLE OF CONTENTS

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY AND RELEVANT FACTS ...1

III. ARGUMENT6

 A. THE EXCEPTIONAL SENTENCE WAS LEGALLY APPROPRIATE AND WAS PROPERLY SUPPORTED BY THE TRIAL COURT’S FINDINGS AND CONCLUSIONS.6

 B. ABARCA’S ATTORNEY WAS NOT INEFFECTIVE AT SENTENCING BECAUSE HE ARGUED YOUTH AS A MITIGATING FACTOR AND SUCCEEDED IN THAT THE PRONOUNCED SENTENCE IS FORTY MONTHS LESS THAN THE STATE’S RECOMMENDATION.12

IV. CONCLUSION.....15

TABLE OF AUTHORITIES

CASES

<i>State v. Coleman</i> , slip. op. no. 76851-4-I (December 10, 2018)	10
<i>In re Nichols</i> , 151 Wn. App. 262, 211 P.3d 462 (2009).....	13
<i>State v. Breitung</i> , 173 Wn.2d 393, 267 P.3d 1012 (2011).....	12
<i>State v. Coleman</i> , __ Wn. App. __, ¶ 19, __ P.3d __, slip. op. No. 76851-4-I, (December 10, 2018)	10
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003).....	13
<i>State v. Fitch</i> , 78 Wn. App. 546, 897 P.2d 424 (1995).....	8
<i>State v. France</i> , 176 Wn. App. 463, 308 P.3d 812 (2013).....	7
<i>State v. Hrycenko</i> , 85 Wn. App. 543, 933 P.2d 435 (1997).....	9
<i>State v. Souther</i> , 100 Wn. App. 701, 998 P.2d 350 (2000), <i>review denied</i> , 142 Wn.2d 1006.....	8
<i>State v. Stark</i> , 66 Wn. App. 423, 832 P.2d 109 (1992).....	8
<i>State v. White</i> , 80 Wn.App. 406, 907 P.2d 310 (1995).....	12
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	12

STATUTORY AUTHORITIES

RCW 9.94A.010.....	8
RCW 9.94A.535 (4).....	7
RCW 9.94A.535(e)(ii)	9
RCW 9.94A.535.....	7
RCW 9.94A.537 (6).....	7
RCW 9.94A.537(3).....	8

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether sufficient reasons and factual grounds exists to justify and support the imposition of an upward exceptional sentence?

2. Whether counsel was ineffective at the sentencing of a youthful offender when counsel highlighted the offender's youth, present evidence of his immature decision process (through his mother), and convinced the trial court to impose a sentence 40 months lower than the sentence contemplated by the plea agreement?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY AND RELEVANT FACTS

Peter Abarca was charged by information filed in Kitsap County Superior Court with delivery of methamphetamine with a special allegation of major violation of the Uniform Controlled Substance Act (UCSA) and two counts of possession of methamphetamine with intent to manufacture or deliver each count with a special allegation of major violation of UCSA. CP 1-8. Later, a first amended information charge the same three offense but added accomplice liability to each count and changed count III to possession of heroin with intent to manufacture or deliver instead of methamphetamine. CP 28-32.

Abarca pled guilty to the first amended information. CP 53-63 (statement of defendant on plea of guilty). Abarca did not make a factual statement in paragraph 11 of the plea form but he agreed that the trial court could review police reports or statements of probable cause in order to establish a factual basis for the pleas. CP 62. The trial court reviewed those documents at the time of the pleas. RP, 1/8/18, 9. Abarca's pleas included acknowledgement that he was pleading to the "aggravating circumstance" found in each count. CP 62. Further, the plea form advised Abarca that the trial court could impose an exceptional sentence and that if that was done he would have a right to appeal his sentence. CP 57 (paragraph (k)).

Pursuant to his pleas of guilty, Abarca and his attorney executed a plea agreement. CP 47-52. That document advised that the state would recommend a 180 month sentence. CP 48. Abarca agreed to cooperate with law enforcement in further investigation. CP 49.

The plea agreement advised Abarca that any attempt to collaterally attack or appeal the agreed-upon sentence constitutes a breach of the agreement. CP 50-51. A breach allows the state to file new charges or seek sentence anew. CP 51. The plea agreement was later amended to correct the recitation of the offender points and standard ranges as to each count. CP 73. The documents had presumed that two California

convictions were adult felonies and warranted a point each but it developed that those were juvenile offense which scored a half point only and the points and range were accordingly changed. RP, 6/27/18, 5. In all other respects, the two plea agreements are the same. RP, 6/27/18, 6. Abarca had no objection to the changes. RP, 6/27/18, 7.

The trial court did not follow the recommendation. CP 81. Rather than impose 180 months (each count consecutively sentenced at 60 months), the trial court imposed 120 months (each count sentenced at 60 months but counts II and III concurrent with one another). CP 81. Although less time than contemplated by the plea agreement, 120 months is still an upward exceptional sentence. The judgment and sentence advised Abarca that the joint agreements in the plea agreement continue in full force and effect. CP 87.

The trial court entered findings of fact and conclusions of law with regard to the exceptional sentence. CP 122-124. There, the trial court considered the certificate of probable cause in the case and therefrom found facts sufficient to support the pleas of guilty and the aggravating circumstances. CP 123. The trial court concluded that the aggravating circumstances found justified an exceptional sentence. CP 123.

During the plea colloquy, the parties discussed the exceptional sentence recommendation. RP, 1/8/18, 4-5. After that discussion, during

which the state clearly indicated that the recommendation would be for 180 months, the trial court asked Abarca if he understood that fact. RP, 1/8/18, 5. He said "yes." Id.

The sentencing hearing included the presentation of evidence by the state. RP, 6/27/18. Abarca's co-defendant Yenilen Guzman¹ was sentenced at the same time. RP, 6/27/18, 4. A detective testified that Abarca and Guzman had come to the attention of law enforcement when they were investigating another drug dealer. RP, 6/27/18, 9-10. Guzman was identified as this other dealer's girlfriend. RP, 6/27/18, 11. Eventually, Guzman became a primary target of law enforcement. RP, 6/27/18, 15. Police did a controlled buy from Guzman and received 2.06 pounds of methamphetamine. RP 17-18. That pile of drugs was shown to the trial court. RP, 6/27/18, 20.

A second controlled purchase from Guzman netted two more pounds of methamphetamine. RP, 6/27/18, 23. The trial court was also shown this pile of drugs. RP, 6/27/18, 24. Abarca attended this second controlled buy. RP, 26/27/18, 25. A video was shown to the trial court in which Abarca is present and handling the drugs. RP, 6/27/18, 27.

A third purchase was set up as a "buy/bust." RP, 6/27/18, 29. Abarca was not present at this operation. RP, 6/27/18, 30. But Guzman

and the police operative had a phone conversation with Abarca at the scene of the third buy. RP, 6/27/18, 31. Guzman was uncomfortable with the deal and Abarca advised her to drive a short distance away and “ditch” the drugs. RP, 6/27/18, 32. Police stopped the car and a search revealed five pounds of methamphetamine. RP, 6/27/18, 32. Additionally, the search revealed .3 pounds of heroin or approximately 135 grams. 6/27/18 33. The detective opined that a regular heroin user would get ten different uses from a gram. Id.

All of the drugs from the third occasion were shown to the trial court. RP, 6/27/18, 34. The detective opined that in his experience you would never see amounts of drugs that big in the local area. RP, 6/27/18, 35. On training and experience, the detective believed that the 9.7 pounds of methamphetamine would dose out to approximately 4400 individual servings of the methamphetamine and the heroin seized would provide approximately 1350 individual uses of that drug. RP, 6/27/18, 38. Street values were estimated at \$176,000 for the methamphetamine and \$20,000 for the heroin. RP, 6/27/18, 39.

The detective outlined Abarca’s involvement in the drug transactions. Although he was not always present, he was active in phone conversations with the police operative. RP, 6/27/18, 41. Police believe

¹ Ms. Guzman’s appeal is pending under No. 51967-4-II.

that Abarca was helping to provide security for Guzman. *Id.* Abarca was involved in the negotiations over the price of the drugs. RP, 6/27/18, 42.

The trial court found that the case is “extraordinary.” RP, 6/27/18, 117. He believed that the 4400 doses of meth and 1350 doses of heroin had the potential to do damage in the community. *Id.* The trial court found that although Abarca is young he had a complete understanding of what he was doing in these offenses. RP, 6/27/18, 118. The extraordinary nature of the case warranted an extraordinary sentence. RP, 6/27/18, 119. The trial court announced 120 months for both defendants. RP, 6/27/18, 121. The trial court ruled that that amount of time took into consideration “whatever mitigating factors that may exist.” *Id.*

III. ARGUMENT

A. THE EXCEPTIONAL SENTENCE WAS LEGALLY APPROPRIATE AND WAS PROPERLY SUPPORTED BY THE TRIAL COURT’S FINDINGS AND CONCLUSIONS.

Abarca argues that the trial court’s reasons for imposition of an exceptional sentence were inadequate and that the sentence imposed is too long. This claim is without merit because the trial court had authority to impose an exceptional sentence and the trial court’s findings of fact were supported by substantial evidence and the trial court’s conclusions of law

reasonably followed from the facts found.

A trial court may impose an exceptional sentence above the standard range if “it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. A reviewing court may reverse a sentence which is outside the standard range if it finds that the record is insufficient to support the departure or justify it or the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.535 (4).

Review is three-tiered: whether there is sufficient evidence to support the trial court’s reasons is reviewed under the clearly erroneous standard; justification for the sentence is reviewed de novo; whether a particular sentence is clearly excessive is reviewed for abuse of discretion. *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013) *review denied* 179 Wn.2d 1015 (2014). Generally, “[t]he trial court has all but unbridled discretion in fashioning the structure and length of an exceptional sentence.” *France*, 176 Wn. App. at 470 (internal quotation marks omitted). Further, once a legally correct justification for the upward departure is extant, the SRA allows the trial court to sentence an offender up to the statutory maximum. RCW 9.94A.537 (6).

Review of the justification for the departure asks whether the reasons supplied “were sufficiently substantial and compelling,

considering the purposes of the Sentencing Reform Act of 1981 (SRA)” and whether the reasons duplicate factors already considered in setting the standard range. *State v. Fitch*, 78 Wn. App. 546, 550-51, 897 P.2d 424 (1995). In application, the second question on review, justification, drives consideration of the exercise of discretion as to the length of the exceptional sentence. “A sentence is not clearly excessive unless it is clearly unreasonable, that is, it was imposed on untenable grounds or for untenable reasons or is a sentence that no reasonable person would have imposed.” *State v. Souther*, 100 Wn. App. 701, 998 P.2d 350 (2000) *review denied* 142 Wn.2d 1006 (2000). And, “[o]nce substantial and compelling factors exist to support an exceptional sentence, the length of the sentence is left to the discretion of the sentencing court.” *State v. Stark*, 66 Wn. App. 423, 436, 832 P.2d 109 (1992) (citation omitted).

The purposes of the SRA include sentencing proportionate with seriousness and criminal history, promotion of respect for the law, punishment commensurate with that imposed on others committing similar offenses, public protection, offender improvement, husbanding of state resources, and reducing the risk of recidivism. RCW 9.94A.010.

Sufficient facts supported the exceptional sentence here. An aggravating circumstance, not involving criminal history, may be either proven to a jury or stipulated to by the defendant. RCW 9.94A.537(3).

Here, Abarca's guilty pleas included the aggravating circumstance of a major violation of the Uniform Controlled Substance Act. That aggravating circumstance includes, *inter alia*, that the current offense "involved an attempt or actual sale or transfer of controlled substances in quantities substantially larger than for personal use." RCW 9.94A.535(e)(ii). At the sentencing hearing it was established that Abarca was involved in the delivery of 9.7 pounds of methamphetamine which is roughly equivalent to 4400 doses of the drug. RP, 6/27/18, 38. Similarly, he was involved in delivery of heroin that would provide 1350 doses. *Id.* The factual basis for the major UCSA violation was established. An exceptional sentence is justifiable if any one of the listed circumstances is found. *State v. Hrycenko*, 85 Wn. App. 543, 548, 933 P.2d 435 (1997).

From these facts, the trial court also found significant danger to the community and thereby considered the purposes of the SRA. RP, 6/27/18, 117. Thus, the trial court here was armed with a stipulated SRA aggravating circumstance that was supported by the record and which caused concern for the SRA purpose of community protection. With this, the trial court's discretion in the length of the exceptional sentence was unfettered. There was no error in the imposition of the exceptional sentence.

As for the trial court's findings and conclusions, they adequately

convey the necessary information. A recent Court of Appeals case provides guidance in considering the sufficiency of the trial court's findings and conclusions:

Our review is limited to determining whether substantial evidence supports the challenged findings of fact and, in turn, if the supported findings and unchallenged findings support the court's conclusions of law. "Evidence is substantial if it is sufficient to convince a reasonable person of the truth of the finding." "So long as this substantial evidence standard is met, 'a reviewing court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently.' " Even if a trial court relies on erroneous or unsupported findings of fact, immaterial findings that do not affect its conclusions of law are not prejudicial and do not warrant reversal. Unchallenged findings of fact are verities on appeal.

State v. Coleman, __ Wn. App. __, ¶ 19, __ P.3d __, slip. op. No. 76851-4-I, (December 10, 2018) (internal citation by footnote omitted). Here, these standards are met. There are no disputed facts in the trial court's findings. The trial court's findings are supported by substantial evidence of the aggravating circumstances herein as adduced at the sentencing hearing. The trial court's findings are supported by Abarca's own admission that the aggravating circumstances obtain. And, it follows as a matter of law that the major violation of UCSA provides the trial court with the substantial and compelling reason to impose an upward departure.

Finding I. notes that Abarca's pleas included the major violation aggravating circumstance. CP 122. Findings II. and III. more specifically tie the aggravating circumstance to each crime of conviction. CP 122-23.

Finding IV. evinces the trial court's understanding of the correct standard range and statutory maximum. CP 123. Finding V. established that Abarca voluntarily, knowingly and intelligently entered his pleas, which included at the time of the pleas the aggravating circumstance. CP 123.

In conclusion II., the trial court finds that the extant major violation aggravating circumstances constitute "substantial and compelling" reasons for an exceptional sentence. CP 123. And conclusion III. specifically ties the exceptional sentence to the found aggravators. *Id.*

The record shows that the trial court had authority to impose the sentence imposed. The record shows that Abarca entered his pleas with full knowledge that he was admitting the aggravating circumstances on each count and that by those aggravating circumstances the state would recommend a 180 month sentence. The sentencing procedure was without error and the trial court's findings and conclusions are sufficient. This claim fails.

B. ABARCA’S ATTORNEY WAS NOT INEFFECTIVE AT SENTENCING BECAUSE HE ARGUED YOUTH AS A MITIGATING FACTOR AND SUCCEEDED IN THAT THE PRONOUNCED SENTENCE IS FORTY MONTHS LESS THAN THE STATE’S RECOMMENDATION.

Abarca next claims that his counsel was ineffective for failing to argue that Abarca’s youth warranted a downward departure. This claim is without merit because defense counsel in fact argued that Abarca’s youth and immaturity mitigated his behavior and the sentence imposed was 40 months lower than the sentence recommended in the plea agreement.

A claim of ineffective assistance is reviewed de novo. *State v. White*, 80 Wn.App. 406, 410, 907 P.2d 310 (1995). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Abarca must “overcome a strong presumption that counsel’s performance was reasonable.” *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011). Such claims are addressed as follows:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel’s

function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. “The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances.”

In re Nichols, 151 Wn. App. 262, 272-73, 211 P.3d 462 (2009) (internal citation omitted). Further, Abarca “must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct of counsel.” *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003)..

It does appear that Abarca is a youthful offender. He was 19 when the crimes started and 20 at the time of sentencing. Defense counsel highlighted those ages in the defense sentencing memorandum. CP 68. Next, the defense memorandum notes that the codefendant, Yenilen Guzman, was 27 or 28 years old and involved romantically with Abarca. CP 69. The defense then provides the trial court with an analysis of the line of case of which *O'Dell* is a part, clearly advising the trial court that youth is a vital mitigating factor. CP 69-71.

Thus consideration of the reasonableness of defense counsel's performance begins by noting that defense counsel in fact placed the controlling law squarely before the trial court. Next, consideration of the circumstances presented to defense counsel further erodes Abarca's claim.

Defense counsel knew of the extraordinarily large amount of drugs with which Abarca was involved. RP, 6/27/18, 99 (“no doubt there’s a lot of drugs here”) He knew that he had made a plea bargain that included a 15 year prison recommendation from the state. His argument shows that he knew that there was little or no likelihood of a downward departure from the standard range.

Defense counsel further underlined the youth aspect of sentencing in presenting the testimony of Abarca’s mother. She told the trial court that Abarca is still a kid who is influenced by older people and doesn’t think like a grown man. RP, 6/27/18, 95, 96. Defense counsel in fact argued the mitigation of Abarca’s youth. RP, 6/27/18, 102-03. But what counsel reasonably knew was that given the circumstances there was no chance that a downward departure was in the offing. But he still asserted the mitigation of youth both in a written memorandum and in oral argument.

Under these circumstances a request for a sentence below the standard range would have been completely unavailing. Defense counsel knew this in saying “He’s getting an aggravated sentence. The Court is going to that. The issue is, should it make it 15 years, which I argue is not proportionate.” RP, 6/27/18, 105. Strategically, Abarca’s best hope was to convince the trial court that a lower exceptional sentence should be

considered. And it was considered. Abarca's counsel succeeded in convincing the trial court to reduce the state's recommended sentence by 40 months.

Under all the circumstances of this case, defense counsel reasonably and successfully argued Abarca's youth in order to reduce the length of the exceptional sentence that Abarca would have gotten in any event. And since the state, the defense, and the trial court came to the hearing expecting an upward departure, Abarca cannot show prejudice in having received such a sentence. Moreover, it appears that defense counsel did some good lawyering in getting 40 months knocked off the recommended sentence. Counsel's performance was reasonable and caused not prejudice. This claim fails.

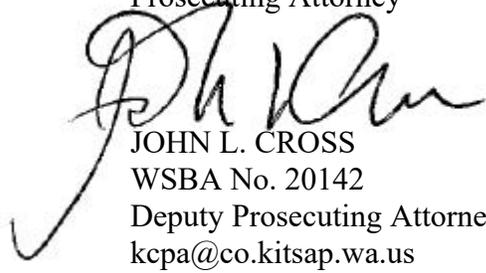
IV. CONCLUSION

For the foregoing reasons, Abarca's conviction and sentence should be affirmed.

DATED January 7, 2019.

Respectfully submitted,

CHAD M. ENRIGHT
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross", is written over the typed name and title of the Deputy Prosecuting Attorney. The signature is fluid and cursive, with a large initial "J" and "C".

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