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Division II
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No. 51879-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

VIRGINIA SHOFNER,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Virginia Shofner requested an exceptional sentence below the applicable standard range based on her long history of mental health issues, specifically bipolar disorder. Although Ms. Shofner established the existence of her mental health issues, her willingness to seek help, and her diminished culpability due to her mental health, the court refused to exercise its discretion to consider a lesser sentence. Because the trial court refused to consider whether Ms. Shofner's mental health issues diminished her culpability, this Court should remand for a new sentencing hearing.

Additionally, on March 27, 2018, the governor signed into law House Bill 1783, amending RCW 10.01.160(3) to prohibit the imposition of discretionary legal financial obligations ("LFOs") on indigent defendants. Eight days later, the trial court ordered Ms. Shofner to pay \$300 in discretionary LFOs. Because Ms. Shofner is indigent within the meaning of the statute, and because our Supreme Court has found these amendments apply prospectively to cases on appeal, the \$300 in discretionary LFOs imposed by the trial court should be stricken from her judgment and sentence.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to exercise its discretion to consider whether Ms. Shofner's mental health issues diminished her ability to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law.

2. The trial court erred in ordering Ms. Shofner to pay \$300 in discretionary LFOs because she is indigent within the meaning of amended RCW 10.01.160(3) and her case is still pending on appeal.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Trial courts are permitted to impose an exceptional sentence below the standard range where a defendant's capacity to appreciate the wrongfulness of her actions, or to conform her actions to the requirements of the law, was significantly impaired. Where a court fails to exercise its discretion to consider this mitigating factor, this failure is necessarily an abuse of discretion requiring reversal. Should this court reverse and remand for a new sentencing hearing where the trial court refused to meaningfully consider whether Ms. Shofner's mental health issues diminished her culpability and warranted an exceptional sentence below the standard range?

2. Recently-amended RCW 10.01.160(3) prohibits courts from imposing discretionary LFOs or a criminal filing fee on persons who receive public assistance, are involuntarily committed, or have an income of 125 percent or less of the federal poverty line. These amendments apply prospectively to cases still pending on appeal. Should this Court strike the \$300 in discretionary LFOs imposed on Virginia Shofner because her income was below the poverty line at the time of sentencing?

D. STATEMENT OF THE CASE

Virginia Shofner pled guilty and was sentenced to two years in prison for felony driving under the influence. CP 10-21. Having long suffered from bipolar disorder, at sentencing, Ms. Shofner requested an exceptional sentence downward to permit her to seek mental health treatment to help prevent her from reoffending. RP 14-15, 24-26. Counsel argued Ms. Shofner was not someone who “willingly on their own volition just flouts the law and decides to drink in excess and then drive.” RP 14. Instead, counsel asked the court to consider who Ms. Shofner “truly is,” and to consider her diminished culpability in relation to others who drive intoxicated but do not suffer from severe mental health issues. RP 26.

Laurie Roland, a chemical dependency counselor, told the court she had worked with Ms. Shofner for several years, and this was the first time Ms. Shofner had “begged” for help with her mental health issues. RP 23-24. Ms. Roland believed it was “the only way she’s going to make it.” RP 24.

The court did not question Ms. Shofner’s mental health issues or their effect on her behavior. RP 26. Nevertheless, the court sentenced Ms. Shofner to two years total confinement, finding it could not consider her mental health issues “as a legally sufficient basis for an exceptional sentence.” RP 27; CP 24-35. The court clearly had no intention of considering whether Ms. Shofner deserved an exceptional sentence below the standard range and declared, “It was my intention prior to today in all honesty to impose 29 months,” the high end of the standard range. RP 27-28. The court only sentenced Ms. Shofner to 24 months because it felt “really tied by” the State’s recommendation in the plea paperwork and worried the sentence would be reversed otherwise. RP 28.

In addition to her term of imprisonment, the court ordered Ms. Shofner to pay a \$200 dollar criminal filing fee and a \$100 DNA collection fee. CP 32. At the time of sentencing, Ms. Shofner had no

assets and no income, and she owed approximately \$2500 in debt. CP 38-40. She had also had her DNA collected due to a previous conviction. CP 27. Ms. Shofner moved the court for an order of indigency for her appeal, and the court found her indigent. CP 38-42.

E. ARGUMENT

1. The court erred by refusing to meaningfully consider whether Ms. Shofner’s severe mental health issues diminished her capacity to appreciate the wrongfulness of her conduct or conform her conduct to the law.

The Sentencing Reform Act (“SRA”) prescribes the trial court’s authority to sentencing in felony cases. *State v. Furman*, 122 Wn.2d 440, 456, 858 P.2d 1092 (1993); *In re Post-Sentence Review of Combs*, 176 Wn. App. 112, 117, 308 P.3d 763 (2013). A trial court may depart from the sentencing guidelines where there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. An exceptional sentence below the standard range is appropriate where a defendant’s “capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.” RCW 9.94A.535(1)(e).

Courts have broad discretion to consider the mitigating factors enumerated in RCW 9.94A.535(1). *See State v. O’Dell*, 183 Wn.2d 680,

696-97, 358 P.3d 359, 366 (2015). A court must meaningfully consider whether characteristics specific to a defendant diminish her culpability. *Id.* “The failure to exercise discretion is itself an abuse of discretion subject to reversal.” *Id.* at 697 (citing *State v. Grayson*, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005)).

O’Dell represents a significant departure from how Washington courts had previously interpreted RCW 9.94A.340. *State v. Law* provides a brief survey of the Supreme Court’s cases interpreting this statute to prohibit exceptional sentences based on factors personal to a particular defendant. 154 Wn.2d 85, 97, 110 P.3d 717 (2005). RCW 9.94A.340 provides:

The sentencing guidelines and prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant.

First, *Law* noted that in *State v. Freitag*, 127 Wn.2d 141, 145, 896 P.2d 1254 (1995) the Court found RCW 9.94A.340 barred reliance on a defendant’s altruistic past and concern for others. *Law*, 154 Wn.2d at 98. Next, *Law* noted the Court had previously found youthfulness and lack of prior police contacts were personal factors not related to the crime and thus improper factors under the statute. *Id.* (citing *State v.*

Ha'mim, 132 Wn.2d 834, 940 P.3d 633 (1997), *abrogated by State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015)). Finally, *Law* explained its holding in *State v. Fowler*, 145 Wn.2d 400, 38 P.3d 335 (2002), as rejecting the defendant's strong family support as a mitigating factor because it related solely to the defendant and not the crime. *Law*, 154 Wn.2d at 98. Relying on the rule that mitigating factors must relate to the crime and not the defendant *Law* reversed a mitigated sentence based upon a defendant's post-crime response to treatment and strengthening family connections. *Id.* at 104.

O'Dell upended this line of cases, permitting trial courts to consider factors personal to the defendant in determining whether an exceptional sentence was appropriate. Thus, although *O'Dell* was decided in the context of youth, its holding does not turn on this particular characteristic. Rather, *O'Dell* stands for the proposition that trial courts must meaningfully consider whether a defendant's culpability was diminished by her personal characteristics and circumstances. This includes where a person's mental health issues severely impair her ability to appreciate the wrongfulness of her actions

or to abide by the law. Failing to make such considerations is an abuse of discretion. *O'Dell*, 183 Wn.2d at 697.

In this case, the court failed to exercise its discretion, finding Ms. Shofner's mental health issues were not "a legally sufficient basis for an exceptional sentence." RP 27. Moreover, the court could not have meaningfully considered the mitigating nature of Ms. Shofner's mental health issues where it declared, "It was my intention prior to today in all honesty to impose 29 months." RP 27-28. The trial court had already decided to impose a standard range sentence before the sentencing hearing had even taken place. The only reason the court did not sentence Ms. Shofner to 29 months was its concern over the plea agreement and whether the sentence would be reversed on appeal. RP 28. This failure to exercise discretion is an abuse of discretion, and this Court should reverse and remand for a new sentencing hearing.

2. The legislature recently changed the law as to legal financial obligations. Under *Ramirez*, these changes apply to cases on appeal. Applying the law in effect, the Court should order \$300 in LFOs against Ms. Shofner stricken.

In 2018, the law on legal financial obligations changed. Now, it is categorically impermissible to impose any discretionary costs on indigent defendants. RCW 10.01.160(3); LAWS OF 2018, ch. 269, § 6(3). Now, the previously mandatory \$200 filing fee cannot be imposed

on indigent defendants. RCW 36.18.020(2)(h); LAWS OF 2018, ch. 269, § 17(2)(h). It is also improper to impose the \$100 DNA collection fee if the defendant's DNA has been collected as a result of a prior conviction. RCW 43.43.7541; LAWS OF 2018, ch. 269, § 18.

Our Supreme Court recently held that these changes apply prospectively to cases on appeal. *State v. Ramirez*, No. 95249-3, 2018 WL 4499761, at *6 (Wash. Sept. 20, 2018). In other words, that the statute was not in effect at time of the trial court's decision to impose legal financial obligations does not matter. *Id.* at *7-8. Applying the change in the law, our Supreme Court in *Ramirez* ruled the trial court impermissibly imposed discretionary legal financial obligations, including the \$200 criminal filing fee. *Id.* at *8.

Here, Ms. Shofner is indigent. CP 38-42. The trial court imposed the \$200 filing fee and the \$100 DNA fee against Ms. Shofner. CP 32. As in *Ramirez*, the change the law applies to Ms. Shofner's case because it is on direct appeal and not final. Accordingly, this Court should strike the \$200 filing fee. *Ramirez*, at *8. Because Ms. Shofner has previously had her DNA collected as a result of a prior conviction, the Court should also order the \$100 DNA collection fee stricken. CP 27.

F. CONCLUSION

For the foregoing reasons, this Court should reverse and remand for a new sentencing hearing, and instruct the trial court to strike the \$200 filing fee and the \$100 DNA collection fee in Ms. Shofner's judgment and sentence.

DATED this 30th day of November 2018.

Respectfully submitted,

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VIRGINIA SHOFNER,)	
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APPELLANT.)	

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