

**FILED  
Court of Appeals  
Division II  
State of Washington  
1/23/2019 2:30 PM**

**NO. 51879-1-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**VIRGINIA BETH SHOFNER,**

**Appellant.**

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**RESPONDENT'S BRIEF**

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Deputy Prosecuting Attorney  
Representing Respondent**

**HALL OF JUSTICE  
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## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The trial court did not err by not imposing an exceptional sentence below the range as the court exercised its discretion in considering Shofner's mental health issues.
2. The State concedes that the trial court did not conduct an adequate, individualized inquiry into Shofner's current and future ability to pay legal financial obligations at sentencing. The State further concedes that *State v. Ramirez*, No. 95249-3, 2018 WL 4499761 and House Bill 1783 apply to this case.

## **II. STATEMENT OF FACTS**

On March 22, 2018, Virginia Shofner plead guilty to one count of Felony Driving Under the Influence, one count of Driving While License Suspended/Revoked in the First Degree (Habitual Offender), and one count Operating a Vehicle without an Ignition Interlock. RP 2-7. On that date, Shofner's attorney requested a hearing date to discuss sentencing to specifically argue for a departure from Shofner's sentencing range based on mental health, which would include "necessary witnesses" who would be available to testify. RP 7-8.

On April 3, 2018, the defendant argued for an exceptional sentence downward to permit her to seek mental health treatment to help prevent her from reoffending. RP 14-15, 24-26. The court allowed testimony from Shofner's mother, Lou Shofner, regarding her daughter's history with

mental health issues. RP 15-17, 20-22. The court also allowed testimony from Shofner's father, Thomas Shofner, regarding his daughter's history with mental health and how she self-medicates with alcohol to combat those issues. RP 17-22. Shofner's attorney argues that Shofner has been suffering with bipolar disorder her entire life and, "until this arrest, was still fighting it and still thinking she could drink her way out of her predicament." RP 22. He further argues that sending her to prison as a "standard defendant would be," would not provide the treatment Shofner needs to combat her mental health issues. RP 22.

The court also allowed testimony from Laurie Roland, a chemical dependency counselor, who informed the court that she is familiar with Shofner and stated that her mental health needs to be addressed. RP 23. She testifies, "this will continue. She'll go to jail, she'll go to prison, she'll get out, she'll drink again, and possibly drive and kill somebody or herself." RP 23. Additionally, Shofner's attorney passed forward an exhibit of a letter from a medical professional diagnosing Shofner with bipolar disorder. RP 24. Lastly, Shofner is allowed to speak for herself, admitting that she needs help and apologizing for her actions. RP 24-25.

The trial court, in its ruling, sentenced Shofner to 24 months in prison and 12 months Community Custody on Count I, and 364 days each

on Counts II and III to run concurrently. RP 28. She now timely appeals her conviction.

### III. ARGUMENT

#### A. **The trial court did not err by not imposing an exceptional sentence below the range as the court exercised its discretion in considering Shofner's mental health issues.**

The Sentencing Reform Act ("SRA") outlines the trial court's authority in regard to sentencing on felony cases. *State v. Furman*, 122 Wn2d 440, 456, 858 P.2d 1092 (1993); *In re Post-Sentence Review of Combs*, 176 Wn. App. 112, 117, 308 P.3d 763 (2013). RCW 9.94A.535 gives the court the discretion to impose a sentence outside the standard sentencing range for an offense if it finds there are "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535(1) outlines mitigating factors, which is not an exhaustive list, for the courts to consider. If the court finds that mitigating circumstances are established by a preponderance of the evidence, the court "may impose an exceptional sentence below the standard range."

One of those mitigating factors listed in the statute, and cited partially by the appellant, is that the court may consider whether "the 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. *Voluntary use of drugs or alcohol is excluded.*” RCW 9.94A.535(1)(e) (*emphasis added*).

Courts have been granted broad discretion when considering mitigating factors listed in RCW 9.94A.535. The court in *State v. O’Dell*, 183 Wn.2d 680, 696-97, 358 P.3d 359, 366 (2015) held that a court must meaningfully consider whether characteristics specific to a defendant diminish his or her culpability. The court’s failure to meaningfully consider specific characteristics, in *O’Dell* it was in the context of youth, would rise to the level of an abuse of discretion subject to reversal. *Id.* 183 Wn.2d at 697. (citing *State v. Grayson*, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005)).

In this case, the court did not fail to exercise its discretion when considering Shofner’s mental health issues. The trial court allowed testimony from Shofner’s mother, father, her chemical dependency counselor, and allowed her to testify herself. Additionally, the court allowed an exhibit from Shofner’s medical professional diagnosing her with bipolar disorder. The court states, “first of all, I don’t question Ms. Shofner’s mental health issue, and that is driving a lot of her behavior.” RP 26. The court further states, “The problem for the justice system is not Ms. Shofner’s decision to drink, although I know it’s a huge problem in her life and her family’s life. My problem is her decision to drive.” RP 27. He concludes at

that point that he “cannot see her mental health issue as a legally sufficient basis for an exceptional sentence.” RP 27.

The court did exercise its discretion in meaningfully considering Shofner’s mental health issues because the court allowed numerous people to testify, allowed an exhibit diagnosing the defendant with bipolar disorder, and allowed argument from her attorney regarding the reasons for the request, namely to get Shofner the treatment she needs. The court stated that there is no question about whether Shofner has a mental health disorder or suffers from mental health issues. The court also acknowledged Shofner’s self-medication with alcohol which is a huge problem in her and her family’s lives. The court clearly stated that it does not have an issue with Shofner’s decision to drink as a method of self-medication. However, the court distinguished Shofner’s decision to drink as self-medication from Shofner’s decision to drive after drinking as self-medication. This distinction made by the court is the basis for the court’s ruling that Shofner’s mental health issues are not a legally sufficient basis for an exceptional sentence.

RCW 9.94A.535(1) gives the court discretion to consider mitigating factors, which the court did in this present case. Shofner specifically cites 9.94A.535(1)(e) as a mitigating factor that the court failed to consider, which, as a result, is an abuse of discretion. However, Shofner fails to

acknowledge that the specific mitigating factor excludes voluntary use of drugs or alcohol.

**B. The State concedes that the trial court did not conduct an adequate, individualized inquiry into Shofner's current and future ability to pay legal financial obligations at sentencing.**

The State concedes that the trial court failed to properly inquire into Shofner's ability to pay LFOs prior to imposing discretionary fees. Additionally, it is unnecessary to remand for resentencing as House Bill 1783 prohibits the imposition of discretionary LFOs on an indigent defendant. Therefore, this court should grant the appeal and remand back to the trial court to strike the discretionary LFOs.

#### IV. CONCLUSION

For the reasons stated above, the State respectfully requests this Court to deny Shofner's request to reverse and remand for a new sentencing hearing. The State also requests to instruct the trial court to strike the \$200 filing fee and the \$100 DNA collection fee in Ms. Shofner's judgment and sentence.

Respectfully submitted this 23<sup>rd</sup> day of January, 2019.

By:   
NICOLE G. HUGHES, WSBA #52229  
Deputy Prosecuting Attorney  
Representing Respondent

**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on January 23<sup>rd</sup>, 2019.

*Michelle Sasser*

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Michelle Sasser

# COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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## Transmittal Information

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