

FILED
Court of Appeals
Division II
State of Washington
3/25/2019 4:41 PM

NO. 51906-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SOCORRO VELAZQUEZ,

Appellant.

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

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT 1

1. The court’s sua sponte imposition of an exceptional sentence rested on a misunderstanding of the operation of the standard range, which is a legal error undermining the sentence imposed 1

2. The prosecution properly concedes the changes in the law require striking unauthorized LFOs .. 4

B. CONCLUSION 5

TABLE OF AUTHORITIES

Washington Supreme Court

In re Rainey, 168 Wn.2d 367, 229 P.3d 686 (2010) 4

Washington Court of Appeals

State v. Brundage, 126 Wn. App. 55, 107 P.3d 742 (2005) 1, 2

United States Supreme Court

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... 2

Statutes

RCW 9A.20.021 3

A. ARGUMENT

1. The court’s sua sponte imposition of an exceptional sentence rested on a misunderstanding of the operation of the standard range, which is a legal error undermining the sentence imposed.

On appeal, the prosecution insists the court properly imposed a sentence that far exceeded the sentence that the State had recommended for Mr. Velazquez. At the time of sentencing, the prosecution did not seek any exceptional term of confinement and did not contend it was consistent with the purposes of the Sentencing Reform Act.

As an exceptional sentence that no party sought, the court offered no legal justification until the prosecution told the court it needed one. RP 49. The reasons the court gave was that it was searching for a sentence long “enough to serve justice.” RP 47. But a sentence that is “enough” time is not a basis to depart from the standard range. The court’s reasoning for this extraordinary sentence is not supported by the record and lacks a logical and legal basis.

The prosecution’s brief heavily relies on *State v. Brundage*, 126 Wn. App. 55, 107 P.3d 742 (2005), claiming it

definitively declares that any offender score above “9” is automatic license to the court to impose an exceptional sentence above the standard range. But as the *Brundage* Court ruled, “a standard range sentence is not ‘clearly too lenient’ simply because the defendant has an offender score greater than 9.” *Id.* at 66.

In *Brundage*, the defendant had an offender score of “12” after engaging in a brutal attack on his wife that included several convictions for rape and other charges. *Id.* at 67. The trial court in *Brundage* had imposed an exceptional sentence based on several aggravating factors but *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) was decided after the sentence was imposed, and the only potentially available remaining aggravating factor rested on the notion of “free crimes” under the multiple offense policy. *Id.* at 61 n.7.

Brundage is different from Mr. Velazquez’s case based on the specifics of the offender score calculation and it is this offender score calculation that is a decisive factor in permitting an exceptional sentence under the multiple offense policy. The

prosecution fails to understand or address this crucial distinction.

Here, the court incorrectly ruled that Mr. Velazquez was not being punished “for Count II or Count III” without an exceptional sentence. RP 49. It believed that both offenses would be “free crimes.” *Id.* But the court was wrong and misunderstood the offender score calculation at issue.

Mr. Velasquez had an offender score of 8 if sentenced on one current conviction, the score became 9 when adding count II, and it only exceeded 9 when adding count III. Thus, the court was wrong when it concluded that both Count II and Court III were “free crimes” and were not being punished under the standard range. RP 49.

Furthermore, Count II was a conviction for hit and run. But hit and run has a statutory maximum of five years and Mr. Velazquez was receiving that five year sentence under the standard range. RCW 9A.20.021(1)(c); CP 25. No exceptional sentence was legally available for this offense, contrary to the court’s claim that the standard range left two offenses unpunished. RP 49.

Count III was a second count of vehicular assault. A statutory multiplier raised the score for this offense two points, rather than one, but that multiplier shows the legislature taking that offense into account and cannot be used as a basis for finding “free crimes.” *See* Opening Brief at 12-13.

The court misconstrued the degree and extent of unpunished offenses when declared the exceptional sentence was justified for two purportedly “unpunished” offenses. The court abused its discretion by misapplying the law, which undermines the exceptional sentence imposed. *In re Rainey*, 168 Wn.2d 367, 375, 229 P.3d 686 (2010).

2. The prosecution properly concedes the changes in the law require striking unauthorized LFOs.

Based on changes in the law that apply to indigent persons whose cases are pending on appeal, the prosecution properly acknowledges that the \$100 DNA fee and \$200 filing fee should be stricken. This Court should accept the prosecution’s concession.

B. CONCLUSION.

For the reasons explained in Mr. Velazquez's opening brief and as reiterated above, the court lacked authority to impose an exceptional sentence as a matter of law and misunderstood the factual predicate for this extraordinary sentence. The exceptional sentence should be vacated as well as the unauthorized legal financial obligations.

DATED this 25th day of March 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy P. Collins', written in a cursive style.

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,

Respondent,

v.

SOCORRO VELAZQUEZ,

Appellant.

NO. 51906-2-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF MARCH, 2019, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS – DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | |
|---|--|
| <input checked="" type="checkbox"/> SARA BEIGH, DPA
[appeals@lewiscountywa.gov]
[sara.beigh@lewiscountywa.gov]
LEWIS COUNTY PROSECUTING ATTORNEY
345 W MAIN ST FL 2
CHEHALIS, WA 98532 | <input type="checkbox"/> U.S. MAIL
<input type="checkbox"/> HAND DELIVERY
<input checked="" type="checkbox"/> E-SERVICE VIA PORTAL |
| <input checked="" type="checkbox"/> SOCORRO VELAZQUEZ
887287
MCC-TRU
PO BOX 888
MONROE, WA 98272 | <input checked="" type="checkbox"/> U.S. MAIL
<input type="checkbox"/> HAND DELIVERY
<input type="checkbox"/> _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF MARCH, 2019.

x _____ *grd*

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

March 25, 2019 - 4:41 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51906-2
Appellate Court Case Title: State of Washington, Respondent v. Socorro A. Velazquez, Appellant
Superior Court Case Number: 17-1-00768-9

The following documents have been uploaded:

- 519062_Briefs_20190325163951D2924460_1660.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.032519-12.pdf
- 519062_Motion_20190325163951D2924460_9797.pdf
This File Contains:
Motion 1 - Extend Time to File
The Original File Name was washapp.032519-11.pdf

A copy of the uploaded files will be sent to:

- appeals@lewiscountywa.gov
- greg@washapp.org
- sara.beigh@lewiscountywa.gov
- teri.bryant@lewiscountywa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Nancy P Collins - Email: nancy@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190325163951D2924460