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Court of Appeals  
Division II  
State of Washington  
11/30/2018 4:31 PM

No. 51906-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

SOCORRO VELAZQUEZ,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

After Socorro Velazquez pled guilty and the parties recommended an agreed sentence of 68 months in prison, the court imposed a 120-month exceptional sentence “to serve justice.” When asked to give a legal basis for the exceptional sentence, the court claimed that Mr. Velazquez was not being punished for two of the three current offenses based on his offender score.

However, the court misunderstood the nature of Mr. Velazquez’s offender score and his offenses were in fact “punished.” The actual reason the court imposed an exceptional sentence was its dissatisfaction with the standard range, but this is not a valid reason for an exceptional sentence. A new sentencing hearing should be ordered.

B. ASSIGNMENTS OF ERROR

1. The court misconstrued the governing statutes and improperly imposed an unauthorized exceptional sentence.

2. The court imposed discretionary legal financial obligations (LFOs) that are no longer authorized by statute.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The court's authority to impose a sentence above the standard range is strictly limited by statute as well as the requirements of due process and the right to a jury trial. Here, the court misconstrued the sentencing statutes and the nature of Mr. Velazquez's offender score to impose an exceptional sentence based on the "free crimes" provision of RCW 9.94A.535(2)(c). Does the court's misapplication of the law and misunderstanding of facts of the case require reversal of the sentence?

2. A change in the law governing LFOs dictates that certain formerly mandatory costs are discretionary and may not be imposed on indigent people. These changes apply to cases pending on direct review. Should this court strike LFOs that are no longer legally authorized?

D. STATEMENT OF THE CASE

In exchange for Socorro Velazquez's guilty plea, the parties promised to recommend a 68 month sentence, the high

end of the standard range. RP 4.<sup>1</sup> Pursuant to this plea agreement, Mr. Velazquez pled guilty to two counts of vehicular assault and one count of hit and run. CP 010. The prosecutor expressly informed the court he was recommending 68 months as agreed. RP 4.

Mr. Velazquez's attorney also told the court that both he and the prosecutor had extensive experience in the criminal justice system and had reached an appropriate agreed resolution. RP 39-40. Defense counsel clarified the record to explain Mr. Velazquez's non-violent criminal history and the lack of any drugs or alcohol involved in the car accident underlying the incident. RP 41-42. He told the court the agreed resolution was fair and asked the court to impose it. RP 44, 43, 45.

Mr. Velazquez said he wanted "to apologize to the victims and say I'm sorry" and he "didn't mean to hurt anybody." RP 45.

Before the court imposed its sentence, several people affected by the vehicular accident spoke at length about the extent of their injuries or the effect of the victim's injuries on

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<sup>1</sup> The verbatim report of proceeding referred to herein is from

their own lives. RP 5-38. Two people were badly injured in the accident and these injuries greatly affected them and their loved ones. *Id.*

The judge announced that he almost always followed agreed sentencing recommendations when people plead guilty because the lawyers knew more about the case than he did and he trusted their joint recommendations. RP 47. He also said that Mr. Velazquez's waiver of his constitutional right to a jury trial was a significant benefit to the victims and their families, because trials are difficult for them and can wreak "havoc." RP 46-47.

However, the judge said he would impose an exceptional sentence above the standard range of 120 months, rather than the agreed 68-month high end standard range sentence recommended. RP 47. The judge said the reason he was imposing this sentence was that he did not think 68 months was "enough to serve justice." RP 47. The judge said he was not sure that even "120 months or 10 years is enough to serve justice," but he wanted to recognize that Mr. Velazquez took "some

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the sentencing hearing on May 8, 2018.

responsibility” by admitting his guilt and because there was a significant benefit in not having a trial. RP 46.

The court created its 120-month sentence by imposing two consecutive 60-month terms for counts I and III (vehicular assault). RP 47. It also imposed a concurrent 60-month term for count II, which was the statutory maximum for this count, a class C felony of hit and run. RP 47; RCW46.52.020(4)(b).

The prosecutor asked the court what legal basis it was using for this exceptional sentence because he needed to prepare findings. RP 49. The court cited RCW 9.94A.535(2)(c), where a high offender score results in some current offenses going unpunished. RP 49. The court said that “without an exceptional sentence,” Mr. Velasquez was not being punished “for Count II or Count III, so those would be what we sometimes refer to in the legal field as free crimes.” RP 49. The court did not elaborate further other than to say there are “substantial and compelling reasons” to impose an exceptional sentence. RP 49-50.

The court also imposed legal financial obligations it deemed mandatory, including a \$200 filing fee and \$100 DNA collection fee. RP 48.

E. ARGUMENT

**1. The court imposed an exceptional sentence for impermissible reasons and based on a misapprehension of the law.**

*a. A court has strictly limited authority to impose a sentence greater than the standard range.*

A court's sentencing authority stems strictly from statute, and is further restricted by the constitutional protections of due process, the right to jury determinations of all factual issues, and the prohibition on cruel punishment. *State v. Cawyer*, 182 Wn. App. 610, 616, 330 P.3d 219 (2014); *see Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Bassett*, \_ Wn.2d \_, 428 P.3d 343, 348 (2018); *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012); U.S. Const. amends. VI, VIII, XIV; Const. art. I, §§ 3, 14, 22.

Courts are generally required to impose standard range sentences. *State v. Law*, 154 Wn.2d 85, 93, 110 P.2d 717 (2005). When a judge imposes sentences for several current offenses, the terms must be concurrent. RCW 9.94A.589(1)(a). To impose consecutive sentences for current offenses, the court must

comply with the exceptional sentencing provisions of RCW 9.94A.535.

Standard range sentences presumptively apply because they are based on the legislature's assessment of the appropriate punishment for certain offenses and are adjusted for a person's criminal history. *State v. Amo*, 76 Wn. App. 129, 133, 882 P.2d 1188 (1994). A judge's belief that the standard range is insufficient punishment is not a basis to depart from the standard range. *State v. Pascal*, 108 Wn.2d 125, 137-38, 736 P.2d 1065 (1987).

To impose a sentence above the standard range, any factual determination justifying this sentence other than a prior conviction must be found by the jury and proven beyond a reasonable doubt. *See State v. Hayes*, 182 Wn.2d 556, 562, 342 P.2d 1144 (2015).

*b. The court's decision to impose an exceptional sentence was its dissatisfaction with the standard range.*

The trial court's dissatisfaction with the sentencing structure of the SRA is not a basis for an exceptional sentence. *State v. Batista*, 116 Wn.2d 777, 789, 808 P.2d 1141 (1991). A

court's assessment that the standard range is too lenient is a factual finding that must be made by the jury under the Sixth Amendment and must be tethered to a valid aggravating factor under RCW 9.94A.537. *State v. Alvarado*, 164 Wn.2d 556, 564, 192 P.3d 345 (2008).

Here, the court explained its reason for departing from the SRA as driven by its dissatisfaction with the high end of the standard range and its belief that Mr. Velazquez's behavior merited more punishment. RP 46-47.

When pronouncing his sentence, the judge explained he typically followed agreed recommendations because he respected the experienced lawyers "know the case better than I do," including the "strengths and weaknesses" of the case. RP 47. The judge said agreed recommendations are "extremely important for our legal system." RP 47. But he did not think the agreed recommendation of 68 months was "enough to serve justice," and instead imposed 120 months. RP 47.

The judge further explained it was not sure that even "120 months or 10 years is enough to serve justice," but it wanted to recognize that Mr. Velazquez took "some

responsibility” by admitting his guilt. RP 46. The judge also acknowledged that Mr. Velasquez’s plea benefited the victims and their families, because he had the right to go to trial and it would have been “a much more difficult experience” for the victims and their families if he had not waived his right to a trial. RP 47.

The court did not mention any other reason to impose this exceptional sentence until later, after the prosecutor told the court it needed to prepare factual findings and needed a “basis” to list for this sentence. RP 49.

Because the court’s primary motivation for an exceptional sentence was that the standard range was not enough punishment in light of the harm Mr. Velazquez caused by his conduct, the court relied on an impermissible, fact-based, subjective assessment of the case and dissatisfaction with the standard range. *Alvarado***Error! Bookmark not defined.**, 164 Wn.2d at 564; *Batista*, 116 Wn.2d at 789.

The prosecution did not seek an exceptional sentence. RP 4. It did not allege or prove any fact-based aggravating factors beyond a reasonable doubt. Neither the Sixth Amendment nor

the SRA permit the court to exceed the standard range based on judge's belief the ends of justice merit more punishment than called for by the standard range.

*c. The court's after-the-fact justification of the "free crimes" aggravating factor misconstrued its application to the case.*

RCW 9.94A.535(2)(c) permits a court to impose an exceptional sentence without further jury findings if it determines both: (1) "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished"; and (2) "considering the purpose of this chapter [RCW 9.94A], that there are substantial and compelling reasons justifying an exceptional sentence."

Here, when the prosecutor told the court he needed a legal basis for the exceptional sentence, the court cited the "free crimes" aggravating factor of RCW 9.94A.535(2)(c) as the sole basis to depart from the standard range and to disregard the agreed recommendation. RP 49.

The court summarily stated that "without an exceptional sentence," Mr. Velasquez was not being punished for either

“Count II or Count III, so those would be what we sometimes refer to in the legal field as free crimes.” RP 49. But the court misunderstood Mr. Velazquez’s offender score and misapplied this aggravating factor.

The maximum offender score used by the legislature is “9 or more.” RCW 9.94A.510. 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 both counts II and III were not accounted for in the punishment imposed by standard range. RP 49.

The court also did not acknowledge that the statutory maximum for count II, hit and run, is 60 months, so no “free crimes” aggravator could apply. *See* RCW 9A.20.021(1)(c). Regardless of a person’s criminal history or other current offenses, no court could increase the sentence imposed for count II beyond 60 months.

And the court did not acknowledge or address the multipliers used to elevate Mr. Velazquez’s offender score based on his current offenses of vehicular assault. Under RCW

9.94A.525(11), Mr. Velazquez’s two current convictions for vehicular assault counted as two points in his offender score for both offenses, rather than one, giving him a score of “11” because of this multiplier. But the use of this multiplier means that both current offenses are being factored into the punishment he received.

A court must weigh the use of multipliers for the “free crimes” aggravating factor because the use of a multiplier to increase a person’s offender score means the offenses are being counted in a person’s offender score. *See State v. Phelps*, 2 Wash.App.2d 1051; 2018 WL 1151975, \*4 (2018) (unpublished, cited as non-binding authority under GR 14.1); *see generally State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

In *Phelps*, this Court reversed an exceptional sentence imposed based on the “free crimes” aggravator where the defendant’s offender score for taking a motor vehicle without permission was elevated to 19, largely because his prior six convictions for similar offenses counted as three points each. *Phelps*, 2018 WL 1151975 at \*3. Without the multiplier, he would have had an offender score of 6. This Court ruled that the

current offenses were punished because it was the nature of those offenses that triggered the multiplier and left the defendant with an offender score of 19. *Id.* at \*4.

In *France*, the defendant was convicted of nine counts of felony harassment and had six prior convictions, giving him an offender score of 15. 176 Wn. App. at 466. The court imposed an exceptional sentence based on two aggravating factors: an officer of the court was a victim and some of the current offenses were not punished under the standard range. *Id.* at 472-73. This Court upheld this exceptional sentence in that case, in part because no multipliers increased the offender score and the standard range accounted for only three of the nine offenses of conviction.

Here, the court misconstrued the nature of the “unpunished” offenses, incorrectly believing that two offenses were unpunished when the offender score was 9 for two current offenses and was only elevated above 9 for one conviction. RP 49. The court’s misperception of the score was based on its failure to understand the multiplying effect of the vehicular offenses, and it never acknowledged that the multiplying effect showed the

current offenses were being taken into account for purpose of punishment.

A court abuses its discretion when it misapplies the law or fails to understand the scope of its discretion. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Here, the court did both, and this undermines the exceptional sentence imposed.

*d. The “free crimes” aggravating factor did not apply as a matter of law.*

The court’s sentencing role is to carry out the legislative mandate. *In re Pers. Restraint of Acron*, 122 Wn. App. 886, 891, 95 P.3d 1272 (2004) (refusing to speculate about seriousness level for unranked offense because “[a]ppellate courts do not supply omitted language even when the legislature’s omission is clearly inadvertent”).

As a basic rule of statutory construction, courts must rely upon the plain language of the statute. *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). Penal statutes are given “a strict and literal interpretation.” *Id.* at 727. The court “cannot add words or clauses to

an unambiguous statute when the legislature has chosen not to include that language.” *Id.*

The plain language of RCW 9.94A.535(2)(c) indicates the legislature did not intend an offender score of ten to justify an exceptional sentence. RCW 9.94A.535(2)(c) requires that “*some of the current offenses*” are not punished by the standard range. (emphasis added).

The statute does not say “one” or “any” offense above nine is grounds for an exceptional sentence. The legislature knows how to indicate one or any single offense but instead choose the phrase “some of the current offenses.” *See State v. Mathers*, 193 Wn. App. 913, 919, 376 P.3d 1163 (2016) (“where the legislature uses different language within a provision, a different intent is indicated.”).

For example, the SRA describes “one or more crimes” in RCW 9.94A.730, “one or more of the facts” in RCW 9.94A.537, and “one or more violent acts” in RCW 9.94A.562. By contrast, like in RCW 9.94A.535(2)(c), “some of” is used to describe a plurality in RCW 9.94A.589: “if the court enters a finding that *some or all of the current offenses* encompass the same criminal

conduct then those current offenses shall be counted as one crime.”(emphasis added).

“Some” is an ordinary word, and this court can thus look to its dictionary definition. *Alvarado*, 164 Wn.2d at 562. (“When a term has a well-accepted, ordinary meaning, we may consult a dictionary to ascertain the term’s meaning.”). The word “some” when followed by “of,” functions as a quantifier.<sup>2</sup> As a quantifier it means, “a few of them but not all of them.”<sup>3</sup> “A few” is used to indicate a small number of people or things.<sup>4</sup> A small group of things is necessarily more than one thing.

Ambiguity in a sentencing statute is construed in the light most favorable to a defendant. *Matter of Seitz*, 124 Wn.2d 645, 649, 880 P.2d 34 (1994). By requiring “some of the offenses” to be unpunished, in the context of a standard range that includes “9 or more” as the top of the offender score, the statutory scheme took into account one offense above 9, at the

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<sup>2</sup> COLLINS ENGLISH DICTIONARY, *available at* [https://www.collinsdictionary.com/us/dictionary/english/some\\_1](https://www.collinsdictionary.com/us/dictionary/english/some_1) (last accessed 9/15/2017)

<sup>3</sup> COLLINS ENGLISH DICTIONARY, *available at* [https://www.collinsdictionary.com/us/dictionary/english/some\\_1](https://www.collinsdictionary.com/us/dictionary/english/some_1) (last accessed 9/15/2017) (description of some as quantifier).

least, when setting the standard range. Consequently, the court was not statutorily authorized to impose an exceptional sentence where an incremental increase at “9 or more” does not leave unpunished more than one offense.

The legislature crafted the standard ranges with the understanding that people would have “nine or more” points at the top of the range. RCW 9.94A.510. While the legislature allowed an exceptional sentence when “some of the current offenses” are unpunished, it did so with the understanding that the standard range would suffice generally for most people with nine or more points. The goal of the SRA is “funnel judicial discretion and to establish consistency and uniformity in sentencing.” *Hayes*, 182 Wn.2d at 566. It is only logical and consistent with the SRA that the legislature expected a more significant threshold of criminal history to justify an exceptional sentence.

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<sup>4</sup> COLLINS ENGLISH DICTIONARY, *available at* <https://www.collinsdictionary.com/us/dictionary/english/few> (last accessed 9/15/2017) (definition of “a few.”)

*e. This Court should vacate the exceptional sentence because it is both legally and factually erroneous.*

Where an exceptional sentence is not legally justified by the aggravating factor or is based on an improper reason for departing from the standard range, the exceptional sentence should be vacated. *Hayes*, 182 Wn.2d at 567. Here, the court misunderstood the nature of Mr. Velazquez’s offender score, incorrectly believed two offenses were unpunished under the standard range, and was unaware of the multiplier used to account for the offenses in the offender score. The exceptional sentence should be vacated and a new sentencing hearing ordered.

**2. The DNA and court filing fees are no longer authorized as a valid legal financial obligation to impose on Mr. Velazquez.**

Under recent statutory amendments, it is categorically impermissible to impose discretionary costs on indigent defendants. *State v. Ramirez*, \_\_ Wn.2d \_\_, 426 P.3d 714, 718 (2018); LAWS OF 2018, ch. 269, § 6(3). This change in the law “applies on appeal to invalidate” discretionary LFOs imposed upon an indigent person. *Ramirez*, 426 P.3d at 721.

The previously mandatory \$200 filing fee cannot be imposed on indigent defendants. *Id.*; 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. LAWS OF 2018, ch. 269, § 18.

Here, Mr. Velazquez is indigent. CP 32 (order of indigency); CP 34-35 (motion for order of indigency). He also had several prior convictions that would have necessarily triggered his DNA collection. CP 25.

The court imposed only LFOs it deemed to be mandatory LFOs. RP 48. But these then-mandatory costs included the \$100 DNA fee and \$200 court filing fee. RP 48; CP 27-28.

As in *Ramirez*, the new statutes apply to this case. Mr. Velazquez's present indigent status is documented in the declaration filed for purposes of pursuing this appeal. CP 34-35. This financial statement is "reliable" evidence of his on-going poverty. *See Ramirez*, 426 P.3d at 720. This Court should strike the non-mandatory LFOs.

F. CONCLUSION.

Because the court imposed an invalid exceptional sentence and issued LFOs that are no longer permitted by statute, this Court should reverse Mr. Velaquez's sentence and remand for a new sentencing hearing at which the court should impose a standard range term, strike \$300 in LFOs, and order any other relief in the interest of justice.

DATED this 30<sup>th</sup> day of November 2018.

Respectfully submitted,

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

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 51906-2-II
	)	
SOCORRO VELAZQUEZ,	)	
	)	
Appellant.	)	

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# WASHINGTON APPELLATE PROJECT

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