

FILED
Court of Appeals
Division II
State of Washington

NO. 51964-0-II
3/25/2019 3:22 PM

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

STATE OF WASHINGTON,

Respondent,

v.

MARILYN CORINNE REDD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 18-1-00298-18

BRIEF OF RESPONDENT

CHAD M. ENRIGHT
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 328-1577

SERVICE

Dana M Nelson
1908 E Madison St
Seattle, Wa 98122-2842
Email: nelsond@nwattorney.net

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED March 25, 2019, Port Orchard, WA *Elizabeth Allen*
Original e-filed at the Court of Appeals; Copy to counsel listed at left.
Office ID #91103 kcpa@co.kitsap.wa.us

TABLE OF CONTENTS

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

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

 A. PROCEDURAL HISTORY.....1

 B. FACTS.....6

III. ARGUMENT.....7

 A. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION IN DENYING A REQUESTED
DOSA SENTENCE BASED ON THE BROAD
SCOPE OF REDD’S CRIMES.....7

IV. CONCLUSION.....11

TABLE OF AUTHORITIES

CASES

State v. Grayson
154 Wn.2d 333, 111 P.3d 1183 (2005).....8, 9

State v. Conners,
90 Wn. App. 48, 950 p.2d 519 (1989) 9

State v. Hender,
180 Wn.App. 895, 324 P.3d 780 (2014)..... 8

STATUTORY AUTHORITIES

RCW 9.94A.535..... 6

RCW 9.94A.585(1)..... 8

RCW 9.94A.655(4)..... 8

RCW 9.94A.660..... 4

RCW 9.94A.660(3)..... 8

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion by refusing a request for a DOSA sentence because of the large number of victims and broad scope of Redd's criminal scheme?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Marilyn Corinne Redd was charged in the original information filed in Kitsap County Superior Court with ten felony counts, as follows:

--count I, first degree possession of stolen property, aggravating circumstance of major economic offense;

--count II, second degree identity theft, major economic offense;

--count III, second degree possession of stolen property, major economic offense;

--count IV, forgery;

--count V, second degree identity theft;

--count VI, second degree possession of stolen property;

--count VII, forgery;

--count VIII, second degree theft;

--count IX, second degree identity theft;

--count X, second degree possession of stolen property. CP 37-42.

The first amended information charged eighteen felonies and two gross misdemeanors, as follows

--count I, first degree possession of stolen property, major economic offense;

--count II, second degree identity theft, major economic offense;

--count III, second degree possession of stolen property, major

economic offense;

--count IV, forgery;

--count V, second degree identity theft;

--count VI, second degree possession of stolen property;

--count VII, forgery;

--count VIII, second degree theft;

--count IX, second degree identity theft;

--count X, second degree possession of stolen property;

--count XI, forgery;

--count XII, second degree identity theft

--count XIII, forgery;

--count XIV, second degree identity theft;

--count XV, forgery;

--count XVI, second degree identity theft;

--count XVII, forgery;

--count XVIII, first degree driving with license revoked (gross misdemeanor);

--count XIX, operation of a motor vehicle without ignition interlock device (gross misdemeanor);

--count XX, possession of controlled substance [methamphetamine].

CP 107-116.

Redd had been the subject of a fraud investigation and in interviews with police had admitted to an ongoing fraud scheme. RP 25. She admitted that she undertook the scheme in order to get money for drugs. RP 28. At one point, she set up a fake business in order to get the material to produce fake checks. RP 35. Counting all the medical cards, checkbooks, mail, and etc. stolen by Redd and her associates revealed 391

victims. RP 35. Red had negotiated “dozens” of fraudulent checks in the amount of \$400 to \$500 each. RP 44.

The investigating officer had never before seen such an intricate scheme. RP 28. The police obtained a bank’s video footage which showed Redd repeatedly cashing checks. RP 26. When police served a search warrant on her home, they found the stolen mail of “hundreds of people.” RP 19. The police found “tools for printing checks,” computers and software used for printing checks. Id. They found one victim’s check that had been altered by scratching out the name. Id. They found a check issued by the Washington State Treasurer for the Department of Social and Health Services in the amount of \$13,316.80 with the name of the recipient scratched off. RP 20-21. Police found a “fraud book” in which Redd had collected the personal information of victims, allowing her to “hit them” over and over. RP 31-32.

Redd entered pleas of guilty to the twenty counts in the first amended information. CP 127-138 (statement of defendant on plea of guilty). The plea form is signed by Redd and her attorney thereby attesting that the lawyer had explained the pleas to her, that she understood the provisions of the plea form, and that she understood and had no questions about those provisions. CP 137-328. The plea statement recites Redd’s understanding that the state would make the sentencing

recommendation found in the incorporated plea agreement. CP 131. Among other things, the statement advised Redd that “[t]he judge does not have to follow anyone’s recommendation as to sentence.” CP 131 (alteration added). Further, the statement of defendant advised Redd that “[t]he judge may sentence me under the drug offender sentencing alternative (DOSA) if I qualify under RCW 9.94A.660.” CP 133 (alteration and emphasis added).

The plea agreement was also signed by Redd and her lawyer once again thereby acknowledging that the lawyer had explained the document to her, that she understood it, and that she understood that she was waiving substantial rights by entering the agreement. CP 125. In the plea agreement, Redd was advised that the state would seek an exceptional sentence. CP 121. Redd also agreed to be evaluated for a substance abuse disorder and comply with recommended treatment. CP 122. In the agreement, the state did not agree to a DOSA sentence but did not foreclose Redd from asking for one. CP 122.

The trial court ordered a presentence investigation (PSI) specifically intended to be a screening for a DOSA sentence. CP 139. The PSI writer noted that Redd was seeking a DOSA because she understood her need for drug treatment. CP 142. The PSI writer found that Redd qualified for the alternative and opined that she would benefit

from the program. CP 143.

At sentencing, the state indicated that there were multiple counts of mail theft that had not been charged pursuant to the plea agreements. RP 47; CP 120 (“numerous counts”). As to her DOSA request, the state noted that on January 24, 2018, it appeared that Redd and her attorney were seeking a drug court option for her. RP 49. But then Redd committed additional crimes on February 8 and 14. Id.

The trial court rejected Redd’s DOSA request and also rejected the state’s sentencing recommendation of 100 months and a day. The trial court was very concerned about the number of victims in the case. RP 90

The trial court told Redd that it had given this sentencing a lot of thought, “but, I just can’t, in good conscience, Ms. Redd, in light of the totality of the victimization of your crimes really do anything better than that.” RP 94. Redd was sentence to a total of 72 months confinement. CP 147. The trial court found that chemical dependency contributed to Redd’s offenses. CP 146. Based thereon, the trial court ordered as a condition of sentence that Redd submit to a chemical dependency evaluation and comply with all recommended treatment. CP 151.

The 72 month sentence (72 months imposed on count I with all other counts concurrent (CP 147)) is an exceptional sentence because the top of the standard range on count I is 57 months. CP 146. Although the

exceptional sentence box on the judgment and sentence is not checked (CP 147), the trial court signed findings of fact and conclusions of law (hereinafter “findings and conclusions”) in support of the exceptional sentence. CP 157-159.

In the findings and conclusions, the trial court found that the major economic offense aggravating circumstance was appropriate as to counts I, II, and III because the attempted monetary loss was greater than in a typical offense, because of the high degree of sophistication and planning involved, and because of the multiple victims involved. CP 157-58. Further, the trial court found that Redd’s high offender score resulted in some of the offenses going unpunished, which justifies an upward departure under RCW 9.94A.535. CP 158. The trial court found that Redd was indeed eligible for a prison-based DOSA but that “the court’s denial of DOSA in this cause is based on the facts and circumstances in this case, which evidence the appropriateness of an exceptionally high sentence.” CP 159.

Redd timely appealed her sentence. CP 160

B. FACTS

The facts of Redd’s offenses are included in 98 pages of police reports, statements of probable cause, and exhibits that were filed in

support of the charges. CP 1-36; 44-106. A more accessible short-hand version of Redd's many offenses is found on the statement of defendant on plea of guilty. CP 136-137.

The plea form short summaries tell the tale of Redd being in the possession of multiple checks stolen from multiple victims. Redd, knowing the items to be stolen and without the owners' permissions, altered or forged all these financial instruments and attempted to negotiate them. She further admitted driving a car on a suspended driver's license and possessing methamphetamine.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A REQUESTED DOSA SENTENCE BASED ON THE BROAD SCOPE OF REDD'S CRIMES.

Redd argues that the trial court abused its discretion by refusing her request for a DOSA sentence. This claim is without merit because the trial court's reasons for denying the DOSA alternative were tenable.

The defense asked for a prison-based DOSA, speaking at length as to why it should be imposed. RP 81. The DOC report and the defense presentation establish that Redd was eligible for the alternative. But "eligibility does not automatically lead to" an alternative sentence because

the sentencing court must still determine “that the sentencing alternative is appropriate and should be imposed.” *State v. Hender*, 180 Wn.App. 895, 900, 324 P.3d 780 (2014); RCW 9.94A.655(4). “The legislature entrusted sentencing courts with considerable discretion ... to determine ... whether [an] alternative is appropriate.” *Hender*, 180 Wn.App. at 900–01.”

In fact, the DOSA statute codifies the trial court’s discretion. The statute provides, in part, that “If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate. . . .” RCW 9.94A.660(3). Eligibility may be established but it still falls to the sentencing court’s broad discretion to decide whether or not the alternative is “appropriate.”

That broad discretion means that “[a]s a general rule, the trial judge’s decision whether to grant DOSA is not reviewable.” *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). That statement is supported by a citation to RCW 9.94A.585(1), which provides that a standard range sentence may not be appealed. Redd received an exceptional sentence. Redd is not appealing the exceptional sentence so the statute seems to foreclose the present appeal. But that exceptional sentence takes the matter out of the plain language of subsection 585. In any event, “an offender may always challenge the procedure by which a sentence is imposed.” *Grayson*, 154 Wn.2d at 338.

But *Grayson* is clear that in this context an abuse of discretion must entail that the trial court “refuses categorically to impose an exceptional sentence below the standard range under any circumstances.” 154 Wn.2d at 342; see *State v. Conners*, 90 Wn. App. 48, 53, 950 p.2d 519 (1989) (a court's decision, after consideration, not to apply DOSA and impose a standard sentence range is not reviewable). Specific to sentencing alternatives:

where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.

Id. In the present case the trial court did not categorically exclude the sentencing alternative.

The trial court spoke at length about the sentencing. RP 89-93. The trial court noted that “[t]he volume of—of victimization is--is mind boggling in many respects.” RP 90. The trial court indicated that the case had been given “a lot more thought than you can possibly know.” RP 90. The trial court was mindful that Redd’s crimes have “significant impacts on people’s lives.” RP 92. . Ruling on the DOSA request, the trial court said

But, ultimately, you know, this kind of carnage, in terms of the effect that this has on people’s lives, has to be considered as well. I’m, going to decline the DOSA option.

RP 93. In its oral ruling, then, the trial court understood the availability of

the DOSA alternative and exercised its discretion against that alternative based on the large number of victims who suffered significant impacts from Redd's criminality.

After having denied the alternative, the trial court remarked that it did not "believe that the legislature intended for this quantity of criminal activity to support a DOSA recommendation." RP 94. Redd latches on to this post-ruling remark as evidence of an untenable reason for the denial of the alternative. Once again, after the legislature remark, the trial court addressed Redd and assured her that much thought had been given but, returning to the reason for the denial, "I just can't, in good conscience, Ms. Redd, in light of the totality of the victimization of your crimes really do anything better than that." RP 94.

As indicated, the same reason for the denial is found in the trial court's written findings. CP 159. Factually, both the oral ruling and the written findings show that the trial court denied the DOSA request based on the tenable ground of the extraordinarily high level of victimization and impacts on the community. This was the trial court's theme throughout consideration of Redd's DOSA request—both orally and in writing. Given the scope of Redd's crimes, the trial court, after careful consideration, denied the sentencing alternative. There was no abuse of discretion.

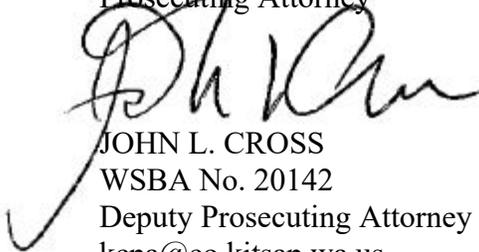
IV. CONCLUSION

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

DATED March 25, 2019.

Respectfully submitted,

CHAD M. ENRIGHT
Prosecuting Attorney



JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

March 25, 2019 - 3:22 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51964-0
Appellate Court Case Title: State of Washington, Respondent v. Marilyn C. Redd, Appellant
Superior Court Case Number: 18-1-00298-1

The following documents have been uploaded:

- 519640_Briefs_20190325152106D2232613_1123.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Redd Marilyn 20190312 resp brief.pdf

A copy of the uploaded files will be sent to:

- jcross@co.kitsap.wa.us
- kcpa@co.kitsap.wa.us
- nelsond@nwattorney.net
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Elizabeth Allen - Email: erallen@co.kitsap.wa.us

Filing on Behalf of: John L. Cross - Email: jcross@co.kitsap.wa.us (Alternate Email:)

Address:
614 Division Street, MS-35
Port Orchard, WA, 98366
Phone: (360) 337-7171

Note: The Filing Id is 20190325152106D2232613