

FILED
Court of Appeals
Division II
State of Washington
1/10/2019 10:28 AM

NO. 52260-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ARON SHELLEY,
Appellant.

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

The Honorable Erik D. Price, Judge

BRIEF OF APPELLANT

LISE ELLNER, WSBA No. 20955
SPENCER BABBIT, WSBA No. 51076
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

TABLE OF CONTENTS

	Page
A. ASSIGNMENT OF ERROR.....	1
Issue Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	4
THE TRIAL COURT ABUSED DISCRETION BY FAILING TO EXERCISE ITS DISCRETION DURING RESENTENCING ON REMAND.	4
D. CONCLUSION.....	7

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES	
<i>State v. Garcia-Martinez</i> , 88 Wn. App. 322, 944 P.2d 1104 (1997).....	5
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005)	6, 7
<i>State v. McFarland</i> , 189 Wn.2d 47, 399 P.3d 1106 (2017)	5, 6, 7
<i>State v. Shelley</i> , 3 Wn.App.2d 196, 414 P.3d 1153 (2018).....	3
<i>State v. Toney</i> , 149 Wn. App. 787, 205 P.3d 944 (2009).....	4
RULES, STATUTES, AND OTHERS	
RCW 9.94A.545.....	5

A. ASSIGNMENT OF ERROR

The trial court abused its discretion when it failed to recognize its discretion to deviate from the original sentence imposed after trial when that sentence had been reversed on direct appeal.

Issue Presented on Appeal

Did the trial court abuse its discretion when it failed to recognize its discretion to deviate from the sentence originally imposed after trial and that sentence had been reversed on direct appeal?

B. STATEMENT OF THE CASE

The state charged Aron Shelley with two counts of Assault in the Second Degree-Domestic Violence, one count of Assault of a Child in the Second Degree-Domestic Violence, one count of Felony Harassment-Domestic Violence, and four counts of Violation of a No-Contact Order-Domestic Violence on June 24, 2015. CP 8-9. Mr. Shelley proceeded to a jury trial where he was found guilty of one count of Assault in the Second Degree, Assault of a Child in the Second Degree, Felony Harassment, and two counts of Violating a No-Contact Order. CP 161-177. The jury returned

special verdicts finding that all Mr. Shelley's crimes were committed against family or household members and that he was armed with a deadly weapon at the time he committed the assault charged in Count 1. CP 161-173. The jury acquitted Mr. Shelley of the second count of Assault in the Second Degree and two counts of Violating a No-Contact Order. CP 164, 174-77.

At Mr. Shelley's original sentencing, the state and trial court calculated his offender score to be 9 on all counts. CP 322. The state requested a sentence at the high-end of the standard range while Mr. Shelley requested an exceptional sentence downward based on his well-documented history of mental health diagnoses and the diminished capacity defense he presented at trial. CP 268, 280. The trial court imposed a high-end, standard range sentence of 120 months. CP 323. Mr. Shelley appealed his conviction and sentence. CP 289.

In a published opinion, the Court of Appeals affirmed Mr. Shelley's convictions but held that the domestic violence special verdicts related to the Assault of a Child and Felony Harassment counts were invalid as a matter of law because Mr. Shelley did not have a biological or legal parent-child relationship with the victim.

State v. Shelley, 3 Wn.App.2d 196, 200-01, 414 P.3d 1153 (2018). The Court of Appeals vacated these special verdicts and remanded the case for resentencing with a corrected offender score on Counts 1, 3, and 4. *Shelley*, 3 Wn.App.2d at 201.

The invalidation of the special verdicts resulted in Mr. Shelley's offender score being calculated at 8 for Count 1, 6 for Count 3, and 5 for Count 4. CP 369. These adjustments lowered Mr. Shelley's sentencing range to 89-114 months because of a possible high-end sentence of 102 months on Count 3 and the 12-month deadly weapon enhancement on Count 1 that must be imposed consecutive to any other sentence. CP 370. At resentencing the state again requested a sentence at the high-end of the standard range and asked the trial court to impose 114 months. CP 358.

Mr. Shelley again requested an exceptional sentence downward. CP 341. The trial court did not consider Mr. Shelley's request and instead adopted the state's recommendation of 114 months so as to not "second-guess" the original sentence. CP 370; 8/9/18 RP 13. Mr. Shelley filed a timely notice of appeal. CP 384.

C. ARGUMENT

THE TRIAL COURT
ABUSED DISCRETION BY FAILING TO
EXERCISE ITS DISCRETION DURING
RESENTENCING ON REMAND.

The sentencing court abused its discretion when it refused to exercise its discretion to consider an exceptional downward sentence for Mr. Shelley.

When an appellate court remands a case for a full resentencing hearing, the trial court has broad discretion to sentence the defendant within the appellate court's mandate. *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). The Court of Appeals remanded Mr. Shelley's case for a full resentencing, accordingly, Mr. Shelley may raise his sentencing issue in this case. *Toney*, 149 Wn. App. at 792.

"A discretionary sentence within the standard range is reviewable in "circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. McFarland*, 189 Wn.2d 47, 56-58, 399 P.3d 1106 (2017) (*internal citation omitted*) (*quoting State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). In other words, a

trial court abuses its discretion when it fails to recognize its discretion at sentencing. *McFarland*, 189 Wn.2d at 56-58.

In *McFarland*, the state supreme court remanded for a new sentencing hearing where defense counsel expressed concern for the harshness of a multiple firearm enhancements but did not request an exceptional downward sentence, even though the court had discretion to do so under RCW 9.94A.545. *McFarland*, 189 Wn.2d at 57-58. The court held that counsel was ineffective because it did not provide argument for the court to exercise discretion and it was possible the court would have imposed an exceptional sentence had counsel raised this argument. *Id.*

Here, although Mr. Shelley did request an exceptional sentence, the reasoning of *McFarland* applies because the underlying basis for the decision turned on the court's failure to exercise discretion, albeit due to counsel's deficient performance. The ruling in *McFarland* requires a court to exercise discretion when such discretion is legally required. In resentencing *McFarland* and Mr. Shelley, the courts were required to exercise discretion and failed to do so. *McFarland*, 189 Wn.2d at 56-58.

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

like *McFarland* also applies to the instant case to provide resentencing relief for Mr. Shelley. In *Grayson*, the supreme court reversed the sentencing court holding that it abused its discretion by categorically refusing to consider an exceptional sentence below the standard range under any circumstances. *Grayson*, 154 Wn.2d at 342.

The sentencing court committed the same error in Mr. Shelley's case. Mr. Shelley requested an exceptional sentence downward at his resentencing hearing. CP 340-41; 8/9/18 RP 7-10. The trial court did not consider this request in accordance with *McFarland* and *Grayson* which requires a sentencing court to exercise its discretion during resentencing when the court of appeals has remanded for a full resentencing. *McFarland*, 189 Wn.2d at 56-58; *Grayson*, 154 Wn.2d at 342.

Instead, the sentencing refused to consider his request at all and simply deferred to the determination made by a different judge at Mr. Shelley's original sentencing hearing:

[TRIAL COURT]: Now, with respect to the request made by the defense, the defense has made a request for an exceptional downward sentence for several reasons. Of those reasons that the defense has cited, the Court notes both of those reasons were cited to the original sentencing judge and were rejected by that judge. In my view, the

appropriate role that I sit here today, it would be inappropriate to second-guess those decisions. . . . I think the appropriate role for this court is to adopt what was done previously . . .”.

8/9/18 RP 12-14.

From this passage, it is evident that the sentencing court mistakenly believed that its “role” in Mr. Shelley’s resentencing was limited to re-imposition of the prior sentence without consideration of Mr. Shelley’s request for an exceptional sentence and without the exercise of any independent discretion.

As in *McFarland* and *Grayson*, the sentencing court here committed reversible error by categorically refusing to exercise its discretion in favor of adopting the prior court’s sentence. Accordingly, this Court must reverse the sentence and remand for a new sentencing hearing before an independent judge. *McFarland*, 189 Wn.2d at 59; *Grayson*, 154 Wn.2d at 343.

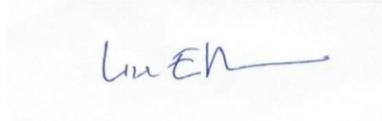
D. CONCLUSION

The trial court abused its discretion when it failed to recognize its discretion to deviate from Mr. Shelley’s original sentence by failing to consider Mr. Shelley’s request for an exceptional downward sentence. The record establishes the possibility that the trial court would have imposed a different

sentence had it properly recognized its discretion. Under the SRA and applicable case law, the trial court's abuse of discretion requires reversal of Mr. Shelley's sentence and a remand for resentencing.

DATED this 10th day of January 2019.

Respectfully submitted,

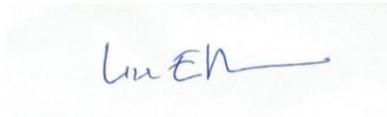


LISE ELLNER, WSBA No. 20955
Attorney for Appellant



SPENCER BABBIT, WSBA No. 51076
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Thurston County Prosecutor's Office paoappeals@co.thurson.wa.us and Aron Shelley/DOC#359941, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362a true copy of the document to which this certificate is affixed on January 10, 2019. Service was made by electronically to the prosecutor and Aron Shelley by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

January 10, 2019 - 10:28 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52260-8
Appellate Court Case Title: State of Washington, Respondent v. Aron D. Shelley, Appellant
Superior Court Case Number: 15-1-00582-4

The following documents have been uploaded:

- 522608_Briefs_20190110102631D2594437_8488.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Shelley AOB .pdf
- 522608_Other_Filings_20190110102631D2594437_7855.pdf
This File Contains:
Other Filings - Appearance
The Original File Name was Shelley Notice of Appearance.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- babbitts@seattleu.edu
- jacksoj@co.thurston.wa.us

Comments:

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net
Address:
PO BOX 2711
VASHON, WA, 98070-2711
Phone: 206-930-1090

Note: The Filing Id is 20190110102631D2594437