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Court of Appeals
Division II
State of Washington
5/13/2019 4:37 PM

NO. 52784-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

TERRY SHEPARD,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. INTRODUCTION 1

B. ASSIGNMENT OF ERROR 1

C. ISSUES PERTAINING TO THE ASSIGNMENT OF
ERROR 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 5

**The trial court lacked the authority to impose an
exceptional sentence based on aggravating factors the
legislature considered when it set the standard range for
Mr. Shepard’s convictions. 5**

1. The legislature considered the factors to the trial court
used to justify an exceptional sentence when it set the
standard range for Mr. Shepard’s charged offenses. 6

2. The facts of this case do not distinguish it from other
cases, barring it from imposing an exceptional sentence... 12

3. This matter should be remanded for a new sentencing
hearing, with instructions for resentencing within the
standard range..... 15

F. CONCLUSION 15

TABLE OF AUTHORITIES

United States Supreme Court

Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)..... 12

Washington Supreme Court

State v. Barnes, 117 Wn.2d 701, 818 P.2d 1088 (1991) 6

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987) 7

State v. Ferguson, 142 Wn.2d 631, 15 P.3d 1271 (2001) 6, 15

State v. Fisher, 108 Wn.2d 419, 739 P.2d 683 (1987) 12, 14

State v. Grewe, 117 Wn.2d 211, 813 P.2d 1238 (1991) 5, 11

State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)..... 12

State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986)..... 6

State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994).....
..... 9, 12

State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978) 7

Washington Court of Appeals

State v. France, 176 Wn. App. 463, 308 P.3d 812 (2013) 5

State v. Rotko, 116 Wn. App. 230, 67 P.3d 1098 (2003)..... 6

State v. Soderquist, 63 Wn. App. 144, 816 P.2d 1264 (1991).....
..... 6, 10, 11, 14

Statutes

House Bill 208, 43rd Legislature (1975) 9

House File, Attachment 2A (Model Penal Code) 9

RCW 9.94A.050	8
RCW 9.94A.507	9
RCW 9.94A.525	8
RCW 9.94A.533	9
RCW 9.94A.535	7
RCW 9.94A.585	5
RCW 9A.44.050	7, 14
RCW 9A.44.060	8
RCW 9A.44.100	7, 14
Senate Bill 2063, 42nd Legislature (1974)	9
Washington House Bill Analysis, 2007 Reg. Sess. H.B. 1097 (2007)	10

A. INTRODUCTION

When the legislature considers certain facts as implicit in the standard range for an offense, it is error for the court to impose an exceptional sentence based on those facts.

Terry Shepard's jury found the prosecution proved two aggravating factors, vulnerable victim and abuse of trust, when it found Mr. Shepard guilty of attempted rape in the second degree and indecent liberties. But because the legislature considered these factors when it determined the standard range for charged subsections of these offenses, the trial court was not authorized to use them to impose an exceptional sentence.

This error requires a new sentencing hearing, with an order that Mr. Shepard be sentenced within the standard range.

B. ASSIGNMENT OF ERROR

The court erred when it imposed an exceptional sentence based on factors the legislature considered when it set the standard range for Mr. Shepard's convictions.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

An exceptional sentence may not be imposed when it is based on factors the legislature considered when it set the standard range for an offense. Mr. Shepard was convicted of attempted rape in the second degree, when the essential elements of the offense were that the victim was a resident of a facility for mentally disordered persons Mr. Shepard had supervisory authority over or, in the alternative, that the victim was developmentally disabled and Mr. Shepard had supervisory authority over her. He was also convicted of two counts of indecent liberties, where the allegations were the victim was developmentally disabled and Mr. Shepard had supervisory authority over her. For all of these charges, the jury found the prosecution proved the aggravating factors of particular vulnerability and abuse of trust.

When determining the standard range for these offenses, as charged, the legislature considered the facts on which the jury's verdict rests. Because the legislature considered the aggravating factors when it set the standard

range, does the trial court's error in imposing an exceptional sentence require remand for resentencing within the standard range?

D. STATEMENT OF THE CASE

Terry Shepard worked as an attendant at Rainier School, which is a long-term home for developmentally delayed persons. RP 585. He was charged with sexually assaulting two residents. RP 438, CP 22-24. After trial, a jury found him guilty of attempted rape in the second degree and two counts of indecent liberties. RP 1389, CP 66-75. The jury also found the facts supported the aggravating factors of abuse of trust and that the victims were particularly vulnerable for all of the charges. *Id.*

Both of the women the prosecution accused Mr. Shepard of sexually assaulting were residents of Rainier School, in the cottage where Mr. Shepard worked. RP 438. The women had the intellectual capacity of young children. RP 781-82, 815. The first woman was also autistic and carried a diagnosis of bipolar disorder. RP 774. She had a limited

ability to communicate, with a vocabulary of only a few spoken words and a greater number of words she could use through a modified version of sign language. RP 931. The second woman could communicate verbally. RP 517. She had mobility issues, requiring a wheel chair and suffered from an anxiety disorder. RP 433, 944. Neither woman was capable of living on their own. RP 781, 815.

Mr. Shepard had no prior criminal history. CP 90-91. The standard range for his convictions was 109.5-145.5 months. CP 95. Mr. Shepard asked for a standard range sentence. RP 1430. He argued the court could not impose an exceptional sentence because the facts required to prove the crime were also required to prove the aggravating factors. RP 1432, 1438.

The court disagreed. It imposed an exceptional sentence of 295.5 months to life, ordering the sentences for the attempted rape and the two counts of indecent liberties to run consecutively. RP 1446, CP 98, 126. The court found the

aggravating factors authorized the exceptional sentence the court imposed. *Id.*

E. ARGUMENT

The trial court lacked the authority to impose an exceptional sentence based on aggravating factors the legislature considered when it set the standard range for Mr. Shepard's convictions.

This Court must reverse an exceptional sentence where it finds (1) under a clearly erroneous standard, insufficient evidence supports the reasons for imposing an exceptional sentence, (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range, or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient. RCW 9.94A.585(4); *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013). Because Mr. Shepard challenges the reasons given by the trial court to impose the exceptional sentence, a de novo standard applies. *State v. Grewe*, 117 Wn.2d 211, 215–16, 813 P.2d 1238 (1991).

“[F]actors inherent in the crime—inherent in the sense that they were necessarily considered by the Legislature [in

establishing the standard sentence range for the offense] and do not distinguish the defendant's behavior from that inherent in all crimes of that type—may not be relied upon to justify an exceptional sentence” *State v. Ferguson*, 142 Wn.2d 631, 647–48, 15 P.3d 1271 (2001). Here, the trial court imposed an exceptional sentence based on abuse of trust and victim vulnerability, factors already considered by the legislature when it determined the standard range for the charged offenses. *State v. Soderquist*, 63 Wn. App. 144, 148–49, 816 P.2d 1264 (1991). This error requires a new sentencing hearing.

- 1. The legislature considered the factors to the trial court used to justify an exceptional sentence when it set the standard range for Mr. Shepard's charged offenses.**

A court may not base an exceptional sentence on factors the legislature necessarily considered when setting the standard range for the offense. *State v. Rotko*, 116 Wn. App. 230, 243, 67 P.3d 1098 (2003) (citing *State v. Barnes*, 117 Wn.2d 701, 706, 818 P.2d 1088 (1991); *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986)). “A reason offered to

justify an exceptional sentence is sufficient only if it ‘take[s] into account factors other than those which are necessarily considered in computing the presumptive range for the offense.’” *State v. Dunaway*, 109 Wn.2d 207, 218, 743 P.2d 1237 (1987) (quoting *Nordby*, 106 Wn.2d at 518); *see also State v. Workman*, 90 Wn.2d 443, 454-55, 584 P.2d 382 (1978).

To elevate the allegations to rape in the second degree as charged in this case, the prosecution was required to prove the victim was a resident of a facility for mentally disordered persons or was a person with developmental disabilities whom Mr. Shepard had supervisory authority over. RCW 9A.44.050(e) and (c). Indecent liberties required similar proof, requiring the government to prove the victim was a developmentally disabled person whom Mr. Shepard had authority over. RCW 9A.44.100(1)(c).

The aggravating factors required proof of the same factors. RCW 9.94A.535(3)(b) permits a trial court to consider an exceptional sentence when the jury finds the “defendant

knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.” RCW 9.94A.535(3)(iv) authorizes an exceptional sentence when the jury finds the defendant “used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.”

For an offender with Mr. Shepard’s criminal history, elevating the charge from rape in the third degree to rape in the second degree substantially increases the standard range. For rape in the third degree, Mr. Shepard’s standard range with his offender score would have been 41-54 months. RCW 9A.44.060; RCW 9.94A.525. For rape in the second degree, the standard range is 146-194 months. RCW 9.94A.050; RCW 9.94A.525. The maximum sentence for rape in the third degree is 33% of the sentence a person can serve for a rape in the second degree. Rape in the second degree is also an indeterminate sentence, meaning that the standard range is only the minimum terms persons must serve before they are

eligible for release. RCW 9.94A.507(1). Because Mr. Shepard was convicted of an attempt, the standard range is three-quarters of the completed offense. RCW 9.94A.533(2).

In fact, Washington's Supreme Court has previously recognized the legislature considered these aggravating factors when it set the standard range for Mr. Shepard's offenses. *State v. Ortega-Martinez*, 124 Wn.2d 702, 710, 881 P.2d 231 (1994). For example, when the legislature considered which degree of rape such conduct should fall under, it declined to enact at least four measures that were less protective of vulnerable victims living in supervised homes when their caregivers sexually assaulted them. *Id.* (citing Senate Bill 2063, 42nd Legislature (1974); House Bill 208, 43rd Legislature (1975), House File, Attachment 2A (Model Penal Code)).

And when the legislature amended the statute to include persons who transport persons with developmental disabilities, it targeted the same aggravating factors at issue here, affirming its previous considerations. Washington

House Bill Analysis, 2007 Reg. Sess. H.B. 1097 (2007). In the report to the legislature, rape in the second degree and indecent liberties were amended

“to include the situation in which the perpetrator (a) has sexual intercourse with a frail elder, a *vulnerable adult*, or a person with a developmental disability and (b) was providing transportation, *within the course of his or her employment*, at the time of the offense.”

Id. (emphasis added).

This analysis has been affirmed by the Court of Appeals. In *State v. Soderquist*, this Court held that vulnerable victims and abuse of trust were contemplated when the legislature defined the two subsections of indecent liberties charged here, specifically (1) intercourse with a physically helpless person, and (2) intercourse with a developmentally disabled person where the perpetrator has supervisory authority over the victim. 63 Wn. App. at 148–49. But because Mr. Soderquist was convicted under the forcible compulsion subsection, an exceptional sentence was authorized in that case. *Id.*

This distinguishing factor between the *Soderquist* and Mr. Shepard's case are the subsections the prosecution charged Mr. Shepard with. Like this case, *Soderquist* involved a nurse who worked at Eastern State Hospital who was caught sexually assaulting a person who required total care because her extensive disabilities. 63 Wn. App. at 146. He was convicted of attempted rape in the second degree, along with findings that he violated a position of trust and that his victim was particularly vulnerable. *Id.* at 147. In authorizing an exceptional sentence in *Soderquist*, this Court recognized the legislature only considered abuse of trust and vulnerability of the victim when it defined the subsections under which Mr. Shepard was prosecuted. *Id.* at 151; *see also Grewe*, 117 Wn.2d at 215.

Because the jury found Mr. Shepard guilty under the subsections of both offenses were the legislature contemplated trust and vulnerability, an exceptional sentence is not authorized. *Soderquist*, 63 Wn. App. at 151. The legislature considered the particular vulnerability of developmentally

delayed persons living in mental health facilities who lived under the authority of their caregivers when it set the standard range for offenders convicted of subsections (e) and (c) of rape in the second degree and of indecent liberties.

Ortega-Martinez, 124 Wn.2d at 710. As such, the court erred when it imposed an exceptional sentence in this case.

2. The facts of this case do not distinguish it from other cases, barring it from imposing an exceptional sentence.

There may sometimes be circumstances where a court may impose an exceptional sentence when the aggravating factors distinguish the particular offense from others of the same type. *State v. Fisher*, 108 Wn.2d 419, 423–24, 739 P.2d 683 (1987), *overruled in part on other grounds by State v. Hughes*, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 216, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). This Court has also held that there may be circumstances where abuse of trust can be distinguished from a position of authority. *State v. Marcum*, 61 Wn. App. 611, 613, 811 P.2d 963 (1991). This is not the case here.

The prosecution charged Mr. Shepard with two alternative counts of rape in the second degree. CP 22-23. The first alternative charged that the first victim was a resident of a facility for mentally disordered persons whom Mr. Shepard had supervisory authority over. CP 23. The second alternative charged that the victim was developmentally disabled and the perpetrator had supervisory authority over the victim. *Id.* After the court consolidated the charges into one count, the jury found Mr. Shepard guilty of the lesser-included offense of attempted rape in the second degree. CP 66-67. Likewise, the two counts of indecent liberties charged that the victim was developmentally disabled and that Mr. Shepard had supervisory authority over the victim. CP 23-24. Mr. Shepard was convicted of both of these counts.

All three of Mr. Shepard's convictions included the same two aggravators: that Mr. Shepard used his position of trust, confidence, or fiduciary responsibility to facilitate the crime and that Mr. Shepard knew that the victims were particularly vulnerable or incapable of resistance. CP 22-24.

The jury found the evidence supported both of these aggravators.

These were not exceptional circumstances. Certainly both of the women suffered from developmental disabilities that made them vulnerable. Mr. Shepard, as the night attendant, had supervisory authority over them. RP 438. It was, however, only possible to prove the charged offenses by establishing the aggravators. *See* RCW 9A.44.050(e) and (c); RCW 9A.44.100(1)(c). 525(3)(b). The women's vulnerability was because of their developmental disabilities. Mr. Shepard's position of trust depended on his supervisory authority. These facts cannot be separated from each other or used to justify an exceptional sentence. *Soderquist*, 63 Wn. App. at 151.

Because the facts of this case do not distinguish themselves from other cases of the same type, this Court should hold that the reasons given by the trial court to exceed the standard range do not justify an exceptional sentence.

Fisher, 108 Wn.2d at 423-24; *Soderquist*, 63 Wn. App. at 151.

Remand for a new sentencing hearing is required. *Fisher*, 108 Wn.2d at 423-24.

- 3. This matter should be remanded for a new sentencing hearing, with instructions for resentencing within the standard range.**

When an exceptional sentence is based on improper factors, the matter must be remanded for resentencing within the standard range. *Ferguson*, 142 Wn.2d at 649. Because the court imposed an exceptional sentence based on factors necessarily considered when it set the standard range for Mr. Shepard's convictions, resentencing is required.

F. CONCLUSION

Mr. Shepard asks this Court to order resentencing within the standard range.

DATED this 9th day of May, 2019.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 52784-7-II
)	
TERRY SHEPARD,)	
)	
Appellant.)	

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