

FILED
Court of Appeals
Division II
State of Washington
8/19/2019 11:19 AM

NO. 52812-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

SHARON CARSON,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Stephen E. Brown, Judge

BRIEF OF APPELLANT

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

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

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
Issues Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	2
Substantive Facts.....	2
Procedural Facts.....	2
C. ARGUMENT.....	4
1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO APPLY THE PRESUMPTION CONTAINED IN RCW 9.94A.589(1)(a) FOR RUNNING THE BUS STOP SENTENCING ENHANCEMENTS CONCURRENT TO EACH OTHER	4
2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED A \$100 DNA FEE AS PART OF MS. CARSON'S SENTENCE WHEN DNA WAS COLLECTED FOR A PREVIOUS FELONY AND MS. CARSON IS INDIGENT	7
D. CONCLUSION.....	8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of VanDelft,
158 Wn.2d 731, 147 P.3d 573 (2006) 5

State v. Conover,
183 Wn.2d 706, 355 P.3d 1093 (2015) 4, 6

State v. Crumpton,
181 Wn.2d 252, 332 P.3d 448 (2014) 6

State v. Ramirez,
191 Wn.2d 732, 426 P.3d 714 (2018) 7, 8

State v. Sisouvanh,
175 Wn.2d 607, 290 P.3d 942 (2012) 6

State v. Vance,
168 Wn.2d 754, 230 P.3d 1055 (2010) 5

RULES, STATUTES, AND OTHERS

RCW 10.10.160 8

RCW 43.43.7541 7

RCW 9.94A.533 4

RCW 9.94A.535 4, 5, 6

RCW 9.94A.589 1, 4, 6

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it imposed the school bus stop sentencing enhancements consecutive to each other and failed to apply the presumption contained in RCW 9.94A.589(1)(a), which directs trial courts to run such enhancements concurrent to each other unless an exceptional sentence is ordered.

2. The trial court abused its discretion by imposing a DNA collection fee as part of Ms. Carson's sentence when she has prior felony convictions and the trial court found her indigent at sentencing.

Issues Presented on Appeal

1. Did the trial court abuse its discretion when it imposed the school bus stop sentencing enhancements consecutive to each other and failed to apply the presumption contained in RCW 9.94A.589(1)(a), which directs trial courts to run such enhancements concurrent with each other unless an exceptional sentence is ordered?

2. Did the trial court abuse its discretion when it imposed the DNA collection fee as part of Ms. Carson's sentence

when such a fee was previously collected for prior felony convictions, and Ms. Carson is indigent?

B. STATEMENT OF THE CASE

Substantive Facts

The Aberdeen Police Department staged three controlled drug buys targeting Sharon Carson in August of 2018. RP 28, 174. In all three of the controlled buys, detectives used a criminal informant (CI) to purchase methamphetamine from a residence Ms. Carson owns located at 820 West Cushing Street in Aberdeen. RP 111-12, 174. There is a school bus stop located at 821 West Cushing Street, which is across the street from the targeted residence. RP 170.

Procedural Facts

The state charged Ms. Carson with three counts of delivering a controlled substance (methamphetamine) and one count of unlawful use of a building for drug purposes. CP 124-26. The three counts of delivering methamphetamine included allegations that the offenses took place within 1000 feet of a school bus stop. CP 124-26. Ms. Carson elected to proceed to a jury trial. 11/2/18 RP 5.

The jury found Ms. Carson guilty as charged and answered

“yes” with respect to all three special verdicts regarding the school bus stop enhancement. RP 325; CP 168-74. At sentencing, the state argued for a high-end sentence and for the trial court to impose the school bus stop enhancements consecutive to each other:

[PROSECUTOR]: That right there, school zone enhancement, there’s a 24-month enhancement, those are run consecutive to each other and to all other matters. So right off the bat that’s 72 months prison, that just – must be imposed in addition to anything in the standard range.

RP 334. Ms. Carson objected and argued for a prison-based Drug Offender Sentencing Alternative (DOSA) sentence. RP 338-41. The trial court adopted the state’s recommendation by imposing the enhancements consecutive to each other and ordering 120 months of confinement, 72 of which resulted from the consecutive sentencing enhancements. RP 345; CP 215. The trial court also found Ms. Carson indigent and imposed a total of \$600 in legal financial obligations (LFOs), including a \$100 DNA collection fee. CP 214, 217. Ms. Carson filed a timely notice of appeal. CP 226-27.

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO APPLY THE PRESUMPTION CONTAINED IN RCW 9.94A.589(1)(a) FOR RUNNING THE BUS STOP SENTENCING ENHANCEMENTS CONCURRENT TO EACH OTHER

Contrary to the state's assertions, at Ms. Carson's sentencing, RCW 9.94A.533(6) does not require the trial court to run the school bus stop enhancements consecutive to each other. *State v. Conover*, 183 Wn.2d 706, 717, 355 P.3d 1093 (2015). "[I]nstead, when two or more offenses each carry school bus route stop enhancements, the determination of whether those enhancements are to run concurrently or consecutively is also determined by resort to the rules in RCW 9.94A.589(1)(a)." *Conover*, 183 Wn.2d at 708.

RCW 9.94A.589(1)(a) provides that "[s]entences imposed under this subsection *shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.*" RCW 9.94A.589(1)(a) (emphasis added). This portion of the statute creates a presumption of concurrent sentences. *In re Pers. Restraint of VanDelft*, 158 Wn.2d

731, 738, 147 P.3d 573 (2006), *overruled on other grounds as recognized in State v. Vance*, 168 Wn.2d 754, 762-63, 230 P.3d 1055 (2010). “A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section.” RCW 9.94A.535.

Ms. Carson’s judgment and sentence contains a place for the trial court to indicate it intends to impose an exceptional sentence and indicate a finding of aggravating factors, but that space is left blank. CP 213-14. Additionally, the trial court did not enter written findings of fact and conclusions of law, which are required to impose an exceptional sentence under RCW 9.94A.535. Finally, there is no discussion of an exceptional sentence upwards in the record:

[TRIAL COURT]: So counts 1, 2, and 3, I’m sentence – sentencing you to 48 months. And on count 4, I’m sentencing you to 20 – or excuse me, 18 months. There’s 24 months enhancement, consecutive, on counts 1, 2, and 3, followed by 12 months community custody.

RP 345. The record shows that the trial court ordered the sentencing enhancements to be served consecutive to each other without realizing that doing so meant it was imposing an

exceptional sentence upwards.

A trial court abuses its discretion when it applies an incorrect legal standard. *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). The trial court applies an incorrect legal standard when it fails to apply a presumption required by law. *State v. Crumpton*, 181 Wn.2d 252, 263-64, 332 P.3d 448 (2014). Here, the trial court failed to realize that *Conover* and RCW 9.94A.589(1)(a) required it to apply a presumption that the school bus stop enhancements are to run concurrent to each other. Instead, it adopted the state's erroneous assertion that those enhancements are presumed to run consecutive to each other. RP 334, 345. As a result, it unknowingly imposed an exceptional sentence upwards without making any of the findings required to impose such a sentence under RCW 9.94A.589 and RCW 9.94A.535.

In sum, unwittingly, the trial court applied an incorrect legal standard when it presumed that the school bus stop sentencing enhancements were to run consecutive to each other. The correct legal standard is to presume the exact opposite: the enhancements should run concurrent to each other in the absence of aggravating factors justifying an exceptional sentence under RCW 9.94A.535.

The trial court abused its discretion when it sentenced Ms. Carson. Ms. Carson respectfully requests that this court vacate her sentence and remand her case to the trial court for resentencing with instructions to apply the proper presumption regarding the sentencing enhancements.

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED A \$100 DNA FEE AS PART OF MS. CARSON'S SENTENCE WHEN DNA WAS COLLECTED FOR A PREVIOUS FELONY AND MS. CARSON IS INDIGENT

RCW 43.43.7541 imposes a \$100 DNA collection fee on defendants convicted of a felony or certain misdemeanors. RCW 43.43.7541. The Washington State Legislature amended this statute effective June 7, 2018 to include language specifying that this fee may only be collected from a defendant once. *State v. Ramirez*, 191 Wn.2d 732, 738, 426 P.3d 714 (2018).

Following *Ramirez*, the DNA fee is treated as a discretionary LFO where the state previously collected an indigent defendant's DNA. RCW 43.43.7541; *Ramirez*, 191 Wn.2d at 747. Subsequently, a trial court may not impose discretionary LFOs on an indigent defendant where the state previously collected DNA. RCW

10.10.160(3); *Ramirez*, 191 Wn.2d at 747.

Here, the trial court impermissibly imposed a second \$100 DNA collection fee as part of Ms. Carson's sentence despite finding her indigent at sentencing. CP 214, 217. This was an abuse of discretion and contrary to law. Under *Ramirez*, this fee must be vacated. *Ramirez*, 191 Wn.2d at 747.

Ms. Carson respectfully requests that this court remand her case to the trial court with instructions to strike the DNA fee from her judgment and sentence.

D. CONCLUSION

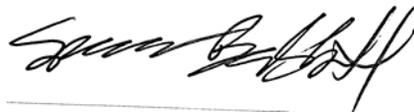
Ms. Carson respectfully requests this court vacate her exceptional sentence and remand for re-sentencing. Ms. Carson also requests this court remand for sentencing to vacate the \$100 DNA collection fee.

DATED this 19th day of August 2019.

Respectfully submitted,



LISE ELLNER, WSBA No. 20955
Attorney for Appellant



SPENCER BABBITT, WSBA No. 51076
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor's Office appeals@co.grays-harbor.wa.us and Sharon Carson/DOC#267469, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332 a true copy of the document to which this certificate is affixed on August 19, 2019. Service was made by electronically to the prosecutor and Sharon Carson by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

August 19, 2019 - 11:19 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52812-6
Appellate Court Case Title: State of Washington, Respondent v Sharon Elaine Carson, Appellant
Superior Court Case Number: 18-1-00500-3

The following documents have been uploaded:

- 528126_Briefs_20190819111802D2310540_5664.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Carson AOB .pdf
- 528126_Other_20190819111802D2310540_8769.pdf
This File Contains:
Other - request for transcripts
The Original File Name was Carson Request for Transcripts.pdf
- 528126_Other_Filings_20190819111802D2310540_2019.pdf
This File Contains:
Other Filings - Appearance
The Original File Name was Carson Notice of Appearance.pdf

A copy of the uploaded files will be sent to:

- appeals@co.grays-harbor.wa.us
- babbitts@seattleu.edu
- ksvoboda@co.grays-harbor.wa.us
- rtrick@co.grays-harbor.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 20190819111802D2310540