

FILED
Court of Appeals
Division II
State of Washington
10/28/2019 3:31 PM

NO. 52812-6-II

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

STATE OF WASHINGTON,
Respondent,

v.

SHARON ELAINE CARSON,
Appellant.

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

THE HONORABLE STEPHEN BROWN, JUDGE

BRIEF OF RESPONDENT

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ADDITIONAL PROCEDURAL AND SUBSTANTIVE FACTS

The Respondent adopts the Appellant's recital of substantive and procedural facts, and offers the Court the following additional facts to address the Appellant's additional grounds.

The State charged the Appellant on September 5, 2018, by Information with one count of Possession of Heroin. CP 1. The charge stemmed from what officers found, observed, and seized during the execution of a search warrant by the Grays Harbor Drug Task Force (DTF) at the Appellant's residence the day before. The initial Information covered a syringe detectives found in the Defendant's bedroom containing about 4 mg of a brownish liquid consistent with heroin. CP 3-5. The State amended the Information five days later at Arraignment to add three counts of Delivery of a Controlled Substances which were made to a confidential informant during the course of the DTF's investigation.

A plea offer was made, whereby the Defendant could plead guilty to one count of Delivery of Heroin with an agreed recommendation of 14 months in jail, but if the matter proceeded to trial the State would add the felony of Unlawful Use of a Building for Drug Purposes, and allege school bus stop enhancements on each delivery count. CP 29. That plea

offer was rejected by the Appellant and, as the State had provided notice, it entered a third Amended Information. RP 3-6, CP 41-47.

RESTATEMENT OF THE ISSUES

1. Was the Court aware of its discretion to run three school bus stop enhancements on three counts of Delivery of a Controlled Substance consecutive or concurrent, and did its decision to run those enhancements consecutive violate the provisions of the Sentencing Reform Act?
2. Did the Court err in imposing a \$100 DNA collection fee in the absence of any indication that the Appellant's DNA had been collected by the State pursuant to a previous felony conviction?

ARGUMENT

The Court Knew of its Discretion to Impose the School Enhancements Consecutive or Concurrent

The Appellant suggests the trial court was misled by the State at sentencing when the prosecutor advised the court that the three 24-month enhancements must be run consecutive, adding 72 months to the standard range sentence. RP 334. Even if the State did incorrectly give the Court the impression that the School Bus Stop enhancements must be imposed consecutive to each other, defense counsel corrected the misimpression by directing the court's attention to the correct reading of the statute. Counsel directed the Court to section 2 of RCW 9.94A.589, and said "any sentence applied by this Court on the enhancement for Counts 1, 2 and 3 could be and should be served concurrently, rather than consecutively." RP 341; RCW 9.94A.589.

The statute providing the 24-month enhancement at issue reads:

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW ... if the offense was [committed within 1,000 feet of a school bus stop] ... All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 9.94A.533(6).

A reasonable reading of this statute shows that the sentencing enhancements should be consecutive—each time RCW 69.50 is violated next to a school bus stop, the offender should spend two years in prison. But, the Legislature did not write subsection (6) to be as obvious in that regard as subsection (3) regarding firearm enhancements, which reads that the enhancements there “shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.” RCW 9.94A.533(3)(e).

The matter has been apparently been resolved in *Conover*, where the Supreme Court held that, without the explicit language included in the firearm enhancement subsection, the school zone enhancements in RCW 9.94A.533(6) “does not require trial courts to run school bus route stop enhancements on different counts consecutively to each other.” *State v. Conover*, 183 Wn.2d 706, 708, 355 P.3d 1093 (2015). Instead, whether those enhancements are served concurrently or consecutively is determined by turning to RCW 9.94A.589. *Id.* Sentencing courts are directed that “sentences imposed under this subsection shall be served concurrently,” and that “Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.” RCW 9.94A.589(1)(a).

The Court's Sentence Serves the Purpose of the Sentencing Reform Act

The opening sentence of RCW 9.94A.535 provides that “The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. The purpose of the Sentencing Reform Act “is to provide structure for the sentencing of felony offenders, while maintaining judicial discretion in sentencing.” *State v. Tili*, 148 Wn.2d 350, 368, 60 P.3d 1192, 1201 (2003), *interpreting* RCW 9.94A.010.

In reviewing a sentence, such as this which the Appellant labels as exceptional, the reviewing court uses a three-pronged test:

- (1) Are the reasons supported by the record under the clearly erroneous standard of review?
- (2) Do those reasons justify a departure from the standard range as a matter of law? And
- (3) was the sentence imposed clearly too excessive or lenient under the abuse of discretion standard of review?

State v. Davis, 146 Wn. App. 714, 720, 192 P.3d 29, 31 (2008).

To reverse a sentence outside the standard sentence range, the reviewing court must find either no factual basis, or no equitable basis for the sentence. A sentence can be reversed either if “the reasons supplied by the sentencing court are not supported by the record ... or that the sentence

imposed was clearly excessive or clearly too lenient.” RCW 9.94A.585(4).

The sentencing hearing in this case demonstrates that the court gave Mrs. Carson’s case due consideration. At the sentencing hearing, the prosecutor informed the court that the Defendant made a phone call from jail shortly after a jury convicted her wherein she asked a family member to post on social media the identity of the confidential informant used by the DTF in the case. RP 336-37. Defense counsel advocated for an exceptional downward, but in the end, the trial court found "There's no reason for the Court to mitigate anything under the circumstances.” RP 347. In rendering the sentence, the trial court referenced “a really good potential for community deterrent.” RP 342. Judge Brown said “People in the community know who you are and what you do. All right. And they're going to know - just like you put out on Facebook [the informant’s identity], they're going to know what your sentence is and they're going to know [what happens] when you make choices like you do.” Id.

Judge Brown’s sentence meets the purpose of the Sentencing Reform Act. His sentence “Promote[s] respect for the law by providing punishment which is just; [and is] commensurate with the punishment imposed on others committing similar offenses.” RCW 9.94A.010. This

is evidenced by his statement that “they’re going to know [what happens] when you make choices like you do.” RP 342.

The sentence is appropriate given the facts before the court, and are in keeping with the intent of the Sentencing Reform Act. The basis is not clearly erroneous given the record, and the behavior of the Appellant, detailed by Judge Brown, warrants the sentence.

The Imposition of the \$100 DNA Fee is Proper

Appellant argues that the imposition of the \$100 DNA collection fee, required under RCW 43.43.7541, was improper. The Appellant’s reliance on *Ramirez* to support the assertion that the DNA fee specifically was in error is misplaced. *Ramirez* addressed the adequacy of an individualized inquiry into a defendant’s ability to play legal financial obligations (LFOs), and it held that the statutory changes to RCW 10.01.160 apply prospectively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). In this case, the trial court did not conduct an individualized inquiry into the Appellant’s ability to pay, but one was not necessary as no discretionary LFOs were imposed.

The DNA collection fee, in this case, is not discretionary. The statute regarding DNA collection following felony convictions states that each sentence “must include a fee of one hundred dollars unless the state

has previously collected the offender's DNA as a result of a prior conviction.” RCW 43.43.7541. Ms. Carson’s last felony conviction occurred in 1998. The statute in question did not exist in 1998. There is no evidence that the State previously collected the Appellant’s DNA as part of any previous sentence. Thus, the imposition of the \$100 is appropriate in this case.

Appellant’s Additional Grounds

Appellant’s first and sixth grounds regarding her time for trial are without merit. A defendant's constitutional right to a timely trial is not synonymous with the procedural right to a trial within specified timeframes under CrR 3.3. *State v. White*, 94 Wn.2d 498, 501, 617 P.2d 998 (1980). There is no constitutional mandate that a trial be held within 60 days of arraignment when in custody, and there are many exceptions to that general rule. *State v. Terrovona*, 105 Wn.2d 632, 651, 716 P.2d 295 (1986). In the Appellant’s case, her trial was held within the requirements of CrR 3.3, in that it occurred within 60 days of a legitimate commencement date, even if not within 60 days of her original arraignment.

On October 1, the Appellant’s first court-appointed attorney, Michael Nagle, moved to withdraw/disqualify himself, citing a conflict of

interest. CP 13. The court accepted the disqualification and appointed a new attorney, Morgan Lake. CP 12. That date constitutes a new commencement date under the court rules. CrR 3.3(c)(2)(vii). The 60th day from October 1 would be November 29. Thus, the Appellant's trial beginning on November 27 was within the procedural requirements of CrR 3.3.

Appellant's second and third grounds regarding probable cause to support the charges are without merit. The State initially charged the Appellant with Possession of Heroin. CP 1. To support the charge, the Deputy Prosecuting Attorney submitted a sworn declaration asserting probable cause for the offense based on the reports from the DTF from its search of the Defendant's residence. CP 3–5. That declaration provided sufficient facts to establish probable cause relying, in part, on the DTF detectives' training and experience. The State was granted leave to amend the Information on September 10. CP 7–9. Ultimately the count of Possession of Heroin regarding the heroin in the syringe of which the Appellant focuses was not pursued at trial. The DTF's failure to retain the brownish liquid does not negate the initial probable cause.

Ethically, a prosecutor must have probable cause to file an Information. RPC 3.8(a). But, a determination of probable cause

independent of the prosecutor's is not required. *State v. Jefferson*, 79 Wn.2d 345, 347, 485 P.2d 77, 78 (1971).

The Appellant's fourth and fifth grounds, the right to have a preliminary hearing to determine whether probable cause exists, are without merit. A defendant simply does not have that right. "This court has consistently and uniformly held that a criminal defendant is not constitutionally entitled to a preliminary hearing ... Additionally, criminal defendants have no right to a preliminary hearing under the federal constitution." *Id.*, at 348.

The Appellant's seventh ground is without merit. The State did not use any statements made by the Appellant in the case in chief. Thus, CrR 3.5 is not applicable and no hearing is required. CrR 3.5(a).

The Appellant's eighth ground is without merit. The record does not contain any indication that the Appellant was treated unfairly, or that she received an unfair trial.

The Appellant's ninth ground is without merit. In the statement of additional grounds, the Appellant discusses an attorney/client meeting, but does not claim any error or provide any grounds for remedy. RAP 16.4(c).

CONCLUSION

The sentencing court knew of the discretion to sentence the Appellant with the three school bus zone enhancements either consecutive or concurrently, and chose to run the school bus stop enhancements consecutive. That sentence is in keeping with the purposes of the Sentencing Reform Act. The State respectfully requests the sentence be affirmed.

The Appellant's additional grounds have no merit as the Appellant has failed to demonstrate any error or facts to support the claimed errors. The State respectfully requests this court affirm the Appellant's convictions.

DATED this _____ day of October, 2019.

Respectfully Submitted,

BY: _____


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RJT / rjt

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October 28, 2019 - 3:31 PM

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

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