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Division II
State of Washington
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NO. 53195-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER JAMES ROBERSON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Christopher Roberson experienced a post-traumatic stress disorder panic attack when the Pierce County Sheriff's Department officers startled him when they attempted to stop his vehicle for routine traffic violations. He fled from officers in his panic.

Mr. Roberson was charged with attempting to elude a police vehicle with an added an enhancement for endangering an officer in the pursuit. Mr. Roberson pleaded guilty after the prosecutor recommended a sentence of a year and a day.

At sentencing, the court stated it could not issue a sentence below the standard range. This was in error, as Mr. Roberson's mental health when he committed his crime could have been a basis for a sentence below the standard range. Because of the court's erroneous belief, the court failed to properly consider mitigating factors at sentencing.

This Court cannot know whether the sentencing court would have imposed a sentence below the standard range but for its error of law. Therefore, Mr. Roberson asks this Court to order

a new sentencing hearing, where his mental condition can be given proper consideration as a mitigating factor.

B. ASSIGNMENTS OF ERROR

1. The sentencing court abused its discretion by failing to recognize that it could consider Mr. Roberson's mental condition as a mitigating factor allowing a downward departure from the standard range.

2. The sentencing court abused its discretion by failing to recognize it was permitted to issue a downward departure from the non-mandatory endangerment sentence enhancement for the offense of attempting to elude a pursuing police vehicle.

C. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Sentencing courts have the discretion to depart below the standard range where there are mitigating factors that authorize a departure. A court abuses its discretion when it believes it is barred from considering proper mitigating factors as reasons for departure from the standard range. The sentencing court's statements indicated it believed it could not issue a downward departure based on Mr. Roberson's ongoing episode of mental illness during his attempt to elude officers,

which is a factor a court may consider as mitigation at sentencing. Did the court abuse its discretion when it imposed its sentence without considering this mitigating factor?

2. In a prosecution for attempting to elude a pursuing police vehicle, the State may bring a special allegation when another person was threatened with physical injury or harm during the attempt to flee. This allegation increases the sentence by a one year and a day. Unlike other sentence enhancements which the legislature defined as mandatory, this enhancement is not mandatory. Did the sentencing court abuse its discretion when it imposed the endangerment sentence enhancement on the mistaken belief the enhancement was mandatory?

D. STATEMENT OF THE CASE

Mr. Roberson was experiencing a PTSD episode while driving his vehicle when a Pierce County Sheriff officer attempted to pull him over for a routine traffic violation. CP 1; RP 11 (01-09-19), CP 42.

The police tried to pull Mr. Roberson's car over for running a stop sign and speeding. CP 14. According to the

passenger in the vehicle at the time, Mr. Roberson was in a highly agitated and panicked state before officers attempted to pull him over, which contributed to his erratic driving. CP 42.

The deputies used spike strips on an I-5 off-ramp to slow Mr. Roberson down. To get around the spikes, Mr. Robinson nearly hit the officer deploying them. CP 1. Mr. Roberson stopped when the police executed a PIT maneuver to disable his vehicle. CP 2. No one was injured during the pursuit. RP 5 (01-09-2019).

Mr. Roberson was initially charged with attempting to elude a police vehicle. The information also included an enhancement that would allow the court to impose an additional twelve months and one-day sentence. Mr. Roberson pled guilty to the eluding charge, with the prosecutor agreeing to dismiss other charges and recommend a sentence of twelve months and one day. CP 9.

At sentencing, the defense and the passenger in the car requested that the court issue an exceptional sentence below the year and a day endangerment enhancement agreed to in the plea bargain because Mr. Roberson's PTSD episode compromised

his ability to conform his conduct to the law. CP 52; RP 10 (01-09-2019.) The sentencing court's statements indicated it did not believe it could issue a downward departure from the sentence enhancement agreed upon in the plea bargain.

> THE COURT: You do understand the legislature decides the length of time. I'm not a knight-errant.

RP 7 (01-09-2019).

The sentencing court went on to acknowledge that Mr. Roberson's PTSD episode may have played a role in his flight from officers, but reiterated its belief that it could not issue a downward departure on that basis.

> THE COURT: I understand that there have been mental health issues that may have manifested themselves here. I also understand that there was an agreed upon sentence that has an enhancement, and that relates to both your decision and the State's decision about what kind of a deal they are going to offer and whether they are going to prosecute you and for what crime. I don't think it's my place here to jump into that at this late stage of the game.

RP 12 (01-09-2019).

As a result of the court's belief it could not consider an exceptional sentence below the range of the endangerment enhancement, Mr. Roberson was sentenced to twelve months

plus one day of confinement as agreed in the plea bargain. He now appeals his sentence and seeks remand for resentencing.

E. ARGUMENT

The sentencing court abused its discretion when it failed to recognize it could depart from the standard range based on Mr. Roberson's mental condition.

When the legislature enacted the Sentencing Reform Act, it sought to "structure, but . . . not eliminate, the discretionary decisions affecting sentences." RCW 9.94A.010. Among other goals identified in this section, the legislature sought to achieve three purposes: to ensure that sentences were proportionate to the seriousness of the offense and the defendant's criminal history, that sentencing promotes respect for the law through just punishment, and that sentences are commensurate with those imposed on others committing similar offenses. *Id.* To achieve these goals, the Sentencing Reform Act gave judges extensive discretion to impose sentences outside of the standard range if they found substantial or compelling reasons to distinguish a crime from others in the same category. RCW 9.94A.535.

Although the discretion left to sentencing courts to impose exceptional sentences under the Sentencing Reform Act is broad, they are still bound by the limits of the act and by due process considerations. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (quoting *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). A court abuses its discretion when it imposes a standard range sentence without properly considering mitigating factors that distinguish the crime sufficiently to justify imposing a sentence below the standard range. *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015). When the appellate court cannot be sure whether the lower court would have imposed the same sentence if it knew it could have imposed an exceptional sentence under the circumstances of the case, remand is the proper remedy. *In Re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007) (*quoting State v. McGill*, 112 Wn. App. 95, 100-01, 47 P.3d 173 (2002)).

1. *Mr. Roberson's mental health authorized an exceptional sentence below the standard range because it significantly impaired his ability to conform his conduct to the law.*

The Sentencing Reform Act contains a non-exhaustive list of mitigating factors that may justify an exceptional sentence below the standard range. RCW 9.94A.535(1). Included in this list is that an exceptional sentence may be imposed when:

> e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.

RCW 9.94A.535(1)(e).

A mental condition or illness not amounting to insanity or diminished capacity can provide the basis for an exceptional sentence where the record shows that the defendant possessed a mental condition which caused a significant impairment to their ability to appreciate the wrongfulness of their conduct or to conform their conduct to the law. *See State v. Rogers*, 112 Wn.2d 180, 185, 770 P.2d 180 (1989).

Post-Traumatic Stress Disorder is a traumatic stress disorder associated with, among other symptoms, intrusive episodes of intense or prolonged psychological distress or

marked physiological reactions at exposure to internal or external cues which resemble or symbolize a past traumatic event. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 271-272 (David J. Kupfer et al. eds., 5th ed. 2013). The DSM-5 defines numerous characteristics of a PTSD episode triggered by such cues, including marked alterations in arousal and reactivity, exhibited through an exaggerated startle response, hypervigilance, and/or reckless or self-destructive behavior among other potential symptoms. *Id.* This response can be triggered by events which would not trigger a similar response in those who do not suffer from PTSD, because the sufferer's condition has caused them to be particularly sensitive to cues that remind them of the traumatic events they have experienced. *Id.*

Mr. Roberson was evaluated by Optum Behavioral Health and received a referral for mental health treatment to Greater Lakes Behavioral Health Center in October because of his mental health issues. CP 57. His own statements and the order of indigency also corroborated his PTSD:

> Christopher Roberson: I've been going to Greater Lakes Comprehensive Mental Health. Even though I was denied mental health court or I was told that I could not have mental health court, I thought it would be more important for me to get my mental health in check because of the simple fact that I was having sort of an episode at the time that all this had happened.

RP 10 (01-09-2019); CP 23.

That Mr. Roberson's Post-Traumatic Stress Disorder substantially impaired to his ability to conform his conduct to the law was well established in the record. His passenger's written statements and testimony indicated Mr. Roberson had pre-existing mental health issues and was undergoing an episode symptomatic of PTSD prior to officer's attempts to pull him over.

> Leonard Hahn: I believe that this defendant has a diagnosis and has been a consumer of mental health services since he was a child. I believe that the erratic driving which led to the offense is related to [the] defendant's mental health condition and I recall the arresting officers making some comment about mental health issues as there was no real other explanation for the erratic driving.

CP 42.

Without knowing Mr. Roberson was experiencing symptoms of a PTSD episode when attempting to pull him over,

officers unwittingly escalated the severity of his episode by aggressively chasing him with multiple police vehicles. Mr. Roberson's brain was particularly vulnerable to startling or unexpected events in the midst of his triggered state, which compromised the rational processes that would have allowed him to pull over when signaled by deputies as the law required of him. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 272 (David J. Kupfer et al. eds., 5th ed. 2013.

The sentencing court acknowledged that Mr. Roberson's mental condition may have manifested itself in his attempt to flee from officers. RP 12 (01-09-2019.) However, the statements made by the court indicated it believed it was constrained by the legislature to issue a sentence within the standard range of the endangerment enhancement:

> THE COURT: You do understand **the legislature decides the length of time**. **I'm not a knight-errant**.

RP 12 (01-09-2019) (emphasis added).

Webster's New World Dictionary of the American Language defines a "knight-errant" as:

> 1. A medieval knight **wandering in search of adventures, especially ones which allow him to redress wrongs or show his prowess.**
>
> 2. A chivalrous or quixotic person

Webster's New World Dictionary of the American Language 779 (David B. Guralnik et al. eds. 2nd ed. 1976).

Contrary to the sentencing court's statements, the legislature did not remove all discretion from judges to issue sentences outside of the standard range. *See Grayson*, 154 Wn.2d at 342. In fact, the court was required to give proper consideration to all mitigating factors that might justify a downward departure before issuing its sentence. *See O'Dell*, 183 Wn.2d at 696.

The Supreme Court has determined that Post-Traumatic Stress Disorder can produce substantial impairment to the ability of a defendant to conform their conduct to the law even to the extent that it can be used as grounds for a self-defense claim. *See State v. Janes*, 121 Wn.2d 220, 231, 850 P.2d 495 (1993) (Trial court issued downward departure from the standard range for second-degree murder charge where defendant suffered substantial impairment from PTSD, battered

child syndrome as subset of PTSD could be used as grounds for self-defense). Because the court erroneously believed it could not issue a downward departure based on Mr. Roberson's PTSD episode at the time of his flight from officers, this Court must order re-sentencing so this proper mitigating factor can be weighed at sentencing. *Id.*

2. *The sentencing court misunderstood its authority to order an exceptional sentence because the endangerment enhancement for attempting to elude is not mandatory.*

The sentencing court further erred by failing to recognize it could issue a downward departure on the basis of Mr. Roberson's mental condition because the endangerment enhancement agreed to in the plea bargain was not mandatory. The legislature has defined a sentence enhancement for the charge of attempting to elude an officer:

> **RCW 9.94A.834 – Special allegation – Endangerment by eluding a police vehicle**
>
> (1) The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle under RCW 46.61.024, when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by

> the actions of the person committing the crime of attempting to elude a police vehicle.
>
> (2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer.

RCW 9.94A.834.

> **RCW 9.94A.533(11) Adjustments to standard sentences:**
>
> An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

RCW 9.94A.533(11).

Unlike other sentence adjustments in 9.94A.533, the legislature did not specify that confinement for the endangerment enhancement was mandatory. Conversely, the legislature did specify other sentence enhancements within RCW 9.94A.533 as mandatory, including enhancements for firearms, deadly weapons, impaired driving, and sexually motivated crimes. For example, RCW 9.94A.533(13) provides:

> An additional twelve months shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor

> or any drug as defined by RCW 46.61.520 or for vehicular assault committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.522, or for any felony driving under the influence (RCW 46.61.502(6)) or felony physical control under the influence (RCW 46.61.504(6)) for each child passenger under the age of sixteen who is an occupant in the defendant's vehicle. **These enhancements shall be mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions**

RCW 9.94A.533 (13) (emphasis added).

When drafting a statute, if the Legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred. *Matter of Sietz*, 124 Wn.2d 645, 651, 880 P.2d 34 (1994). Here, where the legislature willfully chose to exclude the mandatory and consecutive language for the endangerment enhancement while including such language for other enhancements, it is clear the legislature did not intend for this enhancement to carry a mandatory period of confinement or to run consecutively to the base sentence. *See State v. Conover*, 183 Wn.2d 706, 712-713, 355 P.3d 1093 (2015). Because RCW 9.94A.533(11) lacks the specific mandatory and consecutive language other sentence adjustments within the statute carry, this Court should hold

that the legislature intended RCW 9.94A.533(11) to be a non-mandatory and non-consecutive sentence enhancement.

3. The sentencing court abused its discretion by erroneously dismissing a proper basis for a downward departure from the recommended sentence

A plea bargain was reached in Mr. Roberson's case where the prosecutors agreed to recommend a "year and a day." CP 9. While this was a joint recommendation of the lawyers involved in this case, Mr. Roberson maintained his right to request a downward departure at sentencing and the sentencing court maintained its discretion to depart from the terms of the recommendation. RCW 9.94A.535.

Mitigating factors such as mental illness are often not given proper weight in plea negotiations which so often turn on the strength of the evidence and the likelihood of conviction. It is for this precise reason that the ultimate discretion over sentencing following an accepted plea bargain remains in the hands of a sentencing judge.

The sentencing court's comments during sentencing indicate it did not believe it could issue an exceptional sentence below the agreed enhancement period of confinement of a year

and one day, though it acknowledged Mr. Roberson's mental health issues playing a role in his crime. RP 7, 12 (01-09-2019).

A sentencing court must understand it maintains the discretion to issue a downward departure even from an agreed, recommended sentence. *See O'Dell*, 183 Wn.2d at 696. The discretion maintained by a sentencing judge to impose such exceptional sentences is critical to the integrity of plea negotiations and to prevent manifest injustice where the State possesses significant advantages in bargaining position that can fail to fully incorporate mitigating circumstances into a recommended sentence. *Id.* When the sentencing court indicated it did not believe it could deviate from the legislature's mandate in the enhancement provision because of Mr. Roberson's mental health crisis, it indicated that it had not considered the mitigating factors before imposing its sentence.

The goals of the Sentencing Reform Act to achieve proportionality, consistency, and to issue sentences commensurate with the severity of a crime are best served when a sentencing judge affords relief through downward departure in cases which are distinguished by proper mitigating factors.

State v. McFarland, 189 Wn.2d 47, 57, 399 P.3d 1106 (2017). Mr. Roberson was mentally unwell. His illness played a direct role in his conduct. A commensurate sentence would have been oriented towards treatment for his condition, despite the plea agreement's recommendation.

Both as a matter of justice and to promote public safety, it is in the best interests of society to address mental illness through means other than incarceration. Incarceration is not an environment favorable to the treatment of mentally ill persons and has been proven to worsen the mental health outcomes of many inmates, most of whom will someday be released back into society. Goncalves, Endrass, Rosseger & Dirkzwager, *A Longitudinal Study of Mental Health Symptoms in Young Prisoners: Exploring the Influence of Personal Factors and the Correctional Climate* BMC Psychiatry 16, Article 91 (2016).

The goals of our criminal justice system to punish and deter crime run contrary to the aims of treatment for mentally ill individuals, who often need a supportive and nurturing environment to succeed in treatment. It was for these very reasons that the legislature left the discretion to issue

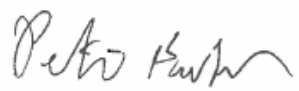
downward departures from the standard range to sentencing judges; judges who can more accurately distinguish those offenders who suffer from mental conditions that altered their conduct, and issue appropriately lesser sentences than the legislature can.

At the time of his sentencing, Mr. Roberson had already served 131 days. RP 5 (01-09-2019). No further incarceration was necessary to deliver a commensurate and appropriate sentence. A downward departure from the twelve months and a day agreed to in the plea bargain would have allowed Mr. Roberson the ability to seek treatment for his mental illness at Greater Lakes Mental Health, where he had already received a referral. CP 57. In light of these factors, a sentencing court that knew it could issue a downward departure on the basis of a mental condition not arising to insanity would have issued a lesser sentence. This Court should reverse and remand for resentencing.

F. CONCLUSION

This Court should reverse the sentence imposed by the sentencing court and remand the case for resentencing.

Dated This Day of September 18th, 2019



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 53195-0-II
v.	)	
	)	
CHRISTOPHER ROBERSON,	)	
	)	
Appellant.	)	

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