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Court of Appeals
Division II
State of Washington
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NO. 53210-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARK LUGLIANI,

Appellant.

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

The Honorable Bernard Veljacic, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ASSIGNMENT OF ERROR

The exceptional sentence is clearly excessive and must be reversed.

Issue pertaining to assignments of error

Appellant entered a guilty plea and stipulated to an aggravating factor. In ordering an exceptional sentence the court expressed its intent to impose less than the maximum sentence allowed in recognition of appellant's cooperation in resolving the case. Where the court nonetheless imposed the statutory maximum sentence, including confinement and community custody, is the sentence clearly excessive?

B. STATEMENT OF THE CASE

The Clark County Prosecuting Attorney charged appellant Mark Lugliani with third degree child molestation, alleging that he used a position of trust, confidence, or fiduciary responsibility in committing the offense. CP 1; RCW 9A.44.089; RCW 9.94A.535(3)(n). Lugliani entered a guilty plea to the offense and stipulated to the aggravating factor. CP 2-11; RP 6-12, 17-18.

With an offender score of 0, Lugliani's standard sentencing range was 6 to 12 months incarceration, plus 12 months of community custody, with a maximum sentence of 60 months. CP 14. He asked the court to

impose either a standard range sentence or a Special Sex Offender Sentencing Alternative. RP 22. The court declined and imposed the statutory maximum sentence consisting of 48 months confinement plus 12 months community custody, entering findings of fact and conclusions of law in support of the exceptional sentence. CP 16-17, 28. Lugliani filed this timely appeal. CP 31.

C. ARGUMENT

THE EXCEPTIONAL SENTENCE IS CLEARLY EXCESSIVE AND MUST BE REVERSED.

A sentencing court has discretion to impose a sentence outside the standard range when a statutory aggravating factor is established by stipulated facts, if the court finds substantial and compelling reasons to exceed the standard range. RCW 9.94A.535[1]; RCW 9.94A.537(3)[2]. While a standard range sentence may not be appealed, a sentence outside the standard range is subject to appeal. RCW 9.94A.585(2)[3]. An exceptional sentence must be reversed if the reviewing court finds that the sentence

[1] "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. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537."

[2] "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts."

[3] "A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the court of appeals in accordance with rules adopted by the supreme court."

imposed was clearly excessive. RCW 9.94A.585(4)(b)[4]. When the sentencing court's determination as to the length of sentence is based on untenable grounds or untenable reasons, the sentence is subject to reversal. *State v. Ritchie*, 126 Wn.2d 388, 392-96, 894 P.2d 1308 (1995).

At sentencing in this case, the defense argued against the State's request that the court impose the statutory maximum sentence, focusing on Lugliani's cooperation in resolving the case. RP 22. Counsel noted that Lugliani had taken responsibility for his actions from the start, he met with investigators, he voluntarily appeared in court, and he did not put the victim through an interview. RP 22-24. Instead, he candidly acknowledged the truth of the allegations and stipulated to the aggravating factor. RP 25-27. Counsel asked the court to impose a SSOSA, arguing that Lugliani was the ideal candidate for that sentencing alternative. RP 32-36.

The court found that, in light of the aggravator, it could not in good conscience order a SSOSA. RP 38-39. It stated that it would, however, acknowledge that Lugliani had taken responsibility for his action by not imposing the maximum sentence allowed by statute. RP 39-40.

[4] "(4) To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient."

Nonetheless, the court imposed a sentence of 48 months confinement and 12 months community custody. CP 16-17.

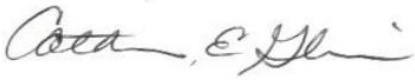
While the court stated its intention to impose less than the maximum sentence, it actually imposed the statutory maximum of 60 months. *State v. Boyd,* 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012) (A court cannot impose an aggregate term of confinement and community custody beyond the statutory maximum); RCW 9.94A.505(5). The court does not appear to have considered that, together with community custody, it imposed the maximum sentence. The length of sentence was based on untenable grounds and therefore the result of an abuse of discretion. Given the court's stated intent, the sentence imposed is clearly excessive and must be reversed.

D. CONCLUSION

The exceptional sentence is clearly excessive in light of the court's stated intent to impose less than the statutory maximum sentence, and it must be reversed.

DATED August 5, 2019.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

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Today I caused to be mailed copies of the Brief of Appellant in *State v. Mark Lugliani,* Cause No. 53210-7-II as follows:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Manchester, WA
August 5, 2019

GLINSKI LAW FIRM PLLC

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Address:
PO BOX 761
MANCHESTER, WA, 98353-0761
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