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Division II
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NO. 53071-4-11

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY J. GREEN,

Appellant.

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

The Honorable Kevin D. Hull, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to give any consideration whatsoever to two of three statutory mitigation factors offered by the defense in support of a motion for an exceptional sentence downward.

2. The appellant received ineffective assistance of counsel during sentencing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion as a matter of law by failing to give any consideration to the defense request for a mitigated exceptional sentence based on the statutory mitigating factors that (1) the defendant committed the crime under compulsion insufficient to constitute a complete defense and (2) that the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was significantly impaired? Assignment of Error 1.

2. There was evidence that Mr. Green's behavior at the time of the incident was caused in part due to his underlying mental health issues. Was trial counsel ineffective by failing to argue that Mr. Green committed the crime under compulsion insufficient to constitute a complete defense and that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was significantly impaired where the trial court focused exclusively on the argument that the victim was a willing

participant to the offense? Assignment of Error 2.

C. STATEMENT OF THE CASE

Tim Green was charged in Kitsap County Superior Court with violation of a court order pursuant to RCW 26.50.110, with a special allegation of domestic violence. Clerk's Papers (CP) 2-7. According to the statement of probable cause, a previously-issued order prohibited him from having contact with the protected party. CP 4. Police responded to a text sent by the protected party to 911 on September 25, 2017 that Mr. Green was outside her residence in Bremerton. CP 4. When police arrived, Mr. Green was seen in the protected party's carport and placed under arrest. CP 4.

Mr. Green had a competency evaluation, was initially found to be incompetent to stand trial, and transferred to Western State Hospital (WSH) for completion of a competency evaluation. CP 11-20, 22-31. An order for competency restoration treatment was entered January 18, 2018, and a WSH psychologist filed a competency assessment dated January 16, 2018. CP 41-59. The court found Mr. Green's competency had been restored and entered an order finding him competent to stand trial on March 29, 2018. CP 64-65.

The matter was set for stipulated facts trial on September 14, 2018 before the Honorable Kevin D. Hull. Report of Proceedings (RP) (9/24/18)

at 2.¹ In preparation for trial, defense counsel obtained an evaluation of Mr. Green by Dr. Brett Trowbridge, which was filed in conjunction with a defense sentencing memorandum. CP 105, 146-150.

On September 14, 2018, Mr. Green entered an *Alford* plea to violation of a domestic violations no contact order as alleged in the information. RP (9/14/18) at 2-11; CP 83-93. The State gave notice that it would recommend to the court that Mr. Green be sentenced to 60 months. RP (9/14/18) at 14.

Immediately following entry of the plea on September 14, 2018, the court allowed argument but stated that sentencing itself would take place at another hearing. RP (9/14/18) at 12. Defense counsel presented argument to the court for an exceptional sentence of eighteen months based on the mitigating factors under RCW 9.94A.535(1) (a),(c) and (e)² that the victim

¹ The record of proceedings consists of the following transcribed hearings: September 14, 2018, March 14, 2019, and April 1, 2019 (sentencing).

²RCW 9.94A.535(1) provides in relevant part:

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

...

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

...

(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. Voluntary use of drugs or alcohol is excluded.

was the initiator, willing participant, aggressor or provoker of the incident, that Mr. Green suffers from a compulsion insufficient to constitute a complete defense that significantly affected his conduct, and that his capacity to conform his conduct to the requirements of the law was significantly impaired. RP (9/14/18) at 17-19. The State argued in support of its recommendation of 60 months and defense counsel requested an exceptional downward sentence of 18 months. RP (9/14/18) at 14, 15. Defense counsel noted that Mr. Green had no recollection of the incident and that he suffers from mental health issues. RP at 15-16. Counsel stated:

He does have some severe mental health problems that went undiagnosed for a number of years.

...

At the time of this incident, basically while he has sought mental health treatment over a period of time, he's been doing it on his own, without help, largely. He is on medication now. At the time of this incident, he was supposed to be on medication and he wasn't taking them—which happens when people do suffer from severe mental health issues.

So once again, he does not recall the incident, he does not recall how he got to the protected party's property. I have spoken with his mother . . . she had told me that in the days leading up to this, that the protected party was contacting him. So I do believe that it was mutual contact, that she was an initiator in this.

RP (9/14/18) at 16.

Counsel argued under RCW 9.94A.535(1)(c) and (e) that Mr. Green suffered from a “compulsion, insufficient to constitute a complete defense but which significantly affected his or her conduct and that his capacity to appreciate the wrongfulness of his or her conduct, and that his capacity to

conform his conduct to the requirements of the law was significantly impaired. RP (9/14/18) at 18.

Following a statement to the court by Mr. Green, the court set the matter over to allow the defense to research the exceptional sentence statute. RP (9/14/18) at 26.

Defense counsel filed a motion for an exceptional sentence below the standard range on March 12, 2019. CP 105-112. Again, counsel cited RCW 9.94A.535(1)(a), (c), and (e) and presented argument in support of an exceptional sentence downward. CP 109-113. In his motion, Mr. Green argued that the protected party agreed to meet Mr. Green prior to his arrest and that she was a willing participant in the offense. CP 109. He also argued that he had no recollection of the incident, as noted in Dr. Trowbridge's report. CP 147. In addition, counsel noted that in Dr. Trowbridge's report, Mr. Green's mother stated that her son was not taking his prescribed medication at the time of the offense. CP 111, 147. Dr. Trowbridge stated his diagnostic impression is that Mr. Green suffers from bipolar disorder but that a diminished capacity defense would not be appropriate because Mr. Green "did have the capacity to know that he [']was knowingly violating a restraint provision.[']" CP 150.

The parties returned for sentencing on March 14, 2019. RP (3/14/19) at 2-35. At the hearing, Mr. Green entered a guilty plea to fourth degree assault involving an incident that occurred while he was in custody for the

current offense. RP (3/14/19) at 4-10.

The State reiterated its recommendation for 60 months. RP (3/14/19) at 13. The Court reviewed the probable cause statement which stated that Mr. Green was seen in the carport of the protected party at the time of his arrest. RP (3/14/19) at 15. The court noted that in the police report, Mr. Green contacted the protected party by calling her, and that she agreed to meet with him, and that he started to act strange and that she went back inside her house, and that he left and later returned to her house. RP (3/14/19) at 16.

The court stated that Mr. Green disengaged from the initial contact and an hour and half later, at 4:30 a.m., returned and rang the protected party's doorbell, and that that did not constitute invited contact at that point. RP (3/14/19) at 20. Counsel argued that Mr. Green suffered from compulsion and that in conjunction with his mental health problems, he did not understand the wrongfulness of contacting her. RP (3/14/19) at 21. Mr. Green told the court that the protected party had called him repeatedly and that he was "off his meds" at the time of the offense. RP (3/14/19) at 23.

The court addressed the mitigation factor alleged by the defense that the victim was a willing participant by calling Mr. Green. RP (3/14/19) at 18-33. The court stated that although to an extent the protected party may have been a willing participant, the court could not find that she was a willing participant to a significant degree, based on her disengagement after initially agreeing to meet with Mr. Green. RP (3/14/19) at 25-26.

The court inquired several times if defense counsel wanted to have the protected party give testimony regarding the basis for the requested exceptional sentence. RP (3/14/19) at 31, 32. The judge stated that he wanted to determine the extent to which the protected party was a willing participant and if she mutually consented to communication leading up to the incident. RP (3/14/19) at 31-33.

The parties reconvened on April 1, 2019. RP (4/1/19) at 2-16. Mr. Green's counsel reported that he had spoken with the protected party and that he would not be calling her as a witness. RP (4/1/19) at 3. Mr. Green stated under oath that the protected party agreed to meet with him and that she contacted his mother in an effort to get him to talk to her on his mother's phone. RP (4/1/19) at 7. He stated that during the time of the contact he was "kind of out of it, psychosis, in another time zone, not really knowing what was going on, out of it, off my meds." RP (4/1/19) at 7.

As the court did during the previous hearing, the court again addressed the mitigation factor that the victim was an initiator or willing participant under RCW 9.94A.535(1)(a). RP (4/1/19) at 4-5, 11. The court found that the victim was not a willing participant in the offense. RP (4/1/19) at 5. After Mr. Green's testimony, the court stated "I'm not able to make a finding that there's a preponderance of the evidence or sufficient evidence to make a finding that [the protected party] was a willing participant to a significant degree." RP (4/1/19) at 11. The trial court imposed 60 months;

RP (4/1/19) at 11; CP 158-168.

Pro se notice of appeal was filed under the incorrect cause number. The Court determined that the notice of appeal was timely in a ruling on July 24, 2019. A second notice of appeal was filed July 12, 2019. CP 170.

D. ARGUMENT

1. THE TRIAL COURT'S FAILURE TO CONSIDER WHETHER MR. GREEN COMMITTED THE CRIME UNDER COMPULSION INSUFFICIENT TO CONSTITUTE A COMPLETE DEFENSE OR WHETHER HIS CAPACITY TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE LAW WAS SIGNIFICANTLY IMPAIRED AS A BASIS TO IMPOSE A MITIGATED EXCEPTIONAL SENTENCE REQUIRES RESENTENCING

Mr. Green sought an exceptional sentence based on three separate statutory grounds; 1) the victim was an initiator, willing participant, aggressor or provoker of the incident, 2) the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was significantly impaired, and 3) whether he committed the crime under compulsion insufficient to constitute a complete defense. CP 105-09. In denying the motion for a downward departure, the trial court only considered the issue of whether the victim was an initiator or willing participant in the offense. RP (4/1/19) at 11. The court's complete failure to consider the second and third mitigation factors offered by the defense for a downward exceptional sentence constitutes an abuse of discretion due to the court's

failure to exercise discretion, and this Court should therefore remand for resentencing.

Generally, the sentencing court must impose a sentence within the standard sentencing range under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014). However, the sentencing court may exercise its discretion by imposing a sentence below the standard range if “substantial and compelling reasons” justify an exceptional sentence. RCW 9.94A.535. The sentencing court must find that mitigating circumstances justifying a sentence below the standard range are established by a preponderance of the evidence. RCW 9.94A.535(1).

A standard range sentence is generally not appealable. RCW 9.94A.585(1); *State v. Friederich–Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). Appellate review of the sentencing court's denial of a request for an exceptional sentence below the standard range is limited to circumstances where the sentencing court refuses to exercise its discretion at all, or relies on an impermissible basis for refusing to impose an exceptional sentence. *State v. Garcia–Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998). The failure to exercise discretion by failing to consider an exceptional sentence authorized by

statute is an abuse of that discretion. *State v. O'Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015), review denied, 189 Wn.2d 1007 (2017) (citing *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)). See also *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

“While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *Grayson*, 154 Wn.2d at 342. The sentencing court's failure to consider an exceptional sentence authorized by statute is reversible error. *Grayson*, 154 Wn.2d at 342.

The standard of review of a sentencing court's decision to deny an exceptional sentence is abuse of discretion. *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002); *O'Dell*, 183 Wn.2d at 697.

During hearings on September 14, 2018, March 14, 2019, and April 1, 2019, and in the defense sentencing memorandum, the defense requested an exceptional sentence downward because “to a significant degree the victim was an initiator, willing participant, aggressor or provoker of the incident” under RCW 9.94A.535(1)(a). RP (3/14/19) at 17; CP 109-10.

Counsel provided two additional grounds for an exceptional sentence: RCW 9.94A.535(1)(c) arises when “[t]he defendant committed the

crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.” The third statutorily enumerated mitigating factor cited by defense counsel is that 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).

In this case the sentencing court failed to actually consider the statutorily enumerated mitigating factors offered by the defense that Mr. Green, due to his mental illness, committed the crime under compulsion insufficient to constitute a complete defense but which significantly affected his conduct and that his capacity to appreciate the wrongfulness of his conduct, or to conform his actions to the law was significantly impaired.

Instead, the court’s attention was focused exclusively on the question of whether the protected party was a willing participant in the offense. The court’s colloquy at sentencing shows that it failed to consider that Mr. Green provided a valid mitigating factor regarding his compulsion to commit the crime or if his capacity to appreciate the wrongfulness of the offense or conform to the law was significantly impaired. RP (4/1/14) at 4-5, 11. This failure to exercise discretion is itself an abuse of discretion subject to

reversal. *O'Dell*, 183 Wn.2d at 697; see also *Grayson*, 154 Wn.2d at 342.

The sentencing court was not obligated to grant Mr. Green's request for an exceptional sentence downward, but failing to actually consider two of the three mitigating factors provided by the defense was an abuse of discretion. *Grayson*, 154 Wn.2d at 342. This Court should reverse and remand for resentencing so the court may properly exercise its sentencing discretion.

2. MR. GREEN'S COUNSEL WAS PREJUDICIAALLY INEFFECTIVE BY FAILING TO ARGUE FOR AN EXCEPTIONAL SENTENCE DOWNWARD BASED ON RCW 9.94A.535(1)(c) AND (e)

The appellant argues that his trial counsel was ineffective because although the defense cited the mitigation factors, he did not sufficiently brief or argue to the court that Mr. Green's mental disorders warranted a mitigated sentence downward under RCW 9.94A.535(1)(c) and (e). Defense counsel failed to adequately argue those factors and instead focused solely on the issue of whether the protected party was a willing participant or provoker under 9.94A.535(1)(a), as a mitigating factor that justified the trial court imposing an exceptional downward sentence from the standard sentencing range.

Both the Sixth Amendment and Article 1, § 22 of the Washington

Constitution guarantee the accused the right to effective assistance of counsel. A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). The right to counsel is constitutionally guaranteed at all critical stages of a criminal proceeding, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987) (“Sentencing is a critical stage of the proceedings, at which a defendant is constitutionally entitled to be represented by counsel.”). To prevail on a claim of ineffective assistance of counsel, Mr. Green must show that (1) his trial counsel's representation was deficient and (2) his trial counsel's deficient representation prejudiced him. *Strickland*, 466 U.S. at 687–88; *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

The first prong is met by the defendant showing that the performance falls “ ‘below an objective standard of reasonableness.’ ” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 668). A defendant alleging ineffective assistance must overcome “a strong presumption that counsel's performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). “ ‘When counsel's conduct can be

characterized as legitimate trial strategy or tactics, performance is not deficient.” *Grier*, 171 Wn.2d at 33 (quoting *Kyllo*, 166 Wn.2d at 863).

The second prong is met if the defendant shows that there is a substantial likelihood that the misconduct affected the verdict. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). A defendant's failure to meet their burden on either prong will be fatal to a claim of ineffective assistance of counsel. *Kyllo*, 166 Wn.2d at 862.

Mr. Green’s counsel failed to continue to press his argument for a downward departure under the factors set out in RCW 9.94A.535(1)(c) and (e)—initially raised during the September 14, 2018 hearing and in the defense sentencing memorandum. The failure to argue the supporting facts of Mr. Green’s mental illness could have supported the trial court's imposition of an exceptional sentence downward and therefore constitutes ineffective assistance of counsel. Counsel's failure to base his argument on clear statutory grounds and supporting case law that could have justified the trial court's imposition of an exceptional sentence downward has been found to constitute deficient performance. *State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002), *State v. Hernandez-Hernandez*, 104 Wn. App. 263, 266, 15 P.3d 719 (2001).

Here, defense counsel moved for an exceptional sentence based on

the three statutory factors, but after the initial hearing, failed to argue for a mitigated sentence based on Mr. Green's mental illness under RCW 9.94A.535(1)(c) and (e), instead arguing only that the protected party initiated or participated in the offense.

Ample evidence was presented during the hearings that Mr. Green suffered from mental illness resulting in compulsion insufficient to constitute a complete defense but which significantly affected his conduct and impaired his capacity to appreciate the wrongfulness of his conduct. Mr. Green described his own mental condition at the time of the offense as being "out of it" and that he was "off my meds." RP (4/1/19) at 7. Dr. Trowbridge, who had reviewed the probable cause statement, WSH documents from Mr. Green's competency evaluation, and interviewed the appellant, concluded that that Mr. Green suffers from bipolar disorder. CP 150. While this may not have furnished him with a complete defense to the offense, there was sufficient evidence of mental illness to qualify as mitigating factors under RCW 9.94A.535(1)(c) and (e). Despite this, counsel essentially abandoned the argument for mitigation under RCW 9.94A.535(1)(c) and (e), despite having initially propounded those factors on September 14, 2018 and in the sentencing memorandum.

Failure to present the court with any supporting arguments at the

hearing on March 14, 2019 and the final sentencing hearing on April 1, 2019 regarding Mr. Green's mental problems, and to fail to argue for mitigation below the standard arrange based on his mental issues, constituted deficient performance. Failure to argue or cite relevant facts and caselaw is below the objective standard of reasonableness if that failure prevents the court from making an informed decision.

Regarding prejudice, this case is similar to *McGill*, 112 Wn. App. at 95, in which Division One reversed due to ineffective assistance of counsel. In *McGill*, a defendant was convicted of two counts of delivery of cocaine and one count of possession with intent to deliver cocaine. *McGill*, 112 Wn.App. at 98. Following a jury trial, the trial court stated that it had "no option but to sentence [McGill] within the range," and imposed a low end sentence. *Id.* at 99. McGill's counsel failed to inform the trial court that there were permissible bases to impose an exceptional sentence downward. *Id.* at 97. On appeal, Division One of this court held that McGill received ineffective assistance where the trial court's comments indicated that it would have considered an exceptional sentence had it known it could. *Id.* at 101–02.

Here, the sentencing court understood that it *could* impose an exceptional sentence, but chose to concentrate exclusively on the factor that

the victim was a willing participant and ignored the other factors originally cited by defense counsel. Counsel provided ineffective assistance at sentencing by failing to argue for an exceptional sentence under the other two factors that were ignored by the court because it cannot be ascertained that the sentencing court would have imposed the same sentence had it considered mitigation under RCW 9.94A.535(1)(c) or (e).

Remand for reconsideration of Mr. Green's motion for a mitigated sentence is necessary so that he may be provided effective assistance of counsel in making that motion and the trial court may exercise properly informed discretion.

E. CONCLUSION

The trial court erred in not considering an exceptional sentence under RCW 9.94A.535(1)(c) and (e), based on Mr. Green's documented mental health issues, which significantly impaired his ability to conform his conduct to the requirements of the law or to appreciate the wrongfulness of his conduct. Alternatively, this Court should remand for resentencing so Mr. Green may receive effective assistance of counsel in requesting a mitigated sentence.

DATED: January 22, 2020.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

CERTIFICATE OF SERVICE

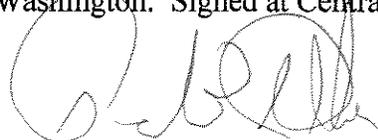
The undersigned certifies that on January 22, 2020, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Randall Sutton, Kitsap County Prosecutor's Office and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 22, 2020.



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