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Division II
State of Washington
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No. 53790-7-II

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

STATE OF WASHINGTON, Respondent

v.

FORREST AMOS, Appellant

APPEAL FROM THE SUPERIOR COURT
OF LEWIS COUNTY
THE HONORABLE JAMES LAWLER

MOTION TO WITHDRAW AND BRIEF REFERRING TO
MATTERS IN THE RECORD WHICH MIGHT ARGUABLY
SUPPORT APPELLATE REVIEW

Marie J. Trombley
Appointed Counsel for Appellant
PO Box 829
Graham, WA 98338
253-445-7920

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I. IDENTITY OF MOVING PARTY

Marie Trombley, appointed counsel for the appellant, Forrest Amos, respectfully requests the relief designated in Part II.

II. STATEMENT OF RELIEF REQUESTED

Appointed counsel requests permission to withdraw pursuant to RAP 15.2(i) and RAP 18.3(a)(2).

III. FACTS RELEVANT TO MOTION

By order dated July 19, 2019, and pursuant to an order of indigency entered in superior court, this Court appointed Marie Trombley to represent appellant Amos in the appeal of the denial of his CrR 7.8 motion in Lewis County Superior Court under cause number 16-1-00399-5. Mr. Amos is appealing the convictions and sentence under cause number COA 504006-II. CP 15.

In reviewing this case for issues to raise on appeal, counsel did the following:

- (a) read and reviewed the verbatim report of proceedings from the CrR 7.8 hearings;
- (b) read and reviewed the clerk's papers;
- (c) researched all pertinent legal issues and conferred with other counsel about potential legal and factual bases for appellate review.

IV. GROUNDS FOR RELIEF

RAP 15.2(i) allows an attorney to withdraw on appeal where counsel can find no basis for a good faith argument on review. Under due process requirements of *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967); *State v. Theobald*, 78 Wn.2d 184, 185, 470 P.2d 188 (1970); and *State v. Pollard*, 66 Wn.App. 779, 825 P.2d 336, 834 P.2d 51, *rev.denied* 120 Wn.2d 1015 (1992), counsel seeks to withdraw as appellate counsel and allow Mr. Amos to proceed pro se. Counsel submits the following brief to satisfy her obligations under *Anders*, *Theobald*, *Pollard*, RAP 15.2(i), and RAP 18.3(a)(2).

V. BRIEF REFERRING TO MATTERS IN THE RECORD THAT MIGHT ARGUABLY SUPPORT REVIEW.

A. Potential Issues On Appeal

2. When sentencing for multiple crimes under the "free crime aggravator," do RCW 9.94A.506(3) and RCW 9.94A.535 prohibit the sentencing court from imposing a consecutive sentence that exceeds the statutory maximum designated in RCW 9A.20.021?
3. Is the language of RCW 9.94A.535 ambiguous and therefore, subject to the rule of lenity where the statute

provides: "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 and may be appealed by the offender or the state as set forth in RCW 9.94A.585(2) thru (6)"?

B. STATEMENT OF THE CASE

Forrest Amos was charged and convicted of eight felonies: four counts of forgery and four counts of first-degree criminal impersonation. The criminal impersonation counts were determined to be the same criminal conduct as the forgery counts. CP 1-4; RCW 9A.60.020(3); RCW 9A.60.040. Each conviction was a Class C felony. CP 1.

At sentencing, the court found Mr. Amos's offender score exceeded nine points. CP 4, 104. The State sought an exceptional sentence because the high offender score and multiple current offenses resulted in some convictions going unpunished. CP 81-83.

The court made a finding for an exceptional sentence and sentenced Mr. Amos within the standard range on each count but imposed consecutive sentences for the forgery convictions. CP

105; CP 5-6. With each forgery count sentenced to 29 months, the court imposed a total sentence of 116 months. CP 5. The court entered written findings of fact and a conclusion of law for the exceptional sentence. CP 112-113. Mr. Amos sought appellate review. CP 15. (See Court of Appeals No. 504006). Direct review was on stay pending the conclusion of remand proceedings under *In re Amos*, 1 Wn.App.2d 578, 406 P.3d 707(2017). CP 15.

On December 19, 2018, while the matter was on stay, Mr. Amos filed a CrR 7.8 motion to modify the judgment and sentence¹. CP 14-37. The motion argued that a sentence imposed under RCW 9.94A.535 is subject to the sentencing limitations of RCW 9A.20.021. CP 115-116.

Mr. Amos contended the legislature intended to subject exceptional sentences in the form of multiple consecutive sentences to the same limitations that apply to a lengthened concurrent sentence. CP 18-19. Thus, the maximum allowable amount of confinement for multiple Class C felonies to be served consecutively was limited to 60 months. CP 17.

¹. He did not challenge the court's reasoning for the exceptional sentence. CP 17.

He argued that *State v. France*, 176 Wn.App. 463, 308 P.3d 812 (2013), *State v. Oxborrow*, 106 Wn.2d 525, 723 P.2d 1123 (1986) and *State v. Flake*, 76 Wn.App. 174, 883 P.2d 341 (1994) were wrongly decided because they did not consider the limiting language found in RCW 9.94A.535. CP 2. On May 7, 2019, the court considered and denied the motion. 5/7/19 RP 1-20; CP 120-122. He made a timely notice of appeal. CP 130.

C. POTENTIAL ARGUMENTS ON APPEAL

1. Does RCW 9.94A.506(3), RCW 9.94A.537(6), And The Language Found In RCW 9.94A.535 “Subject To The Limitations In This Section” Prohibit The Sentencing Court From Imposing A Consecutive Sentence Beyond The Statutory Maximum Of The Designated Crimes Established In RCW 9A.20.021 When Multiple Offenses Are Being Sentenced?

The Sentencing Reform Act aims to ensure that punishment for criminal offenses is proportionate to the seriousness of the offense, the offender’s criminal history, and commensurate with the punishment imposed on others committing similar offenses. RCW 9.94A.010.

“Unless a different maximum sentence for a classified felony is specifically established by a statute” the maximum allowable

sentence for a class C felony is “confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.”

RCW 9A.20.021.

RCW 9.94A.535(2)(c) authorizes a trial court to depart from the sentencing guidelines where “the defendant has committed multiple current offenses, and the defendant's high offender score would result in some of the current offenses going unpunished.”

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, and may be appealed by the offender or the state as set forth in RCW 9.94A.585(2) through (6).

RCW 9.94A.535.

RCW 9.94A.535(1)(g) authorizes the court to consider a sentence below the standard range when “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.”

RCW 9.94A.537(6) provides “if the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may

sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the statutory maximum under RCW 9A.20.021 for the underlying conviction, if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.”

“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 range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.” RCW 9.94A.585(4).

Here, the sentencing court found multiple current offenses, and a high offender score would result in some of Mr. Amos’s offenses going unpunished. The court departed from the statutory guidelines and imposed 29 months for each of the four Class C felonies to be served consecutively, resulting in an exceptional sentence of 116 months.

Under Washington case law, the Court has held the statutory maximum for exceptional sentences is equal to the sum total of the statutory maximum for consecutively run convictions. *State v.*

Weller, 197 Wn.App. 731, 301 P.3d 527 (2017); *State v. France*, 176 Wn.App. 463, 308 P.3d 812 (2013); *State v. Cubias*, 155 Wn.2d 549, 554-55, 20 P.3d 929 (2005).

Mr. Amos may wish to argue the phrase “subject to the limitations of this section” found in RCW 9.94A.535 is an issue of first impression, and the sentencing court exceeded its authority by imposing a sentence which went above the statutory maximum term of confinement of 60 months authorized under RCW 9A.20.021.

Mr. Amos may also want to argue that *State v. France*, 176 Wn.App. 463, 308 P.3d 812 (2013), *State v. Batista*, 116 Wn.2d 777, 808 P.2d 1141 (1991), *State v. Oxborrow*, 106 Wn.2d 525, 732 P.2d 1123 (1986), and *State v. Flake*, 76 Wn.App. 174, 883 P.2d 341 (1994), and other similar cases were wrongly decided. *France*, the most recent, did not consider the language of “subject to the limitations of this section” found in RCW 9.94A.535.

2. Is The Language “Subject To The Limitations Of This Section” In RCW 9.94A.535 Ambiguous And Subject To The Rule Of Lenity?

An appellate Court reviews questions of statutory interpretation de novo. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009). “In construing the free crimes aggravator, our primary duty is to ascertain and carry out the legislature’s intent.” *State v. France*, 176 Wn.App. at 470. When reviewing a statute, the “meaning of words in a statute is not gleaned from [the] words alone but from ‘all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.’” *State v. Evergreen Freedom Foundation*, 192 Wn.2d 782, 790, 432 P.3d 805 (2019).

The Court “assumes the legislature does not intend to create inconsistency and, thus, reads statutes together to achieve a harmonious total statutory scheme that maintains each statute’s integrity.” *Id.* at 795 (citing to *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 792-93, 357 P.3d 1040(2015)).

RCW 9.94A.506 provides the maximum term of confinement in a range may not exceed the statutory maximum for the crime as provided in RCW 9A.20.021. RCW 9A.20.021 sets the statutory maximum for a class C felony to 60 months of imprisonment. RCW

9.94A.537(6) provides that a “court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.”

A departure from the standards of 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 and may be appealed by the offender or the state as set forth in RCW 9.94A.585(2) through (6). RCW 9.94A.535.

In his motion, Mr. Amos contended the phrase “subject to the limitations in this section” limited the sentencing court’s authority to the statutory maximum sentence allowed under RCW 9A.20.021, regardless of the number of other current offenses being sentenced. He argued that to find otherwise would ignore the statutory qualifier, fail to harmonize the sentencing statutes, and render an absurd result with sentencing courts imposing overly excessive sentences. CP 20-21.

Where the Court finds a statute may have more than one reasonable interpretation, it is ambiguous. *City of Seattle v.*

Winebrenner, 167 Wn.2d at 456. The rule of lenity is “a principle of statutory construction: Whenever a criminal statute is ambiguous, and absent clear legislative intent to the contrary.” *State v. Kenney*, 52 Wn.App. 193, 194, 758 P.2d 989 (1988). Where the statute is ambiguous and without clear legislative intent, the court “must construe the statute most favorably to the defendant.” *Id.*

Mr. Amos may want to argue that a reasonable interpretation of RCW 9.94A.535 harmonized with RCW 9A.20.021 and RCW 9.94A.506(3) and RCW 9.94A.537 (6) creates ambiguity about the limitations of imposing an exceptional sentence which orders offenses to be served consecutively. And, the rule of lenity directs any ambiguity should be resolved in his favor.

VI. CONCLUSION

For the reasons stated above, counsel for the appellant asks that the motion to withdraw as appointed counsel be granted and that appellant be allowed to proceed pro se if he chooses to do so.

Dated this 16th day of December 2019.

Respectfully submitted,

Marie Trombley

Marie Trombley
WSBA 41410
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on December 26, 2019, I mailed to the following US Postal Service first-class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Lewis County Prosecuting Attorney at appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov and to Forrest Amos/DOC#809903, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

MARIE TROMBLEY

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