FILED
Court of Appeals
Division II
State of Washington
3/4/2020 1:12 PM

NO. 54070-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL NORMAN,
Appellant.

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

Cowlitz County Cause No. 19-1-00732-7 (08)

The Honorable Stephen M. Warning, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The sentencing court's findings of fact are insufficient to support Mr. Norman's exceptional sentence.
2. The sentencing court exceeded its authority by entering an exceptional sentence absent any finding that doing so what consistent with the purposes of the Sentencing Reform Act, as required by RCW 9.94A.535(2)(a).
3. The trial court erred by entering Conclusion of Law 1.

> **ISSUE 1:** A sentencing court may only impose an exceptional sentence pursuant to a plea agreement if it finds that doing so is "consistent with the purposes of the Sentencing Reform Act." Did the sentencing court in Mr. Norman's case lack the authority to impose an exceptional sentence absent such a finding?

4. The trial court exceeded its authority by sentencing Mr. Norman to 72 months of confinement and 36 months of community custody.
5. The trial court did not have the authority to sentence Mr. Norman to an exceptional sentence that was harsher than the one to which he had agreed, absent some other statutory basis under RCW 9.94A.535.

> **ISSUE 2:** A stipulation to an exceptional sentence as part of a plea agreement can form the required statutory basis for imposing that sentence. Did the trial court exceed that authority by imposing an exceptional sentence that was more severe than the one to which Mr. Norman had agreed, absent any other statutory basis for imposing such a sentence?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mr. Norman pleaded guilty to one count of second-degree assault, domestic violence. CP 18-28.[1] The standard sentencing range for the second-degree assault offense was 63-84 months of confinement plus 18 months of community custody. RP 9.

As part of his plea deal, Mr. Norman agreed to an exceptional sentence of 72 months of confinement and 36 months of community custody, for a total of 108 months. CP 21, 28.

The plea deal did not require Mr. Norman to stipulate to any facts supporting any statutory aggravating circumstances for an exceptional sentence. CP 18-28.[2]

At sentencing, however, the court imposed an exceptional sentence over and beyond that to which Mr. Norman had agreed. RP 16; CP 36-37. The court sentenced Mr. Norman to 78 months of confinement plus 36 months of community custody, for a total of 114 months. RP 16; CP 36-37.

The court entered findings of fact and conclusions of law in support of the exceptional sentence. CP 42. Those findings and

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[1] In exchange, the state dismissed charges for assault of a child. *See* CP 1-4, 16-17, 28.

[2] Mr. Norman agreed that he had an offender score of 24. CP 29. But he was not required, as part of his plea deal, to stipulate to any facts regarding the relationship between that score and his sentence. CP 18-28.

conclusions state only that the "parties stipulate to exceptional sentence" and that the "stipulation is appropriate." CP 42.

Mr. Norman timely appealed his sentence. CP 46.

ARGUMENT

I. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY ENTERING EXCEPTIONAL SENTENCE IN MR. NORMAN'S CASE WITHOUT FIRST FINDING THAT DOING SO WAS "CONSISTENT WITH THE PURPOSES OF THE SENTENCING REFORM ACT."

Mr. Norman agreed to an exceptional sentence as part of his plea agreement, but he did not stipulate to any facts that would have formed a statutory basis for such a sentence. *See* CP 18-28.

The sentencing court's findings and conclusions provide only that the "parties stipulate to exceptional sentence" and that the "stipulation is appropriate." CP 42.

Specifically, the court did not find that an exceptional sentence was "consistent with the purposes of the [SRA.]" CP 42. Absent such a finding, however, Mr. Norman's exceptional sentence is outside the bounds of the court's sentencing authority.

Even when an accused person agrees to an exceptional sentence as part of a plea agreement, the sentencing court may not impose such a sentence without first finding that it is "consistent with the purposes of the Sentencing Reform Act." *In re Breedlove*, 138 Wn.2d 298, 310, 979 P.2d

417 (1999); RCW 9.94A.535(2)(a). This is because the court is not bound by any sentencing recommendation and must "independently determine that the sentence imposed in appropriate." *Id.* at 309.

Absent an independent finding that an exceptional sentence is consistent with the purposes of the SRA, the court lacks authority to impose a sentence beyond that standard range, even when it is agreed to by the parties. *Id.* at 310; *State v. Gronnert*, 122 Wn. App. 214, 221, 93 P.3d 200 (2004).

The court failed to enter that necessary finding in Mr. Norman's case. CP 42. The court did not have the authority to enter the exceptional sentence without it. *Id.*[3]

A question remains regarding the remedy for this error.

In *Breedlove*, the Supreme Court simply remanded the case for entry of findings of fact and conclusions of law. *Breedlove*, 138 Wn.2d at 311 (*citing State v. Head,* 136 Wash.2d 619, 624, 964 P.2d 1187 (1998); *Templeton v. Hurtado,* 92 Wash.App. 847, 965 P.2d 1131 (1998)). In that

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[3] Whether a sentencing court has exceeded its authority is a question of law, reviewed *de novo*. *Bergen*, 186 Wn. App. at 28. A challenge to a sentence that is "contrary to law" may be raised for the first time on appeal. *State v. Hood*, 196 Wn. App. 127, 138, 382 P.3d 710 (2016).

Mr. Norman agreed to the exceptional sentence in his case. CP 18-28. But an accused person cannot "empower a sentencing court to exceed its statutory authorization." *Gronnert*, 122 Wn. App. at 224–25 (*citing State v. Phelps*, 113 Wash.App. 347, 57 P.3d 624 (2002)). Accordingly, Mr. Norman did not invite this error and – like all sentences beyond the court's authority – the issue may be raised for the first time on appeal. *Id.*

case, however, the sentencing court had not yet entered any findings of conclusions in support of the exceptional sentence at all. *Id.* at 303.

In Mr. Norman's case, the sentencing court *did* enter findings of fact and conclusions of law. CP 42. But the court failed to find that an exceptional sentence was consistent with the purposes of the SRA in Mr. Norman's case. CP 42.

Accordingly, Mr. Norman's case is more like *Gronnert*. In that case, the court of appeals held that the error required remand for resentencing within the standard range. *Gronnert*, 122 Wn. App. at 226. This was true even though Mr. Gronnert had agreed to an exceptional sentence as part of a plea bargain and received the benefit of a reduced charge in exchange. *Id.* at 224-26. The sentencing court's failure to find that the exceptional sentence was consistent with the SRA rendered the exceptional sentence beyond that court's authority, regardless of the agreement. *Id.*

Similarly, in Mr. Norman's case, the court entered findings and conclusions in support of the exceptional sentence but did not find that the sentence was consistent with the SRA. CP 42. Accordingly, the court simply lacked the authority to impose an exceptional sentence, no matter what Mr. Norman had agreed to. *Id.* Mr. Norman's case must be remanded for resentencing within the standard range. *Id.*

II. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY ENTERING AN EXCEPTIONAL SENTENCE BEYOND THAT TO WHICH MR. NORMAN HAD AGREED AS PART OF HIS PLEA DEAL, ABSENT ANY STATUTORY BASIS FOR DOING SO.

The standard sentencing range for Mr. Norman's offense was 63-84 months of confinement plus 18 months of community custody. RP 9. Accordingly, a standard range sentence would have totaled to 81-102 months of confinement and community custody.

But, as part of his plea deal, Mr. Norman agreed to an exceptional sentence of a total of 108 months: 72 months of confinement and 36 months of community custody. CP 21, 28. But that is not the sentence that the court imposed.

Instead, the court imposed an exceptional sentence over and above that to which Mr. Norman had agreed. RP 16; CP 36-37. The court sentenced Mr. Norman to 78 months of confinement plus 36 months of community custody, for a total of 114 months. RP 16; CP 36-37.

The sentencing court exceeded its authority by sentencing Mr. Norman to an exceptional sentence, longer than the one to which he had agreed, absent any additional statutory basis for doing so.

A. Mr. Norman's agreement to one exceptional sentence did not grant authority upon the court to enter a higher one.

A court's sentencing authority is limited to that granted by statute. *State v. Bergen*, 186 Wn. App. 21, 28, 344 P.3d 1251 (2015) (*citing State*

v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986)); *See In re West*, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005).

Second-degree assault is a "violent offense," with a standard community custody period of eighteen months. RCW 9.94A.030(54)(a)(viii); RCW 9.94A.701(2).

A sentencing court may, however, impose a community custody term longer than eighteen months for the offense as part of an exceptional sentence. *See* e.g. *In re Smith*, 139 Wn. App. 600, 605, 161 P.3d 483, 486 (2007), *as amended* (July 13, 2007) (it constitutes an exceptional sentence to impose a community custody term longer than that delineated by statute).

But exceptional sentences are only permissible in a few, statutorily delineated contexts. *See* RCW 9.94A.535(2). In all contexts, the court must find "substantial and compelling reasons" to justify an exceptional sentence. RCW 9.94A.535; *Breedlove*, 138 Wn.2d at 305.

The legislature has permitted a court to impose an exceptional sentence pursuant to a stipulated plea agreement when:

> The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds *the exceptional sentence* to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

RCW 9.94A.535(2)(a) (emphasis added).

The Sentencing Reform Act (SRA) also "specifically authorizes agreements which recommend sentences outside the standard sentencing range." *State v. Gronnert*, 122 Wn. App. 214, 219, 93 P.3d 200, 202 (2004) (*citing Breedlove*, 138 Wn.2d at 309).

Agreement of the parties can constitute the "substantial and compelling reasons" required for the court to impose an exceptional sentence. *Breedlove*, 138 Wn.2d at 309.

Accordingly, the courts of appeals have found that it does not violate the SRA for a court to impose the exceptional sentence that has been agreed upon as part of a plea deal. *See e.g. State v. Dillon*, 142 Wn. App. 269, 275-76, 174 P.3d 1201 (2007); *Breedlove*, 138 Wn.2d at 300; *State v. Poston*, 138 Wn. App. 898, 907, 158 P.3d 1286 (2007); *State v. Chambers*, 176 Wn.2d 573, 586, 293 P.3d 1185 (2013).

In each of those cases, the court imposed an exceptional sentence that was either exactly what the accused had agreed to or that constituted less time than the agreed sentence. *Dillon*, 142 Wn. App. at 275; *Breedlove*, 138 Wn.2d at 300; *Poston*, 138 Wn. App. at 90; *Chambers*, 176 Wn.2d at 586. In that context, those courts held that the accused cannot agree to a certain sentence and then later claim on appeal that that same sentence (or a lower sentence) had no valid basis. *Id.*

But that is not what happened in Mr. Norman's case. Instead, Mr. Norman agreed to one sentence and the court imposed a *harsher* exceptional sentence. CP 21, 28, 36-37.

Absent some other statutory basis for the exceptional sentence, the court had no authority to impose the actual sentence ordered in Mr. Norman's case. But Mr. Norman did not stipulate to any facts that would have supported an exceptional sentence beyond that to which he agreed. *See* CP 18-28. The trial court erred by imposing an exceptional sentence which was not supported by agreement of the parties or by any other statutory authority.

The sentencing court exceeded its authority by imposing the exceptional sentence in Mr. Norman's case, which was not supported by agreement of the parties or by any other statutory authority. *Bergen*, 186 Wn. App. at 28. Mr. Norman's sentence must be vacated and his case must be remanded for resentencing within the court's authority.

B. Mr. Norman's offender score cannot form the basis for his exceptional sentence because he did not stipulate that a standard range sentence would have been "clearly too lenient."

Mr. Norman agreed that he had an offender score of 24. CP 29. But he was not required, as part of his plea deal, to stipulate to any facts regarding the relationship between that score and his sentence. CP 18-28.

Specifically, he did not stipulate that a standard range sentence would have been too lenient. CP 18-28.

Absent such a stipulation – or a finding by a jury that a standard range sentence would have been "clearly too lenient" – Mr. Norman's exceptional sentence in this case cannot be justified by his high offender score.

A sentencing court may impose an exceptional sentence based on a high offender score if:

> (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. [or]
> (d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

RCW 9.94A.535(2)(c)-(d).

Mr. Norman pleaded guilty to and was sentenced for only one offense, so subsection (c) – applicable to situations in which the accused "has committed multiple current offenses" -- cannot be used to justify his exceptional sentence. RCW 9.94A.535(2)(c).

Subsection (d) requires a finding that a standard range sentence would be "clearly too lenient." RCW 9.94A.535(2)(d). That finding must be made by a jury; an exceptional sentence cannot be supported by a judge's belief that a standard range sentence would be too lenient,

regardless of the offender score. *See State v. Flores*, 164 Wn.2d 1, 20, 186 P.3d 1038 (2008) (*citing In re Pers. Restraint of Van Delft*, 158 Wn.2d 731, 743, 147 P.3d 573 (2006); *State v. Suleiman*, 158 Wn.2d 280, 287, 143 P.3d 795 (2006); *State v. Hughes,* 154 Wash.2d 118, 140, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco,* 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

But the sentencing court did not find that a standard range sentence would have been "clearly too lenient" in Mr. Norman's case. CP 42. Nor would such a finding have been permissible when that fact had neither been stipulated to nor found by a jury. *Id.*

Additionally, no prior convictions had been "omitted" from Mr. Norman's offender score, as required to trigger the aggravating factor under subsection (d). His score of 24 included each of his prior felony and juvenile convictions. *See* CP 14-15.

Mr. Norman's high offender score cannot be used to justify the exceptional sentence in his case because neither of the relevant statutory provisions apply. *See* RCW 9.94A.535(2)(c)-(d).

CONCLUSION

The sentencing court did not have the authority to impose an exceptional sentence in Mr. Norman's case because it did not find that

doing so was consistent with the purposes of the SRA. Mr. Norman's case must be remanded for resentencing within the standard range.

In the alternative, the sentencing court exceeded its authority by entering an exceptional sentence in Mr. Norman's case over and above that to which he had agreed as part of his plea deal. Because that sentence is not supported by any other statutory authority, it must be vacated and Mr. Norman's case must be remanded for resentencing in accordance with his agreement.

Respectfully submitted on March 4, 2020,

Skylar T. Brett, WSBA No. 45475
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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Gabriel Norman/DOC#819817
Monroe Corrections Center
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on March 4, 2020.

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March 04, 2020 - 1:12 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
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Appellate Court Case Title:	State of Washington, Respondent v. Gabriel H. Norman, Appellant
Superior Court Case Number:	19-1-00732-7

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