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Court of Appeals
Division II
State of Washington
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No. 54125-4-II

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

STATE OF WASHINGTON, Respondent

v.

MATTHEW PEARSON, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PACIFIC COUNTY
THE HONORABLE JUDGE DONALD J. RICHTER

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF FACTS..... 1

III. ARGUMENT..... 3

A. The Trial Court Erred When It Failed To Exercise Its Discretion To
Run Mr. Pearson’s Sentence Concurrent With An Existing Sentence
Imposed For A Subsequent Offense. 3

IV. CONCLUSION..... 6

TABLE OF AUTHORITIES

Washington Cases

In re Pers. Restraint of Delgado, 149 Wn.App. 223, 239, 204 P.3d 936
(2009)..... 3

State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008)..... 3

State v. Grayson, 154 Wn.2d 333,111 P.3d 1183 (2005)..... 3

State v. King, 135 Wn.App. 662, 145 P.3d 1224 (2006)..... 4

State v. King, 149 Wn.App. 96, 101, 202 P.3d 351 (2009)..... 3

State v. Quaale, 182 Wn.2d 191, 196, 340 P.3d 213 (2014)..... 3

State v. Shilling, 77 Wn.App. 166, 175, 889 P.2d 948 (1995)..... 4

State v. Watson, 63 Wn.App. 854, 859, 822 P.2d 327 (1992) 5

Statutes

RCW 9.94A.589(3) 3

I. ASSIGNMENTS OF ERROR

A. The trial court erred when it failed to exercise its discretion under RCW 9.94A.589(3) to impose the defendant's sentence concurrent with an existing sentence imposed for a subsequent offense

LEGAL ISSUE: Under RCW 9.94A.589(3) must the trial court exercise its discretion to determine whether to impose a felony sentence concurrently with an existing sentence imposed for a subsequent felony?

II. STATEMENT OF FACTS

Pacific County prosecutors charged Matthew Pearson with one count of possession of a controlled substance, methamphetamine. CP 1.

On April 18, 2018, members of the US Marshals Northwest Fugitive Task Force and a Grays Harbor deputy executed a DOC arrest warrant for Mr. Pearson. RP 28,42. In a search incident to arrest, officers found a pipe in one of Mr. Pearson's pockets. RP 46. At a bench trial, Mr. Pearson stipulated the pipe contained methamphetamine residue. RP 17, 52. Supp. CP 45. The court entered a guilty verdict and findings of fact and conclusions of law. CP 7-9. The court imposed an 18-month sentence, with 12 months of community custody. CP 10-22.

In a post-sentence motion for clarification, defense counsel sought a court order directing Mr. Pearson's sentence to run concurrent with the sentence he was already serving on an unrelated matter, and credit for time served while he was at the Pacific County jail awaiting trial on the current matter. CP 23.

Both defense counsel and the prosecutor appeared to have agreed Mr. Pearson was not under sentence for another felony when he was arrested on April 18, 2018 but disagreed on the applicability of RCW 9.94A.589(3). RP 80-81. Before Mr. Pearson was charged and brought to trial he was convicted and sent to prison on an unrelated matter. RP 78. The State argued because Mr. Pearson was not arrested or charged with possession of methamphetamine until after he had been convicted on an unrelated felony, the sentence could not be served concurrently. RP 79.

Defense counsel argued RCW 9.94A.589(3) provided for a concurrent sentence "whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony." RP 80. It appears defense counsel discarded the argument, having admitted he did not fully understand it. RP 78, 81. The court denied the motion to give Mr. Pearson credit for time served in the Pacific County jail. The court did not address the applicability of RCW 9.94A.589(3). RP 82. Mr. Pearson makes this timely appeal. CP 30-44.

III. ARGUMENT

A. The Trial Court Erred When It Failed To Exercise Its Discretion To Run Mr. Pearson's Sentence Concurrent With An Existing Sentence Imposed For A Subsequent Offense.

Sentencing errors may be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Under RCW 9.94A.589(3) a trial court has discretion to run a sentence on a felony concurrently with an existing sentence imposed on a subsequent offense. *State v. King*, 149 Wn.App. 96, 101, 202 P.3d 351 (2009). A trial court's decision regarding concurrent or consecutive sentences is reviewed for an abuse of discretion. *In re Pers. Restraint of Delgado*, 149 Wn.App. 223, 239, 204 P.3d 936 (2009). A trial court abuses its discretion when it relies on manifestly unreasonable grounds or reasons, or when the court refuses to exercise its discretion. *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005); *State v. Quaale*, 182 Wn.2d 191, 196, 340 P.3d 213 (2014).

RCW 9.94A.589(3) provides:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced *for a felony that was committed* while the person was *not under sentence for conviction of a felony*, the sentence *shall run concurrently* with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced *unless the court pronouncing the current sentence expressly orders* that they be served consecutively.

(Emphasis added).

Here, it was the State’s argument that RCW 9.94A.589(3) did not apply because Mr. Pearson had not been *charged or arrested* for the possession crime on April 18, 2018. This is not an accurate interpretation of the statute. The statute does not require the individual to have been charged for the earlier in time crime. Under the plain language of the statute, RCW 9.94A.589(3) applies “when (1) a person who is not under sentence of a felony (2) *commits* a felony and (3) *before sentencing* (4) is *sentenced for a different felony.*” *State v. Shilling*, 77 Wn.App. 166, 175, 889 P.2d 948 (1995).(Emphasis added).

Because RCW 9.94A.589(3) applies in this case, the trial court did have discretion to run the current sentence concurrently “with any felony sentence which ha[d] been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced.” A review of the record at sentencing demonstrates the defense attorney, the prosecutor, and presumably the court did not understand that RCW 9.94A.589(3) applied, and the court was authorized to exercise its discretion to impose a concurrent sentence.

Failure to exercise discretion when the law requires it is itself an abuse of discretion. In *State v. King*, 135 Wn.App. 662, 145 P.3d 1224 (2006), the defendant threatened a witness after he was pronounced guilty

at his criminal trial, but before he was sentenced for three earlier felonies. *Id.* at 666-67, 675. Because the witness intimidation crime occurred before sentencing, he was not “under sentence”. Under RCW 9.94A.589(3) the “sentencing judge [had] discretion to impose either a concurrent or a consecutive sentence for a crime that the defendant committed *before* he started to serve a felony sentence for a different crime.” *King*, 149 Wn.App. at 101 (*King II*).

On review, the Court reasoned that although the trial court may have imposed the witness intimidation sentence to run consecutive to the felony sentences, the defendant “was entitled to have the court at least consider imposing concurrent sentences.” *King I*, 135 Wn.App. at 676. The presumption is that the sentences will be served concurrently. *King*, 135 Wn.App. 675. (*King I*). The matter was remanded for the trial court to exercise its discretion.

The result in this case should be the same. This matter should be remanded because the trial court did not exercise its discretion, as it never addressed the applicability of RCW 9.94A.589(3). If the trial court exercised its discretion and imposed concurrent sentences, “the last sentence imposed will overlap the prior sentence.” *State v. Watson*, 63 Wn.App. 854, 859, 822 P.2d 327 (1992). The concurrency begins at the time of the most recent conviction.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Pearson respectfully asks this Court to remand for the sentencing court to exercise its discretion under RCW 9.94A.589(3).

Respectfully submitted this 14th day of May 2020.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on May 14, 2020, 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: Pacific County Prosecuting Attorney at mmcclain@co.pacific.wa.us and to Matthew Pearson/DOC#301173, Washington Corrections Center, PO Box 900, Shelton, WA 98584.



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