

FILED
Court of Appeals
Division II
State of Washington
5/26/2020 3:41 PM
No. 54279-0-II

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

STATE OF WASHINGTON, Respondent

v.

JEFFREY BUTTERFIELD, Appellant

APPEAL FROM THE SUPERIOR COURT
OF GRAYS HARBOR COUNTY
THE HONORABLE JUDGE DAVID L. EDWARDS

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

| | | |
|------|---|---|
| I. | ASSIGNMENTS OF ERROR | 1 |
| II. | STATEMENT OF FACTS | 1 |
| III. | ARGUMENT | 3 |
| | A. The Trial Court Erred When It Imposed A Sentence In Excess of the Statutory Maximum for Counts 5,6,7, and 8. | 3 |
| | B. The Trial Court Abused Its Discretion When It Imposed An Exceptional Sentence Which Is Clearly Excessive..... | 5 |
| IV. | CONCLUSION..... | 7 |

TABLE OF AUTHORITIES

Washington Cases

State v. Anderson, 58 Wn.App. 107,791 P.2d 547 (1990)..... 3
State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012)..... 4
State v. Butterfield, 10 Wn.App.2d 399, 447 P.3d 650 (2019)..... 2
State v. France, 176 Wn.App. 463, 308 P.3d 812 (2013)..... 5
State v. Halsey, 140 Wn. App. 313, 165 P.3d 409 (2007)..... 6
State v. Knutz, 161 Wn. App. 395, 253 P.3d 437 (2011)..... 6
State v. Law, 154 Wn.2d 85, 110 P.3d 717 (2005)..... 6
State v. Mann, 146 Wn.App. 349, 189 P.3d 843 (2008)..... 3
State v. Oxborrow, 106 Wn.2d 525, 723 P.2d 1123 (1986)..... 7
State v. Tili, 108 Wn.App.289, 29 P.3d 1285 (2001)..... 5

Statutes

RCW 9.94A.507(5)..... 4
RCW 9.94A.510..... 6
RCW 9.94A.535..... 5
RCW 9.94A.535(2)(c) 2
RCW 9.94A.585(4)..... 6
RCW 9.94A.589(1)(a) 5
RCW 9.94A.701(9)..... 4
RCW 9.95.420 7
RCW 9A.20.021(1)(b) 5
RCW 9A.20.021(1)(c) 4
RCW 9A.44.079..... 4
RCW 9A.64.020(1)(b) 5

I. ASSIGNMENTS OF ERROR

- A. The trial court erred when it imposed a sentence outside the statutory maximum term for Count 5: a Class C felony.
- B. The trial court erred when it imposed a sentence outside the statutory maximum term for Count 6: a Class C felony.
- C. The trial court erred when it imposed a sentence outside the statutory maximum term for Count 7: a class B felony.
- D. The trial court erred when it imposed a sentence outside the statutory maximum for Count 8: A Class B felony.
- E. The trial court abused its discretion when it ordered an exceptional sentence so clearly excessive it shocks the conscience. CP 55.

LEGAL ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the trial court err when it imposed a sentence 18 months each over the statutory maximum for Counts 5,6,7 and 8?
- B. Did the trial court abuse its discretion when it imposed an exceptional sentence of 1,520 months under RCW 9.94A.535(2)(c)?

II. STATEMENT OF FACTS

A jury convicted Jeffrey Butterfield of two counts each of rape of a child first degree, rape of a child second degree, rape of a child third degree, and incest in the first degree. *State v. Butterfield*, 10 Wn.App.2d

399, 447 P.3d 650 (2019). The trial court imposed an exceptional sentence of 1,520 months, each sentence to run consecutive to the other. *Id.* at 402.

This Court reversed the exceptional sentence finding the jury instructions and special verdict forms did not contain all the essential elements of the statutory aggravating factor and the trial court erroneously imposed an exceptional sentence relying on a different statutory factor. *Id.* This Court remanded for resentencing. *Id.* at 406. At the resentencing hearing, the state asked the court to impose the same exceptional sentence under RCW 9.94A.535(2)(c).

Defense counsel questioned the applicability of the “free crimes aggravator”. RP 7-8. Counsel noted the convictions for rape of a child in the first and second degree each had a statutory maximum of a lifetime sentence. CP 58. The standard range for rape of a child first degree was 240-318 months, and rape of a child in the second degree was 240-318 months. RP 8; CP 58. Counsel said, “The idea behind free crime is to punish those offenses that will go unpunished because you’re outside the offender score range. In this particular circumstance I don’t know how he would ever be able to get above a lifetime sentence.” RP 8.

Defense counsel asked the court to impose 240 months to life, noting that 60-year-old Mr. Butterfield’s release was subject to the Indeterminate Sentencing Review Board (ISRB). RP 9.

The court said, “Mr. Butterfield should- should never be in a position where another human being is actually considering releasing him from custody. I- I’m going to- I’m not going to allow it to happen to the extent it’s within my power. I’m going to follow your sentencing recommendation.” RP 11.

The court imposed 60 months on counts 5 and 6, plus 36 months of community custody; 102 months for counts 7 and 8, with 36 months of community custody; 318 months on counts 1 and 2 and 280 months on counts 3 and 4. CP 60,61. Relying on RCW 9.94A535(2)(c), the court ordered the sentences to run consecutively because “an exceptional sentence is appropriate to ensure that the punishment is proportionate to the seriousness of the offenses and that none of the Defendant’s current offense go unpunished.” CP 55.

Mr. Butterfield makes this timely appeal. CP 75.

III. ARGUMENT

A. The Trial Court Erred When It Imposed A Sentence In

Excess of the Statutory Maximum for Counts 5,6,7, and 8.

Sentencing errors may be raised for the first time on appeal. *State v. Anderson*, 58 Wn.App. 107, 110, 791 P.2d 547 (1990). Questions involving a sentencing court’s authority are reviewed de novo. *State v. Mann*, 146 Wn.App. 349, 357, 189 P.3d 843 (2008).

A trial court may not impose a sentence of confinement and community custody that, when combined, exceeds the statutory maximum for the offense. RCW 9.94A.701(9)¹. Remand for sentencing that complies with RCW 9.94A.701(9) is required when the total sentence of confinement and community custody exceeds the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 471, 275 P.3d 321 (2012).

Community custody sentences for sex offenses not subject to RCW 9.94A.507(5) are governed by RCW 9.94A.701(a), with a statutory term of three years. Here, counts five through eight are subject to RCW 9.94A.701(a).

Rape of a child third degree is a class C felony. RCW 9A.44.079. The statutory maximum sentence for a class C felony is 60 months. RCW 9A.20.021(1)(c). The court sentenced Mr. Butterfield to 60 months of confinement, and 36 months of community custody for counts five and six for a total of 96 months each CP 58, 60-61. This sentence exceeds the 5-year statutory maximum by 18 months each, in violation of RCW 9.94A.701(9).

Incest in the first degree is a class B felony. RCW

¹ RCW 9.94A.701(9): The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

9A.64.020(1)(b). The statutory maximum for a class B felony conviction is 10 years. RCW 9A.20.021(1)(b). Here, the court imposed 102 months each for counts 7 and 8, and 36 months of community custody. CP 60. This sentence exceeds the 120-month maximum by 18 months.

Because the sentences for counts 5 through 8 exceed their respective statutory maximums, this matter must be remanded for resentencing to comply with RCW 9.94A.701(9).

B. The Trial Court Abused Its Discretion When It Imposed An Exceptional Sentence Which Is Clearly Excessive.

When several offenses are sentenced at the same time, the presumption of the sentencing statute is that each sentence will be served concurrently. RCW 9.94A.589(1)(a). A trial court must impose a sentence within the standard range unless it finds substantial and compelling reasons to justify a departure. RCW 9.94A.535; *State v. Tili*, 108 Wn.App.289, 296, 29 P.3d 1285 (2001). A trial court is authorized to exercise its discretion to impose an exceptional sentence where some current offenses may go unpunished. *State v. France*, 176 Wn.App. 463, 470, 308 P.3d 812 (2013); RCW 9.94A.535(2)(c). Imposition of consecutive sentences for crimes sentenced at the same time is an exceptional sentence. RCW 9.94A.589(1)(a).

On review of an exceptional sentence, the appellate court asks (1) are the reasons supplied by the sentencing judge supported by the record; (2) do those reasons justify a sentence outside the standard range; and (3) was the sentence clearly excessive or too lenient. RCW 9.94A.585(4). The court applies the clearly erroneous standard to the first question, the de novo standard to the second, and the abuse of discretion standard to the third. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

A trial court has all but “unbridled discretion” in setting the length of an exceptional sentence. *State v. Halsey*, 140 Wn. App. 313, 325, 165 P.3d 409 (2007). However, an appellate court will find a sentence is clearly excessive if it is based on untenable grounds or reasons, or its length “shocks the conscience” in light of the record. *State v. Knutz*, 161 Wn. App. 395, 410-11, 253 P.3d 437 (2011).

Here, the trial court relied on RCW 9.94A.535(2)(c) to impose an exceptional sentence. The court concluded an exceptional sentence was appropriate to ensure the punishment was proportionate to the seriousness of the offenses and that none of the multiple current offenses would go unpunished.² CP 55.

² Mr. Butterfield’s offender score was calculated at ‘22’, of which ‘21’ were other current offenses. A defendant’s standard range sentence reaches its maximum limit at an offender score of ‘9’. RCW 9.94A.510.

Here, even without imposition of an exceptional sentence, none of the current offenses would go unpunished. A jury convicted 60-year-old Mr. Butterfield of 4 class A sex offenses, each of which carries a statutory maximum of life in prison. Without consecutive sentences, Mr. Butterfield's minimum term of incarceration is 26.5 years, a likely *de facto* life sentence. Additionally, because he is subject to the end of sentence review process of the ISRB, he would not be released without scrupulous review. RCW 9.95.420.

The court unreasonably preempted the role of the ISRB saying "Mr. Butterfield...should never be in a position where another human being is actually considering releasing him from custody...I'm not going to allow it to happen to the extent it's within my power." RP 11. For an action to be "clearly excessive" it must be shown to be clearly unreasonable, i.e. exercised for untenable reasons or an action that no reasonable person would have taken. *State v. Oxborrow*, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986). Here, the court abused its discretion by imposing a sentence far beyond Mr. Butterfield's lifetime and unreasonably preempted the statutory role of and function of the ISRB.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Butterfield respectfully asks this Court to again reverse the exceptional sentence because it is clearly excessive and remand to the trial court

Respectfully submitted this 26th day of May 2020.

A handwritten signature in black ink that reads "Marie Trombley". The signature is written in a cursive style with a distinct loop at the end of the last name.

Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on May 26, 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: Grays Harbor County Prosecuting Attorney at appeals@co.grays-harbor.wa.us and to Jeffrey Butterfield/DOC#404550, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.



Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

MARIE TROMBLEY

May 26, 2020 - 3:41 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54279-0
Appellate Court Case Title: State of Washington, Respondent v Jeffrey L. Butterfield, Appellant
Superior Court Case Number: 17-1-00192-1

The following documents have been uploaded:

- 542790_Briefs_20200526154005D2872161_0096.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Butterfield AOB .pdf

A copy of the uploaded files will be sent to:

- appeals@co.grays-harbor.wa.us
- ksvoboda@co.grays-harbor.wa.us

Comments:

Sender Name: Marie Trombley - Email: marietrombley@comcast.net

Address:

PO BOX 829

GRAHAM, WA, 98338-0829

Phone: 253-445-7920

Note: The Filing Id is 20200526154005D2872161