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Court of Appeals
Division II
State of Washington
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NO. 54279-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

JEFFREY L. BUTTERFIELD SR.,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **The State concedes that the community custody on counts 5, 6, 7, and 8 must be reduced and/or stricken.**
2. **The sentencing court did not abuse its discretion when it imposed an exceptional sentence in this case.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The facts in this case were presented in detail in the original appeal. However, it is worth noting that the victims in this case, AB1 and AB2, were sexually abused by the Appellant from the time they were four or five years old until they were sixteen years old. *State v. Butterfield*, 447 P.3d 650, 651 (2019). The Appellant was convicted by a jury of eight counts relating to this abuse. Specifically, he was convicted of two counts each of rape of a child in the first degree, rape of a child in the second degree, rape of a child in the third degree, and incest in the first degree. CP 56-57.

Based upon RCW 9.94A.535(2), the sentencing court imposed an exceptional sentence by ordering that the confinement on all counts run consecutively. CP 53-55.

ARGUMENT

- 1. The State conceded that the community custody on counts 5, 6, 7, and 8 must be reduced and/or stricken.**

The Appellant objects to the community custody terms imposed on counts 5, 6, 7, and 8. Counts 5 and 6 are convictions for Rape of a Child in the Third Degree, a class C felony. CP 58; RCW 9A.44.076. Counts 7 and 8 are convictions for Incest in the First Degree, a class B felony. CP 58; RCW 9A.64.020(1)(a).

Pursuant to RCW 9A.94A.701(9), the sentencing court was required to reduce the term of community custody for these counts so that the total term of confinement plus community custody does not exceed the statutory maximum.

On counts 5 and 6, the court imposed the statutory maximum of 60 months for the term of confinement. CP 60. Therefore, the 36 months of community custody imposed for these counts exceeds the authority of the sentencing court and should be stricken.

On counts 7 and 8, the court imposed 102 months on each count. CP 60. Therefore, the term of community custody should be reduced to 18 months on each count.

As the Appellant has lifetime community custody pursuant to RCW 9.94A.507 for counts 1, 2, 3, and 4 there is no practical effect to his correction. Therefore, the State requests that this issue be remanded for entry of an order correcting the community custody rather than a full re-sentencing.

2. The sentencing court did not abuse its discretion when it imposed an exceptional sentencing in this case.

Pursuant to RCW 9.94A.589(1)(a), it is assumed that the confinement on individual counts will run concurrently. An imposition of consecutive terms of confinement is an exceptional sentence.

An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review:

1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

State v. Law, 154 Wash. 2d 85, 93, 110 P.3d 717, 720 (2005); *State v.*

Ha'mim, 132 Wash.2d 834, 840, 940 P.2d 633 (1997) (citing former RCW

9.94A.210(4); *State v. Branch*, 129 Wash.2d 635, 645–46, 919 P.2d 1228 (1996); and *State v. Allert*, 117 Wash.2d 156, 163, 815 P.2d 752 (1991)).

In the Appellant’s case, the State asked the sentencing court to find “substantial and compelling” circumstances to impose an exceptional sentence based on RCW 9.94A.535(2)(c). Without such a finding and the imposition of an exceptional sentence the Appellant’s sentences would run concurrently, meaning that some conduct would go unpunished due to the Appellant’s high offender score.

A defendant's standard range sentence reaches its maximum limit at an offender score of “9 or more.” RCW 9.94A.510. An offender score is computed based on both prior and current convictions. RCW 9.94A.525(1). For the purposes of calculating an offender score when imposing an exceptional sentence, current offenses are treated as prior convictions. *State v. Newlun*, 142 Wash.App. 730, 742, 176 P.3d 529 (2008). Where a defendant has multiple current offenses that result in an offender score greater than nine, further increases in the offender score do not increase the standard sentence range. *See State v. Alvarado*, 164 Wash.2d 556, 561–63, 192 P.3d 345 (2008).

However, a trial court may impose an exceptional sentence under the free crimes aggravator when “[t]he defendant has committed multiple

current offenses and the defendant's high offender score results in some of the current offenses going unpunished.” RCW 9.94A.535(2)(c). In other words, if the number of current offenses results in the legal conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses, then the court may impose an exceptional sentence. *Newlun*, 142 Wash.App. at 743, 176 P.3d 529. *See State v. France*, 176 Wash. App. 463, 468–69, 308 P.3d 812, 815–16 (2013).

The Washington State Supreme Court has held that “[t]he plain language in...RCW 9.94A.535(2) does not require a jury’s finding of fact and can be considered and imposed by the court without the procedure set out in RCW 9.94A.537.” *State v. Mutch*, 171 Wash.2d 646, 657, 254 P.3d 803 (2011).

The trial court has “all but unbridled discretion” in fashioning the structure and length of an exceptional sentence.” *France*, 176 Wash.App. at 470; *State v. Halsey*, 140 Wash.App. 313, 325, 165 P.3d 409 (2007) (quoting *State v. Creekmore*, 55 Wash.App. 852, 864, 783 P.2d 1068 (1989)).

When looking at the three questions posed by *State v. Law*, the reasons of the sentencing court are clearly supported in the record. In this

case, the Appellant was convicted of eight felony sex offenses. Including all the crimes at bar, the Appellant has an offender score of 22 on each count. CP 58. This greatly exceeds the maximum offender score of 9. As each other current offense counts for three points, the Appellant reached his maximum offender score after accounting for counts 1-4. This clearly leaves half of the convictions incurring no additional punishment. As outlined above, an offender score in excess of nine is a basis that justifies a departure from the standard range. Thus, the first two part of the *Law* inquiry have been satisfied.

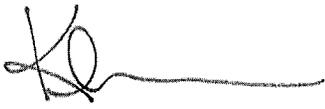
The question for this Court is whether or not the sentence imposed in this case was “clearly too excessive.” *State v. Law*, 154 Wash.2d at 93. The facts in this case established that the Appellant sexually abused his two daughters for more than a decade. The sentencing court was in the best place to judge the Appellant’s demeanor and lack of remorse. Considering the totality of the facts and circumstances of this case, the sentence imposed was not an abuse of the court’s discretion.

CONCLUSION

Based on the foregoing, the State respectfully requests that the sentence imposed by the trial court be affirmed, but that the terms of community custody on counts 5, 6, 7, and 8 be reduced and/or stricken.

DATED this 29th day of July, 2020.

Respectfully Submitted,

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GRAYS HARBOR CO PROS OFC

July 29, 2020 - 10:08 AM

Transmittal Information

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