

28194-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TYLER W. GASSMAN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT/CROSS-RESPONDENT'S RESPONSE BRIEF TO
CROSS-APPEAL

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A. CROSS-APPEAL ASSIGNMENT OF ERROR

1. The State alleges that trial court erred by ordering an exceptional sentence downward.

B. CROSS-APPEAL ISSUE

1. Does the fact of a criminal history consisting of a single, nonviolent, juvenile conviction for residential burglary establish a propensity to commit violent crimes as an adult, thereby rendering the trial court's finding that the defendant had no apparent predisposition to participate in an armed robbery an abuse of discretion?

C. CROSS-APPEAL STATEMENT OF THE CASE

The trial court entered Amended Findings of Mitigated

Exceptional Sentence. (CP 154-55) The court found:

Pursuant to RCW 9.94A.535 The Court finds, by a preponderance of the evidence heard during the trial and at the time of sentencing, the following facts which warrant a mitigated exceptional sentence of 309 months of total incarceration as set forth in the Judgment and Sentence and Warrant of Commitment:

1. The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the mandatory minimum sentences and

weapon enhancements when considering the purpose of the Sentencing Reform Act as expressed in RCW 9.94A.010.

2. When considering the role of the primary actors as well as the age and criminal history of the Defendant, the Court finds he had no apparent predisposition to participate in this crime and was induced to do so by others.

3. Based on the criminal nature of the situation which gave rise to the incident and his manner and motives while testifying, the victim was more likely than not the initiator, willing participant, aggressor or provoker of the incident by arranging the incident with one or more of the codefendants.

(CP 599-600)

As a result, the Court sentenced Mr. Gassman to a mitigated exceptional sentence of 309 months, or nearly 26 years in prison. The court ordered Mr. Gassman's sentence for multiple serious violent offenses to be served concurrently. (CP 600) The State appealed.

D. ARGUMENT

Under RCW 9.94A.585, appellate courts may review an exceptional sentence to ensure that (1) substantial evidence supports the trial court's reasons for imposing the sentence; (2) the reasons, as a matter of law, justify a departure from the standard range; and (3) the trial court did not abuse its discretion in sentencing the defendant too excessively or too leniently. *State v.*

Ferguson, 142 Wn.2d 631, 646-47, 15 P.3d 1271 (2001). Whether a court's stated reasons are sufficiently substantial and compelling to support an exceptional sentence is a question of law that the court of appeals reviews de novo. *State v. Suleiman*, 158 Wn.2d 280, 291 n. 3, 143 P.3d 795 (2006).

The State contends that the trial court's findings supporting the exceptional sentence were unsupported by the record. In support of its contentions, the State cites that the jury found Mr. Gassman was more than merely an unwilling participant in the crimes. (Resp. Br. At 20) Additionally, the State argues that Mr. Gassman's prior conviction and Mr. Duane Statler's comments to the court contradict the court's findings that Mr. Gassman was not predisposed to commit these crimes.

First, the State's argument that the jury found Mr. Gassman was "more than an unwilling participant" is simply not in the record. Apparently the State simply relies upon the fact that the jury found Mr. Gassman guilty. But the jury had no manner of communicating its thoughts about Mr. Gassman's alleged role or willingness to participate in the crimes. No special verdict form existed that allowed the jury to distinguish the level of Mr. Gassman's supposed culpability. The State's reliance upon

nothing more than a guilty verdict does not establish that the trial court abused its considerable discretion.

Second, the State attacks the court's finding that Mr. Gassman was not predisposed to participate in these crimes, and cites Mr. Gassman's juvenile conviction. Mr. Gassman's previous criminal history was limited to a single, nonviolent, juvenile residential burglary charge from January, 2000. (CP 568) The fact of this conviction does not support the State's argument that Mr. Gassman was predisposed to committing an alleged armed, violent crime as an adult. Unlike the adult corrections system, one of the goals of the juvenile justice system continues to be the rehabilitation of juvenile offenders. See *State v. Rice*, 98 Wn.2d 384, 392-93, 655 P.2d 1145 (1982); *State v. Weber*, 159 Wn.2d 252, 283-84, 149 P.3d 646 (2006) (Madsen, J., dissenting) ("the juvenile justice system is fundamentally different from and serves different purposes than the criminal justice system.")

Thus, given the goals of rehabilitation of the juvenile justice system, the fact of a single, isolated, nonviolent juvenile conviction several years prior should not be considered evidence of a propensity for violent crime as an adult. This conviction does not undercut the court's findings.

Moreover, as additional support for its attack upon the court's finding that Mr. Gassman was not predisposed to participation in these crimes, the State cites Mr. Statler's comments at sentencing. The State's reliance upon Mr. Statler's comments is curious. Mr. Statler spoke in support of a mitigated sentence, and his comments indicated Mr. Gassman had trouble in the past, but had worked to turn his life around, and had succeeded:

I guess I can start with Tyler is a young man, spent a lot of time with us and my family, camping, fishing, being kids, bicycling. I've seen him grow up. He's always been trustworthy, part of our family. Tyler got in trouble as a kid with Paul. You've probably seen on his previous, and he was guilty. Those boys were guilty. They made a mistake. He came out the first day he was out, after he took care of his previous obligations. He was with me building custom homes his first day out and working hard, dependable. He was working when all this happened. He was waiting to go to work when these crimes happened. You sat through the trial. I sat through the trial. We all seen what happened. And truly, your Honor, I believe beyond in my heart that these boys are innocent. If they were guilty, I wouldn't have been here pushing so hard, and I truly believe that you know that. They're good kids.

* * *

... All three of these young men had moved on with their lives. They weren't out holding up drug dealers and committing robberies, and I just can't believe that the system let us down like this. And our whole government is on checks and balances, and I just don't see where the balances came into this. So all we can do now is hope that you see it within your heart to grant minimums in case the next set of checks and balances doesn't show justice for these kids.

Tyler is a good kid. He's a good kid. Your Honor, if you had the chance to see him growing up, be with him, know him as a person, you would be happy to invite him into your home, same as I would. Thanks, your Honor.

(6/2/10 RP 15-17)

Mr. Statler's eloquent, heartfelt assessment provided the court with ample evidence: Mr. Gassman had made a mistake in the past, but he had moved on with his life and become a productive member of society.

Mr. Statler was in an excellent position to make this assessment, because he has known Mr. Gassman since Mr. Gassman was a child, and has been close to him. Neither Mr. Statler's comments nor the fact of Mr. Gassman's single juvenile conviction supports the State's contention. The record in this case fails to support the State's arguments that the court abused its discretion by sentencing Mr. Gassman to a mitigated exceptional sentence.

E. CONCLUSION

The court's mitigated exceptional sentence was supported by a preponderance of the evidence. The trial court did not abuse its considerable discretion in ordering concurrent sentences.

Dated this 26th day of August, 2010.

GEMBERLING & DOORIS, P.S.

A handwritten signature in black ink, reading "Julia A. Dooris". The signature is written in a cursive style with a long horizontal flourish extending to the right.

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