

No. 305473

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
June 6, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, Respondent

v.

ALFRED GALINDO, JR., Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE LINDA TOMPKINS

BRIEF OF APPELLANT

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I. Assignment of Error

A. By misunderstanding the application of statute and case law, the sentencing court failed to exercise its discretion to impose a sentence outside the standard range, when there were substantial and compelling reasons justifying the exceptional sentence.

Issues Pertaining To Assignment of Error

A. Did the resentencing court err when it misunderstood and misapplied the law as it pertains to a mitigated sentence, requiring remand for resentencing?

II. Statement of Facts

Alfred Galindo Jr. was tried and convicted on three counts of first degree assault. CP 84-96. At the sentencing hearing, the court ordered a sentence of 138 months of incarceration, the sentences to run concurrently. CP 88. The court did not enter written findings of fact or conclusions of law to explain its reasoning in concluding a mitigated sentence was appropriate. Mr. Galindo appealed his convictions and the State cross-appealed the mitigated sentence.

On review, this Court examined the facts of the case as well the oral reasoning for the mitigated sentence. This Court observed

that the case arose “from a practical joke gone horribly wrong.” Mr. Galindo had received text messages and telephone calls from his girlfriend and some friends, alerting him that individuals to whom Mr. Galindo owed money had kidnapped her. He went looking for her and eventually came upon three people in a car that he thought contained his girlfriend. He rammed the vehicle, told the driver to stop, and pointed a toy gun out his window. Ms. Brown was not in the vehicle. The individuals in the car were frightened but not harmed. At trial, Mr. Galindo’s defense was ‘defense of others’. *See State v. Alfred Galindo*, 160 Wn.App. 1033 (2011).

This Court noted that at the sentencing hearing, the trial court ordered a mitigated sentence based on three factors: first, Mr. Galindo had a chemical dependency problem; second, although three individuals were in the car, it was a single violent act; and third, the length of consecutive sentences (a total of 27 years), “all strung together serves very little purpose for community safety” and further added, “the multiple impact for the three victims when added together, results in a sanction that is clearly beyond...punishment. *Id.* (citing 11 RP (Oct. 29, 2009) at 247.)

This Court concluded that the lack of a written explanation hampered its review of the sentencing court’s reasoning. However,

from what it could discern, the reasons did not fit the substantial and compelling standard. This Court added, “ If the trial court was indicating that this offense resulted in much less harm than typical for a first degree assault, such a finding might support an exceptional sentence.” *Id.* The exceptional sentence was reversed and the case remanded for a new sentencing proceeding.

On remand, at the resentencing hearing, the court stated, “The inartful use of the language by [this] court was meant to recognize that in the examination of the facts of that case the computation of the three even low end standard ranges consecutively was magnified by the fact that they were three passengers in one car.

That was on the court’s mind and, frankly, more particularly, was the multiple effects policy, and in the text of the Court of Appeals decision, we now know that, because these are serious violent offenses, this analysis is nonexistent....

In reviewing the cases that have been cited and argued very well, the *Pennington, Hodges, Baker, Statler*, in searching for some sort of proportionate or commensurate benchmark, I cannot find that the harms to these three people were much less than typical for first Degree Assault ...

The Court must look at the nature of the offense, and I cannot find that the unfortunate reason for this whole matter going forward mitigates the impact on the victims....

For that reason I must advise that I cannot find much less harm than typical...I will impose the low end of each of the standard ranges, but there is no substantial and compelling reasons, there is no additional finding that would enable me to run these sentences concurrently....RP 29-30.

The court further stated,

“This isn’t a result that the court is pleased with, and I must advise if there were some legal basis, the argument of counsel,...was at the quality that the court would have been able to go there.” RP 31.

The court then imposed a 324-month sentence. RP 30; CP 158.

Mr. Galindo appeals. CP 168.

III. ARGUMENT

By Misunderstanding The Application Of Law, The Sentencing Court Failed To Exercise Its Discretion To Impose A Sentence Outside The Standard Range, When There Were Substantial And Compelling Reasons Justifying An Exceptional Sentence.

Generally, a defendant may not appeal a trial court’s refusal to impose an exceptional sentence, however, appellate review is permitted when a court either refuses to exercise discretion or relies on an impermissible basis for refusing to impose an

exceptional sentence below the standard range. *State v. Garcia-Martinez*, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997). A failure to exercise discretion is an abuse of discretion. *State v. Pettitt*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980).

By statute, a sentencing court may depart from the standards in RCW 9.94A.589(1) and (2), and impose an exceptional downward sentence if it finds that mitigating factors justify it. RCW 9.94A.535; *In re Mulholland*, 161 Wn.2d 322, 332, 166 P.3d 677 (2007). In determining whether a factor legally supports departure from a standard range sentence, the reviewing Court applies a two-part test: first, the sentencing court may not base an exceptional sentence on factors necessarily considered by the legislature in establishing the standard range sentence; second, the asserted mitigating factor must be sufficiently substantial and compelling to “distinguish the crime in question from others in the same category.” *State v. Ha’mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997).

The mitigating factors in Mr. Galindo’s case meet the necessary requirements for consideration of an exceptional sentence and should have been considered by the sentencing court. First, they are not factors necessarily considered by the

legislature in establishing the standard range sentence; second, they are not personal in nature to Mr. Galindo (e.g. chemical dependency, primary supporter of dependents, prior criminal record); third, they distinguish the crime in question from others in the same category; fourth, the factors are upheld by statute and case law pertaining to mitigated exceptional sentences.

1. The Resentencing Court Had The Discretion To Consider Whether Any Victims Were Seriously Injured As A Result Of The Crime.

In *State v. Statler*, this Court upheld an exceptional downward sentence. *State v. Statler*, 160 Wn. App. 622, 640, 248 P.3d 165 (2011). There, the defendants were charged with first degree robbery, two counts of attempted first degree murder, or alternatively, first degree assault; two counts of drive-by shooting, while armed with a firearm. *Id.* at 629. Statler was found guilty of first degree robbery, two counts of first degree assault, two counts of drive-by shooting and a special verdict of being armed with a deadly weapon at the time of the crimes. *Id.* at 630. The victim in that case had been beaten with a shotgun and a pistol.

In imposing concurrent sentences for all but the firearm enhancement, the trial court considered the defendant's age, the

amount of time he would be incarcerated compared to other defendants, and *the fact that no one was seriously injured as a result of the crime.* (emphasis added). *Id.* at 640. This Court held that based on that evidence, substantial and compelling reasons justified the exceptional sentence. *Id.* When more than one ground for justification for an exceptional sentence is identified by the trial court, the reviewing court may affirm *if even only one* independent ground is valid. *State v. Zatkovich*, 113 Wn. App. 70, 78, 52 P.3d 36 (2002). (emphasis added).

Here, at the resentencing hearing, the court appeared to believe it could not consider the lack of harm to the victims as a mitigating factor. RP 29-30. The court misunderstood this Court's direction in its opinion, "If the trial court was indicating that this offense resulted in much less harm than typical for a first degree assault case, such a finding might support an exceptional sentence." *Galindo*, 160 Wn. App. at *5.

The court appeared to think it had to evaluate whether re-arranging another car to get it to stop was different than any other first-degree assault case involving a vehicle. The trial court's understanding and reasoning was incorrect. Rather, the issue was whether the *degree of harm* was less than typical for a first-degree

assault. The court did not apprehend that it was within its discretion to evaluate both the existence and degree of any resultant harm, as in *Statler*. The record supported the fact that the individuals in the car Mr. Galindo hit were physically unharmed. That evidence alone provides a substantial and compelling reason to justify an exceptional sentence.

2. The Resentencing Court Had The Discretion To Consider The Failed Defense of ‘Defense Of Others’ As A Mitigating Factor.

The statutory list of mitigating factors is illustrative, not exclusive, thus, courts can consider potential mitigating factors not found on the statutory list. See RCW 9.94A.535(1).¹ In *Jeannotte*, the Washington Supreme Court held that a trial court could consider a failed defense as a mitigating factor in imposing an exceptional downward sentence, even though the jury rejected the defense. *State v. Jeannotte*, 133 Wn.2d 847, 947 P.2d 1192 (1997). Quoting and approving of their reasoning in *State v. Hutsell*, the Court noted:

¹ RCW 9.94A.535(1): “The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences...”

“[t]he mitigating circumstances enumerated in RCW 9.94A.390² represent failed defenses,”... The Guidelines contain a number of mitigating factors applicable in situations where circumstances exist which tend to establish defenses to criminal liability but fail. In all these situations, if the defenses were established, the conduct would be justified or excused, and thus would not constitute a crime at all. The inclusion of these factors as mitigating factors recognizes that there will be situations in which a particular legal defense is not fully established, but where *the circumstances that led to the crime, even though falling short of establishing a legal defense, justify distinguishing the conduct from that involved where those circumstances were not present. Allowing variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime is wholly consistent with the underlying principle.* Certainly the fact that the substantive law treats these circumstances as complete defenses establishes the legitimacy of their use in determining relative degrees of blameworthiness for purposes of imposing punishment..” *State v. Hutsell*, 120 Wn.2d 913, 920-21, 845 P.2d 1325 (1993). (internal citations omitted).

² Former RCW 9.94A.390 was recodified in 2001 as RCW 9.94A.535.

As this Court acknowledged in its opinion, the circumstances of Mr. Galindo's crime were the result of a practical joke gone horribly amiss. While the jury did not excuse Mr. Galindo's conduct by affirming a 'defense of others', a sentencing court is given the liberty to find a basis for a mitigated sentence based on an unsuccessful defense. The circumstance that led to the crime, being told a loved one had been kidnapped by malevolent individuals is a unique circumstance, distinguishing the conduct from others where those circumstances were not present. Here, even though in the eyes of the jury Mr. Galindo fell short of a 'defense of others' justification, the court was not restricted at sentencing from considering the circumstances that led to the conduct and giving it due weight.

In an attempt to categorize Mr. Galindo's conduct as similar to other first-degree assault convictions involving an automobile, and thereby not meritorious of an exceptional sentence, the State's counsel argued a similarity to *State v. Baker*, 136 Wn. App. 878, 151 P.3d 237 (2007). However, the circumstances surrounding Baker's criminal conduct is markedly different from those surrounding Mr. Galindo's conduct.

There, attempting to elude police, Baker drove his SUV through stop signs and stop lights, drove 80 mph in a 30 mph zone, backed up, accelerated and rammed a police vehicle, and drove toward a police officer on a motorcycle, turning at the last moment and only clipping the front of the bike. At one point, it was reported that Baker laughed, “flipped off” the policeman and sped away. *Id.* at 881. Baker was convicted of first-degree assault, second-degree assault, and attempting to elude a police vehicle. Baker did not present a defense of others, but rather, argued that his intention was to escape from, not cause harm to police officers. *Id.* at 882. Further, the record does not show that Baker ever requested a mitigated sentence. The only similarities between *Baker* and Mr. Galindo are that both are young men, no one suffered harmed by their actions, both were convicted of first-degree assault using a vehicle, and both received extremely long sentences.

At the resentencing hearing, preparing to impose a standard range sentence, the court commented that it was not pleased with the harshness of the sentence, and wished there were some legal basis to render a mitigated sentence. The resentencing court appeared to misunderstand that it could consider whether the victims were not harmed and assign weight to a failed defense in

making its decision. The court's failure to understand its liberty to examine the compelling and substantial justifications for a mitigated sentence that were based in the record and its failure to exercise its discretion based on that misunderstanding was an abuse of discretion.

IV. Conclusion

For these reasons Mr. Galindo respectfully requests this Court to remand to the trial court for proper consideration of the mitigation factors and resentencing.

Respectfully submitted this 6th day of June,

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for appellant Alfred Galindo, do hereby certify under penalty of perjury of the laws of the United States and the State of Washington, that on June 6, 2012, I sent a true and correct copy of appellant's brief by first-class mail, postage prepaid, Alfred Galindo, Jr., DOC # 892580, Washington State Penitentiary, 1313 N. 13th Ave, Walla Walla, WA 99362; and by email per agreement between the parties to Mark E. Lindsey, Spokane County Prosecutor, at kowens@spokanecounty.org.

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