

**FILED**

JUL 02 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

30547-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALFRED GALINDO, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

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I.

APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court erred in ordering that the convictions for three serious violent felonies of first degree assault involving three different victims be served consecutively in contravention of the provisions of RCW 9.94A.535(1).

II.

ISSUE PRESENTED

1. Did the trial court abuse its discretion when it entered a standard range sentence in compliance with RCW 9.94A.589 on remand from the reversal of an exceptional sentence for lack of a substantial and compelling basis evident from the record?

III.

STATEMENT OF THE CASE

The Respondent accepts the Appellant's Statement of the Case for purposes of this appeal only.

#### IV.

#### ARGUMENT

##### A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IMPOSING THE STANDARD RANGE SENTENCE PURSUANT TO RCW 9.94A.589(1)(b).

The primary issue presented by this case is the one which arises from this Court's remand order. Was the trial court required to impose a mitigated exceptional sentence of concurrent sentences since the multiple offense policy did not apply herein to render the three offenses the "same criminal conduct?" This Court's remand order answered that question "No." The Sentencing Reform Act and the record before the trial court provide the same result. There was no error.

On remand, a sentencing court retains discretion to sentence in any lawful manner which does not conflict with the appellate court's ruling, *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). The terms of the mandate set the bounds for the sentencing court's discretion. Here, the remand orders: "a new sentencing proceeding." For defendant's resentencing, the trial court was advised that it may not impose a mitigated exceptional sentence without showing its work; the court must provide substantial and compelling reasons from the record that support the imposition of such a sentence. RCW 9.94A.535; *State v. Galindo*, 160 Wn. App. 1033 (2011).

Defendant contends on appeal from his resentencing, that the trial court abused its discretion by not exercising its discretion in failing to impose a mitigated exceptional sentence. As this Court ruled in its opinion reversing the trial court's originally imposed mitigated exceptional sentence,

The initial problem with the exceptional sentence is the fact that there are no written findings of fact or conclusions of law that explain the basis for the sentence...It is possible for a mitigated exceptional sentence involving concurrent terms under RCW 9.94A.589(1)(b). *In re Pers. Restrain of Mulholland*, 161 Wash.2d 322, 166 P.3d 677 (2007)...The court's oral remarks...reference 'the multiple impact for the three victims, when added together, results in a sanction that is clearly...beyond punishment.' (citations omitted) We are not exactly sure what the meaning of that remark is...Because we cannot conclude that it is justified on this record, the exceptional sentence is reversed and the matter remanded for a new sentencing proceeding. In the event that an exceptional sentence is again imposed, written findings must be entered.

*State v. Galindo*, 160 Wn. App. 1033 (2011).

When this case returned for resentencing, the trial court faced the decision whether to again impose a mitigated exceptional sentence with the three sentences to be served concurrently as opposed to consecutively as directed by RCW 9.94A.589(1)(b). The resentencing record reflects that the trial court imposed a standard range sentence pursuant to RCW 9.94A.589(1)(b) whereby the sentences on the three convictions for most serious violent felonies were to be served consecutively.

In this appeal, defendant appeals the trial court's imposition of a standard range sentence claiming that the trial court abused its discretion in not imposing a mitigated exceptional sentence. A claim of abuse of discretion invokes a review by the appellate court which examines only whether no reasonable person would take the position adopted by the trial court. *State v. Nelson*, 108 Wn.2d 491, 504-505, 740 P.2d 835 (1987).

Here, the Information charged the defendant with three counts of first degree assault arising out of an incident with three victims. The defendant was charged based upon the ramming of his sport utility vehicle ("SUV") into the small car in which the three victims were riding. The evidence established that defendant purposefully rammed the victims' vehicle multiple times while the two vehicles were travelling at speeds of up to one hundred miles per hour in an urban area. The trial court declined to impose a mitigated exceptional sentence upon remand based upon its review of the record and its conclusion that there was no factual basis to justify imposing such a sentence.

**B. THE TRIAL COURT IMPOSED A STANDARD RANGE SENTENCE UPON REMAND BECAUSE IT FOUND NO SUBSTANTIAL AND COMPELLING REASONS TO JUSTIFY A MITIGATED EXCEPTIONAL SENTENCE.**

The Sentencing Reform Act ("SRA"), RCW 9.94A.030(45) defines "serious violent offense" as "...(v) Assault in the first degree." The SRA, RCW 9.94A.589(1)(b) provides, in pertinent part:

Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct...all sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed [on non serious violent offenses].

RCW 9.94A.589(1)(b).

The SRA provides a sentencing court with the discretion to impose an exceptional sentence by departing from the guidelines under RCW 9.94A.535. Here, this Court in defendant's initial direct appeal found that the trial court had neither satisfied the evidentiary nor procedural prerequisites for imposing a mitigated exceptional sentence. This Court reversed the exceptional sentence and remanded the case for resentencing with the only caveat being that if the trial court intended to again impose an exceptional sentence, then it needed to provide written factual findings and legal conclusions detailing the substantial and compelling reasons justifying such a sentence.

At the resentencing, the trial court made several observations regarding the record before it and concluded that the basis for it having imposed a mitigated exceptional sentence initially were insufficient. Moreover, the trial court reviewed the record and concluded that substantial and compelling reasons did not exist therein to justify a mitigated exceptional sentence upon remand.

[O]n the court's mind...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...

...I cannot find that the harms to these victims were much less than typical for first degree assault.

I have very clearly in mind the testimony and the evidence about the multiple impacts from Mr. Galindo's large SUV. These three students, not having a clue what was befalling them and the lack of let up. It just continued...the pursuing vehicle of Mr. Galindo drove up almost parallel to the smaller vehicle. He appeared to make eye contact, fell back. The multiple strikes certainly, as the jury found, placed the victims in serious concern for their life, and the multiple contacts also satisfied the intent to do great bodily harm.

...I can't find that the unfortunate reason for this whole matter going forward mitigates the impact on the victims...

For that reason...I cannot find much less harm than typical. The Court must set out substantial and compelling reasons. The multiple offense policy as a matter of law applied to the facts was the sole basis the Court was utilizing and as, a matter...was not applicable.

...there is no substantial and compelling reasons, there is no additional finding that would enable me to run these sentences concurrently...

We will take a minute, complete the documents.

*(Pause in the proceedings for signing documents.)*

This isn't a result that the Court is pleased with...there was no stone left unturned...

RP of resentencing proceedings 12/9/11 ("120911-RP") 29-31.

Defendant characterizes these comments by the trial court as indicating a lack of understanding of the statutory and case law pertinent to this issue. Defendant characterizes the trial court's comments as evincing its perception that it lacked the discretion to impose a mitigated exceptional sentence. Defendant cites the holding in *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), as having been misunderstood by the trial court. Therein the Supreme Court held that the perception that a sentencing court does not have the discretion to impose the

mitigated exceptional sentence of ordering the sentences of serious violent offenses to be served concurrently was erroneous. With respect, *In re Mulholland* does not apply here because the trial court knew it had, and did indeed exercise its, discretion when it originally imposed the concurrent mitigated exceptional sentence. However, when reversed and remanded to justify a mitigated exceptional sentence, the trial court reviewed the record and found that it did not yield substantial and compelling reasons to support a mitigated sentence. Hence, the record reflects that the trial court exercised its discretion in finding a lack of substantial and compelling reasons justifying a mitigating sentence in light of the purpose of the SRA.

As noted, whether a sentence is justified as a valid use of the trial court's discretion is reviewed for abuse of that discretion. An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court. *State v. Nelson*, 108 Wn.2d at 504-505. Clearly, such is not the case from the record herein. Upon reversal of its mitigated exceptional sentence, the trial court again noted its discretion to impose a mitigated sentence and concluded that the record did not provide substantial and compelling reasons to justify ordering that the sentences imposed on each conviction be served consecutively. 120911-RP 29-31. Accordingly, defendant has not established that the trial court abused its discretion in resentencing defendant upon remand, hence the sentences should be affirmed.

As previously noted, whether a trial court's stated reasons are sufficiently substantial and compelling to support an exceptional sentence is a question of law that is reviewed *de novo*. *State v. Suleiman*, 158 Wn.2d 280, 291 n.3, 143 P.3d 795 (2006). Here, this Court reviewed the record of the hearing imposing the mitigated exceptional sentences *de novo* and concluded that the trial court had not supported its exceptional sentence with substantial and compelling reasons from the record. This Court then reversed the exceptional sentence and remanded to the trial court to resentence defendant and, if the trial court imposed yet a second mitigated sentence, to provide the requisite substantial and compelling reasons for so doing.

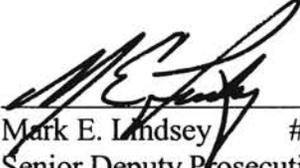
Upon resentencing, the trial court was specifically invited to review the record to provide substantial and compelling reasons to support a mitigated exceptional sentence. Upon being afforded a second opportunity to review the record and support a mitigated exceptional sentence, the trial court instead concluded that there existed no substantial and compelling reasons to support same. 120911-RP 29-31. Accordingly, the trial court then imposed a standard range sentence of consecutive sentences for the terms imposed on the three first degree assault convictions pursuant to RCW 9.94A.589(1)(b). The State respectfully requests that the standard range sentence imposed herein be affirmed.

V.

CONCLUSION

For the reasons stated herein, the sentences should be affirmed.

Respectfully submitted this 2<sup>nd</sup> day of July 2012.

  
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