

FILED

FEB 18, 2014

Court of Appeals
Division III
State of Washington

31999-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANNY S. HERRON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

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INDEX

APPELLANT’S ASSIGNMENT OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....1

ARGUMENT.....2

 A. THE TRIAL COURT DID NOT ERR IN
 IMPOSING AN EXCEPTIONAL SENTENCE
 AS THE COURT NEVER INTENDED
 TO IMPOSE AN EXCEPTIONAL SENTENCE.....2

 B. THE SENTENCE DOES NOT NEED TO BE
 VACATED AND THE CASE REMANDED
 FOR RESENTENCING.....4

CONCLUSION.....6

TABLE OF AUTHORITIES

STATUTES

RCW 9.94A.507..... 2, 3, 4
RCW 9.94A.507(3)(b) 4, 5
RCW 9.94A.507(3)(c) 4
RCW 9.94A.507(3)(c)(i)..... 5

I.

ASSIGNMENTS OF ERROR

1. The court erred in failing to follow the statutes governing imposition of a sentence outside the standard range.
2. The court erred in imposing a minimum sentence above the standard range based on a reason for which there is no factual support in the record.

II.

ISSUES

- A. DID THE TRIAL COURT ERR IN IMPOSING AN EXCEPTIONAL SENTENCE?
- B. DOES THIS SENTENCE NEED TO BE VACATED AND THE CASE REMANDED FOR RESENTENCING?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case except for the defendant's insertion of argument into the Statement at page 5 of the defendant's brief. The State rejects the defendant's characterization of the trial judge's comments as being the judge's explanation for

the court's decision to sentence outside the standard range. The trial court never mentions an exceptional sentence and does not state that the cited sections are its reasons for sentencing outside the standard range or even that it is sentencing outside the standard range. There are no facts to support the defendant's claims.

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN IMPOSING AN EXCEPTIONAL SENTENCE AS THE COURT NEVER INTENDED TO IMPOSE AN EXCEPTIONAL SENTENCE.

The defendant has misinterpreted the Judgment and Sentence and the record as the trial court having imposed an exceptional sentence.

The defendant pled guilty to Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the Second Degree and First Degree Incest. As part of his criminal history, the defendant had a conviction for First Degree Child Molestation with a sentencing date of August 12, 1999. CP 42. There was no argument that the defendant should be sentenced under RCW 9.94A.507. There is no contest to that determination raised on appeal.

RCW 9.94A.507 reads in part:

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a); or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(31)(b), and is convicted of any sex offense other than failure to register.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c)(i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

RCW 9.94A.507 (selected portions).

RCW 9.94A.507(3)(b) provides that the maximum term shall be the statutory maximum for the crime which is how the defendant was sentenced. RCW 9.94A.507(3)(c) provides for a minimum sentence to be within the standard range unless an exceptional sentence is imposed. An exceptional sentence was not imposed in this case so the minimums should have been set at somewhere in the range of 33-43 months on count IV and 46-61 months on count V. This was not done.

**B. THE SENTENCE DOES NOT NEED TO BE VACATED
AND THE CASE REMANDED FOR RESENTENCING.**

The defendant finds all manner of faults, premised on the idea that the trial court violated this statute by imposing an exceptional sentence. The situation is actually less ominous. An examination of the transcript from pages RP 34-45 shows that at points there appears to be some confusion amongst the parties regarding the operation of RCW 9.94A.507. What is also apparent is that the trial court did *not* declare an exceptional sentence. Section 2.4 on page 4 of the Judgment and Sentence shows that the boxes for an exceptional sentence are not checked. CP 43.

It is true that the Judgment and Sentence paperwork was completed incorrectly. The State maintains that the only error in this case was the scrivener's error caused by the lack of understanding (on the part of all parties) which caused the judgment and sentence to be completed with incorrect numbers

in section 4.1(b) of the Judgment and Sentence. CP 43 The minimum terms listed are 60 months for count IV and 120 months for count V. These numbers are incorrect under RCW 9.94A.507(3)(c)(i). The numbers entered in those two boxes should have been within the standard range in each of the counts. In other words, under RCW 9.94A.507(3)(b) the maximum sentences listed for the two counts are correct but under RCW 9.94A.507(3)(c)(i) the minimums are incorrect.

In order to sentence using the minimums listed in the Judgment and Sentence, the trial court would have had to declare an exceptional sentence. It did not. The defendant, as noted at the outset, has created a mountain from two erroneous entries on the Judgment and Sentence. The State respectfully submits that this case need not be vacated as requested by the defendant. This case should be remanded solely for the limited purpose of clarifying the Judgment and Sentence to show minimum ranges derived from the standard sentencing ranges of each count. There is no reason to completely vacate the sentence and re-open the sentencing.

VI.

CONCLUSION

For the reasons stated above, the State respectfully requests that the trial court be instructed to clarify the Judgment and Sentence to reflect the proper minimums for Counts IV and V.

Dated this 18th day of February, 2014.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 31999-7-III
 v.)
)
DANNY S. HERRON,)
)
 Appellant,)
)

I certify under penalty of perjury under the laws of the State of Washington, that on February 18, 2014, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

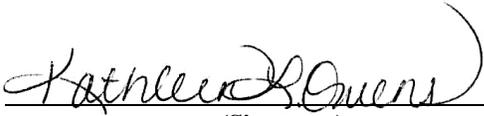
Janet G. Gemberling
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and mailed a copy to:

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2/18/2014
(Date)

Spokane, WA
(Place)


(Signature)