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Court of Appeals  
Division III  
State of Washington

32046-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TROY R. HOLWAY, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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APPELLANT'S BRIEF

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Janet G. Gemberling  
Attorney for Appellant

JANET GEMBERLING, P.S.  
PO Box 9166  
Spokane, WA 99209  
(509) 838-8585

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A. ASSIGNMENTS OF ERROR

1. The court erred in imposing sentence enhancements based on school bus stop proximity.
2. The court abused its discretion in denying defendant's request for a mitigated sentence.

B. ISSUES

1. Was testimony identifying the location of purported school bus stops that failed to show that the purported stops were established by the school district or its agents sufficient to support sentence enhancements?
2. Did the court abuse its discretion by relying on irrelevant factors in declining to impose a mitigated sentence?

C. STATEMENT OF THE CASE

Donnell Bell works with Detective Alan Quist to make undercover narcotics buys. (RP 52-53, 57) In this role as an informant he purchased heroin from Troy Holway. (RP 53) He made a total of three purchases, on October 12, October 14, and October 19, 2011. (RP 27, 37, 54) Mr. Bell was paid \$70 for each purchase. (RP 65)

For the first purchase, Mr. Bell met with Mr. Holway at the McDonald's on Third. (RP 54) Later that month, he met with Mr. Holway twice at the Zip's on Division. (RP 55, 57) At each meeting, Mr. Bell purchased heroin from Mr. Holway, and then gave the heroin to Detective Quist. (RP 58) Subsequent testing established that Mr. Bell received 0.9 grams of heroin at the first meeting, 1.0 grams at the second meeting, and 0.7 grams at the third meeting. (RP 77, 79)

The State charged Mr. Holway on January 3, 2013 with three counts of delivery of a controlled substance. (CP 1) On September 9, the State moved to amend the information to include the enhancement of delivery of a controlled substance within a thousand feet of a protected zone. (RP 1) Mr. Holway pleaded not guilty to the amended information; the document amending the information does not appear to have been filed with the court. (RP 2-3) The charges were tried to a jury on September 10 and 11.

In addition to testimony about the October 2011 transactions, two witnesses provided evidence relating to sentence enhancements. Joel Edgar, a Spokane County geographic information systems technician provided a map showing the area within a 1,000 foot radius of the Third Avenue location, with "stars representing bus stop locations." (RP 115)

Mr. Edgar provided a similar map for the relevant location on Division Street. (RP 117)

Rhonda McLellan works for Spokane School District Number 81 as “a transportation liason in charge of regular ed routing.” (RP 118-19) Ms. McLellan explained that the stars on Mr. Edgar’s map are bus stops for elementary schools and possibly a middle school. (RP 119-20) She also identified the location of Lewis & Clark High School near Third Avenue.

(RP 120)

The jury found Mr. Holway guilty of the crimes of Delivery of a Controlled Substance as charged in Counts 1, 2, and 3. (CP 25-27) The jury was given a special verdict form asking: “Did the defendant deliver a controlled substance within one thousand feet of a school bus route stop designated by a school district or within one thousand feet of the perimeter of a school ground?” (CP 29) The jury answered “yes” as to Counts 1, 2 and 3. (CP 29)

The standard range for Mr. Holway’s sentence was based on his offender score of 7 points. (CP 68) Defense counsel asked the court to find that Mr. Holway’s presumptive sentence would be clearly excessive under the multiple offense policy, and to impose a lesser sentence. (RP 173-180; CP 38-42) The court imposed a standard range sentence of

60 months' incarceration plus an additional 72 months' incarceration based on three school zone enhancements for a total sentence of 132 months. (RP 188)

#### D. ARGUMENT

##### 1. THE EVIDENCE OF BUS STOP LOCATIONS WAS INSUFFICIENT TO SUPPORT ENHANCED SENTENCES ON COUNTS 2 AND 3.

Mr. Holway was given two-year sentence enhancements for Counts 2 and 3 based on evidence purporting to establish the presence of school bus stops within 1,000 feet of the Zip's on Division.

Under RCW 69.50.435, a defendant convicted of delivery of a controlled substance within 1,000 feet of a school bus route stop is subject to a sentencing enhancement. The statute defines "[s]chool bus route stop" as "a school bus stop as designated by a school district". RCW 69.50.435(f)(3). A school district may delegate authority to its agents or employees to designate school bus stop locations, and such an agent's testimony that he or she has designated certain school bus stops is sufficient evidence as to the location of those bus stops. *See State v. Sanchez*, 104 Wn. App. 976, 978-79, 17 P.3d 1275 (2001).

Ms. McLellan did not testify that, as part of her job as a transportation liaison, she has authority to designate school bus stops. She

did not testify as to who has that authority or how the bus stops are designated. She did not tell the jury how she had arrived at her conclusion that the stars on Mr. Edgar's maps represented designated school bus stops. The State failed to present any evidence that the stars on the maps represented the locations of school bus stops designated by a school district or any of its agents.

The evidence was insufficient to support the jury's finding that Mr. Holway delivered a controlled substance within one thousand feet of a school bus route stop designated by a school district. Imposition of two-year sentence enhancements for Counts 2 and 3 was error.

2. THE COURT RELIED ON AN IMPERMISSIBLE BASIS FOR REFUSING TO IMPOSE AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE.

Mr. Holway's three current convictions resulted in an offender score of 7; his score, based on a single current conviction, would have been 5. RCW 9.94A.525, .589. The standard range sentence for delivery of a controlled substance with an offender score of 7 is 60 to 120 months. RCW 9.94A.517, 518. The range for the same offense, but with an offender score of 3 to 5, is 20 to 60 months. *Id.*

The fact pattern in the present case provides a substantial and compelling reason for imposing an exceptional sentence below the standard range:

“[A]lthough the prosecutor has discretion to charge and obtain convictions on multiple controlled buys, the sentencing court has power to determine whether the resulting standard range sentence is “clearly excessive” as a result of the multiple offense policy in [former] RCW 9.94A.400. If it is, the sentencing court has power to grant an exceptional sentence downward, pursuant to RCW 9.94A.390(1)(g).”

*State v. Sanchez*, 69 Wn. App. 255, 262, 848 P.2d 208 (1993); *see* RCW 9.94A.535(1)(g) and RCW 9.94A.589(1). *Sanchez* involved three controlled buys, between August 15 and August 23, to a police informant who paid between \$80 and \$150 for small quantities of cocaine. 69 Wn. App. 257-58.

The courts have applied the reasoning in *Sanchez* in numerous cases. *See State v. McGill*, 112 Wn. App. 95, 101-02, 47 P.3d 173 (2002); *State v. Fitch*, 78 Wn. App. 546, 552-53, 897 P.2d 424 (1995); *State v. Hortman*, 76 Wn. App. 454, 886 P.2d 234 (1994), *review denied*, 126 Wn.2d 1025, 896 P.2d 64 (1995). Each of these cases involved controlled buys of small amounts of a controlled substance initiated by police and the same informant over a brief period of time.

Whether a given presumptive sentence is clearly excessive in light of the purposes of the SRA is not a subjective

determination dependent upon the individual sentencing philosophy of a given judge. Rather, it is an objective inquiry based on the Legislature's own stated purposes for the act. Sanchez holds that a presumptive sentence calculated in accord with the multiple offense policy is clearly excessive if the difference between the effects of the first criminal act and the cumulative effects of the subsequent criminal acts is nonexistent, trivial or trifling....

*State v. McGill*, 112 Wn. App. at 101.1 The purposes of the SRA are not served by the multiple offense policy "if qualitative differences between the first criminal act and subsequent acts must be ignored". *Fitch*, 78 Wn. App. at 553.

Ordinarily, the trial court's decision to impose a sentence within the standard range is not reviewable. RCW 9.94A.585. But a court's decision to impose a standard range sentence in "circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below

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<sup>1</sup> This reasoning has also been relied on to support a mitigated sentence in a case involving prosecution for multiple forgeries:

Considering the close relationship in time, intent and scheme of the several forgeries, we find that the sentencing court was within the authority granted in RCW 9.94A.390(1)(g) when it found that the minimal cumulative effects of the crimes were substantial and compelling reasons for imposing an exceptional sentence. As we said in *State v. Fitch*, 78 Wash. App. 546, 897 P.2d 424 (1995), "none of the purposes of the SRA are served by the multiple offense policy of RCW 9.94A.400 if qualitative differences between the first criminal act and subsequent acts must be ignored."

*State v. Calvert*, 79 Wn. App. 569, 581-83, 903 P.2d 1003, 1010-11 (1995).

the standard range” is subject to appellate review. *State v. McGill*, 112 Wn. App. at 100-101. “A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority.” *Id.*

In considering whether to follow *Sanchez*, the trial court relied on its understanding that “Mr. Sanchez had many mitigating factors present to be advanced in favor of his request for an exceptional sentence that are absent here in Mr. Holway’s case.” (RP 179, 187) The court did not articulate those differences, but apparently relied on the argument of State’s counsel.

The deputy prosecutor pointed out that Mr. Holway was “an experienced heroin dealer” with an extensive criminal record, and argued that an implicit reason for the reduced sentence in *Sanchez* was that Mr. *Sanchez* had no apparent experience in selling drugs. (RP 181-82) But the courts have consistently held that “lack of criminal history is an insufficient ground for sentencing below the standard range since the Legislature specifically considered criminal history when establishing standard sentencing ranges.” *State v. Freitag*, 127 Wn.2d 141, 144, 896 P.2d 1254, 1255 (1995) *amended*, 127 Wn.2d 141, 905 P.2d 355 (1995).

The deputy prosecutor also pointed out that while Mr. Sanchez had apparently suffered from some mental disability and was illiterate, Mr. Holway had no such disadvantage. (RP 182) But the *Sanchez* opinion utterly rejected any learning disability or inadequate education as a mitigating circumstance:

As already seen, the first reason used by the sentencing court was Sanchez's limited education. In *State v. Rogers*, 112 Wash.2d 180, 185, 770 P.2d 180 (1989) (educational level), and *State v. Altum*, 47 Wash. App. 495, 505–06, 735 P.2d 1356 (alleged learning disability), review denied, 108 Wash.2d 1024 (1987), there was no evidence that the defendant's education level or alleged learning disability had significantly impaired his capacity to conform his conduct to the requirements of the law. As a result, both courts refused to characterize education level or learning disability as a mitigating factor within the meaning of RCW 9.94A.390(1)(e). Similarly in this case, Sanchez presented no evidence that his limited education impaired his capacity to conform his conduct to the requirements of the law, and we hold that his education level without more, does not constitute a substantial and compelling reason for an exceptional sentence.

*State v. Sanchez*, 69 Wn. App. at 259-60.

The deputy prosecutor also suggested that the *Sanchez* decision “center[s] around an implied issue of entrapment whether or not the police, having controlled the situation, having the defendant acquiring enough confidence in the CI to sell him drugs, and then they just kept sending him in to make additional purchases to rack up the offender score.” (RP 182) The deputy prosecutor suggested that while such a

concern might be appropriate in the case of Mr. Sanchez, with his learning disabilities and limited experience, it would not be justified in the present case in light of Mr. Holway's experience and ability. (RP 182)

The appellate courts' decisions have uniformly rejected "the inference that the exceptional sentence was imposed as a sanction for police practices." *State v. Fitch*, 78 Wn. App. 552-53

In declining to give Mr. Holway a sentence below the standard range the trial court relied on factual differences between the Sanchez case, none of which was relevant to the reason for imposing a mitigated sentence in *Sanchez*, and Mr. Holway's case. The court ignored the remarkable similarity of the relevant facts among *Sanchez*, its progeny, and the present case.

Here, as in *Sanchez*, *Fitch*, *McGill*, and *Hortman*, "the difference between the effects of the first criminal act and the cumulative effects of the subsequent criminal acts is nonexistent, trivial or trifling . . ." and "the resulting standard range sentence is 'clearly excessive' as a result of the multiple offense policy." 69 Wn. App. at 261-62.

The sentence should be reversed.

E. CONCLUSION

Mr. Holway received sentence enhancements for which the supporting evidence was insufficient. His request for a mitigated sentence was denied for reasons that are insufficient and impermissible. The resulting sentence should be reversed and the matter remanded for resentencing.

Dated this 8th day of April, 2014.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489  
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32046-4-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
TROY R. HOLWAY,	)	
	)	
Appellant.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on April 10, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey  
kowens@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on April 10, 2014, I mailed a copy of the Appellant's Brief in this matter to:

Troy R. Holway  
#866839  
Washington Correction Center  
PO Box 900  
Shelton, WA 98584

Signed at Spokane, Washington on April 10, 2014.

  
Janet G. Gemberling  
Attorney at Law