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DECEMBER 10, 2014
Court of Appeals
Division III
State of Washington

32114-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DEAN L. ANDERS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The court violated appellant's constitutional right to a public trial during the jury selection process.
2. The court erred in failing to properly address appellant's request for an exceptional sentence downward.
3. The Judgment and Sentence contains two scrivener's errors.

II. ISSUES PRESENTED

1. Did the trial court violate the defendant's right to a public trial by using a "silent" juror selection procedure?
2. Did the trial court err by choosing not to give an exceptional sentence downward?
3. Does the Judgment and Sentence in this case contain scrivener's errors?

III. STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the case with the following additions:

Appellant states "Burt was in a drunken rage." App. Br., p. 5. The defendant states this as a plain fact without noting its source. This statement is an opinion delivered by the *defendant* on direct questioning of his defense counsel.

Although both Mr. Hill and Mr. Anders were tried together, Mr. Hill was acquitted (2RP¹ 836) and Mr. Anders was found guilty on the First Degree Assault charge and Deadly Weapon Enhancement. CP 34 - 35.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S PUBLIC TRIAL RIGHTS BY USING A "SILENT" PEREMPTORY CHALLENGE PROCEDURE.

The defendant finds error in the trial court's use of "silent" peremptory challenges saying that the defendant's right to a public trial was impinged by the procedure and therefore his conviction should be reversed. The record reflects that the selection procedure was conducted silently. 3RP 88.

The defendant wishes to claim that the selection of jurors by way of peremptory and for cause changes must be open to the public. Two out of three divisions of the Courts of Appeals disagree with the defendant's assertion that selecting a jury by way of silent peremptories and for cause challenges implicates the right to a public trial.

In *State v. Love*, 176 Wn.App. 911, 309 P.3d 1209 (2013), Division III decided that the public trial right does not apply to peremptory and for cause challenges. Division III, in *Love*, distinguished between the

¹ The verbatim report of proceedings are referenced the same as the Brief of Appellant, (p. 2, n.1).

voir dire process, which was part of the right to public trial and the actions involved in challenging a juror which were not part of the right to a public trial. Since this ruling removes peremptory and for cause procedures from the public trial arena, arguments involving silent peremptories have no merit.

The defendant attempts to classify *Love* as “wrongly decided.” App. Br., p. 15. Such efforts are pointless as *Love* was discussed favorably in *State v. Smith*, 334 P.3d 1049, 1060 (2014). The Washington State Supreme Court noted that it was nearly impossible to determine where the public trial right attaches and where it does not attach. *Id.*

In *State v. Dunn*, 180 Wn.App. 570, 321 P.3d 1283 (2014), Division II was dealing with a defendant who argued that his public trial rights were violated because the trial court conducted the peremptory challenges at the clerk’s station. The *Dunn* court adopted the holding in *Love, supra*. The *Dunn* court stated: “We agree with Division Three that experience and logic do not suggest that exercising peremptory challenges at the clerk’s station implicates the public trial right.” *Dunn, supra*, at 575.

It is plain under the case law that silent peremptories and for cause challenges are not within the ambit of the defendant’s public trial rights. This argument has no merit.

B. THE TRIAL COURT SENTENCED WITHIN THE STANDARD RANGE AND DID NOT ERR IN NOT USING THE DEFENDANT'S PROFFERED EXCEPTIONAL SENTENCE DOWNWARD.

The defendant challenges his sentence, mainly because the defense counsel argued for an exceptional downward departure sentence and the court did not grant an exceptional sentence. The two sentencing factors put forth by the defense were a failed self-defense factor and that the victim (to a significant degree) was the initiator, willing participant, aggressor, or provoker of the incident.

The court sentenced the defendant to 180 months and the 24-month deadly weapon enhancement. This is a standard range sentence for the crime with the defendant's criminal history score. CP 44.

The general rule is that a standard range sentence cannot be appealed. RCW 9.94A.585(1). When the trial court declines to impose an exceptional sentence, the only available method of attacking that decision is to establish that the trial court failed to do something it was required to do at sentencing. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). A defendant may also challenge the trial court's usage of an impermissible basis for refusing an exceptional sentence. *State v. Garcia-Martinez*, 88 Wn.App. 322, 329–30, 944 P.2d 1104 (1997).

The trial court has discretion to sentence anywhere within the standard range without providing any reasons in support of its decision. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719 (1986). However, *Ammons* does permit challenges to the procedures by which a sentence within the standard range is imposed. *Id.*, at 183.

The defendant has not cited to any law that requires the court to justify a standard range sentence on the record. Additionally, the defendant has not shown any concrete references in the record that show the trial court operated on faulty logic or mistakenly applied the law.

The defendant seems to be under the impression that he is somehow entitled to an exceptional sentence because his self-defense argument failed and the defendant stated that the victim was the initiator of the fracas. The defendant claims not to know what reason the court used to refuse the exceptional down request. Since the defense counsel thoroughly argued his position and the defendant touched on some of the same issues in his lengthy allocution, the imposition of a standard range sentence would seem to answer all such questions. The defendant has not argued that the court was asleep or otherwise impaired in its ability to hear the defense counsel's arguments. Nor did the defendant show that the judge made any comments pertaining to some preformed bias that included the defendant.

The trial was not statutorily required to impose an exceptional downward sentence. RCW 9.94A.535(1). “The court *may* impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence.” RCW 9.94A.535(1) (emphasis added).

The defendant finds fault in the trial court’s failure to “consider on the record” the defense proffered factors for an exceptional sentence. “Whenever a sentence *outside the standard sentence range* is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.” RCW 9.94A.535 (emphasis added). The sentence in this case was not an exceptional sentence; it was a standard range sentence. In fact, the sentence imposed is not even at the high end of the standard range. The court acknowledged verbally that the State had asked for high end and victim wanted more than high end. 2RP 861.

C. THERE ARE NO SCRIVENER’S ERRORS IN THE JUDGMENT AND SENTENCE.

The defendant notes that the Judgment and Sentence in this case indicates at CP 49 that the defendant waived his right to be present at any restitution hearing. There is nothing in the transcript from the sentencing that supports the alleged waiver of the defendant’s right to be present at any restitution hearing.

An order correcting the Judgment and Sentence was filed on December 9, 2013. CP 75-76. The first page of this order noted that no further restitution would be requested. CP 75. Therefore, the issue involving the alleged waiver of appearance at a restitution hearing is moot.

The next alleged scrivener's error is not an error at all. The defendant asserts that his criminal history as listed in Section 2.2 of the Judgment and Sentence is incorrectly listed because the section indicates that the defendant's criminal history was "Domestic Violence." Section 2.2 of the Judgment and Sentence does not indicate a DV component. The section has a statement after the listing of the criminal history that "Domestic Violence was pled and proved." The defendant misinterprets the Section 2.2 as saying that the defendant's prior history was thereby listed as a DV crime. If one reads the entirety of the DV sentence, it can be seen that an asterisk is at the beginning of designation. None of the defendant's criminal history was marked with an asterisk. The same marking scheme can be seen just above Section 2.2. There is no criminal history noted in that section because there were no crimes added in that portion of the Judgment and Sentence. The "boilerplate" is available if needed and denoted by the asterisk.

There is no need for a correction of Section 2.2. It was misinterpreted by the defendant.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

DEAN LEE ANDERS,

Appellant,

NO. 32114-2-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 10, 2014, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Casey Grannis
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and to

Eric J. Nielsen
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and mailed a copy to:

Dean Lee Anders, #771473
Coyote Ridge Corrections Center
PO Box 769
Connell WA 99326

12/10/2014

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)

V. CONCLUSION

The State respectfully requests that the defendant's conviction(s) be affirmed.

Dated this 10 day of December, 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