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AUG 28, 2015
Court of Appeals
Division III
State of Washington

No. 32599-7-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MEGHAN BRADFORD SANDVIG,

Defendant/Appellant

Respondent's Brief

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RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

- 1. The Court did not err in finding that the defendant committed thirty acts of theft in the first degree, and punishment imposed did not constitute double jeopardy.**
- 2. The court did not err in relying on the aggravating factor that the current offense was a major economic offense.**
- 3. The sentence imposed by the court was not clearly excessive.**
- 4. The record could support the finding that Ms. Sandvig had the current or future ability to pay discretionary legal financial obligations.**

5. **The court did not err by imposing a minimum monthly payment toward restitution to begin after release from custody.**

I. STATEMENT OF FACT

Rusty Osborn and his wife, Debbie owned Premier Paint and Floor covering, a business in Ellensburg, WA. (CP 52, 104) Meghan Sandvig was the office manager and bookkeeper for the business. (RP 28, 30, CP 94) She worked there for some years, as the business encountered the recession and difficult financial times. (CP 52-63) The business ended up laying off employees, cutting salaries, cutting benefits, and laying off more employees. (RP 35, CP 52-63) During this time, for several years, Ms. Sandvig was siphoning off money from the business. As the State charged in the information, on various different dates, Ms. Sandvig would make telephone transfers, transferring more than \$5000 at a time from the business account into her own personal account. (RP 28, 34, 35-36, CP 21-28, 52-63,) Over half a million dollars was siphoned off while she was

there. (CP 95, 106) Ms. Sandvig spent that money on a lavish lifestyle of clothes and jewelry and trips while others were having hours cut and jobs cut and salaries cut. (RP 35-36, CP 52-63)

The State ended up charging her with thirty counts of theft in the first degree for thirty separate transactions that Ms. Sandvig initiated. These incidents represented separate dates of separate calls transferring money from the business into her own account, sometimes months apart, sometimes weeks or days apart. (CP 21-28, RP 35-37) Each of the charges alleged a specific date of a specific transaction. (CP 21-28)

The defendant pled guilty as charged, and also admitted to the facts that were alleged as aggravating facts in support of an exceptional sentence, though the defendant did not agree an exceptional sentence should necessarily be imposed. (CP 29-37, RP 25-31) A sentencing hearing was held later where parties argued about whether the offenses constituted the same criminal conduct. (CP 43-49, CP 40-42, RP 36-39) The court found the incidents did not constitute the same criminal conduct because they did not happen at the same time. (RP 71)

The court did find that the defendant had committed multiple current offenses which meant that the high offender score resulted in some of the offenses going

unpunished. In fact, the court found that twenty of the charges would be going unpunished. (CP 94) The court also found that the current offense met the definition of a major economic offense because it involved multiple incidents per victim, it involved an actual monetary loss substantially greater than typical, and because the defendant used her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, pursuant to RCW 9.94A.535(3)(d). Specifically, the court found that Ms. Sandvig was office manager/bookkeeper and did enjoy a position of trust, which she used in order to take the money and to evade detection over a course of years. (CP 94) The court found that these two aggravating factors justified the imposition of an aggravated sentence. The court then imposed an aggravated sentence of 90 months, which it reached by figuring 3 months for each count multiplied by 30 counts. (RP 73, CP 64-76)

The court also assessed restitution (CP 102-103, 105-107) and some other legal financial obligations (RP 73-74, CP 69).

ARGUMENT

1. The Court did not err in finding that the defendant committed thirty acts of theft in the first degree, and punishment imposed did not constitute double jeopardy.

The defense analyzes the facts as a unit of prosecution case, but incorrectly applies a standard from *State v. Turner*, 102 Wn.App.202 (2000). *Turner* involved a case in which the State had alleged different methods of stealing money from the same victim during the same time period. The court there found that because the charges reflected simply different schemes or methods of stealing money over the same time, with the same intent and the same victim, that the unit of prosecution was ambiguous. However, the case at hand is different, since it involves separate and distinct incidences of theft which occur at different times. This situation is identical to the more recent and more appropriate analogy of *State v. Kinneman*, 120 Wn.App.327 (2003). In *Kinneman*, an attorney made sixty-seven different unauthorized withdrawals from his trust account and converted those funds to his own use. The State had charged and convicted him separately for each withdrawal, and the Court held that,

“The State had the discretionary authority to charge Kinneman with a separate count of theft for each discrete, unauthorized withdrawal he made from his IOLTA account. He was not subject to double jeopardy for 67 theft convictions where each was based on a discrete, unauthorized withdrawal.” *Kinneman* at 338.

The court upheld his 28 counts of theft in the first degree and 39 counts of theft in the second degree. *Kinneman* held, and has been cited for the proposition, that prosecutors have “considerable latitude to either aggregate charges or to bring multiple charges.” *Kinneman* at 337-338, and *State v. K.R.*, 169 Wn.App. 742 (2012) at 746-747. Thus, the unit of prosecution for theft in the first degree (in its current statute, RCW 9A.56.030) is \$5000, and it is within the discretion of the prosecutor to charge discrete instances of theft of that amount or to aggregate them into one charge. The case of *State v. Dash*, 163 Wn.App. 63 (2011), which defense cites for the proposition that multiple takings can be a single larceny, is a case about the statute of limitations, not unit of prosecution, and does not change the prosecutor’s discretion to charge discrete instances of theft, merely because the prosecution in that case chose to charge only one count.

In the present case, the State alleged, and the defendant pled to

thirty discrete instances of theft of over \$5000, each of which took place at a separate time. (CP 21-28) Although the defendant undoubtedly did not intend at first to steal so much, she allowed herself to get in deeper and deeper as months went by. As the State argued in the sentencing memorandum, each time the defendant picked up the telephone and made a telephone transfer of money into her own account, she had to decide anew to commit a crime, whether months, weeks, or merely days had passed since she had tapped into this illicit source of money. (CP 45) Each time, she knew what she was doing was wrong and she did it anyway, ignoring the consequences obvious all around her to her employer, her fellow employees, and her own conscience. Just as *K.R.* points out, it is the court's duty to consider the unit of prosecution and the legislative intent. "A court should not be hasty in finding an ambiguity because the result may be a construction of the statute that does not accurately reflect legislative intent." *K.R.* at 748, citing *In re Transfer of Territory*, 130 Wn.App.806 (2005). In this instance the court was bound to look at the specific facts of the case to determine the unit of prosecution, and as in *Kinneman*, each unauthorized withdrawal of funds

and conversion to personal use was a discrete theft. No double jeopardy principle is violated.

2. The court did not err in relying on the aggravating factor that the current offense was a major economic offense.

It is proper during a plea for the defendant to stipulate to relevant facts that would support an exceptional sentence. The Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct 2531, 159 L.Ed.2d 403 (2004) held

“When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding.” *Blakely* at 310.

However, it would be completely inappropriate for the defendant now to claim that the facts do not legally support an exceptional sentence. The defendant specifically stipulated that facts supporting two aggravating factors did exist. It was part of the plea, or the state

would have been entitled to go to trial to prove them. (RP 22-23, RP 28-30) The defendant cannot now challenge them, after agreeing on the record that, as the information alleged,

“the defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished, pursuant to Revised Code of Washington 9.94A.535.(a-meaning 2)(c)

and

the current offense was a major economic offense because it involved multiple incidents per victim, it involved actual monetary loss substantially greater than typical for the offense, and the defendant used her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, pursuant to Revised Code of Washington 9.94A.535(3)(d).” (CP 28)

This language from the information, to which the defendant pled, (CP 29-37), comes straight from the statute.

In RCW 9.94A.535(2), the legislature determined,

“The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances: ...

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.”

This circumstance was alleged and the fact of it was stipulated to.

The statute also provides in RCW 9.94A.535(3):

“Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537. ...

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.”

Several of the factors in (3)(d), specifically i, ii, and iv, were alleged in the information (CP 28). However, the statute indicates consideration of any of the factors can identify the offense as a major economic offense. The allegation as a whole was stipulated to, not just the one factor—(i)—that the appellant complains of.

Both of these allegations, from the information, were admitted at

the guilty plea. (RP 28-30) They were also found by the court at sentencing, and set forth as contained in the Amended Information in the Findings of Fact and Conclusions of Law as to Exceptional Sentence (CP 93-96, compare with CP 28). The court was clear it relied upon both factors.

The court said,

“Based on your plea I found you guilty of those offenses. You also—agreed with the state’s allegations that you had committed multiple current offenses and your high offender score would result in some of the current offenses going unpunished, and—that the current offense was a major economic offense because it involved multiple incidents per victim, it involved actual monetary loss substantially greater than typical for the offense and that you used your position of trust, confidence or fiduciary responsibility to facilitate the commission of the crimes.

You didn’t agree at the time that you pled guilty that – aggravating—or aggravated sentence should be imposed but you did agree that the facts did exist that would allow the imposition of one....” (RP 70)

And after a little more discussion, the court continued,

“ And—I think it’s important, though, that we go above the standard range.” (RP 71)

In more detail, in the written findings, the court found,

“4. The standard range is 43 to 57 months. If the defendant had committed Theft 1 ten times, the standard range would be the same. Thus, twenty charges would be unpunished.

5. The defendant was the office manager/bookkeeper for the business and did enjoy a position of trust, which she used in order to

- take the money and to evade detection over a course of years.
6. The state has alleged an amount in excess of \$500,000. A restitution hearing will be set to find the exact amount. ¹
 7. The crime occurred over a course of over two years.
 8. The court finds that the two aggravating factors justify the imposition of an aggravated sentence.” (CP 94-95)

Thus, the court specifically found that the operation of the SRA resulted in some twenty offenses going unpunished, and also that this guilty plea constituted a major economic offense. Defense complains that one sub-factor was improper. The sub-factors listed were only points to be considered in determining whether or not this crime was a major economic offense. The court found that it was a major economic offense. The fact of multiple incidents was discussed more with regard to the first aggravator about the offender score than the second—the major economic offense. The court’s specificity about the monetary loss, which was known to be (and the defendant had stipulated that it would be) substantially greater than the \$150,000+ which is required for thirty counts of Theft 1, and the court’s specificity about the defendant’s position of trust, both clearly uphold

¹ The restitution was eventually determined by agreed order to be “\$577,228.60 (CP 106)

the finding that this was a major economic offense. More important, the defendant had specifically stipulated to the fact that it was in fact a major economic offense. The court was absolutely entitled to rely upon the defendant's words that "We stipulate to factual basis for aggravators but not that aggravated sentence should be imposed." (CP 36) and the colloquy at the time of the plea. (RP 22-23, 28-30)

Additionally, the court was entitled to take into account the defendant's admission of thirty different counts. Thus, considering appellant's argument that the standard range took into account the fact that there were multiple incidents for this victim, even if the first ten times Ms. Sandvig took money were counted into the offender score, the twenty additional times that were NOT counted in the standard range should be allowed to be considered in determining if this plea was a major economic offense.

While the exact amount of restitution was not yet determined at the time of the plea, the fact that it would be substantially greater than \$150,000 was known. It was stipulated to. (See again the agreement

that the facts were stipulated to in RP 22-23 and 28-30). Defense counsel referred to \$350,000. (RP 63) The State then indicated “We’ll be seeking \$577,000” (RP 63), and the Judge said the State had put in “closer to \$578,000” in the sentencing memorandum and the proposed Judgment and Sentence, which the court saw (RP 63 and CP 69). Even if the exact final restitution number (577,228.60) was not told to the court at the time of sentencing, the fact that the amount was substantially greater than 150,000 was distinctly before the court, specifically illuminating and explaining the agreement of the defendant to the allegation that the amount was substantially greater than typical for the offense. This sub-factor was clearly on the court’s mind.

A large amount of time was spent discussing the position of trust that Ms. Sandvig enjoyed. (See the victim impact statements at CP 52-63, as well as their recommendations to the judge RP 43-56, and the defendant’s own stipulations, as previously referenced). The most poignant moments of the sentencing hearing involved the recitations by the victims (RP 42-56) and the defendant’s own admission that she violated their trust. (RP 67) So that sub-factor was before the court as

well, in great detail.

Finally, the defense specifically told the court,

“And once again, she didn’t—she didn’t want to put anybody through having a jury come in and prove the facts for the aggravator, or-- You know? She stepped up and said, ‘Yes, that would qualify.’” (RP 62-63)

The defendant herself and through her attorney admitted that the facts showed proper aggravating circumstances, not an “improper factor.” (See all of the proceedings, from RP 22 at the plea where counsel indicates, “We’re adding in two aggravators that Ms. Sandvig is stipulating to the factual basis for the aggravators but not that the court should impose an aggravated sentence.” to the above quoted RP 62-63 at the sentencing where the defense tells the court the defendant said “yes, that would qualify.”)

It is disingenuous and totally in contradiction to the point of the plea to indicate that the reviewing Court should remand to see if some improper factor were used to determine aggravating factors. Legitimate bases for the aggravating factors were clearly discussed and relied upon by the court. It was for the court to decide whether to impose an exceptional sentence based upon those factors, and the court

did so. They were legitimate and the function of the stipulation as to the facts was to give the court substantial evidence for both factors. There is no reason to remand the case to determine which of the sub-factors to prove one of the stipulated aggravating factors the court relied upon most.

3. The sentence imposed by the court was not clearly excessive.

The sentence ultimately imposed by the court for thirty counts of Theft in the First Degree was 90 months. This comes to exactly seven and one half years for stealing over half a million dollars as a trusted bookkeeper, over a course of years.

In analyzing a sentence to determine whether it is clearly excessive, the reviewing court subjects the decision to an abuse of discretion standard of review. *State v. Ritchie*, 126 Wn.2d 388. (1995) The Court there held that for an action to be clearly excessive, it must be

based on untenable grounds or untenable reasons or be an action no reasonable judge would have taken. *State v. Branch*, 129 Wn.2d 635 (1996).

In the current case, although the judge did not have to give a reason for the length of the sentence imposed, (see *Ritchie, supra*), he did indicate, “I’m going to impose 90—that’s nine, zero,—months on Counts 1 through 30. The idea is three months per count.” (RP 73) Three months is the standard range for just one count with no additional counts. The standard range for an offender score of nine, which would involve ten counts, is 43-57 months, which is 4.3 to 5.7 months per count. The legislature obviously believes that if this crime happens as many as ten times, each count should be worth more than three months. In fact, a reasonable approach for this judge might have been to triple the midpoint range from the ten counts, since there were thirty counts, and that would have led to 150 months. Or the court could at least have doubled the standard range to give the state’s recommended sentence of 100 months. But the court gave the conservative number of 90 months, allowing for only three months per

count. It would be ridiculous to say that no reasonable judge would give that sentence for the actions of the defendant. Statement after statement was provided both in writing and orally about how impactful this major economic offense was, since it victimized not just the business itself, but everyone who worked there.

This was no Fred Meyer with large corporate offices somewhere else. This was a local Mom and Pop business run by a man who tried to put every employee's welfare, including the defendant's above his own. It was his trust and all her coworkers' trust that Ms. Sandvig violated.

Any member of the public off the street who heard that Ms. Sandvig had embezzled over half a million dollars from her employer would be highly unlikely to find seven and a half years in prison to be clearly excessive. The amount of time imposed is not shocking at all.

4. The record could support the finding that Ms. Sandvig had the current or future ability to pay discretionary legal financial obligations.

The defendant obviously had been gainfully employed and working up until she was caught stealing. (RP entire record) There was no evidence of any infirmities or disabilities that were produced for the judge. She said in her statement that she wanted to pay back what she took and that she wanted to be a productive member of society and give back in a meaningful way. (RP 67) Such factors as these were significant in *State v. Lundy*, 176 Wn.App 96 (2013), which also held that formal findings were not required.

When the judge came to impose legal financial obligations, he said,

“I’m going to strike (inaudible) right here the restitution order’s going to—The only thing I’m ordering today is \$500 victim—victim—I’m just assuming that after your release from confinement you will be able to work. There’s nothing preventing you, except for this (inaudible). Is that accurate? —working and making payments.

So I’ll impose --\$850 in legal costs and fees—today, and then the prosecuting attorney will set a restitution hearing, and that will be within 180 days. And I’m going to require that you make minimum payments, upon release, of \$100 a month—and do the best you can on that. And that will be upon release.” (RP 73-74)

Of course, the record on this is not as good as the record from actually being at the hearing, since the pause after the question, “Is that accurate?” is not reflected in a transcript, nor is the physical response of the defendant to the question. Plus, some of the colloquy is inaudible. It ought to be evident from the judge’s next words that the defendant nodded yes. And the defendant did not object to the imposition of this financial obligation, so the issue need not be heard, except by the discretion of the court. *State v. Blazina*, 182 Wn.2d 827 (2015).

If the Court wishes to remand the case for a hearing to see what Ms. Sandvig’s financial prospects are once she gets out of prison, that would be a more certain way of determining the defendant’s future ability to pay, and it would make a more thorough record for the purpose of complying with *Blazina*. This would be applicable only to the discretionary legal financial obligations. See *Lundy* at 102-104. Those total \$250.00. The hearing would be about that \$250.

Or, in the interests of judicial economy and efficiency, the Court of Appeals could strike the \$250 and it would make little difference,

given the size of the restitution amount, and might be more cost effective than using public resources to transport the defendant back from prison for the days it would take to have the hearing.

5. The court did not err by imposing a minimum monthly payment toward restitution to begin after release from custody.

The defendant did not challenge the award of restitution in this case, either at the hearing, (See RP 67), or in the Brief of Appellant. However there is a challenge to the \$100 per month that was ordered for the defendant to begin paying this restitution after release. Given the high nature of the restitution, which was agreed at \$577,228.60 (CP 105-107), the payment amount that the court set was very low. The ridiculously high interest rates for legal financial obligations and restitution will likely keep the defendant paying for the rest of her life. However, the victims were out that money and should get at least a small percent of it back in their lifetime. \$100 does not seem unreasonable, and it is clear that the court set that amount with Ms.

Sandvig's circumstances in mind, and knowing that it may prove unworkable. The court made the specific comment, "...and do the best you can on that. And that will be upon release." (RP 73-74) Since the court had just sentenced the defendant to seven and one half years, the court was obviously taking the defendant's lack of immediate financial ability to pay into consideration. The Court of Appeals may take judicial notice that the Superior court has always, like all Superior Courts in Washington, been very flexible with persons who cannot pay, and as long as people appear to be trying, no enforcement action is taken.

In any event, the \$100 was phrased more as a goal than as an absolute, and is many years away from being applicable. If the Court chooses to remand for inquiry about discretionary financial obligations, the Superior Court will undoubtedly also ask about a payment plan. However the plan needs to be something designed to both accommodate financial hardship and actually pay the bill. The State suggests that \$100 per month is as good as any other amount with those competing goals in mind.

CONCLUSION

Since the thirty incidences of theft took place on different days, as different, discrete events, and since the unit of prosecution for Theft in the First Degree is set at the amount of \$5000 from *State v. Kinneman*, the punishment imposed did not constitute double jeopardy.

Since the defendant stipulated to facts to support two aggravating factors: that the multiple offenses resulted under the SRA in lack of punishment for two thirds of the crimes, and that the crimes constituted a major economic offense because of the role of the defendant in the business and the amount taken, the court did not err in imposing an exceptional sentence.

Since the sentence was less than twice the middle of the standard range, despite the many counts and the huge financial loss, the sentence was not clearly excessive.

Since the record suggested that Ms. Sandvig would have a future ability to pay discretionary legal financial obligations, and since the defendant did not object to their imposition, this Court should decline to decide the legal financial obligation issue, or at the most should remand for the Court to conduct an inquiry

into the defendant's ability to pay.

And since the payment of \$100 was made with the defendant's future incarceration and large potential judgment amount in mind, it should stand or be modified only when the defendant appears to need a modification, which would be after release.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "L. Candace Hooper".

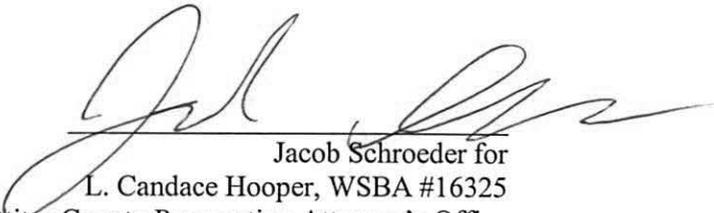
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PROOF OF SERVICE

I, Jacob Schroeder, do hereby certify under penalty of perjury that on August 28th, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the Response to Personal Restraint Petition:

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