

FILED
APR 19, 2016
Court of Appeals
Division III
State of Washington

No. 33642-5-III

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

STATE OF WASHINGTON,

Appellant,

v.

JASON GRAHAM,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SPOKANE COUNTY

BRIEF OF RESPONDENT

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A. INTRODUCTION AND ISSUE PRESENTED

In Jason Graham’s prior appeal the Supreme Court concluded the trial court could rely upon the multiple-offense mitigating factor to impose a mitigated exceptional sentence shorter than the consecutive sentences presumptively required for multiple serious violent offenses. *State v. Graham*, 181 Wn.2d 878, 886, 337 P.3d 319 (2014). The Court also clarified that the only factual inquiry required was consideration of whether the standard range sentence is clearly excessive in light of the policies of the Sentencing Reform Act (SRA) set out in RCW 9.94A.010. *Graham*, 181 Wn.2d at 886-87.

When resentencing Mr. Graham, the trial court considered the purposes of the SRA and determined that the 82-year presumptive sentence was clearly excessive. The issue then before this Court is whether the sentencing court acted contrary to the SRA when the that court complied with the Supreme Court’s reasoning and direction?

B. STATEMENT OF THE CASE

Mr. Graham engaged in a “methamphetamine-induced shooting spree in January 2002.” *Graham*, 181 Wn.2d at 880. The targets were several Spokane police officers pursuing him as he fled a traffic stop. *Id.* In the end, Mr. Graham was the only person injured. *Id.* A jury convicted Mr. Graham of ten crimes including six serious violent offenses. *Id.* The

combination of his offender score, the consecutive sentences imposed on the serious violent offenses as required by RCW 9.94A.589, and numerous weapon enhancements, Mr. Graham received a sentence of more than 102 years. *Id.* at 880-81.

On appeal, Mr. Graham's sentence was reversed due to the absence of an adequate jury finding to support the enhancements imposed. *Id.* at 881.

At a resentencing hearing, Mr. Graham argued for an exceptional mitigated sentence of 25 years, pointing to the factor that the multiple offense policy resulted in a clearly excessive presumptive sentence. *Id.* Judge MaryAnn Moreno agreed the presumptive sentence was unfair and improper in light of the circumstances of Mr. Graham's crime, but concluded the mitigating factor could not legally apply to multiple consecutive sentences. *Id.* Thus, the court imposed a standard range sentence of more than 82 years. *Id.*

On appeal, the Supreme Court again reversed the sentence, concluding the multiple-offense mitigating factor could apply to consecutive sentences. *Id.* at 885. The Court clarified that the necessary factual inquiry was whether the sentence was clearly excessive in light of the policies of the SRA in RCW 9.94.010. *Graham*, 181 Wn.2d at 886-87.

On remand, and acting at the Supreme Court's direction, Judge Moreno considered the policies of the SRA and concluded the

presumptive 82-year sentence was clearly excessive. CP 247. Instead the court imposed a sentence of 23 years. *Id.*

C. ARGUMENT

The sentencing court acted consistent with the Supreme Court's direction in Mr. Graham's prior appeal and properly considered the policies of the SRA to conclude a mitigated sentence was appropriate.

The sentence imposed by Judge Moreno is supported by the law and the facts of Mr. Graham's case and should be affirmed. Where a trial court imposes a mitigated sentence, a reviewing court may only overturn the sentence if:

- (a) Either . . . the reasons supplied by the sentencing court are not supported by the record which was before the judge or . . . those reasons do not justify a sentence outside the standard sentence range for that offense; or
- (b) . . . the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4).

The trial court's findings regarding the presence of mitigating factors, being a factual determination, must be upheld unless clearly erroneous. *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991) (citing *State v. Nordby*, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986)). The review of the legal adequacy of the mitigating factors is a question of law. *State v. Post*, 118 Wn.2d 596, 614, 826 P.2d 172 (1992). An appellate court reviews the length of the sentence imposed

only to determine whether the trial court abused its discretion, *i.e.*, one that no reasonable jurist could impose.

Here, the trial court's determination that mitigating factors exist is factually supported. The legal adequacy of the mitigating factors was recognized by the Supreme Court in Mr. Graham's prior appeal. Finally, the trial court did not abuse its discretion when it imposed a 23-year sentence.

1. In Mr. Graham's prior appeal the Supreme Court concluded the trial court could impose a mitigated sentence if the trial court found the presumptive sentence was excessive in light of the purpose of the SRA.

Generally, the justification for an exceptional sentence is legally adequate so long as it is a "substantial and compelling reason" to depart from the standard range: that is, it "take[s] into account factors other than those which are necessarily considered in computing the presumptive range for the offense." *State v. Fisher*, 108 Wn.2d 419, 423, 739 P.2d 683 (1987). As the Supreme Court has recognized, the mitigating factor that Mr. Graham's presumptive sentence is excessive satisfies this standard.

In RCW 9.94A.535(1)(g), the legislature authorized a sentencing court to impose a mitigated sentence if the court found

The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly

excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

The Supreme Court noted “[t]he legislature recognized it could not craft a standard range that could account for all factual variations underlying offenses and offenders. It adopted .535 as a safety valve.” *Graham*, 181 Wn.2d 878, 886 (citing *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986)). *Graham* explained the Legislature adopted the multiple-offense mitigating factor “to address ‘the potential that its multiple offense policy could operate to produce presumptive sentence ranges inconsistent with the purposes of the [SRA].’” *Id.* (citing *Boerner*, *supra* § 9.12(e), at 9–31). Thus, a sentencing court which considers the purposes of the SRA set forth in RCW 9.94A.010 in determining whether a sentence is too harsh is not considering factors already considered by the Legislature when it established the standard range sentence.¹ Instead, that sentencing court is employing the very safety-valve the Legislature created.

¹ The seven policies identified in RCW 9.94A.010 are:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

Nonetheless, the State continues to maintain the Legislature necessarily considered the purposes of the SRA when it set the standard range and presumptive consecutive sentence. Brief of Appellant at 16-17. Thus, the State contends, the trial court could not rely on the factors in RCW 9.94A.010. While it may be true that the Legislature considered these policies in a general sense, the Legislature could not and did not consider the proper application of those policies to the universe of cases. That is precisely the point made in *Graham*. The Legislature did not consider or account for the degree to which individual prosecutorial charging discretion could so inflate the resulting sentence in any given case. Mr. Graham's case provides such an example.

Graham expressly recognized this mitigating factor could legally apply to Mr. Graham's case. The State's argument is nothing more than an expression of the State's disagreement with the Supreme Court's decision. Because of the Supreme Court's decision, the legal adequacy of this mitigating factor is not at issue in this case.

2. The trial court employed the correct factual analysis.

Beyond resolving the legal adequacy of the multiple offense policy as a mitigating factor, *Graham* clarified the only required factual inquiry was consideration of the factors in RCW 9.94A.010. In his

prior appeal, Mr. Graham specifically asked the Court to address this question. The Court said:

[f]inally, Graham asks us to clarify the factual finding a sentencing judge must make to invoke the multiple offense policy mitigating factor of .535(1)(g). We decline to do so because we think the statute is also clear on that point. It directs the judge to consider if the presumptive sentence “is clearly excessive in light of the purpose of this chapter, *as expressed in RCW 9.94A.010.*” RCW 9.94A.535(1)(g) (emphasis added).

Graham, 181 Wn.2d at 886-87.

Despite this the State maintains a trial court must also determine whether the harm occasioned by each subsequent offense was “nonexistent, trivial or trifling” with respect to the harm occasioned by the first offense. Brief of Appellant at 13-14. Indeed, the State claims the Supreme Court did not “repudiate this standard.” Brief of Appellant at 14. In light of the above quote from the Supreme Court, the State’s claim is wholly indefensible. The State’s dissatisfaction with the outcome of the prior appeal does not free the State or this Court to ignore that outcome. *See, In re Personal Restraint of Heidari*, 174 Wn.2d 288, 293, 274 P.3d 366 (2012) (lower courts must follow opinions of Supreme Court on issues of state law).

There is good reason for the Court’s rejection of the State’s trifling-or-trivial standard. As a practical matter, the State’s approach would categorically bar application of the multiple offense mitigating

factor to serious violent felonies. Where such convictions result in consecutive sentences they are by definition “separate and distinct” offenses, that is, offenses involving separate harm or victims. RCW 9.94A.589(1)(b). Such offenses will by definition always entail additional nontrivial harm. *State v. Cubias*, 155 Wn.2d 549, 552, 120 P.3d 929 (2005). Concluding the mitigating factor could nonetheless apply in Mr. Graham’s case, the Supreme Court necessarily understood it would apply despite the additional harm occasioned by the separate offense, otherwise the Court would have concluded the factor could not apply at all. The State’s “nonexistent, trivial, or trifling” or “additional harm” standard would effectively repudiate the Supreme Court’s decision. This Court cannot do that. *Heidari*, 174 Wn.2d at 293.

The Supreme Court necessarily and expressly rejected the “nonexistent, trivial, or trifling” standard as the proper factual standard. In its place, the Court directed that a sentencing court need only consider the factors set out in RCW 9.94A.010. The trial court did just that. The court employed the correct factual inquiry when resentencing Mr. Graham.

3. The trial court’s decision is factually supported.

Because the trial court relied upon a legally permissible mitigating factor and employed the correct factual inquiry, the only

remaining question is whether the trial court's factual findings are supported by substantial evidence.

The function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact.

Bale v. Allison, 173 Wn. App. 435, 458, 294 P.3d 789 (2013).

In applying this deferential analysis, it is important to note Judge Moreno presided over Mr. Graham's trial and each of his prior sentencing hearings. Judge Moreno is thus familiar with the facts of the case, with who Mr. Graham is, and with what he did. The State's criticisms of Judge Moreno's factual determinations amount to nothing more than disagreement with her resolution of contested factual matters.

The Supreme Court found the necessary factual inquiry in imposing a mitigated sentence in this case is whether the standard range sentence is clearly excessive in light of the policies set out in RCW 9.94A.010. Thus, the Supreme Court directed the trial court to consider those policies to determine if a mitigated sentence is appropriate. Judge Moreno did exactly that. Her findings are factually supported.

Judge Moreno found the 82 year sentence dictated by the SRA was disproportionate to the seriousness of the offense. CP 246. The

court noted that the only offense which yields such a lengthy standard range sentence is murder. *Id.* Mr. Graham was not charged or convicted of a murder.

The State attacks this finding contending the court failed to “weigh” the number and nature of current offenses and failed to weigh Mr. Graham’s criminal history. Brief of Appellant at 15. It is absurd to contend that a court relying upon the “multiple-offense policy” was somehow unaware that the current case involved multiple offenses. It is equally absurd to contend that the judge who presided over Mr. Graham’s lengthy trial and prior sentencings was unaware of the nature of the current offenses and his criminal history. Indeed, Judge Moreno noted, “I just want to assure the state that I have a vivid recollection of this trial.” 6/12/15 RP 25. Judge Moreno specifically noted Mr. Graham had a prior felony offense. *Id.* at 29. Plainly the court weighed the number and nature of the offenses both current and prior, and its findings were not clearly erroneous.

The State’s argument on this point comes down to its contention that a court cannot legally consider the purposes of the SRA in imposing a mitigating sentence because the Legislature had those policy considerations in mind when it set the standard range. Brief of

Respondent at 16. As discussed previously, *Graham* rejected that contention.

The trial court found Mr. Graham's standard range sentence of more than 82 years did not promote respect for the law and was not commensurate with sentences for similar offenses. CP 246. The court noted such a sentence for these offenses served only as retribution – "it is simply a life sentence." 6/12/15 RP 30. Mr. Graham was approximately 21 at the time of the offenses, CP 51, 64, and thus his earliest hope of release would be at age 103. That effectively constitutes a life sentence.

The State challenges the court's conclusion, stating flippantly "no other AK-47 armed-terroristic attempted cop-killing defendants were discussed." Brief of Appellant at 18. However, the trial court cannot be faulted for failing to engage in such proportionality review. "Clearly the Legislature did not intend for the trial courts, or the appellate courts, to engage in a proportionality review of all prior . . . sentences." *State v. Solberg*, 122 Wn.2d 688, 704, 861 P.2d 460 (1993). The court's finding that an 82-year sentence was not consistent with other sentences, and did not promote respect for the law was not clearly erroneous.

Again, the State's argument devolves into the simplistic contention that the court erred in failing to focus on the presence or absence of some additional harm. Brief of Appellant at 18. *Graham* repudiated that standard.

Next the trial court found Mr. Graham's standard range sentence failed to afford him the opportunity to improve himself, contrary to the SRA's goal of rehabilitation. CP 246. The court correctly noted that a standard range sentence would require Mr. Graham to die in prison. Plainly, that outcome denies him a meaningful opportunity at improvement. The State responds that even if Mr. Graham served the remainder of his life in prison his sentence could still afford him the opportunity to improve himself. Brief of Appellant at 19. But it cannot be seriously contended that the rehabilitative goal of the SRA, or any penal system, is intended to simply create better prisoners as opposed to better citizens. The trial court's finding that an effective life sentence did not serve the SRA's rehabilitative goals was not clearly erroneous.

Finally, the trial court found that while Mr. Graham's serious and violent offenses warranted some degree of retribution, an 82 year sentence served no other purpose and was thus not a frugal use of resources. CP 246. As before, the State's argument on this point amounts to a claim that the Legislature necessarily considered the

proper allocation of resources when it set the standard range. Brief of Appellant at 20. But again the State's insistence that the court cannot consider the purposes set forth in RCW 9.94A.010 as basis for a mitigated sentence was considered and rejected in *Graham*.

In the end, the fact that the trial court could have made different factual findings does not render the factual findings it actually made clearly erroneous. As directed by the Supreme Court, the trial court considered the policies of RCW 9.94A.010 and determined the presumptive sentence was clearly excessive. The court's findings are factually supported.

4. The trial court did not abuse its discretion when it sentenced Mr. Graham to spend more than two decades in prison.

After considering the nature of Mr. Graham's crimes and the policies of the SRA, the trial court imposed a 23-year sentence. CP 215, 247.

The State contends the sentence imposed by the court was clearly too lenient. Brief of Appellant at 22. In making this argument, the prosecutor claims that Mr. Graham "received a 10-year sentence for his ten crimes." *Id.* That claim is simply not true.

It is beyond dispute that the trial court imposed a sentence of 23 years not 10. The Judgment and Sentence plainly states as much. CP 215. The trial courts Findings of Fact state the same. CP 247.

The prosecutor reaches his “10-year” number by simply ignoring the 13 years Mr. Graham will be incarcerated pursuant to these convictions due to weapon enhancements added to the underlying sentences. But the fact that the time is due to enhancements is of no moment. “Enhancement statutes increase the punishment for the underlying crime, but they do not elevate the degree of a crime or create a separate criminal offense.” *State v. Gaworski*, 138 Wn. App. 141, 147-48, 156 P.3d 288 (2007). The enhancements are part and parcel of Mr. Graham’s sentence. It is wholly disingenuous for the State to claim that his sentence is only ten years. The State is not free to manufacture facts that better suit its argument. This Court should not countenance the State’s efforts to do so.

Its misstatement of the facts aside, the State next engages in a comparison of Mr. Graham’s sentence to the length of sentences in some other selected cases. Brief of Appellant at 22. From this limited comparison, the State concludes Mr. Graham’s sentence is too lenient. The Supreme Court has rejected the use of a proportionality review to determine whether the length of a sentence is appropriate finding such

review inconsistent with the provisions of the SRA “which limit[] review *solely* of the record before the trial court.” *State v. Ritchie*, 126 Wn.2d 388, 397, 894 P.2d 1308 (1995).

Comparison with, but more importantly limitation by, standard sentences is inconsistent with the trial court having found substantial and compelling reasons to justify an *exceptional* sentence. Use of the word “exceptional”, by definition, implies a deviation from the norm.

Id.

Instead, the length of an exceptional sentence is reviewed only for an abuse of discretion. *Id.* at 395. A court abuses its discretion when it uses the incorrect legal standard or its decision is manifestly unreasonable. As discussed previously, the court employed the correct legal standard. The State has not demonstrated a 23-year sentence is manifestly unreasonable. The court did not abuse its discretion.

D. CONCLUSION

Graham expressly endorsed the mitigating factor employed here, and directed that in determining whether a sentence is clearly excessive the trial court must consider the purposes of the Sentencing Reform Act set forth in RCW 9.94A.010. The trial court did not err in doing just that. This Court should affirm the sentence imposed.

Respectfully submitted this 18th day of April, 2016.

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JASON GRAHAM,)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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