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Court of Appeals
Division III
State of Washington

NO. 34442-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

TYLER FIFE,

Appellant.

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

The Honorable Christopher Culp, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding it lacked legal authority to impose a mitigated exceptional sentence.

2. The trial court erred by failing to give any consideration to one of two reasons offered by the defense to impose a mitigated exceptional sentence.

Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion as a matter of law by concluding it lacked authority to impose a mitigated exceptional sentence based on a failed duress defense because:

(a) it would directly conflict with the jury's conclusion Appellant failed to establish duress by a preponderance of the evidence, when that jury determination does not preclude a finding "[t]he defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct"¹?; and because

(b) the trial court determined that to impose such a sentence it had to conclude there was "substantial and compelling evidence"² of

¹ RCW 9.94A.535(1)(c) (emphasis added).

duress, when the proper standard is instead duress “insufficient to constitutes a complete defense”³ by a “preponderance of the evidence”⁴?

2. Did the trial court abuse its discretion as a matter of law by completely failing to give any consideration to the defense request for a mitigated exceptional sentence based on the statutory mitigating factor that Appellant lacked a predisposition to commit the crimes and was instead induced by others to participate?⁵

B. STATEMENT OF THE CASE

(1) Procedural Facts

The Okanogan County Prosecutor charged Appellant Tyler S. Fife with first degree burglary, residential burglary, second degree burglary, first degree theft, second degree theft, first degree possession of stolen property, possession of a stolen motor vehicle (a Chevy Blazer), possession of a stolen motor vehicle (a Chevy truck), theft of a motor vehicle (Chevy Blazer), theft of a firearm, possession of Vicodin,

² RP 485 (statement by judge during sentencing). “RP” refers to the single volume of verbatim report of proceedings for the dates of May 3-5 & 11, 2016.

³ RCW 9.94A.535(1)(c).

⁴ RCW 9.94A.535(1).

⁵ RCW 9.94A.535(1)(d).

possession of Ecstasy, and two counts of third degree malicious mischief. CP 176-81. The prosecutor alleged that on December 1-2, 2014, Tyler and three others broke into two homes in Okanogan County and stole valuables, including a Chevy Blazer from the detached garage from one of the homes. CP 165-75. Prior to trial, the prosecution abandon the possession of a stolen motor vehicle charge involving the Chevy truck. CP 159-64; RP 12-13.

A trial was held May 3-5, 2016, before the Honorable Christopher Culp. RP 1-446. A jury found Fife guilty of the thirteen remaining charges. CP 44-46; RP 445-46.

On May 11, 2016, Judge Culp rejected Fife's request for a mitigated exceptional sentence and instead imposed a mid-standard range sentence of 89.5 months, \$600 in mandatory legal financial obligations, and ordered him to pay over \$19,000 in restitution. CP 19-39. Fife appeals. CP 6-18.

(2) Substantive Facts

Fife admitted participating in the burglary of two homes in Okanogan County. However, both Fife and one of the other participants, Samantha Garcia, a woman with whom Fife was romantically involved, claimed they did so only out of fear Sean Dahlquist, the ring leader, would physically harm them if they refused. RP 201, 209, 219-21, 288-94, 308-

09, 331-32. Fife specifically recalled Dahlquist threatening to stab him with a knife if he did not help burglarize the first home they were at, before physically pulling him out of the car and making him help. RP 290-92. Fife said he complied only so no one would get hurt. RP 293.

Similarly, Fife recalled Dahlquist handling a gun as he instructed Fife to join him and the fourth member of the group, Chantelle Mendivil, in burglarizing the second house later the same night. RP 308-09. Dahlquist told Fife he did not trust him to stay behind and Fife noted Dahlquist was acting “[r]eally weird.” Id. Fife testified he was scared by the armed Dahlquist, so he complied. RP 309.

The jury was instructed on the defense of “duress” as follows:

Duress is a defense to a charge if:

(1) The defendant participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the defendant that in case of refusal the defendant or another person would be liable to immediate death or immediate grievous bodily injury; and

(b) Such apprehension was reasonable upon the part of the defendant; and

(c) The defendant would not have participated in the crime except for the duress involved.

The defense of duress is not available if the defendant intentionally or recklessly placed himself in a situation in which it was probably that he would be subject to duress. The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the

defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 80 (Instruction 30).

In closing argument, defense counsel conceded Fife played an active role in burglarizing the two homes by helping remove items from each home after Dahlquist broke in. RP 421, 429-30. Counsel argued the sole issue for the jury, therefore, was not whether Fife was involved, but why he was involved, which came down to assessing Fife's state of mind during the crimes, i.e., was Fife under duress as a result of Dahlquist threats to stab, and possibly even shoot him? RP 422-31.

By finding Fife guilty on all charged offenses, the jury necessarily rejected the duress defense. CP 44-46.

C. ARGUMENTS

1. THE SENTENCING COURT'S FAILURE TO APPLY THE CORRECT LEGAL STANDARD IN ASSESSING WHETHER IT HAD AUTHORITY TO IMPOSE A MITIGATED EXCEPTIONAL SENTENCE AGAINST FIFE REQUIRES RESENTENCING.

The trial court applied the wrong legal standards in assessing whether it had authority to imposed a mitigated exceptional sentence based on Fife's failed duress defense. This constitutes an abuse of discretion as a matter of law and requires remand for resentencing.

When judicial discretion is called for, the judge must exercise some sort of meaningful discretion. State v. Grayson, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005). A sentencing court has discretion to determine whether the circumstances of an offense warrant an exceptional sentence below the standard range. State v. Korum, 157 Wn.2d 614, 637, 141 P.3d 13 (2006).

A trial court abuses its discretion when its decision is "manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). All defendants have the right to the trial court's examination of available sentence alternatives. In re Restraint of Mulholland, 161 Wn.2d 322, 334, 166 P.3d 677 (2007). A trial court's failure to exercise its discretion or to properly understand the breadth of its discretion is an abuse of discretion. See State v. Elliott, 121 Wn. App. 404, 408, 88 P.3d 435 (2004) (refusal to hear expert testimony was a failure to exercise discretion); State v. Fleiger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (failure to determine whether defendant was a security risk before ordering "shock box" was abuse of discretion), review denied, 137 Wn.2d 1003 (1999); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (refusal to exercise discretion in imposing an exceptional sentence below the range is reviewable error), review denied, 136 Wn.2d 1002 (1998).

In Mulholland, the trial court failed to recognize it had discretion to impose concurrent sentences for several first degree assault convictions as a mitigated exceptional sentence, despite a statutory presumption of consecutive sentences. In affirming the Court of Appeals remand for resentencing, the Supreme Court noted that although the record did not indicate the trial court would necessarily have imposed a mitigated exceptional sentence if it had known it had the authority, there was some indication it might, and remand was appropriate so the court could at least consider the available options. 162 Wn.2d at 333-34.

Here, Fife sought a mitigated exceptional sentence under RCW 9.94A.535(1)(c) & (d),⁶ which provide:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. . . .

...

(1) Mitigating Circumstances--Court to Consider

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. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

...

⁶ CP 40-43 (defense sentencing memorandum).

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

Emphasis added.

Here, the trial court concluded the law precluded imposition of a sentence below the standard range. RP 484-85. In reaching this conclusion, the court noted the jury had rejected the duress defense, and then opined, “if the jury was not able to find by a preponderance that there was duress, then, Mr. ([defense counsel] and Mr. Fife, the court surely cannot find today that there is substantial and compelling basis upon which to find duress and thus a basis for an exceptional sentence. There just isn’t.” RP 484-85. The court went on to reason that if it found “substantial and compelling evidence to deviate from the guidelines, in effect what I would be doing is overrule the jury’s determination by a lesser standard that there wasn’t duress.” RP 485. In concluding its analysis of the defense request for a mitigated exceptional sentence, the court offered:

I’m just going to say this one other way. And that is that those twelve people felt there was no duress. It would be inappropriate for me, given the higher standard – I have to find substantial and compelling evidence that

there was duress. If there's no preponderance, there certainly isn't this higher standard.

And – and so while on one hand, Mr. Fife, I'm sorry that I can't grant you an exceptional sentence, on the other hand I would say to you that in my view, having listened to the case, it would be totally inappropriate.

RP 485 (emphasis added).

The trial court's analysis of Fife's request for a mitigated exceptional sentence based on a failed duress defense reveals the court did not have a proper grasp of the relevant law in several respects. For example, as the highlighted portions of the block quotes above reveal, the trial court was erroneously applying a "substantial and compelling evidence" standard instead of the correct "preponderance of the evidence" standard, which the statute dictates. RCW 9.94A.535(1); RP 485.

Similarly, it is apparent the trial court failed to recognize that just because the jury refused to acquit on the basis of duress, did not mean the court could not find Fife was under duress when participating in the crimes, because the relevant statutory language makes clear a failed duress defense can still provide grounds for a mitigated exceptional sentence. RCW 9.94A.535(1)(c). Moreover, there was ample evidence to support such a finding based on the testimony of Fife and Garcia. RP 201, 209, 219-21, 288-94, 308-09, 331-32.

Similar to Mulholland, the trial court here failed to recognize it had authority, in this instance under RCW 9.94A.535 (1)(c), to impose a mitigated exceptional sentence. The record here, even more than in Mulholland, shows the court likely would have exercised this authority but for its erroneous conclusion the law did not allow it. See RP 485 (court apologizes to Fife for not being able to grant a mitigated exceptional sentence).

But for the trial court's misconception that it lacked the legal authority to do so, there is a reasonable probability the court would have imposed a lesser sentence. The failure to exercise discretion at sentencing based on a lack of understanding that such discretion exists constitutes an abuse of discretion. Grayson, 154 Wn.2d at 335. This Court should reverse and remand for resentencing so the court may properly exercise its sentencing discretion. Mulholland, 162 Wn.2d at 333-34.

2. THE TRIAL COURT'S FAILURE TO CONSIDER LACK OF THE PREDISPOSITION TO COMMIT THE OFFENSES AND BEING INDUCED BY OTHERS AS A BASIS TO IMPOSE A MITIGATED EXCEPTIONAL SENTENCE ALSO REQUIRES RESENTENCING.

Fife sought an exception sentence on two separate statutory grounds; 1) a failed duress defense, and 2) a lack of predisposition to commit the crime and was induced by others to commit them. CP 40-43.

The trial court only considered the failed duress defense, and did so in

error. See Argument C.1., supra. The court's complete failure to consider the second offered basis constitutes an abuse of discretion as well by failing to exercise discretion, and therefore this Court should remand for resentencing.

As previously noted, when judicial discretion is called for, the judge must exercise some sort of meaningful discretion. Grayson, 154 Wn.2d at 335. Like all defendants, Fife had a right to have the trial court examine all available sentence alternatives. Mulholland, 161 Wn.2d at 334. A trial court's failure to exercise its discretion is an abuse of discretion. Elliott, supra; Fleiger, supra; Garcia-Martinez, supra.

Here, the trial court received and read the defense sentence memorandum setting forth both statutory basis under RCW 9.94A.535(1) for why a mitigated exceptional sentence was appropriate for Fife. RP 454, 467. And at sentencing both the defense and prosecution addressed both options for a mitigated exceptional sentence presented by the defense. See RP 463 (prosecutor disputes Fife's claim he lack a predisposition to commit the crimes, noting he has a prior theft offense); RP 468-73 (defense counsel argues both statutory bases apply in favor of a

mitigated exceptional sentence). The court, however, only considered the duress option, and it did so incorrectly.⁷ RP 482-85.

The trial court's failure to exercise discretion with regard to the lack-of-predisposition/induced-by-others mitigating factor presented by the defense constitutes an abuse of discretion. Elliott, supra; Fleiger, supra; Garcia-Martinez, supra. This Court should therefore reverse and remand for resentencing. Mulholland, 162 Wn.2d at 333-34.

D. CONCLUSION

For the reasons presented, remand for resentencing is required.

DATED this 24th day of March 2017.

Respectfully submitted,

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⁷ See Argument C.1., supra.

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No. 34442-8-III

Certificate of Service

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Cause No. 34442-8-III, in the Court of Appeals, Division III, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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