

FILED

APR 21, 2017

Court of Appeals
Division III
State of Washington

NO. 344428

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

PLAINTIFF/RESPONDENT,

V.

TYLER FIFE

DEFENDANT/APPELLANT

BRIEF OF RESPONDENT

KARL F. SLOAN
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

Branden E. Platter
WSBA #46333
Deputy Prosecuting Attorney

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

ARGUMENT.....2

 A. A defendant may not appeal a sentence within the standard range.....2

 B. The trial court used its proper discretion in imposing a standard range sentence.....3

 C. The trial court was not required to recognize the defendant’s claim of lack of predisposition.....12

CONCLUSION.....13

TABLE OF AUTHORITIES

Table of Cases

<i>State v. Ammons</i> , 105 Wn.2d 175 (1986).....	4
<i>State v. Cole</i> , 117 Wn.App. 870 (Div.1, 2003).....	10
<i>State v. Friederich-Tibbets</i> , 123 Wn.2d 250 (1994).....	2, 3
<i>State v. Garcia-Martinez</i> , 88 Wn.App. 322 (Div.1, 1997), review denied, 136 Wn.2d 1002 (1998).....	3, 4, 5, 6, 7, 11, 13
<i>State v. Mail</i> , 121 Wn.2d 707 (1993).....	2, 3, 4, 5, 8
<i>In re Mulholland</i> , 161 Wn.2d 322 (2007).....	9
<i>State v. Rousseau</i> , 78 Wn.App. 774 (Div.1, 1995).....	2, 3

Additional Authority

RCW 9.94A.500.....	3, 4, 7
RCW 9.94A.535.....	3, 11
RCW 9.94A.535(1).....	7
RCW 9.94A.535(1)(c).....	3
RCW 9.94A.535(1)(d).....	12, 13
RCW 9.94A.585(1).....	2, 8

STATEMENT OF THE CASE

Appellant, Tyler Fife, was charged in Okanogan County Superior Court case number 14-1-00423-9 with Count 1- Burglary in the First Degree, Count 2- Residential Burglary, Count 3- Burglary in the Second Degree, Count 4- Theft in the First Degree, Count 5- Theft in the Second Degree, Count 6- Possessing Stolen Property in the First Degree, Count 7- Possession of a Stolen Motor Vehicle, Count 8- Theft of a Motor Vehicle, Count 9- Theft of a Firearm, Count 10- Possession of a Controlled Substance, Count 11- Possession of a Controlled Substance, Count 12- Malicious Mischief in the Third Degree, and Count 13- Malicious Mischief in the Third Degree. [CP 159-164] Appellant was found guilty of all counts by a jury. [CP 44-46]

A sentencing hearing was held on May 11, 2016. [RP 454] The trial court reviewed the defendant's sentencing brief [RP 454:13]; the State's sentencing brief [456:23- 457:5]; statements of victim Dale Crandall [RP 465:11-466:14] and Judy Schell [RP 454:18]; and heard comments from the State [RP 457:9-464:1], defense counsel [RP 468:14- 473:20], and the defendant [RP 475:19- 476:11]. The defendant requested an exceptional sentence downward based on argument that the defendant acted under duress and lacked a predisposition for criminal behavior. [RP 468:14-473:20] The State recommended a standard range sentence. [RP 462:3-24] After

considering all of these factors, and weighing the aggravating and mitigating factors, the trial court sentenced the defendant to standard range sentences on all counts. [RP 489:15- 490:23; CP 28-39]

ARGUMENT

A. A defendant may not appeal a sentence within the standard range.

Appellant does not present an appealable issue. Under RCW 9.94A.585(1), a sentence within the standard sentence range for an offense shall not be appealed. A trial court's refusal to impose an exceptional sentence downward is also not appealable. *State v. Rousseau*, 78 Wn.App. 774, 777 (Div.1, 1995) citing *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252 (1994); *State v. Mail*, 121 Wn.2d 707 (1993). Appellant requested an exceptional sentence downward, but the court declined and Appellant was sentenced to standard range sentences on all thirteen counts. [CP 28-39]

Appellant's argument is merely an attempt to circumvent the statutory prohibition against appealing standard range sentences by disguising the argument as a claim that the trial court did not understand the legal standard. Respondent asks this Court to find that Appellant raises a non-appealable issue and to deny the appeal.

B. The trial court used its proper discretion in imposing a standard range sentence.

Appellant's first argument is that the trial court misunderstood the legal standard for imposing an exceptional sentence under RCW 9.94A.535(1)(c). A court may impose an exceptional sentence outside the standard range if it finds there is a "substantial and compelling" reason to justify the exceptional sentence. RCW 9.94A.535. Under RCW 9.94A.535(1)(c), the trial court can impose an exceptional sentence downward if the defendant "committed the crime under duress...insufficient to constitute a complete defense but which significantly affected his or her conduct."

Appellant cannot meet the legal standard to raise this issue on appeal. While a defendant may not appeal a sentence within the standard range, the defendant may appeal the "procedure" by which the sentence was imposed. *State v. Garcia-Martinez*, 88 Wn.App. 322, 329 (Div.1, 1997), review denied, 136 Wn.2d 1002 (1998). However, the defendant must be able to show either that the sentencing court refused to consider information mandated in RCW 9.94A.500 or that the defendant timely and specifically objected to consideration of certain information and no evidentiary hearing was held. *Id.* citing *Mail*, 121 Wn.2d at 713; *Friederich-Tibbets*, 123 Wash.2d at 252; *Rousseau*, 78 Wash.App. 774.

The rationale is that if a court were to rely on an impermissible basis like race, gender or religion and sentence the defendant to the top of the standard range on that basis, a defendant could still appeal the sentence even though it is within the standard range because the challenge is to the constitutionality of the basis for the sentence, not its length. *Garcia-Martinez*, 88 Wn.App. at 329.

The sentencing “procedure” that may typically be appealed is limited to whether the trial court considered SRA mandated information contained in RCW 9.94A.500 (formerly RCW 9.94A.110). *Mail*, 121 Wn.2d at 711. In *Mail*, the defendant challenged the procedure the sentencing court used by challenging the court’s review of a court file from a previous unrelated case. *Id.* at 709. The defendant asserted that *State v. Ammons*, 105 Wn.2d 175 (1986) authorized the defendant to challenge the “procedure” the trial court used in reaching its sentence. *Id.* at 710. *Ammons* held, quite vaguely, that an appellant is not precluded from challenging the procedure by which a sentence within the standard range was imposed. *Ammons*, 105. Wn.2d at 183. However, the Court in *Mail* narrowed what was meant by “procedure.”

To determine what was meant by ‘procedure,’ it is appropriate to refer to the act that *Ammons* was construing—the SRA itself. The SRA is the sole statutory source of sentencing authority. Therefore, we must look to this

statute to determine exactly what procedures are required in imposing this standard range sentence.

The SRA mandates that the court ‘shall consider the presentence reports...and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed. (citation omitted) This section of the statute forms a baseline- a minimum amount of information which, if available and offered, *must* be considered in sentencing. By comparison, [RCW 9.94A.530] identifies the information that the court ‘may rely on’ in arriving at a sentence within the standard range, but does not limit in any way the sources of information a sentencing court may consider. (citation omitted)...

The SRA also provides that if a defendant ‘disputes material facts [used in sentencing], the court must either not consider the fact or grant an evidentiary hearing on the point.’ This is the only other procedure required in standard range sentencing which may have been applicable to this case.

In sum, we now hold that in order for a “procedural” appeal to be allowed under *Ammons*, it must be shown that the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so. Without such a showing, the clear rule of [RCW 9.94A.585(1)] applies and the appeal will be denied.

Mail, 121 Wn.2d at 711-712.

The same principles apply where a defendant has requested an exceptional sentence below the standard range: review is limited to 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 the standard range. *Garcia-Martinez*, 88 Wn.App. at 330. A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range. *Id.* A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex or religion. *Id.* Even in those instances, however, it is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence. *Id.*

Conversely, “a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling.” *Id.* So long as the trial court has considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually or legally insupportable and imposed a standard range sentence, it has not violated the defendant's right to equal protection. *Id.*

In accordance with *Mail* and *Garcia-Martinez*, Appellant cannot show that either the sentencing court refused to consider information

mandated in RCW 9.94A.500 or that the defendant timely and specifically objected to consideration of certain information and no evidentiary hearing was held. *Garcia-Martinez*, 88 Wn.App. at 329. Appellant's argument is simply that the trial court misunderstood the law, which is not supported by the record.

First, there is no record that any objection was made at the trial court level or that any further evidentiary hearing was requested or required. The trial court considered the briefs and arguments of both the State and defense counsel, statements of victims, and the statement of the defendant. [RP 454:13; 456:23- 457:5; 465:11-466:14; 454:18; 457:9-464:1; 468:14- 473:20; 475:19- 476:11]. There is no objection in the record by Appellant as to the trial court's consideration, or lack of consideration, of any information. Therefore, Appellant cannot now raise this issue on appeal.

Second, the "procedure" that may be appealed is limited to whether the trial court failed to consider information mandated by RCW 9.94A.500. Appellant does not assert that the trial court failed to consider information mandated by this statute. Appellant asserts that the trial court did not consider discretionary information that Appellant asserted at the sentencing hearing. RCW 9.94A.535(1) ("The court *may* impose an exceptional sentence..."). This is not the "procedure" contemplated by

Ammons and *Mail*. According to *Mail*, if Appellant is not asserting that the trial court violated RCW 9.94A.500, the clear rule of RCW 9.94A.585(1) applies and the appeal will be denied. *Mail*, 121 Wn.2d at 712.

Even if this Court were to consider the issue, Appellant mischaracterizes the trial court's refusal to agree that an exceptional sentence is appropriate, with the trial court's belief that it could not impose an exceptional sentence. The former is an accurate reflection of the trial court's ruling.

Appellant argues that the trial court misunderstood or misapplied the law when the court stated that it could not find substantial and compelling evidence of duress when the jury refused to find duress under the lower standard of preponderance of the evidence. [RP 484:24-485:5] However, the trial court did not mistakenly believe that it could not legally consider duress as claimed by Appellant. The trial court simply did not factually find that duress was presented to the level required for the court to justify imposing an exceptional sentence.

[I]f the jury was not able to find by a preponderance that there was duress, then, [] 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. If the court were to say that there's substantial and compelling evidence to deviate from the guidelines, in effect what I would be doing is to overrule

the jury's determination by a lesser standard that there wasn't duress.

[RP 484:25-485:12]

The record is clear that the trial court understood it *could* impose an exceptional sentence based on duress; the court simply chose not to based on its factual determination that if the jury could not find duress present by a preponderance of evidence, the trial court could not find there was a substantial and compelling reason to impose an exceptional sentence based on duress. [RP 484:25-485:12]

Appellant cites to *Mulholland* in support of his argument; however, in *Mulholland*, the Court remanded for resentencing because there was some indication that the trial court may have considered an exceptional sentence if it knew that it legally could have. *In re Mulholland*, 161 Wn.2d 322, 333-334 (2007). Appellant cites the trial court's apology to Appellant for not imposing an exceptional sentence as proof the trial court would have considered an exceptional sentence. *Appellant's Opening Brief* 10. However, Appellant presents only the first part of that sentence and omits the rest. The trial court's full statement is as follows:

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 485:19-22] So contrary to *Mulholland*, the trial court in this case would not have imposed an exceptional sentence downward regardless.

This case is similar to *State v. Cole*, 117 Wn.App. 870 (Div.1, 2003). The defendant in that case requested the court impose an exceptional sentence downward based on the victim being the initiator, willing participant, aggressor, or provoker of the incident. *Id.* at 880. The trial court declined and imposed a standard range sentence. Citing *Garcia-Martinez*, the appeals court stated “the court did not refuse to exercise discretion. The court considered Cole’s request for application of a mitigating factor, heard extensive argument on the subject, and then exercised its discretion by denying the request. Cole may not appeal that ruling.” *Id.* at 881.

In this case, the trial court fully considered all of the information presented and exercised its discretion. The court specifically addressed whether or not there was a basis to consider duress as a mitigating factor and the court felt there was not a sufficient basis. The trial court went into detail about why the jury did not find that the defendant acted under duress: 1) the credibility of the defendant and Ms. Garcia based on conflicting testimony, 2) the defendant’s failure to seek help or tell law enforcement what had happened, and 3) the defendant’s “selfie” photo with the stolen camera. [RP 482:17-483:24] The trial court considered all

of these factors and determined that if the jury could not find duress by a preponderance of the evidence, the trial court on the same facts could not find that the defendant acted under duress for sentencing purposes. [RP 485:13-18]

Furthermore, the trial court specifically ruled, that even if a mitigating factor were present, the court felt that an exceptional sentence downward would be inappropriate. [RP 485:19-22] The court considered statements of two of the victims fairly heavily. [RP 485:23-25] The court considered that life is about choices and choices have consequences; and the defendant needs to accept the consequences of his choices. [RP 486:3-13] The court also considered the effect the defendant's actions had on the victims and the violation of their homes and their lives. [RP 486:14-487:1] The trial court listed at least four aggravating facts supporting why an exceptional sentence would not be appropriate. [RP 489:15-24] The court then listed what it considered to be the mitigating factors. [RP 489:25-490:4]

Having considered both the aggravating and mitigating factors, the court imposed a standard range sentence. [RP 489:15-490:22] The trial court exercised its discretion and Appellant cannot now challenge that on appeal. *Garcia-Martinez*, 88 Wn.App. at 330.

C. The trial court was not required to recognize the defendant's claim of lack of predisposition.

Appellant similarly argues that the trial court failed to consider defense's proposed mitigating factor under RCW 9.94A.535(1)(d). Under RCW 9.94A.535(1)(d), the trial court may impose an exceptional sentence below the standard range if "the defendant, with no apparent predisposition to do so, was induced by others to participate in the crime." However, Appellant's argument is unpersuasive. First, even if the trial court found that RCW 9.94A.535(1)(d) did apply, the court was not *required* to impose an exceptional sentence down since the statute uses the word "may" not "shall." RCW 9.94A.535. Second, the trial court knew it could consider that factor, but elected not to. Neither of these issues are appealable.

As pointed out in Appellant's opening brief, the trial court received sentencing briefs from both the State and the defendant. *Appellant's Opening Brief* 11. Both counsel for the State and for the defendant argued the issue of whether the mitigating factor of lack of predisposition/inducement by others applied to the defendant. [RP 463:12-464:1; 469:14-470:22]

Therefore, the trial court was fully aware and informed of its ability to consider whether the defendant lacked a predisposition and was

induced by others when the trial court considered sentencing. While the trial court may not have expressly addressed that particular factor in imposing its sentence, the trial court's denial of imposition of an exceptional low sentence speaks for itself. The trial court was aware that it could mitigate the sentence under RCW 9.94A.535(1)(d) and it chose not to. Therefore, the trial court exercised its discretion, chose not to impose an exceptional sentence, and Appellant cannot now appeal that decision. *Garcia-Martinez*, 88 Wn.App. at 330.

This refusal to apply RCW 9.94A.535(1)(d) is also consistent with the trial court's basis for refusing to impose a mitigating factor based on duress, *supra*. The trial court pointed out that the jury did not believe the defendant was credible and did not believe that duress applied. [RP 482:17-483:24] By extension, it appears the trial court did not accept that the defendant was "induced by others" as the defendant argued. This was a factual determination by the trial court and cannot be second guessed on appeal. The trial court heard the defendant's argument, the court simply did not buy it.

CONCLUSION

Appellant has no legal basis to challenge his standard range sentence. The trial court fully considered the arguments of counsel, the defendant, and victims. The trial court weighed aggravating factors and

mitigating factors and imposed a standard range sentence. Respondent requests this court deny the appeal and affirm the trial court's sentence.

Dated this 21st day of April, 2017

Respectfully Submitted:



Branden E. Platter, WSBA#46333
Deputy Prosecuting Attorney
Okanogan County, Washington

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 21st day of April, 2017, I provided email service to the following, a true and correct copy of the Brief of Respondent:

E-mail:

Eric J. Nielsen
nielsene@nwattorney.net

John Sloane, Office Manager
sloanej@nwattorney.net

Christopher H. Gibson
Attorney for Appellant
gibsonc@nwattorney.net

Nielsen, Broman & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122-2842
Phone: (877) 710-5111
Fax: (206)623-2488



Shauna Field, Legal Assistant

KARL F. SLOAN

Okanogan County Prosecuting Attorney
P. O. Box 1130 • 237 Fourth Avenue N.
Okanogan, WA 98840
(509) 422-7280 FAX: (509) 422-7290

OKANOGAN COUNTY PROSECUTOR
April 21, 2017 - 3:50 PM
Transmittal Letter

Document Uploaded: 344428-4.21.17 Brief of Respondent.pdf

Case Name: State of Washington v. Tyler Fife

Court of Appeals Case Number: 34442-8

Party Respresented:

Is This a Personal Restraint Petition? Yes No

Trial Court County: Okanogan - Superior Court #: 14-1-00423-9

Type of Document being Filed:

- Designation of Clerk's Papers / Statement of Arrangements
- Motion for Discretionary Review
- Motion: ____
- Response/Reply to Motion: ____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill / Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition / Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to bplatter@co.okanogan.wa.us, nielsene@nwattorney.net, sloanej@nwattorney.net, and gibsonc@nwattorney.net.

Sender Name: Shauna Field-larson - Email: sfield@co.okanogan.wa.us