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Court of Appeals
Division III
State of Washington

NO. 345301

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL HENRY CAMPBELL

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY
The Honorable Harold Clarke, III

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENT OF ERROR

The trial court refused to exercise its discretion as to whether a sentencing alternative was appropriate.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court sufficiently consider the defense's request for a sentence below the standard range?

III. STATEMENT OF THE CASE

Substantive Facts

Daniel Henry Campbell (Mr. Campbell) fronted drugs to family friend, Angelique Sam (Sam), with the expectation, she would sell them and pay him \$200.00 from the proceeds. 5/12/16 RP 200-201. Although Sam was a heavy drug user, Mr. Campbell trusted she would pay him back. Sam called Mr. Campbell, some days later, and told him to drop by her apartment in a few days to get the money. 5/12/16 RP 56; 5/12/16 RP 204.

After a few days passed, Mr. Campbell caught a ride to Sam's apartment with his nephew. When they arrived, Mr. Campbell saw Sam's sister outside, with her grandchildren. 5/12/16 RP 199. Mr. Campbell had known the sister for some time. She had dated his cousin for a few years. So, when he saw her, he greeted her with a hug and exchanged chit-chat. Mr. Campbell asked where Sam was. The sister told him Sam was inside and motioned towards the apartment. Mr. Campbell and the sister said their goodbyes and he and his nephew walked towards Sam's front door. The door was open, so they went inside. 5/12/16 RP 199-203.

Sam was at a table in the dining room working on jewelry with a Dremel tool. Mr. Campbell and his nephew sat at the table with Sam. Sam continued to work while

she and Mr. Campbell engaged in small talk and got caught up on how each other were doing. Then, the conversation turned to the debt. Sam told Mr. Campbell she did not have his money, but she had some knives and Kindle Fires she would give him instead. 5/12/16 RP 207-208. She opened one of the knives and gave it to Mr. Campbell to inspect. The knife was like an Old Timer folding pocket knife. It had a little bone handle and three separate blades, which measured about 2 ½ inches. 5/12/16 RP 210-211; 5/12/16 RP 236.

Mr. Campbell handled the knife a bit, but told Sam under no uncertain terms he wanted his money. 5/12/16 RP 213. Then out of nowhere, Sam stabbed Mr. Campbell in the chest with the Dremel tool. She inflicted the stab with such force it left about a half an inch scar in his chest. Mr. Campbell pushed Sam away. 5/12/16 RP 212; 5/12/16 RP 235.

Sam tried to lunge towards Mr. Campbell again with the Dremel tool. Mr. Campbell, still with knife in hand, shoved her back. Sam tipped over in the chair and nicked her throat on one of the knife's blades. 5/12/16 RP 236. Stunned, Sam yelled for her boyfriend, who never appeared. Mr. Campbell left; he had drugs on him and he did not want any more trouble. 5/12/16 RP 240-241. By that time, his nephew was already outside. 5/12/16 RP 215.

Sam's sister called police. 5/12/16 RP 136. The first officer, who arrived at the apartment, noticed blood splatter and signs of a struggle. He also noticed Sam's demeanor, which was remarkably calm. 5/12/16 RP 153-158. Sam told police Mr. Campbell attacked her, but neglected to disclose any thing about the drugs. 5/12/16 RP

56. It was only just before trial, she decided to “come clean” about what happened.
5/12/16 RP 188.

Procedural Facts

The state charged Mr. Campbell with one count second-degree assault and one count first-degree attempted robbery. Mr. Campbell pleaded not guilty and opted for a jury trial. 5/11/16 RP 6-7; CP 1-2; CP 137-138.

At trial, Mr. Campbell explained how Sam hurt herself when he tried to defend against her attacks, but the jury found him guilty on both counts. The jury also rendered a special verdict that found Mr. Campbell was armed with a deadly weapon. 5/17/16 RP 326-327; CP 131, 133, 134; CP 132, 135.

The state acknowledged the first-degree attempted robbery offense and the second-degree assault with a deadly weapon offense merged and recommended the court impose a sentence only on the first-degree attempted robbery charge. The state reminded the court Mr. Campbell pleaded guilty to second-degree assault with a deadly weapon in 2008, so the deadly weapon enhancement would be 24 months instead of 12 months. Given the nature of the offense and Mr. Campbell’s criminal history, the state asked the court to sentence him to 90 months, which was approximately midpoint within the standard range between 81 to 108 months. With the deadly weapons enhancement, the state recommended a 114-month sentence. 6/7/16 RP 336-337; CP 211-212; CP 150-153.

Mr. Campbell presented to the court a pair of certificates to show he completed a leadership and a financial education course while he awaited trial. 6/7/16 RP 339. He asked the court to consider his accomplishments as well as his failed self-defense as

grounds to mitigate his sentence to 81 months. With the deadly weapons enhancement, he recommended a sentence 105-month sentence. 6/7/16 RP 338.

The court acknowledged its authority to mitigate a standard sentence, but concluded the state's request was appropriate and reasonable. It found,

As we all know in the system, the jury has made their ruling or made their decision. The sentencing that then takes place is based upon the seriousness of the crime and the number of points the defendant has. And the grid indicates to us that the range is the 81 to 108 months. Presumptively we look to the mid-point, which again has to be in the 94 to 95 range in this particular case. And then the Court can consider whether moving up or down from sort of that starting point is appropriate, and that is within the Court's discretion. It seems to the Court that the request made by the state is appropriate and reasonable, and seems like that's the appropriate sentence in this particular case, and I will adopt that position of 90 months. The 24 months follows, of course, consecutive to that, then for the total of 114 months.

The court also imposed community custody and legal financial obligations. 6/7/16 RP 342; CP 193-206. Mr. Campbell filed a notice to appeal. CP 214-229.

IV. ARGUMENT

THE TRIAL COURT DID NOT MEANINGFULLY AND SUFFICIENTLY CONSIDER MR. CAMPBELL'S REQUEST TO MITIGATE HIS SENTENCE BELOW THE STANDARD RANGE.

Standard of review

A standard range sentence is generally not appealable. State v. Khanteechit, 101 Wn. App. 137, 138, 5 P.3d 727 (2000). Also, generally, the decision of whether to grant a sentencing alternative is not reviewable on appeal. "However, a defendant may always challenge the procedure by which [the] sentence was imposed. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). This court must limit its review of such decisions to circumstances where the trial court has categorically refused to exercise its discretion or has relied on an impermissible basis for refusing

to impose an alternative. Grayson, 154 Wn.2d at 342. A trial court has exercised its discretion when it has considered the facts and has concluded there is no basis for an exceptional sentence. State v. Peppin, 186 Wn. App. 901, 912, 347 P.3d 906, 912, review denied, 184 Wn.2d 1016, 360 P.3d 817 (2015).

Analysis

The Sentencing Reform Act (SRA) provides certain “failed defenses” may constitute mitigating factors to support an exceptional sentence below the standard range. RCW 9.94A.535; State v. Jeannotte, 133 Wn.2d 847, 851, 947 P.2d 1192, 1194 (1997). These “failed defense” mitigating circumstances include self-defense, duress, mental conditions not amounting to insanity, and entrapment: RCW 9.94A.390(1)(a) (victim was aggressor) *codified as* 9.94A.535(1)(a); RCW 9.94A.390(1)(c) *codified as* RCW 9.94A.535(1)(c) (defendant acted under duress or compulsion insufficient to constitute a complete defense); RCW 9.94A.390(1)(d) *codified as* RCW 9.94A.535(1)(d) (defendant, with no apparent predisposition to do so, was induced by another to participate in the crime); RCW 9.94A.390(1)(e) *codified as* RCW 9.94A.535(1)(e) (capacity to appreciate wrongfulness of conduct was significantly impaired). State v. Jeannotte, 133 Wn.2d at 851-852. By allowing these failed defenses to be treated as mitigating circumstances, the Legislature recognized there may be “circumstances that led to the crime, even though falling short of establishing a legal defense, [that] justify distinguishing the conduct” from that in other similar cases. State v. Jeannotte, 133 Wn.2d at 852.

While trial courts have considerable discretion under the SRA, they are still required to act within its strictures and principles of due process of law. State v. Mail,

121 Wn.2d 707, 712, 854 P.2d 1042 (1993). No defendant is entitled to an exceptional sentence below the standard range, but every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183, 1187–88 (2005). If a trial court fails to consider an exceptional sentence, it is reversible error. Id.

For example, in State v. Grayson, 154 Wn.2d 333, 343, 111 P.3d 1183, 1188 (2005), our Supreme Court reversed the trial court’s sentencing decision because the trial judge did not appear to meaningfully consider whether a sentencing alternative was appropriate. In that case, Grayson requested a Drug Offender Sentencing Alternative (DOSA) as part of his sentence for crack cocaine delivery. The trial judge denied his request “because the state no longer ha[d] money available to treat people who go through a DOSA program.” Grayson, 154 Wn.2d at 337. The prosecutor suggested the court enrich the record with specific reasons why Grayson was not a suitable candidate for a DOSA, but the judge vigorously interrupted mid-sentence with the statement, “I’m not going to give a DOSA, so that’s it.” State v. Grayson, 154 Wn.2d at 341.

Grayson challenged the judge’s decision on appeal. He argued the court failed to seriously consider the alternative and relied on facts outside the record. Grayson, 154 Wn.2d at 338. Our Supreme Court agreed and found although the trial judge declined to give a DOSA “mainly” because he believed there was inadequate funding to support the program, it recognized the judge did not state that this was his “sole” reason. But he did not articulate any other reasons for denying the DOSA, and he specifically rejected the prosecution’s suggestion that more reasons be placed on the record.

The Supreme Court furthered, it was clear the judge's belief the DOSA program was underfunded was the primary reason he denied the DOSA. State v. Grayson, 154 Wn. 2d at 342. However, there were ample other grounds the court have relied on to have found Grayson was not a good candidate for DOSA. For example, he faced significant time for this crime and still was scheduled to face at least another 100 months for a pending marijuana delivery charge. He had an extensive and exclusively drug-based criminal history. And he continued to commit drug offenses even while on conditional release from other drug offenses. State v. Grayson, 154 Wn. 2d at 342-43. The Supreme Court considered all the circumstances and found the trial court categorically refused to consider a statutorily authorized sentencing alternative. State v. Grayson, 154 Wn. 2d at 342.

Like Grayson's DOSA, Mr. Campbell asked the trial judge to consider his failed self-defense as a mitigating factor for a sentencing alternative. He also proffered leadership and financial education certificates as proof to further justify an exceptional sentence. 7/22/16 RP 339. The court took the certificates, but made no mention of them. Instead, the court ruled,

As we all know in the system, the jury has made their ruling or made their decision. The sentencing that then takes place is based upon the seriousness of the crime and the number of points the defendant has. And the grid indicates to us that the range is the 81 to 108 months. Presumptively we look to the mid-point, which again has to be in the 94 to 95 range in this particular case. And then the Court can consider whether moving up or down from sort of that starting point is appropriate, and that is within the Court's discretion. It seems to the Court that the request made by the state is appropriate and reasonable, and seems like that's the appropriate sentence in this particular case, and I will adopt that position of 90 months. The 24 months follows, of course, consecutive to that, then for the total of 114 months.

6/7/16 RP 342.

Grayson reinforced this was not enough because at no point on the record did the trial court state why Mr. Campbell's request for a sentence below the standard range fell short. Mr. Campbell was entitled to ask for a sentence alternative under RCW 9.94A.535. For that reason, the trial court had to actually consider his request, which meant the trial court had to consider the facts and conclude, on the record, there was no basis for an exceptional sentence. This failure to exercise discretion warrants a reversal. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183, 1187-88 (2005).

V. CONCLUSION

Based on the arguments above, Mr. Campbell asks this court to reverse the trial court's decision and to remand this case for sentencing.

Submitted this 7th day of April, 2017.

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DECLARATION OF SERVICE

April 7, 2017

Court of Appeals Case No. 345301

Case Name: *State of Washington v. Daniel Henry Campbell*

I declare under penalty and perjury of the laws of Washington State that on **Friday, April 7, 2017**, I filed an appellant's opening brief with Division Three Court of Appeals and served copies to:

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