

No. 34897-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DONALD DYSON,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

On remand after this Court vacated Donald Dyson's sentence and remanded for resentencing, the trial court failed to recognize and exercise the discretion it had.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where a sentence is reversed on appeal and the matter is remanded for resentencing, the sentencing court is free to consider new arguments in support of a mitigated sentence. Here, after the matter was remanded for resentencing, the resentencing court believed its authority was limited to simply striking the unconstitutional provisions of the prior sentence but otherwise was required to impose the same sentence. Did the trial court err?

C. STATEMENT OF THE CASE

Donald Dyson previously appealed his convictions and sentence for two counts of first degree assault. Among the issues he raised, was a claim that the trial court violated his Sixth Amendment right to a jury trial when the trial judge, rather the jury, determined the acts could likely have caused death and thus imposed five-year mandatory minimum sentences on those two counts under RCW 9.94A.540. While it affirmed his convictions, the Court found that the judicial factfinding that established the basis for the mandatory minimum sentences

violated the Sixth Amendment. The Court “vacat[ed] Mr. Dyson’s sentence and remand[ed] for resentencing.” CP 39.

On remand, but prior to the resentencing hearing, Mr. Dyson was evaluated by Eastern State Hospital, to address whether he was competent. The report submitted to the court by Eastern staff noted that as a child Mr. Dyson suffered significant abuse and trauma at the hands of his father. CP 70-71. The report diagnosed Mr. Dyson as suffering from Posttraumatic Stress Disorder and that he had previously suffered a Traumatic Brain Injury. CP 70. The staff at Eastern concluded Mr. Dyson was competent.

At resentencing relying in part on the information in the competency report, Mr. Dyson requested an exceptional mitigated sentence. RP 8. Specifically relying on *In re the Personal Restraint of Mulholland*, 161 Wn.2d 322, 327, 166 P.3d 677 (2007), Mr. Dyson asked the court to run the sentences for both convictions concurrently. *Id.* The court refused.

D. ARGUMENT

Despite the vacation of the prior judgment and this Court’s mandate that the trial court resentence Mr. Dyson, the prosecutor argued the trial court was “only empowered” to strike the minimum terms. RP 3.

The trial court too, misconstrued this Court's mandate to resentence Mr. Dyson. The trial court stated: "...I am left with following the direction of the court of appeals, which is to remand with instructions . . . to remove the mandatory minimum for each crime. . . . That is the direction I have received, and as part of the system I will follow those directions."

While it is true that this Court's mandate directs that the court could not impose the mandatory minimum, the mandate did not bar the court from otherwise resentencing Mr. Dyson. Put another way, the fact that the Court directed the trial court to correct the constitutional violation in its prior sentence did not prevent the trial court from otherwise considering the appropriate sentence for Mr. Dyson on remand. The trial court erroneously believed it lacked the authority to consider Mr. Dyson's request for an exceptional sentence.

Generally, a standard range sentence may not be appealed. RCW 9.94A.585(1). That statute, however, does not place an absolute prohibition on the right of appeal. Instead, the statute only precludes review of challenges to the amount of time imposed when the time is within the standard range. *State v. McGill*, 112 Wn. App. 95, 99, 47 P.3d 173 (2002). A defendant, however, may challenge the procedure

by which a sentence within the standard range is imposed. *State v. Mail*, 121 Wn.2d 707, 712-13, 854 P.2d 1042 (1993).

When a defendant has requested a mitigated exceptional sentence, review is available where the court refused to exercise discretion or relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *Mulholland*, 161 Wn.2d at 332 (court's failure to recognize its discretion to impose concurrent sentence was fundamental defect); *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998). As set forth above, the trial court failed to recognize it had the authority to resentence Mr. Dyson, including the ability to impose a mitigated sentence. This Court should remand with clear direction to the trial court that it has the authority to resentence Mr. Dyson.

E. CONCLUSION

For the reasons above, this Court should again vacate Mr. Dyson's sentence and remand for resentencing.

Respectfully submitted this 23rd day of May, 2017.

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DIVISION THREE**

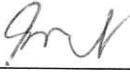
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 34897-1-III
)	
DONALD DYSON,)	
)	
APPELLANT.)	

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