

34897-I-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DONALD DYSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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.

II. ISSUE PRESENTED

If the trial court did not exercise any independent judgment on the validity of the defendant's request for an exceptional sentence after the case was specifically remanded to the trial court to strike a mandatory sentencing provision, is the trial court's imposition of the same sentence, but for the mandatory sentencing provision, an appealable issue under RAP 2.5(c)(1)?

III. STATEMENT OF THE CASE

The defendant/appellant, Donald Dyson, was found guilty of two counts of first degree assault. CP 25.¹ This court affirmed the convictions by unpublished decision, but in the published portion of the opinion, remanded to the trial court for resentencing with a specific directive to strike the mandatory sentencing provision. *State v. Dyson*, 189 Wn. App. 215, 360 P.3d 25 (2015). The Supreme Court denied review. 184 Wn. 2d 1038 (2016).

¹ See also original appeal under File No. 32248-3-III, Clerk's Pages (CP) 96 and 97.

The matter was remanded for resentencing because the trial court, rather than a jury, found the facts necessary to impose a mandatory five-year minimum sentence for the defendant's two serious violent, first degree assault convictions.² *Id.* at 228.

Ultimately, this Court found under federal precedent that the trial court should have submitted a separate jury question regarding the applicability of the five-year mandatory minimum to each first degree assault convictions. *Id.* at 228. Specifically, this Court held:

[W]e affirm the convictions of Donald Dyson. Nevertheless, we remand for resentencing with instructions that the trial court remove the mandatory minimum sentences for each crime. The resentencing will allow Donald Dyson to receive potential early release credits.

Id. at 228.

On remand and for the first time, the defense advanced a post-traumatic stress syndrome argument to support a request for a downward

² RCW 9.94A.540 prescribes, in relevant part:

(1) Except to the extent provided in subsection (3) of this section, the following minimum terms of total confinement are mandatory ...

(b) An offender convicted of the crime of assault in the first degree ... where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.

departure from the standard sentencing range. RP 5-6. The defense also pointed out that the lower court had the discretion under *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), to order the two first assault convictions to run concurrently to each other.³ RP 6.

The State argued the trial court's authority on remand was limited to striking the mandatory minimum sentencing provision. RP 9.

Thereafter, the Honorable Harold Clarke mentioned that he had reviewed the various mitigation materials presented by the defense, and, although it explained some of the travails in the defendant's life, such circumstances did not amount to a cognizable defense to the charges. RP 14-15. As stated by the court: "Again, it is an explanation of Mr. Dyson and his life, and it probably helps us to understand where he's gotten to in his life and perhaps his reaction to certain situations, but nonetheless, what the law penalizes is those reactions. So absent, you know, a defense of insanity or

³ At the original sentencing, the defendant requested a downward departure based upon a failed defense. *See* file no. 32248-3-III, Report of Proceedings (RP) 816-17. However, the same sentencing judge ordered a total determinate sentence of 296 months within the standard range and that the defendant serve a minimum mandatory sentence of 60 months of "flat time" for both counts I and II under RCW 9.94A.540(1)(b). *See* file no. 32248-3-III, RP 827-831, and CP 71.

something along those lines, these matters simply provide our background.”

RP 15. The court then imposed the sentence and remarked:

I of course remember this case very -- I shouldn't say of course -- I remember this case very clearly because the facts were dramatic, you might say; in other words, they left an impression on you when you listened to the testimony of the victims involved and of those that then described the injuries.

And I remember my finding, which was legally inappropriate, but my finding about the injury, particularly as to the one gentleman. I recall quite clearly that he nearly died. And had it not been for a bystander -- as I recall somebody involved who stopped the bleeding long enough before the medics got there -- we would have had a death on our hands. That is what struck me. Maybe I got a different view than someone else listening to the testimony, but I'm expressing what I recall. Again, that was the impression at sentencing that I had, and that is why I was led to the finding that I made.

Be that as it may, those are no longer appropriate. But I think it goes back to the seriousness of the offense, and that is my point today. This was a very serious situation, and perhaps but for the quick acting of at least one or more individuals, we might have had a whole different situation before us.

Be that as it may, I think ultimately I am left with following the direction of the court of appeals, which is to remand with instructions to the trial court to remove the mandatory minimum sentences for each crime. And of course I will do that. That is the direction that I have received, and as part of the system I will follow those directions.

Even if I were so inclined to review my sentence, even if I thought I had authority to run things concurrently, which I'm not necessarily convinced I do, even if I did, even if I was convinced that this report somehow allows me to open the sentence up and reimpose it, I will just indicate that I am not

so inclined to do that. But I believe the sentence that I imposed in light of the evidence that I heard was appropriate at that time in January of 2014, and I believe it still is.

And in saying that I want everyone to understand I appreciate how long the sentence is but, again, based on what I heard and saw, I thought it was the appropriate sentence to impose. And again, I still do.

RP 16-17.

Thereafter, the trial court again imposed a standard range sentence of 296 months. CP 97. The trial court struck the 60-month mandatory sentencing provision. CP 97

This second appeal timely followed.

IV. ARGUMENT

THE DEFENDANT IS NOT ENTITLED TO REVIEW UNDER RAP 2.5(C)(1) BECAUSE THE TRIAL COURT EXPRESSLY DECLINED TO CONSIDER THE DEFENDANT'S REQUEST FOR AN EXCEPTIONAL SENTENCE. INSTEAD, THE TRIAL COURT MADE ONLY A CORRECTIVE CHANGE TO THE JUDGMENT AND SENTENCE TO REFLECT THIS COURT'S PREVIOUS RULING TO STRIKE THE MANDATORY SENTENCING PROVISION.

A trial court's discretion on remand is limited by the scope of the appellate court's mandate. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). If the trial court exercises no discretion on an issue, there is no issue to review in an appeal following the remand because the original judgment and sentence remains final and intact. *Id.* at 40; *State v. Barberio*, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993); *accord*, *State v. Parmelee*,

172 Wn. App. 899, 905, 292 P.3d 799, *review denied*, 172 Wn.2d 1027 (2013). Since the rule deals with a trial court ruling presently before the appellate court, it is “[o]nly if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue [that] it become[s] an appealable question.” *Id* at 50. Moreover, the rule permits, but does not mandate review of unremanded matters, in both the trial court and the appellate court. *Barberio*, 121 Wn.2d at 51; see also RAP 2.5(c)(1) (an issue that was not raised in an earlier appeal becomes an “appealable question” only if “the trial court, on remand, exercised its independent judgment” to review and rule again on the issue).

In *Kilgore*, the Supreme Court concluded that, because the trial court on remand chose not to exercise its discretion, Kilgore’s case remained final, and the trial court did not abuse its discretion when it declined to invalidate Kilgore’s exceptional sentence. 167 Wn.2d, at 44. It noted that the trial court “made clear that in correcting the judgment and sentence to reflect the reversed counts, it was not reconsidering the exceptional sentence imposed on each of the remaining counts.” *Id.* at. 41.

Similarly, in *Barberio*, the defendant’s first appeal resulted in the reversal of one of his convictions. 121 Wn.2d, at 49. The defendant had not challenged his exceptional sentences upward or the supporting aggravating circumstances on direct appeal. *Id.* At his resentencing, the defendant

challenged several of the aggravating factors the trial court had relied on to determine his first exceptional sentence. *Id.* In response, the trial court made “only corrective changes in the amended judgment and sentence” and imposed the same exceptional sentence. *Id.* at 51. Specifically, the trial court stated that it would not revisit the issue of the sentence on the remaining conviction. *Id.* The trial court emphasized that neither new evidence nor the Court of Appeal’s opinion merited reexamination of the defendant’s sentence. *Id.* at 51–52. Only if the trial court chooses to reconsider an issue can the appellate court decide whether to review the trial court’s decision regarding that issue. *Id.* at 51. The high court emphasized that the exceptional sentence was “a clear and obvious issue” which Barberio should have raised in his first appeal.⁴ The court concluded that “[t]his case well illustrates the necessity of the rule which denies review at this late stage.” *Id.* at 52. The Supreme Court ultimately denied review of the exceptional

⁴ However, the Supreme Court did observe that:

[t]he trial court may exercise independent judgment as to decisions to which error was not assigned in the prior review, and those decisions are subject to later review by the appellate court.

Barberio, 121 Wn.2d at 50.

sentence issue because the trial court declined to independently review it and rule on it again.

Like *Barberio*, the defendant here did not challenge the trial court's refusal to grant an exceptional sentence in his first appeal. Also, as in *Barberio*, the trial court at the defendant's resentencing did not exercise its independent judgment to review and reconsider its earlier sentencing but only reviewed the judgment and sentence in light of this Court's mandate to strike the sentencing provision. The record reflects that the lower court did not exercise any independent judgment and believed the mandate was straightforward in its direction.

During the resentencing, the trial court allowed the defense to make its record⁵ regarding a mitigated sentence, but it did not rule on the merits of the request. The trial court instead found the mandate was clear in its directive requiring the lower court to only strike the mandatory sentencing provision. The trial court declined to impose an exceptional sentence and ordered the same sentence, but for striking the mandatory sentencing

⁵ At the original sentencing, the defense had requested a downward departure from the standard sentencing range based upon a failed self-defense claim. *See* file no. 32248-3-III, RP 816-18. On appeal, the defendant did not challenge the trial court's refusal to impose an exceptional sentence. *Id.*

provision, allowing the defendant the potential to earn early release credits as required by this court's opinion.

Moreover, the lower court indicated it was not inclined to modify the original sentence length and impose an exceptional sentence downward regardless of the defendant's new claim. Remand is not necessary when the record clearly indicates the sentencing court would have imposed the same sentence. *See, e.g., State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) ("When the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway").

Therefore, there is no issue for this Court to review. This rule promotes judicial economy and encourages timely appeals. *See Parmelee*, 172 Wn. App. at 906.

V. CONCLUSION

The defendant is not entitled to review under RAP 2.5(c)(1). On remand, the trial court expressly declined to consider the defendant's request for an exceptional sentence and it did not exercise its independent judgment in any way when complying with this Court's order. Given the scope of the mandate, the resentencing court properly declined the defendant's request for an exceptional sentence. And because the trial court

exercised no discretion on this issue, it is not properly before this Court and not appealable. The State respectfully requests this Court affirm the judgment and sentence.

Dated this 18 day of July, 2017.

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A handwritten signature in black ink, appearing to read 'L. Steinmetz', is written over a horizontal line.

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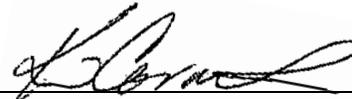
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I certify under penalty of perjury under the laws of the State of Washington, that on July 18, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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(Date)

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(Place)



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SPOKANE COUNTY PROSECUTOR

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