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Court of Appeals
Division III
State of Washington
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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
Respondent,)	
)	NO. 35240-4-III
v.)	
)	Douglas County Superior
MANUEL RODRIGUEZ-FLORES,)	Court No. 15200019-9
Petitioner/Appellant)	
)	

RESPONDENT'S BRIEF

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A. INTRODUCTION

This is the State's response to Appellant Manuel Rodriguez-Flores appeal of the standard range sentence imposed by the Honorable John Hotchkiss after remand for re-sentencing after an initial appeal. In this appeal, Appellant claims that because the trial court was offended by the comments of the Appellate Court on remand that his high end of the standard range sentence is improper. Appellant also raises the issue that the jury demand fee is not a mandatory legal financial obligation (LFO). The State requests the Court dismiss the appeal of the sentence; and strike the jury demand fee from Appellant's Judgment and Sentence as it is a discretionary legal financial obligation and its imposition is inconsistent with the trial court's reasoning.

B. IDENTITY OF RESPONDENT

Respondent is the State of Washington, by and through Steven M. Clem, Douglas County Prosecuting Attorney, and his deputy, Julia E. Hartnell.

C. ASSIGNMENT OF ERROR

Respondent, State of Washington, assigns no errors to this matter and responds only to the issues presented by Appellant.

D. STATEMENT OF THE CASE

The facts of the underlying case are set forth in this court's unpublished opinion No. 33311-6-III (Feb. 23, 2017), 197 Wn. App. 1080. There the court held that there was sufficient evidence to support the Appellant's convictions for delivering a controlled substance with school zone enhancements, but remanded the case for resentencing due to a sentencing error under *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015) due to the Court running the school bus enhancements consecutive rather than concurrent to each other. The Court then ordered the "particularly painless" remedy of full resentencing in the instant case and specifically did not find that the court's comments at sentencing amounted to a chilling of the right to a jury trial, but merely cautioned the trial court to avoid any implication that a harsh sentence is based on Mr. Rodriguez-Flores' choice to stand trial. No. 33311-6-III (Feb. 23, 2017), 197 Wn. App. 1080, at 4. The court did not find that the comments at sentencing required remand to a different sentencing Judge. *Id.*

The resentencing hearing was held on April 3, 2017. At that hearing the Court waived all financial obligations but for the

mandatory obligations. RP 11-12 The State concedes that the jury demand fee is not a mandatory obligation and that consistent with the Court's reasoning should be waived. The Court addressed the Appellant's lack of remorse at his initial sentencing and again at his remanded sentencing stating "he has absolutely no recognition of the wrongdoing. This Court has no reasons to believe it won't happen again as soon as he is released," and "I think that the only way to stop this kind of activity is to sentence him to the maximum time so when he gets out, at least some people will be safe." RP 13

E. AUTHORITY AND DISCUSSION

1. The trial court's comments regarding the Court of Appeals does not implicate a bias against the Appellant on the part of the trial court.

The trial court's comments address two distinct entities. The trial court first addresses comments expressing frustration with the appellate court. While the State cannot condone the court's comments, that commentary does not implicate a bias by the trial court against the Appellant. The issue presented is limited in scope to whether or not the trial court had improper bias against the Appellant. Whether or not the trial court violated the code of judicial conduct is not a proper consideration on appeal. CJC

Scope(7). “The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.” *Id.* Bias against the Appellate Court, while improper, does not indicate that the trial court did not properly consider Appellant’s sentence. There is no evidence to suggest as such. Rather, the commentary by the trial court indicates frustration with the Court of the Appeals and with resentencing procedure. RP 13

At no time does the trial court blame the Appellant for the decision by the Court of the Appeals or indicate in any way that he is unwilling to consider the Appellant’s argument at sentencing and request for a lesser sentence. There is no indication from the record that the trial court’s animus towards the Appellate Court caused the trial judge to be “personally embroiled” with the Appellant. *Offutt v. United States*, 348 U.S. 11, 17, 75 S.Ct. 11, 99 L.Ed. 11 (1954)

The trial court’s reasoning for the standard range sentence is sound and statutorily permissible. The trial court’s comments are similar to the comments at issue in *Hess v. United States*, 496 F.2d 936, 938 (9th Cir. 1974). In *Hess*, as in the instant case, the

Appellants took to trial a case to which they had no defense. *Id.* at 938. The Trial Court, in addressing the Appellants at sentencing expressed that in order to seek leniency, one must first admit their sins.” *Id.* The Appellate Court found that it would be “hard pressed” considering the trial Court’s sentencing remarks in their entirety that the remarks indicated a harsher penalty on Appellant’s due to the exercise of the right to trial. *Id.* The lack of remorse shown by the Appellant both in the actions that led to his conviction as well as at his subsequent sentencing indicate a lack of remorse consistent with the Court’s sentencing decision.

Appellant cites several cases in support of the proposition that exercise of the right to trial should not yield greater punishment. The State agrees with that proposition, but disagrees that the cases cited by Appellant are applicable to the facts at bar. In *Mazzaferro*, two co-Appellants were charged with crimes, one entered a guilty plea, while the other went to trial, and the Appellant who went to trial received a longer sentence. *U.S. v. Mazzaferro*, 865 F.2d. 450 (1st Cir. 1989) In *Jackson*, if and only if an interstate kidnapping Defendant elected trial by jury would they be eligible for the death penalty. *U.S. v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209,

20 L.Ed.2d 138 (1968). Neither of these cases bear sufficient factual similarity to the case at bar to be instructive.

The analysis by the trial court regarding the Appellant's remorse is similar to the analysis in *U.S. v. Jones*:

The law also has long recognized that a Appellant's decision to plead guilty is good evidence of acceptance of responsibility and possibly even sincere remorse. See, e.g., *id.* at 753, 90 S.Ct. at 1471-72 (Appellant who pleads "extends a substantial benefit to the State and ... demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in [quicker] rehabilitation"); *Alabama v. Smith*, 490 U.S. 794, 802, 109 S.Ct. 2201, 2206, 104 L.Ed.2d 865 (1989); *United States v. McLean*, 951 F.2d 1300, 1303 n. 2 (D.C.Cir.1991). In the absence of what one member of the court at oral argument called a "Remorse-o-meter" to gauge the Appellant's level of sincerity, sentencing judges are almost bound--and certainly permitted--to look at a Appellant's objective conduct, inferring the greatest remorse, other things being equal, from the promptest acknowledgements of guilt. *U.S. v. Jones*, 997 F.2d 1475, 1478 (Cir. 1993).

The logical gymnastics required to impute the trial court's frustration with the Court of Appeals as bias against the Appellant is untenable. There is no indication in the record that the frustration is transferred upon the Appellant. The trial court does not attempt to undermine the ruling of the Court of Appeals, accepting the remand of the initial sentence pursuant to *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015). The trial court did

not attempt to impose a sentence beyond the standard range. Further the trial court waived the Appellant's remaining LFOs with limited inquiry or comment. RP 11-12. Certainly if the trial court had a bias against Appellant as suggested, he would not have engaged in these practices that benefit the Appellant.

Sentences within the standard range are presumed appropriate and may not be appealed. RCW 9.94A.585(1) The trial court is not required to provide a basis for the sentence selected if it is within the standard range. The trial court did however articulate an appropriate reasoning to support a high-end sentence: that the Appellant lacked remorse for his actions and that he was blatantly engaging in selling drugs within a school zone. RP 13-14 The trial court's frustration with the appellate court does not render this sentence within the standard range inappropriate.

2. The trial court did not impose its sentence because of the Appellant's exercise of his right to trial.

The line between a lack of remorse and demanding the right to trial can be indistinct. However, the record clearly indicates which side of that line the trial court's decision fell on. The trial court unequivocally stated that it found the Appellant:

...the Appellant has absolutely no remorse for what he's done. He has absolutely no recognition of the wrongdoing. This Court has no reason to believe it won't happen again as soon as he is released, and again there was no defense at all. He was caught on videotape. He knew that. RP 13.

The trial court may properly consider the defense or lack thereof raised to the charge in its sentencing decision. Courts have frequently held that there is no error wherein a more lenient sentence is granted due to the entry of a guilty plea, or in consideration of facts surrounding the trial. *North Carolina v. Pearce*, 89 S.Ct. 2089, 395 U.S. 711, 23 L.Ed.2d 656 (1969); *Chaffin v. Stynchcombe*, 93 S.Ct. 1977, 412 U.S. 17, 36 L.Ed.2d 714 (1973); *Bordenkircher v. Hayes*, 98 S.Ct. 663, 434 U.S. 357, 54 L.Ed.2d 604 (1978); *United States v. Goodwin*, 102 S.Ct. 2485, 457 U.S. 368, 73 L.Ed.2d 74 (1982). If when sentencing the trial court may grant lenity based upon an offender's decision to plea guilty and acknowledge their wrongs, then an Appellant who does not acknowledge their wrongs, whether with a guilty plea, or an acknowledgement after trial, should not be able to benefit in the same manner. *U.S. v. Jones*, 997 F.2d 1475, 1480 (Cir. 1993)

3. The Jury demand fee is a discretionary legal financial obligation (LFO) and thus consistent with the trial court's reasoning with regards to the other discretionary LFOs should be waived.

The state concedes that based upon, *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), *State v. Hathaway*, 161 Wn. App. 634, 652-653, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011); *State v. Blazina*, 182 Wn.2d. 827, 838, 344 P.3d 680 (2015) and RCW 10.01.160(3). That the jury demand fee is a discretionary legal financial obligation. Because the trial court made clear its intent to only impose the mandatory legal financial obligations, and because of the recitation by the Appellant indicating his inability to pay discretionary legal financial obligations the State submits that the jury demand fee of \$250.00 should be stricken.

F. CONCLUSION

Based on the foregoing facts and authorities, the State respectfully requests this court to uphold the trial court's sentence, strike the jury demand fee, and dismiss the appeal.

Respectfully submitted this
22nd day of February 2018.


Julia E. Hartnell WSBA 51489
Deputy Prosecuting Attorney

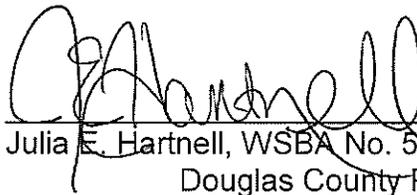
IN THE COURT OF APPEALS, DIVISION III
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	<i>Declaration of service</i>
Respondent,)	
)	NO. 35240-4-III
v.)	
)	Douglas County Superior
MANUEL RODRIGUEZ-FLORES,)	Court No. 15200019-9
Petitioner/Appellant)	
)	

I, Julia Elizabeth Hartnell, do hereby certify under penalty of perjury that on February 22, 2018, I provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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