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Court of Appeals
Division III
State of Washington
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NO. 35295-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

BRYAN JACOB STORMS,

Defendant/Appellant.

REPLY BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
(509) 775-0777

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES ii

STATUTES ii

ARGUMENT 1

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey, 530 U.S. 466, ___ S. Ct. ___,
___ L. Ed. 2d ___ (2000)……... 2

STATUTES

RCW 9.94A.535..... 3

RCW 9.94A.589(1)(a) 2

ARGUMENT

The State, in its brief, concedes that the trial court did not identify any new factors upon which to base the exceptional sentence imposed on Mr. Storms.

Mr. Storms' original sentence was 448 months. This was an exceptional sentence whereby the trial court ran the convictions on Counts I, II, and III consecutively. Count IV was ordered to run concurrently.

Mr. Storms appealed the denial of his suppression motion. The Court of Appeals reversed the trial court and directed that the blood draw evidence be suppressed. This reduced Mr. Storms' standard range sentence on Count I from 210 to 280 months to 108 to 144 months. The upper range constituted a reduction of 136 months.

The State asserts that defense counsel was not ineffective when she failed to challenge the trial court's imposition of a consecutive sentence on Count IV at the time of resentencing. The State is in error.

In essence, the benefit which Mr. Storms received as a result of the appeal was negated by the trial court's resentencing decision. Instead of receiving a reduction of 136 months he only received a reduction of 16 months.

The State's argument that Mr. Storms received a reduced sentence is disingenuous when all other factors are considered. When an appeal results in a defendant's favor, neither the State nor the trial court should be allowed to circumvent the benefit gained.

Mr. Storms does not argue that the trial court did not have the authority to impose consecutive sentences on Counts I, II, and III. However, he does contend that that authority did not exist as to Count IV.

The cases relied upon the State in its brief ignore the fact that those cases were all decided prior to *Apprendi v. New Jersey*, 530 U.S. 466, ___ S. Ct. ___, ___ L. Ed. 2d ___ (2000).

The trial court's reasoning for imposition of the consecutive sentence involving Count IV is set forth in the State's brief at page 8. The reasoning encompasses all factors which the trial court was aware of at the time of the original sentencing hearing.

RCW 9.94A.589 (1)(a) provides, in part:

> …Sentences imposed under this subsection **shall** be served concurrently. Consecutive sentences **may** only be imposed under the exceptional sentence provisions of RCW 9.94A.535. … This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(Emphasis supplied.)

RCW 9.94A.535 provides, in part:

> The court may impose a sentence outside the standard sentence range for an offense if it finds, concerning the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. …
> …
> If the sentencing court finds an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585 (4).
>
> A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

Mr. Storms contends that the Legislature intended to have multiple offenses sentenced concurrently with the exception of multiple serious offenses. He does not challenge the fact that the trial court had the authority to impose consecutive sentences on Counts I, II, and III under either the "free crimes" doctrine or the aggravating factor(s) found by the jury.

The trial court had the opportunity, at the original sentencing hearing, to also run Count IV consecutive to the other counts. It did not do so. It ran the 120-month sentence concurrent to those counts.

Upon resentencing, without the introduction of any new factors upon which to support a consecutive sentence involving Count IV, the presumption of vindictiveness prevails.

It is the introduction of additional factors, whether mitigating or aggravating, that would allow a resentencing court to change its mind on whether or not sentencing should be concurrent or consecutive.

In the absence of those changed circumstances, Mr. Storms contends that a resentencing court is precluded from altering its original determination.

The trial court originally sentenced Mr. Storms at the high end of the range for Counts I, II, and III and ran them consecutive.

Count IV was also sentenced at the high end of the range but run concurrent.

Mr. Storms is entitled to be resentenced at the high end of the range in accord with the original determination by the trial court for consecutive sentences as to Counts I, II, and III and a concurrent sentence on Count IV.

DATED this 3rd day of January, 2018.

Respectfully submitted,

s/ Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99166
(509) 775-0777
(509) 775-0776
nodblspk@rcabletv.com

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COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. BRYAN JACOB STORMS, Defendant, Appellant.	))))))))))))	SPOKANE COUNTY NO. 13 1 00556 6 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 3rd day of January, 2018, I caused a true and correct copy of the *REPLY BRIEF* and to be served on:

COURT OF APPEALS, DIVISION III E-FILE
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

SPOKANE COUNTY PROSECUTOR'S OFFICE E-FILE
Attn: Brian O'Brien
SCPAAppeals@spokanecounty.org

BRYAN JACOB STORMS #755119 U.S. MAIL
Coyote Ridge Corrections Center
PO Box 769
Connell, Washington 99326

s/ Dennis W. Morgan_____

DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99169
Phone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com