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Division III
State of Washington
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No. 35451-2-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

KELLY EUGENE SMALL,
Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
Honorable Christopher E. Culp, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The resentencing court was bound by its prior determination of the same facts at the original sentencing regarding the aggravating factor of victim's presence in the residence at the time of the burglary.

2. The resentencing court was bound by the Court of Appeals' finding there was no indication in the record that the trial court would have imposed an exceptional sentence for the burglary count had it realized the addition of 24 months presently required by RCW 9.94A.533(8) did not apply.

3. The resentencing court lacked jurisdiction to impose an exceptional sentence on the burglary conviction (count 3).

4. The court erred by entering Finding of Fact paragraph three (CP 8, Order Modifying Judgment and Sentence):

The original sentencing on Count 3 was supported by the aggravating factors, and it appears the [original sentencing court's] imposition of 24 months was based on those factors and not on RCW 9.94A.533([8]).

5. The court erred by entering a portion of Finding of Fact paragraph four (CP 9, Order Modifying Judgment and Sentence):

The Court now finds that both aggravating factors found by the jury on Count 3 support an exceptional sentence of 24 months consecutive. ...

6. The court erred by entering Finding of Fact paragraph five (CP 9, Order Modifying Judgment and Sentence):

That pursuant to RCW 9.94A.535, the Court now imposes an exceptional sentence on Count 3.

Issues Pertaining to Assignments of Error

1. Does a court err if on remand it imposes an exceptional sentence based on an aggravating factor where it is estopped by its prior determination on the same facts in the original sentencing?

2. Upon remand, a sentencing court is bound by the mandate issued by the Court of Appeals. In this case, the sentencing exceeded the authority set forth in the mandate. Did the sentencing court lack jurisdiction to impose an exceptional sentence on the burglary count in this case?

B. STATEMENT OF THE CASE

On October 5, 2012, the trial court sentenced Mr. Small to 380 months' imprisonment for an incident that occurred on February 25, 2006. The sentence included 356 months (base sentence of 236 months plus 120 months regarding the jury's two findings of particular vulnerability and deliberate cruelty) for first degree rape, 113 months (concurrent base sentence of 89 months plus consecutive 24 month enhancement regarding

the jury's finding of sexual motivation "and pursuant to RCW 9.94A.533(8)") for first degree burglary, and concurrent 12 months for forgery. CP 76–79, 80, 84, 97.

The court entered written "Findings of Fact and Conclusions of Law for Sentencing". CP 76–79. With respect to the burglary conviction (count 3), the court recognized the jury found beyond a reasonable doubt the aggravating factors of sexual motivation and that the victim was present when the crime was committed. CP 77 at Finding of Fact 2. The state had urged the court to impose an exceptional sentence based on the jury findings of aggravating factors as to the rape and burglary counts by running the high-ends of their standard ranges consecutively. 10/5/12¹ RP 2790–91. The State argued separately that as to the burglary conviction, RCW 9.94A.533(8)(a) created a mandatory imposition of 24 months based on the jury finding of sexual motivation and it must run consecutive to the total amount of confinement. 10/5/12 RP 2791.

The court agreed with the state's representation. It did not consider the jury finding as an independent basis for imposing the sexual

¹ This is the date of the original sentencing. Contemporaneously with the filing of this brief, appellant has filed a motion to supplement record to include the sentence report of proceedings from *State v. Kelly Eugene Small*, COA No. 31185-6-III.

motivation enhancement; instead it relied only on the statute authorizing the enhancement. 10/5/12 RP 2815–18; CP 78 at Conclusion of Law 4; *State v. Small*, 198 Wash. App. 1008, 2017 WL 959538 at *7 (Wash.Ct.App. March 7, 2017). The State did not appeal the court’s conclusion of law.

The court imposed no additional sentence regarding the jury’s finding that the victim of the burglary was present in the residence when the burglary was committed. 10/5/12 RP 2822–23, 2828; CP 78 at Conclusion of Law 5; *Small*, 2017 WL 959538 at *7. The court declined to do so because it believed “that [factual circumstance] was [already] included in burg one, and in rape one.” 10/5/12 RP 2822–23. The State did not appeal the court’s conclusion of law.

Mr. Small appealed, in pertinent part arguing that the trial court erred when it added 24 months to his total period of confinement under RCW 9.94A.533(8) because the statute authorizes and mandates additional time where there is a finding of sexual motivation only “for felony crimes committed on or after July1, 2006.” *Small*, 2017 WL 959538 at *6–7. The State conceded the mandatory 24-month addition to the sentence was not authorized given the date of the crime. *Small*, 2017 WL 959538 at *6.

The Court of Appeals rejected the State's argument that the jury's finding of sexual motivation for the burglary would alternatively support the addition of 24 months to the sentence as an exceptional sentence under RCW 9.94A.535(3)(f), and "the court's intent to impose [an] exceptional sentence [was] clear." *Small*, 2017 WL 959538 at *6–7.

"We find no indication [in the record] that the trial court would have imposed an exceptional sentence for the burglary count had it realized that the addition of 24 months presently required by RCW 9.94A.533(8) did not apply." *Small*, 2017 WL 959538 at *7.

The court concluded, "We remand for partial resentencing in light of the possibly mistaken application of the enhancement, which was not mandatory at the time of Mr. Small's crimes. We otherwise affirm." *Small*, 2017 WL 959538 at *1. "We remand for resentencing on the burglary count." *Small*, 2017 WL 959538 at *7. The cause was mandated to the Okanogan County Superior Court "for further proceedings in accordance with the attached true copy of the Opinion." CP 19.

At the resentencing hearing on July 19, 2017, the trial court imposed an exceptional sentence of 24 months above the standard range for the burglary count, giving two reasons: (1) The original sentencing on

Count 3 was supported by the aggravating factors, and “it appears the imposition of 24 months was based on those factors and not on RCW 9.94A.533([8]),” and (2) “The Court now finds that both aggravating factors found by the jury on count 3 support an exceptional sentence of 24 months consecutive.” CP 8–9; RP 27–28.

Mr. Small timely appealed. CP. The court found him indigent for the purposes of appeal. CP 5–6.

C. ARGUMENT

1. The doctrine of collateral estoppel bars use of the aggravating factor of presence of the victim in the residence during the burglary to increase Mr. Small’s standard range sentence.

The doctrine of collateral estoppel applies in criminal cases and bars relitigation of issues actually adjudicated. *See State v. Peele*, 75 Wn.2d 28, 30, 448 P.2d 923 (1968). “The application of collateral estoppel in a criminal action is a 2–step operation: the first is to determine what issues were raised and resolved by the former judgment, and the second is to determine whether the issues raised and resolved in the former prosecution are identical to those sought to be barred in the subsequent action.” *Id.* at 30–31. In general, collateral estoppel “precludes the retrial of issues decided in a prior action.” *State v. Collicott*, 188 Wn.2d 649, 827 P.2d

263 (1992) (citations omitted).

Imposition of an exceptional sentence upon remand in this case is directly related to the jury's findings of two aggravating factors regarding the burglary count. A trial court may consider aggravating or mitigating factors justifying an exceptional sentence and then must determine whether "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535.

At the first sentencing hearing, the sentencing judge declined to impose an exceptional sentence based on the jury's finding beyond a reasonable doubt that the victim was present in the residence when the crime was committed. He could have determined that an exceptional sentence was justified on this basis, but instead concluded that he "would impose[] no additional sentence" based on this finding because the presence of a victim "was [already] included" in Mr. Small's convictions for first degree rape and first degree burglary. CP 78 at Conclusion of Law 5; 10/5/12 RP 2822–23. This followed the State's argument that the various aggravating factors, including presence of the victim during the crime of burglary, would support the requested exceptional sentence as to the two main counts, rape and burglary. 10/5/12 RP 2790–92, 2808–09.

After considering these issues at the first sentencing and having determined that no exceptional sentence would be imposed on the burglary count on the basis of the aggravating factor of presence of the victim during the crime, the trial court is estopped from now imposing an exceptional sentence on the count based on a repeat assertion by the State of the victim's presence during the crime of burglary. *Collicott*, 118 Wn.2d at 66; RP 12–13, 20–22, 24–25.

2. In light of the mandate issued by the Court of Appeals, the sentencing court lacked jurisdiction to impose an exceptional sentence on the burglary count based on the sexual motivation finding.

The trial court's discretion to resentence 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); *see also In re Wilson's Estate*, 53 Wn.2d 762, 764, 337 P.2d 56 (1959) (trial court may consider no issue other than the one for the determination of which the case was remanded). The appellate mandate is binding on the superior court and must be strictly followed. *In re Marriage of McCausland*, 129 Wn. App. 390, 399, 118 P.3d 944 (2005), *rev'd on other grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007).

Here, the Court of Appeals made an explicit finding there was “no indication that the trial court would have imposed an exceptional sentence

for the burglary count had it realized that the addition of 24 months presently required by RCW 9.94A.533(8) did not apply” and “remand[ed] for resentencing on the burglary count.” *Small*, 2017 WL 959538 at *7. The finding was based on evidence in the record that the original sentencing court “did not increase Mr. Small’s sentence at all based on one of the aggravating circumstances found by the jury (that [the victim] was in her home at the time of the burglary), and in orally announced its sentencing decision, it thrice characterized the 24-month increase for the sexual motivation finding as mandatory, not discretionary. See RP at 2817–18 (“The Court is also required to add,” “There’s a 24-month required for,” and, “The Court is also required to impose an additional sentence under 9.94A.533(8) because of sexual motivation involved in the burglary.”).” *Small*, 2017 WL 959538 at *7. Absent evidence of the original sentencing court’s intent to impose an exceptional sentence on the burglary count, the purpose of the remand was to remove the erroneous 24-month addition to Mr. Small’s standard range sentence of 89 months.

The resentencing court instead disputed the appellate court’s unambiguous finding by stating “it appears the imposition of 24 months was based on [the sexual motivation and presence of victim] factors and not on [the mandatory sexual motivation enhancement required by] RCW

9.94A.533[8].” CP 8. The court made no finding or citation to the record to support its contradiction of the appellate court’s finding.

The resentencing court orally attempted to contradict the finding by stating (1) it was mere coincidence that the addition of 24 months to Mr. Small’s sentence happened to match the required 24-month term of the enhancement under RCW 9.94A.533(8) and (2) the original sentencing judge² would not have mistakenly applied the sexual motivation 24-month enhancement that was effective in July 2006 to a crime of burglary “committed in 1998.” RP 25–27.

The “mere coincidence” suggestion fails where the reference to a “24-month” term occurred only during discussion of the enhancement statute at the original sentencing. 10/5/2012 RP 2791–2793, 2800–2801, 2817–2818. The only terms discussed with respect to an exceptional sentence were—as argued by the State—the much higher number of months calculated by running the high ends of the ranges for burglary and rape consecutively or—as imposed by the court—the two additional 60-month sentences added to Mr. Small’s crime of first degree rape based on the jury’s findings of two aggravating factors. . 10/5/2012 RP 2790, 2792,

² The Honorable Jack Burchard, now retired, presided over the original trial in 2012. RP 26, 27, 29 30.

2815–2816, 2822. The record does not support a finding of fact or conclusion of law that the original sentencing court imposed the 24-month additional term as an exceptional sentence.

As to the other alleged contradiction of the appellate court’s explicit finding, the resentencing court was mistaken in its facts. The burglary was committed on February 25, 2006, not in 1998. CP 101. RCW 9.94A.533(8) was approved on March 20, 2006 and applied only to felonies committed on or after July 1, 2006. *Small*, 2017 WL 959538 at *6; 2006 Wash. Legis. Serv. Ch. 123 (S.S.S.B. 6460) (WEST). The State erroneously told the original sentencing court that the newly enacted statute was in effect at the time of original sentencing and required a mandatory sexual motivation enhancement of 24 months be added to Mr. Small’s total sentence. 10/5/2012 RP 2791–2792. The original sentencing court imposed the enhancement pursuant to the statute and the State’s representation about its application. *See Small*, 2017 WL 959538 at *7. The application of the enhancement was both intentional and mistaken, and should have been removed from Mr. Small’s sentence, as required by the Court of Appeal’s opinion and mandate.

Upon remand, the resentencing court did not believe it was making a discretionary decision. RP 12. It understood that its role was to

determine whether the court originally imposed an exceptional sentence or improperly imposed an enhancement for sexual motivation. RP 36. It determined the original sentencing court's ruling imposed an exceptional sentence of 24 months to the high end of the standard range, for a total sentence on the burglary charge of 113 months. RP 27–28, 36. It “guessed” that the court felt the 24 months extra time was proportionate to the seriousness of the offense and was appropriate. RP 29–30. Its findings of fact that an exceptional sentence was originally intended are not supported in the record and thus do not provide a basis to refute the appellate court's finding to the contrary.

For the reasons set forth above, the resentencing court exceeded the authority granted by the Court of Appeals' mandate. Following remand, the superior court lacked jurisdiction to impose an exceptional sentence on the burglary count. The exceptional sentence/order modifying judgment and sentence must be vacated, and the case remanded for correction of the judgment and sentence.

3. Appeal costs should not be awarded.

In determining whether costs should be awarded in the trial court our Supreme Court has held:

The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within

this inquiry, the court must also consider important factors . . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see also State v. Grant*, 196 Wn. App. 644, 649–50, 385 P.3d 184 (2016). The appellate courts should also consider important nonexclusive factors such as an individual’s other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual’s age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant “cannot contribute anything toward the costs of appellate review.” *Sinclair* 192 Wn. App. at 391. *Sinclair* held, as a general matter, that “the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., ‘increased difficulty in reentering society, the doubtful

recoupment of money by the government, and inequities in administration.’

” *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

Mr. Small was 43 years old³ when the crimes of first degree burglary and first degree rape were committed in 2006. He was 50 years old when sentenced⁴ in October 2012 to 380 months (31.66 years) of confinement. Mr. Small remains in confinement and was 55 years old at the time the order modifying judgment and sentence was entered herein on July 29, 2017. CP 8. The resentencing court found Mr. Small remained indigent for purposes of this appeal and was entitled to appointment of counsel and costs of review at public expense. CP 5–6.

In light of Mr. Small’s indigent status, and the presumption under RAP 15.2(f), that he remains indigent “throughout the review” unless the appellate court finds his financial condition has improved “to the extent [he] is no longer indigent,”⁵ this court should exercise its discretion to waive appellate costs.⁶ RCW 10.73.160(1).

³ Mr. Small’s date of birth is July 4, 1962. CP 80.

⁴ CP 80, 84.

⁵ *Accord*, RAP 14.2, which provides in pertinent part:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender’s financial circumstances **have significantly improved since the last determination of indigency**. (Emphasis added).

D. CONCLUSION

For the reasons stated, the exceptional sentence/order modifying judgment and sentence must be vacated, and the case remanded for correction of the judgment and sentence. Alternatively, should the State be deemed the substantially prevailing party, this court should exercise its discretion to waive appellate costs.

Respectfully submitted on February 20, 2018.

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⁶ Appellate counsel anticipates filing a report as to Mr. Small's continued indigency no later than 60 days following the filing of this brief.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 20, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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