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No. 35483-1-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 16-1-00490-4

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

DEBRA JEAN SHOEMAKER,
Defendant/Appellant.

BRIEF OF RESPONDENT

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A. COUNTER-STATEMENT OF ISSUES

1. The sentencing court did not violate RCW 9.94A.530(2), the “real facts doctrine,” when imposing Ms. Shoemaker’s sentence because Ms. Shoemaker acknowledged the facts presented at sentencing.
2. The sentencing court did not violate Ms. Shoemaker’s right to due process.
3. Ms. Shoemaker has failed to prove that her counsel provided deficient performance, and that but for counsel’s deficient performance the result would likely have been different.
4. The trial court did not violate the appearance of fairness doctrine.

B. STATEMENT OF THE CASE

For purposes of appeal, the State accepts Ms. Shoemaker’s statement of the case as presented in the Appellant’s Opening Brief. The State’s only addition is to note the absence of a particular fact in the record: not once during the sentencing hearing did any lawyer, party, or other person say “objection,” or otherwise utter any

disagreement with the court's sentencing procedures. *See generally* RP 2-42.

C. ARGUMENT

Ms. Shoemaker presents four issues on appeal concerning the validity of her sentencing hearing. First, Ms. Shoemaker argues the court violated RCW 9.94A.530(2) by not holding an evidentiary hearing regarding facts introduced by the victim's representative. Second, she argues that she was denied due process because the court permitted the introduction of unreliable facts at sentencing. Third, Ms. Shoemaker argues in the alternative that her counsel provided ineffective assistance for failing to object to the improper admission of adjudicative facts at sentencing. Fourth, Ms. Shoemaker argues that if resentencing is granted that it should occur in front of another judge. The State addresses each of these arguments in the order presented.

1. The sentencing court did not violate RCW 9.94A.530(2), the "real facts doctrine," when imposing Ms. Shoemaker's sentence.

A party in a criminal case cannot appeal a felony sentence within the standard range. RCW 9.94A.585(1). However, a party

“is not precluded from challenging on appeal the procedure by which a sentence within the standard range was imposed.” *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719 (1986). Here, Ms. Shoemaker challenges the legality of the process used to determine her sentence. As such, this Court reviews this issue de novo.

During sentencing, defendants do not have any constitutional right to have the facts relied on by the judge proven by a jury if the facts are used to impose a sentence within a standard range. *State v. Williams*, 159 Wn. App. 298, 316-17, 244 P.3d 1018 (2011) (discussing *Harris v. United States*, 536 U.S. 545, 565, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002) (plurality opinion)). The only limitations on what facts the court can consider are those limitations imposed by statute, specifically RCW 9.94A.530(2). *Id.* at 317. Under this statute, the trial court may rely on no more information than is “admitted, acknowledged, or proved” at the time of sentencing. RCW 9.94A.530(2). “Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.” RCW 9.94A.530. Even when the facts are disputed and a hearing is required, the Court is authorized

to utilize relaxed evidentiary procedures during the hearing. ER 1101(c)(3) (“The rules [of evidence] need not be applied in the following situations: . . . sentencing.”).

In the present case, the victim’s representative, Mr. Myers, presented his facts prior to Ms. Shoemaker and her counsel presenting theirs. RP 7-15, 24. As stated by the Court, some of those facts were not in the police reports acknowledged by the defendant. RP 28-29. However, he only provided facts within his personal knowledge from investigating this case with the victim’s Washington lawyer, Tyler Hotchkiss, including from interviews he personally conducted with the defendant. RP 10-11. After which, Ms. Shoemaker provided her additional facts. RP 29-33.

Notably, none of the additional facts presented by Ms. Shoemaker conflicted with or disputed any of the facts presented by Mr. Meyers. By its plain terms, the hearing requirement in RCW 9.94A.530(2) is only triggered when facts are disputed. *State v. Grayson*, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005) (holding that

RCW 9.94A.530(2) “require[s] defendant to object”). Because no objection was raised, no evidentiary hearing was required.¹

Finally, by not objecting to the facts put on the record by Mr. Myers or otherwise challenging them through the introduction of contrary facts, Ms. Shoemaker “acknowledged” them. This is because “‘Acknowledged’ facts include all those facts presented or considered during sentencing that are not objected to by the parties.” *Grayson*, 154 Wn.2d at 339.

In summary, the sentencing court did not violate RCW 9.94A.530(2) because Ms. Shoemaker acknowledged the facts presented by Mr. Meyers and because neither she, nor her lawyer, disputed any of the facts presented by Mr. Meyers.

2. The court’s sentencing procedure did not violate Ms. Shoemaker’s constitutional right to due process.

“[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the

¹ The *Grayson* court suggested that Grayson may have been absolved of the duty to object because it was clear that the court was not allowing anyone else to speak when it vigorously interrupted the State. *Grayson*, 154 Wn.2d at 341. That is not the case here where the court gave everyone an additional opportunity to speak even after sentencing recommendations and allocution were completed. RP 27 (The Court: “Did everybody get to say everything they wanted to say?”).

record.” *State v. Ford*, 137 Wn.2d 472, 483, 973 P.2d 452 (1999). “Information relied upon at sentencing is false or unreliable if it lacks some minimal indicium of reliability beyond mere allegation.” *Id.* (citations and quotations omitted). Ms. Shoemaker argues that she should be absolved of her duty to object because the procedure used in this case violated her right to due process. This Court reviews due process challenges *de novo*. *State v. Cantu*, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

A careful review of the record in this case shows that her due process rights were not violated. This is because the information provided by Mr. Myers contained a minimum indicia of reliability. As stated by Mr. Myers, all of the material facts he provided either came from the private investigator hired by the family or from him personally interviewing and being present for interviews with the defendant. RP 10-11. Furthermore, as a lawyer, he is subject to the same duty of candor to the tribunal as all lawyers are in this state. Oregon RPC 3.3(a)(1) (“A lawyer shall not knowingly make a false statement of fact or law to a tribunal”). Moreover, Mr. Myers’s duty of candor to the tribunal does not stop at Oregon’s borders. Oregon

RPC 8.5(a) (“A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs.”). Accordingly, Mr. Myers’s professional responsibilities combined with his presentation of facts within his personal knowledge and from named reliable sources provides a minimum indicia of reliability.

This situation is a far cry from the dicta² in the *Grayson* case relied on by Ms. Shoemaker. *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005). In *Grayson*, the court refused to consider a DOSA because the court flatly stated that there was not funding for DOSA sentences. *Id.* at 337. However, the court did not state its sources for that information; thus, there was no indicia of reliability for the statement beyond mere allegation. Here, we know the sources of Mr. Myers’s information, and if Ms. Shoemaker or her lawyer sought to challenge those sources or rebut them, they could have—unlike in *Grayson*.

² The discussion in *Grayson* about due process and RCW 9.94A.530(2) is dicta because the court very clearly stated that it was reversing solely because the court’s categorical refusal to consider exercising its discretion was an abuse of discretion. *Grayson*, 154 Wn.2d at 341 (“But since we resolve this case on other grounds, we need not decide whether this would be such a case. The best practice is to promptly object.”).

There was no ability to rebut the court's unreliable facts in *Grayson* as demonstrated by the fact that the State tried to supplement the record factually, but the court refused to let anyone else speak. *Id.* at 337. But here, the court went so far as to ask: "Did everybody get to say everything they wanted to say?" RP 27. When Ms. Shoemaker asked to provide the court with more information, the court let her. RP 29-33. Thus, Ms. Shoemaker had ample opportunity to "contradict, discredit, and correct" any misstatements made by Mr. Myers. The fact that she took that opportunity to supplement the record instead of challenging it demonstrates her constitutional rights were not violated.

Ms. Shoemaker contends that she did object or contest the facts presented by Mr. Myers. App. Br. at 25 citing RP 29-30 and RP 34-35. But that is not true. The portion of the record that Ms. Shoemaker cited to is a portion where Ms. Shoemaker explained to the court the steps that she took to minimize the impact of the crime by anonymously reporting the vehicle and asking her co-defendant to return the property. RP 29. But, the court obviously was not impressed by Ms. Shoemaker still attempting to avoid detection by

acting anonymously rather than confessing to the police in person. RP 30. Nothing in this exchange presents a dispute over facts. All that it shows is a dispute over how forthcoming Ms. Shoemaker was about her involvement. Moreover that dispute was between Ms. Shoemaker and the judge—not between Ms. Shoemaker and Mr. Myers.

Ms. Shoemaker also relies on RP 34-35 to argue that she contested facts presented by Mr. Myers. App. Br. at 25. Again, that is not borne out by the record. At RP 34, the court reiterates Mr. Myers's statement that all of the property was gone and never recovered. Ms. Shoemaker did not contend or argue that any of the property was recovered. Accordingly, there is no dispute there about facts. The court then reiterated that Ms. Shoemaker did nothing to help *at the time* that the items could be retrieved, to which Ms. Shoemaker interrupted the court. RP 34-35. However, that is not a dispute with any facts presented by Mr. Myers. That is a dispute over what weight and meaning the court put on the earlier back-and-forth at RP 29-30. It is clear from the overall context of the court's conversation with Ms. Shoemaker that the court would have wanted

to see Ms. Shoemaker walk into the police department, confess, and turn in her co-defendant rather than to anonymously call in the location of the car. That is what the court's statement on RP 34-35 is about. Rather than being a factual dispute, the only real dispute at RP 34-35 is that Ms. Shoemaker believed she should receive some sentencing consideration due to the fact that she took some half-hearted steps to mitigate the impact of her crime and the court disagreed.

Given that neither Ms. Shoemaker, nor her lawyer, ever disputed any of the facts presented by Mr. Myers when given the opportunity to do so, no error occurred.

3. Ms. Shoemaker's lawyer did not provide ineffective assistance of counsel.

In the alternative, Ms. Shoemaker argues that her lawyer provided ineffective assistance of counsel by not requesting an evidentiary hearing under RCW 9.94A.530(2). In a claim of ineffective assistance, the defendant must show that her counsel's performance fell below an objective standard of reasonableness, and a reasonable probability that but for counsel's deficient performance the result would have been different. *Strickland v. Washington*, 466

U.S. 668, 688 and 694, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). A defendant's self-serving statement of ineffective assistance is generally insufficient by itself to overcome the presumption of effective assistance. *State v. Conley*, 121 Wn. App. 280, 287, 87 P.3d 1221 (2004).

Ms. Shoemaker argues that her counsel should have objected because there was no tactical reason for not objecting. App. Br. at 29. This is nothing more than a self-serving statement that does not merit review by this court. One possible reason for not objecting would be that Ms. Shoemaker and her lawyer knew that what Mr. Myers said was, in all material respects, true and thus not worth contesting.

Ms. Shoemaker also argues that there was no tactical reason for her lawyer not objecting because if he had, the court would have had to disregard everything that Mr. Myers said. But, that is not true. If Ms. Shoemaker's lawyer had objected, the court would have just held a contested hearing under RCW 9.94A.730(2), at which time the State would have called Mr. Myers as a witness and Mr. Myers would have presented the same information from his personal

knowledge. While some of the information provided was not from his personal knowledge, hearsay is admissible in this context because the rules of evidence do not apply provided the hearsay is reliable. ER 1101(c)(3). Alternatively, the State would have either presented a declaration from the private investigator or brought the private investigator in to testify.

For this same reason, Ms. Shoemaker's *Strickland* claim also fails the second prong. Because RCW 9.94A.730(2) allows this same information to be presented to the sentencing court (just in another format) she has failed to show a reasonable likelihood that asking for a contested hearing would have yielded a different result (i.e. that this information would have been excluded from consideration).

4. Ms. Shoemaker has failed to show that resentencing should occur in front of a different judge.

If the Court remands for resentencing, Ms. Shoemaker requests it be done in front of another judge. The State disagrees with the appropriateness of that remedy.

“[R]eassignment may be sought for the first time on appeal where, for example, the trial judge will exercise discretion on

remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue.” *State v. McEnroe*, 181 Wn.2d 375, 387, 333 P.3d 402 (2014).

Even though Judge Allan would exercise discretion upon remand regarding the issue that triggered the appeal, Ms. Shoemaker’s demand for a new sentencing judge necessarily fails because Judge Allan has not been exposed to prohibited information, nor has she expressed an opinion on the merits.

Judge Allan has not been exposed to prohibited information because it is clear that the information supplied at sentencing would be admissible again once the proper witnesses are before the court. There is no reason to believe that Mr. Myers and the private investigator would not present this same information to the court at a contested hearing upon remand.

Although Judge Allan has prejudged the request for a DOSA, she has not done so under the totality of the circumstances having heard whatever testing of the evidence or additional evidence the defense might wish to present at a contested hearing. Accordingly,

there is no reason to believe that Judge Allan cannot be impartial. It may be that whatever new information or contextualization that the defense presents upon remand might induce her to grant a DOSA.

Furthermore, this case does not resemble other cases where a new judge has been assigned upon remand. In *Harrison*, a new judge was called-for because the State had breached the plea agreement exposing the judge to prohibited information about the State's opinion regarding the sentence; in that instance a new judge was necessary. *State v. Harrison*, 148 Wn.2d 550, 557-59, 61 P.3d 1104 (2003). The same was called for in *Sledge* where the trial court improperly relied on earned-release time in calculating a fair sentence, which was a prohibited factor that could not be guarded against upon remand. *State v. Sledge*, 133 Wn.2d 828, 846, 947 P.2d 1199 (1997).

Here, the court's only error (if any) was to rely on information presented in the wrong format—not information that was altogether inadmissible. This error would be sufficiently remedied upon remand when the same information gets presented,

but in a format that permits the defense to cross-examine the presenter and to present their own information in rebuttal.

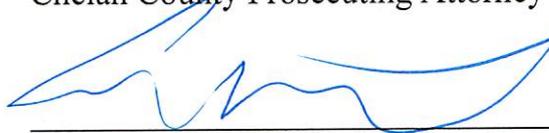
D. CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests this Court affirm Ms. Shoemaker's sentence.

DATED this 26th day of March, 2018.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



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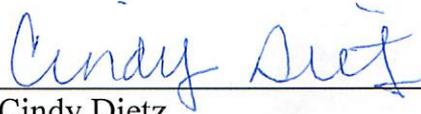
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	No. 35483-1-III
Plaintiff/Respondent,)	Chelan Co. Superior Court No. 16-1-00490-4
vs.)	DECLARATION OF SERVICE
DEBRA JEAN SHOEMAKER,)	
Defendant/Appellant.)	

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 26th day of March, 2018, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 26th day of March, 2018.



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