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Court of Appeals
Division III
State of Washington
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Nº. 35494-6-III

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

STATE OF WASHINGTON
Respondent,

v.

MICHAEL ODOM,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Benton County,
Cause No. 14-1-00718-7
The Honorable Bruce Spanner & Honorable Jackie Shea-Brown,
Presiding Judges

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in running Mr. Odom's sentences for his two convictions in this case consecutive to each other where the convictions were entered and the sentences imposed on the same day and the trial court did not find any substantial and compelling reasons to justify an exceptional sentence.
2. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should this court vacate the portion of Mr. Odom's sentence requiring his convictions for identity theft to be run consecutively where the convictions were entered and the sentences imposed on the same day and the trial court did not find any substantial and compelling reasons to justify an exceptional sentence? (Assignment of Error No. 1)
2. If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Odom is indigent, as noted in the Order of Indigency? (Assignment of Error No. 2)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On January 25, 2016, Mr. Michael Odom pleaded guilty to two counts of identity theft in the first degree.¹ In return for Mr. Odom's guilty plea, the State agreed to recommend a DOSA sentence if Mr. Odom

¹ RP 3-9; 1/25/2016. The volumes of the report of proceedings are not numbered consecutively. Reference to the report of proceedings will be made by giving the RP page number followed by the date of the proceeding being referenced.

was found to be a good candidate.²

After pleading guilty, Mr. Odom was released from custody on bond.³ After being released from custody on this matter, Mr. Odom was taken into custody in Spokane on charges of second degree theft and forgery (unrelated to this case) and remained in custody until sentencing in this matter.⁴

At sentencing, the State recommended a sentence of 63 months, the low end of the standard range.⁵ Trial counsel for Mr. Odom recommended a DOSA sentence.⁶ The trial court granted Mr. Odom's request for a DOSA sentence⁷ and held that Mr. Odom's sentence in this case would run consecutive to the sentence in the Spokane matter.⁸ On the Felony Judgment and Sentence, the trial court indicated that Mr. Odom's sentences for the identity theft convictions in this case were also to run consecutive to each other by crossing out the paragraphs stating that "all counts" and the "other current convictions" were to run concurrently.⁹ No findings of fact or conclusions of law about an exceptional sentence were filed by the trial court.

² CP 12; RP 51; 7/27/17.

³ RP 53-54; 7/27/17.

⁴ CP 22; RP 54-55; 7/27/17.

⁵ RP 57-58; 7/27/17.

⁶ RP 68; 7/27/17.

⁷ CP 203-204; RP 77; 7/27/17.

⁸ CP 203; RP 92-93; 7/27/17

⁹ CP 203.

Notice of appeal was filed on July 27, 2017.¹⁰

D. ARGUMENT

1. The trial court erred in ordering Mr. Odom’s sentences for the two crimes in this case to run consecutive to each other where the convictions were entered and the sentences imposed on the same day and the trial court did not find any substantial and compelling reasons to justify an exceptional sentence.

a. Sentences for convictions entered and sentenced on the same day must run concurrent to each other unless the trial court finds “substantial and compelling” reasons to justify an exceptional sentence of consecutive sentences.

Sentences for two or more current offenses shall be served concurrently and “[c]onsecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.”¹¹ Under RCW 9.94A.535, a trial court may impose an exceptional sentence if “there are substantial and compelling reasons justifying an exceptional sentence.” In such a case, the trial court must “set forth the reasons for its decision in written findings of fact and conclusions of law.”¹²

Our Supreme Court has stated that “[w]hile the [sentencing reform act] does not formally define ‘current offense,’ the term is defined

¹⁰ CP 214.

¹¹ RCW 9.94A.589(1)(a); *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 508, 301 P.3d 450 (2013).

¹² RCW 9.94A.535.

functionally as convictions entered or sentenced on the same day.”¹³

- b. The trial court erred in modifying the judgment and sentence to indicate that Mr. Odom’s sentences for the identity theft convictions in this case were to run consecutive to each other.

Mr. Odom’s convictions in this case fall squarely under RCW 9.94A.535’s mandate that the sentences be served concurrently. Mr. Odom’s convictions for identity theft were entered and sentenced on the same days, making them “current offenses” as defined in *Finstad*. Because these offenses were “current offenses,” the trial court was **required** under RCW 9.94A.589 to impose concurrent sentences for those convictions unless it followed the exceptional sentence provisions of RCW 9.94A.535.¹⁴ Under RCW 9.94A.535, the trial court must find “substantial and compelling reasons justifying an exceptional sentence” and “set forth the reasons for its decision in written findings of fact and conclusions of law.” The trial court made no such findings here.

Mr. Odom does not dispute that under RCW 9.94A.589(3) the trial court had discretion to choose whether to run the sentence in this case consecutive to the sentence imposed in the Spokane matter. However, if the trial court intended to make Mr. Odom’s convictions for identity theft run consecutive to each other, such a sentence would have been an

¹³ *Finstad*, 177 Wn.2d at 507 (citing RCW 9.94A.525(1)).

¹⁴ RCW 9.94A.589(1)(a).

exceptional sentence that required the trial court to enter findings of fact and conclusions of law supporting that exceptional sentence, which the trial court did not do.

Mr. Odom's sentence violates RCW 9.94A.589. This court should vacate the portion of the judgment and sentence indicating that Mr. Odom's sentences on the identity theft convictions run consecutively and remand for resentencing where those sentences are run concurrently.

2. If the state substantially prevails, the Court of Appeals should decline to award any appellate costs requested.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail.¹⁵

Appellate costs are "indisputably" discretionary in nature.¹⁶ The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. Furthermore, "[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals'] obligation to exercise

¹⁵ *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied*, 185 Wn.2d 1034 (2016).

¹⁶ *Id.*, at 388.

discretion when properly requested to do so.”¹⁷

Mr. Odom has been convicted of a felony and sentenced to prison. The trial court determined that he is indigent for purposes of this appeal.¹⁸ There is no reason to believe that status will change. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations.¹⁹

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

E. CONCLUSION

The trial court erred by striking the portions of the judgment and sentence that indicated Mr. Odom’s current convictions would be served concurrently without making the findings of fact and conclusions of law regarding an exceptional sentence required by RCW 9.94A.589 and RCW 9.94A.535.

This court should vacate the portions of Mr. Odom’s judgment and sentence that indicate his current offenses run consecutively and should remand this case for correction of the judgment and sentence to indicate the sentences for the current offenses will run concurrently.

¹⁷ *Id.*

¹⁸ CP 217-219.

¹⁹ *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

DATED this 24th day of January, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Reed Speir", written over a horizontal line.

Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 24th day of January, 2018, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Andrew Kelvin Miller
Benton County Prosecutors Office
7122 W Okanogan Pl Bldg A
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And to:

Mr. Michael Odom, DOC No. 308391
PO Box 2049
Airway Heights, WA 99001-2049

Signed at Tacoma, Washington this 24th day of January, 2018.



Reed Speir, WSBA No. 36270

LAW OFFICE OF REED SPEIR

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