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Court of Appeals  
Division III  
State of Washington  
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No. 35539-0-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JEFFREY LEE McFADDEN,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRANT COUNTY

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court acted without statutory authority in imposing an exceptional sentence in the form of consecutive sentences.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A trial court may impose a sentence only as authorized by statute. Did the trial court act without statutory authority in imposing an exceptional sentence in the form of consecutive sentences for Jeffrey McFadden's multiple current offenses?

C. STATEMENT OF THE CASE

Following an incident that occurred in February 2014, the State threatened to charge McFadden with his third "strike" which would, if successfully prosecuted, result in a mandatory sentence of life without the possibility of parole. CP 2. In order to avoid that result, McFadden agreed to a settlement with the State. Id. The State agreed to file an amended set of charges that would not include a "strike" offense and both parties agreed to recommend an exceptional sentence that would amount to 20 years in prison, provided McFadden received early release credits. Id.

In accordance with the agreement, the State filed an amended information charging one count of unlawful possession of a firearm in

the first degree (count I), one count of distribution of marijuana to a person under age eighteen (count II), and one count of intimidating a witness (count III). CP 4-5.

McFadden's offender score for each count was six. CP 92. The standard sentence range for count I was 57 to 75 months. RCW 9.41.040(1); RCW 9.94A.515; RCW 9.94A.510. The standard sentence range for count II was 100+ to 120 months. RCW 69.50.406(2); RCW 9.94A.518; RCW 9.94A.517. And the standard sentence range for count III was 46 to 61 months. RCW 9A.72.110; RCW 9.94A.515; RCW 9.94A.510.

McFadden pled guilty to the amended charges. CP 6-15; RP 73-79. He said he understood the State would recommend a sentence above the standard range of 114 months for count I and 115 months for count III, and a standard range sentence of 114 months for count II. CP 9. He said he understood the parties agreed to recommend an exceptional sentence in the form of consecutive sentences for all three counts, totaling 343 months. CP 9-10, 14. The guilty plea statement also says, "If the court imposes an exceptional sentence after a hearing, either the State or I can appeal the sentence." CP 10.

McFadden was sentenced on March 16, 2015. Consistent with the parties' agreement, the court imposed an exceptional sentence above the standard range for counts I and III and a standard range sentence for count II, all three sentences to be served consecutively to each other. CP 92. The total sentence imposed is 343 months. CP 93.

On June 17, 2016, McFadden filed a CrR 7.8 motion for relief from judgment in the trial court. CP 17-41. McFadden requested the court "vacate his consecutive sentence and impose a sentence consistent with the sentencing reform act." CP 17. McFadden acknowledged a sentence outside the standard range was authorized based on the parties' stipulation. CP 19. But he argued the court acted without statutory authority in imposing consecutive sentences because consecutive sentences are authorized in only two situations: where a person is convicted of multiple current offenses and his or her high offender score results in some of them going unpunished, or if the current offenses are "serious violent" offenses. CP 19. McFadden requested that only the erroneous portion of the sentence be vacated, that is, only that portion ordering the sentences to be served consecutively. CP 20. He requested to be resentenced with concurrent sentences. CP 20-21.

The trial court transferred the motion to this Court for consideration as a personal restraint petition. CP 110-12. This Court dismissed the petition, ruling it was time barred. CP 118-22.

On September 29, 2017, McFadden filed a notice of appeal. Through the assistance of another person, he explained that he cannot read or write. CP 16. He explained he had asked his trial attorney to file a notice of appeal but his attorney never responded to his request and never filed a notice of appeal. CP 16. This Court agreed that extraordinary circumstances justify allowing McFadden's appeal to proceed.

D. ARGUMENT

**The trial court acted without statutory authority in imposing an exceptional sentence in the form of consecutive sentences.**

The trial court did not have statutory authority to impose consecutive sentences because McFadden's offender score was not above the top of the sentencing grid, and because no other exception to the statutory presumption of concurrent sentences applies.

1. McFadden may challenge his erroneous sentence despite his guilty plea.

McFadden's sentence is erroneous to the extent it exceeds the court's statutory authority. It is a long-standing and well-established

principle of criminal law that “[a] trial court only possesses the power to impose sentences provided by law.” In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Our supreme court has “often reaffirmed the principle that a sentence in excess of statutory authority is subject to challenge, and the defendant is entitled to be resentenced.” In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002).

McFadden did not give up his right to challenge his erroneous sentence by pleading guilty or entering a plea agreement with the State. “[A] defendant cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that authorized by statute and thus cannot waive a challenge to such a sentence.” Id. at 872.

2. The controlling statute did not authorize consecutive sentences.

Whenever a person is to be sentenced for two or more current offenses, the trial court must comply with RCW 9.94A.589. Section (1)(a) of that provision requires that sentences for multiple current offenses be served concurrently, unless certain limited exceptions apply:

Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current

offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. ***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.

(emphasis added).

The exception to the presumption of concurrent sentences provided in section (1)(b) of this provision does not apply here. That section states:

Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under this subsection (1)(b) shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

McFadden was not convicted of any serious violent offenses.

Therefore, consecutive sentences were not authorized under this section.

The exceptions provided in sections (1)(c) and (1)(d) also do not apply. Section (1)(c) applies only where a person is convicted of unlawful possession of a firearm in the first or second degree and felony theft of a firearm or possession of a stolen firearm, or both. RCW 9.94A.589(1)(c). Section (1)(d) applies only where a person is convicted of certain driving offenses. RCW 9.94A.589(1)(d). Neither of those circumstances exists here.

If a person is convicted of multiple current offenses but the case does not fall under any of the above exceptions, “[c]onsecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.” RCW 9.94A.589(1)(a).

The exceptional sentence statute, RCW 9.94A.535, allows the court to impose an exceptional sentence in the form of consecutive sentences if “[t]he defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.” RCW 9.94A.535(2)(c).

That provision does not authorize an exceptional sentence in the form of consecutive sentences here. McFadden’s offender score was only six, well below the top of the sentencing grid. CP 92. He did not

have a “high offender score” that “result[ed] in some of the current offenses going unpunished.” RCW 9.94A.535(2)(c).

No other provision of the sentencing statute expressly authorizes the court to impose consecutive sentences in a case such as this, notwithstanding the parties’ stipulation to an exceptional sentence. In general, a trial court may impose an aggravated exceptional sentence if

The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

RCW 9.94A.535(2)(a). “[A] stipulation to an exceptional sentence, made as part of a valid plea agreement, may be a substantial and compelling reason that justifies the imposition of a sentence outside the standard range.” In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 300, 979 P.2d 417 (1999).

But even where the parties stipulate to an exceptional sentence as part of a plea agreement, “[s]uch an exceptional sentence must be one that is authorized by statute.” Id.

Here, the sentence the court imposed was not authorized by statute, even if the parties stated they agreed to it. As discussed, the controlling statute does not expressly authorize the trial court to impose

consecutive sentences under the facts of this case. McFadden was not convicted of any serious violent offenses. See RCW 9.94A.589(1)(b). He was not convicted of unlawful possession of a firearm in the first or second degree and felony theft of a firearm or possession of a stolen firearm, or both. See RCW 9.94A.589(1)(c). He was not convicted of any driving offenses. See RCW 9.94A.589(1)(d). And his offender score was not so high that some of the current offenses would otherwise go unpunished. See RCW 9.94A.535(2)(c).

In sum, the court acted without statutory authority in imposing an exceptional sentence in the form of consecutive sentences.

3. The consecutive sentences must be reversed and on remand the court must impose concurrent sentences.

When a court imposes a sentence in excess of its statutory authority, the remedy is to reverse the erroneous portion of the sentence and leave the remainder of the judgment and sentence intact.

“Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed.” Goodwin, 146 Wn.2d at 877. At resentencing on remand, the trial court must impose a sentence that complies with the sentencing statute. Carle, 93 Wn.2d at 33-34.

The erroneous portion of McFadden's judgment and sentence must be reversed and he must be resentenced in accordance with the sentencing statute. Id. Thus, his consecutive sentences must be reversed and, on remand, the trial court must impose concurrent sentences. Id.

E. CONCLUSION

The trial court exceeded its statutory authority in ordering consecutive sentences. The sentence must be reversed and remanded for resentencing.

Respectfully submitted this 28th day of September, 2018.

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	)	
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	)	
JEFFRY MCFADDEN,	)	
	)	
APPELLANT.	)	

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# WASHINGTON APPELLATE PROJECT

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