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IN THE COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY LEE McFADDEN, APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF
GRANT COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00118-8

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR

NOTHING IN THE SRA LIMITS THE TRIAL COURT’S AUTHORITY TO IMPOSE CONSECUTIVE SENTENCES IN AN AGGRAVATED UPWARD SENTENCING DEPARTURE OTHERWISE AUTHORIZED UNDER THE LIMITATIONS OF RCW 9.94A.535. DID THE TRIAL COURT EXCEED ITS AUTHORITY WHEN IT IMPOSED NEGOTIATED CONSECUTIVE SENTENCES FOR CRIMES NOT IDENTIFIED IN RCW 9.94A.589(1)(B) THROUGH (1)(D)?

II. STATEMENT OF THE CASE¹

The State adopts facts from the Statement of the Case recited in the appellant’s opening brief, and supplements those facts below. RAP 10.3.

Before entering the plea agreement at issue here, appellant Jeffry² Lee McFadden faced trial on charges of rape in the first degree while armed with a deadly weapon not a firearm; kidnapping in the first degree while armed with a deadly weapon not a firearm; assault in the second degree (deadly weapon) while armed with a deadly weapon not a firearm; and unlawful possession of a firearm in the first degree. CP 50–54. For McFadden, the rape, kidnapping, and assault charges were “three strikes”

¹ The State cites to the clerk’s papers as CP at _____. The State does not cite to any verified report of proceedings.

² The State uses “Jeffry” instead of “Jeffrey” wherever McFadden’s first name appears in this brief. All of the State’s trial court records in this case and in four earlier Grant County cases dating back to September 2012 indicate McFadden’s first name is spelled “Jeffry” without an “e” before the “y.” McFadden’s trial counsel in this case spelled his name “Jeffry.” *See, e.g.*, CP at 1, 6. McFadden clearly signed his Statement on Plea of Guilty “Jeffry,” as he did on all of the documents he signed related to his appeal in this Court. His June 17, 2016 motion for relief from judgment or order, filed in Grant County Superior Court, is captioned “Jeffry Lee McFadden” and signed “Jeffry McFadden.”

offenses. CP at 52–53. McFadden’s criminal history included Oklahoma convictions for two counts of first degree rape and one count of robbery with a firearm. CP at 91. His offender score before his guilty plea was six. CP at 92.

III. ARGUMENT

NOTHING IN THE SRA LIMITS THE TRIAL COURT’S AUTHORITY TO IMPOSE CONSECUTIVE SENTENCES IN AN AGGRAVATED UPWARD SENTENCING DEPARTURE OTHERWISE AUTHORIZED UNDER THE LIMITATIONS OF RCW 9.94A.535. THE TRIAL COURT DID NOT EXCEED ITS AUTHORITY WHEN IT IMPOSED NEGOTIATED CONSECUTIVE SENTENCES FOR CRIMES NOT IDENTIFIED IN RCW 9.94A.589(1)(B) THROUGH (1)(D).

A. McFadden may challenge his sentence.

McFadden may challenge his exceptional sentence. Sentences outside the standard range are subject to appeal by both the defendant and the state. RCW 9.94A.535; RCW 9.94A.585(2). McFadden’s guilty plea statement specifically recites he is entitled to challenge imposition of an exceptional sentence. CP at 10.

B. The trial court did not exceed its authority in following the parties’ plea agreement because consecutive sentences are statutorily authorized for McFadden’s convictions.

1. RCW 9.94A.589(1) does not “control” consecutive exceptional sentences and such sentences are expressly authorized by the SRA and Washington case law.

McFadden’s challenge to his stipulated consecutive sentence is premised on an apparent misunderstanding of the interrelationship

between various cross-referenced provisions of Washington’s Sentencing Reform Act of 1981 (the SRA). His core premise—that RCW 9.94A.589(1) is the “controlling statute” for *exceptional* sentencing, such that no consecutive sentence may be imposed for any reason unless explicitly authorized within that section—is simply wrong.

2. RCW 9.94A.505 controls sentencing and identifies the section of the SRA governing sentences in which the mandatory standard sentence is either consecutive or concurrent and a separate section related to exceptional sentences.

RCW 9.94A.505³ sets out the SRA’s interrelated scheme of mandatory sentencing guidelines and establishes the general rule that,

³ The relevant portions of RCW 9.94A.505(1) and (2) provide:

- (1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.
- (2) (a) The court shall impose a sentence as provided in the following sections and as applicable in the case:
 - (i) Unless another term of confinement applies, a sentence within the standard sentence range established in RCW 9.94A.510 or 9.94A.517;
 - (ii) RCW 9.94A.701 and 9.94A.702, relating to community custody;
 - (iii) RCW 9.94A.570, relating to persistent offenders;
 - (iv) RCW 9.94A.540, relating to mandatory minimum terms;
 - (v) RCW 9.94A.650, relating to the first-time offender waiver;
 - (vi) RCW 9.94A.660, relating to the drug offender sentencing alternative;
 - (vii) RCW 9.94A.670, relating to the special sex offender sentencing alternative;
 - (viii) RCW 9.94A.655, relating to the parenting sentencing alternative;
 - (ix) RCW 9.94A.507, relating to certain sex offenses;
 - (x) RCW 9.94A.535, relating to exceptional sentences;
 - (xi) RCW 9.94A.589, relating to consecutive and concurrent sentences;
 - (xii) RCW 9.94A.603, relating to felony driving while under the influence of intoxicating liquor or any drug and felony physical control of a vehicle while under the influence of intoxicating liquor or any drug.

absent another applicable term of confinement, sentences for all felonies shall be imposed within the standard ranges established in RCW 9.94A.510 for general felonies and 9.94A.517 for drug crimes. RCW 9.94A.505(2)(a)(i).

Other applicable terms of confinement are established by statutes cross-referenced in RCW 9.94A.505(2)(a)(ii) through (xii). One of these is RCW 9.94A.535, relating to exceptional sentences. RCW 9.94A.505(2)(a)(x). Another is RCW 9.94A.589, relating to consecutive and concurrent standard sentences. RCW 9.94A.505(2)(a)(xi). The language of RCW 9.94A.505 thus clearly differentiates exceptional sentences imposed under Section 535 from Section 589's classification of crimes for mandatory—that is, standard—concurrent or consecutive sentences.

3. The SRA explicitly authorizes exceptional aggravated consecutive sentences for crimes not specified in RCW 9.94A.589(1)(b) through (d).

RCW 9.94A.589(1)(a)⁴ concerns felonies where standard concurrent sentences are mandatory. “Sentences imposed under this

⁴ RCW 9.94A.589(1)(a) provides: 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*

subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.” *Id.* There is no way to read into these two sentences a blanket prohibition against consecutive aggravated exceptional sentences for crimes encompassed by subsection (1)(a).

The remaining three subsections, (1)(b) through (1)(d), define those classes of felonies for which mandatory standard sentences are consecutive. McFadden’s narrowed focus on subsections (1)(b) through (1)(d) obscures his sight-line to the plain language in subsection (1)(a) unambiguously authorizing consecutive exceptional sentences for offenses other than those enumerated in subsections (1)(b) through (1)(d). The language in RCW 9.94A.589(1)(a) does not refer to any limitations or categories appearing in (1)(b) through (1)(d).

“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 [RCW 9.94A.535]” RCW 9.94A.535. This is the section of the SRA governing exceptional sentences. It does not contain language dictating or

sentence provisions of RCW 9.94A.535. “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle. (Emphasis added.)

limiting which type of exceptional sentence a court may impose in the presence of aggravating factors, an extended term sentence or a consecutive sentence. No language anywhere in the SRA restricts the trial court to extended term exceptional sentences when an aggravated upward departure is warranted.

Twenty-seven years ago, the Washington Supreme Court removed all doubt. “Where multiple current offenses are concerned, in addition to lengthening of sentences, an exceptional sentence may also consist of imposition of consecutive sentences where concurrent sentencing is otherwise the standard.” *State v. Batista*, 116 Wn.2d 777, 784, 808 P.2d 1141 (1991). Any of the aggravating factors in RCW 9.94A.535(2) “may be relied upon by a trial court to support an exceptional sentence in the form of consecutive sentences.” *Batista*, 116 Wn.2d at 785. The first aggravating circumstance set out in RCW 9.94A.535(2), occurs when

[t]he 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). That is the circumstance upon which McFadden, the State, and the trial court relied to implement the plea deal by which McFadden avoided a third strike.

Where the parties agree that an exceptional sentence is justified, the purposes of the SRA are generally served by accepting the agreement as a substantial and compelling reason for imposing an exceptional sentence. Those purposes often will include: ensuring that the punishment for the criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; promoting respect for the law by providing punishment which is just; protecting the public; or making frugal use of the State's resources.

In re Breedlove, 138 Wn.2d 298, 309, 979 P.2d 417 (1999).

C. *McFadden is not entitled to retain the benefit of his plea bargain if this Court concludes consecutive sentences were erroneously imposed.*

McFadden is not entitled to concurrent sentences on the reduced charges he negotiated in exchange for agreeing to a 343-month exceptional sentence. A plea agreement is one contractual bargain between a defendant and the State, a "package deal." *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003) (citing *State v. Hardesty*, 129 Wn.2d 303, 318, 915 P.2d 1080 (1996)). Plea agreements involving multiple charges are indivisible where, as here, the charges are made at the same time, are described in a single document, and accepted in a single proceeding. *Id.*

Here, McFadden negotiated consecutive exceptional sentences to avoid strike convictions and life without parole. Imposition of consecutive sentences for the reduced charges is the only reasonable way to arrive at the 343-month aggravated upward departure to which McFadden

stipulated. Should this Court conclude the trial court lacked statutory authority to impose consecutive sentences, the appropriate remedy is to allow McFadden to withdraw his plea of guilty and face trial on his original “three strikes” offenses.

IV. CONCLUSION

This Court should affirm that the SRA authorizes imposition of consecutive aggravated exceptional sentences involving crimes for which standard sentences are served concurrently under RCW 9.94A.589(1)(a).

DATED this 26th day of November, 2018.

Respectfully submitted,

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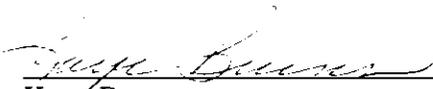
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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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