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NO. 35658-2-III

COURT OF APPEALS

STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

THOMAS LEE WEATHERWAX,

Defendant/Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

1. The trial court, at the resentencing hearing, abused its discretion when it determined it did not have the authority to grant Thomas Lee Weatherwax a mitigated sentence based upon the decision in *State v. Weatherwax*, 188 Wn.2d 139 (2017).

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Under the facts and circumstances of Mr. Weatherwax's case, in light of the decision in *State v. Weatherwax, supra*, did the trial court have discretion to consider a mitigated sentence under the multiple offense policy set out in RCW 9.94A.535(1)(g)?

STATEMENT OF THE CASE

On May 1, 2017 the Washington State Supreme Court issued its mandate in Cause Number 93192-5, *State v. Thomas Lee Weatherwax*. (CP

1)

A scheduling hearing was held on September 26, 2017. The trial court, at that hearing, indicated that it was going to limit its consideration of Mr. Weatherwax's resentencing to the contents of the Supreme Court's opinion. (RP 5, ll. 3-18)

The resentencing hearing was conducted on October 27, 2017. The State asserted that the trial court's authority was limited to the Supreme Court opinion. Defense counsel argued for a mitigated sentence based upon the multiple offense policy resulting in a presumptive sentence that was clearly excessive. (RP 7, ll. 1-7; RP 10, ll. 5-8)

The trial court resentenced Mr. Weatherwax to one hundred and eight (108) months on Counts II, III and IV to run consecutive. Count VIII was run concurrent to Counts II, III and IV and the trial court imposed sixty-six (66) months on that count.

The trial court also imposed firearm enhancements totaling three hundred and sixty months. Mr. Weatherwax's total sentence is six hundred and eighty-four (684) months. (CP 38)

In the course of resentencing Mr. Weatherwax the trial court stated:

At this point in time I do accept the state's
position with regard to any kind of an excep-
tional sentence, that that is not before me.

(RP 20, l. 25 to RP 21, l. 2)

Mr. Weatherwax filed his Notice of Appeal on November 1, 2017. (CP 67)

SUMMARY OF ARGUMENT

The trial court abused its discretion when it failed to consider Mr. Weatherwax's request for a mitigated sentence. The trial court did not believe it had the authority to consider a mitigated sentence based upon the Supreme Court decision in *State v. Weatherwax*, which stated at 156:

We hold that for purposes of RCW 9.94A.589(1)(b), (1) anticipatory offenses have the same seriousness level as their target crimes and (2) when the seriousness levels of two or more serious violent offenses are identical, the trial court must choose the offense whose standard range is lower as the starting point for calculating the consecutive sentences. We reverse and remand for resentencing consistent with this opinion.

Mr. Weatherwax contends that the above language did not preclude the trial court, at resentencing, from considering a mitigated sentence under the provisions of RCW 9.94A.535(1)(g).

Due to the trial court's abuse of discretion (lack of action on Mr. Weatherwax's request) the sentence needs to be vacated and the case remanded to the trial court for another resentencing hearing.

ARGUMENT

RCW 9.94A.535(1) provides, in part:

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

...

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

Our Supreme Court has made it clear that a sentencing court has the discretion to impose an exceptional sentence under the provisions of RCW 9.94A.535(1)(g) in a number of recent cases. *See: Personal Restraint of Mulholland*, 161 Wn.2d 322, 327-28, 166 P.3d 677 (2007) (a sentencing court **may** order that multiple sentences for serious violent offenses run concurrently as an exceptional sentence if it finds there are mitigating factors justifying such a sentence); *State v. Graham*, 181 Wn.2d 878, 337 P.3d 319 (2014) (a trial court **must** consider the policies set out in RCW 9.94A.010

when exercising its discretion concerning whether or not to impose an exceptional sentence pursuant to the multiple offense policy of RCW 9.94A.535(1)(g)); *State v. McFarland*, 189 Wn.2d 47, 54 (2017) (there is nothing in the Sentencing Reform Act (SRA) precluding concurrent exceptional sentences for firearm-related convictions).

The trial court, by reading the *Weatherwax* opinion, *supra*, in the manner that it did, ignored and/or sidestepped the exercise of its discretionary authority as outlined in *Mulholland*, *Graham* and *McFarland*.

It appears that the trial court's failure to exercise its discretion was based upon a misinterpretation of its authority at a resentencing hearing. This misinterpretation could well have been based upon the fact that Mr. Weatherwax did not argue for a mitigated sentence at the time of his original sentencing.

However, the lack of argument at his original sentencing hearing does not preclude Mr. Weatherwax from making an argument at a resentencing hearing.

In *State v. Davenport*, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007), the Court stated: "At the resentencing hearing, the trial court had the discretion to consider issues Davenport did not raise at his initial sentencing or in his first appeal."

In essence, the State's position at the resentencing hearing was that Mr. Weatherwax was precluded from asking for a mitigated sentence and that the trial court must limit itself to the ruling in *State v. Weatherwax*, *supra*. The State was in error.

It has been long established that the doctrines of *res judicata* and collateral estoppel do apply in criminal cases. See: Modern Status of Doctrine of *Res Judicata* in Criminal Cases, Annot., 9 A.L.R. 3d 203 (1966). These doctrines, as applied to criminal cases, bar relitigation of issues actually determined by a former verdict and judgment. *Sealfon v. United States*, 332 U.S. 575, 98 L. Ed. 180, 68 S. Ct. 237 (1948); *United States v. Burch*, 291 F.2d 1 (5th Cir. 1961); *State v. Barton*, 5 Wn.2d 234, 105 P.2d 63 (1940). 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.

State v. Peele, 75 Wn.2d 28, 30-31, 448 P.2d 923 (1968).

Mr. Weatherwax contends that neither doctrine precludes his request for a mitigated sentence at the resentencing hearing.

In *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) the Court stated: "Accordingly, Harrison's prior sentence ceased to be a final judgment on the merits, and collateral estoppel does not apply."

The *Harrison* Court based its statement on the fact that his prior sentence had been reversed and the finality of the judgment destroyed.

The State, in *Harrison*, argued that he was precluded from relitigating the judgment and sentence based upon the doctrine of collateral estoppel.

The *Harrison* Court ruled at 561:

The policy behind collateral estoppel is to “prevent [] relitigation of an issue after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case.” *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). Nonetheless, Washington courts follow federal precedent that in criminal cases, collateral estoppel is not to be applied with a “hypertechnical” approach but rather, “with realism and rationality.” *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S. Ct. 1189, 25 L. Ed.2d 469 (1970), *cited with approval in State v. Harris*, 78 Wn.2d 894, 895-97, 480 P.2d 484 (1971); *see also State v. Kassahun*, 78 Wn. App. 938, 948-49, 900 P.2d 1109 (1995).

Before collateral estoppel will apply to preclude the relitigation of an issue, all of the following requirements must be met: (1) the issue in the prior adjudication must be identical to the issue currently presented for review, (2) the prior adjudication must be a final judgment on the merits, (3) the party against whom the doctrine is asserted must have been a party to or in privity with a party to the prior adjudication and (4) barring the

relitigation of the issue will not work an injustice on the party against whom the doctrine is applied. *Nielson*, 135 Wn.2d at 262-63.

Under the facts and circumstances of Mr. Weatherwax's case the issue of a mitigated sentence was not an issue presented in the prior sentencing hearing. Thus, this constitutes a new issue which the trial court was required to consider.

Moreover, failure to consider the issue worked an injustice on Mr. Weatherwax. It deprived him of a full and fair resentencing hearing where all aspects of the case itself, and the person(s) involved, could be comprehensively analyzed and appropriate factors considered in light of the SRA.

As the *McFarland* Court noted at 52:

Among its many objectives, the SRA seeks to “[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history” and “commensurate with the punishment imposed on others committing similar offenses.” RCW 9.94A.010(1), (3).

In addition to the multiple offense policy Mr. Weatherwax asserts that the trial court has authority to consider whether or not to run the firearm enhancements concurrently.

Even though firearm enhancements are not directly involved with the sentencing provisions of RCW 9.94A.589, the reasoning in the *Mulholland*, *Graham* and *McFarland* cases should apply equally to RCW 9.94A.533(3)(d) and (e) which state:

(d) If the offender is being sentenced for any firearm enhancements ... and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995 ... all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter

The *McFarland* case involved firearm-related convictions. It did not address firearm enhancements.

However, in *State v. Conover*, 183 Wn.2d 706, 708, 355 P.3d 1093 (2015) and *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 254, 955 P.2d 798 (1998) it appears clear that multiple enhancements are subject to the same disposition pursuant to the rules in RCW 9.94A.589.

The *Charles* Court involved firearm enhancements. Its conclusion, at 254 was:

... [I]f the court runs the enhancements consecutively with the base sentences and then consecutively with each other, it is as if the court had taken the enhancement for one crime and stacked it on top of the enhancement which has been added to a different offense. This runs counter to the normal structure of the SRA. **We therefore conclude that multiple weapon enhancements do not necessarily run consecutively to each other.** As all parties recognize, they do run consecutively to the underlying sentence for the crime to which they apply. However, **when two or more offenses each carry firearm enhancements, the determination of whether multiple current sentences are to run concurrently or consecutively is determined by resort to the rules in RCW 9.94A.400.** [Now RCW 9.94A.589]

(Emphasis supplied.)

Finally, as the *McFarland* Court stated at 56:

While no defendant is entitled to challenge a sentence within the standard range, this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision; **every defendant is entitled to have an exceptional sentence actually considered.** *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

(Emphasis supplied.)

CONCLUSION

The trial court failed to recognize its ability to exercise its discretion in granting or denying an exceptional sentence to Mr. Weatherwax. The State convinced the trial court that it must abide strictly by the *State v. Weatherwax* decision and that it could not consider any other aspects of the original sentence at resentencing. The State was obviously in error. The error caused the trial court to abuse its discretion.

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A trial court errs when “it refuses categorically to impose an exceptional sentence below the standard range under any circumstances” or when it operates under the “mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.” *Garcia-Martinez*, 88 Wn. App. at 330; *Mulholland*, 161 Wn.2d at 333.

State v. McFarland, *supra* 54

Mr. Weatherwax’s current sentence must be reversed and his case remanded for resentencing. This Court should direct the resentencing court

to give due consideration to the multiple offense policy and apply such mitigating factors that may exist in accord with the *Charles, Mulholland, Graham* and *McFarland* decisions.

DATED this 27th day of March, 2018.

Respectfully submitted,

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COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	SPOKANE COUNTY
Plaintiff,)	NO. 13 1 03446 9
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
THOMAS LEE WEATHERWAX,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 27th day of March, 2018, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

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