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Division III
State of Washington
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35658-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS WEATHERWAX, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Upon remand for resentencing, if the sentencing court imposed a sentence for conspiracy to commit first degree assault, under count two of the judgment and sentence, that exceeded the statutory maximum sentence of 10 years, should this Court remand for resentencing?

2. If this Court remands for resentencing to the superior court, should the trial court consider whether to grant a downward sentence if one is requested by the defendant at the resentencing?

II. STATEMENT OF THE CASE

The defendant was convicted in the Spokane County Superior Court of drive-by shooting, first-degree assault, and conspiracy to commit a first-degree assault (an inchoate crime), with firearm enhancements for the assault and conspiracy charges, and first degree unlawful possession of a firearm. On direct appeal, this Court vacated the drive-by shooting convictions for insufficiency of the evidence and several community custody provisions, but otherwise affirmed the judgment and sentence and remanded for resentencing. *State v. Weatherwax*, 193 Wn. App. 667, 376 P.3d 1150, *reversed in part*, 188 Wn.2d 139, 392 P.3d 1054 (2017).

The case was then appealed to the Supreme Court. On May 1, 2017, our high court remanded to the lower court for resentencing, requiring the lower court to determine whether the completed crime of first degree assault

or the anticipatory crime of conspiracy to commit first degree assault had the lower standard range, for calculating the consecutive sentences. *Weatherwax*, 188 Wn.2d at 156.

On remand, in addition to the other convictions, the defendant was sentenced under count two (conspiracy to commit first degree assault), which is a class B felony, to 108 months of confinement on the base offense and 120 months of confinement on the firearm enhancement,[1] for a total of 228 months.[2] CP 38, 42-43. The sentence for count two exceeded the statutory maximum of ten years.

In addition, at the time of resentencing, the defendant requested an exceptional sentence downward that would have resulted in no

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[1] The defendant had a previous deadly weapon enhancement finding in conjunction with an attempted second degree assault conviction in Spokane County in 2010, which doubled the incarceration time for all current firearm enhancements in this case on remand. CP 41. RCW 9.94A.533(3)(d) states: "If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed."

[2] The defense attorney and deputy prosecutor erroneously recommended to the sentencing court that the standard range sentence for conspiracy to commit first degree assault on count two was 103.5-138 months on the base crime and 120 months for the firearm enhancement on count two. CP 25-26 (defense sentencing brief), CP 35-36 (State's sentencing brief); RP 17 (deputy prosecutor's recommendation on count two), RP 25 (defense recommendation on count two).

incarceration on the base offenses, and that the sentences imposed on the firearm enhancements run concurrently. RP 20-25.

The State opposed the defendant's request for an exceptional sentence asserting that an exceptional sentence was not requested at the original sentence and defendant was barred from making this request on remand. CP 36-37; RP 18-19.

The defendant then made a statement to the court requesting a mitigated sentence. RP 28-29. Regarding the potential sentence which could be imposed on remand, the lower court stated:

> All right. It is my belief that I have some constraints on where I'm at today. And I'll make it clear for the record that that is the case, so that if this is reviewed down the line, someone can tell me otherwise if that is not true.
>
> And I alluded to this for a moment with counsel earlier in a status conference, but as I understand, the Supreme Court's direction, which of course to some extent incorporates the Court of Appeals' sentence which wasn't reversed -- for example as to the drive-by shooting charges -- I am to resentence consistent with the opinion.
>
> Which essentially what it does is tells me that I start out, as [the deputy prosecutor] said, as Count II is the place to begin -- and that is the shorthand obviously. That is not the language, but that is how we begin.
>
> So I think if I have discretion it is then within the standard range. But I am to follow that opinion and sentence as I was directed.
>
> So when we're resentencing today, what we know is, we're no longer going to be sentencing on counts V, VI and VII

> [drive-by shootings]; they're gone. We also know, and I think counsel is correct, I heard or saw in the briefing an agreement as to the ranges; that is, the standard ranges. The same course of conduct with counts I and II; the scoring being the same; then once again we start as we are supposed to, and what the amounts are with regard to the firearm enhancements.
>
> So those things seem to be agreed because, of course, they are a function of looking at the statute. So I appreciate that that is where we're at in that regard.
>
> So I think what I'm left with, then, is to go back and sentence within those ranges.
>
> At this point in time I do accept the state's position with regard to any kind of an exceptional sentence, that [sic] that is not before me.
>
> Again, if the court down the road says I'm to redo this sentence a second or third time, then that is what I'll do. But for today, then, I'm to impose a sentence on II, III and IV -- well, and Count VIII. Count VIII is concurrent by law, which we all agree to as well.

RP 29-31.

The defendant timely filed a direct appeal alleging the trial court erred when it allegedly refused to consider the imposition of an exceptional sentence downward at the resentencing.

III. ARGUMENT

A. UPON REMAND AND AFTER RESENTENCING, THE COMBINATION OF THE BASE SENTENCE AND FIREARM ENHANCEMENT IMPOSED ON COUNT TWO OF THE JUDGMENT AND SENTENCE EXCEEDED THE STATUTORY MAXIMUM FOR CONSPIRACY TO COMMIT FIRST DEGREE ASSAULT. REMAND FOR RESENTENCING IS REQUIRED.

A first-degree assault is a class A felony and has a statutory maximum of life imprisonment. RCW 9A.36.011(2), 9A.20.021(1)(a). A conspiracy to commit a class A felony, other than murder in the first degree, is a class B felony. RCW 9A.28.040(3)(b). The statutory maximum for a class B offense is 120 months (ten years). RCW 9A.20.021. In addition, the firearm enhancement for a class B felony carries an additional 36 months of confinement. RCW 9.94A.533(b).

In the present case, on remand from the Supreme Court, the defendant was resentenced and a judgment and sentence was entered in the superior court on October 27, 2017. CP 38-52. Notwithstanding the other convictions, the defendant was sentenced under count two (conspiracy to commit first degree assault), which is a class B felony, to 108 months' confinement for the base offense, and an additional 120-months' firearm enhancement, and 36 months of community custody.[3] The total sentence for

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[3] The sentence included 36 months of community custody pursuant to RCW 9.94A.701 on count two, which also exceeded the statutory maximum when combined with the standard range sentence and the firearm enhancement for the conspiracy to commit first degree assault. A trial court errs "when it impos[es] a

count two, a class B felony, was 264 months. Obviously, the defendant's combined term of incarceration exceeded the 120-month statutory maximum. Therefore, it is an illegal sentence and remand to the superior court to determine the appropriate standard range and community custody is appropriate. Therefore, Respondent requests this Court enter an order for resentencing in the superior court.

B. IF THIS COURT REMANDS FOR RESENTENCING, THE DEFENDANT SHOULD BE ALLOWED TO REQUEST AN EXCEPTIONAL SENTENCE AT RESENTENCING.

The defendant argues the trial court failed to exercise its discretion when it did not consider the defendant's request for an exceptional sentence on remand from the Supreme Court.

When an appellate court orders remand for resentencing, the resentencing court has broad discretion to resentence on all counts. *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009), *review denied*, 168 Wn.2d 1027 (2010). Conversely, the resentencing court does not have discretion to resentence on all counts "when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence." *Id.* at 792.

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term of confinement plus a term of community custody exceeding the statutory maximum." *State v. Hernandez*, 185 Wn. App. 680, 688, 342 P.3d 820 (2015), *review denied*, 185 Wn.2d 1002 (2016).

In *Toney*, the appellate court "remanded for resentencing under proceedings consistent with this opinion," on the issue of whether specific sentence enhancements should run concurrent or consecutive to each other. *Id.* at 790. The superior court subsequently conducted a full resentencing hearing. *Id.* at 790. The court of appeals clarified that the trial court had this discretion because its remand had "not limit[ed] the trial court to making a ministerial correction," rather it had "unequivocally remand[ed] for resentencing." *Id.* at 792.

In *State v. Rowland*, 160 Wn. App. 316, 331, 249 P.3d 635 (2011), Division Two concluded that the resentencing court had erred by refusing to allow the defendant to challenge his offender score. In that case, the appellate court remanded to correct the defendant's miscalculated offender score, but on remand, the defendant raised a different challenge to his offender score that had not been considered by the appellate court. *Id.* at 331. *Rowland* concluded that, because the resentencing court had "necessarily exercised its independent discretion" to address broader sentencing issues, the defendant was "entitled to raise new challenges to his offender score on remand." *Id.* at 331.

In the present case, the Supreme Court remanded to the trial court to determine which of the current serious violent offenses, with equally "highest seriousness levels," had the lower starting point for calculation of

the offender score.[4] *Weatherwax*, 188 Wn.2d at 156. The Court "reverse[d] and remand[ed] for resentencing consistent with this opinion." *Id.* Accordingly, the Supreme Court's remand for resentencing was not purely ministerial, and the superior court had the authority to conduct a full resentencing and exercise its discretion in determining whether an exceptional sentence downward should be imposed, which it did not do. If the matter is remanded, the trial court has the discretion to consider if an exceptional sentence downward is justified, if advanced by the defendant.

IV. CONCLUSION

This Court should remand the case to the superior court for resentencing and the lower court should exercise its discretion if an exceptional sentence request is advanced by the defendant.

Respectfully submitted this 19 day of June, 2018.

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[4] The Supreme Court specifically held: "for purposes of RCW 9.94A.589(1)(b), anticipatory offenses carry the same seriousness level as their completed offenses…. [W]hen an anticipatory offense and a completed offense carrying the same seriousness level might both form the basis for calculating consecutive sentences under RCW 9.94A.589(1)(b), the sentencing court must start its calculations with the offense that produces the lower overall sentence." *Weatherwax*, 188 Wn.2d at 143-44.

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

STATE OF WASHINGTON, Respondent, v. THOMAS LEE WEATHERWAX, Appellant.	NO. 35658-2-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 19, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Dennis Morgan
nodblspk@rcabletv.com

6/19/2018	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

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