

FILED
Court of Appeals
Division III
State of Washington
5/29/2018 12:07 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35703-1-III

STATE OF WASHINGTON, Respondent,

v.

CECILY McFARLAND, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
PO Box 1241
Walla Walla, WA 99362
Phone: (509) 876-2106
Andrea@2arrows.net
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....2

V. ARGUMENT.....5

VI. CONCLUSION.....15

CERTIFICATE OF SERVICE17

AUTHORITIES CITED

State Cases

In re Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007).....3

State v. Alexander, 125 Wn.2d 717, 888 P.2d 1169 (1995).....12

State v. Garcia-Martinez, 88 Wn. App. 322, 944 P.2d 1104 (1997).....6

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005).....14

State v. Haggin, 195 Wn. App. 315, 381 P.3d 137 (2016).....8

State v. Hortman, 76 Wn. App. 454, 886 P.2d 234 (1994).....9, 11

State v. Kinneman, 120 Wn. App. 327, 84 P.3d 882 (2003).....7, 9, 12

State v. McFarland, 189 Wn.2d 47, 399 P.3d 1106 (2017).....3, 6, 8

State v. McFarland, 192 Wn. App. 1071, __ P.3d __, 2016 WL 901088 (2016), *reversed*, 189 Wn.2d 47 (2017)10

State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002).....6

State v. Owens, 95 Wn. App. 619, 976 P.2d 656 (1999).....7

State v. Sanchez, 69 Wn. App. 255, 848 P.2d 208 (1993).....9, 10, 11

State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016).....15

State v. Stump, 185 Wn.2d 454, 374 P.3d 89 (2016).....15

Statutes

RCW 9.94A.010.....6, 7, 12

RCW 9.94A.535(1)(g).....1, 2, 3, 5, 7, 11, 12, 13, 14

RCW 9.94A.585(1).....6

RCW 9.94A.589(1)(c).....1, 2, 3, 8, 11

Court Rules

GR 14.1(a).....10
RAP 14.2.....15, 16
RAP 15.2(f).....15

I. INTRODUCTION

Cecily McFarland was found guilty of ten counts of theft of a firearm, three counts of unlawful possession of a firearm, and first degree burglary. Because of the mandatory consecutive sentence provisions of RCW 9.94A.589(1)(c), she faced a total sentence of 237 months, or just under 20 years. On appeal, the Washington Supreme Court remanded the case for resentencing, holding that the sentencing court could apply the “multiple offense policy” mitigating factor set forth in RCW 9.94A.535(1)(g) to run the offenses concurrently if the standard range results in a presumptive sentence that is clearly excessive in light of the purpose of the Sentencing Reform Act. Notwithstanding the Supreme Court’s opinion, following remand, the sentencing court concluded it lacked authority to impose an exceptional sentence downward and re-imposed the 237-month term. McFarland now appeals, contending the sentencing court abused its discretion by concluding a mitigated sentence downward was not authorized.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in concluding that it lacked authority under RCW 9.94A.535(1)(g) to impose an exceptional sentence and run the firearm sentences concurrently.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the trial court had discretion to impose an exceptional sentence downward under RCW 9.94A.535(1)(g).

ISSUE NO. 2: Whether the trial court's conclusion that an exceptional sentence under RCW 9.94A.535(1)(g) would unlawfully interfere with the exercise of prosecutorial charging discretion was erroneous.

ISSUE NO. 3: Whether the trial court incorrectly conflated its consideration of the purposes of the SRA to evaluate whether a consecutive sentence is clearly excessive under RCW 9.94A.535(1)(g) with considering the purposes of the SRA as independent mitigating factors justifying a downward departure from the standard range.

IV. STATEMENT OF THE CASE

A jury convicted Cecily McFarland of first degree burglary, ten counts of theft of a firearm, and three counts of unlawful possession of a firearm. CP 1. Applying the mandatory consecutive sentencing provision of RCW 9.94A.589(1)(c) to the firearm charges resulted in a low-end sentence of 237 months. CP 6. The sentencing court noted that the term was equivalent to a typical sentence for second degree murder, and McFarland's counsel noted that if she had stolen toasters rather than

firearms, she would be facing a range of 9-12 months' imprisonment. CP 26-27. Despite its misgivings, the sentencing court concluded it had no discretion to impose a lower sentence and sentenced McFarland to 237 months. CP 27.

McFarland appealed and the Washington Supreme Court reversed her sentence. CP 24-25; *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017). Building on the rationale of *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), the Supreme Court that RCW 9.94A.535(1)(g) permits the court to impose concurrent sentences for firearm convictions notwithstanding the requirements of RCW 9.94A.589(1)(c) if the multiple convictions result “in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA].” *McFarland*, 189 Wn.2d at 55. Because the trial court did not believe it had discretion to impose concurrent sentences, the *McFarland* Court remanded the case for resentencing. *Id.* at 58-59.

Following remand, the sentencing court remained uncertain about its authority to impose a mitigated sentence of concurrent terms and held a number of hearings to consider it. During those hearings, the sentencing court questioned what was the purpose of the Sentencing Reform Act [“SRA”] with which consecutive sentences would be inconsistent, what

the factual basis was for imposing an exceptional sentence, and whether the decision overruled all previous case law concerning exceptional sentences. RP 23, 37, 38. McFarland's counsel focused primarily on a proportionality argument, pointing out that McFarland's co-defendant received a plea bargain that resulted in a four-year sentence, fourteen years less than McFarland faced. RP 24, 42. McFarland's appellate counsel also advocated for the exceptional sentence, emphasizing that McFarland's rehabilitation and accountability undermined the benefit of a lengthy and costly prison sentence and the need to protect the public. CP 89-92. Despite frankly acknowledging that the 20-year presumptive sentence was excessive, the sentencing court concluded that the sentence was a factor of the prosecutor's charging decision, and it lacked authority to review prosecutorial charging discretion except for vindictiveness. RP 56-57, 60, 62-63.

Ultimately, the sentencing court concluded that despite the Supreme Court's holding, he lacked authority to impose a sentence below the standard range. RP 82. Although he believed the sentence was excessive, he did not believe there were reasons allowing him to impose an exceptional sentence downward. RP 76. In a written letter ruling, the sentencing court stated that there were no legally permissible bases for finding the consecutive sentence clearly excessive in light of the purposes

of the SRA. CP 122. It concluded that the reason for any disparity in McFarland's sentence was the result of the prosecutorial charging decision, and determined that it could not interfere with the exercise of prosecutorial discretion. CP 124. Despite clearly regarding the mandatory sentence as excessive, and an "injustice," the court lamented the lack of remedy for exercising prosecutorial discretion in a manner that does not promote just and fair results, stating, "Neither the legislature nor Washington appellate courts has provided trial court in Washington with any tools to deal with the problem the Supreme Court apparently sees with Ms. McFarland's sentence." CP 124.

Accordingly, the sentencing court imposed the same sentence of 237 months, running all of the firearm convictions consecutively. CP 105. McFarland now appeals and has been found indigent for that purpose. CP 135, 138.

V. ARGUMENT

The sentencing court erroneously concluded it lacked the authority to impose an exceptional sentence downward, despite the express acknowledgment of such authority from the Supreme Court. Because the "multiple offense" mitigating factor set forth in RCW 9.94A.535(1)(g) permits the court to depart from the standard range when the resulting

sentence is clearly excessive, the sentencing court's acknowledgment that McFarland's sentence was excessive and unjust supported an exceptional sentence in this case. Accordingly, the case should be remanded for resentencing.

“The SRA operates to provide structure to sentencing, ‘but does not eliminate[] discretionary decisions affecting [offender] sentences.’” *McFarland*, 189 Wn.2d at 52 (quoting RCW 9.94A.010). Ordinarily, a standard range sentence may not be appealed. RCW 9.94A.585(1); *State v. Garcia-Martinez*, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1997). However, if a court categorically refuses to impose an exceptional sentence or relies upon an impermissible basis for declining to impose an exceptional sentence, the process by which the sentence was imposed may be appealed. *Id.* at 330. When a court erroneously believes it lacks the authority to impose an exceptional sentence, it has refused to exercise its discretion and remand for resentencing is appropriate. *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). Here, the sentence results from the sentencing court's conclusion that it lacked authority to impose a mitigated sentence downward. RP 82. Because it did have such authority, the ruling is appealable.

The trial court's legal reasoning for imposing (or not imposing) an exceptional sentence are reviewed *de novo*. *State v. Owens*, 95 Wn. App. 619, 625, 976 P.2d 656, *review denied*, 138 Wn.2d 1015 (1999). Here, the sentencing court's conclusion that it lacked authority to enter a mitigated sentence was based upon its legal reasoning that despite the inequity of the standard term, no legally justifiable reasons existed to depart from it. CP 122. Furthermore, because the standard term directly resulted from the prosecutor's decision to charge the crimes individually for each firearm stolen and possessed unlawfully, the court lacked the power to interfere with the resulting sentence, no matter how unjust. CP 124. These reasons cannot be sustained by the applicable law.

In general, a court is obligated to impose a sentence within the standard range under the SRA. *State v. Kinneman*, 120 Wn. App. 327, 342, 84 P.3d 882 (2003), *review denied*, 152 Wn.2d 1022 (2004). However, it can impose a sentence above or below the standard range for substantial and compelling reasons, including the exception set forth in the "multiple offense" mitigating factor, RCW 9.94A.535(1)(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." *Id.*

RCW 9.94A.589(1)(c) applies when an offender is convicted of both unlawfully possessing a firearm and stealing or possessing a stolen firearm and requires the sentencing court to impose “consecutive sentences for each conviction of the felony crimes listed in this subsection . . . and for each firearm unlawfully possessed.” *See also State v. Haggin*, 195 Wn. App. 315, 381 P.3d 137 (2016) (convictions for both crimes is required to trigger mandatory consecutive sentencing requirement). In McFarland’s first appeal, the Washington Supreme Court examined the statutory language of RCW 9.94A.589(1)(c) and concluded it did not preclude the sentencing court from imposing concurrent sentences as an exceptional downward sentence under the “multiple offense” mitigator. *McFarland*, 189 Wn.2d at 53-54. Although the Hard Time for Armed Crime Act clearly intended to provide for harsher standard range sentences for firearm-related crimes, the language of the Act does not prohibit the court from applying the exceptional sentence provisions of the SRA. *Id.* at 54.

Accordingly, under *McFarland*’s express direction, the sentencing court was fully authorized to impose concurrent sentences for the unlawful possession and theft of a firearm charges if consecutive sentencing resulted in a presumptive sentence that is clearly excessive in light of the purpose of the SRA. 189 Wn.2d at 55. Contrary to the sentencing court’s

conclusion that it lacked a lawful basis to impose an exceptional sentence, RCW 9.94A.535(1)(g) provides the legal authority. Its conclusion that it lacked authority to impose concurrent sentences was, therefore, erroneous, and resentencing should be required due to the court's failure to exercise the discretion recognized in *McFarland*.

Furthermore, to the extent the trial court did consider imposing an exceptional sentence under RCW 9.94A.535(1)(g), it applied an incorrect standard to determine whether the resulting sentence was clearly excessive. The "multiple offense" mitigating factor applies "if the difference between the effects of the first criminal act and the cumulative effects of the subsequent criminal acts is nonexistent, trivial or trifling." *Kinneman*, 120 Wn. App. at 343 (quoting *State v. Hortman*, 76 Wn. App. 454, 463-64, 886 P.2d 234 (1994)).

When, for example, police conduct multiple controlled buys of small amounts of narcotics involving the same individuals and location, the subsequent buys had little to no effect beyond the first, justifying application of the exception. *State v. Sanchez*, 69 Wn. App. 255, 261, 848 P.2d 208, *review denied*, 122 Wn.2d 1007 (1993). Similarly here, the charges arose from a single burglary against the same victims in which multiple items, including 10 firearms, were taken. *State v. McFarland*,

192 Wn. App. 1071, __ P.3d __, 2016 WL 901088 at *1 (2016), *reversed*, 189 Wn.2d 47 (2017).¹ The multiple takings did not harm any additional victims, inflict any successive or greater injury on the victims over time, or otherwise result in a substantially more egregious crime because multiple firearms were taken rather than a single one, yet the presumptive punishment was the same as would be meted out to an offender who stole 10 different firearms from 10 different people in a series of distinct wrongdoings. Similarly, the unlawful possessions occurred at the same time and place, and no greater harm resulted from the unlawful possession of a single firearm than several. Under the *Sanchez* standard, the trial court had ample grounds to conclude that McFarland's standard range sentence of 237 months was clearly excessive when the individual firearm charges served to significantly increase the standard range sentence, but the difference between the single crime and the cumulative effect of all of the crimes was nominal. *Sanchez*, 69 Wn. App. at 261.

Notably, the *Sanchez* court directly rejected the reasoning employed by the sentencing court here that the court may not interfere

¹ This case is unpublished. It is not cited for precedential legal authority but merely to illustrate the pertinent facts of the case. *See* GR 14.1(a).

with the prosecutor's exercise of discretion to choose the charges. To the contrary, the *Sanchez* court stated:

We also recognize that the prosecutor has discretion to choose the number of charges. We merely hold that although the prosecutor has discretion to charge and obtain convictions on multiple controlled buys, the sentencing court has power to determine whether the resulting standard range sentence is 'clearly excessive' as a result of the multiple offense policy in [RCW 9.94A.589]. If it is, the sentencing court has power to grant an exceptional sentence downward, pursuant to [RCW 9.94A.535(1)(g)].

Id. at 262. Thus, the sentencing court was incorrect to conclude that imposing an exceptional sentence under the "multiple offense" mitigating factor would interfere with the prosecutor's charging discretion. The sentencing court is not a passive tool of the legislature and the State, but possesses independent discretion to determine whether the resulting sentence, in light of the cumulative effects of the multiple crimes, is clearly excessive. *See, e.g. Hortman*, 76 Wn. App. at 460-61 (observing that an exceptional downward sentence does not punish the State or law enforcement for charging decisions, but reflects an independent judicial inquiry).

Lastly, in considering the cumulative vs. singular effects of the multiple crimes charged to determine whether the resulting sentence is "clearly excessive," the sentencing court is to consider the purposes of the

SRA as set forth in RCW 9.94A.010. RCW 9.94A.535(1)(g). Those express purposes are to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010. While these policies are not themselves mitigating factors, they provide support for imposing an exceptional sentence once an appropriate mitigating circumstance – such as the “multiple offense” mitigator – has been identified. *Kinneman*, 120 Wn. App. at 347 (quoting *State v. Alexander*, 125 Wn.2d 717, 730 n. 22, 888 P.2d 1169 (1995)).

Here, the sentencing court was allowed to consider that a 237-month sentence, comparable to what a convicted murderer would receive, was unjust and disproportionate for a non-violent theft of multiple items of property on a single occasion. It was allowed to consider that

McFarland's co-defendant, who participated in the same conduct, received only a 41 month sentence by plea bargaining with the State. It was allowed to consider that imprisoning McFarland for nearly 20 years was a wasteful use of state resources in light of her dearth of criminal history and positive progress during her incarceration. While the sentencing court was correct that none of these reasons are themselves mitigating factors justifying an exceptional sentence, it failed to appreciate that these factors inform whether the sentence is "clearly excessive" under RCW 9.94A.535(1)(g), and therefore can and should be considered in evaluating the appropriateness of a mitigated sentence.

In sum, the sentencing court erred in applying an incorrect and unachievable standard to imposing a mitigated sentence under RCW 9.94A.535(1)(g). By excessively deferring to the prosecuting attorney's charging decision and the legislature's presumption that firearm crimes should be punished individually, the sentencing court abdicated its own responsibility to consider whether individual punishments run contrary to the purposes of the SRA to promote just, proportionate, and frugal outcomes. By conflating the purposes of the SRA with independent mitigating factors, rather than the standard for evaluating the excessiveness of the sentence, the sentencing court's reasoning results in the circular outcome that the purposes of the SRA cannot be considered to

evaluate whether consecutive sentences are clearly excessive, but evaluating whether consecutive sentences are clearly excessive requires consideration of the purposes of the SRA. As a result, the sentencing court's rejection of the bases urged by McFarland as "either contrary to the plain language of the SRA or . . . declared by appellate courts to be improper bases for a mitigated sentence" was legally erroneous. CP 122.

"While no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Here, the sentencing court's confusion about the standard to evaluate a mitigated sentence under RCW 9.94A.535(1)(g) precluded it from fairly and actually considering McFarland's request in light of the applicable law. The sentence should be reversed and the case remanded for resentencing.

In the event McFarland does not prevail on appeal, appellate costs should not be imposed. Pursuant to the General Court Order dated June 10, 2016 and Title 17 of the Rules on Appeal, McFarland respectfully requests that due to her continued indigency, the court should decline to impose appellate costs in the event she does not prevail. Her report as to continued indigency is filed contemporaneously with this brief and shows

that she lacks assets and income, carries substantial LFO debt, has only a high school education and no work history beyond her prison employment.

McFarland was found indigent for purposes of appeal. CP 135. The presumption of indigence continues throughout review. RAP 15.2(f). The Court of Appeals has recognized that in the absence of information from the State showing a change in the appellant's financial circumstances, an award of appellate costs on an indigent appellant may not be appropriate. *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016). The Supreme Court has additionally recognized that application of RAP 14.2 should "allocate appellate costs in a fair and equitable manner depending on the realities of the case." *State v. Stump*, 185 Wn.2d 454, 461, 374 P.3d 89 (2016).

Furthermore, in recognition of the hardships imposed by large appellate cost awards, the Supreme Court has revised RAP 14.2 to provide that unless the Commissioner receives evidence of a substantial change in the appellant's financial circumstances, the original determination that the appellant lacks the ability to pay should control and costs should not be imposed on indigent appellants.

Under these circumstances, this court should exercise its discretion under RAP 14.2 to decline to impose appellate costs. McFarland has been found indigent for appeal and has complied with this court's General Order. Under the *Sinclair* standard as well as revised RAP 14.2, an appellate cost award is inappropriate in this case.

VI. CONCLUSION

For the foregoing reasons, McFarland respectfully requests that the court REVERSE the sentence imposed herein and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 29 day of May, 2018.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class postage pre-paid, addressed as follows:

Cecily Z. McFarland, DOC #320691
Washington Corrections Center for Women
9601 Bujacich Road NW
Gig Harbor, WA 98332

Garth Louis Dano
Attorney at Law
35 C St NW
PO Box 37
Ephrata, WA 98823-1685

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 29 day of May, 2018 at Walla Walla, Washington.



Andrea Burkhardt

BURKHART & BURKHART, PLLC

May 29, 2018 - 12:07 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35703-1
Appellate Court Case Title: State of Washington v. Cecily Z. McFarland
Superior Court Case Number: 14-1-00413-6

The following documents have been uploaded:

- 357031_Briefs_20180529120637D3382963_7427.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellants Brief.pdf
- 357031_Financial_20180529120637D3382963_0472.pdf
This File Contains:
Financial - Other
The Original File Name was Report as to Continued Indigency.pdf

A copy of the uploaded files will be sent to:

- gdano@grantcountywa.gov

Comments:

Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net
Address:
PO BOX 1241
WALLA WALLA, WA, 99362-0023
Phone: 509-876-2106

Note: The Filing Id is 20180529120637D3382963