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NO. 35703-1-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CECILY MCFARLAND, APPELLANT

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR

- A. Whether the trial court, having carefully considered and rejected as legally insufficient all McFarland’s proposed grounds for a mitigated exceptional sentence, properly concluded it lacked legal authority to modify the sentence originally imposed. (Assignment of Error No. 1).
- B. Whether the trial court’s conclusion McFarland did not qualify for a mitigated exceptional sentence arose from an erroneous conclusion concerning prosecutorial charging discretion. (Assignment of Error No. 1)
- C. Whether the trial court correctly rejected McFarland’s assertion that a mitigated exceptional sentence could be imposed based solely on findings reciting the purposes of the SRA as independent mitigating factors. (Assignment of Error No. 1).

II. STATEMENT OF THE CASE¹

In October 2014, 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 at 100-01. In November 2017, the question of McFarland’s sentence was back before the sentencing court on remand from the Washington Supreme Court in *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017).²

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¹ The State cites to the transcript of resentencing proceedings as TP ____ and to the related clerk’s papers as CP at ____.

² The Supreme Court’s opinion is included in the Clerk’s Papers on appeal. For simplicity, the State cites to the Clerk’s Papers when referring to that opinion in its Statement of the Case.

A. THE OPINION OF THE SUPREME COURT

This is the case in which the Washington Supreme Court first declared mitigated exceptional concurrent sentences could be imposed on felons convicted of firearm-related crimes under RCW 9.94A.510, the Hard Time for Armed Crime Act of 1995, Laws of 1995, ch. 129 (“HTACA”). Neither the Court of Appeals nor the Supreme Court found McFarland’s trial counsel ineffective for having failed to raise the argument at McFarland’s first sentencing. CP at 46, 50-51.

Washington’s dangerous firearms statute, RCW 9.41.040(7), makes each firearm unlawfully possessed a separate offense and unequivocally states:

Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender *shall* serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

RCW 9.41.040(6) (emphasis added); CP at 029-030. RCW 9.94A.589(1)(c), the multiple offense subsection of the Sentencing Reform Act of 1981 (“SRA”), states an offender “shall” serve consecutive sentences for each conviction of crimes listed in that subsection, and for each firearm unlawfully possessed. CP at 28-29. The Supreme Court observed: “From these statutes, lower courts have concluded that

standard sentences for multiple firearm-related convictions must be served consecutively.” CP at 029.

The issue before the Supreme Court was whether, given the clear statutory language, a court could impose concurrent sentences in a mitigated exceptional sentence, noting the issue was not resolved by the court of appeals. CP at 25. The Court, expanding its holding in *In re Personal Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), clarified that mitigated exceptional concurrent sentences may be imposed for multiple firearm-related offenses under RCW 9.94A.589(1)(c). CP at 33. Quoting RCW 9.94A.535, the Court held

that in a case in which standard range consecutive sentencing for multiple firearm related convictions “results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA],” a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences.

CP at 33. The Court did not identify more specific guidelines to assist a sentencing court in this determination. The majority remanded McFarland’s case for resentencing because

while the sentencing court’s language did not indicate the same level of sympathy or discomfort with the sentence as expressed by the court in *Mullholland*, the court indicated some discomfort with his apparent lack of discretion and even commented that McFarland’s standard range sentence was equivalent to that imposed for second degree murder.

CP at 37. The Court remanded in order to “allow the trial court the opportunity to consider whether to impose a mitigated sentence by running McFarland’s 13 firearm-related sentences concurrently. CP at 25.

The six-justice majority did not express an opinion concerning McFarland’s eligibility for a mitigated exceptional sentence under the multiple offense provisions of RCW 9.94A.589(1)(c). CP at 28-38. Justice Fairhurst and Justice Yu authored separate dissenting opinions. CP at 39, 46. Justice Gonzalez joined Justice Yu’s dissent. CP 57. Justice Fairhurst, like the majority, expressed no opinion on McFarland’s eligibility for relief. CP 39-45. Justices Yu and Gonzalez, however, agreed with the Court of Appeals—the particular facts of McFarland’s case made her ineligible for a mitigated exceptional sentence. CP at 47-48. “The problem [with remanding the case for resentencing] is that the record in this case reveals neither a sentencing error nor any legally justifiable basis for imposing an exceptional sentence.” CP at 47-48.

B. THE RESENTENCING HEARINGS

McFarland’s sentencing spanned four separate hearings, the first held October 23, 2017, the last on November 14, 2017. TP 1. The sole issue on remand was whether mitigated concurrent exceptional sentences were appropriate in McFarland’s case. TP 6.

McFarland asserted the Supreme Court remanded the case because “[t]hey thought this was too harsh.” TP 15. She argued her sentence was proportionate to sentences for more serious crimes such as murder and was disproportionate to the 41-month prison drug offender sentencing alternative (DOSA) sentence her codefendant received under the settlement deal McFarland rejected.³ TP 24. McFarland argued she should receive a 41-month sentence because it was proportionate with her codefendant’s sentence. TP 9. Speaking on her own behalf, McFarland asked for “a chance, you know?” TP 21. She said she had been in prison three years, obtained her high school diploma, was taking college classes, and had a good job. TP 21. She told the court she used to be bad but had learned her lesson and “just want[ed] a chance to get out and live my life with my family and actually do good for the community and myself.” TP 21. She brought up the fact she voluntarily withdrew appeal of an issue that could have led to a second trial because she wanted to spare the victims, with whom she had once had a close relationship. TP 21-22.

The court, quoting the mitigating provision of RCW 9.94A.535(1)(g), that “the [operation of the] multiple offense policy of [RCW 9.94A.410] results in a presumptive sentence that is clearly

³ McFarland’s first degree burglary conviction precluded the court from imposing a prison-based DOSA. RCW 9.94A.660(1)(a).

excessive in light of the purpose of this chapter”, asked McFarland to identify the purposes of the SRA with which her consecutive sentences were inconsistent. TP 23. McFarland repeated her sentence was not just and fair “[b]ecause it was proportionate to more serious crimes such as murders, [and] because it was disproportionate to what the [codefendant] received.” TP 24. The court asked McFarland whether the court’s clearly-expressed discomfort with her sentence was actually disagreement with the legislature’s judgment “about the relatively serious nature of the conduct that was charged in this case.” TP 24. McFarland responded only that the Supreme Court “said there’s a difference between hard time for armed crime and too hard a time for armed crime. And I think that’s why we’re here today.” TP 25. She did not agree the issue was the seriousness of her conduct in light of an express legislative construct, repeating only that the court had discretion to impose concurrent sentences. TP 25.

The State countered that remand was to allow McFarland to present statutory reasons justifying a mitigated sentence, “other than the fact that sure seems like a lot of time for a young lady to have to spend.” TP 25-26. The State strongly contested McFarland’s unwavering assertion remand was for the express purpose of imposing concurrent sentences, noting the majority did not conclude McFarland’s original sentence was too harsh. TP 26. The State asserted McFarland’s remorse was not a

mitigating factor and that the court had to balance her desire to protect her victims from the agony of a second trial against her having taken advantage of their special relationship to enter their occupied home and steal 18 firearms, 2,000 rounds of ammunition, checkbooks, electronics, and other property. TP 26.

Agreeing the court had discretion to order a mitigated sentence if McFarland qualified under RCW 9.94A.535(1)(g), the State contested that undue harshness was established by the discrepancy between her sentence and that of her codefendant, arguing the proper comparison was with others convicted under the HTACA, where twenty-year sentences are not uncommon. TP 26-28. The court continued the hearing a week to look further into the parties' arguments. TP 28.

The court received an ex-parte letter from McFarland's appellate counsel the morning of the second hearing. TP 32. Appellate counsel argued McFarland's sentence was longer than sentences for sex crimes against children and reminded the court of its earlier comment comparing the sentence with a sentence for murder. CP at 91. Appellate counsel provided many examples of McFarland's commendable post-sentencing behavior, though she omitted facts about the crime and McFarland's circumstances at the time she committed the crime. CP at 88-92.

McFarland argued the Supreme Court had already ruled “the multiple offense policy is the mitigating factor * * * [as long as] it’s consistent with the policy goals of the SRA, which the [c]ourt enumerated last week.” TP 34. The court, confirming it would have to enter written findings, asked: “What would they say?” TP 35. McFarland replied: “What they would say is that the [c]ourt found that the multiple offense policy in this case was a mitigating factor that supported departure from the standard range because the presumptive standard range in this sentence was excessive in light of the purposes of the SRA.” TP 35. She then recited the seven factors enumerated in RCW 9.94A.010.⁴ TP 35.

The court asked again for a factual basis, pointing out the Supreme Court had not held the multiple offense policy was harsh in every HTACA case. TP 37. Referring to the trial court’s comment at her first sentencing comparing her sentence to that of murder, McFarland answered only that

⁴ RCW 9.94A.010 provides:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and 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.

the Supreme Court had authorized the court to impose a mitigated sentence. TP 37. The court replied: “I can if there’s a factual basis.” TP 37. McFarland asserted her codefendant’s sentence was part of the factual basis and that the Supreme Court thought her sentence too harsh. TP 38.

The State reiterated that the codefendant’s convictions under the plea agreement differed from McFarland’s convictions following trial and expressed concern over a proportionality analysis comparing sentences for different crimes. TP 39. The State argued a proportionality analysis should compare sentences of defendants convicted of the same offenses. TP 40. In response to the court’s comments concerning “unfettered” charging discretion conferred on prosecutors, the State pointed out it charged only 13 gun-related charges and no aggravators when the facts supported 36 separate gun-related charges and at least two aggravators. TP 40-41.

The State also argued the difference between McFarland’s sentence and that of her codefendant was a benefit the codefendant received, not a price McFarland paid for exercising her right to trial. TP 42-43. The State asserted this was not “semantic sleight of hand”—both defendants faced the same potential sentence and both were offered a plea bargain to mitigate their sentences. TP 42-43. The State also reminded the court prosecutorial discretion was bound by statutes governing charging

decisions. TP 45. The court agreed the legislative scheme for gun-related offenses is intentionally punitive. TP 43.

The State argued the purpose of the SRA most relevant to McFarland's case was that of promoting respect for the law by ensuring people convicted of similar offenses are sentenced similarly. TP 46. The appropriate proportionality comparison was between McFarland and other people who committed crimes either while armed or in order to obtain firearms. TP 46. The State contended there was no showing a 20 year sentence was excessive in all such cases. TP 46.

McFarland then admitted the specific facts she and her attorneys put forth to justify her request for a mitigated sentence—the laudatory things she had done to become a better person after going to prison—were not supported by case law as mitigating factors and that the law held what a defendant did after sentencing was of little import. TP 60. She admitted the Supreme Court's "beef" with the original sentencing procedure was that the trial court believed it did not have any discretion when it actually did. TP 61.

Toward the close of the hearing, after further discussion concerning prosecutorial charging discretion, the court told McFarland

*State v. Rice*⁵ dealt with her argument concerning the disparity between her sentence and that of her codefendant, TP 63, and recommended counsel read *State v. Roberts*⁶ for its holding that an exceptional sentence cannot be based on a defendant's good conduct following commission of the crime. TP 64. Concerned by lack of specific guidance from the Supreme Court, the court suggested appellate counsel appear the following week to explain the relevance of the various facts she recited in her letter. TP 66.

Appellate counsel was unable to appear. TP 69. Instead, she wrote another letter. CP at 93-95. The parties confirmed the issue was whether McFarland's sentence was clearly excessive and the court stated its decision on that issue could not be based on McFarland's personal characteristics, but instead had to have something to do with the crime. TP 72-73. In addition, the difference between the effect of one of McFarland's crimes and the cumulative effect of all her crimes "would have to be non-existent, trivial, or trifling." TP 73. The court called the parties' attention to the express legislative directive that each firearm stolen supported a separate charge, to which counsel replied McFarland's *intent* in stealing the guns was the same. TP 73. The court replied that "the

⁵ *State v. Rice*, 159 Wn. App. 545, 246 P.3d 234 (2011), *aff'd*, 174 Wn.2d 884, 279 P.3d 849 (2012).

⁶ *State v. Roberts*, 77 Wn. App. 678, 685, 894 P.2d 1340 (1995).

cumulative effect, the harm done - - the legislature says it's not the same. Stealing 14⁷ [firearms] isn't the same as stealing one." Counsel, referring back to his argument at the first sentencing, admitted "the cumulative effect if she had stolen toasters versus the cumulative effect of stealing firearms is substantially different." TP 74. The court commented the legislature had not specifically addressed stealing multiple toasters the way it had with firearms. TP 74. McFarland agreed. TP 74. McFarland also agreed when the court said, "there isn't any prosecutorial vindictiveness here." TP 75.

After again expressing frustration with lack of direction from the Supreme Court, the court stated: "I'm not going to change my sentence in this case." TP 75. The court explained: "this is, in my view, is an excessive sentence but not for any reasons that the [Supreme] Court will authorize me to go below the range." TP 76. He explained to McFarland the State could have charged "a lot more counts" and that she could have had to serve even more time. TP 76. The court continued the hearing a week so the parties could incorporate the court's written letter into the amended sentencing documents. TP 76-77.

Right before the court imposed sentence on November 14, 2017,

⁷ The court misspoke. That eighteen guns were stolen was never contested.

McFarland eloquently expressed again how she had “messed up, made mistakes, and hurt families, including my own.” TP 81. She talked about what she had learned while incarcerated, the classes she had taken, the diploma and AA degree she earned. TP 81. She was learning “Braille to help give back to the community.” TP 81. She then rephrased the underlying argument made by counsel throughout the sentencing hearings: “[I]f the Supreme Court didn’t think that I was eligible for a mitigated sentence, [then] I wouldn’t be here.” TP 81. The court encouraged McFarland to review its letter with her attorney, then imposed a sentence identical to the original. TP 82.

C. THE TRIAL COURT’S RULING AND ITS RATIONALE

The court’s written ruling recognized the Supreme Court had made clear he had discretion to run McFarland’s convictions concurrently as an exceptional, mitigated sentence for firearm-related crimes under RCW 9.94A.535(1)(g), the “multiple offense policy” subsection of the SRA, and that he was to “meaningfully consider” such a sentence. CP at 126. He also recognized the Supreme Court had stressed “that among the objectives of the SRA are to make punishment for crime proportionate to the seriousness of the offense and to make that punishment commensurate with the punishment imposed on others committing similar offenses.” CP at 127.

The court stated its reasons for any downward departure from the guidelines must be memorialized in written findings of fact and conclusions of law, noting “[n]either the Supreme Court nor Ms. McFarland’s counsel has suggested what this court should write in order to satisfy this requirement. Furthermore, the reasons suggested are insufficient as a matter of law.” CP at 127. The court appreciated its discretion was constrained—it could impose such a sentence “*only if the imposition of consecutive sentences results in a clearly excessive sentence*.” That, in turn, requires this court to find that consecutive sentencing here is excessive in light of the purposes of the SRA.” CP at 137 (emphasis in original). The court held the various bases McFarland suggested “are either contrary to the plain language of the SRA or have been declared by appellate courts to be improper bases for mitigated sentences.” CP at 27.

The court rejected McFarland’s comparison of her sentence to a sentence for murder because murder and firearm theft are not similar crimes. CP at 127. Although the court had repeatedly expressed extreme discomfort with McFarland’s sentence, he pointed out “the SRA treats all those who steal firearms in exactly the same way.” CP at 127. He wrote that McFarland’s original sentence was imposed without consideration of her sex, race, or any other distinguishing basis. CP at 127. The court also rejected another of McFarland’s proportionality arguments—the “toasters

versus guns” issue—commenting it had no authority to “somehow ‘overrule’ the prosecutor’s decision to charge multiple thefts as individual crimes, or to file all available counts.”⁸ CP at 128.

The court then laid out the legal principles relevant to its decision. CP at 128. First, analysis of the multiple offense mitigating factor “focuses on the difference between the effect of one of the defendant’s crimes and the cumulative effect of all of them. If the difference is nonexistent, trivial, or trifling, a sentence below the standard range is justified.”⁹ CP at 128. “[O]ur legislature has declared that the theft of multiple firearms causes multiple, separate harms” and no party here had demonstrated otherwise. CP at 128. “[P]ossible distribution of twelve¹⁰ firearms, to up to twelve unknown persons, presents a far greater risk to society than the theft of a single firearm.” CP at 128. The court also rejected McFarland’s comparison of her sentence to that of “her codefendant who pled guilty to reduced charges as a result of a bargain with the State . . . [because] disparities resulting from plea bargaining are not inconsistent with the purposes of the SRA.”¹¹ CP at 128.

⁸ It appears the court may have forgotten the State had charged approximately one-third of the supported charges and none of the statutorily-authorized aggravators, a fact he earlier agreed was accurate. TP 40-41.

⁹ Citing *State v. Kinneman*, *supra*, 120 Wn. App. at 342-46 and 13B Seth A. Fine & Douglas J. Ende, WASHINGTON PRACTICE, CRIMINAL LAW, § 4008 (1998).

¹⁰ Trial evidence leads to the inference McFarland disposed of eight firearms, not twelve.

¹¹ Citing *State v. Rice*, *supra*, 159 Wn. App. at 574-75

The court accepted that his subjective determination that McFarland's "standard range is unwise or that it does not advance the goals of the SRA does not justify a mitigated sentence."¹² CP at 128. Case law prohibits the court from basing a mitigated sentence on factors necessarily considered by the legislature in establishing the standard range. CP at 128. "[An] asserted mitigating factor must be sufficiently substantial and compelling to distinguish the defendant's *crime* from others in the same category."¹³ (Emphasis in trial court's opinion.)

The court then rejected each of the various reasons advanced by McFarland and her attorney, citing to specific precedent.

Neither Ms. McFarland's good conduct following commission of the crime,¹⁴ nor her need for treatment,¹⁵ nor her amenability to improvement by means other than incarceration,¹⁶ nor her remorse,¹⁷ make her sentence clearly excessive under the policies of the SRA. Factors which are personal to the Defendant cannot justify a mitigated sentence.¹⁸

CP at 129. The court attributed differences between McFarland's standard range and that of her codefendant to her criminal history, "the legislature's

¹² Citing *State v. Allert*, 112 Wn.2d 156, 169, 815 P.2d 762 (1991); *State v. Pascal*, 108 Wn.2d 125, 137-38, 736 P.2d 1065 (1987).

¹³ Citing *State v. Law*, 154 Wn.2d 85, 95, 110 P.3d 717 (2005).

¹⁴ Citing *State v. Roberts*, *supra*, 77 Wn. App. at 685.

¹⁵ Citing *State v. Paine*, 69 Wn. App. 873, 850 P.2d 1369 (1993).

¹⁶ Citing *State v. Freitag*, 127 Wn.2d 141, 896 P.2d 1254 (1995), *amended* 127 Wn.2d 141.

¹⁷ Citing *State v. McClarney*, 107 Wn. App. 256, 26 P.3d 1013 (2001), *rev. denied* 146 Wn.2d 1002 (2002).

¹⁸ Citing *Fine & Ende*, *supra*, § 4010.

explicit judgment” about the severity of her crimes, and the State’s charging decisions. CP at 129. Citing *State v. Korum*, 157 Wn.2d 614, 638, 141 P.3d 13 (2006), the court stated it could not interfere with the prosecutor’s decision-making process absent demonstrated prosecutorial misconduct. CP at 129.

Expressing clear frustration and dismay with the length of McFarland’s sentence, the court attributed its “excessive” sentence to the prosecutor’s charging decisions, complaining of the Supreme Court’s failure to take this opportunity to “police prosecutorial discretion”, which, the court opined, “surely must be the true and primary cause of injustice in cases such as this one.” CP at 129.

III. ARGUMENT

McFarland’s assignment of error and statement of related issues are predicated on misinterpretation, both of the scope of Supreme Court’s ruling and of the trial court’s decision on remand. The Supreme Court did not remand this matter for resentencing because it concluded a mitigated, exceptional sentence was appropriate in her case, but because its opinion clarified that the trial court had discretion to consider such a sentence. While the trial court expressed unabashed frustration and personal distress over the length of McFarland’s sentence, he did not allow his personal beliefs and feelings to cloud his determination that McFarland failed to

present statutorily-permissible grounds for a mitigated downward departure. Unlike McFarland, the court's difficult decision is grounded on an accurate interpretation of the law. The trial court did not abuse its discretion.

A. STANDARD OF REVIEW

RCW 9.94A.585(4)¹⁹ governs appellate review of issues related to exceptional sentences. *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997).²⁰ The question of whether the court's reasons for reimposing a standard range sentence are supported by evidence in the record is reviewed under a clearly erroneous standard; whether the reasons given justify departure from the standard range is reviewed de novo. *Id.*

B. LEGAL PRINCIPLES ON REVIEW

There is no general right to appeal a sentence within the standard range. RCW 9.94A.585(1). Appellate courts review standard range sentences only "in circumstances where the court has refused to exercise its discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (citing *State v. Herzog*, 112 Wash.2d 419, 423, 771 P.2d 739

¹⁹ RCW 9.94A.585(4) provides, in relevant part:

(4) To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

²⁰ *Ha'mim* cites RCW 9.94A.210(4), superseded in 2001 by RCW 9.94A.585(4).

(1989), *review denied*. 136 Wn.2d 1002 (1998)); *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). “When a court has considered the facts and concluded there is no legal or factual basis for an exceptional sentence, it has exercised its discretion, and the defendant cannot appeal that ruling.” *Id.*

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). An exceptional mitigated sentence must be supported by facts proved by a preponderance of the evidence. RCW 9.94A.535(1). A trial court may impose an exceptional mitigated sentence if it finds there are substantial and compelling reasons justifying downward departure. RCW 9.94A.535. One such circumstance is demonstrated when “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purposes of [the SRA], as expressed in RCW 9.94A.010.” RCW 9.94A.535(1)(g).

“Whether a given presumptive sentence is clearly excessive in light of the purposes of the SRA is not a subjective determination dependent upon the individual sentencing philosophy of a given judge. Rather, it is an objective inquiry based on the Legislature’s own stated purposes for the act.” *State v. Hortman*, 76 Wn. App. 454, 463, 886 P.2d 234, 239 (1994) (citing RCW 9.94A.010 as “setting forth the purposes of the SRA”). These seven legislative policy goals 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. "Sentencing judges should examine each of these policies when imposing an exceptional sentence under .535(1)(g)." *State v. Graham*, 181 Wn.2d 878, 887, 337 P.3d 319 (2014).

McFarland appears never to have understood what type of facts would satisfy her burden to distinguish her crimes from those of others sentenced for firearm crimes under the HTACA. She argued the court's findings would be adequate if they stated nothing more than that "the multiple offense policy in this case was a mitigating factor that supported departure from the standard range because the presumptive standard range in this sentence was excessive in light of the purposes of the SRA." TP 35. Appellate counsel asserted findings would be adequate if they quoted various purposes of the SRA exemplified by McFarland's apparent moral turnaround, and by comparison of her sentence with those of others convicted of crimes other than HTACA offenses. CP 94. These arguments have no support in law.

"The purposes of the SRA are not in and of themselves mitigating

circumstances; rather, they may provide support for imposition of an exceptional sentence once a mitigating circumstance has been identified by the trial court.” *State v. Powers*, 78 Wn. App. 264, 270, 896 P.2d 754 (1995) (citing *State v. Alexander*, 125 Wash.2d 717, 730 n. 22, 888 P.2d 1169 (1995)). The court must identify a valid mitigating factor before imposing a sentence below the standard range. *Id.* Trial courts do not have “a general discretion to deviate from the guidelines if in broad terms the Court believes that the standard range sentence is either excessively high or excessively low.” *Id.* at 271 (internal quotation marks omitted). Despite its earnest and repeated efforts to do so, this court was unable to elicit from McFarland and her two attorneys even one distinguishing fact. TP 23, 37. McFarland eventually admitted no case law held the facts she had put forth—all related to her laudatory post-conviction behavior while incarcerated—were proper mitigating factors. TP 60.

Standard range sentences imposed under the multiple offense policy are clearly excessive when the difference between the effect of the first criminal act and the cumulative effect of the subsequent criminal acts is nonexistent, trivial or trifling. *Hortman*, 76 Wn. App. at 463–64 (citing *State v. Sanchez*, 69 Wn. App. 255, 848 P.2d 208 (1993)). The multiple offense policy is designed to ameliorate injustice caused by an insignificant difference in effect. *Sanchez*, 69 Wn. App. at 261. *Sanchez* provides a typical example. There, law enforcement engaged the defendant in three separate drug transactions within a very short period of time, all with the same person and all involving very small amounts of cocaine. *Id.* at 260. Law enforcement initiated all three transactions. *Id.* Focusing on the effect

of the first buy alone and the cumulative effect of all three buys, Division Two of this Court concluded the difference in effect was trivial or trifling. *Id.* at 261. Under such circumstances, “the multiple offense policy should not operate; rather, the sentencing judge should be permitted to give an exceptional sentence downward on grounds that the ‘operation of the multiple offense policy . . . results in a presumptive sentence that is clearly excessive.’” *Id.* (quoting former RCW 9.94A.390(1)(g) (1984)).

Findings and conclusions reciting the various purposes of the SRA are insufficient to support a downward departure if unsupported by facts in the record. *State v. Powers*, 78 Wn. App. at 896 (citing *Alexander*, 125 Wash.2d at 730 n. 22). That is, a court may not, without more, justify an exceptional mitigated sentence by finding the sentence would fulfill one or more purposes enumerated in RCW 9.94A.010. *Id.*

A sentence under the multiple offense policy is not excessive when the difference between the effect of the first crime and the cumulative effect of the subsequent crimes is *not* trivial or trifling. *State v. Kinneman*, 120 Wn. App. 327, 346, 84 P.3d 882, 892 (2003) (cumulative effect of 66 IOLTA thefts totaling \$208,713, subsequent to an initial theft of \$400, was not nonexistent, trivial or trifling). The purposes of the SRA are not served when qualitative differences between the first and subsequent acts are ignored. *State v. Calvert*, 79 Wn.App. 569, 583, 903 P.2d 1003 (1995).

The HTACA provides that every firearm taken is a separate offense. RCW 9A.56.300(3). Each firearm unlawfully possessed is a separate offense.

RCW 9.41.040(7). The law requires consecutive sentences for any offender convicted under the HTACA for unlawful possession of a firearm *and* theft of a firearm or possession of a stolen firearm, or both. RCW 9.41.040(6). With these provisions, the legislature effectively precluded courts from concluding generally that the difference between the effect of theft or possession of a single stolen firearm and the cumulative effect of multiple thefts or possessions is nonexistent, trivial, or trifling. The court mentioned this when he wrote of “the legislature’s explicit judgment” about the severity of McFarland’s crimes. CP at 129.

McFarland was unable to point to any fact in her case—any fact related to the crime or to her circumstances at the time of the crime—distinguishing her situation from that of any other person convicted of the same or similar crimes. She admitted the cumulative effect of stealing firearms was substantially different than the cumulative effect of stealing toasters. TP 73-74. A critical fact McFarland attempted to avoid was that she successfully disposed of a number of firearms between the time of the burglary and her arrest less than 24 hours later. The cumulative effect of multiple stolen firearms disbursed into the community is substantially greater than the effect of one. The court recognized these distinctions when he said: “the legislature says it’s not the same. Stealing 14 isn’t the same as stealing one.” TP 73.

C. THE TRIAL COURT, HAVING CAREFULLY CONSIDERED AND REJECTED AS LEGALLY INSUFFICIENT ALL MCFARLAND’S PROPOSED GROUNDS FOR A MITIGATED EXCEPTIONAL SENTENCE, PROPERLY CONCLUDED IT LACKED LEGAL AUTHORITY TO MODIFY THE STANDARD RANGE SENTENCE ORIGINALLY IMPOSED. THE DECISION WAS NOT THE RESULT OF AN ERRONEOUS CONCLUSION CONCERNING PROSECUTORIAL

CHARGING DISCRETION, BUT, RATHER, THE COURT'S PROPER
REFUSAL TO IMPOSE SUCH A SENTENCE SOLELY ON FINDINGS
RECITING THE PURPOSES OF THE SRA AS INDEPENDENT
MITIGATING FACTORS.

A fair reading of the record on remand establishes the trial court would have imposed a mitigated exceptional sentence had McFarland identified any legally-cognizable justification for doing so. The court continued the sentencing hearing twice and sought the appearance of appellate counsel to assist McFarland and trial counsel. TP 66. The court considered two letters from appellate counsel. TP 32, 69. The court undertook substantial research on its own, carefully pairing each of McFarland's stated reasons for downward departure with the case specifically rejecting that reason. TP 64; CP at 128. The court recognized and accepted that his subjective distaste for McFarland's sentence was insufficient to justify downward departure from the standard range. CP at 128.

Although he found it painful, the court correctly concluded no substantial and compelling reason justified an exceptional mitigated sentence.

This Court should conclude the standard range sentence imposed on remand was the result of an entirely proper and legally grounded exercise of the trial court's sentencing discretion and did not arise out of any misunderstanding concerning prosecutorial discretion or the showing necessary to establish a standard range sentence is clearly excessive under the circumstances here.

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IV. CONCLUSION

For these reasons, the State respectfully requests this Court to affirm the trial court's imposition following remand of McFarland's 237 month standard-range sentence.

DATED this 10th day of August, 2015.

Respectfully submitted,

GARTH DANO
Grant County Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Katharine W. Mathews", written over a horizontal line.

Katharine W. Mathews, WSBA# 20805
Deputy Prosecuting Attorney
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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 party, receipt confirmed, pursuant to the parties' agreement:

Andrea Burkhart
Andrea@2arrows.net

Dated: August 13, 2018.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

August 13, 2018 - 9:23 AM

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