

FILED  
Court of Appeals  
Division III  
State of Washington  
8/7/2018 10:41 AM

NO. 357821

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

---

STATE OF WASHINGTON  
PLAINTIFF/RESPONDENT,

V.

TYLER FIFE  
DEFENDANT/APPELLANT

---

BRIEF OF RESPONDENT

---

BRANDEN E. PLATTER  
Prosecuting Attorney  
237 4th Avenue N.  
P.O. Box 1130  
Okanogan County, Washington

509-422-7280 Phone  
509-422-7290 Fax

Branden E. Platter  
WSBA #46333  
Prosecuting Attorney

**TABLE OF CONTENTS**

STATEMENT OF THE CASE.....1

ARGUMENT.....3

    A. A defendant may not appeal a sentence within the standard range.....3

    B. The trial court did not abuse its discretion in refusing to impose an exceptional sentence based on Appellant’s claim of duress.....5

    C. The trial court did not abuse its discretion by refusing to impose an exceptional sentence based on lack of criminal predisposition.....6

    D. Appellant’s asserted errors number three and four are time barred as they were not included in Appellant’s first appeal...9

CONCLUSION.....11

**TABLE OF AUTHORITIES**

Table of Cases

*State v. Fife*, 200 Wn.App. 1041, 2017 WL 4074623 ..... 2, 6, 8, 10

*State v. Friederich-Tibbets*, 123 Wn.2d 250 (1994).....4

*State v. Garcia-Martinez*, 88 Wn.App. 322 (Div.1, 1997), review denied,  
136 Wn.2d 1002 (1998)..... 4

*State v. Jacobsen*, 78 Wn.2d 491, 493 (1970) ..... 9

*State v. Knight*, 176 Wn.App. 936, 957 (2013) ..... 4

*State v. Mail*, 121 Wn.2d 707 (1993)..... 4

*State v. Mandanas*, 163 Wn.App. 712, 716 (Div. 1, 2011) ..... 9, 10

*State v. Rousseau*, 78 Wn.App. 774 (Div.1, 1995).....2, 3

*State v. Sauve*, 100 Wn.2d 84, 87 (1983) ..... 9, 10

Additional Authority

RCW 9.94A.535(1).....2

RCW 9.94A.585(1)..... 3

## STATEMENT OF THE CASE

Appellant, Tyler Fife, was charged in Okanogan County Superior Court case number 14-1-00423-9 with Count 1- Burglary in the First Degree, Count 2- Residential Burglary, Count 3- Burglary in the Second Degree, Count 4- Theft in the First Degree, Count 5- Theft in the Second Degree, Count 6- Possessing Stolen Property in the First Degree, Count 7- Possession of a Stolen Motor Vehicle, Count 8- Theft of a Motor Vehicle, Count 9- Theft of a Firearm, Count 10- Possession of a Controlled Substance, Count 11- Possession of a Controlled Substance, Count 12- Malicious Mischief in the Third Degree, and Count 13- Malicious Mischief in the Third Degree. [CP 262-267] Appellant was found guilty of all counts by a jury. [CP 83-84]

During sentencing, the defendant requested an exceptional sentence downward based on the mitigating factors of duress and a lack of criminal predisposition. [CP 69-72; RP1<sup>1</sup> 468:14- 473:20] The State recommended a standard range sentence. [CP 73-82; RP1 457:9-464:1] After weighing the aggravating and mitigating factors, the trial court sentenced the defendant to standard range sentences on all counts. [RP1 489:15- 490:23; CP 57-68]

---

<sup>1</sup> Consistent with Appellant's Brief, Respondent references the Report of Proceedings from Appellant's first appeal, Court of Appeals case number 34442-8-III as "RP1." The Report of Proceedings on re-sentencing will be referred to as "RP2."

Appellant filed a direct appeal in *State v. Fife*, COA No. 34442-8-III. See *State v. Fife*, 200 Wn.App. 1041, 2017 WL 4074623.<sup>2</sup> In his appeal, Appellant argued that the trial court misapplied the legal standard for imposition of an exceptional sentence based on mitigating factors as *substantial and compelling evidence* of the mitigating factor, rather than substantial and compelling reasons and proof by a preponderance of the evidence as actually required by RCW 9.94A.535. *Fife*, 2017 WL 4074623. Appellant also argued that the trial court erred by concluding that the jury's verdicts of guilty, thus their refusal to accept his duress defense, precluded the court from finding duress for mitigating purposes during sentencing. *Fife*, 2017 WL 4074623. He finally argued that the trial court erred by failing to consider his request for an exceptional sentence due to lack of criminal predisposition. *Fife*, 2017 WL 4074623.

In an unpublished opinion issued on September 14, 2017, this Court held that the trial court applied the wrong legal standard under RCW 9.94A.535 for mitigating factors and that the court failed to consider Appellant's request for an exceptional sentence based on lack of criminal predisposition. *Fife*, 2017 WL 4074623. [CP 21-29] The Court remanded the case to the trial court for re-sentencing. *Fife*, 2017 WL 4074623.

---

<sup>2</sup> GR 14. This case is not being cited for any binding authority and is only being cited as reference to the decision of the prior appeal in this matter.

Appellant was re-sentenced on November 30, 2017. [RP2 33:1] Appellant provided a sentencing brief, again requesting an exceptional sentence downward based on duress and lack of criminal predisposition. [CP 13-19] The trial court discussed the opinion of the Court of Appeals' decision, clarified the standard that the trial court was applying, and factually addressed both Appellant's request for an exceptional sentence based on duress and lack of criminal predisposition. [RP2 40:3-45:16] The court denied the defendant's request for an exceptional sentence downward. [RP2 45:15] The trial court made clear that it fully considered both of Appellant's requested basis' for mitigation:

[F]or the sake of the Court of Appeals if there's ever any other appellate matter involving this case, I don't want anyone to feel that the Court today has disregarded any of the stated reasons for the defense's request for an exceptional sentence. In other words, be clear folks, that I am mindful of the defendant's claim of duress and – and that he lacked a pre-disposition for criminal behavior. And I truly hope that everyone in this courtroom feels like this Court has considered this matter at length because I have.

[RP2 40:7-16]

## ARGUMENT

A. A defendant may not appeal a sentence within the standard range.

Appellant does not present an appealable issue. Under RCW 9.94A.585(1), a sentence within the standard sentence range for an offense

shall not be appealed. A trial court's refusal to impose an exceptional sentence downward is also not appealable. *State v. Rousseau*, 78 Wn.App. 774, 777 (Div.1, 1995) citing *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252 (1994); *State v. Mail*, 121 Wn.2d 707 (1993).

Respondent recognizes that a defendant may appeal the procedure a trial court follows when imposing a standard sentence range or in considering an exceptional sentence. *State v. Knight*, 176 Wn.App. 936, 957 (2013). When a defendant requests an exceptional sentence, the court may only review whether the trial court refused to exercise discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence. *State v. Garcia-Martinez*, 88 Wn.App. 322, 330 (1997).

On re-sentencing after remand, Appellant again requested an exceptional sentence downward, but the court declined and Appellant was sentenced to standard range sentences on all thirteen counts. [CP 1-11] The trial court did not refuse to exercise discretion at all and engaged in a thorough analysis of the facts when considering Appellant's request. [RP2 40:3-45:16] The trial court did not rely on any impermissible basis for refusing to impose an exceptional sentence; the court relied on the facts presented at trial. [RP2 43:19-44:6; 44:21-45:11]

Appellant attempts to disguise a non-appealable issue as a procedural error. No procedural errors occurred on re-sentencing.

Respondent asks this Court to find that Appellant raises a non-appealable issue and to deny the appeal.

B. The trial court did not abuse its discretion in refusing to impose an exceptional sentence based on Appellant's claim of duress.

The trial court, on re-sentencing, did not abuse its discretion by refusing to impose an exceptional sentence downward based on duress.

The trial court thoroughly analyzed the issue of whether duress was established for the purposes of sentencing:

[F]or purposes of re-sentencing, and for the record, and any future potential appellate review, the Court today, again, rejects the defendant's request for an exceptional sentence. Specifically, and regardless of the jury's verdicts, the Court finds that Mr. Fife's contention is arguable at best. He claims he refused or couldn't or didn't leave due to his fear that Mr. Dahlquist would hurt him or Ms. Garcia if he left or sought help. Yet, the evidence presented at trial showed opportunities when he might have left or ceased participation. The evidence is arguable and such that the Court cannot conclude by a preponderance that the defendant acted under duress or threat, even an amount less than necessary to establish the legal defense of duress.

[RP2 43:19-44:6] The Court also discussed its own ability to hear the testimony of witnesses as well as observe their demeanor on the witness stand. [RP2 44:11]

Appellant argues that the trial court erred because the court focused on the *word* duress, rather than using other statutory words such as coercion, threat, or compulsion. *Brief of Appellant*, pg. 11. The trial

court discussed Appellant's contention that he participated in these crimes based on his fear of Mr. Dahlquist. [RP2 43:19-44:6] This broad term covers all of the terms listed or contemplated by the duress mitigating factor. The trial court rejected the idea itself that Appellant participated in these crimes out of anything other than his own volition.

The trial court did not err in its analysis. The court considered Appellant's argument, but having been the trial judge, the judge rejected it based on the evidence presented. Appellant is simply unhappy with his sentence and now attempts to disguise his displeasure as a procedural error by the trial court. Appellant's request to re-sentence, yet again, after the court has thoroughly addressed his duress argument, should be denied.

C. The trial court did not abuse its discretion by refusing to impose an exceptional sentence based on lack of criminal predisposition.

Appellant asserts that the trial court abused its discretion in denying his request for an exceptional downward departure based on lack of criminal predisposition. *Brief of Appellant*, pg. 1. This issue was raised in Appellant's first appeal of this case. *Fife*, 2017 WL 4074623.

The reviewing court found that the trial court did not address Appellant's request for an exceptional sentence based on lack of predisposition and ordered, in part that the court address the issue of predisposition on re-sentencing. *Fife*, 2017 WL 4074623.

On re-sentencing, the trial court directly addressed Appellant's request for an exceptional sentence downward based on criminal predisposition:

Likewise, the Court today is denying an exceptional sentence based on a lack of pre-disposition to crime and/or that someone else induced him to commit the crimes. It may be true that the defendant has minimal criminal history. But, it's interesting, as counsel pointed out last week, that Mr. Fife had only been in Okanogan County for a very short period of time and in that time managed to become acquainted with, and apparently to some degree, befriended Mr. Dahlquist. I don't like the word disingenuous, but it is a contradiction to say really that on one hand Mr. Fife chose to hang out with this other person, befriending him to some degree or another, but at the same time, didn't know what was going on. So, I'm not satisfied that the evidence supports an exceptional sentence based on a lack of pre-disposition or that someone else is somehow responsible.

[RP2 44:21-45:11] These comments followed the trial court's analysis denying the defendant's request for an exceptional sentence based on duress. [RP2 44:21] It is apparent that the trial court also considered its factual analysis regarding duress as also applied to the issue of predisposition and inducement.

Appellant's argument that the comment regarding Appellant only being in the county for a short period of time as evidence outside the record that was considered in sentencing is misleading. The trial court's analysis and decision was not based on Appellant's duration of residence,

but on his chosen associates during his time in the county and his knowledge of their behavior. [RP2 45:5-9] Furthermore, Appellant's argument that the relevant question is whether the plan to commit the burglaries originated in his mind versus a co-defendant's is erroneous. One person may come up with the idea to commit a crime and present that idea to others. If those others agree to commit the crime, they have chosen of their own volition to participate. They have not been induced.

In the first appeal, the State argued that the trial court silently recognized Appellant's argument regarding lack of predisposition and silently and impliedly rejected the argument. *Fife*, 2017 WL 4074623. The Court commented, "[w]e might accept the State's argument if the trial court simply stated that the court rejected the request for a downward sentence or rejected the request under both alternatives." *Fife*, 2017 WL 4074623. However, according to the Court, the trial court wholly ignored the request. *Fife*, 2017 WL 4074623. So, it is clear from the Court's statements that no overly extensive analysis is really necessary in the court's decision whether to impose an exceptional sentence downward based on an argued factor. The trial court need only consider it and directly address it.

In this case, the trial court on re-sentencing engaged in an analysis on the record as to why an exceptional sentence based on lack of pre-

disposition was not appropriate. Therefore, no error occurred and there was no abuse of discretion.

D. Appellant's asserted errors number three and four are time barred as they were not included in Appellant's first appeal.

Appellant asserts in this second appeal after re-sentencing that the statutes, as applied to Appellant, are unconstitutional [*Brief of Appellant*, pg. 17-21] and that the evidence was insufficient to support a conviction for Burglary in the First Degree [*Brief of Appellant*, pg. 21-23]. However, these issues were not raised in Appellant's first appeal and are now being raised for the first time in this second appeal after re-sentencing.

The general rule is that a defendant is prohibited from raising issues on a second appeal that were or could have been raised on the first appeal. *State v. Mandanas*, 163 Wn.App. 712, 716 (Div. 1, 2011) citing *State v. Sauve*, 100 Wn.2d 84, 87 (1983). See also *State v. Jacobsen*, 78 Wn.2d 491, 493 (1970) ("We adhere to our policy which prohibits issues from being presented on a second appeal that were or could have been raised on the first appeal.")

In *Mandanas*, the defendant appealed his sentence in a direct appeal. *Mandanas*, 163 Wn.App. at 715. The appellate court found that the trial court abused its discretion in its determination of same or separate criminal conduct and the case was remanded for re-sentencing. *Id.* In a

second appeal, the defendant raised a double jeopardy challenge to his convictions. *Id.* Following *Sauve*, the court held that the defendant's double jeopardy challenge was not timely as it was not raised in the initial appeal. *Id.* at 717. "[E]ven an issue of constitutional import cannot be raised in a second appeal." *Id.* at 717. "Even though an appeal raises issues of constitutional import, at some point the appellate process must stop. Where, as in this case, the issues could have been raised on the first appeal, we hold they may not be raised in a second appeal." *Sauve*, 100 Wn.2d at 87.

In this case, Appellant initially appealed his case. *Fife*, 2017 WL 4074623. In his appeal, Appellant raised two issues: the trial court's use of the incorrect legal standard for imposing a mitigated exceptional sentence downward and the trial court's failure to consider Appellant's lack of predisposition as a mitigating factor. *Fife*, 2017 WL 4074623. Appellant raised no constitutional issues to the statutes nor did he assert insufficiency of the evidence. *Fife*, 2017 WL 4074623. The Court issued its opinion on the merits on September 14, 2017 and the mandate ordering remand for re-sentencing was issued on October 18, 2017. [CP 20-29] Re-sentencing was held on November 22, 2017. [RP2 10] Appellant's second appeal followed.

Following *Sauve*, Appellant did not raise asserted errors number three and four in his first appeal, thus, he is prohibited from now asserting them in this second appeal. Should this Court disagree, Respondent would seek leave to file responses to these specific arguments.

### CONCLUSION

Respondent requests this Court deny Appellant's request and affirm the trial court's sentence. Appellant does not present appealable issues with regard to his sentence, claimed unconstitutionality of the statutes, and sufficiency of the evidence. Further, the trial court fully considered Appellant's duress and lack of criminal predisposition arguments on re-sentencing and did not abuse its discretion by denying an exceptional sentence downward.

Dated this 6<sup>th</sup> day of August, 2018

Respectfully Submitted:



Branden E. Platter, WSBA#46333  
Prosecuting Attorney  
Okanogan County, Washington

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 7th day of August, 2018, I provided service to the following, a true and correct copy of the Brief of Respondent:

**E-mail:** ken@millerchaselaw.com  
andy@millerchaselaw.com

Kenneth J. Miller  
Andrew Chase  
Miller and Chase, PLLC  
PO Box 978  
Okanogan WA 98840



---

Shauna Field, Office Administrator

**BRANDEN E. PLATTER**  
Okanogan County Prosecuting Attorney  
P. O. Box 1130 • 237 Fourth Avenue N.  
Okanogan, WA 98840  
(509) 422-7280 FAX: (509) 422-7290

**OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE**

**August 07, 2018 - 10:41 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35782-1  
**Appellate Court Case Title:** State of Washington v. Tyler Scott Fife  
**Superior Court Case Number:** 14-1-00423-9

**The following documents have been uploaded:**

- 357821\_Briefs\_20180807104105D3679591\_0218.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was 8.7.18 Brief of Respondent.pdf*

**A copy of the uploaded files will be sent to:**

- andy@millerchaselaw.com
- ken@millerchaselaw.com

**Comments:**

---

Sender Name: Shauna Field - Email: sfield@co.okanogan.wa.us

**Filing on Behalf of:** Branden Eugene Platter - Email: bplatter@co.okanogan.wa.us (Alternate Email: sfield@co.okanogan.wa.us)

Address:  
PO Box 1130  
Okanogan, WA, 98840  
Phone: (509) 422-7288

**Note: The Filing Id is 20180807104105D3679591**