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Court of Appeals  
Division III  
State of Washington  
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No. 35976-0-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JAYME LEE RODGERS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Judge Harold D. Clarke, III

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APPELLANT'S REPLY BRIEF

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## A. INTRODUCTION

Appellant Jayme Lee Rodgers accepts this opportunity to reply to the State's brief. Mr. Rodgers requests the Court refer to his opening brief for issues not addressed in this reply.

## B. ARGUMENT IN REPLY

**1. This case should be reversed and remanded for the resentencing court to consider whether to exercise its discretion to consider Mr. Rodgers' request for an exceptional sentence.**

This argument pertains to Issue 1 raised in Mr. Rodgers' opening brief. In Issue 1, Mr. Rodgers argues the trial court erred by refusing to exercise its discretion, on remand for resentencing, to consider his request for an exceptional sentence. *See* Appellant's Opening Brief pgs. 9-14.

In response, the State asserts "[g]iven the scope of the [Supreme] Court's mandate, the trial court properly exercised its discretion and declined the defendant's invitation to consider an exceptional sentence." *See* Respondent's Brief pg. 9. To support its argument, the State relies upon *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009) and *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993). *See* Respondent's Brief pgs. 5-9.

Interestingly, the State is currently making the opposite argument in the pending appeal of Mr. Rodgers' co-defendant, Thomas Weatherwax, agreeing with Mr. Weatherwax that remand for resentencing is appropriate:

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. *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.

Brief of Respondent in *State v. Thomas Weatherwax*, COA No. 35658-2-III, pgs. 7-8 (footnote omitted), filed June 19, 2018, available at: <https://www.courts.wa.gov/content/Briefs/A03/356582%20Respondent.pdf>; *but see In the Matter of Marriage of Snider & Stroud*, 430 P.3d 726, 728 (Wash. Ct. App. 2018) (stating that one panel of the Court of Appeals is not bound by another panel, even in the same division, but noting that trial courts are bound by published decisions of the Court of Appeals).

Both cases relied upon by the State, *Kilgore* and *Barberio*, are distinguishable from this case. In *Kilgore*, “the mandate . . . did not explicitly authorize the trial court to resentence [the defendant].” *Kilgore*, 167 Wn.2d at 42. Further, “[a]lthough [the defendant’s] offender score was reduced from 18 to 12, his presumptive sentencing range remained the same.” *Id.* In *Barberio*, “the trial court did not exercise its independent judgment to review and reconsider its earlier sentence[,]” but rather, “made only corrective changes in the amended judgment and sentence.” *Barberio*, 121 Wn.2d at 51.

Here, the mandate explicitly authorized the trial court to resentence Mr. Rodgers. (CP 90-111); *see also State v. Weatherwax*, 188 Wn.2d 139, 144, 146, 156, 392 P.3d 1054 (2017). In addition, his presumptive sentencing range changed. (CP 55, 189-190). Importantly, the trial court did not merely make corrective changes to the amended judgment and sentence, but instead, exercised its independent judgment to review and reconsider its earlier sentence. (RP 18-51). Therefore, Mr. Rodgers was entitled to raise new sentencing issues at his resentencing. *See State v. Toney*, 149 Wn. App. 787, 792-93, 205 P.3d 944 (2009); *State v. Davenport*, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007); *State v. Rowland*, 160 Wn. App. 316, 331-32, 249 P.3d 635 (2011); *State v.*

*Forsman*, No. 49743-3-III, 2018 WL 834718, \*5-6 (Wash. Ct. App. Feb. 13, 2018); *State v. McEvoy*, No. 50026-4-III, 2018 WL 2688272, \*2 (Wash. Ct. App. June 5, 2018); GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority).

The State further argues:

Importantly, the trial court did not forbid defense counsel from requesting an exceptional sentence or making a record in that regard. Rather than requesting an exceptional sentence (other than filing a sentencing brief in support of an exceptional sentence), defense counsel deferred to the trial court to determine whether it would exercise its discretion and permit a full resentencing.

Respondent's Brief pg. 9-10

Mr. Rodgers disagrees with this characterization of the record, and asserts that defense counsel did request the resentencing court impose an exceptional sentence. (CP 122-180; RP 25, 31-32). However, once the resentencing court made clear it was not going to exercise its discretion and consider Mr. Rodgers' request, he then requesting a sentence on the low-end of the standard range, while preserving his objections to the trial court not considering his exceptional sentence requests. (RP 31-32).

Contrary to the State's argument, the trial court did not properly exercise its discretion at resentencing. *See* Respondent's Brief pg. 9-10. Instead, the trial court failed to recognize it had discretion to do anything other than recalculate his sentence pursuant to our Supreme Court's interpretation of RCW 9.94A.589(1)(b). (RP 27-30); *see also Weatherwax*, 188 Wn.2d at 143-44. This failure to recognize its discretion, that it had the authority to consider Mr. Rodgers' arguments for an exceptional sentence, was an abuse of discretion. *See, e.g., McEvoy*, 2018 WL 2688272, at \*2; GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority).

*McEvoy* is similar to what occurred in this case, and sets forth the proper remedy that Mr. Rodgers should receive. The remedy here is remand for the resentencing court to consider whether to exercise its discretion to consider Mr. Rodgers' request for an exceptional sentence. *See McEvoy*, 2018 WL 2688272, at \*2; GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority).

In *McEvoy*, the defendant was convicted of several crimes, including two counts of violation of a no-contact order, and the trial court imposed an exceptional sentence. *McEvoy*, 2018 WL 2688272, at \*1. The defendant appealed, but he did not challenge his exceptional sentence. *Id.* On appeal, the court determined that both of the defendant's convictions for violation of a no-contact order violated the double jeopardy prohibition, because the convictions merged with his conviction for felony stalking. *Id.* The court vacated the two convictions for violation of a no-contact order, and remanded the case for resentencing, consistent with the opinion. *Id.*

At his resentencing hearing, the defendant argued the court's mandate permitted the trial court to resentence him for his remaining convictions. *Id.* The resentencing court declined to reconsider the defendant's exceptional sentence, reasoning it only had the discretion to vacate the two convictions for violation of a no-contact order. *Id.*

On appeal the defendant argued, in relevant part, that "the resentencing court abused its discretion when it determined that it lacked the authority on remand to resentence him for his remaining convictions." *Id.* at \*2. The court agreed. *Id.* The court found:

This court's opinion remanded [the defendant's] case for "resentencing." The accompanying mandate instructed the trial court to engage in further proceedings in accordance with the opinion. Thus, the mandate gave the resentencing court broad authority to conduct a new sentencing hearing.

As a result, the resentencing court had discretion to resentence [the defendant] on all counts. The resentencing court failed to recognize its discretion when it determined that it did not have the authority to resentence [the defendant] for his remaining convictions. Accordingly, the resentencing court abused its discretion.

*Id.*

The court recognized “[a] trial court abuses its discretion when it fails to recognize its discretion.” *Id.* (citing *State v. McFarland*, 189 Wn.2d 47, 58, 399 P.3d 1106 (2017)).

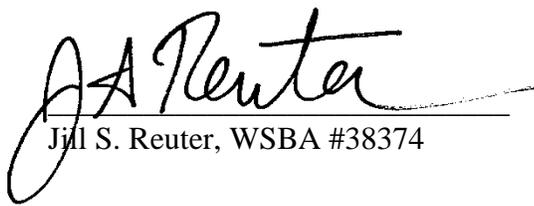
The court remanded the case “for the resentencing court to consider whether to exercise its discretion to resentence [the defendant] for his remaining convictions.” *Id.* at \*3.

Here, the trial court failed to recognize its ability to exercise its discretion to grant or deny an exceptional sentence to Mr. Rodgers. This case should be reversed and remanded for the resentencing court to consider whether to exercise its discretion to consider Mr. Rodgers’ request for an exceptional sentence.

### **C. CONCLUSION**

This case should be reversed and remanded: (1) for the resentencing court to consider whether to exercise its discretion to consider Mr. Rodgers’ request for an exceptional sentence; (2) to modify the community custody condition requiring “[t]hat the defendant not be allowed to have any association or contact with known felons or gang members or their associates[,]” in accordance with this Court’s previous opinion; (3) to strike the mandatory minimum terms of confinement of 60 months on Counts 2, 3, and 4; and (4) to strike the \$200 in court costs and the \$100 DNA collection fee. Mr. Rodgers also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 6th day of February, 2019.

A handwritten signature in black ink, reading "Jill S. Reuter". The signature is fluid and cursive, with a large initial "J" and "R". A horizontal line is drawn across the signature, starting from the middle of the "J" and extending to the right, ending under the "er" part of the name.

Jill S. Reuter, WSBA #38374

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON ) COA No. 35976-0-III  
Plaintiff/Respondent )  
vs. ) Spokane Co. No. 13-1-03434-5  
)  
JAYME LEE RODGERS ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 6, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

Jayme Lee Rodgers, #376149  
Monroe Correctional Complex, WSR-B404  
PO Box 777  
Monroe, WA 98272

Having obtained prior permission, I also served a copy on the Respondent at [scpaappeals@spokanecounty.org](mailto:scpaappeals@spokanecounty.org) using the Washington State Appellate Courts' Portal.

Dated this 6th day of February, 2019.

  
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