

FILED
Court of Appeals
Division III
State of Washington
11/28/2018 8:00 AM

No. 35976-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

JAYME LEE RODGERS,

Appellant.

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

The Honorable Judge Harold D. Clarke, III

APPELLANT'S OPENING BRIEF

Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 242-3910
admin@ewalaw.com

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT.....9

Issue 1: Whether the trial court erred by refusing to exercise its discretion to consider Mr. Rodgers’ requests for an exceptional sentence.....9

Issue 2: Whether the trial court erred by imposing a 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[,]” and by not modifying this condition in accordance with this Court’s opinion.....14

Issue 3: Whether the trial court erred in imposing a mandatory minimum term of confinement of 60 months on Counts 2, 3, and 4.....16

Issue 4: Whether the trial court erred in imposing \$200 in court costs and a \$100 DNA collection fee.....18

Issue 5: Whether this Court should deny costs against Mr. Rodgers on appeal in the event the State is the substantially prevailing party.....22

E. CONCLUSION.....26

TABLE OF AUTHORITIES

Washington Supreme Court

<i>In re Pers. Restraint of Mulholland</i> , 161 Wn.2d 322, 166 P.3d 677 (2007).....	12, 14
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	17
<i>State v. Barberio</i> , 121 Wn.2d 48, 846 P.2d 519 (1993).....	10
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	20, 23, 24, 25
<i>State v. Graham</i> , 181 Wn.2d 878, 337 P.3d 319 (2014).....	6, 14
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005).....	12
<i>State v. Kilgore</i> , 167 Wn.2d 28, 216 P.3d 393 (2009).....	10, 12
<i>State v. McFarland</i> , 189 Wn.2d 47, 399 P.3d 1106 (2017).....	12
<i>State v. O’Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015).....	6, 13
<i>State v. Ramirez</i> , 426 P.3d 714 (Wash. Sup. Ct. 2018).....	19, 20, 21
<i>State v. Weatherwax</i> , 188 Wn.2d 139, 392 P.3d 1054 (2017).....	4, 5, 13
<i>State v. Wheeler</i> , 183 Wn.2d 71, 349 P.3d 820 (2015).....	10

Washington Courts of Appeal

<i>State v. Breaux</i> , 167 Wn. App. 166, 273 P.3d 447 (2012).....	4, 5
<i>State v. Davenport</i> , 140 Wn. App. 925, 167 P.3d 1221 (2007).....	11, 13
<i>State v. Forsman</i> , No. 49743-3-II, 2018 WL 834718 (Wash. Ct. App. Feb. 13, 2018).....	11, 13
<i>State v. Garcia–Martinez</i> , 88 Wn. App. 322, 944 P.2d 1104 (1997).....	9, 10, 12

<i>State v. McEvoy</i> , No. 50026-4-II, 2018 WL 2688272 (Wash. Ct. App. June 5, 2018).....	11, 13
<i>State v. Rowland</i> , 160 Wn. App. 316, 249 P.3d 635 (2011).....	11, 13
<i>State v. Sandefer</i> , 79 Wn. App. 178, 900 P.2d 1132 (1995).....	9
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	22
<i>State v. Toney</i> , 149 Wn. App. 787, 205 P.3d 944 (2009).....	10, 11, 13
<i>State v. Weatherwax</i> , 193 Wn. App. 667, 376 P.3d 1150 (2016).....	3, 4, 15, 16, 17

Washington Statutes

RCW 9.94A.535(1)(g).....	14
RCW 9.94A.540(1)(b).....	17
RCW 9.94A.589(1)(b).....	3, 4, 9
RCW 10.01.160.....	24
RCW 10.73.160(3).....	23, 24
RCW 10.101.010(3)(a)-(c).....	21
RCW 36.18.020(2)(h) (2017).....	18
RCW 36.18.020(2)(h).....	21
RCW 43.43.7541 (2017).....	18
RCW 43.43.7541.....	22

Washington Court Rules

GR 14.1(a).....	12, 13
GR 34 cmt.....	24

RAP 14.2.....25
RAP 15.2(e).....24
RAP 15.2(f).....24, 25

Other Authorities

Laws of 2018, ch. 269, § 17.....19, 21
Laws of 2018, ch. 269, § 18.....19

A. ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to exercise its discretion to consider Mr. Rodgers' requests for an exceptional sentence.
2. The trial court erred by imposing a 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."
3. The trial court erred by not modifying 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 opinion.
4. The trial court erred in imposing a mandatory minimum term of confinement of 60 months on Counts 2, 3, and 4.
5. The trial court erred in imposing \$200 in court costs and a \$100 DNA collection fee.
6. An award of costs on appeal against Mr. Rodgers would be improper, in the event that the State is the substantially prevailing party.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred by refusing to exercise its discretion to consider Mr. Rodgers' requests for an exceptional sentence.

Issue 2: Whether the trial court erred by imposing a 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[,]'" and by not modifying this condition in accordance with this Court's opinion.

Issue 3: Whether the trial court erred in imposing a mandatory minimum term of confinement of 60 months on Counts 2, 3, and 4.

Issue 4: Whether the trial court erred in imposing \$200 in court costs and a \$100 DNA collection fee.

Issue 5: Whether this Court should deny costs against Mr. Rodgers on appeal in the event the State is the substantially prevailing party.

C. STATEMENT OF THE CASE

In 2014, the State charged Jayme Lee Rodgers with three counts of first degree assault (counts 1, 3, and 4) and one count of conspiracy to commit first degree assault (count 2).¹ (CP 17-18). Following a jury trial held that same year, the jury found Mr. Rodgers guilty as charged. (CP 20-23). The jury also returned special verdict forms finding that Mr. Rodgers was armed with a firearm at the time of the commission of each of these crimes. (CP 30-33).

At sentencing, the trial court found that one count of first degree assault (count 1) and the conspiracy to commit first degree assault (count 2) constitute the same course of conduct. (CP 57).

The trial court sentenced Mr. Rodgers based upon an offender score of four for count 1, and an offender score of zero for counts 2, 3, and 4. (CP 55).

The trial court imposed 150 months confinement on count 1; 108 months confinement on count 3; and 108 months confinement on count 4. (CP 57).² The trial court also imposed 60 months on each count for the firearm enhancements. (CP 57). The trial court ran each of these terms of confinement consecutive to each other, for a total sentence of 546 months confinement. (CP 57).

¹ Mr. Rodgers was also charged with, and convicted of, three counts of drive by shooting. (CP 18-19, 24-26). This Court reversed these three convictions on appeal, for insufficient evidence. *See State v. Weatherwax*, 193 Wn. App. 667, 376 P.3d 1150 (2016) (unpublished portion of the opinion). Therefore, these convictions are not on appeal here.

² The trial court did not impose any confinement on count 2. (CP 57).

The trial court also imposed a mandatory minimum term of confinement of 60 months on each first degree assault count (counts 1, 3, and 4), pursuant to RCW 9.94A.540. (CP 54-55, 57). The trial court imposed terms of community custody with conditions, including the following condition: “[t]hat the defendant not be allowed to have any association or contact with known felons or gang members or their associates.” (CP 59).

Mr. Rodgers appealed. (CP 67-83). This Court issued an opinion, published in part, on May 3, 2016. *State v. Weatherwax*, 193 Wn. App. 667, 376 P.3d 1150 (2016). In the published portion of its opinion, this Court rejected Mr. Rodgers’ argument that the trial court improperly calculated his sentence under RCW 9.94A.589(1)(b) when it applied an offender score of zero to his conviction for conspiracy to commit first degree assault (count 2), rather than to his convictions for first degree assault, and upheld the trial court’s calculation of his sentence. *Id.* at 673-76.

Also in the published portion of its opinion, this Court considered a challenge by Mr. Rodgers to the community custody condition stating “[t]hat the defendant not be allowed to have any association or contact with known felons or gang members *or their associates.*” *Id.* at 677-81 (emphasis added). This Court held this condition is “unconstitutionally vague and must be stricken, clarified, or narrowed at resentencing.” *Id.* at 677. This Court found that gang-related conditions of community custody could be imposed as crime-related. *Id.* at 681.

However, “they must be limited to behaviors that signify gang membership or association in or with an identified gang or gangs.” *Id.* Specifically, this Court ruled “[l]imits on association must be confined to felons, gang members or gang associates in the sense defined by RCW 9.94A.030(13), or to other specifically described persons having a direct relation to the circumstances of the crime.” *Id.*

In the unpublished portion of its opinion, this Court reversed the mandatory minimum sentences imposed on counts 1, 3, and 4. *Id.* at 667.

This Court remanded the case for resentencing. *Id.* at 681.

Mr. Rodgers sought review of this Court’s opinion by our Supreme Court, and the Supreme Court reversed this Court’s ruling regarding the calculation of his sentence pursuant to RCW 9.94A.589(1)(b).³ (CP 92-111); *see also State v. Weatherwax*, 188 Wn.2d 139, 392 P.3d 1054 (2017). The Court acknowledged this Court’s approach conflicted with the approach taken by Division One. *See State v. Breaux*, 167 Wn. App. 166, 179, 273 P.3d 447 (2012).

Our Supreme Court held “for the purposes of RCW 9.94A.589(1)(b), anticipatory offenses carry the same seriousness level as their completed offenses.” (CP 94, 100-106, 110); *see also Weatherwax*, 188 Wn.2d at 143, 148-52, 156. The Court further held “when an anticipatory offense and a completed offense carrying the same seriousness level might both form the basis for calculating consecutive sentences under RCW 9.94A.589(1)(b), the sentencing

³ This is the only issue decided by the Supreme Court. (CP 92-111); *see also State v. Weatherwax*, 188 Wn.2d 139, 392 P.3d 1054 (2017).

court must start its calculations with the offense that produces the lower overall sentence.” (CP 94, 106-110); *see also Weatherwax*, 188 Wn.2d at 143-44, 153-156. The Court reasoned that because Mr. Rodgers’ sentence “could plausibly be calculated in two different ways under the statute as written, the rule of lenity requires us to construe the statute as directing trial courts to choose the offense that will yield the lower of the two possible sentences.” (CP 110); *see also Weatherwax*, 188 Wn.2d at 155-56.

Our Supreme Court then “reverse[d] and remand[ed] for resentencing using the approach taken by the Court of Appeals in *Breaux*.” (CP 94, 97); *see also Weatherwax*, 188 Wn.2d at 144, 146; *Breaux*, 167 Wn. App. at 179. The Court concluded its opinion by stating “[w]e reverse and remand for resentencing consistent with this opinion.” (CP 110); *see also Weatherwax*, 188 Wn.2d at 156.

On remand, the trial court held a resentencing hearing, where it heard recommendations from both Mr. Rodgers and the State, allowed individuals to speak on Mr. Rodgers behalf, and allowed Mr. Rodgers to speak. (RP 18-51). Both parties also submitted sentencing memorandum for the Court’s consideration. (CP 122-149, 181-184).

Mr. Rodgers requested the trial court impose an exceptional sentence below the standard range by running the sentences on each count and for each firearm enhancement concurrently. (CP 126-128; RP 25, 31-32). Mr. Rodgers argued, based on *State v. Graham*, that “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 purposes of the SRA [Sentencing Reform Act].” (CP 126-128); *see also State v. Graham*, 181 Wn.2d 878, 880, 337 P.3d 319 (2014) (decided on November 13, 2014, after Mr. Rodgers’ first sentencing hearing).

Mr. Rodgers also requested the trial court impose an exceptional sentence below the standard range based on the mitigating factor of his youth at the time of the crimes. (CP 128-131; RP 25, 31-32). Mr. Rodgers argued, based on *State v. O’Dell*, that because he was sentenced to 45.5 years confinement for crimes committed when he was 22 years old, he “deserves an opportunity to have a sentencing court meaningfully consider whether his youthfulness justifies an exceptional sentence below the standard range.” (CP 130); *see also State v. O’Dell*, 183 Wn.2d 680, 683, 690-99, 358 P.3d 359 (2015) (decided on August 13, 2015, after Mr. Rodgers’ first sentencing hearing). In support of this argument, Mr. Rodgers offered a report from a forensic mental health evaluation conducted for purposes of his resentencing hearing, and letters of support from friends and family. (CP 131-149). Mr. Rodgers also offered an email from one of the victims in support of a 10-year sentence; certificates he earned while incarcerated; and his own written statement. (CP 150-180).

The State argued the sentencing arguments raised by Mr. Rodgers requesting an exceptional sentence were not properly before the trial court at

resentencing, because the Supreme Court did not direct the trial court to include such considerations. (CP 181-184; RP 21-22).

The trial court declined to consider the arguments for an exceptional sentence presented by Mr. Rodgers. (RP 25-30). The trial court stated:

. . . I'm aware of the case law. I'm aware if we had sentenced this case today, we might have different arguments than we had in August of '14. And I'm aware that we might have a different approach on some things, at least would have a different record, because we would talk about different things as least as to that. But my position is the court of appeals looked at this, the Supreme Court looked at it, and ultimately sent me a specific direction and mandate and said, you are to do this. And I think I'm bound by that.

. . . .

I'm going to follow the mandates and delete the counts that the court of appeals took out and resentence using the correct starting point by the Supreme Court, if that's a simple way to say it.

(RP 27-30).

The trial court sentenced Mr. Rodgers based upon an offender score of one for count 2, and an offender score of zero for counts 1, 3, and 4. (CP 189-190; RP 47-50). The offender score of one was based upon a prior conviction for third degree assault, committed on February 14, 2014, and sentenced on July 29, 2014. (CP 189, 211-212; RP 20); *see also* Felony Judgment and Sentence in Spokane County Superior Court No. 14-1-00544-1.⁴ A \$100 DNA collection fee was imposed on Mr. Rodgers pursuant to this prior conviction, and the collection of a

⁴ On the same day as this opening brief was filed, Mr. Rodgers filed a Motion to Accept Additional Evidence under RAP 9.11, asking this Court to accept and consider a copy of his Felony Judgment and Sentence in Spokane County Superior Court No. 14-1-00544-1, as additional evidence.

DNA sample from Mr. Rodgers was ordered. *See also* Felony Judgment and Sentence in Spokane County Superior Court No. 14-1-00544-1.⁴

The trial court imposed 84 months confinement on count 2; 108 months confinement on count 3; and 108 months confinement on count 4. (CP 191; RP 47-50).⁵ The trial court also imposed 60 months for the firearm enhancements on counts 3 and 4, and 36 months for the firearm enhancement on count 2. (CP 191, RP 30, 43-44, 47-50). The trial court ran each of these terms of confinement consecutive to each other, for a total sentence of 456 months confinement. (CP 191; RP 47-50).

The trial court also imposed the following mandatory minimum sentences: “[X] The confinement time on Count(s) 2, 3, and 4 contain(s) a mandatory minimum term of 60 months.” (CP 191).

The trial court imposed terms of community custody with conditions, including the following condition: “[t]hat the defendant not be allowed to have any association or contact with known felons or gang members or their associates.” (CP 192-193).

The trial court imposed legal financial obligations (LFOs), including \$200 in court costs, pursuant to RCW 36.18.020(2)(h), and a \$100 DNA collection fee, pursuant to RCW 43.43.7541. (CP 194).

⁵ The trial court did not impose any confinement on count 1. (CP 191; RP 47).

Mr. Rodgers appealed. (CP 202-203). The trial court entered an Order of Indigency, granting Mr. Rodgers a right to review at public expense. (CP 205-210).

D. ARGUMENT

Issue 1: Whether the trial court erred by refusing to exercise its discretion to consider Mr. Rodgers' requests for an exceptional sentence.

At the resentencing hearing held following remand for resentencing by our Supreme Court, Mr. Rodgers requested the trial court impose an exceptional sentence below the standard range. The trial court declined to consider his arguments for an exceptional sentence, and instead only applied the Supreme Court's holding regarding the application of RCW 9.94A.589(1)(b). Because the Supreme Court's remand did not limit the trial court to making a ministerial correction to Mr. Rodgers' sentence, the trial court abused its discretion when it failed to consider Mr. Rodgers' request for a mitigated sentence. Mr. Rodgers' sentence should be reversed and remanded to the trial court for another resentencing hearing, at which the trial court should consider Mr. Rodgers' request for an exceptional sentence below the standard range.

If the trial court imposes a standard range sentence, the general rule is that the sentence cannot be appealed. *See, e.g., State v. Sandefer*, 79 Wn. App. 178, 180-81, 900 P.2d 1132 (1995). However, a standard range sentence can be challenged on the basis that the trial court refused to exercise discretion. *State v.*

Garcia–Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). Under these circumstances, it is the trial court’s refusal to exercise discretion that is appealable, rather than the sentence itself. *Id.*

An issue becomes an appealable question “[o]nly if the trial court, on remand, exercised its independent judgment, reviewed and ruled again” on the issue. *State v. Wheeler*, 183 Wn.2d 71, 78, 349 P.3d 820 (2015) (citing *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993); *State v. Kilgore*, 167 Wn.2d 28, 39–41, 216 P.3d 393 (2009)).

“[T]he defendant may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding, but not when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence.” *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). In *Toney*, the defendant appealed his sentence, arguing the statute in effect at the time did not mandate firearm enhancements to run consecutively. *Id.* at 790. The Court of Appeals agreed and remanded for resentencing under “proceedings consistent with this opinion.” *Id.* (internal quotation marks omitted) (citation omitted). The trial court held a resentencing hearing and imposed a standard range sentence, and the defendant again appealed. *Id.* at 790-91.

On appeal, the State argued the defendant could not challenge his new sentence because the trial court imposed them following a ministerial remand. *Id.*

at 791. The Court held the defendant could appeal his resentencing, because its remand was not limited to making a ministerial correction, but rather, the case was remanded for resentencing. *Id.* at 792. The court reasoned the trial court did not simply amend a judgment, but rather, it completely resentenced the defendant, “conducting a full, adversarial resentencing proceeding, giving both sides the opportunity to be heard.” *Id.* at 793.

Thus, where a resentencing court exercises its independent judgment on remand, a defendant is entitled to raise new challenges to his sentence on remand. *See id.* at 792-93; *see also State v. Davenport*, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007) (stating “[a]t the resentencing hearing, the trial court had the discretion to consider issues [the defendant] did not raise at his initial sentencing or in his first appeal.”); *State v. Rowland*, 160 Wn. App. 316, 331-32, 249 P.3d 635 (2011) (where the resentencing court was required to correct the offender score and the standard range, the trial court exercised independent discretion, and the defendant was entitled to raise new challenges to his offender score on remand); *State v. Forsman*, No. 49743-3-II, 2018 WL 834718, *5-6 (Wash. Ct. App. Feb. 13, 2018) (the trial court erred by confining resentencing to school bus enhancements and declining to consider the defendant’s criminal history arguments, finding “[b]ecause the mandate was not purely ministerial, the superior court had the authority to conduct a full resentencing hearing.”); *State v. McEvoy*, No. 50026-4-II, 2018 WL 2688272, *2 (Wash. Ct. App. June 5, 2018)

(the resentencing court abused its discretion when it failed to recognize its discretion to resentence the defendant on all counts, where the mandate gave the resentencing court broad authority to conduct a new sentencing hearing); GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority); *Cf. Kilgore*, 167 Wn.2d at 40-41 (ruling there was no issue to review in an appeal following resentencing, where the trial court on remand did not exercise its independent judgment).

“‘[W]hile no defendant is entitled to an exceptional sentence . . . , every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.’” *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007) (quoting *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)). “A trial court abuses discretion when ‘it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.’” *Grayson*, 154 Wn.2d at 342 (quoting *Garcia-Martinez*, 88 Wn. App. at 330). “A trial court errs . . . when it operates under the mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.” *State v. McFarland*, 189 Wn.2d 47, 54, 399 P.3d 1106 (2017) (internal quotation marks omitted) (citations omitted) (alteration in original). “The failure to consider an exceptional sentence is reversible error.” *Grayson*, 154 Wn.2d at 342.

Here, as in *Toney*, the case was remanded for resentencing “consistent with this opinion.” (CP 110); *see also Weatherwax*, 188 Wn.2d at 156; *Toney*, 149 Wn. App. at 793. The trial court held a resentencing hearing on remand, and exercised its independent judgment. (RP 18-51). Mr. Rodgers requested the trial court impose an exceptional sentence below the standard range. (CP 126-131; RP 25, 31-32). The trial court declined to consider these arguments, failing to exercise its discretion. (RP 25-30).

Because the trial court exercised its independent judgment on remand, rather than merely making a ministerial correction to the sentence, Mr. Rodgers was entitled to raise new challenges to his sentence. *See Toney*, 149 Wn. App. at 792; *Davenport*, 140 Wn. App. at 932; *Rowland*, 160 Wn. App. at 331-32; *Forsman*, 2018 WL 834718 at *5-6; *McEvoy*, 2018 WL 2688272 at *2; GR 14.1(a). The trial court failed to recognize its ability to exercise its discretion in granting or denying an exceptional sentence to Mr. Rodgers.

The trial court has the discretion to impose an exceptional sentence below the standard range based on the Mr. Rodgers’ youth at the time he committed the crimes. *See State v. O’Dell*, 183 Wn.2d 680, 683, 690-99, 358 P.3d 359 (2015) (where the defendant committed the crime 10 days after his eighteenth birthday, holding “a defendant’s youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is.”).

The trial court also has the discretion to imposed an exceptional sentence under RCW 9.94A.535(1)(g), “[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 this chapter, as expressed in RCW 9.94A.010.” RCW 9.94A.535(1)(g); *see also State v. Graham*, 181 Wn.2d 878, 880, 882-87, 337 P.3d 319 (2014); *Mulholland*, 161 Wn.2d at 327-331

The trial court abused its discretion when it failed to consider Mr. Rodgers’ request for an exceptional sentence below the standard range. Mr. Rodgers’ sentence should be reversed and remanded to the trial court for another resentencing hearing, at which the trial court should consider Mr. Rodgers’ request for an exceptional sentence below the standard range.

Issue 2: Whether the trial court erred by imposing a 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[,]” and by not modifying this condition in accordance with this Court’s opinion.

At resentencing, the trial court imposed a term of community custody “[t]hat the defendant not be allowed to have any association or contact with known felons or gang members or their associates.” However, in its prior appellate decision, this Court held that this condition is unconstitutionally vague, and ordered the condition must be stricken, clarified, or narrowed at resentencing. Therefore, the trial court erred in imposing a condition of community custody “[t]hat the defendant not be allowed to have any association or contact with

known felons or gang members or their associates[]” at resentencing without the modifications previously ordered by this Court. The case should be reversed and remanded for resentencing.

At Mr. Rodgers’ first sentencing hearing, the trial court imposed terms of community custody with conditions, including the following condition: “[t]hat the defendant not be allowed to have any association or contact with known felons or gang members or their associates.” (CP 59).

In the published portion of its opinion, this Court considered a challenge by Mr. Rodgers to this community custody condition. *Weatherwax*, 193 Wn. App. at 677-81. This Court held the condition is “unconstitutionally vague and must be stricken, clarified, or narrowed at resentencing.” *Id.* at 677. This Court found that gang-related conditions of community custody could be imposed as crime-related. *Id.* at 681. However, “they must be limited to behaviors that signify gang membership or association in or with an identified gang or gangs.” *Id.* Specifically, this Court ruled “[l]imits on association must be confined to felons, gang members or gang associates in the sense defined by RCW 9.94A.030(13), or to other specifically described persons having a direct relation to the circumstances of the crime.” *Id.*

However, when resentencing Mr. Rodgers, the trial court imposed terms of community custody with conditions, including the following condition, without the modifications required by this Court: “[t]hat the defendant not be allowed to

have any association or contact with known felons or gang members or their associates.” (CP 192-193).

Because this Court previously ruled the community custody condition “[t]hat the defendant not be allowed to have any association or contact with known felons or gang members or their associates[]” was “unconstitutionally vague and must be stricken, clarified, or narrowed at resentencing[.]” the trial court erred in imposing this same condition at resentencing without making the modifications in accordance with this Court’s opinion. *See Weatherwax*, 193 Wn. App. at 677. The case should be reversed and remanded for resentencing where the trial court should make these previously ordered modifications.

Issue 3: Whether the trial court erred in imposing a mandatory minimum term of confinement of 60 months on Counts 2, 3, and 4.

At resentencing, the trial court imposed a mandatory minimum term of confinement of 60 months on Counts 2, 3, and 4. However, in its prior appellate decision, this Court reversed the mandatory minimum sentences imposed on counts 1, 3, and 4. And, the statute authorizing mandatory minimum terms of confinement does not apply to the crime in count 2. Therefore, the trial court erred in imposing a mandatory minimum term of confinement of 60 months on Counts 2, 3, and 4. These mandatory minimum terms should be stricken.

At Mr. Rodgers’ first sentencing hearing, the trial court imposed a mandatory minimum term of confinement of 60 months on each first degree

assault count (counts 1, 3, and 4), pursuant to RCW 9.94A.540. (CP 54-55, 57). In the unpublished portion of its opinion, this Court reversed the mandatory minimum sentences imposed on counts 1, 3, and 4. *See Weatherwax*, 193 Wn. App. at 667.

However, when resentencing Mr. Rodgers, trial court imposed the following mandatory minimum sentences: “[X] The confinement time on Count(s) 2, 3, and 4 contain(s) a mandatory minimum term of 60 months.” (CP 191).

Because this Court previously reversed the mandatory minimum sentences imposed on counts 3 and 4, the trial court erred in imposing a mandatory minimum term of confinement of 60 months on Counts 3 and 4 at resentencing. *See Weatherwax*, 193 Wn. App. at 667.

The trial court also erred in imposed a mandatory minimum term of confinement of 60 months on Count 2 at resentencing. By its plain terms, the statute authorizing mandatory minimum terms of confinement does not apply to the anticipatory offense of conspiracy to commit first degree assault. *See RCW 9.94A.540(1)(b)*; *see also State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that illegal or erroneous sentences can be challenged for the first time on appeal).

The trial court erred in imposing mandatory minimum terms of confinement of 60 months on Counts 2, 3, and 4. These terms should be stricken.

Issue 4: Whether the trial court erred in imposing \$200 in court costs and a \$100 DNA collection fee.

The trial court imposed \$200 in court costs and a \$100 DNA collection fee on Mr. Rodgers. The law now prohibits trial courts from imposing \$200 in court costs on defendants who are indigent at the time of sentencing. The law also now provides that the \$100 DNA collection fee is no longer mandatory where the State has previously collected a defendant's DNA as a result of a prior conviction. These changes in the law apply prospectively to cases on direct appeal at the time the law changed. Therefore, the \$200 in court costs and the \$100 DNA collection fee imposed here should be stricken.

At the time of Mr. Rodgers' resentencing, the trial court was authorized to impose a \$200 criminal filing fee:

Clerks of superior courts shall collect the following fees for their official services . . . [u]pon conviction . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 36.18.020(2)(h) (2017).

The trial court was also authorized to impose a \$100 DNA collection fee:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law.

RCW 43.43.7541 (2017).

However, effective June 7, 2018, by House Bill 1783, our Legislature amended RCW 36.18.020(2)(h) to prohibit the imposition of the \$200 criminal filing fee on indigent defendants:

(2) Clerks of superior courts shall collect the following fees for their official services . . . (h) Upon conviction . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, *except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).*

Laws of 2018, ch. 269, § 17 (emphasis added).

In addition, House Bill 1783 amends former RCW 43.43.7541 to make the DNA database fee no longer mandatory if a defendant's DNA has been collected because of a prior conviction:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*

Laws of 2018, ch. 269, § 18 (emphasis added).

Our Supreme Court recently held these statutory amendments apply prospectively to cases on direct appeal at the time the amendment was enacted.

See State v. Ramirez, 426 P.3d 714, 721-23 (Wash. Sup. Ct. 2018).

In *Ramirez*, following his convictions in Superior Court, the court imposed \$2,900 in LFOs on the defendant, including a \$200 criminal filing fee and discretionary LFOs of \$2,100 in attorney fees. *Ramirez*, 426 P.3d at 716. Following sentencing, the trial court issued an order of indigency. *Id.*

On appeal, the defendant argued “the trial court failed to make an adequate individualized inquiry into his ability to pay before imposing discretionary LFOs, contrary to *State v. Blazina*. *Id.* at 717; *see also State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). After Division Two of the Court of Appeals rejected this argument, our Supreme Court granted review. *Id.*

Our Supreme Court first held the trial court did not conduct an adequate individualized inquiry into the defendant’s current and future ability to pay before imposing discretionary LFOs. *Id.* at 717-21. The Court noted that “[n]ormally, this *Blazina* error would entitle [the defendant] to a full resentencing hearing on his ability to pay LFOs.” *Id.* at 721. The Court further noted that after it granted review, the legislature passed House Bill 1783. *Id.*

The Court then considered the defendant’s argument that House Bill 1783’s amendments applied to his case, because he qualified as indigent at the time of sentencing and his case was not yet final when House Bill 1783 was enacted. *Id.* at 721-23. The Court held “House Bill 1783 applies prospectively to [the defendant] because the statutory amendments pertain to costs imposed on criminal defendants following conviction, and [the defendant’s] case was pending on direct review and thus not final when the amendments were enacted.” *Id.* at 722. The Court concluded the defendant was entitled to benefit from the statutory changes in House Bill 1783. *Id.* at 723.

The Court acknowledged that House Bill 1783 made the following statutory changes:

House Bill 1783 . . . establishes that the DNA database fee is no longer mandatory if the offender’s DNA has been collected because of a prior conviction
House Bill 1783 amends former RCW 10.01.160(3) to expressly prohibit courts from imposing discretionary costs on defendant who are indigent at the time of sentencing: “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”

. . . .
House Bill 1783 also amends the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit charging the \$200 criminal filing fee to defendants who are indigent at the time of sentencing.

Id. at 721-22.

Accordingly, the Court held “the trial court impermissibly imposed discretionary LFOs of \$2,100, as well as the \$200 criminal filing fee, on [the defendant].” *Id.* at 723. The Court remanded the case for the trial court to strike these two amounts from the defendant’s judgment and sentence. *Id.*

Here, this direct appeal was not yet final when House Bill 1783’s statutory amendments were enacted. *See* Laws of 2018, ch. 269, § 17. Therefore, Mr. Rodgers is entitled to benefit from the statutory changes in House Bill 1783. *See Ramirez*, 426 P.3d at 721-23.

Mr. Rodgers was indigent at the time of resentencing. (CP 205-210); *see also* RCW 10.101.010(3)(a)-(c) (defining indigent). Therefore, the trial court erred in imposing \$200 in court costs. *See* RCW 36.18.020(2)(h).

In addition, a \$100 DNA collection fee was already imposed upon Mr. Rodgers, and the collection of a DNA sample from him was already ordered, pursuant his prior conviction for third degree assault, committed and sentenced in 2014. (CP 189, 211-212; RP 20); *see also* Felony Judgment and Sentence in Spokane County Superior Court No. 14-1-00544-1.⁶ Therefore, his DNA has been previously collected. The trial court authorized a second collection contrary to the amended RCW 43.43.7541. *See* RCW 43.43.7541.

This court should remand this case for the trial court to strike the \$200 in court costs and the \$100 DNA collection fee from Mr. Rodgers' judgment and sentence.

Issue 5: Whether this Court should deny costs against Mr. Rodgers on appeal in the event the State is the substantially prevailing party.

Mr. Rodgers preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

The trial court entered an Order of Indigency for purposes of appeal, granting Mr. Rodgers the right to review at public expense. (CP 205-210). Mr.

⁶ On the same day as this opening brief was filed, Mr. Rodgers filed a Motion to Accept Additional Evidence under RAP 9.11, asking this Court to accept and consider a copy of his Felony Judgment and Sentence in Spokane County Superior Court No. 14-1-00544-1, as additional evidence.

Rodgers' report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Rodgers remains indigent.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *Blazina*, 182 Wn.2d at 835. In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Id.* at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Rodgers’ indigency has been determined for purposes of this appeal. (CP 205-210).

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “[t]he adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. Mr. Rodgers met this standard for indigency. (CP 205-210).

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); *see also* CP 205-210. “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party

is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to “seriously question” this indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Rodgers to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal.

This Court is asked to deny appellate costs at this time. Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Rodgers’ current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. To the contrary, Mr. Rodgers’ report as to continued

indigency, filed in this Court on the same day as this opening brief, shows that he remains indigent. Appellate costs should not be imposed in this case.

E. CONCLUSION

This case should be reversed and remanded for resentencing to: (1) consider Mr. Rodgers' requests for an exceptional sentence; (2) 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) strike the mandatory minimum terms of confinement of 60 months on Counts 2, 3, and 4; and (4) 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 28th day of November, 2018.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

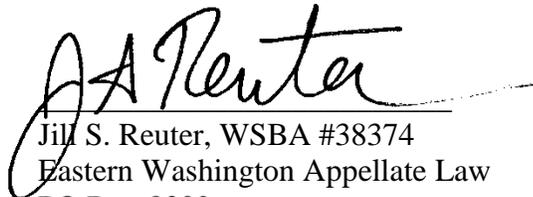
STATE OF WASHINGTON) COA No. 35976-0-III
Plaintiff/Respondent)
vs.) Spokane Co. No. 13-1-03434-5
)
JAYME LEE RODGERS) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 28, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening 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 using the Washington State Appellate Courts' Portal.

Dated this 28th day of November, 2018.



Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 242-3910
admin@ewalaw.com

NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW

November 27, 2018 - 10:13 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35976-0
Appellate Court Case Title: State of Washington v. Jayme Lee Rodgers
Superior Court Case Number: 13-1-03434-5

The following documents have been uploaded:

- 359760_Briefs_20181127221104D3982131_1866.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Opening Brief filed 11.28.18.pdf
- 359760_Financial_20181127221104D3982131_0483.pdf
This File Contains:
Financial - Other
The Original File Name was Report as to Continued Indigency filed 11.28.18.pdf
- 359760_Motion_20181127221104D3982131_5480.pdf
This File Contains:
Motion 1 - Other
The Original File Name was Motion to Accept Additional Evidence filed 11.28.18.pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- scaappeals@spokanecounty.org

Comments:

Sender Name: Jill Reuter - Email: jill@ewalaw.com
Address:
PO BOX 8302
SPOKANE, WA, 99203-0302
Phone: 509-242-3910

Note: The Filing Id is 20181127221104D3982131