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Court of Appeals
Division III
State of Washington
10/10/2019 9:00 AM

No. 36547-6

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

RUDY E. WILLIAMS, Appellant.

BRIEF OF RESPONDENT

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I. **SUMMARY OF ISSUES**

1. DID THE TRIAL COURT ERR WHEN IT AGREED WITH THE PROSECUTOR THAT THE FREE CRIMES DOCTRINE WAS A SUFFICIENT BASIS FOR IMPOSING AN EXCEPTIONAL SENTENCE?

2. DID THE FREE CRIMES DOCTRINE JUSTIFY AN EXCEPTIONAL SENTENCE FOR AN OFFENDER SCORE OF TEN (10) ON EACH OF THREE CONVICTIONS?

3. DID THE TRIAL COURT ABUSE ITS DISCRETION BY IMPOSING A SENTENCE 30 MONTHS LONGER THAN THE TOP END OF THE STANDARD RANGE FOR COUNT 1, WHEN THE TOP END OF THE STANDARD RANGE FOR COUNTS 3 AND 4 WAS 60 MONTHS?

4. DID THE TRIAL COURT ABUSE ITS DISCRETION BY CORRECTING A CLERICAL ERROR IN THE WARRANT OF COMMITMENT SO IT CONFORMED WITH THE AMENDED JUDGMENT AND SENTENCE?

II. SUMMARY OF ARGUMENT

1. THE FREE CRIMES DOCTRINE WAS THE BASIS FOR THE EXCEPTIONAL SENTENCE AND IT JUSTIFIED IMPOSITION OF AN EXCEPTIONAL SENTENCE.
2. IMPOSITION OF AN ADDITIONAL 30 MONTHS, FOR TWO CONCURRENT CRIMES EACH HAVING A STANDARD RANGE OF 51 TO 60 MONTHS, WAS NOT CLEARLY EXCESSIVE.
3. CORRECTING A CLERICAL ERROR IN THE WARRANT OF COMMITMENT WAS NOT AN ABUSE OF DISCRETION.

III. STATEMENT OF THE CASE

Respondent-State would first note that the Appellant makes some very substantial errors in the Appellant's Statement of the Case. Those errors are specifically noted below. This is the Appellant's third appeal. See, State v. Williams, 5 Wn.App.2d 1027 (unreported, Div. 3, 2018); State v. Williams, 6 Wn.App.2d 1041 (unreported Div. 3, 2018). The State eagerly awaits responding to his fourth appeal, filed

three weeks ago with the Asotin County Superior Court.

The Appellant was found guilty at bench trial on November 22, 2016 of Counts 1 through 5, respectively, Felony Domestic Violence No Contact Order Violation, Assault in the Third Degree-Domestic Violence, and three (3) charges of Tampering with a Witness. The Appellant appealed. Division Three of the Court of Appeals affirmed the convictions on Counts 1, 3, and 4, but remanded for trial on the convictions for Counts 2 and 5 (i.e., Assault in the Third Degree, and Tampering with a Witness). Williams, 5 Wn.App.2d 1027. On December 3, 2018, at the resentencing hearing, the State moved to dismiss Counts 2 and 5 rather than retry those charges. Clerk's Papers ("CP") at 3; Verbatim Report of Proceedings ("VRP") at 3. The trial court granted that motion. Id., at 4. The Appellant's offender score was ten (10) for each of the three (3) convicted crimes, Count 1 – Felony Domestic Violence No Contact Order Violation, and Counts 3 and 4, both charges of Tampering with a Witness. Id., at 6. The standard range for Count 1 was 60 to 60 months and for Counts 3 and 4 was 51 to 60 months. Id.

The State recommended Appellant receive an exceptional sentence of 90 months, and based its request upon the free crimes doctrine. RCW 9.94A.535(2)(c). VRP at 4-6. The State made further comments prior to the court making its decision. VRP at 8-9, 9-10, 12-13, 14. Appellant objected and recommended he be sentenced "for

a total of ten months consecutive”, and “ten months a piece”. VRP at 5, 8. He also made numerous other comments to the court. VRP at 6-8, 9, 10-12, 13-14. The court regularly queried the Appellant and the State regarding their arguments. VRP at 3, 6, 8, 9, 10, 11, 12, 13, 14. Following a comment in which the State reaffirmed its recommendation of 60 months on Count 1, and 30 months on both Counts 3 and 4 and to run consecutive to Count 1, the trial court agreed with the State, stating, “That’s going to be the order of the court.” VRP at 14.

The written findings supporting the aggravating factor found by the trial court were entered as part of the Amended Judgment and Sentence, based upon the free crimes doctrine. CP at 6. Also, in the Amended Judgment and Sentence the trial court found that “due to the [Appellant’s] high offender score of 10, Counts 3 [&] 4 would go effectively unpunished.” CP at 15. The court further found that, “A sentence with[in] the standard range and concurrent would clearly be too lenient.” Id. The sentence entered in the Amended Judgment and Sentence was 60 months on Count 1. CP at 9. It also entered a sentence of 30 months on Counts 3 and 4, with the 30 months being concurrent to each other, but consecutive to the 60 month sentence for Count 1. Id.

At the end of the sentencing hearing, the deputy prosecutor filled in a Warrant of Commitment and handed it up to the court

whereupon the trial court signed it. That document indicated the court sentenced the Appellant to 60 months on Count 1, and 30 months on Counts 3 and 4 *concurrent* to Count 1, clearly inconsistent with the consecutive sentence just entered in the Amended Judgment and Sentence. CP at 9, 16.

Irrelevant to this matter, but noted to mitigate any potential confusion, the Amended Judgment and Sentence was further amended on December 18, 2108, for removal of the \$100 DNA fee and the \$200 filing fee pursuant to COA 35271-4-III. State v. Williams, 6 Wn.App.2d 1041 (unreported, Div 3., 2018).

On December 31, 2018, the Appellant motioned to “confirm courts ‘concurrent’ re-sentencing order”, apparently referencing the Warrant of Commitment entered on December 3, 2018. CP at 22. On January 4, 2019, the State moved to amend the Warrant of Commitment, so its language would be consistent with the sentence entered in the Amended Judgment and Sentence. CP at 28. The Court again agreed with the State and entered an Order Amending the Warrant of Commitment on January 14, 2019. CP at 30-31. The Judgment and Sentence was never amended from concurrent sentence to a consecutive sentence.

On January 17, 2019, the Appellant motioned to amend Counts 1, 3, and 4. CP at 37-39. Testimony was taken on February 26, 2019, and the court denied the Appellant’s motion. CP at 48.

IV. DISCUSSION

1. THE FREE CRIMES DOCTRINE WAS THE BASIS FOR THE EXCEPTIONAL SENTENCE AND IT JUSTIFIES IMPOSITION OF AN EXCEPTIONAL SENTENCE.

An appellate court analyzes the appropriateness of an exceptional sentence by asking: (1) Are the reasons given by the sentencing judge supported by the record under the clearly erroneous standard? (2) Do the reasons justify a departure from the standard range under the de novo review standard? (3) Is the sentence clearly too excessive ... under the abuse of discretion standard?

State v. Alvarado, 164 Wn.2d 556, 560–61, 192 P.3d 345, 347

(2008) (*citations omitted*).

A Trial court errs when it imposes a sentence based on a miscalculated offender score or an inaccurate standard range. State v. Chambers, 176 Wn.2d 573, 588, 293 P.3d 1185, 1192 (2013). And,

Under RCW 9.94A.535(2)(c) the legislature provided that where current offenses go unpunished based on criminal history and current offenses, this is an aggravating circumstance per se. This provision was designed to codify the “free crimes” factor as an automatic aggravator without the need for additional fact finding as to whether the existence of “free crimes” results in a “clearly too lenient” sentence.

Alvarado, 164 Wn.2d at 567.

Here, the Appellant was found guilty of Counts 1, 3, and 4. As a result, his offender score was ten (10) for each count. The standard range for Count 1 was 60 to 60 months, and was 51 to 60 months for Counts 3 and 4. The State recommended imposition of a 90 month

exceptional sentence, 60 months on Count 1, the top end of the standard range for the count, to be followed by 30 months for both Counts 3 and 4. The basis for the recommendation was the Appellant's offender score of ten (10) for each of the three felony convictions, and that absent an exceptional sentence two of the concurrent crimes would go unpunished. While the Appellant recommended a lesser sentence, apparently believing incorrectly that the consecutive portion previously imposed was ten months, the trial court agreed with the deputy prosecutor's reasoning.

Additionally, the basis for the exceptional sentence was the "free crimes doctrine". Because that reason is a *per se* aggravating factor, imposition of an exceptional sentence was justified.

2. IMPOSITION OF AN ADDITIONAL 30 MONTHS, FOR TWO CONCURRENT CRIMES EACH HAVING A STANDARD RANGE OF 51 TO 60 MONTHS, WAS NOT CLEARLY EXCESSIVE.

"The trial court has 'all but unbridled discretion' in fashioning the structure and length of an exceptional sentence." State v. France, 176 Wn. App. 463, 470, 308 P.3d 812, 816 (Div. 1, 2013) (*citations omitted*). With respect to an exceptional sentence, a court does not abuse its discretion when it sentences a Defendant to a term that is double the standard range. State v. Negrete, 72 Wn.App. 62, 71, FN 9, 863 P.2d 137, 142 (Div. 3, 1993) (standard range of 26 - 34 months, exceptional sentence of 60 months) (*citing State v. Meija*,

111 Wn.2d. 892, 766 P.2d 454 (1989) (standard range of 12 – 14 months, sentenced to 30 months)). Here, the Appellant fails to argue the 90-month sentence was clearly excessive or was an abuse of discretion. Additionally, the Appellant does not indicate the trial court made an error in the Appellant's offender score calculation or in selecting the standard range when it sentenced the Appellant. Therefore, the 90 month total exceptional sentence was not excessive and was not an abuse of discretion.

3. CORRECTING A CLERICAL ERROR IN THE WARRANT OF COMMITMENT WAS NOT AN ABUSE OF DISCRETION.

Lastly, correcting clerical errors or mistakes is well within the purview of a trial court. CrR 7.8(a-b). Here, the trial did court did not amend the judgment and sentence as is incorrectly alleged by the Appellant. Instead, the court corrected an error on the Warrant of Commitment, as it did not accurately reflect the consecutive sentence entered in the Amended Judgment and Sentence. Because the trial court may, and should, correct errors pursuant to CrR 7.8(a-b), it again did not abuse its discretion in correcting the Warrant of Commitment.

V. CONCLUSION

Because the "free crimes doctrine" is implicated here, and it is a *per se* aggravating factor, the trial court did not abuse its discretion

when it sentenced the Appellant to an exceptional sentence. Further, the 90 month exceptional sentence, 30 months beyond the standard range for Count 1, for an offender score of 10, on three separate counts, all having a standard range top end of 60 months, was not an abuse of discretion. Lastly, the trial court properly corrected the Warrant of Commitment so that it conformed with the sentence entered in the Amended Judgment and Sentence.

Dated this 9 day of October, 2019.

Respectfully submitted,



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Court of Appeals No: 365476

DECLARATION OF SERVICE

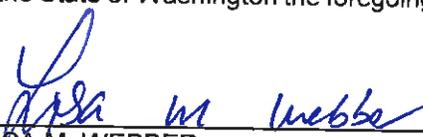
DECLARATION

On October 10, 2019 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

LISE ELLNER
liseellnerlaw@comcast.net

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

Signed at Asotin, Washington on October 10, 2019.


LISA M. WEBBER
Office Manager

DECLARATION
OF SERVICE

ASOTIN COUNTY PROSECUTOR'S OFFICE

October 10, 2019 - 9:00 AM

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