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Division III
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No. 36946-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW STEVEN MCNEIL,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

The trial court sentenced Mathew McNeil to consecutive sentences for current offenses, but did not order an exceptional sentence, in plain violation of RCW 9.94A.589(1)'s requirement that concurrent sentences must be imposed for current offenses unless the court orders an exceptional sentence under RCW 9.94A.535.

This Court should reject the State's efforts to validate this illegal sentence through various theories that have no basis in law or the facts of this case. Because the trial court's sentence violates the plain language of the SRA, reversal and remand for a new sentencing hearing is required.

B. ARGUMENT IN REPLY

1. RCW 9.94A.589(1)(a) governs the trial court's sentencing of Mr. McNeil's current offenses; this mandatory subsection allows for none of the exceptions argued by the State on appeal.

The State's argument that RCW 9.94A.589(1)(a) does not apply to the court's sentencing of Mr. McNeil on current offenses is wrong on both the law and the facts.

a. Mr. McNeil's and the prosecutor's agreed recommendation resulted in the court sentencing him on the same day for current offenses, which is governed by RCW 9.94A.589(1).

The State cites *State v. Moore* for the proposition that the trial court was not bound by the plain language of RCW 9.94A.589(1)(a),

which requires the court impose concurrent sentences for current offenses, unless the court imposes an exceptional sentence. Brief of Respondent (BOR) at 10 (citing *State v. Moore*, 63 Wn. App. 466, 820 P.2d 59 (1991)). *Moore* is inapplicable.

In *Moore*, the question was whether the former version of RCW 9.94A.589(1)¹ or (3)² applied, where the defendant avoided sentencing by another court three years prior only because he absconded, and in the meantime, accrued a new felony conviction. *Moore*, 63 Wn. App. at 467-68. Because he absconded from his sentencing, the defendant was not technically “under sentence” for the prior convictions, which would have allowed the court to impose consecutive terms under section (3). *Id.* at 469. The *Moore* court ruled that section (3), rather than (1), still applied because “[i]n effect, the trial court merely completed the overdue task of sentencing the defendant for the 1987 burglary convictions and then

¹ RCW 9.94A.589(1) is substantively the same as RCW 9.94A.400(1)(a), at issue in *Moore*. Laws of 2000, ch. 28, § 14(1)

² RCW 9.94A.589(3) is substantively the same as RCW 9.94A.400(3), at issue in *Moore*. The only difference in the current subsection is the underlined word “conviction,” included here: “Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.” Laws of 2000, ch. 28, § 14(3).

proceeded to sentence him for the 1990 assault convictions.” *Id.* By absconding three years prior, the defendant prevented the previous sentences from being entered where they otherwise would have. *Id.* at 470. This situation, the court noted, is very different from a court sentencing current offenses under RCW 9.94A.589(1)(a), “in which multiple independent charges in a single jurisdiction are pending against a defendant due to routine delays in sentencing and are sentenced at the same hearing.” *Id.* at 470-71.

Courts have subsequently interpreted *Moore* very narrowly. In *State v. Smith*, the court held that the *Moore* exception did not apply where there “is no evidence that [the defendant] evaded any sentencing date.” 74 Wn. App. 844, 852, n. 6, 875 P.2d 1249 (1994). Likewise, in *State v. Rasmussen*, the trial court granted the defendant’s several requests for continuances while he awaited sentencing on two charges, including his request to act as an informant for the State—a contractual obligation he did not fulfill. 109 Wn. App. 279, 285, 34 P.3d 1235 (2001). Though the *Rasmussen* court did not “endorse” the defendant’s actions, the exception carved out in *Moore* did not apply because “he obtained each continuance with the trial court’s approval.” *Id.* at 286. “He never absconded the court’s jurisdiction or failed to appear at court-ordered hearings.” *Id.* Thus, this is not the “unique scenario” that would allow the court to apply

RCW 9.94A.589(3) instead of subsection (1) *Id.* (citing *Smith*, 74 Wn. App. at 852, n.6).

Despite the weight of governing authority to the contrary, the State still argues that Mr. McNeil's and the State's agreed upon sentencing hearing for current offenses provides a set of "unique facts," allowing the court to sentence Mr. McNeil under RCW 9.94A.589(3), rather than section (1). BOR at 10.

Notably, the State's litany of allegations supporting its contention there was "nothing routine about the delay" in Mr. McNeil's sentencing provides no citation to the record. BOR at 11-12. The record on appeal reveals that the continuances for Mr. McNeil's sentencing were routine. The State did not object to Mr. McNeil's first request to continue sentencing so he could try to enter a drug rehabilitation program in the jail in September 2018. 9/5/18 RP 9. The court granted this continuance and scheduled his sentencing for January of 2019. *Id.* at 10.

In its Statement of Facts, the State admits the record does not indicate why the court continued the January sentencing hearing to February 2019. BOR at 3. Then, without citation to the record, the State alleges that Mr. McNeil "specifically manipulated his sentencing date to February 27." BOR at 12.

The State did not bring charges and arraign Mr. McNeil for the instant conduct until months later, in April of 2019. CP 1. The record reflects that all three cases were intended to be resolved and sentenced together in July of 2019 by agreed recommendation between Mr. McNeil and the State. 7/3/19 RP 23-26.

This agreed-upon sentencing date, where all three cases were set to be resolved at the same time, cannot be compared to the circumstances in *Moore*, who absconded to avoid being sentenced. *Moore*, 63 Wn. App at 467. The agreed-upon delays in Mr. McNeil’s case are precisely the sort of “routine delays” based on multiple independent charges that are governed by RCW 9.94A.589(1). *Rasmussen*, 109 Wn. App. at 286.

Moreover, a plain reading of RCW 9.94A.589(3) “clearly declares that its application is subject to subsections (1) and (2). If a conflict results from the application of subsection (3), it yields to the result under subsections (1) and/or (2).” *State v. Elmore*, 143 Wn. App. 185, 190, 177 P.3d 172 (2008). Subsection (3) of RCW 9.94A.589 has no application when, as here, the person is being sentenced for current offenses. *Id.*

b. There are no “equitable considerations” that allow a sentencing court to ignore the mandates of the SRA.

There are no “equitable principles” that allow the court to impose a sentence not otherwise authorized by the SRA as urged by the State. BOR

at 13. The only case cited by the State in support of this proposition is a 1940s case involving suit for money damages in an “equity court,” which is not constrained by the criminal laws set by the legislature as is a criminal court.³ BOR at 13 (citing *Income Inv’rs v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940)). This assertion that rules of equity, rather than the SRA, govern a trial court’s sentencing authority is contrary to well settled law that a court commits reversible error when it exceeds its sentencing authority under the SRA. *State v. Winborne*, 167 Wn. App. 320, 330, 273 P.3d 454 (2012) (citing *State v. Hale*, 94 Wn. App. 46, 53, 971 P.2d 88 (1999)). This Court should reject the State’s argument that the court can abandon the authority granted to it by the SRA based on “equitable” considerations.

c. *Mr. McNeil did not invite the court to impose an illegal sentence.*

Mr. McNeil did not invite the court’s error as argued by the State. BOR 13. He did not request the court to impose the sentence it did, but even if he had, the invited error doctrine does not preclude review of an

³ Black’s Law Dictionary defines a “court of equity” as a court that does not use law to resolve disputes: “A court that (1) has jurisdiction in equity, (2) administers and decides controversies in accordance with the rules, principles, and precedents of equity, and (3) follows the forms and procedures of chancery.” COURT, Black’s Law Dictionary (11th ed. 2019).

illegally imposed sentence. *State v. Mercado*, 181 Wn. App. 624, 631, 326 P.3d 154 (2014)). This is because the fixing of legal punishments for criminal offenses is a legislative function. *Id.* (citing *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719 (1986)). Even where a defendant clearly invited the challenged sentence by participating in a plea agreement, if the sentencing court exceeded its statutory authority, the invited error doctrine will not preclude appellate review. *Id.* at 631 (citing *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 872, 50 P.3d 618 (2002)).

Mr. McNeil could not have invited the court's illegal sentence where the court rejected the parties' recommendation and sentenced Mr. McNeil contrary to the request of the parties. 7/3/19 RP 31-32. Even if Mr. McNeil had requested this sentence, he could still challenge it on appeal if the sentence is not authorized by the SRA. The State's argument that this was invited error is supported by neither fact nor law. BOR at 13-14.

d. Mr. McNeil is not in breach of the rejected plea agreement.

The concept of breach does not apply to Mr. McNeil's challenge to the court's sentence that it entered after rejecting the parties' agreed upon recommendation. BOR at 14-15.

Plea agreements are contracts, and the law imposes upon the State an implied promise to act in good faith. *State v. Harrison*, 148 Wn.2d 550,

556, 61 P.3d 1104 (2003). The concept of breach does not apply here, where both parties, consistent with the terms of their joint agreement, advocated an agreed sentence to the court. 7/3/19 RP 24-27. Mr. McNeil's plea form stated the court could reject this recommendation and sentence him within the standard range unless the court finds a compelling reason not to. CP 11. The trial court did just this when it entered the illegal sentence that Mr. McNeil now challenges on appeal. 7/3/19 RP 32-33.

Due process requires a prosecutor to adhere to the terms of the agreement. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). By the State's logic, it is the State that is in breach of the agreement because the State is now advocating on appeal for a sentence that is contrary to the terms of the plea agreement. In *Sledge*, the State breached the plea agreement by effectively advocating for an exceptional sentence, contrary to the parties' agreement. *Id.* This is what the State is advocating here by arguing that Mr. McNeil is not entitled to reversal and remand on a sentence the court imposed contrary to the parties' agreed recommendation.

When the State breaches a plea agreement, the purpose of the remedy is to restore the defendant to the position he held before the breach. *Harrison*, 148 Wn.2d at 559. If this Court determines the concept of breach applies here, Mr. McNeil is entitled to "a reversal of the

original sentence and remand for a new sentencing, preferably before a different judge.” *Id.*

2. Because the trial court’s sentence is not authorized by the SRA, remand for resentencing is required.

The State’s concession that remand is necessary, but only for the court to enter findings of fact and conclusions of law, fails to account for the critical fact that the court’s sentence violates the SRA, which means he must be resentenced.

If the court had ordered an exceptional sentence in Mr. McNeil’s judgment and sentence, but simply failed to enter findings of fact in support of the exceptional sentence, then the State would be correct that under *Friedlund*, remand for entry of findings would be the appropriate remedy. *State v. Friedlund*, 182 Wn.2d 388, 395, 341 P.3d 280 (2015); BOR at 16-17. But unlike in *Friedlund*, the trial court did not order an exceptional sentence in Mr. McNeils’s judgment and sentence. *See* CP 24 (no exceptional sentence imposed in judgment and sentence). Instead, the court impermissibly sentenced Mr. McNeil to consecutive terms for current offenses pursuant to RCW 9.94A.589(3). CP 25.

Friedlund made clear that an “oral colloquy, even if on the record, cannot satisfy the SRA’s requirement that findings justifying an exceptional sentence must be in writing.” 182 Wn.2d at 393. If an oral

colloquy does not suffice for written findings, it certainly cannot be used to infer the court ordered an exceptional sentence when it did not, as the State appears to argue can be inferred here. BOR at 17-18.

Contrary to the State's claim, *Rasmussen* is directly on point, because in *Rasmussen*, the trial court imposed consecutive sentences for offenses sentenced on the same day, but the court did not impose an exceptional sentence. *Rasmussen*, 109 Wn. App. at 286. Reversal and remand for a new sentencing hearing is required here, just as in *Rasmussen*, because the court's sentence violates the SRA. *Id.*

The trial court did not impose an exceptional sentence, but rather sentenced Mr. McNeil to consecutive terms for current offenses in violation of RCW 9.94A.589(1)(a). Remand for resentencing is required because the court's sentence violates the SRA. *Rasmussen*, 109 Wn. App. at 286.

3. Mr. McNeil withdraws assignment of error 1.

In Mr. McNeil's opening brief he assigned error to the court's entry of his guilty plea on the grounds that it was involuntary. Brief of Appellant at 1. Counsel moves to withdraw this assignment of error and his argument in support of withdrawal of his guilty plea.

C. CONCLUSION

There is no exception that permitted the court to sentence Mr. McNeil contrary to the requirements of the SRA. The trial court's consecutive sentences imposed in violation of RCW 9.94A.589(1)'s plain command violate the SRA, requiring reversal and remand for a new sentencing hearing.

DATED this 19th day of March, 2020.

Respectfully submitted,

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STATE OF WASHINGTON,)	
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v.)	NO. 36946-3-III
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MATTHEW MCNEIL,)	
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APPELLANT.)	

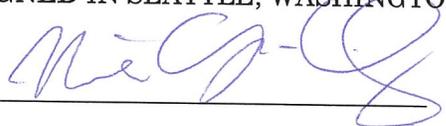
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