

FILED
Court of Appeals
Division III
State of Washington
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No. 36946-3-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

Matthew McNeil,

Appellant.

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

AMENDED OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court imposed consecutive sentences for current offenses in violation of its statutory authority under the Sentencing Reform Act (SRA).

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. RCW 9.94A.589(1)(a) requires that when a person is sentenced on more than one felony offense on the same day, the sentences are to run concurrently unless the court makes findings in support of an exceptional sentence under RCW 9.94A.535. Here, the court sentenced Mr. McNeil in the same sentencing hearing, imposed consecutive sentences, but not as an exceptional sentence. Does this sentence violate the SRA?

C. STATEMENT OF THE CASE

Mr. McNeil pleaded guilty to two separate offenses of attempting to elude in September of 2018.¹ CP 22; 9/5/18 RP 4². Mr. McNeil waived speedy sentencing so that he could take a series of classes while in jail, including a drug treatment course. 9/5/18 RP 9-10.

¹ COA No. 36944-7-III and No. 36945-5-III.

² Citations from 9/5/18 are from the VRP in COA No. 36944-7-III and No. 36945-5-III.

While Mr. McNeil was in jail, staff discovered his effort to obtain the medication used to treat opiate addiction, Suboxone³ through the mail. CP 3. For this, Mr. McNeil was charged with two criminal counts: possession of a controlled substance with intent to deliver, and delivery of a controlled substance. CP 1.

The State filed an amended information charging a single count of conspiracy to commit delivery of a controlled substance on the day Mr. McNeil was scheduled to enter a plea. CP 6; 7/3/19 RP 2. Mr. McNeil was also scheduled to be sentenced on his two prior guilty pleas for attempting to elude. 7/3/19 RP 2, 7.

The State announced that Mr. McNeil was scheduled for entry of a guilty plea to the amended count of conspiracy to commit delivery of a controlled substance. 7/3/19 RP 2. The trial court reviewed Mr. McNeil's guilty plea form with him. 7/3/19 RP 2-6. The court found him guilty of the offense based on the factual basis provided in the police reports. CP 16; 7/3/19 RP 6.

³<https://www.aclu-wa.org/cases/kortlever-et-al-v-whatcom-county> (The ACLU brought a legal challenge against Whatcom County Jail for depriving its inmates of "Medication-Assisted Treatment" (MAT), including buprenorphine (Suboxone and Subutex)).

The State articulated the parties' joint recommendation of six months to serve on this charge, consecutive to a recommended DOSA⁴ for the attempting to elude charges. 7/3/19 RP 7.

The court rejected this joint recommendation, instead imposing the maximum confinement permitted by law for this offense, 12 months. CP 25; 7/3/19 RP 11-13. The court ran this sentence consecutive to the attempting to elude charges. CP 25. The court noted orally that it could impose an exceptional sentence based on Mr. McNeil's 9+ offender score, because "a crime would be unpunished if the Court were to run these concurrent." 7/3/19 RP 11-12. However, the court did not impose an exceptional sentence. CP 24. Rather, the court ran the three offenses consecutive to each other under RCW 9.94A.589(3). CP 25.

D. ARGUMENT

The court's imposition of consecutive sentences under RCW 9.94A.589(3) is not authorized by the SRA.

The court did not have authority to sentence Mr. McNeil to consecutive sentences under RCW 9.94A.589(3).

⁴ Drug Offender Sentencing Alternative.

a. Mr. McNeil was sentenced for “current offenses.”

Felony offenses sentenced on the same day are “current offenses” and must be sentenced concurrently, unless sentenced under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a); *State v. Rasmussen*, 109 Wn. App. 279, 286, 34 P.3d 1235 (2001) (“RCW 9.94A.400(1)(a)⁵ controls and requires that a court make finding of aggravating circumstances warranting imposition of an exceptional sentence before sentences imposed on the same day may be served consecutively if appropriate.”)).

“While the SRA does not formally define ‘current offense,’ the term is defined functionally as convictions entered or sentenced on the same day.” *In re Finstad*, 177 Wn.2d 501, 507, 301 P.3d 450 (2013). Mr. McNeil was sentenced on the same day, in the same sentencing hearing, for this matter, along with the guilty pleas to attempting to elude for Superior Court # 18-1-00848-5⁶ and Superior Court # 17-1-02238-2.⁷ CP 22; 7/3/19 RP 2. Because Mr. McNeil’s offenses in these cases were sentenced on the same day, in the same hearing they were

⁵ Recodified as § 9.94A.589 by Laws 2001, ch. 10, § 6.

⁶ Court of Appeals number 36945-5-III.

⁷ Court of Appeals number 36944-7-III.

“current offenses.” His sentencing falls squarely under RCW

9.94A.589(1)(a).

b. The court’s consecutive sentence is not permitted by law.

The trial court ordered consecutive sentences in violation of the requirements of the SRA.

The trial court sentenced Mr. McNeil to consecutive sentences under RCW 9.94A.589(3). CP 25. However, the trial court did not order an exceptional sentence in Mr. McNeil’s Judgment and Sentence. CP 24. And the court entered no written findings in support of an exceptional sentence.

RCW 9.94A.589(3) expressly states that it is “subject to” RCW 9.94A.589(1), which applies to the sentencing of current offenses. Because Mr. McNeil was sentenced on “current offenses,” RCW 9.94A.589(1) applies, and the court was required to either sentence him to concurrent sentences or impose an exceptional sentence under RCW 9.94A.535. Under RCW 9.94A.535, the trial court must find “substantial and compelling reasons justifying an exceptional sentence” and “set forth the reasons for its decision in written findings of fact and conclusions of law.” The entry of written findings is “essential” when a

court imposes an exceptional sentence. *State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015).

The trial court orally noted that it could impose an exceptional sentence based on Mr. McNeil's high offender score that would leave a crime unpunished if the Court were to run these concurrent. 7/3/19 RP 11-12. However, it cannot be argued that the court's statement about its ability to impose an exceptional sentence satisfies the SRA's requirements: "an oral colloquy, even if on the record, cannot satisfy the SRA's requirement that findings justifying an exceptional sentence must be in writing." *Friedlund*, 182 Wn.2d at 393.

Because the trial court imposed Mr. McNeil's sentences in all causes on the same date, the provisions of RCW 9.94A.589(3) permitting a court to impose consecutive sentences was subject to RCW 9.94A.589(1), which allows consecutive sentences for current offenses only under the exceptional sentence provisions of RCW 9.94A.535. The trial court's order of a consecutive sentence without imposing an exceptional sentence, and absent written findings, violates the SRA.

Mr. McNeil's sentence must be vacated and remanded for resentencing. *Rasmussen*, 109 Wn. App. at 286.

E. CONCLUSION

The court's order that this sentence run consecutive to other current offenses, without the court ordering an exceptional sentence, violates the commands of the SRA and requires remand for resentencing.

DATED this 6th day of April 2020.

Respectfully submitted,
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RESPONDENT,)	
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v.)	NO. 36946-3-III
)	
MATTHEW MCNEIL,)	
)	
APPELLANT.)	

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