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NO. 37050-0-III

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

STATE OF WASHINGTON,

Appellant,

v.

ANGELA FRANKLIN,

Respondent,

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

The Honorable Lesley A. Allan, Judge

BRIEF OF RESPONDENT

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A. COUNTERSTATEMENT OF THE ISSUES

1. The record shows the trial court imposed an exceptional sentence of three months (as opposed to a standard range sentence of six months and one day) because of Angela Lee Franklin's diminished culpability, the 17-month delay in processing the case, and to reward Franklin for her continuing cooperation with the Department of Corrections. Because the trial court had valid bases to impose the exceptional sentence downward, should Franklin's sentence be affirmed?

2a. The prosecutor at the sentencing hearing indicated a shorter sentence would be more feasible to allow Franklin to serve the sentence on work release or electronic home monitoring, pointed out that the mitigating circumstances listed in RCW 9.94A.535(1) were not the exclusive bases to depart from the standard range, and drafted the trial court's findings supporting the exceptional sentence. Even if the trial court erred in imposing the exceptional sentence downward, was the error invited by the prosecution?

2b. As noted in the preceding issue statement, at sentencing, the prosecutor led the trial court to believe the state

supported an exceptional sentence downward. Yet the state now appeals the exceptional sentence downward. Should the state be judicially estopped from taking inconsistent positions at sentencing and on appeal?

2c. Given that its deputy supported the exceptional sentence at the sentencing hearing, the state never to the exceptional sentence downward in the trial court. Given that the imposition of an exceptional sentence requires a case-by-case adjudication, has the state failed to preserve appellate review of the exceptional sentence imposed?

B. COUNTERSTATEMENT OF THE CASE

Franklin pleaded guilty to one count of simple possession of methamphetamine. CP 7-18. In her statement on plea of guilty, she wrote, “On or about the 2nd day of March, 2018, in Chelan County, WA, I unlawfully possessed a small amount of methamphetamine.” CP 16. Police reports indicated she possessed only one-half gram of meth. CP 5.

At sentencing, the parties came to court jointly recommending the low-end of the standard range, which was six months and one day. RP 3. The trial court asked Franklin if she

wished to speak and Franklin described her success in achieving sobriety, the delay in the case, and her desire to move forward with her life, among other things. RP 4-6. Franklin indicated that her sobriety began on the same day she was arrested in this case, stating that becoming sober was her choice and that she was “doing everything I’m supposed to because I want to.” RP 6-7, 11-12. Franklin also indicated she was still under Department of Corrections supervision in another case and was in full compliance and cooperation. RP 7.

The trial court asked the prosecutor what options were available, suggesting it wished to impose a shorter sentence. RP 8. The prosecutor suggested that six-month sentence “would be a really long time for somebody to do work crew,” stated that Franklin would likely not be able to work in addition to the work release sentence, and expressed concern about the financial expense of electronic home monitoring. RP 8-9.

The trial court stated it believed that “Ms. Franklin has been successful in her DOC supervision, that she is employed. And the sentence of six months plus a day, considering the nature of the crime here and all of these other factors, seems excessive to the

Court.” RP 12. The court asked the prosecutor for input: “you’re the party that might want to challenge that.” RP 12. Rather than challenge the trial court, the prosecutor stated, “My read of [RCW] 9.94A.535 does not say -- it’s not an exhaustive list.” RP 12. The trial court agreed, “It’s not, yeah. It’s including but not limited to.” RP 12.

The trial court then imposed an exceptional sentence downward of three months, “which for a simple possession is a decent length of sentence,” authorizing Franklin to serve the sentence on electronic home monitoring with credit for time already served. RP 12-14; CP 23. The prosecutor drafted findings of fact to support the exceptional sentence, “trying to get the language right” for the appendix. RP 14. The trial court adopted the state’s language and added, “Imposition of the standard range is not in the interests of justice.” RP 15; CP 32.

C. ARGUMENT

1. **The trial court based its exceptional sentence on Franklin’s diminished culpability and cooperation with authorities, which provides a legally valid basis for an exceptional sentence downward**

A trial court may impose a sentence outside the standard range “if it finds, considering the purpose of [chapter 9.94A RCW], that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. The legislature intended this exceptional sentence provision “to authorize courts to tailor the sentence—as to both the length and the type of punishment imposed—to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid.” In re Postsentence Petition of Smith, 139 Wn. App. 600, 603, 61 P.3d 483 (2007).

An exceptional sentence may be reversed on appeal only if:

- (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence;
- (2) under a de novo standard, the reasons supplied by the trial court do not justify a departure from the standard range;
- or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient. RCW

9.94A.585(4); State v. France, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

RCW 9.94A.535(1) permits a trial court to impose an exceptional sentence below the standard range “if it finds that mitigating circumstances are established by a preponderance of the evidence.” The statute provides an illustrative list of mitigating factors that “are not intended to be exclusive reasons for the exceptional sentences.” RCW 9.94A.535(1).

On appeal, the prosecution does not challenge the factual support for the trial court’s findings and does not argue the three-month sentence was clearly too lenient.¹ Therefore, the only matter disputed by the state is whether the trial court had a valid basis to impose a mitigated exceptional sentence. Br. of Appellant at 1 (assigning error only to the trial court’s purported lack of “valid basis” for imposing sentence).

The state is mistaken in disputing the trial court’s basis for imposing an exceptional sentence of three months. The state is correct that the mere personal characteristics of the defendant are

¹ This likely results in part from the fact that, as discussed below, the prosecution encouraged and agreed to the three-month sentence Franklin received.

not valid bases for imposing exceptional sentences downward. See Br. of Appellant at 3-4 (relying primarily on State v. Murray, 128 Wn. App. 718, 724-25, 116 P.3d 1072 (2005), for the proposition that “[n]either addictions nor other personal circumstances of defendants have been found to support exceptional sentences downward”). Franklin also agrees with the state that, generally speaking, the pertinent question “how the circumstances of [the defendant]’s crime distinguish it from other crimes in the same category.” Murray, 128 Wn. App. at 725 (citing State v. Pennington, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989)). But the state fails to recognize that the trial court did distinguish Franklin’s crime based on her cooperation and lack of culpability.

When the defendant’s personal circumstances or undertakings are relevant to assessing her culpability in committing the crime in question, a sentencing court does not err in imposing an exceptional sentence below the standard range. The Washington Supreme Court recently concluded that a court conducting a resentencing “may certainly exercise its discretion to consider evidence of subsequent rehabilitation where such evidence is relevant to the circumstances of the crime or the offender’s

culpability.” State v. Ramos, 187 Wn.2d 420, 449, 387 P.3d 650 (2017) (emphasis added). The Ramos court made this statement in the context of resentencing a juvenile who had received a de facto life-without-parole sentence in 1993. Id. at 430-32. If a resentencing court may consider evidence of subsequent rehabilitation where that evidence is relevant to assessing the defendant’s culpability at the time of the crime, there is no sound reason why a sentencing court cannot consider such evidence when sentencing a defendant in the first instance, as here.

The Washington Supreme Court has also approved of an exceptional sentence downward based on the defendant’s cooperation with and assistance to the state. State v. Nelson, 108 Wn.2d 491, 499, 740 P.2d 835 (1987). The Washington Supreme Court quoted the Court of Appeals Nelson decision with approval: “we see no reason why the judge cannot reward the defendant’s cooperative attitude further by granting leniency in sentencing.” Id. (quoting State v. Nelson, 43 Wn. App. 871, 877-78, 719 P.2d 961 (1986)).

Nelson and Ramos establish that it is appropriate to consider a defendant’s personal circumstances when they inform the

sentencing court regarding the defendant's diminished culpability or willingness to cooperate with authorities. In this case, the trial court did exactly as the trial courts did in Nelson and Ramos—it determined that Franklin's circumstances and cooperation showed her lessened culpability for possessing methamphetamine and accordingly imposed an exceptional sentence of three months rather than six months and one day.

The trial court's discussion with Franklin began by noting "this is a real old case" that had been pending for 17 months, since March 2, 2018. RP 4-5; CP 4. Franklin noted she had maintained her sobriety since March 2, 2018, the day she was arrested on the instant charge, and the trial court congratulated her. RP 4-5, 11. The trial court also asked Franklin how she "manage[d] to get sober and stay sober" and Franklin answered,

A decision. I made the choice to. . . I'm not going to be in that position anymore ever again. And so it's just -- but it's hard because it's like I'm doing everything I'm supposed to because I want to. It's my choice. It's not because I have to. It's I want to.

RP 6-7. Franklin also indicated she was on current Department of Corrections community custody, stating, "And I'm complying with DOC as well." RP 7. Franklin clarified that the "last time I've done

anything was” March 2, 2018, the day she was arrested on the instant charge. RP 11-12.

Based on the court’s exchange with Franklin, the court expressed concern at the delay in the case and asked the state for options other than imposing a six-month-and-one-day sentence. RP 8. The court stated that “considering where [Franklin] is in her life right now, in the Court’s view, is getting hit kind of hard” and so it was “inclined to find some mitigating circumstances that would justify the Court in this particular case going below the standard range.” RP 10. The court again noted the amount of time it took to bring Franklin before the court for sentencing, noted that, after a drug-offender sentencing alternative was revoked in other case, Franklin had “been on DOC supervision successfully apparently as far as we know.” RP 10-11. Given Franklin’s success on DOC supervision, sobriety since the date of arrest and “the nature of the crime here and all of these other factors,” the trial court determined that a six-month sentence “seem[ed] excessive.” RP 12. The court then imposed a “sentence here of three months which for a simple possession is a decent length of sentence,” also authorizing Franklin to serve the sentence on electronic home monitoring, given

that Franklin was “one of those rare circumstances where it would be appropriate to allow [her] to do it in a different way and would not serve to derail the positive progress that [she is] making.” RP 12-13.

The record shows that the trial court was not merely considering Franklin’s personal circumstances to impose an exceptional sentence downward but considering how these personal circumstances showed Franklin was less culpable for the crime of simple possession than the norm. The court noted that the delay in resolving the case was inappropriate, noted Franklin’s positive progress despite not having been sentenced, including her sobriety from the date of arrest, and noted Franklin had been cooperative and compliant with ongoing DOC supervision. In the trial court’s view, these circumstances lessened Franklin’s culpability such that a six-month-and-one-day sentence seemed excessive. The trial court considered Franklin’s circumstances from what she stated at the sentencing hearing “relevant to the circumstances of the crime or the offender’s culpability,” which may validly support an exceptional mitigated sentence. Ramos, 187 Wn.2d at 449. In addition, “[t]he trial court properly relied on [Franklin]’s assistance

and cooperation with the authorities as a mitigating factor in sentence.” Nelson 107 Wn.2d at 500-01. The trial court committed no error.

To be sure, the trial court’s written findings, drafted by the prosecutor, could have more clearly indicated that the trial court was not merely relying on Franklin’s personal circumstances. The written findings state, “The defendant has been sober for 17 months,” “[t]he defendant is employed,” and “[t]he length of time since the time of the crime [and] the circumstance since then have substantially changed.” CP 32. The trial court also determined that a standard range sentence was “not in the interests of justice.” CP 32. Franklin concedes these findings could have been better written to ensure they are not interpreted as the trial court’s mere reliance on Franklin’s personal circumstances, rather than her diminished culpability. However, where there is no inconsistency between oral and written findings, “[a]n appellate court is permitted to use the trial court’s oral decision to interpret findings of fact and conclusions of law[.]” State v. Moon, 48 Wn. App. 647, 653, 739 P.2d 1157 (1987). There is no inconsistency here and the court’s oral ruling made clear that Franklin’s success with DOC

supervision, sobriety, and progress diminished her culpability or should be rewarded “considering the nature of the crime here.” RP 10-12. The trial court acted appropriately under Ramos and Nelson. There was no error.

Finally, the trial court also noted that this was a crime of simple possession and otherwise noted the “nature of the crime here” when imposing an exceptional sentence. RP 12. Indeed, Franklin’s culpability was also diminished based on the crime itself. In her own words in the statement on plea of guilty, Franklin admitted she “unlawfully possessed a small amount of methamphetamine.” CP 16. Police reported she possessed only one-half gram of meth. CP 5. Possession of a small quantity of drugs is itself a substantial and compelling reason to impose an exceptional sentence below the standard range.² State v. Alexander, 125 Wn.2d 717, 726-27, 888 P.2d 1169 (1995) (“We . . . conclude that a trial court may treat an ‘extraordinarily small amount’ of a controlled substance as a substantial and compelling reason for downward departure from the standard sentence

² This likely represents another reason for why, as discussed below, the prosecution encouraged Franklin’s mitigated sentence of three months.

range.”). The Alexander court recognized the small-quantity basis for an exceptional sentence by pointing out the legislature had defined controlled substance violations to include crimes involving anything less than two kilograms of a drug and noting that Alexander possessed only .00003 kilograms of cocaine. Id. Because Franklin possessed only .0005 kilograms of methamphetamine, the trial court was similarly empowered to impose an exceptional sentence below the standard range here.

Instead of imposing a six-month-and-one-day standard range sentence, the trial court imposed a sentence of three months. CP 23. For all the reasons discussed above, the trial court had legally valid, substantial and compelling reasons to impose this sentence. The trial court’s lawful exceptional sentence below the standard range should be affirmed.

2. **If Franklin’s exceptional sentence was erroneous, the prosecution invited the error, is estopped from asserting the error, or waived the error, requiring affirmance**
 - a. By encouraging the trial court to impose an exceptional sentence below the standard range, the prosecution invited the error it now complains of

Under the invited error doctrine, a party may not set up an error in the trial court and then use the error as a basis for an appeal. State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). “To determine whether the invited error doctrine is applicable to a case, we may consider whether the [appellant] affirmatively assented to the error, materially contributed to it, or benefited from it.” State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014) (citing State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321 (2009); In re Pers. Restraint of Copland, 176 Wn. App. 432, 442, 309 P.3d 626 (2013)). To qualify as invited error, the error “must be the result of an affirmative, knowing, and voluntary act.” Mercado, 181 Wn. App. at 630.

If the exceptional mitigated sentence imposed on Franklin was error, the error was invited by the prosecution. After hearing from Franklin, the trial court turned to the prosecutor and asked

whether there were any options to alter the six-month sentencing recommendation. RP 8. The prosecutor stated she was “looking at it,” noted possible “reprisal from the powers that be,” and then asserted that six months and a day “would be a really long time for somebody to do work crew. I mean, she wouldn’t be able to work as much on top of that. And I don’t know that electronic home monitoring would be more expensive if finances are a problem.” RP 8-9. The prosecutor’s statements acknowledge she was aware she was departing from the state’s initial recommendation, even noting she could face reprisal by her supervisors for doing so. The prosecutor then suggested reasons for imposing a shorter sentence, including potential difficulties with a six-month work release or electronic home monitoring sentence. The prosecutor’s statements affirmatively undermined the state’s own six-month-and-one-day recommendation.

A few moments later, the court indicated that “the sentence of six months plus a day, considering the nature of the crime here and all of these other factors, seems excessive to the Court.” RP 12. The court then again addressed the prosecutor: “you’re the party that might want to challenge that. And I do this sort of very

cautiously because I'm concerned about it wouldn't be the Court's intent to set a precedent of starting to disregard the standard sentence range." RP 12. The prosecutor responded, "My read of [RCW] 9.94A.535 does not say -- it's not an exhaustive list, so" RP 12. Here again, the state affirmatively indicated that the trial court could impose an exceptional sentence below the standard range because RCW 9.94A.535(1) provides that the statute's enumerated mitigating circumstances "are not intended to be exclusive reasons for exceptional sentences." This represents another voluntary and affirmative undertaking by the prosecution in support of imposing an exceptional sentence below the standard range. If there was error, it was invited by the state.

In addition, after imposing the sentence, the state indicated that it was preparing findings to support the exceptional sentence: "I'm trying to get the language right on the 2.4 [appendix 2.4 to the judgment and sentence]. Feel free to change it." RP 14. The trial court joked that it would change it "[o]nly if Mr. Hershey [presumably the chief criminal deputy] is going to appeal it." RP 14-15. The court stated to the prosecutor that it was adding language about a standard range sentence being "not in the

interests of justice” but “otherwise, ‘you’ve got it very well written[.]” RP 15. Here too, the state affirmatively assisted the trial court in imposing an exceptional sentence downward. It drafted the findings of fact and conclusions of law that enabled it the court to impose its exceptional sentence, even when the trial court joked that it would not change the findings or conclusions unless the prosecutor’s supervisor were to appeal. The prosecutor was aware that her superiors might disagree with her decision to support a three-month exceptional sentence yet affirmatively supported the exceptional sentence anyway, repeatedly assisting the court in imposing it. If it was error to impose the exceptional sentence, the prosecutor invited the error.

The invited error doctrine precludes the state from complaining about its own deputy’s actions at sentencing. Perhaps the prosecutor did face reprisal for assenting to the exceptional sentence, but that is an internal matter for the prosecutor’s office, not a basis for appeal. The trial court’s sentence should be affirmed.

- b. The prosecution should be estopped from taking a position on appeal inconsistent with its position in the trial court

The state should also be precluded from challenging the trial court's exceptional sentence now because it supported the sentence at the time. "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). The doctrine is concerned with a party's inconsistent assertions and applies "if a litigant's prior inconsistent position benefited the litigant or was accepted by the court." CHD, Inc. v. Taggart, 153 Wn. App. 94, 102, 220 P.3d 229 (2009).

Courts focus on three primary factors when deciding whether to apply judicial estoppel:

"(1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Miller v. Campbell, 164 Wn.2d 529, 539, 192 P.3d 352 (2008) (quoting Arkison v. Ethan Allen, Inc., 160 Wn.2d 529, 538-39, 192 P.3d 352 (2008)). All three factors are present in this case.

First, the state's position at sentencing supported or at least acquiesced in an exceptional sentence below the standard range. This is clearly inconsistent with its current position on appeal that challenges the exceptional sentence Franklin received.

Second, the trial court was misled by the state's inconsistent position. The trial court directly asked the state to pipe up at sentencing if it had an issue with the exceptional sentence, stating, "you're the party that might want to challenge that." RP 12. The state responded by giving the trial court the green light, stating that RCW 9.94A.535's enumerated mitigating circumstances were not exhaustive. RP 12. The state had previously given the trial court a similar green light by suggesting a shorter sentence would be more feasible if Franklin were to serve the sentence on either work release or electronic home monitoring. RP 8-9.

If the prosecution had any issue with the exceptional sentence, it should have stated as much at the sentencing hearing before the exceptional sentence was imposed. Instead, the

prosecution supported and encouraged the exceptional sentence at the sentencing hearing. Remarkably, the state now appeals the exceptional sentence supported by its deputy. The trial court was misled, believing its sentence had the state's support. RP 12.

Third, the state's inconsistent position would both give the state an unfair advantage and impose an unfair detriment on Franklin. Absent estoppel, the state would face no consequence for taking a particular position at sentencing; it may simply change its mind for no reason and all and obtain a new hearing. This would provide the state an unfair advantage: it would never be bound by or required to honor its positions in the trial court. Allowing the state's inconsistent positions would also be unfair to Franklin, who detrimentally relied on the state's support in obtaining the exceptional three-month sentence and who has already served the entire three-month sentence. See RP 13-14 (ordering Franklin to begin serving her three-month sentence on September 3, 2019 and indicating she was entitled to 32 days of credit for time served).

If the state takes a position in the trial court, it should not be permitted to take the opposite position on appeal. Franklin asks

that the state be estopped from continuing to assert its inconsistent opinion on appeal. Franklin's sentence should be affirmed.

- c. Because exceptional mitigated sentences are imposed on a case-by-case basis, the prosecution waived any claim of error by failing to object to the exceptional sentence at the sentencing hearing

Finally, by failing to object, the state waived any claim of error even if the error is not invited and even if the state is not estopped from taking inconsistent positions. "Appellate review normally does not extend to arguments not raised in the trial court. RAP 2.5(a)." State v. Casimiro, 8 Wn. App. 2d 245, 249, 438 P.3d 137 (2019). "This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond." State v. Blazina, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015).

The Washington Supreme Court has carved out exceptions for vagueness claims against community custody conditions and for certain legal errors, such as when the court exceeds its statutory authority. See, e.g., State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (unpreserved constitutional challenges to community custody conditions); State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d

452 (1999) (collecting cases with various examples of sentencing errors being considered for the first time on appeal). These non-RAP 2.5(a) exceptions to the error preservation requirement are based on the general need for sentence uniformity. State v. Peters, 10 Wn. App. 2d 574, 581-82, 455 P.3d 141 (2019); Blazina, 182 Wn.2d at 833-34. “[T]he exception for illegal or erroneous sentences does not apply when the challenged sentence term, had it been objected to in the trial court, was one that depends on a case-by-case analysis.” Peters, 10 Wn. App. at 582 (citing Blazina, 182 Wn.2d at 834). “And courts never need consider claims of error—even constitutional error—that were invited or waived.” Peters, 10 Wn. App. at 582 (citing Casimiro, 8 Wn. App. 2d at 849).

The trial court was not without statutory authority to impose an exceptional sentence in this case. Although the state complains about the trial court’s basis for the exceptional sentence, nowhere does the state assert that the trial court lacked *any* legal authority to impose an exceptional sentence downward. As noted above, the mitigating circumstances listed in RCW 9.94A.535(1) are not exclusive and the trial court certainly could have imposed an exceptional sentence on another basis, including Franklin’s

possession of only a small quantity of meth. Imposing an exceptional sentence always presents a case-specific analysis for the trial court.

Because any decision to impose an exceptional sentence depends on a case-by-case analysis, the Ford exception that allows challenges to erroneous sentences to be raised for the first time on appeal does not apply. Blazina, 182 Wn.2d at 834; Peters, 10 Wn. App. 2d at 582. The state was required to object to the sentence imposed by the trial court. Its failure to do so precludes review of its assignment of error.

D. CONCLUSION

Franklin received a legally compliant sentence. In the event she did not, it is because the state waived the error, invited the error, or is estopped from raising it. Franklin's sentence should be affirmed.

DATED this 27th day of February, 2020.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "K March", written over a horizontal line.

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