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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 370828

**COURT OF APPEALS,
DIVISION III,
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent,

v.

PETR SICHKAR, Appellant,

**APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY**

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION.....4

II. ASSIGNMENT OF ERROR.....4
1. The court erred by using the defendant’s *Alford* plea against the defendant for sentencing and giving Mr. Sichkar the maximum sentence for not “taking responsibility” for his actions.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....4
1. Did the court err when sentencing Mr. Sichkar to the maximum time for his charge by using Mr. Sichkar’s *Alford* plea against him?

IV. STATEMENT OF THE CASE.....4

V. STANDARD OF REVIEW.....6

VI. ARGUMENT.....7

VII. CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

Fed.R.Crim.P 11(b)(3).....11

in Lincoln Cty., 546 F.3d 613, 617 (9th Cir. 2008)5

State v. Morreira, 2017 Wn. App. 450, 4536, 8

State v. Murray, 118 Wn. App. 518, 521.....5

State v. Pleasant, 148 Wn. App. 408, 4115

State v. Talley, 134 Wn.2d 176, 178 (1998).....9

U.S. v. Williams, 741 F.3d 1057, 105811

United States v. 4.85 Acres of Land.....5

United States v. Decinces, 808 F.3d 785, 788-89 (9th Cir. 2015).....4

United States v. Goynes, 175 F.3d 350, 351 (1999)4

United States v. Moran, 493 F.3d 1002, 1012 (9th Cir. 2007).....4

United States v. Neel, 386 Fed.Appx. 740, 743.....11

United States v. O'Brien, 601 F.2d 1067, 109.....11

Vasquez-Ramirez v. United States Dist. Court, 443 F.3d 692, 701 (2006)7, 10, 11

Regulations and Rules

RCW 9.94A.530(2).....7, 8, 10

USCS Const. Amend. 610

I. INTRODUCTION

The defendant, Mr. Sichkar, was originally charged with five counts of child molestation in the first-degree, four counts of child molestation in the second-degree, and four counts of child molestation in the third-degree. VRP 5. This matter went to trial, and there was a hung jury. VRP 4. As a result of this hung jury, the prosecutor reduced Mr. Sichkar's charges to two counts of fourth degree assault with sexual motivation. VRP 5. The state's recommendation was if Mr. Sichkar was to plead guilty, they would recommend no jail time. VRP 15. Mr. Sichkar took an *Alford* plea, which Judge Hazel used against him and sentenced him to the maximum time. VRP 12, 27. Mr. Sichkar appeals this sentence based upon the assignment of error set forth herein.

II. ASSIGNMENTS OF ERROR

1. The court erred by using the defendant's *Alford* plea against the defendant for sentencing and giving Mr. Sichkar the maximum sentence for not "taking responsibility" for his actions.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the court err when sentencing Mr. Sichkar to the maximum time for his charge by using Mr. Sichkar's *Alford* plea against him?

IV. STATEMENT OF THE CASE

At the end of August, 2018, a trial was held for defendant, Nikolayevich Petr Sichkar. VRP 4. The jury came back unable to reach a unanimous verdict because five jurors were not convinced beyond a reasonable doubt that Mr. Sichkar committed the crime. VRP 4, 20. The State dismissed and amended several of the charges because it was a "trying experience" for the alleged victims, and it took a while to get to trial with the alleged incidents occurring all the way back in 2009. VRP 4, 17.

A sentencing hearing was held on August 21, 2019 before the Honorable Tony D. Hazel. VRP 1. Deputy Prosecuting Attorney, Deric Martin was present to represent the State of

Washington, and Jason Johnson was present to represent the defendant, Mr. Sichkar. VRP 3. The State amended Mr. Sichkar's charge from five counts of child molestation in the first-degree, four counts of child molestation in the second-degree, and four counts of child molestation in the third-degree to "two counts of assault in the fourth-degree with sexual motivation with the intention of proceeding to plea and sentencing on those two charges." VRP 3, 5. The judge granted the motion to amend the counts. VRP 5. In exchange, if Mr. Sichkar took a guilty plea, the State would recommended no jail time, a two-year no-contact order with both victims, both of Mr. Sichkar's daughters would be listed on the protection orders, and 24 months of unsupervised supervision. VRP 14-15. The State believed that the offer and sentencing recommendation were in the "interest of justice" and asked the judge to follow the State's recommendation. VRP 4. The maximum sentence for each misdemeanor is 364 days in jail and a 5,000 dollar fine on each count. VRP 10.

Mr. Sichkar took an *Alford* plea to both misdemeanor counts. VRP 12. After Mr. Sichkar took this plea, the judge determined that the plea was entered into and made knowingly, intelligently and voluntarily. VRP 18. The judge also found that there was a sufficient factual basis for the plea. VRP 19. After finding sufficient factual basis for the plea the judge moved onto sentencing. VRP 19.

When it came to sentencing Mr. Martin again stated that he believed the sentencing recommendation would be a "fair resolution." VRP 20. As a result of a hung jury from the previous trial, Mr. Johnson and Mr. Martin believed this would be a fair resolution in the interest of justice. VRP 19, 23. Before the judge made a ruling he allowed Tatyana Bonner to make a statement before the Court. VRP 22. The judge then turned to Mr. Martin and asked if the victims agreed with the recommendation, which Mr. Martin said they did. VRP 22.

The judge turned again to Ms. Bonner, and asked if she believed two years or less would be an appropriate sentence for Mr. Sichkar, which Ms. Bonner stated two years. VRP 25. The judge stated that he was disturbed that Mr. Sichkar did not accept responsibility for the offenses and sentenced Mr. Sichkar to the maximum time. VRP 25-26. When granting Mr. Sichkar to the maximum time the judge stated that “one compelling issue for this Court is the fact that [Mr. Sichkar] did not accept responsibility and [Mr. Sichkar] entered an *Alford* plea.” VRP 27.

Mr. Johnson clarified for the record and asked the judge “is it the Court taking the aggravating factor the fact he [Mr. Sichkar] entered an *Alford* plea?” VRP 27. With which the judge stated, “I’m taking note of the fact he has not accepted responsibility, has not made an apology and could have do so; that is part of the Court’s consideration in imposing the sentence.” VRP 28.

V. STANDARD OF REVIEW

This Court reviews the application of law to these uncontested facts *de novo*. *United States v. Goynes*, 175 F.3d 350, 351 (1999); *See, United States v. Decinces*, 808 F.3d 785, 788-89 (9th Cir. 2015); *United States v. Moran*, 493 F.3d 1002, 1012 (9th Cir. 2007). This Court reviews *de novo* a trial court’s sentencing under statutory authority. We review *de novo* a trial court’s sentencing under statutory authority. *See, State v. Murray*, 118 Wn. App. 518, 521, *State v. Pleasant*, 148 Wn. App. 408, 411. A court abuses its discretion when it makes “an error of law, when it rests its decision on clearly erroneous findings of fact, or when we are left with ‘a definite and firm conviction that the district court committed a clear error of judgement.” *United States v. 4.85 Acres of Land, More or Less, Situated in Lincoln Cty.*, 546 F.3d 613, 617 (9th Cir. 2008).

VI. ARGUMENT

A. There was judicial misconduct when the main deciding factor in sentencing was the fact that Mr. Sichkar did not take responsibility for his actions.

The court erred when Judge Hazel used Mr. Sichkar's *Alford* plea against Mr. Sichkar sentencing him to the maximum sentence for not "taking responsibility" for his actions. VRP 27. Mr. Sichkar did not take responsibility for his actions because he was taking an *Alford* plea which is when a defendant pleads guilty while claiming his innocence. VRP 12.

The Prosecutor originally charged Mr. Sichkar with thirteen counts of child molestation. VRP 5. When this matter went to trial, the end result was a hung jury. VRP 4. As a result of the jury unable to find Mr. Sichkar guilty, the Prosecutor reduced Mr. Sichkar's charges to two counts of assault in the fourth-degree with sexual motivation. VRP 5. By pleading to these charges, the State recommended twenty-four months suspended sentence. VRP 15. The prosecutor recommended this reduced charge, and sentencing because when this case went to trial the first time there was a "substantial amount of uncertainty to both parties" which resulted in a hung jury. VRP 4. This was also a taxing experience for the two alleged victims. *Id.* The State and defense wanted this all to end. *Id.* As a result of this taxing experience, and the amount of time it took to get to trial the State negotiated this deal with Mr. Sichkar. VRP 4-5.

Mr. Sichkar entered into an *Alford* plea, where he plead guilty while claiming his innocence. VRP 12. One of the alleged victims stated her thoughts of the case and believed Mr. Sichkar should be punished for the maximum amount. VRP 25. Judge Hazel then sentenced Mr. Sichkar to the maximum time available, "364 days and 364 days consecutive for two years minus two days." VRP 26. The judge's reasoning behind the harsh sentencing was the fact that Mr. Sichkar entered into an *Alford* plea, and did not take responsibility for his actions. VRP 27.

There was judicial misconduct when Judge Hazel did not follow the sentencing recommendations and punished Mr. Sichkar to the maximum time for not taking responsibility for his alleged crime. VRP 25, 27. The Court should reverse Mr. Sichkar's sentencing and resentence him for the following reasons:

First, Judge Hazel is unable to consider facts of a more serious crime when deciding the sentence length for Mr. Sichkar. *See, State v. Morreira*, 2017 Wn. App. 450, 453. Judge Hazel seemed to take in the fact that Mr. Sichkar was originally charged with thirteen counts of child molestation, instead of focusing on the new charges. VRP 5. Judge Hazel focused on the fact that the defendant took an *Alford* plea, and did not take responsibility for his alleged actions. VRP 27. An *Alford* plea should not and cannot be used against a defendant.

Second, Judge Hazel cannot consider facts that are not stipulated by Mr. Sichkar, and by relying on Ms. Bonner's statements there should have been an evidentiary hearing to test the reliability of Ms. Bonner. VRP 28. It is a delicate matter to challenge statements of victims in a sentencing hearing, which resulted in the defense counsel not attacking the credibility of the alleged victim. VRP 29. A main factor in Mr. Sichkar's sentence was Ms. Bonner's statement, which the defense was unable to attack the credibility of her statements. VRP 28. The sentencing court cannot rely on more information than what has been admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. RCW 9.94A.530(2). When the defendant disputes material facts, "the court must either not consider the fact or grant an evidentiary hearing on the point." *Id.* The statements of the alleged victim had not been admitted by the plea agreement and should not have been a deciding factor in Mr. Sichkar's lengthy sentence. VRP 28.

Third, Judge Hazel's personal feelings about the prosecutor's charges being too aggressive or lenient is not a deciding factor in sentencing. See *Vasquez-Ramirez v. United States Dist. Court*, 443 F.3d 692, 701 (2006). Mr. Hazel considered Mr. Sichkar's original charges and the statements from the alleged victim when determining Mr. Sichkar's sentence. VRP 5, 28. Judge Hazel also told Mr. Sichkar "I think your attorney did an excellent job getting you this resolution and the fact you're only serving two years" and that the "compelling issue for this Court is the fact that you did not accept responsibility and you entered an *Alford* plea." VRP 27. With these statements it shows that Judge Hazel's personal feelings were that Mr. Sichkar should have been charged with a lot more. A judge does not have to follow the sentencing recommendations made by the state but when the judge's personal feelings of the prosecutor's charging decision results in a lengthy sentence, there is judicial misconduct.

i. Judge Hazel is unable to consider facts of a more serious crime when deciding a sentence length for Mr. Sichkar.

The trial court erred when it considered Mr. Sichkar not taking responsibility for his actions, even though that is not a requirement for an *Alford* plea.

The key inquiry in Mr. Sichkar's appeal is whether or not Judge Hazel can use Mr. Sichkar's *Alford* plea against him. The simple answer is no. Under Washington Revision Code § 9.94A.370(2), the "sentencing court may not consider facts probative of a more serious crime." *State v. Morreira*, 2017 Wn. App. 450, 453. The facts Judge Hazel was supposed to consider was a fourth-degree assault with sexual motivation. Instead Judge Hazel considers that fact that Mr. Sichkar did "not accept[] responsibility for these offenses." VRP 25. The elements of a fourth-degree assault with sexual motivation does require the defendant to accept responsibility.

This would undermine the purpose of defendant's taking *Alford* pleas if the sentencing judge could turn around and use the defendant's "lack of self-accountability" against them. VRP

27. An *Alford* plea is when a defendant pleads guilty but claims they are innocent. If defendants would have to take accountability for their actions in order to get a lesser sentence from the judge, they would essentially just have to plead guilty. There would then be no purpose for an *Alford* plea.

Allowing a judge to use an *Alford* plea against the defendant in sentencing and sentencing him to the maximum time available for not taking responsibility, would be detrimental to defendants in this county and would cause an unfair precedent.

ii. Judge Hazel cannot consider facts that are not stipulated by Mr. Sichkar, and by relying on Ms. Bonner's statements there should have been an evidentiary hearing to test the reliability of Ms. Bonner.

A trial court cannot rely on more information than what has been admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. RCW 9.94A.530(2). When the defendant disputes material facts, "the court must either not consider the fact or grant an evidentiary hearing on the point." *Id.* This RCW states that the judge must only consider what has been admitted by the plea agreement, and the plea agreement "can only include matters to which the defendant has agreed." *State v. Young*, 51 Wn.App. 517, 522 (1988).

There is judicial misconduct when the judge relies on facts not stipulated by the defendant. In *State v. Talley*, 134 Wn.2d 176, 178 (1998) defendant was charged with one count of second-degree rape, but when this matter went to trial the jury could not reach a verdict. The defendant then entered into a plea bargain agreement where the defendant would take an *Alford* plea for second-degree rape. *Id.* at 178-179. During the sentencing hearing the judge reviewed the certification for determination of probable cause and the police reports. *Id.* Defendant argued that the sentencing judge by reviewing those documents would rely upon facts not stipulated by the defendant. *Id.* The Court of Appeals, which the Supreme Court affirmed, concluded that the

sentencing court violated the “Sentencing Reform Act of 1981 by relying on facts that were not acknowledged or admitted by [defendant] or proven by a preponderance of the evidence at an evidentiary hearing” which may have caused the exceptional sentencing. *Id.* at 181-181.

The sentencing court in Mr. Sichkar’s case considered the statements of an alleged victim which did not give Mr. Sichkar the ability to confront this witness and test the credibility of that statement. The Court turned to the alleged victim and asked “do you feel comfortable with the sentencing recommendation where he would serve no time or is it your desire that he serve time for this?” VRP 25. Ms. Bonner stated “it’s my desire for him to serve time.” *Id.* And when asked how long Mr. Sichkar should be in jail she responded “two years.” VRP 25. The judge then sentenced Mr. Sichkar to “364 days and 364 days consecutive for two years minus two days.” VRP 26. The main factors that the Court considered when sentencing Mr. Sichkar were these statements made by the alleged victim. It is a delicate matter for attorneys not to challenge statements of victims during sentencing but when the statements of the victim are the main factor for the sentencing length, the defense should be allowed to attack the credibility of the witness. When the sentencing judge relies heavily on this statement there needs to be an evidentiary hearing for the defense to attack the credibility of the statement.

The Sixth Amendment of the Constitution gives the defendants the right to “be confronted with the witnesses against him.” USCS Const. Amend. 6. Mr. Sichkar did give up his right to trial by taking an *Alford* plea, but when the defendant disputes a material fact that the sentencing judge heavily relies on “the court must either not consider the fact or grant an evidentiary hearing on the point.” RCW 9.94A.530(2). The Court should allow Mr. Sichkar to have his constitutional right to confront any witnesses, especially when the credibility of a witness is a main component. When the sentencing judge considered Ms. Bonner’s testimony,

the judge should have either not considered the statement or granted an evidentiary hearing to allow Mr. Sichkar to have his constitutional right.

iii. Judge Hazel's personal feelings about the prosecutor's charges being too aggressive or lenient is not a deciding factor in sentencing.

A judge is unable to sentence individuals to a lengthy amount of time because they personally feel that the prosecutor's charging decision is too lenient.

The judge's personal feelings about how much time the defendant should serve is not applicable in sentencing hearings. In *Vasquez-Ramirez v. United States Dist. Court*, 443 F.3d 692 (2006), the judge rejected a plea the defendant tried to make because he believed the defendant should be sentenced to a longer sentence. *Id.* at 695. With the defendant's crime in this case "the criminal history of the defendant is so high that in good conscience I would not sentence him to 30 months, and I reject the Plea Agreement." *Id.* By refusing to accept Vasquez's plea, the district judge was "trying to force the government to pursue a charge it [did] not wish to press" and this intrudes too far into the executive function. *Id.* at 698.

Even though this Court does not reject Mr. Sichkar's plea an aggravating factor for the sentencing of Mr. Sichkar was the fact that he entered in an *Alford* plea. The judge stated that "I think your attorney did an excellent job getting you this resolution and the fact you're only serving two years." VRP 27. The judge is going too far into the executive function and feels that the prosecution is being too lenient with Mr. Sichkar's charges.

Mr. Sichkar was originally charged with thirteen counts of molestation, but when this matter went to trial a jury was unable to convict Mr. Sichkar on these charges. This resulted in a hung jury. The prosecution lowered Mr. Sichkar's charges as a result. A defendant is allowed to take an *Alford* plea to a "factually unsupported lesser charge if a factual basis exists to support the original charge." *U.S. v. Williams*, 741 F.3d 1057, 1058. A judge properly exercises

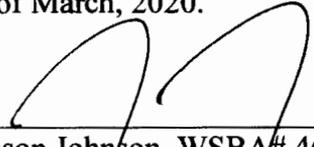
discretion when he or she denies an *Alford* plea when it fails to meet the “factual basis requirement of Rule 11.” *United States v. Neel*, 386 Fed.Appx. 740, 743; Fed.R.Crim.P 11(b)(3). See generally *United States v. O’Brien*, 601 F.2d 1067, 109. In Mr. Sichkar’s case, the judge did not reject Mr. Sichkar’s plea, but did use the plea against Mr. Sichkar to sentence him to the maximum time.

This judgment call by the judge is going too far into the executive function for considering the factors of Mr. Sichkar’s original charges. “It matters not that the judge feels the prosecutor’s charging decision was too aggressive or too lenient.” *Vasquez-Ramirez v. United States Dist. Court*, 443 F.3d 692, 701 (2006). The judge considering the fact that Mr. Sichkar entered into an *Alford* plea, and did not take accountability resulted in the maximum sentence to “restore a sense of justice” is simply not aloud. VRP 27.

VII. CONCLUSION

For the foregoing reasons, the court erred when it used Mr. Sichkar’s Alfred plea against him during sentencing. Therefore, this Court should reverse the verdict and grant Mr. Sichkar a new sentence.

Respectfully submitted this 9 day of March, 2020.



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