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COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

OCTAVIO GONZALES-FLORES,

Defendant/Appellant.

SUPPLEMENTAL REPLY BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
120 West Main
Ritzville, Washington 99169
(509) 659-0600

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RULES AND REGULATIONS

ER 801(d)(2)(v) 1

ARGUMENT

This supplemental reply brief answers issues raised in the State's response to the supplemental brief previously entered.

Crawford

Mr. Gonzales-Flores agrees that statements made in furtherance of a conspiracy are non-testimonial in nature. *Crawford v. Washington*, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004); ER 801(d)(2)(v).

What the State overlooks is the fact that the statements admitted at trial were not co-conspirator statements.

The statements made by Sandra Flores were made following her arrest on September 25, 2001. Any conspiracy was at an end on that date. Mr. Gonzales-Flores was also arrested that day.

... [S]tatements made with the purpose of assisting the police, and not in furtherance of the conspiracy, are not admissible under the co-conspirator exemption. *United States v. Alonzo*, 991 F.2d 1422, 1426 (8th Cir. 1993)

....

State v. Atkinson, 75 Wn. App. 515, 519, 878 P.d 505 (1994).

Sandra Flores' statements were made to assist the police. They are not admissible under the co-conspirator exemption to the hearsay rule. The argument contained in the original brief pertaining to the "in furtherance" requirement is incorporated in this brief. (Appellant's brief at 15-16)

The State also misinterprets the challenge to Sandra Flores' statements. The challenge is not to statements she made to the CI; but to statements made directly to the police. Statements made directly to the police are testimonial in nature. *Crawford v. Washington*, 541 U.S. at 69.

The statements made at the forfeiture were also testimonial in nature. A person testifying at a forfeiture hearing is placed under oath. RCW 35.05.452(3); RCW 69.50.505(5).

Blakely

The State is correct that the original appellant's brief and supplemental brief misstate the facts concerning which counts were run consecutively. Mr. Gonzales-Flores concedes that Counts VIII and IX, as opposed to Counts II and IV were run consecutively by the trial court.

Nevertheless, it makes no difference which counts were ordered to run consecutively. The State's argument that multiple deliveries/sales constitute major violations of the Uniform Controlled Substances Act coupled with the jury finding Mr. Gonzales-Flores guilty as to Counts I, III, V, VI and VII does not satisfy the requirements of *Blakely v. United States*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

In *State v. Hughes*, 154 Wn.2d 118, 139-40 (2005), the Supreme Court overturned consecutive sentences imposed by a judge. The Court ruled that there must be a factual determination of the basis for those consecutive sentences by a jury.

RCW 9.94A.589(1) provides, in part: “Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.”

The State relies upon RCW 9.94A.535(2)(e)(i) to support the imposition of the consecutive sentences by the trial court.

The trial court’s Conclusions of Law in support of the exceptional sentence are based upon RCW 9.94A.535(2)(e)(i), (ii), (iv), (v), and (2)(i).

RCW 9.94A.535(2)(i) is the multiple offense policy aggravating factor. (*See*: Appendix “A” – Conclusions of Law; CP 125-27)

Mr. Gonzales-Flores concedes that these multiple offenses increase his offender score beyond the maximum of nine (9).

Given the purpose of the multiple offense policy, the mere presence of multiple offenses does not justify an exceptional sentence on the basis that the sentence is clearly too lenient. Rather, an exceptional sentence is permitted when the rules for sentencing multiple current offenses mean that “some extraordinarily serious harm or culpability resulting from multiple offenses ... would not otherwise be accounted for in determining the presumptive sentencing range.” Because the highest offender score accounted for in the sentencing grid is 9, the highest standard range reflects only that level of criminal history – it does not reflect additional convictions. In such situations, “[b]oth public policy and the stated purposes of the SRA demand full punishment for each current offense.” Extraordinarily serious harm or culpability is therefore “automatically” established whenever an offender score greater than 9 is combined with multiple current offenses, because “a standard

sentence would result in “free” crimes – crimes for which there is no additional penalty.”

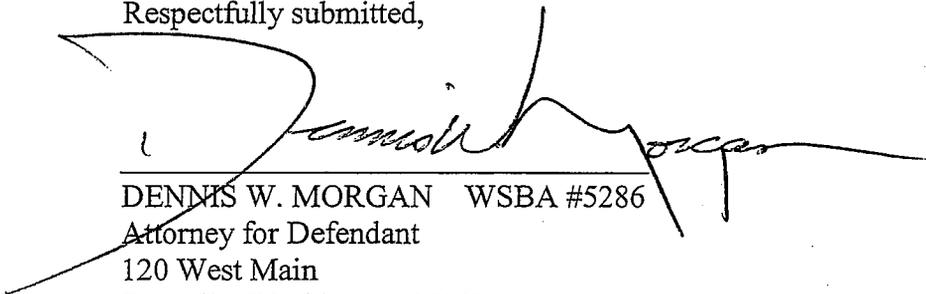
State v. Alkire, 124 Wn. App. 169, 174, 100 P.3d 837 (2004) (quoting *State v. Fisher*, 108 Wn.2d 419, 428, 730 P.2d (1967); *State v. Smith*, 123 Wn.2d 51, 56 n.4, 864 P.2d 1371 (1993))

Mr. Gonzales-Flores contends that in his particular case the State’s conduct in conducting the multiple buys over an extended period of time counteracts the increased offender score as calculated by the trial court. See: *State v. Sanchez*, 69 Wn. App. 255, 848 P.2d 208, review denied, 122 Wn.2d 1007 (1993); *State v. Hortman*, 76 Wn. App. 454, 886 P.2d 234, review denied, 126 Wn.2d 1025 (1995); *State v. Kinneman*, 120 Wn. App. 327, 84 P.3d 882, review denied, 152 Wn.2d 1022 (2004).

Mr. Gonzales-Flores continues to rely upon the argument contained in his original brief and supplemental brief insofar as the exceptional sentence is concerned.

DATED this ^{7th} 25 day of January, 2006.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286
Attorney for Defendant
120 West Main
Ritzville, Washington 99169
(509) 659-0600

APPENDIX "A"

II. CONCLUSIONS OF LAW

- A. The offenses were major violations of the Uniform Controlled Substance Act related to trafficking in controlled substances, more onerous than the typical offense. 6 sales and one possession with intent to deliver resulted in convictions. There was testimony establishing that the defendant was involved in other sales to the informant made by defendant's wife and cousin or brother.
- B. Counts 3,5,6,7,8 and 9 involved amounts substantially larger than for personal use.
- C. The offender occupied a high position in the drug distribution hierarchy.
- D. The current offenses involved a high degree of sophistication and planning, occurred over a long period of time and involved a broad geographical area.
- E. The operation of the multiple offense policy results in a sentence that is clearly too lenient. Counts 2 and 4 were "involving a minor in drug dealing." Under RCW 9.94A.589 (1)(a) these crimes do not involve the same criminal conduct as Counts 1 and 3 because the same victim is not involved. The child is an additional victim. Counting Counts 2 and 4 would result in an offender score of 24. Even if those counts are not scored because they involve the same criminal conduct as Counts 1 and 3, some additional punishment should be imposed for allowing the child to be present at those two drug transactions.
- F. The standard sentences are clearly too lenient even without considering the presence of the child in Counts 2 and 4. If those counts are considered same criminal conduct, the defendant's score on each count remains 18. The sentencing grid only extends to 9 with a result that defendant receives no additional punishment for three serious violations of the Uniform Controlled Substance Act. The standard sentence is the same for 4 convictions of delivery or possession with intent to deliver as for 7 convictions of delivery or possession with intent to deliver. In the standard situation only 1/2 of defendant's offender score actually counts for sentencing purposes.
- G. Considering the purposes of Chapter 9.94A, there are substantial and compelling reasons to impose an exceptional sentence.

H. The exceptional sentence should be imposed in the form of consecutive sentences for counts 8 and 9 in relation to the other counts.

I. Defendant should be sentenced to 15 years (180 months) in prison, 150% of the high end of the standard sentence. This will be accomplished by sentencing the defendant as follows: Offender score of 18. Sentences on counts 2 and 4 are 5 years each, concurrent with all others because they involve the same criminal conduct for scoring purposes. (They are not scored.) The sentence for Counts 1,3,5,6 and 7 is 120 months on each count, concurrent with eachother and concurrent with 2 and 4, but consecutive to 8 and 9. For counts 8 and 9 the sentence is 5 years (60) months, concurrent with eachother but consecutive to Counts 1,3,5,6 and 7. The total sentence is 180 months in prison.

Dated: Feb 27, 2002

Jack Burdard
JUDGE Print name:

[Signature]
Deputy Prosecuting Attorney
WSBA # 27217
Print name:
Karl Sloan

[Signature]
Attorney for Defendant
WSBA #4246
Print name:
B. ROLF BURGENSEN

X OCTAVIO FLORES
Defendant

[Signature]
INTERPRETER