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NO. 69118-0-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Appellant

v.

JOHN A. JONES III,

Respondent

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REPLY BRIEF OF APPELLANT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Appellant

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. ISSUES RAISED ON CROSS APPEAL 1

II. ARGUMENT IN REPLY 1

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO CONSIDER ADDITIONAL RECORDS TO SUPPORT AN ACCUARTE DETERMINATION OF THE DEFENDANT'S OFFENDER SCORE. 1

B. THE LENGTH OF THE EXCEPTIONAL SENTENCE WAS NOT CLEARLY EXCESSIVE. 7

III. CONCLUSION 11

TABLE OF AUTHORITIES

WASHINGTON CASES

Bremerton Public Safety Association v. Bremerton, 104 Wn. App. 226, 15 P.3d 688 (2001) 3
In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005) 6
In re Littlefied, 133 Wn.2d 39, 940 P.2d 1362 (1997) 7, 11
In re Rowland, 149 Wn. App. 496, 204 P.3d 953 (2009) 2
Spinnelli v. Econ. Stations, Inc., 71 Wn.2d 503, 429 P.2d 240 (1967) 6
State v. Ford, 137 Wn.2d 472, 973 P.2d 542 (1999) 5, 6
State v. Hunley, __ Wn.2d __, 287 P.3d 584 (2012) 3, 4, 5, 6
State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994) 3
State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002) 6
State v. McCorkle, 88 Wn. App. 485, 945 P.2d 736 (1997), affirmed, 137 Wn.2d 490 (1999) 5, 6
State v. OxBorrow, 106 Wn.2d 525, 723 P.2d 1123 (1986) 8
State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997) 2
State v. Ross, 71 Wn. App. 556, 861 P.2d 473 (1993) 8
State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003) 2

WASHINGTON STATUTES

Laws of Washington 2008, ch. 231, §1 2
Laws of Washington 2008, ch. 231, §2 4
Laws of Washington 2008, ch. 231, §4 4
RCW 9.94A.500 ..... 2, 5
RCW 9.94A.530 2
RCW 9.94A.530(1) 4
RCW 9.94A.530(2) 1, 3, 4, 5, 7
RCW 9.94A.537(6) 11
RCW 9.94A.585(4) 8

I. ISSUES RAISED ON CROSS APPEAL

1. Was the exceptional sentence imposed by the trial court clearly excessive?

II. ARGUMENT IN REPLY

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO CONSIDER ADDITIONAL RECORDS TO SUPPORT AN ACCUARTE DETERMINATION OF THE DEFENDANT'S OFFENDER SCORE.

The defendant argues that the trial court did not abuse its discretion when it refused to consider the uncertified copy of the preliminary hearing transcript from the California convictions for murder and attempted murder on two bases. First he argues the State has already had sufficient time to produce the information, and the court was within its rights to reject it. Secondly, he argues that the Supreme Court has held the recent amendment to RCW 9.94A.530(2) is unconstitutional, and therefore the State did not have a legal right to produce additional information at a resentencing hearing.

The defendant does not support the first basis for his argument with any authority. The passage of time, and prior opportunity to produce evidence in support of a comparability analysis particularly under the circumstances of this case, does not

justify the trial court's decision to refuse additional evidence in support of that analysis.

First, the court had twice determined that an exceptional sentence of 10 years was justified when considering the facts of the case combined with what it had previously found the defendant's criminal history to be. That 10 year period had not expired by the last resentencing hearing.

Second, the Courts and the Legislature have both made it clear that a sentence based on an accurate offender score is of paramount importance. The Court has repeatedly held that unless there is a clear record that the trial court would have imposed an exceptional sentence, failure to accurately determine the defendant's offender score requires remand for the trial court to do so. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003), State v. Parker, 132 Wn.2d 182, 187, 937 P.2d 575 (1997), In re Rowland, 149 Wn. App. 496, 508, 204 P.3d 953 (2009).

The 2008 legislative amendments to RCW 9.94A.500 and RCW 9.94A.530 were done "in order to ensure that sentences imposed accurately reflect the offender's actual, complete, criminal history, whether imposed at sentencing or upon resentencing." Laws of Washington 2008, ch. 231, §1. To affect that legislative

intent RCW 9.94A.530(2) was amended so that "[o]n remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." (emphasis added). The Court interprets a statute in order to give effect to the Legislature's intent. Bremerton Public Safety Association v. Bremerton, 104 Wn. App. 226, 230, 15 P.3d 688 (2001). The Court previously interpreted the term "shall" as mandatory. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). The reference to remand for resentencing after collateral attack signals the legislature's intent that neither the passage of time nor the number of sentencing and resentencing hearing would be a bar to presentation of new, relevant evidence regarding criminal history.

The defendant's second argument should also be rejected because it rests on an incomplete reading of recent case authority. The defendant argues RCW 9.94A.530(2) was found unconstitutional in State v. Hunley, __ Wn.2d __, 287 P.3d 584 (2012). The facts and issues in that case are far different from those presented here. That case is not persuasive authority for the proposition that the trial court did not abuse its discretion here.

In Hunley the court determined the defendant's offender score based on an unsworn summary of the defendant's criminal history supplied by the prosecutor and to which the defendant did not object. Hunley, 287 P.3d at 587. RCW 9.94A.530(1) had been amended in 2008 to provide that "[a] criminal history summary relating to the defendant from the prosecuting authority or from the state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein." Laws of 2008, ch. 231, §2. RCW 9.94A.530(2) was amended to add, "[a]cknowledgment includes...not objecting to criminal history presented at the time of sentencing." Laws of 2008, ch. 231, §4. The Court considered whether these two specific amendments violated due process. Hunley, 287 P.3d at 589.

The two provisions at issue in Hunley related to the manner in which prior criminal history is determined. The Court stated the manner in which criminal history is proved has constitutional implications. The State bore the burden of proving criminal history. The burden was not met through bare assertions, unsupported by evidence. Nor is it met when the defendant fails to object to those assertions. "To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional

shifting of the burden of proof to the defendant." Hunley, 287 P.3d at 590, quoting, State v. Ford, 137 Wn.2d 472, 482, 973 P.2d 542 (1999) (emphasis added in Hunley.). The legislature did not have the authority to modify or impair judicial interpretation of the constitution. Id. at 591. The Supreme Court agreed with the Court of Appeals that insofar as the amendments to RCW 9.94A.500 and RCW 9.94A.530(2) attempted to do so they were unconstitutional. Id. at 592.

The portion of the amendment the State has relied on relates to the remedy when there has been a failure of adequate proof at a sentencing or resentencing hearing. That portion of the amendment addressed the remedy originally articulated by the Court in State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997), affirmed, 137 Wn.2d 490 (1999).

> Where a defendant specifically and timely objects that the evidence does not prove classification of prior out-of-state convictions used to calculate an offender score, the sentencing court should conduct an evidentiary hearing to allow the State to adduce additional evidence of classification. If the State then fails to prove the requisite felony classifications, the State will not have another opportunity to prove the classifications on remand following appeal.

McCorkle, 88 Wn. App. at 500.

The Supreme Court adopted the remedy in those circumstances in Ford, 137 Wn.2d at 485-86. The Supreme Court continued to apply that remedy when the State did not produce evidence to support it summary of the defendant's criminal history in State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002) and In re Cadwallader, 155 Wn.2d 867, 877, 123 P.3d 456 (2005). None of these cases state the remedy is constitutionally required. The only reference to any authority to support that remedy was articulated in Lopez where the Court stated "We require a specific objection to offer the trial court the opportunity to correct the error". Lopez, 147 Wn.2d at 521 (2002). Lopez relied on Spinnelli v. Econ. Stations, Inc., 71 Wn.2d 503, 508, 429 P.2d 240 (1967). Spinnelli merely stated a party must object before the reviewing court will find error at trial. Spinnelli, 71 Wn.2d at 508. It did not state the rule was constitutionally required.

The Supreme Court specifically said the legislature may change a statutory interpretation. Hunley, 287 P.3d at 591. The legislature did just that when it overruled the remedy adopted by the Court in McCorkle, Ford, Lopez, and Cadwallader. Since the remedy was not based on a judicial interpretation of the constitution, it is not unconstitutional.

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Littlefied, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). Its decision is based on untenable reasons if it is based on an incorrect standard. Id. RCW 9.94A.530(2) required the court to allow the parties to submit additional evidence at the resentencing hearing. By rejecting the State's offered additional evidence the trial court applied the wrong standard, and thereby abused its discretion. Further, because the court stated that the defendant's prior history of violent crimes impacted its decision regarding the length of the exceptional sentence, the court's decision to reject evidence supporting those conviction was manifestly unreasonable.

B. THE LENGTH OF THE EXCEPTIONAL SENTENCE WAS NOT CLEARLY EXCESSIVE.

The trial court imposed an exceptional sentence of 60 months. 1 CP 132. The basis for the exceptional sentence was the court's finding that "[t]he jury found beyond a reasonable doubt the crime occurred within the sight or sound of the victim's or the defendant's minor child or children under the age of 18 years." 1 CP 139. The court concluded "there are substantial & compelling

reasons to impose a sentence above standard range. Crime was committed within sight and sound of minor child under 18 years old." 1 CP 140.

The defendant claims the length of his sentence was clearly excessive. He asks the Court to remand for resentencing within the standard range.

A sentence outside the standard range may be reversed if the reviewing court finds the sentence imposed was clearly excessive. RCW 9.94A.585(4). A sentence which is alleged to be "clearly excessive" is reviewed for an abuse of discretion. State v. OxBorrow, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986). "A sentence is clearly excessive if it is imposed on untenable grounds or for untenable reasons or is manifestly unreasonable." State v. Ross, 71 Wn. App. 556, 568-69, 861 P.2d 473 (1993). A sentence is clearly excessive if "no reasonable person" would have imposed it. Id.

The evidence at trial showed that during the events leading to the assault and afterwards the defendant's actions were designed to control, terrorize, and humiliate Ms. Phillips. He woke Ms. Phillips, by yelling at her and throwing pillows at her. When she tried to get away from him the defendant followed her. The

defendant hit her head and used her hair to pull her head down on the coffee table. The defendant essentially held Ms. Phillips hostage in the living room when he ordered her to strip and sit on the sofa. He then threatened to burn her anus with a hot paring knife telling her he had done that to a previous girlfriend. Ms. Phillips was burned as she tried to prevent the defendant from doing so. The defendant ordered Ms. Phillips back into the bedroom when their infant son began to cry. The defendant then hit her in the nose, breaking it. In doing so the defendant opened wounds on his knuckles sustained from punching a mirror two weeks earlier. 2 CP 349-360.

In its oral remarks the court justified the length of the sentence on the brutality of the assault. The court remarked "I found it was a brutal assault, and I felt that Mr. Jones then, if not now, remained a brutal person." RP 7. "But in addition to the issue of accountability or punishment, I think an overarching concern for the Court is protection for the community including people like Ms. Phillips who would otherwise find themselves at risk of serious harm at the hands of this defendant. That continues to be a fundamental reason for imposing an exceptional sentence." RP 8-9. "By excluding that history, my focus is on the egregious nature

of this assault." RP 10-11. Given evidence regarding the defendant's conduct toward Ms. Phillips before, during, and after the assault, a reasonable person could conclude brutality of his actions warranted at least a 60 months sentence. It was therefore not "clearly excessive."

The defendant argues the court abused its discretion because the 60 month sentence is five times the top of the standard range calculated by the trial court. BOR at 12. The Court has rejected any rule that would limit the trial court's discretion by application of a mathematical formula. Oxborrow, 106 Wn.2d at 531.

The defendant also argues the trial court abused its discretion because it stated that it had an "open door" as to the length of the sentence. BOR at 12. The trial court's reference to an "open door" is vague. It is unlikely that the trial court meant that statement as a grant of unfettered discretion, given the trial judge's reasoning. The trial judge considered the nature of the crime and the nature of the defendant's criminal history to warrant a 120 month sentence. When the court determined that it could only consider the nature of the current offense, it halved the originally imposed exceptional sentence. The court clearly had given each of

the factors it found relevant equal weight, and sentenced accordingly.

It is possible the court's "open door" comment meant that the trial court believed that when the jury found that the aggravating circumstances were proved beyond a reasonable doubt it permitted, but did not require, the trial court to impose an exceptional sentence above the standard range. That is a correct statement of the law. RCW 9.94A.537(6). The court does not abuse its discretion when it applies the correct standard of law. Littlefield, 133 Wn.2d at 47.

III. CONCLUSION

For the foregoing reasons, and the reasons presented in the State's opening brief, the State asks the Court to find the trial court abused its discretion when it refused to consider additional information to support the factual comparability of the defendant's California murder and attempted murder convictions. The State asks this Court to remand the case to the trial court for

resentencing after consideration of the additional materials submitted by the State.

Respectfully submitted on January 29, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By:
KATHLEEN WEBBER #16040
Deputy Prosecuting Attorney
Attorney for Respondent

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

THE STATE OF WASHINGTON, Appellant, v. JOHN A. JONES, III, Respondent.	No. 69118-0-I AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:
The undersigned certifies that on the 29th day of January, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

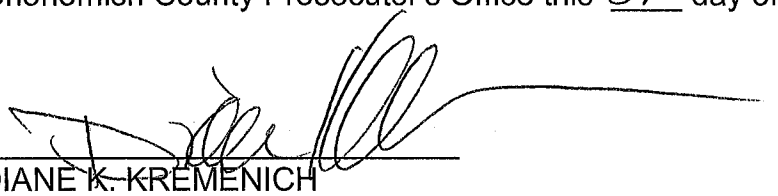
WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Respondent of the following documents in the above-referenced cause:

REPLY BRIEF OF APPELLANT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 29th day of January, 2013.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit