

64339-8

64339-8

NO. 64339-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Appellant,

v.

BRADLEY YOUNG,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

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REPLY BRIEF OF APPELLANT

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**A. ARGUMENTS IN REPLY**

**1. NEW EVIDENCE AFTER APPEAL.**

Young mischaracterizes the State's argument regarding the entry of findings of fact and conclusions of law. He says "the prosecution complains on appeal that the court hearing to decide upon the findings of fact occurred three days after it filed a notice of appeal, contending that its filing of a notice of appeal prohibited the court from entering its findings." Br. of Resp. at 20. This is not the State's argument; clearly a court has the authority to settle the record and enter findings of fact and conclusions of law that articulate the basis for a sentence already imposed, regardless of whether a notice of appeal has been filed.

The State argues, instead, that the trial court's findings and conclusions were inappropriate because they *changed* the factual and legal basis for the exceptional sentence, and depended critically on evidence that had never before been presented. Defense counsel in the trial court admitted as much, when she told the court that the facts originally presented and the court's oral ruling ". . . would not hold up." RP (10/21) 5. Trial counsel then offered "additional information" in the form of "an addendum" that was never presented at the original sentencing hearing, and which

gave rise to an entirely new legal basis for the sentence, i.e. “a failed mental health defense.” RP (10/21) 4-5. As argued in the State’s opening brief, this is clearly contrary to the rule that the trial court loses authority to change its decision after a notice of appeal has been filed.

Young relies on State v. Lopez, 105 Wn. App. 688, 20 P.3d 97 (2001), but that case is inapposite. Lopez dealt with the untimely filing of findings of fact and conclusions of law pursuant to JuCR 7.11(d). Lopez, 105 Wn. App. at 693. The court noted that Lopez was required to prove prejudice and tailoring, and that he had not met that burden where the court’s findings and conclusions were entirely consistent with its oral ruling, save for a single subtle difference on one point that did not alter the analysis. Id. at 694. Here, the trial judge considered *new* evidence that entirely changed the legal basis for his ruling. This new evidence was offered with the express argument that it was needed to protect the case from the State’s appeal. The new evidence and legal rationale were tailored to thwart the State’s appeal. And, because the evidence and theory were offered after sentencing and after an appeal had

been filed, the State's ability to challenge the new evidence was reduced. The State respectfully suggests that this Court should not encourage such practices.

Moreover, prejudice and tailoring must be shown only where a defendant is asking, as was Lopez, for reversal of his conviction and dismissal of the charges. In Lopez, this Court rejected that remedy, in part, because it was disproportionate to any harm caused. The Washington Supreme Court has held that remand is the appropriate remedy when findings were not done, and has said that reversal of a conviction and dismissal of charges will be considered only upon a finding of tailoring and actual prejudice. State v. Head, 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1998).

In this case, the State is not asking for such a draconian remedy. Rather, the State simply asks that the exceptional sentence be reversed and that the case be remanded for resentencing because the court changed its sentence under the guise of entering findings of fact and conclusions of law. There is no requirement that this Court find tailoring and/or actual prejudice under these circumstances.

Finally, as argued in the State's opening brief to this Court, because the trial court's actions violated the Sentencing Reform Act

(SRA) by essentially holding a second sentencing hearing and imposing a different sentence (in the absence of the defendant), reversal and remand is required. Br. of App. at 17-18 (citing RCW 9.94A.500 and .530(2)).

## 2. STANDARD OF REVIEW.

Young misstates the standard of review for exceptional sentences. He says that “when a court considers facts presented and decides there is a basis for an exceptional sentence, that decision may not be disturbed on appeal unless the court’s exercise of discretion was manifestly unreasonable or untenable.” Br. of Resp. at 6 (*citing State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). Rohrich has nothing to do with the standard of appellate review following an exceptional sentence; rather, Rohrich simply repeats the “manifest abuse of discretion” standard of review. The correct standard of review of an exceptional mitigated sentence focuses on the record, the law, and whether the sentence is clearly too lenient. See Br. of App. at 19 (citing RCW 9.94A.585 and State v. Borg, 145 Wn.2d 329, 336, 36 P.3d 546 (2001)).

**3. YOUNG HAS NOT DISTINGUISHED THE MANY CASES THAT FORBID BASING AN EXCEPTIONAL SENTENCE ON A DEFENDANT'S PERSONAL CHARACTERISTICS, DRUG PROBLEMS, OR EFFORTS TO REHABILITATE.**

The State has appealed Young's sentence because it is wholly outside the parameters authorized by the Sentencing Reform Act (SRA) and flatly inconsistent with the law. Young fails to discuss or distinguish any of the long line of cases cited by the State that forbid a sentencing court's consideration of a defendant's personal circumstances and/or efforts to rehabilitate. See Br. of App. at 21-22. Young also fails to discuss or distinguish the cases holding that a mitigating factor is not established unless the defendant proves a nexus between his mental condition and his criminal behavior. See Br. of App. at 23-24. He also ignores the cases which say that a combination of drugs and mental problems cannot justify an exceptional sentence. See Br. of App. at 25. This authority plainly forbids the sentence given to Young, and Young offers no reason to refuse application of that authority here. The sentence must be reversed.

**4. YOUNG HAS FAILED TO SHOW THAT THE TRIAL COURT'S SENTENCE IS SUPPORTED BY THE EVIDENCE.**

As argued in the State's opening brief, Young presented two different (and inconsistent) factual claims to the sentencing court. At the September sentencing hearing, he said that his troubles were caused by long-term drug abuse which caused mental problems. At the October hearing, he offered that a 2007 beating by police caused PTSD which caused his mental problems and, thus, the commission of this crime, and he suggested that his mental problems were independent of drug use.<sup>1</sup> This factual distinction is pivotal, since (it appears) the court ultimately decided that the PTSD was a failed mental defense which occurred "before drug abuse began." CP 69 (FOF No. 1).

These contradictions continue even at the appellate level.

Young alleges that "[his] cognitive limitations were not the result of

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<sup>1</sup> Young says that "the State complains that Young's post-traumatic stress disorder stems from a severe police beating Young received in 2007." Br. of Resp. at 9. This statement misconstrues the State's position, and the facts. The State does not believe that that Young has PTSD stemming from an assault by police. The State's point in its opening brief was that Young's purported PTSD evidence is suspicious at best, because he did not report PTSD to the mental health evaluator who was preparing a mitigation report in the Winter and Spring of 2009 for his sentencing hearing, there is nothing in his documentation or history to support a PTSD finding, and the only thing to support the finding is an allegation that he was assaulted by police in 2007. The claim that Young had PTSD did not surface until after sentencing, when a report allegedly prepared by a social worker from DSHS materialized.

alcohol or drug abuse.” Br. of Resp. at 9. If that assertion is true, then the basis for the court’s original sentence – which focused on his need for substance abuse treatment – is plainly wrong. Moreover, the assertion conflicts with a sentence two pages later in Young’s response brief on appeal, where he asserts that he was unable “to function normally” and was “suffering from brain disease.” Br. of Resp. at 11. Those two quotes were made in the context of Young explaining why his life-long problem *with substance abuse* led to mental health problems, and how he intends to deal with those issues. RP (9/18) 16. If substance abuse led to mental issues, then it does not support his claim that his mental issues were brought about solely by events independent and predating his drug abuse.

There are other significant, internal contradictions in the evidence. Young asserts that the record shows his mental health condition was a “life-long problem and not something that started recently.” Br. of Resp. at 9 (citing 9/18/09 RP 7). The actual verbatim report at the cited page says nothing about the longevity of Young’s mental health issues. More pointedly, it says nothing about PTSD. In fact, a PTSD diagnosis was not claimed at all

during the sentencing hearing on September 18, 2009. These contradictions establish that there is simply no substantial support for Young's claim, and the trial court's finding, that his mental illness, instead of drug use, caused Young to steal this car.

Finally, Young points to no evidence in the sentencing record that establishes a causal or other meaningful connection between his alleged mental illness and the stealing this car. See Br. of App. at 29-30.

**5. YOUNG'S SENTENCE IS "CLEARLY TOO LENIENT."**

In response to the State's argument that this sentence is clearly too lenient, Young says that the sentence was justified because it imposed some jail time, gave Young credit for the progress he had already made, and was not wholly out of line with the standard sentencing range. Br. of Resp. at 17-18. This response misses the point. The State argues that Young's sentence was clearly too lenient because it was self-defeating and advanced *no* purpose of the SRA.

There is some tension between the various purposes of the SRA. RCW 9.94A.010(1)-(7). For instance, offering a defendant

the chance to improve himself sometimes means the public will not be protected to the fullest extent. *Compare* RCW 9.94A.010(3) with (4). Still, the sentencing court is given a measure of discretion, within certain boundaries, to impose a sentence that balances these interests.

This sentence is clearly too lenient, however, because it is not proportionate to the offender's criminal history, it does not promote respect for the law, it is not commensurate with the punishment imposed on similar offenders, it jeopardizes public safety, it does not offer the offender the opportunity to improve himself (due to the fact that no structured treatment is required), it does not make frugal use of resources, and it does not reduce the risk of re-offense. RCW 9.94A.010(1)-(7).

Everyone, including Young and his family, recognized that Young needed structure, control, and treatment to break his addiction. They also confirmed that he routinely relapsed and committed crimes upon release from custody. Yet, the court imposed a sentence that more than halved his confinement time, but provided no structure, no control, and no mandated drug abuse or mental health treatment that would assist him when he was almost immediately released from custody. The sentence

contained nothing to assure success; it was doomed to fail. A sentence that dramatically cuts the confinement time but advances no other interest serves no purpose of the Sentencing Reform Act, is clearly too lenient, and should be reversed.

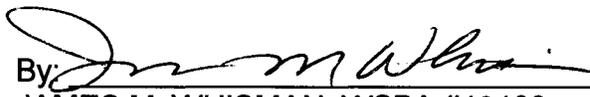
**B. CONCLUSION**

For the foregoing reasons, and the reasons set forth in the State's opening brief, Young's sentence should be reversed and remanded for imposition of a standard range sentence.

DATED this <sup>15<sup>th</sup></sup> \_\_\_\_\_ day of July, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Nancy P Collins, of Washington Appellate Project, at the following address: 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, the attorney of record for the appellant, containing a copy of the Reply Brief of Appellant in STATE V. BRADLEY YOUNG, Cause No. 64339-8-I in the Court of Appeals of the State of Washington, Division I.

I certify under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

\_\_\_\_\_  
Name

Done in Seattle, Washington

\_\_\_\_\_  
Date

07-02-10