

64339-8

64339-8

NO. 64339-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

BRAD YOUNG,

Respondent,

v.

STATE OF WASHINGTON,

Appellant.

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

BRIEF OF RESPONDENT

NANCY P. COLLINS
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711



TABLE OF CONTENTS

A. ISSUES PRESENTED ON REVIEW 1

B. STATEMENT OF THE CASE2

C. ARGUMENT6

 THE COURT APPROPRIATELY EXERCISED ITS
 AUTHORITY AND DISCRETION TO IMPOSE ITS
 SENTENCE.....6

 1. The court had discretion to impose a sentence upon Young
 that was less than the prison time required under the
 standard range6

 a. The facts favoring Young’s sentence were proven by a
 preponderance of evidence and are supported by the
 record7

 b. The reasons given by the court support its discretionary
 determination to impose an exceptional sentence as a
 matter of law 12

 c. The court’s exceptional sentence was not “clearly too
 lenient.” 17

 2. The prosecution’s technical complaint about the late entry
 of the findings of fact necessarily fails when it asserts no
 claim of actual prejudice..... 18

 a. The “new” information presented to the trial court was
 entirely consistent with the information already presented
 to the court.....21

 b. The State does not contest the validity or accuracy of the
 information presented to the court.....23

 c. The findings of fact were filed far in advance of the
 Opening Brief and any delay in their filing do not prejudice
 the State’s statutory right to appeal24

3. The prosecution misrepresents the court's sentencing rationale in an apparently baseless attempt to undermine the court's credibility.....26

D. CONCLUSION.....28

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Ferree v. Doric Co., 62 Wn.2d 561, 383 P.2d 900 (1963)..... 19

State v. Calvert, 79 Wn.App. 529, 903 P.2d 1003 (1995), rev. denied, 129 Wn.2d 1005 (1996)..... 17

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005) 7

State v. Hutsell, 120 Wn.2d 913, 845 P.2d 1325 (1993)..... 14

State v. Jeanotte, 133 Wn.2d 847, 947 P.2d 1192 (1997) 15

State v. Rohrich, 149 Wn.2d 647, 71 P.2d 638 (2003) 6

Washington Court of Appeals Decisions

State v. Bunker, 144 Wn.App. 407, 183 P.3d 1086, rev. granted, 165 Wn.2d 1003 (2008)..... 6, 14

State v. Davis, 146 Wn.App. 714, 192 P.3d 29 (2008)..... 6, 12, 27

State v. Flett, 98 Wn.App. 799, , 992 P.2d 1028 (2000) 26

State v. Hatchie, 133 Wn.App. 100, 135 P.2d 519 (2006) 19

State v. Hescoek, 98 Wn.App. 600, 989 P.2d 1251 (1999)..... 19

State v. Lopez, 105 Wn.App. 688, 20 P.3d 978, rev. denied, 144 Wn.2d 1016 (2001)..... 21

State v. Mallory, 69 Wn.2d 532, 419 P.2d 324 (1966) 19

State v. Moore, 73 Wn.App. 789, 871 P.2d 642 (1994) 7, 17

State v. Murray, 128 Wn.App. 718, 116 P.2d 1072 (2005) 26

Statutes

RCW 9.94A.010 15
RCW 9.94A.5307
RCW 9.94A.5357, 12, 13, 14, 15, 18

Court Rules

JuCR 6.1 18

Other Authorities

D. Boerner, Sentencing in Washington, (1985)..... 14
Washington Sentencing Guidelines Commission, Statistical
Summary of Adult Felony Sentencing, Fiscal Year 2009..... 13

A. ISSUES PRESENTED ON REVIEW.

1. Brad Young asked the trial court for an exceptional sentence below the standard range. The trial court reviewed documents and heard testimony that Young had previously undiagnosed and severe mental health problems, which among other things caused him to have difficulty controlling his behavior. The court heard testimony and received corroborating information that, through the fruits of Young's self-initiated efforts, he recently started receiving treatment for his mental health problems as well as his related substance abuse. Upon reviewing the circumstances of the case, the court determined there were substantial and compelling reasons to impose a sentence that was less than the standard range prison term. The court specified that any of its reasons would justify an exceptional sentence. Where the court's reasons for imposing an exceptional sentence are not clearly erroneous and it validly determined there were substantial and compelling reasons to reduce Young's sentence, did the court exercise its lawful discretion in imposing a sentence?

2. The prosecution objects to the court's entry of findings of fact because the State had filed a notice of appeal three days before the court entered its findings, and the findings refer to a

mental health evaluation that was mentioned at the sentencing hearing but was not filed with the court until after the sentencing hearing. Has the State failed to show that the entry of factual findings after the filing of a notice of appeal invalidates the court's decision?

3. Did the court properly enter findings of fact where the prosecution did not contest the factual issue that Young suffered from a severe mental illness and the mental health evaluation further substantiated the court's justification for an exceptional sentence?

4. Even assuming *arguendo* that the court committed some error by considering a psychological/psychiatric evaluation after pronouncing its sentence but before it entered written findings of fact, is the remedy a new sentencing hearing? Where the State already refused the court's offer of a new sentencing hearing, is there any need for a new hearing?

B. STATEMENT OF THE CASE.

Brad Young stole a "bait car" that Seattle police officers purposefully parked on a street with its doors unlocked and its keys sitting on the center console. CP 2. Officers monitoring the "bait car" learned someone had taken it and stopped Young as he drove

the car. Id. Young was arrested and charged with one count of theft of a motor vehicle, an offense with a seriousness level of two on a scale of one to 16, with one as the lowest and 16 as the highest. CP 1; 9/18/09RP 2; RCW 9.94A.515.

Young pled guilty to the charged crime. CP 67. In the time between his arrest on June 8, 2008, and his sentencing on September 18, 2009, Young began extensive self-initiated and self-propelled efforts to discover the cause of and rectify his offending behavior. 9/18/09RP 3-4.

Young learned that he suffered from serious mental health illnesses that had never been diagnosed, much less treated. 9/18/09RP 13, 15-16. On his own initiative, Young obtained a mental health evaluation. Id. at 6. He commenced treatment from Sound Mental Health. Id. He met with authorities from the Department of Social and Health Services (DSHS), who conducted an in-depth psychiatric and psychological evaluation. DSHS concluded that Young suffered from significant mental health problems and found he was entitled to government funded financial aid due to the severity of his illness and his need for long-term treatment. Id. at 13.

As a child, Young suffered physical abuse and began abusing drugs and alcohol, unaware that these substances served as self-medication for his mental illness. CP 75, 99. He had never received any kind of treatment despite his involvement in the court system as a juvenile and adult. 9/18/09RP 16. After this 2008 arrest, Young enrolled himself in a 28-day inpatient drug treatment program. 9/18/09RP 4. He completed the program and participated in on-going counseling. Id. at 4, 7.

Young enrolled in school. 9/18/09RP 5-6. He took classes at Green River Community College. He received a certificate in custodial training from Renton Technical College as a way to increase his employment opportunities and help him reenter society. Id.

Young arranged to live in clean and sober housing where he could receive mental health support and drug treatment services as well as employment assistance. 9/18/09RP 4, 6.

Finally, Young engaged with his family and drew upon their strong support. 9/18/09RP 7, 13-15. He reconnected with his son, and mended ties with his brothers and mother, thus inspiring them to support him in his efforts to become a healthy and contributing member of society. Young's brother and son both told the court

that the jail “polluted” and “blocked” Young from addressing his mental health issues. 9/18/09RP 14.

Young requested an exceptional sentence below the standard range. He explained to the court that for the first time he understood the fundamental role played by undiagnosed mental health illnesses in his offending behavior as he had been unable to control his behavior. 9/18/09RP 3-8, 15-17. He feared he would lose his access to services and his treatment progress once sent to prison. He asked for a sentence of time served. 9/18/09RP 3.

The State objected to a non-standard range sentence based on Young’s criminal history and his lack of remorse at the time of the incident while he was taking the “bait car.” 9/18/09RP 10-11. The prosecution did not contest Young’s factual claims but urged the court to focus upon Young’s criminal history. The State sought a mid-range sentence of 25 months. 9/18/09RP 2.

The court imposed a sentence of 10-months, less than the low end of the standard range of 22 months but greater than the 4-month “time served” sentence Young desired. 9/18/09RP 2, 25. The State appealed.

Pertinent facts are further addressed in the relevant argument sections below.

C. ARGUMENT.

THE COURT APPROPRIATELY EXERCISED ITS
AUTHORITY AND DISCRETION TO IMPOSE ITS
SENTENCE

1. The court had discretion to impose a sentence upon Young that was less than the prison time required under the standard range. A trial court may impose an exceptional sentence if it finds “substantial and compelling reasons” to justify departure from the standard range and if those reasons are consistent with the purposes of the Sentencing Reform Act (SRA). State v. Davis, 146 Wn.App. 714, 719, 192 P.3d 29 (2008).

A trial court may not refuse to entertain a request for an exceptional sentence below the standard range, as the refusal to exercise discretion is itself an abuse of discretion. State v. Bunker, 144 Wn.App. 407, 421, 183 P.3d 1086, rev. granted on other issue, 165 Wn.2d 1003 (2008). On the other hand, 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. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.2d 638 (2003).

The Sentencing Reform Act expressly authorizes 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.” RCW 9.94A.535(1). Reasons for giving an exceptional sentence will be upheld on appeal unless “clearly erroneous.” State v. Moore, 73 Wn.App. 789, 794, 871 P.2d 642 (1994).

a. The facts favoring Young’s sentence were proven by a preponderance of evidence and are supported by the record. At the sentencing proceedings, the State did not contest the truth of Young’s claims of mental illness, his substance abuse that began in his childhood, his lack of any prior treatment for addiction or mental health problems, his recent commitment to mental health and drug treatment, his educational accomplishments, or his family’s support.

Under the SRA, a trial judge may rely on facts that are admitted, proved, or acknowledged to determine “any sentence.” RCW 9.94A.530(2); State v. Grayson, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005). Facts are “acknowledged” for purposes of sentencing when they are “presented or considered during

sentencing” and “are not objected to by the parties.” Grayson, 154 Wn.2d at 339.

In its appeal, the State offers picayune challenges to the accuracy of the court’s findings. Its primary claim is not that the findings are incorrect, but that they must be ignored and treated as if the court had never entered any findings at all.¹ Because the court’s factual findings are supported by the record, they may not be disturbed on appeal.

In finding of fact 1, the court ruled:

Mr. Young has been diagnosed with post-traumatic stress disorder, anxiety, major depressive disorder recurrent and cocaine dependence all of which existed, according to the DSHS mental health evaluator, before drug abuse began.

CP 69.

Consistent with this finding, in the DSHS Psychological/Psychiatric Evaluation, the mental health provider identified four diagnoses established by the official diagnostic codes: post-traumatic stress disorder, anxiety, major depressive disorder recurrent, and cocaine dependence, consistent with the court’s finding of fact. CP 74. This psychological and psychiatric evaluation also states that Young’s diagnosed conditions were not

caused by past or present alcohol or drug abuse. Id. The mental health evaluator explains that Young’s “mental health condition existed before drug abuse began.” Id.

The prosecution complains that Young’s post-traumatic stress disorder stems from a severe police beating Young received in 2007. The State hypothesizes that this diagnosis must post-date his drug abuse and therefore a portion of Finding of Fact 1 is incorrect. Appellant’s Brief, p. 28. But the court’s finding of fact is consistent with and directly drawn from the mental health evaluation, which says Young’s “mental condition” existed before his drug abuse. CP 74 (Psychological/Psychiatric Evaluation, p. 2).

Furthermore, the finding of fact is supported in the record by the evidence that Young’s mental illness was a life-long problem and not something that started recently. 9/18/09RP 7. The mental health provider who completed the psychological/psychiatric evaluation, Nebyu Hailemariam, concluded that Young was “chronically mentally ill” and that this mental illness would be a lifetime ordeal. CP 76. Hailemariam determined that Young’s cognitive limitations were not the result of alcohol or drug abuse. CP 75. This mental health professional found that Young had

¹ The State’s meritless procedural complaints are discussed *infra*, section

suffered from his “mental health condition” throughout his life and it would continue indefinitely. CP 74, 76.

The State incorrectly asserts that the “psychological/psychiatric evaluation” upon which DSHS relies to determine eligibility for mental health benefits is “solely [] Young’s self-report of this mental condition.” Appellant’s Brief, p. 28. Yet the evaluation was completed and signed by a clinician who is a mental health professional, and the only item in the evaluation resting solely on Young’s report is the very first section where it details the impairment or symptoms the individual claims. CP 73. The evaluation notes that “CX claims” severe PTSD. *Id.* The remainder of the evaluation, including its diagnosis, assessment of functional mental disorder, functional limitations, and prognosis, rest upon the evaluator’s judgment and not Young’s self-report.

In sum, the evidence set forth in finding of fact 1 is supported by the record and proven by the preponderance standard required.

In finding of fact 4, the court found:

It is clear that Young acted impulsively and was impaired by his Axis I diagnoses of post-traumatic stress disorder, anxiety disorder, and major

depressive disorder when he decided to drive the bait car owned by the Seattle Police Department at the time of the incident. The Court finds that this would have constituted a failed mental health defense.

CP 70.

The prosecution takes issue with the court's finding that Young was impaired by his mental illness at the time of the offense. Appellant's Brief, p. 29. But as Young explained to the court and as further established by the mental health evaluations, his involvement in this incident was the result of his inability "to function normally" and his suffering from "a brain disease." 9/18/09RP 16. He had difficulty controlling his behavior before he received mental health treatment and medication. The treatment enabled him to gain some control over his mental health functions. 9/18/09RP 18.² There is no requirement that expert *testimony* prove the basis of an exceptional sentence. Based on Young's statements about the role that his mental health problems played in his inability to control his behavior, combined with the mental health evaluation showing has substantial mental illness and "markedly" severe anxiety and paranoia that caused him difficulty in controlling his acts, the court's finding of fact is supported by the evidence and proven by a

preponderance. CP 74-75. The court's findings are substantiated by evidence in the record. Fair inferences that may be drawn from that evidence are not "clearly erroneous," and may not be disregarded in assessing the validity of the court's sentence.

The remainder of the court's factual findings are challenged for procedural, not substantive reasons, and those are challenges are discussed *infra*.

b. The reasons given by the court support its discretionary determination to impose an exceptional sentence as a matter of law. RCW 9.94A.535(1) includes a list of factors that mitigate in favor of a lesser sentence. Davis, 146 Wn.App. at 721. The listed factors "are illustrative only and are not intended to be exclusive reasons for exceptional sentences." RCW 9.94A.535(1).³ The Legislature "intended" to empower trial courts "to tailor sentences for individual situations that do not fit the predetermined structure." Davis, 146 Wn.App. at 721-22 (internal citation omitted).

² The transcript quotes Young as saying he acted "compulsively" without his medications and made "compulsive decisions," but from the context it appears Young meant he acted impulsively, or in a compelled fashion. 9/18/09RP 18.

³ The illustrative nature of mitigating factors stand in contrast to the explicitly listed permissible aggravating factors. See RCW 9.94A.535 (3) ("the following circumstances are an exclusive list of factors that can support a sentence above the standard range.")

The court may impose an exceptional sentence based on considerations that are not listed in the statute. RCW 9.94A.535(1). The Sentencing Guidelines Commission lists all exceptional sentences imposed each year, and in 2009, it found courts imposed 285 exceptional sentences below the standard range based on the mitigating factor of “the interests of justice.”⁴ A number of offenders received mitigated sentences from a court in 2009 for “rehabilitation or treatment,” or “to make frugal use of the state’s resources,” as well as the “defendant’s mental condition,” a separate consideration from the defendant’s capacity to appreciate the wrongfulness of the offense. *Id.* Two offenders received more lenient sentences because they were “addressing psychological problem[s].” *Id.*

The prosecution misrepresents the legal standard when it parses the words of certain listed illustrative factors and claims Young did not meet the particular statutory requirements. The legal question is not whether the defendant proved that he fit within a “recognized” mitigating factor, but whether the reasons given by

⁴ Washington Sentencing Guidelines Commission, Statistical Summary of Adult Felony Sentencing, Fiscal Year 2009, Table 16 Mitigated Exceptional Sentence Reasons, p. 44, available at: http://www.sgc.wa.gov/PUBS/Statistical_Summaries/Adult_Stat_Sum_FY09_All_Pages.pdf (last accessed May 19, 2010).

the court are substantial and compelling reasons to provide an alternative sentence. RCW 9.94A.535(1).

For obvious reasons, a mitigating factor does not require the accused person show she would have or should have prevailed at trial based on a defense. See Bunker, 144 Wn.App. at 421. The SRA recognizes that even when a person did not and could have not established a certain defense, or the facts do not constitute a legal defense to the charged offense, circumstances may still justify distinguishing the person's behavior from that of others convicted of the offense. Put another way, the SRA allows "variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime." State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993) (citing with approval, D. Boerner, Sentencing in Washington, § 9-23 (1985)). The purposes of the SRA are not simply to impose punishment proportionate to the seriousness of the offense and the offender's criminal history. Additional purposes of the SRA include:

- (1) Offer the offender an opportunity to improve him or herself;
- (2) Make frugal use of the state's and local governments' resources; and

(3) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

One mitigating factor is a failed defense. State v. Jeanotte, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). RCW 9.94A.535(1)(e) provides a court may impose a sentence less than the standard range if it finds, “[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.”

The court found Young’s severe mental illness was a “failed mental health defense.” CP 70. Young did not appreciate the existence or severity of his mental illness at the time of the offense because it had not been diagnosed. 9/18/07RP 15-16. Without medications, he could not control his behavioral impulses. 9/18/09RP 18. Having never had any type of treatment before the incident, he had a significantly impaired understanding of his difficulty in controlling his behavior due to his mental illness, and the extent of his diagnosis was “a big wake up call.” Id.

The trial court weighed Young’s criminal history. It acknowledged his criminal history but noted that many of his convictions occurred some time ago. 10/21/09RP 7. It also gave

weight to the fact that Young had not been arrested for new charges in the year that the case had been pending. 9/18/09RP 17, 20-21. It noted that the offense of conviction was less serious than typical, because Young stole a “bait car” and thus did not cause harm to an unsuspecting individual’s personal property. Id. at 21. Young agreed to pay for any damage to the “bait car” as part of his plea, although this was unnecessary as the State conceded that the car “sustained no damage.” CP 39; 9/18/09RP 2.

The court concluded that after the offense, “Young has taken remedial measures to successfully address” his mental illness and substance abuse problems. CP 71 (Conclusion of Law B). The court also found Young participated in significant counseling, education, and rehabilitation efforts. CP 70. Additionally, the DSHS evaluator found that despite Young’s functional limitations, he poses a low risk to the community. CP 77. Due to his Young’s successful efforts to address the issues that propelled him to commit the charged offense, the court appropriately concluded that “further punishment would not further any rehabilitative purpose and [] the defendant and society are

better served by the defendant's participation in the programs" in which he was engaged in the community. CP 71.

Finally the court found that any of the factors upon which it based an exceptional sentence would independently serve as a valid basis for such a sentence. CP 71. The court explained that if the reviewing court affirmed any of the substantial and compelling reasons for an exceptional sentence, there was no need for remand and any factor would justify the same sentence. Id.

c. The court's exceptional sentence was not "clearly too lenient." A court has substantial discretion to select the length of a sentence imposed. A court abuses its discretion in deciding the length of a sentence only where "no reasonable person" would have imposed such a sentence. Moore, 73 Wn.App. at 795.

In Moore, the court held that a sentence that was 27 months less than the standard range was not "clearly too lenient" and was within the court's "considerable discretion when it deviated from the standard range." Id. at 800. Similarly, a sentence of 17 months where the standard range is 33-43 months is not unreasonable. State v. Calvert, 79 Wn.App. 529, 533, 903 P.2d 1003 (1995), rev. denied, 129 Wn.2d 1005 (1996). Young received a sentence of 10 months, less than the 22-month low end of the standard range.

The 10-month sentence served to punish Young by requiring a significant jail term, but also considered the precise nature of the offense, the appropriate use of state resources, and the benefits society would receive if Young received treatment for his recently diagnosed serious mental health problems, had stable housing, and maintained his sobriety. While these considerations themselves might not justify a sentence less than the standard range, they are appropriate factors for the court to consider in deciding the proper term of sentence to meet the needs of punishment and community safety. The 10-month sentence is not a sentence that no reasonable person would impose for taking a “bait car.”

2. The prosecution’s technical complaint about the late entry of the findings of fact necessarily fails when it asserts no claim of actual prejudice. A court must file findings of fact when it imposes a sentence that departs from the standard range. RCW 9.94A.535. There is no mandatory deadline for the court to enter these findings. See e.g., JuCR 6.1(d) (findings of fact following juvenile adjudication shall be submitted within 21 days after juvenile files notice of appeal).

Written findings of fact are an essential part of the court's order because they formally explain the court's factual and legal reasoning. A court's oral ruling is a preliminary, informal determination; it is the written findings that carry legal significance.

State v. Mallory, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966).

Moreover, the trial court is not bound by its oral ruling when entering written findings and is free to further explain or modify the basis of its ruling.

a court's oral opinion is no more than an oral expression of the court's informal opinion at the time rendered; it is "necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned."

State v. Hatchie, 133 Wn.App. 100, 118, 135 P.2d 519 (2006)

(quoting State v. Hescocock, 98 Wn.App. 600, 606, 989 P.2d 1251

(1999); Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900

(1963)).

At the time the court imposed its sentence upon Young, the prosecution volunteered to draft findings even though the court did not impose the sentence it sought. 9/18/09RP 27. Young reserved the right to object to these findings or propose his own. Id. The court told the parties to set a hearing if they did not agree on the proposed findings. Id.

Not surprisingly, given the State's opposition to the sentence the court imposed, Young did not agree with the State's proposed findings.⁵ Thus, Young proposed his own findings and the parties set a hearing for the court to decide upon the findings it wished to enter. 10/21/09RP 3. The hearing occurred about four weeks after the initial sentencing proceeding. There is no explanation on the record as to how the parties or court scheduled the findings of fact hearing. The prosecutor did not object to the length of time it took to set the hearing. Nor does the delay appear unusual or purposeful.

Yet, 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.

The entry of findings presents a concern for a reviewing court only when the objecting party proves "actual prejudice" resulting from late-entered findings, and such prejudice occurs only upon proof that the Respondent tailored the findings "to meet the issues raised in the [appellant's] *brief*." State v. Lopez, 105 Wn.App. 688, 693, 20 P.3d 978, rev. denied, 144 Wn.2d 1016

⁵ The State's proposed findings are not part of the record on appeal.

(2001) (emphasis added). The prosecution makes no viable claim of actual prejudice here. Rather than raising a substantive complaint about the findings, it takes issue with the procedure. This argument fails on several levels.

a. The “new” information presented to the trial court was entirely consistent with the information already presented to the court. First, the prosecution pretends that the court considered brand new information and fundamentally altered its sentencing decision at the finding of fact hearing. But Young’s mental health issues were a central part of his request for an exceptional sentence. At the sentencing hearing, he explained to the court that only recently he learned that he had mental health problems that played a large role in his behavior at the time of the crime. 9/18/09RP 15-18. After his arrest, he received a diagnosis for mental health illness that he never before understood he suffered and he began receiving treatment for the first time. Not only did he receive mental health treatment, he also applied to DSHS for disability funds. 9/18/09RP 12-13. For example, Young’s social worker told the court at sentencing:

His mental health issues are significant that qualifies him for a GAX medical coupon, which is a track to Social Security, and he showed me a letter from

DSHS that states they were going to assist him with doing that. And . . . he has been willing to take medication for his mental health issues.

9/18/09RP 13.

Young told the judge, "I have both humbled myself and pushed my pride aside to realize I need help and that I cannot function normally without the aid of mental health counseling and medication and drug treatment." 9/18/09RP 16. He had been seeing "a behavior specialist for my mental health issues," to help him correct his behavioral problems that prompted his poor judgment, lack of control, major depression, and use of drugs to self-medicate his troubled mental health. Id. He offered a letter from Sound Mental Health explaining the treatment he received and expected to receive. He explained that he sought out this treatment on his own initiative. He had sensed there was something wrong with him but he knew before knew that his behavior stemmed from untreated and undiagnosed mental health problems. Id. at 18.

Young's mental health problems, his recent understanding of the extent of those problems, and his recent efforts at obtaining professional assistance for them, were the critical part of his request for an exceptional sentence. At the time of the sentencing

hearing, Young had not received his DSHS diagnosis, which recognized the severity of his mental health problems and expressly found he had a legal “disability” under DSHS standards.⁶ He presented this additional documentation to the prosecutor and the court. The DSHS document further substantiated the severity of Young’s mental health problems.

b. The State does not contest the validity or accuracy of the information presented to the court. The prosecutor did not contest the validity of the additional documentation, or ask for the opportunity to respond to its substance. 10/21/09RP 5-6. It simply objected to the court looking at this document after it had imposed sentence. The State argued to the trial court that its sentencing decision “was based on certain facts and circumstances” and the court was barred from “supplement[ing] that record” by considering the DSHS evaluation of Young’s mental health disability. 10/21/09RP 6.

The prosecutor explained that the State’s view was that Young must go to prison, “basing this just strictly on our view of his

⁶ The prosecution implies that Young should have received the DSHS evaluation earlier, but the State presented no information explaining the process of obtaining a DSHS mental health evaluation, there is every reason to surmise that the bureaucracy of obtaining state assistance is cumbersome, and there was no basis to question the truthfulness of defense counsel’s claim that she had not

criminal history.” 10/21/09RP 7. The State objected to any consideration of Young’s mental health issues, or any other issues beyond his criminal history as factors in determining the legally available sentence. Id.

The court asked the prosecutor if he objected to any of the proposed findings. The only objections the prosecutor stated was the court’s reference to “documentation that the defense is now providing to the court.” 10/21/09RP 8-9. The prosecutor objected to the court considering “anything additional” but he did not know what part of the information was new. 10/21/09RP 10. The court offered the prosecution the remedy of another sentencing hearing but the prosecutor demurred, saying he did not “want to keep continuing this over.” 10/21/09RP 9.

c. The findings of fact were filed far in advance of the Opening Brief and any delay in their filing do not prejudice the State’s statutory right to appeal. Usually, the complaint that belatedly entered findings of fact undermine the right to appeal is predicated on the concern that the prevailing party waits until the appellant files a brief in the Court of Appeals and then tailors the court’s findings to undermine the issues raised on appeal.

received the evaluation until after the sentencing hearing. 10/21/09RP 3.

The court entered its findings of fact on October 21, 2009, almost six months before the State filed its brief in the Court of Appeals. CP 69. The court's findings could not have been tailored to undermine the issues framed in appellate court briefing.

Moreover, the court offered the prosecution the opportunity for another sentencing hearing, or to challenge the factual information presented in the DSHS document that had not been presented at the time of sentencing. 10/21/09RP 9. The court said the new information seemed relevant and asked the prosecution if it wanted a new hearing, but the prosecution declined. *Id.* The State voiced no objection to the substance of the information contained in the DSHS report; offered no argument that Young did not suffer from significant mental illness, and declined the court's offer of a new sentencing hearing.

Young's mental health problems were front and center in his request for an exceptional sentence. The fact that Young had other information that further cemented the substantial untreated disability under which he operated does not invalidate the court's sentence but, in fact, supports it.

To the extent the court did not give the prosecution sufficient time to respond to the new information that it used to explain its

basis for imposing an exceptional sentence, the only possible remedy is for a new sentencing hearing. State v. Murray, 128 Wn.App. 718, 725, 116 P.2d 1072 (2005). If the court erred in its procedure, the court may exercise its discretion anew. State v. Flett, 98 Wn.App. 799, 808, 992 P.2d 1028 (2000).

Finally, the court emphasized that it would maintain this sentence based on any of the mitigating factors. CP 71. The court plainly intended to impose such a sentence as long as a legal basis was available for it to do so and the court would maintain that same sentence upon remand. Thus, a new hearing would be unnecessary.

3. The prosecution misrepresents the court's sentencing rationale in an apparently baseless attempt to undermine the court's credibility. The prosecution asserts that the court did not understand the sentence it was imposing and selectively cites the record in a misleading fashion. Brief of Appellant, p. 11-12. The record contradicts the prosecution's claim and it must be disregarded.

The court was not under the impression that Young would be receiving a sentence different from what it imposed. The judge told Young he would not be placed on community custody and

warned him that he needed to ensure he had a strong support system in the community. 9/18/09RP 24.

The judge indicated that he would like to monitor Young in the community, such as through “work or educational release.” 9/18/09RP 22. The court asked if Young would have community custody and the prosecution told him he would not have any community supervision.⁷ The court then warned Young that it should take the court’s leniency seriously, and if he committed new offenses, he should expect significantly harsher punishment. 9/18/09RP 24-26. The court emphasized to Young that it would be very important for him to find community support and maintain his treatment. Id.

The court imposed work or educational release, but cautioned Young that his work release would be revoked if he had any violations of the law. 9/18/09RP 25. The prosecution misinterprets the court’s warning to Young that he would be put in jail if he committed new law violations as displaying the court’s impression that Young would be placed on community custody.

⁷ The prosecution incorrectly informed the court that it lacked authority to impose community custody. 9/18/09RP 24. As part of an exceptional sentence, the court may impose terms of community custody that are not required under the standard range. Davis, 143 Wn.App. at 721-22. Thus, the prosecution misled the court in the scope of its sentencing authority.

The court's remarks came in the context of its order for work or educational release. The State's efforts to undermine the credibility of the judge by quoting from his comments to Young should be disregarded.

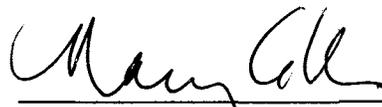
The court's written findings constitute its formal ruling and explanation of its sentence. The court's written ruling is supported by the record, consistent with the purposes of the SRA, and its exercise of discretion should not be disturbed on appeal.

D. CONCLUSION.

For the reasons stated above, this Court should affirm the sentence imposed by the trial court based upon its appropriate exercise of discretion.

DATED this 21st day of May 2010.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Appellant,)	
)	NO. 64339-8-I
v.)	
)	
BRAD YOUNG,)	
)	
Respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF MAY, 2010, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JAMES WHISMAN, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] BRAD YOUNG 1733 WINDSOR WAY CLOVIS, NM 88101-8626	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF MAY, 2010.

X _____


2010 MAY 21 PM 4:16

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710