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No. 64444-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE GUERRERO,

Appellant.

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

The Honorable Jim Rogers
The Honorable William Downing

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OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

In sentencing Jose Guerrero for residential burglary and violation of no-contact order, the trial court refused his request for first-time offender waiver because of a prior misdemeanor conviction. Because the Legislature has already determined that a misdemeanor record does not preclude eligibility for first-time offender status, the court relied on impermissible grounds, and Mr. Guerrero's sentence must be reversed.

B. ASSIGNMENT OF ERROR

The trial court abused its discretion in basing its denial of Mr. Guerrero's request for a first-time offender waiver of the standard sentence range on impermissible grounds.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

RCW 9.94A.650 authorizes the sentencing court to waive the standard sentence range for an eligible first-time offender and impose a sentence of up to 90 days confinement. While a defendant is not entitled to a first-time offender waiver, the court must meaningfully consider such a request and may not rely on impermissible grounds in reaching its decision. Although Mr. Guerrero was eligible for the waiver, the trial court denied the request and imposed a standard range sentence. The only reason

for the denial offered by the trial court was a prior misdemeanor conviction. Did the court abuse its discretion, requiring reversal of the sentence and remand for resentencing?

D. STATEMENT OF THE CASE

Jose Guerrero pleaded guilty to residential burglary and felony violation of a no-contact order (VNCO). CP 7-28. The State recommended a standard range sentence of 12 months for the burglary and 14 months for the VNCO. CP 34. At sentencing, Mr. Guerrero requested a first-time offender waiver of the standard range. RP¹ 14-18. The sentencing court denied the request and imposed a sentence of nine months on the burglary and 13 months on the VNCO, to be served concurrently, with nine to 12 months community custody. CP 34-35.

¹ The record in this case includes of two verbatim reports of proceedings: a guilty plea hearing on September 23, 2009 and a sentencing hearing on October 9, 2009. In this brief, all citations to "RP" refer to the sentencing hearing, as Mr. Guerrero does not refer to the other hearing here.

E. ARGUMENT

THE TRIAL COURT'S FAILURE TO
MEANINGFULLY CONSIDER MR. GUERRERO'S
REQUEST FOR A FIRST-TIME OFFENDER
WAIVER REQUIRES REVERSAL OF HIS
SENTENCE AND REMAND FOR RESENTENCING

1. Mr. Guerrero qualified as a first time offender. RCW

9.94A.650 provides:

(1) This section applies to offenders who have never been previously convicted of a felony in this state, federal court, or another state, and who have never participated in a program of deferred prosecution for a felony, and who are convicted of a felony that is not.

(a) Classified as a violent offense or a sex offense under this chapter;

(b) Manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in Schedule I or II that is a narcotic drug or flunitrazepam classified in Schedule IV;

(c) Manufacture, delivery, or possession with intent to deliver a methamphetamine, its salts, isomers, and salts of its isomers as defined in RCW 69.50.206(d)(2);

(d) The selling for profit of any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana; or

(e) Felony driving while under the influence of intoxicating liquor or any drug or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug.

(2) In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses.

(3) The court may impose up to one year of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed two years.

(4) As a condition of community custody, in addition to any conditions authorized in RCW 9.94A.703, the court may order the offender to pay all court-ordered legal financial obligations and/or perform community restitution work.

Mr. Guerrero's current convictions were not for violent, sex, or drug offenses, and he had no prior felony convictions or deferred prosecutions. Current multiple felony convictions did not disqualify him from first-time offender status. *State v. Johnson*, 97 Wn.App. 679, 682, 988 P.2d 460 (1999) (citing *State v. Welty*, 44 Wn.App. 281, 284, 726 P.2d 472, *review denied*, 107 Wn.2d 1002 (1986)).

Mr. Guerrero was therefore eligible for a first-time offender waiver.

2. Because the court refused to meaningfully consider the request, the sentence must be reversed. A defendant may always challenge the procedure by which a sentence within the standard range is imposed. *State v. Mail*, 121 Wn.2d 707, 712-13, 854 P.2d 1042 (1993). RCW 9.94A.585(1) provides that the length of a standard range sentence may not be appealed, but does not place an absolute prohibition on the right of appeal. *State v. McGill*, 112 Wn.App. 95, 99, 47 P.3d 173 (2002). Review is proper when a defendant requested a sentence below the standard range but the court refused to exercise discretion at all or relied on an impermissible basis for denying the request. *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998).

A court refuses to exercise its discretion if it categorically refuses to impose an exceptional sentence downward under any circumstances. *Id.* A court relies on an impermissible basis if it does not consider the request because of the defendant's race, sex, religion, or other characterization, such as a drug dealer. *Id.*

3. The trial court abused its discretion in basing its denial of a first-time offender waiver on impermissible grounds. “While no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative considered.” *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis in original).

In *Grayson*, the trial court refused the defendant’s request for a DOSA on the basis that

the State no longer has money available to treat people who go through the DOSA program. So I think in this case if I granted him a DOSA it would be merely to the effect of it cutting his sentence in half. I’m unwilling to do that for this purpose alone. There’s no money available. He’s not going to get any treatment; it’s denied.

Id. at 337. In reversing, the Washington Supreme Court ruled, “Considering all of the circumstances, the trial court categorically refused to consider a statutorily authorized sentencing alternative, and that is reversible error.” *Id.* at 342. The Court came to this conclusion even after acknowledging Mr. Grayson was not a good candidate for a DOSA and would likely not receive one on remand. *Id.* at 343.

Although the trial court has broad discretion in granting or denying a sentence under the first-time offender option (*Welty*, 44 Wn.App. at 283-84; *State v. Boze*, 47 Wn.App. 477, 735 P.2d 696 (1987)), *Grayson* requires the court to give the request meaningful consideration.

Here, the State asked the court to consider a certification for probable cause in a previous matter (this document is not in the court file). RP 10-11. Defense counsel objected, noting that that conviction was not a felony. RP 11. The court responded:

[I]t doesn't legally preclude a first offender waiver treatment under the law. What it does is it lets me know that Mr. Guerrero with you at his side stood before a judge and received an order that he should enter into and successfully complete State certified domestic violence treatment program and was to have no contact with [the victim] on April 10th of 2009. It's just a historic fact.

RP 12.

Announcing the sentence, the court stated,

I think it would certainly undercut the seriousness of all sentencings, and the previous one in this case in particular, for this court to treat this as a first offense at this time.

RP 26. The court offered no other rationale for the denial of the first-time offender request. It did, however, commend Mr. Guerrero on his efforts to obtain batterer's treatment and a GED since he had

been in custody on the current offenses, as well as his recognition and remorse that his actions had harmed his children. Sentencing RP 25-26. Based on those remarks, it appears that the court might well have considered the first-time offender option appropriate for Mr. Guerrero, but for his misdemeanor record.

But the Legislature has already decided that prior misdemeanors should not preclude an otherwise eligible defendant from receiving a first-time offender waiver. The Legislature specifically chose to make the waiver available to those with no prior felony convictions. RCW 9.94A.650. Although the court correctly recognized this (RP 12), it based its denial of the waiver on this basis alone. The court therefore relied on impermissible grounds, abusing its discretion. *Garcia-Martinez*, 88 Wn.App. at 330.

In light of the decision in *Grayson*, *supra*, Mr. Guerrero is entitled to reversal of his sentence and remand for resentencing.

F. CONCLUSION

For reasons stated, Mr. Guerrero submits this Court should reverse his sentence and remand for resentencing for the trial court to properly consider his request for a first-time offender waiver.

DATED this 31st day of March, 2010.

Respectfully submitted,



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