

64821-7

64821-7

NO. 64821-7-I

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

REC'D STATE OF WASHINGTON,

Respondent,

MAY 24 2010

v.

King County Prosecutor
Appellate Unit

RICKY SEXTON,

Appellant.

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

The Honorable Sharon Armstrong, Judge

BRIEF OF APPELLANT

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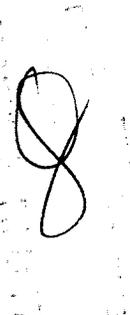


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A. INTRODUCTION

Appellant Ricky Sexton is appealing from his sentence imposed on remand from this Court, following a successful appeal in which Sexton argued the sentencing court failed to independently determine whether his prior convictions for theft and burglary constituted the same criminal conduct. The sentencing court originally calculated Sexton's offender score as 6 points, yielding a standard range of 60 to 120 months, and imposed 70 months.

On remand, the sentencing court agreed Sexton's prior theft and burglary convictions constituted the same criminal conduct and recalculated his offender score as 5 points, yielding a range of 20 to 60 months. Although the court originally imposed a low-end sentence, this time, the court imposed the maximum term of 60 months. As reasons, the court cited Sexton's conduct and offense history, which it mistakenly believed included delivery and manufacturing of methamphetamine.

Sexton moved to modify the judgment and sentence, pointing out the court's mistake, but the court held steadfast to the 60-month sentence it imposed, reasoning: "sentence was based on the nature of the charges and defendant's criminal history."

B. ASSIGNMENTS OF ERROR

1. The sentencing court acted vindictively in imposing on remand a more severe sentence in proportion to the corrected standard range than originally imposed.

2. The trial court abused its discretion in imposing the increased sentence, based on a misunderstanding of the nature of Sexton's prior offenses.

Issues Pertaining to Assignments of Error

1. Whether the sentencing court acted vindictively on remand in imposing a proportionately increased sentence where the judge relied on no new information concerning Sexton's current offenses, but ostensibly on the nature of Sexton's prior convictions, and where the judge held steadfast to her decision to impose the top of the range even after her misperception of Sexton's priors came to light?

2. Whether the sentencing court abused its discretion in imposing the increased sentence, where the court indicated its sentencing discretion was guided by the nature of Sexton's prior convictions, which it mistakenly believed included delivery and manufacturing methamphetamine?

C. STATEMENT OF THE CASE

Following a trial in King County Superior Court, Sexton was convicted of delivering methamphetamine and possessing methamphetamine with the intent to deliver. CP 12-20. Sentencing occurred on April 21, 2008, before the Honorable Sharon Armstrong, who also presided over the trial. Supp. CP __ (sub. no. 75A, Clerk's Minutes, 3/14/08).

Defense counsel Spencer Freeman argued Sexton's prior convictions for burglary and theft of anhydrous ammonia, entered under the same cause number and sentenced the same day, should be counted as same criminal conduct. CP 25-26. Judge Armstrong noted the previous sentencing court did not count them as such and declined to "second-guess that judge." CP 26. Accordingly, the court calculated Sexton's offender score as 6 points, yielding a standard range of 60 to 120 months. CP 13. The court imposed 70 months.¹ CP 15.

On appeal, Sexton argued the sentencing court erred in failing to independently determine whether the priors constituted the same criminal conduct. This Court agreed and remanded for a new sentencing hearing. CP 26.

Resentencing occurred before Judge Armstrong on December 18, 2009. Sexton was represented by Anita Paulsen of The Defender Association, while Sexton listened telephonically. RP 2. After hearing argument, Judge Armstrong agreed Sexton's prior theft and burglary convictions constituted the same criminal conduct. Accordingly, the court recalculated Sexton's offender score as 5 points, yielding a standard range of 20 to 60 months. RP 5.

Paulsen asked the court to impose a sentence on the lower end of the range, as it did previously. RP 3. As Judge Armstrong put it, however: "I don't feel that I'm bound at all by, um, you know, looking at where the sentence I imposed before is in relation to the range." RP 5. The state therefore recommended the maximum:

Your Honor, the State recommends 60 months in that instance. I think, your Honor presided over the trial and is aware of, uh, Mr. Sexton's history with manufacturing methamphetamine. This case was delivery of methamphetamine, possession with intent to deliver methamphetamine. I think considering Mr. Sexton's criminal history and the facts of the case, uh, 60 month sentence is appropriate in this case. Um, he was originally given 70 months when his range was 60 to 120 months. Uh, I don't think the conduct is any different with the different offending, offender score. I think your Honor thought that 70 months was an appropriate amount of time given the facts of the

¹ The prosecutor recommended 84 months. Supp. CP ___ (sub. no. 98, Presentence Statement of King County Prosecuting Attorney, 4/22/08).

case. Um, and, knowing about his prior history and his prior points and what they were and how they were related, um, obviously the Court can't sentence him to 70 months because that's outside the standard range, um, but since the Court thought it fit to sentence him to 70 months, um, originally, I think 60 months is appropriate.

RP 7-8.

Despite the prosecutor's comments, there was no allegation or evidence of manufacturing in the current case. Sexton was convicted of selling methamphetamine to a confidential informant who had been arrested on drug charges, and who, in exchange for police consideration, agreed to set up the drug buy with Sexton. CP 31-35. The possession with intent charge was based on additional methamphetamine found in Sexton's car after the buy. CP 31-35. As will be set forth, infra, Sexton has no prior convictions for manufacturing methamphetamine, either.

In response, Paulsen argued the court should impose a sentence in proportion to the range as it had previously:

I actually thought that this might become an issue and I did a little bit of research. And the case that I found is In re Personal Restraint Petition of Jerry Goodwin,^[2] uh, 2002 case. And, uh, the case,

² In re Personal Restraint of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002) (resentencing required when court imposes sentence based on miscalculated offender score even if sentence imposed is within correct range, if the trial court had indicated its intent to impose a sentence at the low end of the range and the

um, there, and maybe I should just scratch my little personal note off of it was that when their person is being resentenced at a lower sentencing range, the more appropriate thing to do, according to the Court, is to sentence them relative to where they were on the sentencing guidelines. So, in Mr. Sexton's case, he was sentenced at the lower end of what was then the standard range and so I would argue that he should be sentenced again at the lower part of the range, uh, at, at, at score of 5.

RP 8.

Judge Armstrong stated that she would have imposed the high end originally, had the range been lower:

[I]f we had the correct offender score and the range had been 20 months plus to 60 months, when I sentenced before, I would have sentenced Mr. Sexton at the top of the range. Um, it was my view that with the range being so large that 70 months was, was actually the appropriate amount of time, so. Uh, unless there's something in the case that compels me to do sort of a proportionate sentence, I think I have the discretion to impose a sentence that I believe, um, is within the range but comports with the seriousness of the conduct.

RP 9.

When Sexton was afforded an opportunity to speak, he expressed confusion as to why the court would not impose 27 months, which would be proportionate to his original sentence, based on the corrected range. RP 10. Paulsen explained Judge

low end of the correct range is lower than the low end of the ranged determined using the incorrect offender score).

Armstrong did not agree the case law required such a result. RP 10. Sexton did not understand why the judge would not just add 10 months to the bottom of the range, as it did before, and impose a sentence of 30 months. RP 10.

Paulsen interrupted to allow the court to rule:

Attorney Paulson^[3] Well, you have to understand, Mr. Sexton, we are in open Court and the judge is looking at me smiling. Uh, so, um, I –

Ricky Sexton I don't know what to say Ms. Paulson.

Attorney Paulson I, I, I know. But the, the conversation is really with the Court and maybe I can, she's I think she's making a ruling and so maybe we can put the phone closer to her and so you can hear the Court make her ruling.

Ricky Sexton Okay.

Judge Armstrong Uh, Mr. Sexton, I have, um, ruled in your favor on the issue of same criminal conduct that resets your standard range at 20 plus months to 60 months. Given the nature of your conduct, plus the fact that you had prior involvement in methamphetamine sale and, manufacture, um, I, I still believe that the correct sentence for you is 60 months, and that is the sentence that I'm going to impose. Granted it is at the top of this range, um, but I believe that is the right amount of time for your conduct.

RP 10-11.

³ Although counsel's last name is spelled "Paulsen," it is spelled "Paulson" in the transcript. CP 28; RP 12.

After receiving permission to speak, Sexton explained the Judge Armstrong was incorrect about the nature of his priors, which did not include selling or manufacturing methamphetamine. On the contrary, they were for simple possession: "One was a dirty baggie, and the other one was, was, uh, morphine[.]" RP 11. The court noted the theft of anhydrous ammonia, which is an ingredient of methamphetamine. RP 12. When Sexton further stated, "I am not a meth manufacturer, your Honor, I am not a meth dealer," the judge stated she did not believe him and was imposing 60 months. RP 12; CP 29.

Although the hearing was concluded, the court reporter continued recording and reported the following:

Judge Armstrong Ms. Paulson, it has been a journey with this defendant.

Attorney Paulson I gathered that.

Prosecutor Kline I was trying to fill her in before, uh, the hearing, your Honor.

Judge Armstrong Especially the last hearing we had, oof!

Prosecutor Kline I felt so sorry for Mr. Freeman. Uh, it was like, hey, the nicest guy, you know, that's what you get for being a nice guy right? [inaudible].^[4]

⁴ It's unclear from the record what hearing the prosecutor and judge are referencing. Sexton was represented by Spencer Freeman for most of Sexton's

Attorney Paulson It's like, OBD [sic] appointed me, I'll just write a little something and that'll be the end of it.

[laughter]

Prosecutor Kline Well, thank you for, thank you.

Attorney Paulson Now, the ineffective assistance of counsel claim comes through.

[laughter]

Judge Armstrong Or the bar complaint, I mean, the judicial conduct complaint, you know.

Female Unknown I guess I could earn my keep.

RP 13-14.

Sexton thereafter filed a pro se motion to modify his sentence, on grounds it had been imposed based upon misinformation. CP 40-76. Sexton attached proof his prior violations of the Uniform Controlled Substances Act (VUCSA) were simple possession convictions, not for delivery or manufacturing. CP 40-76.

Sexton's original judgment and sentence listed his VUCSAs as:

jury trial and at sentencing. However, Sexton was allowed to proceed pro se during the defense case and closing argument at trial, with Freeman as standby counsel. Supp. CP __ (sub. no. 75A, Clerk's Minutes, 3/14/08).

CONT SUBS VIOL – SEC (D) 7/26/1999 99-1-00132-1

CONT SUBS VIOL A:
MFG/DLVR/POSS 2/6/1997 96-1-04370-4

CONT SUBS VIOL A:
MFG/DLVR/POSS 7/1/1996 95-1-00111-6

CP 18.

For the 1999 offense, a certified copy of the judgment and sentence (attached to the motion to modify) indicated Sexton was convicted of possessing methamphetamine. CP 68; RCW 69.50.401(d). For the 1996 offense, a certified copy of the judgment and sentence indicated Sexton was convicted of possessing morphine. CP 58; RCW 69.50.401(d). For the 1995 offense, a certified copy of the judgment and sentence indicated Sexton was convicted of possessing an unspecified controlled substance. CP 49; RCW 69.50.401(d).

Defense counsel also filed a motion, attaching the same judgments and sentences and concurring that none of them were for manufacturing or delivery. Supp. CP __ (sub. no. 141, Motion for Relief from Error at Sentencing per Cr 7.8, 1/11/10).

The court denied Sexton's motion, however, reasoning: "sentence was based on the nature of the charges and defendant's criminal history." CP 77. Sexton appeals. CP 36-39, 86-88.

D. ARGUMENT

THE COURT ACTED VINDICTIVELY AND ABUSED ITS DISCRETION IN IMPOSING AN INCREASED SENTENCE IN PROPORTION TO THE CORRECTED STANDARD RANGE ON REMAND FROM THIS COURT FOLLOWING A SUCCESSFUL APPEAL.

When the standard range was incorrectly calculated as 60 to 120 months, the court imposed 70 months. As Sexton surmised at re-sentencing, a proportionate sentence based on the corrected range of 20 to 60 months would have been about 27 months. Yet, the court imposed 60 months – the top of the range. When pressed for a reason, the judge explained she felt 60 months was appropriate based on Sexton's conduct and his purported history of manufacturing and delivering methamphetamine. As it turned out, Sexton has no prior convictions for manufacturing or delivering methamphetamine or other drugs.

The court's vindictiveness is evidenced by its imposition of a proportionately increased sentence on remand, its off-color remarks about Sexton when re-sentencing was concluded, and its refusal to modify the sentence once its misunderstanding regarding Sexton's prior criminal history became evident.

Alternatively, the court abused its discretion in imposing the top of the range, as its discretion was guided by an incorrect

understanding of Sexton's criminal history. This Court should reverse Sexton's sentence and remand for a new sentencing hearing before a different judge.

1. The Circumstances Show a Reasonable Likelihood of Actual Vindictiveness.

In North Carolina v. Pearce,⁵ the Supreme Court held that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. Pearce, 395 U.S. at 723. A trial judge is not constitutionally precluded from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." Pearce, 395 U.S. at 723 (emphasis added) (quoting Williams v. New York, 337 U.S. 241, 245, 69 S. Ct. 1079 93 L. Ed. 1337 (1949)). Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. Pearce, 395 U.S. at 723.

⁵ North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

However, "It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an unannounced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." Pearce, 395 U.S. at 723-24. A court is "without right to . . . put a price on an appeal. (I)t is unfair to use the great power given the court to determine sentence to place a defendant in the dilemma of making an unfree choice." Pearce, 395 U.S. at 724 (quoting Worcester v. Commission of Internal Revenue, 370 F.2d 713, 718 (C.A. Mass. 1966)).

The Due Process Clause of the Fourteenth Amendment therefore requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. Pearce, 395 U.S. at 725.

To ensure the absence of such motivation, the Court in Pearce held that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his or her doing so must affirmatively appear. The Pearce Court further held that those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual basis upon which the increased sentence is based must be made part of the record, to ensure full appellate review. Pearce, at 726.

The Pearce presumption of vindictiveness has been narrowed somewhat by subsequent cases. See e.g. Texas v. McCullough, 475 U.S. 134, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986); and Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). In the former case, McCullough was tried before a jury and convicted of murder. He elected to be sentenced by the jury, as was his right under Texas law. After the jury imposed a sentence of 20 years, the trial judge granted McCullough a new trial based on prosecutorial misconduct. McCullough, 475 U.S. at 136.

The state retried McCullough with the same trial judge presiding. This time, the state presented testimony from two

witnesses who had not testified previously. These witnesses testified it was McCullough, not his accomplices, who slashed the victim's throat. After the jury found McCullough guilty, he elected to be sentenced by the judge. The judge sentenced him to 50 years, explaining the increase was due to the new evidence, as well as the fact that McCullough had been recently released from prison at the time of the crime, which the trial judge had only recently learned. McCullough, 475 U.S. at 136.

For two reasons, the Supreme Court held the presumption of vindictiveness did not apply under these circumstances. First, McCullough's second trial came about because the judge herself ordered it: "[U]nlike the judge who has been reversed, the trial judge here had no motivation to engage in self-vindication." McCullough, at 139 (quotation omitted). As the court explained, "Because there was no realistic motive for vindictive sentencing, the Pearce presumption was inappropriate." McCullough, at 139.

Second, the court found the presumption inapplicable because "different sentencers assessed the varying sentences that McCullough received." McCullough, at 140. Where different sentencers are involved:

[I]t may often be that the [second sentencer] will impose a punishment more severe than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty.

McCullough, 475 U.S. at 140 (quoting Colten v. Kentucky, 407 U.S. 104, 117, 92 S. Ct. 1953, 32 L. Ed. 584 (1972)).

Finally, the Court held that even if the Pearce presumption did apply, the trial judge successfully rebutted it, based on the reasons she stated on the record – the new testimony and rapid recidivism consideration. McCullough, at 141. In so holding, the Court clarified that its statement in Pearce that reasons justifying an increase in sentence are not necessarily limited to circumstances or events occurring after the original sentencing proceeding. Id.

For similar reasons, in Smith v. Alabama, the Court held the Pearce presumption did not apply when a defendant received an increased sentence following a jury trial after he successfully challenged his guilty plea on appeal:

We think the same reasoning leads to the conclusion that when a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge. Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will

usually be considerably less than that available after a trial. . . .

. . . in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged.

Smith, 490 U.S. at 802.

Unlike the circumstances of McCullough and Smith, here there is a reasonable likelihood that Judge Armstrong increased Sexton's sentence based on actual vindictiveness. Unlike the judge in McCullough, Judge Armstrong had been reversed on appeal. And unlike the judge in Smith, Judge Armstrong had already sat through a jury trial at the time of the first sentencing. Accordingly, there is justifiable concern about "institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals." McCullough, 475 U.S. at 139 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 27, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973)). Because there was a realistic motive for vindictive sentencing in Sexton's case, the Pearce presumption applies.

Under the facts of Sexton's case, that presumption cannot be overcome. Between the first and second sentencing, there were no "events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental

and moral propensities.” Pearce, at 723 (citing Williams, 337 U.S. at 245). In fact, Judge Armstrong made no such claim. Rather, the judge stated only that she would have imposed the high end of the range originally, had it not been calculated so high, and that:

Given the nature of your conduct, plus the fact that you had prior involvement in methamphetamine sale and manufacture, um, I, I still believe that the correct sentence for you is 60 months[.]

RP 10-11 (emphasis added). The state may claim this passage indicates a vindictive-free motive sufficient to overcome the presumption. However, such is belied by the judge’s conduct in maintaining the exact same sentence once the nature of Sexton’s priors – none of which involved delivery or manufacture as the judge mistakenly believed – was brought to the judge’s attention. If Judge Armstrong’s discretion truly were guided by Sexton’s conduct plus his misperceived prior convictions, there would be no reason for the judge to maintain the same sentence upon discovery of the misperception – apart from vindictiveness.

That Judge Armstrong intended to punish Sexton for a successful appeal is also suggested by the court’s laughter and off-color comments at the close of the sentencing hearing, stating “it

has been a journey with this defendant,” and joking about a “judicial conduct complaint.” RP 13-14.

In response, the state may liken this case to State v. Barberio, 66 Wn. App. 902, 833 P.2d 459 (1992), where this Court held that a reduction in the offender score and standard range did not require a proportionate reduction in the length of the re-imposed exceptional sentence where the sentence entered was in the acceptable range and no showing of vindictiveness was made. However, any similarity between this case and Barberio is superficial at best.

Barberio was convicted of one count of second degree rape and one count of third degree rape. He was sentenced to exceptional sentences of 72 months for the second degree rape and 28 months for the third degree rape, to be served concurrently. The standard ranges for these offenses, based on Barberio’s offender score of 1, was 26-34 and 12-14 months, respectively. Although the trial judge used a mathematical formula to determine the length of the exceptional sentence for the third degree rape conviction, she did not for the second degree rape. Rather, the court imposed a sentence that was closer to the statutory maximum than to the upper end of the standard range, due to several

aggravating factors, including deliberate and extreme cruelty. Barberio, 66 Wn. App. at 904.

On appeal, this Court reversed the third degree rape conviction, based on faulty jury instructions. The prosecutor opted not to retry Barberio on remand, and he was re-sentenced on the second degree rape conviction with an offender score of zero and a standard range of 21-27 months. Although Barberio argued for a reduced sentence, the court again imposed an exceptional sentence of 72 months, based on the aggravating factors previously set forth. Barberio, 66 Wn. App. at 905.

On appeal, Barberio argued the reduction in his offender score and standard range required a proportionate reduction in the length of his reimposed exceptional sentence as a matter of law. Barberio, 66 Wn. App. at 906. This Court concluded it did not. In so holding, this Court noted its decision “might well be different” if, in determining the first exceptional sentence for the second degree rape, the court had used a mathematical formula (such as 2 times the upper end of the standard range as was done for the third degree rape). Instead, however, the court first decided an exceptional sentence was appropriate and then considered the entire scale from the lowest end of the standard range to the

statutory maximum of 120 months. The court determined punishment should be closer to the statutory maximum than to the upper end of the then standard range of 26-34 months. Although the court was required to resentence Barberio in light of his new offender score, this Court held it was entirely appropriate for the court to consider whether 72 months was still appropriate in light of the aggravating factors. This Court also noted there was no evidence of vindictiveness. Barberio, 66 Wn. App. at 907-908.

Whereas the sentencing court in Barberio focused on the aggravating factors and the statutory maximum for the offense as a basis for the length of the exceptional sentence – not Barberio’s offense history or other current offense – Judge Armstrong asserted no reason for her choice of 70 months at the first sentencing. RP (4/21/08) 6-7.⁶ The only reason she gave for not imposing a proportionately reduced sentence based on the corrected offender score on remand was Sexton’s “conduct” concerning the current offenses and purported prior offenses for delivery and manufacturing methamphetamine. Considering that Sexton’s conduct consisted of selling drugs to a confidential informant who had recently been busted himself, Sexton’s offense

history – unlike Barberio’s – had to have been a weighty factor in guiding the court’s discretion. Yet, Judge Armstrong maintained the same sentence upon learning her understanding of that history was incorrect. This fact shows vindictiveness, unlike the facts of Barberio. There is also evidence of vindictiveness in the court’s off-color remarks at the close of re-sentencing. For these reasons, Barberio – while addressing an argument concerning a request for a proportionately reduced sentence – is not controlling here.

In short, the circumstances of this case show no legitimate non-vindictive reason for the proportionate increase in Sexton’s sentence. This is the type of case where the prophylactic rule of Pearce should apply. Based on the court’s off-color remarks and refusal to reduce the sentence upon learning her exercise of discretion was based on a faulty premise, the Pearce presumption cannot be overcome.

2. The Court Abused its Discretion in Imposing a Sentence Based on Unsupported Facts.

The state asked the court to impose the top of the range based on “Mr. Sexton’s history with manufacturing methamphetamine.” RP 7-8. In imposing the top of the range, the

⁶ Sexton is filing a motion (contemporaneously with this brief) to transfer the verbatim reports of proceedings from his first appeal, COA No. 61721-4-I.

court reasoned: "Given the nature of your conduct, plus the fact that you had prior involvement in methamphetamine sale and, manufacture, um, I, I still believe that the correct sentence for you is 60 months[.]" RP 10-11. Although Sexton tried to explain that his priors were for simple possession, the court stated it did not believe him and restated it was imposing 60 months. Because the court was in fact wrong about Sexton's priors, and because the court's main reason for imposing the top of the range was the misperceived nature of Sexton's priors, the court abused its discretion in imposing 60 months.

A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." State v. Stenson, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997). "A trial court's decision is manifestly unreasonable if it 'adopts a view "that no reasonable person would take."'" In re Pers. Restraint of Duncan, 167 Wash.2d 398, 402-03, 219 P.3d 666 (2009) (quoting Mayer v. Sto Indus., Inc., 156 Wash.2d 677, 684, 132 P.3d 115 (2006) (quoting State v. Rohrich, 149 Wash.2d 647, 654, 71 P.3d 638 (2003))). "A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong

legal standard or relies on unsupported facts.” Id. (citing Mayer, 156 Wash.2d at 684, 132 P.3d 115).

The court abused its discretion here, because it relied on an untenable basis in choosing 60 months, namely Sexton’s non-existent delivery and manufacturing priors. Reversal is therefore appropriate.

In response, the state may point out that a standard range sentence is not appealable. RCW 9.94A.585(1). This is not, however, an absolute bar to review. For instance, where a defendant has requested an exceptional sentence below the standard range but was sentenced within the standard range, review may be sought, although it is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. See e.g. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998).

In that same vein, review is appropriate when the court has relied on inaccurate information in choosing the appropriate sentence within the range. See In re the Personal Restraint Petition of Call, 144 Wn.2d 315, 28 P.3d 709 (2001). In Call, our

Supreme Court held “[T]he sentencing court should be afforded an opportunity to determine the appropriate sentence based upon accurate information used as a basis for calculating an offender score and in determining the correct sentence range under the SRA.” Call, 144 Wn.2d at 332.

In that same vein, the sentencing court should be afforded an opportunity to determine the appropriate sentence within the correct sentence range based upon accurate information. A logical corollary is that a defendant should be afforded the opportunity to be sentenced based upon accurate information. That did not happen here.

3. Re-Sentencing Before a Different Judge Should Be the Remedy.

Because there is a realistic likelihood Judge Armstrong acted vindictively in imposing the increased sentence in this case, and because the Pearce presumption cannot be overcome, this Court should reverse and remand for resentencing before a different judge. Even if this Court finds only that Judge Armstrong abused her discretion in imposing the sentence based on misinformation, remand for re-sentencing before a different judge is still the appropriate remedy.

Several cases provide examples of this remedy under similar circumstances. See State v. Sledge, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997) (remanded to different judge "in light of the trial court's already-expressed views on the disposition"); accord, State v. Harrison, 148 Wn.2d 550, 559-60, 61 P.3d 1104 (2003) (resentencing before different judge should be the remedy where state breaches a plea agreement and the defense seeks specific performance); State v. Talley, 134 Wn.2d 176, 182, 188, 949 P.2d 358 (1998) (remanded to different judge where it appeared that initial judge may have "prejudged the matter"); State v. M.L., 134 Wn.2d 657, 661, 952 P.2d 187 (1998) (remand to different judge required where disposition was found clearly excessive); State v. Ameline, 118 Wn. App. 128, 134, 75 P.3d 589 (2003) (remand to different judge following improper exceptional sentence); State v. Romano, 34 Wn. App. 567, 570, 662 P.2d 406 (1983) (remanded to different judge where initial sentencing suffered from appearance of unfairness).

E. CONCLUSION

For the reasons stated above, this Court should reverse and remand for a new sentencing hearing before a different judge.

Dated this 24th day of May, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script that reads "Dana M. Lind". The signature is written in black ink and is positioned above a horizontal line.

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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64821-7-1
)	
RICKY SEXTON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICKY SEXTON
DOC NO. 753204
McNEIL ISLAND CORRECTIONS CENTER
P.O. BOX 881000
STEILACOOM, WA 98388

2010 MAY 24 PM 11:17

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF MAY, 2010.

x Patrick Mayovsky