

NO. 64896-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SOU VOEI SAETERN,

Appellant.

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DIVISION I
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the court properly imposed four exceptional sentences based on the multiple offense policy where the defendant does not dispute that exceptional sentences were warranted.

2. Whether the court is prohibited from imposing an exceptional sentence that is both above the standard range and consecutive to other counts where there is no basis for such a prohibition in the language of the Sentencing Reform Act.

B. STATEMENT OF THE CASE

On March 23, 2009, Sou Saetern was charged with the crime of residential burglary (Count II) in King County Cause No. 09-C-01838-0 SEA. By amended information, Saetern was charged with the additional crimes of attempted residential burglary (Count VII), and two counts of residential burglary (Count X) and (Count XI). CP 48-53.¹

¹ Other co-defendants were charged in Counts I, III, IV, V, VI, VIII, and IX.

On June 1, 2009, Saetern was charged with the crime of attempting to elude a pursuing police vehicle in King County Cause No. 09-1-04303-1 SEA. CP 158. That crime occurred on May 28, 2009. CP 158.

On June 10, 2009, Saetern was charged with the crimes of attempted residential burglary (Count I) and attempting to elude a pursuing police vehicle (Count II) in King County Cause No. 09-C-04422-4 SEA. CP 194-95. Those crimes occurred on June 5, 2009. CP 194-95.

On January 8, 2010, Saetern pled guilty as charged in all three cases. CP 34-88, 162-82, 206-37.

On February 5, 2010, Saetern was sentenced in all three cases. CP 149-156, 184-92, 239-246. The State requested exceptional sentences for Counts II, X and XI in Cause No. 09-C-01838-0 SEA and Count II in Cause No. 09-C-04422-4 SEA. CP 37, 210. The court determined his offender scores and standard ranges to be as follows:

		Offender Score	Standard Range (months)
<u>09-C-01838-0 SEA</u>			
Count I	Residential Burglary	17	63–84
Count VII	Att. Residential Burglary	17	42.75–60
Count X	Residential Burglary	17	63-84
Count XI	Residential Burglary	17	63–84

09-1-04303-1 SEA

Count I	Att. to Elude a Pursuing Police Vehicle	10	22–29
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09-C-04422-4 SEA

Count I	Att. Residential Burglary	17	42.75–60
Count II	Att. to Elude a Pursuing Police Vehicle	10	22–29

CP 150, 185, 240. The court imposed the following sentences:

09-C-01838-0 SEA

Count I	Residential Burglary	96 months
Count VII	Att. Residential Burglary	60 months
Count X	Residential Burglary	96 months
Count XI	Residential Burglary	96 months

09-1-04303-1 SEA

Count I	Att. to Elude a Pursuing Police Vehicle	24 months
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09-C-04422-4 SEA

Count I	Att, Residential Burglary	60 months
Count II	Att. to Elude a Pursuing Police Vehicle	24 months

CP 152, 187, 242. The court ordered that the four sentences imposed in 09-C-01838-0 SEA be served concurrently to each other. The court ordered that the 24-month sentence as to Count II

in 09-C-04422-4 SEA be served consecutively to the sentences imposed in 09-C-01838-0 SEA. CP 242. Together, the sentences total 120 months of confinement. CP 152, 242, 252.

The court entered findings of facts and conclusions of law for the exceptional sentences imposed. CP 250-52. The court found that the multiple offense policy would result in sentences that would allow some of the current offenses to go unpunished without imposition of exceptional sentences. CP 251.

C. ARGUMENT

1. THE TRIAL COURT DID NOT IMPOSE MORE THAN ONE EXCEPTIONAL SENTENCE PER CRIME.

Saetern contends that the court improperly imposed "two exceptional sentences" based on only one aggravating factor, the multiple offense policy. Saetern's contention is incorrect.

RCW 9.94A.535 provides that when there are substantial and compelling reasons justifying an exceptional sentence the court may impose a sentence outside the standard range. That statute also authorizes the court to depart from the standards in RCW 9.94A.589 governing whether sentences are concurrent or consecutive in imposing an exceptional sentence. Pursuant to

RCW 9.94A.589(1) and (2), sentences for all current offenses shall be served concurrently unless the current offenses are serious violent offenses or unless the court imposes an exceptional sentence.

In this case, the court imposed an exceptional sentence on four of the seven counts based on its finding that, in relation to those four counts, due to the defendant's high offender score the multiple offense policy resulted in some of the current offenses going unpunished. See RCW 9.94A.535(2)(c). In imposing an exceptional sentence for Counts II, X and XI in Cause No. 09-C-10838-0 SEA, the court imposed a sentence outside the standard range, 96 months on each count, but ordered them to run concurrently to each other. Thus, these sentences were only exceptional in one respect, the length of confinement was outside the standard range. In imposing an exceptional sentence for Count II in Cause No. 09-C-01838-0 SEA, the court imposed a sentence within the standard range, 24 months, but ordered it to be served consecutively to the sentences imposed in Cause No. 09-C-10838-0 SEA. Thus, this sentence was only exceptional in one respect, that it be served consecutively to those other counts.

Saetern's claim that the court's imposition of a consecutive standard range sentence for Count II of Cause No. 09-C-04422-4 SEA makes the sentences for Cause No. 09-C-108383-0 SEA exceptional in two ways should be rejected. By Saetern's reasoning, the imposition of an exceptional consecutive sentence makes all sentences that it is consecutive to exceptional sentences as well. Such reasoning would deprive the court of the ability to impose consecutive sentences in a multiple offense case unless there was a basis for an exceptional sentence on all counts. Saetern's reasoning should be rejected.

In the present case, the trial court acted in accordance with the Sentencing Reform Act when it imposed an exceptional sentence outside the standard range for Counts II, X, and XI in Cause No. 09-C-01838-0 SEA, and imposed an exceptional within the standard range for Count II in Cause No. 09-C-04422-4 SEA to be served consecutively with the other current offenses.² If the Court had not ordered that Count II be served consecutively to the

² It should be noted that the Judgment and Sentence for Cause No. 09-C-04422-4 SEA contains a scrivener's error that Counts I and II are to be served concurrently with each other. CP 242. Since the court explicitly ordered that Count I be served concurrently with the other two cause numbers and that Count II be served consecutively to the other cause numbers, Count I and II cannot be served concurrently to each other.

other cause numbers, Saetern's sentence for Count II would have resulted in no additional confinement above what had already been ordered in the other cause numbers.³

Each of the sentences was exceptional in only one respect. This is not a case of "double" exceptional sentences being imposed, as Saetern claims. The court properly imposed four exceptional sentences on four of the counts, as authorized by statute.

2. THE SENTENCE REFORM ACTS AUTHORIZES IMPOSITION OF AN EXCEPTIONAL SENTENCE CONSISTING OF A SENTENCE OUTSIDE THE STANDARD RANGE AND CONSECUTIVE SENTENCES WHEN THERE IS A SUBSTANTIAL AND COMPELLING REASON TO DEPART FROM THE STANDARD RANGE.

Saetern argues that a defendant may not receive an exceptional sentence consisting of a sentence outside the standard range and consecutive sentences unless the court finds more than one aggravating circumstance. This Court need not reach this question because, as explained above, that did not happen in this case. Nonetheless, if this Court were to find that question presented in this case, Saetern's argument should be rejected. It

³ The aggravating circumstance at issue was designed to avoid just this result.

runs contrary to the language of the Sentencing Reform Act and contrary to logic. The prior Court of Appeals cases supporting Saetern's position are not well reasoned and should not be followed.

Any question as to what type of exceptional sentences are authorized by the Sentencing Reform Act must begin with the language of RCW 9.94A.535. RCW 9.94A.535 provides that "The court may impose a sentence outside the standard sentence range if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." The statute additionally provides "A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section." Nothing in the statutory language prohibits the court from imposing a sentence outside the range and consecutive to other counts when there is a valid basis for an exceptional sentence.

In State v. Batista, 116 Wn.2d 777, 780, 808 P.2d 1141 (1991), the state supreme court clarified the standards governing the imposition of consecutive sentences as an exceptional sentence. The court stated, "Where multiple current offenses are

concerned, in addition to lengthening of sentences, an exceptional sentence may also consist of imposition of consecutive sentences." Id. at 784. In correcting the trial court's misunderstanding that only consecutive sentences may be imposed when the multiple offense policy aggravating circumstances is found, the court stated, "If a presumptive sentence is clearly too lenient, this problem could be remedied *either* by lengthening concurrent sentences, *or* by imposing consecutive sentences." Id. at 786 (emphasis in original). Two other aggravating circumstances had been found by the trial court, and thus, the court was not addressing the question of whether a sentence outside the standard range and consecutive to other counts could be imposed based on one aggravating circumstance. Id. at 791. Because that question was not presented, Batista cannot fairly be read to stand for the proposition that more than one aggravating circumstance must be found to impose an exceptional sentence that is both outside the standard range and consecutive to other counts.

The two cases from Division Three of this Court that rely on Batista for that proposition are mistaken. In State v. McClure, 64 Wn. App. 528, 827 P.2d 290 (1992), the court relied on the above-quoted sentence from Batista, in concluding that "this language

suggests the court must choose between the two forms of exceptional sentences" when only one aggravating circumstance is present. Id. (emphasis added). No other analysis is presented and the language of the statute is never addressed. McClure is distinguishable in that there were two counts and the trial court only found one valid aggravating circumstance with respect to one count. The court of appeals concluded that a single aggravating factor on only one of the two offenses did not justify a sentence outside the standard range and consecutive sentencing. Here, the aggravating circumstance applied to all counts at issue.

In In re Personal Restraint of Holmes, 69 Wn. App. 282, 848 P.3d 754 (1993), the question presented was quite different. In that case the court curiously imposed a sentence *below* the standard range to run consecutively to other counts. Id. at 293. Citing Batista without further analysis, the court held that the sentence imposed by the court on the basis of a single aggravating factor was improper. Id.

The claim that a trial court is limited to imposing either a sentence above the standard range or a consecutive sentence, but not both, once a basis for an exceptional sentence has been found is similar to the discredited "doubling rule." When the Sentencing

Reform Act was first enacted, defendants argued that an exceptional sentence should be limited to no more than twice the standard range. State v. Oxborrow, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986). The state supreme court rejected that limitation, finding there was no statutory authority for imposing an arbitrary limit on exceptional sentences. Id. The court reasoned that once a basis for an exceptional sentence is established, "the court is permitted to use its discretion to determine the precise length of the exceptional sentence." Id. at 530. An exceptional sentence that is "clearly excessive" may be reversed as an abuse of discretion. Id. See RCW 9.94A.585(4).

In the present case, Saetern does not argue that there was no valid basis to impose exceptional sentences in his case. Saetern also does not argue that his sentences are clearly excessive. If an exceptional sentence has a valid basis and is not clearly excessive, it should be affirmed. As in Oxborrow, this Court should reject the defendant's invitation to impose an arbitrary limit on the trial court's discretion that has no basis in any statutory language.

Given the structure of the sentences in this case, there was no way for the trial court to impose additional punishment for Count

II in Cause No. 09-C-04422-4 SEA without imposing a consecutive sentence. Because the statutory maximum for that crime is 60 months, any concurrent sentence would have been subsumed in the other counts. CP 240. The sentences imposed by the trial court in this case are consistent with the purposes of the Sentencing Reform Act, and should be affirmed.

D. CONCLUSION

Saetern's sentences should be affirmed.

DATED this 13th day of September, 2010.

Respectfully submitted,

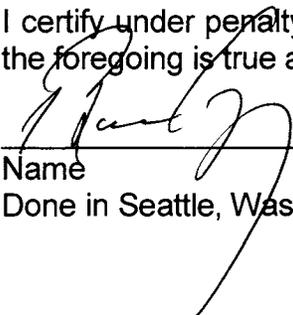
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. SAETERN, Cause No. 64896-9-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

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