

66603-7

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NO. 66603-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS S. PEPPERELL,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE

Has a court abused its discretion in sentencing where it considered the facts and concluded that there was no basis to impose the requested exceptional sentence downward?

II. STATEMENT OF THE CASE

On September 9, 2010, the defendant was sentenced to twelve months and one day for his conviction of bail jumping in Snohomish County Cause No. 09-1-01766-7. 1 CP 65. At the hearing, the defendant asked that he be permitted to complete his final five days of a 19 day work crew sentence from King County. He told the court that he was scheduled to complete this sentence “between Monday and Friday of next week.” Exhibit 1 2.¹ The court inquired if the defendant could give it a date he would report after completing the work crew. The defendant replied that “If the Court gives [me] until 7 o’clock here, [I] can get up from King County and turn [my]self in on Friday.” Exhibit 1 5. The court ordered the defendant to “report to the Snohomish County Jail on 9-17-10 at 7:00 PM. Exhibit 3.

The defendant failed to report to the jail on September 17, 2010. 1/10 RP 104, 108, 1/11 RP 131. On September 23, 2010,

the defendant was arrested based on a warrant that was issued for his failure to report to the Snohomish County Jail. 1/10 RP 22, 30. At that time, he had still not completed his work crew sentence. 1/11 RP 125, 144. A jury convicted the defendant of bail jumping. 1/11 RP 197, 1 CP 13.

On January 18, 2011, the defendant submitted Defendant's Sentencing Memorandum. The defendant requested the court to sentence him to 18 months confinement to run concurrently with the sentence for his prior bail jumping conviction as an exceptional sentence downward as provided in RCW 9.94A.535(1).² This request asked the court to find "that the operation of the multiple offense policy of RCW 9.94A.589³ results in a presumptive sentence that is clearly excessive in light of the purposes of the SRA[.]" 1 CP 25. The defendant then recited facts from an interview with unnamed jurors and argued that none of the purposes of the Sentencing Reform Act (SRA) would be promoted by imposing consecutive sentences. 1 CP 25-27.

¹ Exhibit 1 was admitted for illustrative purposes. 1/10 RP 18. It was designated by the defendant on July 6, 2011.

² RCW 9.94A.535 is attached at Appendix A.

³ RCW 9.94A.589 is attached at Appendix B.

The State responded that “no factual record has been created to support the conclusions the defendant asks this Court to set forth in writing.” 1 CP 70. The State went on to argue that the purposes of the SRA would be foiled by the exceptional sentence the defendant requested. 1 CP 70-71.

The defendant then submitted Defendant’s Sentencing Reply. For the first time, the defendant cited State v. Sanchez, 69 Wn. App. 255, 848 P.2d 208, review denied, 122 Wn.2d 1007 (1993), and asserted that the effects of his second bail jumping conviction were “nonexistent, trivial, or trifling[.]” The defendant offered no analysis of how the effects of the second bail jump were cumulative with those of the first. Instead, he argued “Mr. Pepperell’s failing to report to the jail and maintaining his current residence for six days does little to justify the multiple offense policy.” 1 CP 33-34.

On January 18, 2011, the court held the sentencing hearing.

The defendant argued:

The effect of his second failure to go by a court’s order is minimal, and the rehabilitative impact or the impact that an additional time I custody is going to have is minimal compared to the effect, obviously, that it would have on [the defendant’s] life.

1/18 RP 6.

The defendant then argued that running sentences consecutively in circumstances like his “was [not] necessarily taken into account by the Legislature when they wrote that statute.” 1/18 RP 7.

After hearing further argument from both sides, the court ruled:

Well, certainly a strong case can be made for the fact that the sentence called for here by the standard range is harsher than it should be. . . . I really can't think of anything particular to the facts of this case or this defendant that would justify an exceptional sentence. I think the only way you get there is by general disagreement with the legislative determination, and I'm not authorized to give a lesser sentence as a result of that.

1/18 RP 10. The court then imposed a standard range sentence and ran it consecutively to the defendant's other sentence for bail jumping.

III. ARGUMENT

A. STANDARD OF REVIEW.

Review [of a decision not to impose an exceptional sentence below the standard range] 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.

State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998).

B. THE COURT CONSIDERED AN EXCEPTIONAL SENTENCE.

The defendant asked the court to consider imposing an exceptional sentence. The court clearly stated that it had considered an exceptional sentence, but could not find a factual basis for imposing one. The defendant has failed to show that the court categorically refused to consider an exceptional sentence for bail jumping.⁴

The outcome in this case should be controlled by the legal reasoning in Garcia-Martinez. There, the defendant had been convicted of delivery of cocaine. He asked the court to impose an exceptional sentence of 48 months with 12-18 months of inpatient drug treatment. The basis for his request was that his involvement was minimal and the amount of cocaine was unusually small. The court stated that it preferred to not incarcerate anyone for the standard range the defendant was facing, but since it was “pretty standard for a street deal” an exceptional sentence was not supported by the facts. Garcia-Martinez, 88 Wn. App. at 325.

This Court affirmed the judgment and sentence. It held that:

[The court] did so because it concluded there was no factual basis to justify imposing a sentence below the

⁴ Since the defendant does not argue that the court used an impermissible basis to refuse to an exceptional sentence, the State does not address that issue.

standard range. . . . Without an adequate factual or legal basis to permit it to step outside the standard range, the court decided it could not impose a sentence other than one within the standard range. This is an appropriate exercise of sentencing discretion.

Garcia-Martinez, 88 Wn. App. at 330-31.

The court here, like the one in Garcia-Martinez, expressed some disagreement with the standard range, but found no factual basis for an exceptional sentence. 1/18 RP 9-10. It appropriately exercised its discretion in sentencing.

As he did before sentencing, the defendant relies on Sanchez to argue that “the difference between the first bail jump and the second was nonexistent, trivial and trifling.” Brief of Appellant 20. That is a misapplication of Sanchez. Sanchez and its progeny are all cases where a defendant is being sentenced for multiple crimes in the same hearing under RCW 9.94A.400(1)(a), re-codified as 9.94A.589(1)(a).⁵ The defendant, citing no authority,

⁵ State v. Kinneman, 120 Wn. App. 327, 84 P.3d 882 (2003), review denied, 152 Wn.2d 1022 (2004); State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002); State v. Hernandez-Hernandez, 104 Wn. App. 263, 15 P.3d 719, review denied, 143 Wn.2d 1024 (2001); State v. Bridges, 104 Wn. App. 98, 15 P.3d 1047, review denied, 144 Wn.2d 1005 (2001); State v. Calvert, 79 Wn. App. 569, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996); State v. Fitch, 78 Wn. App. 546, 897 P.2d 424 (1995); State v. Powers, 78 Wn. App. 264, 896 P.2d 754 (1995); State v. Hortman, 76 Wn. App. 454, 866 P.2d 234 (1994), review denied, 126 Wn.2d 1025 (1995).

asserts “However, 9.94A.535(1)(g) does not limit consideration to that provision of the multiple offense policy.” Brief of Appellant 21. There are currently no other provisions of the multiple offense policy, and this Court should not establish one.

It is important to remember what is meant by the “multiple offense policy” of RCW 9.94A.400: The statute sets out a precise, detailed scheme to follow where multiple offenses are involved. Where multiple current offenses are concerned, except in specified instances involving multiple violent felonies, presumptive sentences for multiple current offenses consist of concurrent sentences, each computed with the others treated as criminal history utilized in calculating the offender score.

State v. Batista, 116 Wn.2d 777, 786-787, 808 P.2d 1141, 1146 (1991).

Here, the defendant was not being sentenced for multiple offenses. He was being sentenced for one offense, the bail jumping on September 17, 2010. The defendant asked for an exceptional sentence for that crime, not for multiple crimes. The only justification he provided to the court was:

Given the short amount of time that had passed [between his failure to appear and his arrest] and the minimal effort it took to apprehend him, this is a relatively minor, non-violent offense. An additional

seventeen month sentence is disproportionate to the seriousness of the offense.

1 CP 26.

This is clearly an argument that the standard range is too harsh. The court properly rejected that argument.

The presumptive sentence ranges established for each crime represent the legislative judgment as to how these interests shall best be accommodated. The trial court's subjective determination that these ranges are unwise, or that they do not adequately advance the above goals [of the SRA], is not a substantial and compelling reason justifying a departure.

State v. Pascal, 108 Wn.2d 125, 137-38, 736 P.2d 1062 (1987).

"In sum, this court has consistently interpreted the SRA to require mitigating and aggravating factors to relate to the crime and distinguish it from others in the same category [as more or less egregious]." State v. Law, 154 Wn.2d 85, 98, 110 P.3d 717 (2005). Both here and below, the defendant points to nothing in the record that makes his bail jumping less egregious than other bail jumpings.

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 actually considered.

State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Since the court actually considered the alternative of an exceptional sentence, this appeal must be denied.

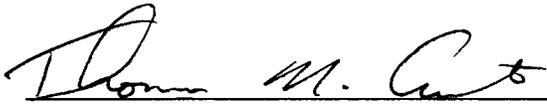
Since the court actually considered the alternative of an exceptional sentence, this appeal must be denied.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on August 23, 2011.

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West's RCWA 9.94A.535

West's Revised Code of Washington Annotated Currentness

Title 9. Crimes and Punishments (Refs & Annos)

Chapter 9.94A. Sentencing Reform Act of 1981 (Refs & Annos)

Sentencing

→9.94A.535. Departures from the guidelines

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

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, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances--Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The 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. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(2) Aggravating Circumstances--Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances--Considered by a Jury--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate

the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

- (o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.
- (p) The offense involved an invasion of the victim's privacy.
- (q) The defendant demonstrated or displayed an egregious lack of remorse.
- (r) The offense involved a destructive and foreseeable impact on persons other than the victim.
- (s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.
- (t) The defendant committed the current offense shortly after being released from incarceration.
- (u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.
- (v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.
- (w) The defendant committed the offense against a victim who was acting as a good samaritan.
- (x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.
- (y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).
- (z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.
- (ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.
- (aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.
- (bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (g).
- (cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

West's RCWA 9.94A.589

West's Revised Code of Washington Annotated Currentness

Title 9. Crimes and Punishments (Refs & Annos)

Chapter 9.94A. Sentencing Reform Act of 1981 (Refs & Annos)

Sentencing

→9.94A.589. Consecutive or concurrent sentences

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.