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DEC 29 2011

King County Prosecutor
Appellate Unit

NO. 66716-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

AARON JOHNSON,

Appellant.

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

The Honorable Susan Craighead, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in imposing an exceptional sentence. CP 86, 88, 167, 169; 3RP 26, 34.¹

2. The sentencing court erred by relying on “uncharged offenses” as a basis for the exceptional sentence.

Issues Related to Assignments of Error

1. Does a sentencing court err by imposing an exceptional sentence based in part on “uncharged offenses”?

2. Where an exceptional sentence is based on an improper reason and the record does not clearly establish the court would have imposed the same sentence without the improper reason, is the correct remedy vacation of the sentence and remand for resentencing?

B. STATEMENT OF THE CASE

This consolidated sentencing appeal arises from four superior court cause numbers. The state charged Johnson in four informations with nine felonies and one misdemeanor. CP 1-4, 56-57,

¹ There are three transcripts: 1RP – 9/16/10 (plea hearing); 2RP – 12/3/10 (counsel substitution and continuance); 3RP – 1/7/11 (sentencing).

107-11, 188-90. This statement of facts references the four cases in the order of their appellate cause numbers:

Case 1: COA No. 66716-5-I; King County No. 09-1-06842-5.

Case 2: COA No. 66617-3-I; King County No. 09-1-05920-5

Case 3: COA No. 66718-1-I; King County No. 09-1-06937-5

Case 4: COA No. 66719-0-I; King County No. 09-1-07228-7

A plea hearing was held September 16, 2010. 1RP 1. On the plea forms and during the course of the plea colloquy, Johnson was informed of the rights he was waiving, the prosecutor's sentencing recommendations, and other consequences of the pleas. 1RP 10-14; CP 58-67, 76, 83, 144, 201-09, 234. He ultimately agreed with the factual basis asserted for each count. 1RP 18, 19-27; CP 15, 67, 122, 210. He also agreed with the state's calculations of his criminal history. 1RP 11-12. At the conclusion of the plea hearing, the court accepted Johnson's guilty pleas, finding them knowingly, intelligently, and voluntarily made. 1RP 28-30.

New counsel appeared with Johnson at a hearing held December 13, 2010. There was discussion about the possibility that Johnson might be considering a motion to withdraw the pleas. The court allowed the substitution of counsel and continued the sentencing hearing at the defense request. 2RP 2-14.

Sentencing was held January 7, 2011. 3RP 1. There was no mention of any motion to withdraw the pleas. The plea and sentencing documents showed Johnson's offender score as 22 or 23 points. This was based on the other current offenses, plus nine prior adult felonies and eight prior juvenile felonies.² CP 27, 32, 37, 77, 79, 81-82, 140-43, 225-33; 3RP 8-9, 11.

At sentencing, Johnson's counsel agreed his offender score was "well over a nine" and the standard ranges were accurate. 3RP 7. Johnson and his counsel asked the court to impose a 10-year term. 3RP 14-24.

The state asked the court to impose a 13-year (156-month) sentence. The state was not concerned with how the court arrived at that total length among the various counts. 3RP 5, 13.

The court noted that Johnson's offender score would be 13 points even without the other current offenses. The court then stated it would impose an exceptional sentence based "on the extraordinarily high offender score, keeping in mind all the uncharged offenses here, and I think that the sentence that the State proposes is very fair, in light of all those factors." 3RP 26 (emphasis added). The court later

² The juvenile convictions each counted ½ point. CP 27, 81, 230; see generally, RCW 9.94A.525(7) – (15).

confirmed it was imposing the exceptional sentence “for all the reasons I placed on the record.” 3RP 34. The court’s written finding states “defendant’s current criminal history would result in a standard range sentence that does not recognize and reflect the defendant’s offenses and current + past criminal history.” CP 86, 167 (emphasis added).

On case 1, the court imposed a 57-month sentence. CP 34. On case 2, the court imposed 120 months on count 1, and 108 months on count 2. CP 88. On case 3, the court imposed 48-month sentences on counts 1 and 4, and a 29-month sentence on count 3. CP 169. A 12-month misdemeanor sentence was imposed on count 2. CP 174-75. On case 4, the court imposed 102 months on count 1, and 57-month sentences on counts 3 and 4. CP 239.

The exceptional sentence of 156 months was reached by running several counts consecutively: the 108-month sentence on case 2, count 2 was consecutive to the 48-month sentences on case 3, counts 1 and 4. CP 88, 169. All other sentences were ordered to be served concurrently. CP 34, 169, 174, 239; 3RP 27-32.

The court also imposed 12 months of community custody on the case 2 sentences, and 9-12 months on the case 4 sentences. CP 89, 240; 3RP 30-31.

C. ARGUMENT

THE COURT ERRED BY RELYING ON “UNCHARGED OFFENSES” TO IMPOSE AN EXCEPTIONAL SENTENCE.

A trial court’s sentencing authority is limited to that granted by statute. In re Postsentence Review of Leach, 161 Wash.2d 180, 184, 163 P.3d 782 (2007); In re Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002). Under Washington’s Sentencing Reform Act (SRA), a court must impose a standard range sentence unless the court finds “substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.505(2)(a)(i), (x); RCW 9.94A.535.

For charges like Johnson’s, standard range sentences for multiple current offenses are presumptively concurrent. To impose consecutive sentences the court must find substantial and compelling reasons. RCW 9.94A.589(1)(a); State v. Vance, 168 Wn.2d 754, 760-61, 230 P.3d 1055 (2010); State v. Alvarado, 164 Wn.2d 556, 568-69, 192 P.3d 345 (2008).

Absent a jury’s finding of aggravating factual circumstances, a court’s authority to impose an exceptional sentence is limited to these four situations:

- (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^[3] 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.^[4]

RCW 9.94A.535(2); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The state recommended an exceptional sentence based on Johnson's criminal history and multiple current offenses. CP 83; 3RP 13-14. The trial court's oral and written findings suggest the trial court may have meant to follow that recommendation in part, but the court

³ The "clearly too lenient" part of this finding likely requires a jury determination. See State v. Mutch, 171 Wn.2d 646, 657-58, 254 P.3d 803 (2011).

⁴ See note 3, supra.

also expressly relied on “uncharged offenses.” 3RP 26.⁵ The court’s reliance on uncharged offenses was error.

Although Alvarado and Vance may allow a court to impose a consecutive exceptional sentence under RCW 9.94A.532(2)(c), the sentencing court must still clearly impose the exceptional sentence based on that aggravating factor. See Alvarado, 164 Wn.2d at 560;⁶ State v. Mutch, 171 Wn.2d 646, 652, 254 P.3d 803 (2011);⁷ State v.

⁵ The court’s written finding in no way disavows the court’s oral reliance on uncharged offenses: “defendant’s current criminal history would result in a standard range sentence that does not recognize and reflect the defendant’s offenses and current + past criminal history.” CP 86, 167 (emphasis added). The broader written term “offenses” includes the subset of orally stated “uncharged offenses.”

⁶ In Alvarado the Supreme Court stated: “The trial court remarked that an exceptional sentence was appropriate because Alvarado had committed multiple current offenses and his offender score was the highest that the trial judge had seen in 14 years. Sentencing Alvarado within the standard range, the trial court concluded, would have resulted in five current offenses going unpunished.” 164 Wn.2d at 560.

⁷ Like the Alvarado court, the sentencing court in Mutch made a similarly clear finding: “The trial court resentenced Mutch to an exceptional sentence of 400 months, finding that Mutch’s offender score was 20, while the sentencing grid only went up to 9, so his multiple current offenses and high offender score would leave three counts of rape and one count of kidnapping unpunished without an exceptional sentence.” 171 Wn.2d at 652. “The trial court made a written finding that the defendant’s high offender score will result in current offenses going unpunished.” 171 Wn.2d at 661.

Newlum, 142 Wn. App. 730, 737, 176 P.3d 529 (2008).⁸ No similarly clear finding is present here. The trial court's oral ruling and written finding do not rely on this aggravating factor, either through clear language or citation to the relevant statutory subsection.⁹

There also can be no doubt that the sentencing court expressly relied on "uncharged offenses." 3RP 26. This is prohibited under the "real facts" doctrine and pre-Blakely SRA authority. State v. Taitt, 93 Wn. App. 783, 790, 970 P.2d 785 (1999); State v. Collins, 69 Wn. App. 110, 115, 847 P.3d 528 (1993). Furthermore, where facts are not stipulated, it is even less clear that an "uncharged offense" or "real facts" rationale can survive in the post-Blakely era of Washington's SRA. See e.g., State v. Hagar, 158 Wn.2d 369, 374, 144 P.3d 298 (2006) (trial court lacked authority to find ultimate fact that offense was a "major economic offense" even where underlying facts were stipulated); State v. Bluehorse, 159 Wn. App. 410, 431-33, 248 P.3d

⁸ The sentencing court found Newlum "has committed multiple offenses, and [his] high offender score would result in some of the current offenses going unpunished;" RCW 9.94A.535(2)(c) was cited and discussed. 142 Wn. App. at 737.

⁹ Nor did the court mention the so-called "free crimes" shorthand, often used synonymously for this aggravating factor. See e.g., State v. Harstad, 153 Wn. App. 10, 27 & n.28, 218 P.3d 624 (2009).

537 (2011) (court erred in imposing sentence based on real facts of uncharged offense).

This record reveals the sentencing court's obvious error in relying on uncharged offenses. In contrast, the record is not nearly as clear as the record in Alvarado, Mutch, or Newlun to show the trial court's intent to rely on the so-called "free crimes" aggravating factor of RCW 9.94A.535(2)(c).

Where a sentencing court imposes an exceptional sentence in part on proper grounds and in part on improper grounds, the appropriate remedy is to remand for resentencing to determine whether the court would impose the same sentence solely on proper grounds. State v. Ferguson, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001); Collins, 69 Wn. App. at 116. Following such error, remand for resentencing is necessary unless the record allows the reviewing court to clearly see the sentencing court intended to impose the exceptional sentence solely on proper grounds. Cf. Mutch, 171 Wn.2d at 660 (where "the entire purpose of the second resentencing hearing was to reconsider the sentence with a revised offender score, we are confident that the trial court intended to impose an exceptional sentence, despite its failure to revise one finding related to the lower offender score.") Because this record provides no similar clarity,

remand for resentencing is appropriate. If in response the state seeks some other shortcut remedy, the state's request will lack merit.

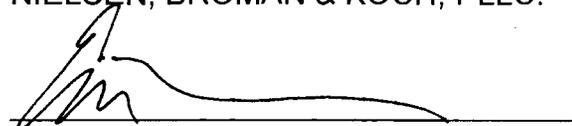
D. CONCLUSION

This Court should vacate the exceptional sentence and remand for resentencing to allow the trial court to determine whether it would impose an exceptional sentence solely on statutorily available grounds.

DATED this 29th day of December, 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

A handwritten signature in black ink, appearing to read "Eric Broman", is written over a horizontal line.

ERIC BROMAN, WSBA 18487

OID No. 91051

Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 66716-5-1
)	
AARON JOHNSON,)	
)	
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 29TH DAY OF DECEMBER 2011, 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] AARON JOHNSON
DOC NO. 775762
WASHINGTON CORRECTIONS CENTER
P.O BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF DECEMBER 2011.

x *Patrick Mayovsky*