

66848-0

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NO. 66848-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

VICTORIA SMITH,

Appellant.

REC'D
AUG 10 2011
King County Prosecutor
Appellate Unit

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

The Honorable Mary I. Yu, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by failing to recognize it had discretion to impose a mitigated exceptional sentence.

Issue Pertaining to Assignment of Error

Less than a week before completing her term of confinement at a work release facility, Appellant failed to return as scheduled. She was arrested six days later and subsequently convicted of first degree escape, for which the standard range sentence is 63-84 months. The trial court declined Appellant's request for a mitigated exceptional sentence, concluding it lacked authority to do so. Where there was a basis to conclude Appellant's commission of first degree escape was distinguishable from and far less serious than most other commissions of that offense because of how little time Appellant had left to serve, did the trial court err in concluding it lacked authority to impose a mitigated exceptional sentence?

B. STATEMENT OF THE CASE

On October 14, 2010, the King County Prosecutor charged appellant Victoria Smith with first degree escape. CP 1; RCW 9A.76.110.

The prosecutor alleged that while serving a sentence in work release for a felony conviction, Smith failed to return as required. CP 3-4.

Smith waived her right to a jury in favor of a bench trial before the Honorable Mary I. Yu. CP 7. The prosecution established at trial that

Smith was arrested for a felony drug crime on August 3, 2010, to which she pled guilty on August 18, 2010, and was sentenced to four months in King County Jail and work release. CP 8-9 (Findings of Fact 1 & 2): Exs. 1, 2 & 11. On October 5, 2010, while confined at a work release facility, Smith failed to return after being released on a three-hour pass to pick up a prescription at Harborview Medical Center. CP 9 (Finding of Fact 5); 1RP 54.¹ Smith was arrested six days later on a warrant. Judge Yu found Smith guilty as charged. CP 8-10; 1RP 77-80.

At sentencing, the prosecution requested a low-end standard range sentence of 63 months. 2RP 3. Defense counsel requested a mitigated exceptional sentence of eight months; two months for each day she had left of the sentence she was serving when she committed the escape. CP 151-54; 2RP 3-5, 8-9. Noting that the statutory mitigating factors under RCW 9.94A.535 are not exclusive, defense counsel argued a mitigated exception sentence was warranted because even the low end of the standard range was excessive in light of the circumstances of Smith's offense, which amounted to failing to return to work release with only four days left in her sentence, which counsel analogized to those instances when a mitigated sentence is warranted for drug crimes that involve only

¹ There are two volumes of verbatim report of proceedings referenced as follows: 1RP - 1/25/11 (trial); and 2RP - 3/4/11 (sentencing).

"an extremely small amount" of drugs. 2RP 8. Counsel also noted that Smith's "escape" was not an active breaking-out from a secure facility, but instead involved no acts of violence or threats, and was committed simply by her failure to return to work release. CP 153.

The trial court agreed that 63 months seemed an excessive sentence in light of the circumstances of Smith's crime. 2RP 9. The court concluded, however, that it had no statutory authority to deviate from the standard range. 2RP 9-10. The court imposed a 63-month sentence. CP 155-62; 2RP 9-10. Smith appeals. CP 163.

C. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO RECOGNIZE IT HAD DISCRETION TO IMPOSE A MITIGATED EXCEPTIONAL SENTENCE.

The trial court failed to recognize it had discretion to impose a mitigated exceptional sentence. The record reveals the trial court would have done so had it realized it had such authority. Because the facts here support imposition of a mitigated exceptional sentence, the court abused its sentencing discretion as a matter of law. Remand for resentencing is required.

When judicial discretion is called for, the judge must exercise some sort of meaningful discretion. State v. Grayson, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005). A sentencing court has discretion to

determine whether the circumstances of an offense warrant an exceptional sentence below the standard range. State v. Korum, 157 Wn.2d 614, 637, 141 P.3d 13 (2006).

A trial court abuses its discretion when its decision is "manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). All defendants have the right to the trial court's examination of available sentence alternatives. In re Restraint of Mulholland, 161 Wn.2d 322, 334, 166 P.3d 677 (2007). A trial court's failure to exercise its discretion or to understand the breadth of its discretion is an abuse of discretion. See State v. Elliott, 121 Wn. App. 404, 408, 88 P.3d 435 (2004) (refusal to hear expert testimony was a failure to exercise discretion); State v. Fleiger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (failure to determine whether defendant was a security risk before ordering "shock box" was abuse of discretion), review denied, 137 Wn.2d 1003 (1999); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (refusal to exercise discretion in imposing an exceptional sentence below the range is reviewable error), review denied, 136 Wn.2d 1002 (1998).

In Mulholland, the trial court failed to recognize it had discretion to impose concurrent sentences for several first degree assault convictions as a mitigated exceptional sentence, despite a statutory presumption of

consecutive sentences. In affirming the Court of Appeals remand for resentencing, the Supreme Court noted that although the record did not indicate the trial court would necessarily have imposed a mitigated exceptional sentence if it had known it had the authority, there was some indication it might, and remand was appropriate so the court could at least consider the available options. 162 Wn.2d at 333-34.

Here, the trial court assumed that absent an applicable statutorily listed mitigating factor it could not impose a sentence below the standard range. 2RP 9. This was error that is evident from the language of the Sentencing Reform Act, which provides:

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. . . .

...
(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.

RCW 9.94A.535; see e.g. State v. Davis, 146 Wn. App. 714, 720-22, 192 P.3d 29 (2008) (although not a specifically listed mitigating factor, mitigated exceptional sentence appropriate when combined term of

standard range and community custody exceeds the statutory maximum sentence).

Similar to Mulholland, Smith's sentencing court failed to recognize it was not limited to those mitigating circumstances specifically listed under RCW 9.94A.535(1). Rather, it was entitled to take into account those circumstances surrounding Smith's offense identified by defense counsel, or any other mitigating circumstances it thought might warrant a sentence that was less than the standard range.

The record, even more so than in Mulholland, indicates the sentencing court here would have exercised this authority and imposed a sentence below the standard range if RCW 9.94A.535(1) listed an applicable mitigating factor. For example, in explaining her understanding that it had no authority to deviate from the standard range Judge Yu stated, "I don't like what I have to do today because I don't think in the big picture that it may be fair, but this is not about what Judge Yu personally thinks." 2RP 9.

There were mitigating circumstances to Smith's escape, as correctly noted by her trial counsel. It was committed when Smith had only four days left to serve on in her sentence, it was committed by simply failing to return from an authorized leave rather than actively escaping a

confinement facility, and it was committed without harm to others or damage to property.

Moreover, the purposes of chapter 9.94A RCW are:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010. Imposition of a 63-month sentence does not serve these purposes because, as Judge Yu noted, the term is disproportionately long for circumstances of Smith's offense. It also fails to promote respect for the law, fails to constitute punishment commensurate with Smith acts, and fails to make frugal use of state and local government resources.

But for Judge Yu's misconception that she was limited to only considering listed mitigating factors, she would have imposed a mitigated exceptional sentence. The failure to exercise discretion at sentencing constitutes an abuse of discretion. Grayson, 154 Wn.2d at 335. This Court should reverse and remand for resentencing.

D. CONCLUSION

For the reasons presented, remand for resentencing is required.

DATED this 10th day of August 2011.

Respectfully submitted,

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A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

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