

NO. 67270-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

RASHOD JONES,

Appellant.

REC'D
OCT 18 2011
King County Prosecutor
Appellate Unit

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Berth M. Andrus, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by concluding there was no legal authority to order Appellant's current felony sentence to be served concurrently with the felony sentence he was under at the time he committed the current offense.

Issue Pertaining to Assignment of Error

There is explicit statutory authority for a sentencing court to depart from the presumptive requirement for consecutive sentences by way of a mitigated exceptional sentence. As such, was it an abuse its discretion as a matter of law for the sentencing court to refuse to order the sentence for the current offense to be served concurrently with the felony sentence being served at the time the current offense was committed on the basis that it had no legal authority to do so?

B. STATEMENT OF THE CASE

Appellant Rashod Jones pled guilty to possession of cocaine. CP 1-30; RCW 69.50.4013; RP 4-18¹. At sentencing Jones asked the court to order his sentence for cocaine possession to be served concurrently with 27 months he had left to serve on a revoked Drug Offender Sentencing Alternative (DOSA) sentence he was under at the time he committed the cocaine possession offense. CP 38-40 (defense sentence memorandum);

¹ There is a single volume of verbatim report of proceedings for the dates of April 19, 2011 (plea hearing) and June 2, 1011 (sentencing) referenced herein as "RP."

RP 32. Jones acknowledged the general rule is that they be served consecutively, but insisted the court had authority to order them concurrent. RP 32-34.

The trial court imposed a standard range sentence of 20 months. CP 44; RP 37. Regarding Jones' request that it be served concurrent with the revoked DOSA, the court stated:

I do not believe that I have the legal authority to run this [sentence] . . . concurrent with the revoked DOSA sentence. Under RCW 9.94A.589(2)(a), . . . the statute appears very clear that I must run these consecutive. . . .[Y]ou certainly may appeal that issue, . . . if you choose to do so I do not believe I have that legal authority. . . .

RP 37.

Jones appeals. CP 51-52.

C. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION AS A MATTER OF LAW BY FAILING TO RECOGNIZE IT HAD DISCRETION TO ORDER THE SENTENCE FOR COCAINE POSSESSION TO BE SERVED CONCURRENTLY WITH THE REVOKED DOSA SENTENCE.

The trial court failed to recognize it had discretion to order the sentence for cocaine possession to be served concurrently with the revoked DOSA as a mitigated exceptional sentence. The record reveals the trial likely would have so ordered if it had recognized the breadth of its

sentencing discretion. Therefore, this Court should reverse and remand for resentencing.

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 circumstances warrant imposition of a mitigated exceptional sentence. 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).

Here, the trial court concluded it was required to order the sentence for cocaine possession to be serve consecutive to the revoked DOSA based on RCW 9.94A.589, which provides:

(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.

RP 37.

There are, however, specific statutory exceptions to RCW 9.94A.589(2)(a), along with other provisions of that statute. In particular, RCW 9.94A.535 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, 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.

...

(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.

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 under RCW 9.94A.589(1)(b). 161 Wn.2d at 326. In affirming the Court of Appeals remand for resentencing, the Supreme Court agreed that the plain language of RCW 9.94A.535 provides sentencing courts with discretion in certain instances to disregard the presumption for consecutive sentence under RCW 9.94A.589(1) and (2), and order the sentences to be served concurrently. Mulholland, 161 Wn.2d at 331.

Although the relevant subsection of RCW 9.94A.589 in Mulholland was (1)(b), and the relevant subsection here is (2)(a), the analysis is the same. The exception to consecutive sentence provided for under RCW 9.94A.535 applies equally to subsections "(1) and (2)" of RCW 9.94A.589.

Here, as in Mulholland, the trial court failed to consider the exception under RCW 9.94A.535. This was an abuse of discretion.

Moreover, had the court been aware of the breadth of its sentencing authority as to Jones, there is a reasonable possibility it would have exercised it and ordered the two sentences served concurrently. As defense counsel noted in his sentencing memorandum, 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.

CP 39 (quoting RCW 9.94A.010).

There is a reasonable basis to argue that a near four-year term of incarceration for cocaine possession and a failed DOSA is clearly excessive in light of the purposes of chapter 9.94A RCW. It is not unreasonable to conclude that it fails to make frugal use of the state's resources, does not promote respect for the law because it is not just, and is not commensurate with the punishment imposed on others for similar offenses.

But for the sentencing court's failure to recognize it had discretion to order the sentences to be served concurrently, there is a reasonable possibility Jones would be serving a 27-month sentence instead of a 47-month sentence. The failure to exercise discretion at sentencing constitutes an abuse of discretion as a matter of law. Grayson, 154 Wn.2d at 335. This Court should reverse and remand for resentencing.

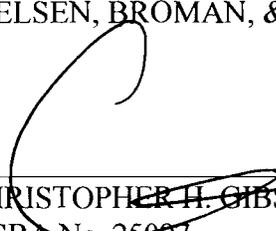
D. CONCLUSION

For the reasons presented, remand for resentencing is required.

DATED this 18th day of October 2011.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 67270-3-1
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RASHOD JONES,)	
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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 18TH DAY OF OCTOBER 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] RASHOD JONES
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WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF OCTOBER 2011.

x *Patrick Mayovsky*

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