

67270-3

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NO. 67270-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RASHOD JONES,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH ANDRUS

BRIEF OF RESPONDENT

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A. ISSUES

Whether Jones has failed to show a defect in sentencing based on the trial court's statement that consecutive terms were required where an offender under sentence for a felony commits another felony, when Jones did not request an exceptional sentence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Rashod Jones, was charged with violation of the uniform controlled substances act for possession of cocaine. CP 1. The State alleged that Jones was arrested for assaulting two women, and police discovered 2.7 grams of cocaine in Jones's pocket during a search incident to arrest. CP 3-4. Jones pleaded guilty as charged. CP 7-30; RP 4. Jones was sentenced on June 11, 2011. CP 41-49. The court imposed a standard range sentence of 20 months confinement, and ordered his sentence to be served consecutively to a Drug Offender Sentencing Alternative (DOSA) that was previously revoked in another case because of this new conviction. CP 41-49.

2. SUBSTANTIVE FACTS

In 2008, Jones was convicted of custodial interference (domestic violence) and felony harassment. CP 26. He was given the benefit of a DOSA, and sentenced to 27.5 months in prison, and 27.5 months of community custody. Jones was serving his term of community custody when he committed the current offense.

Jones committed the current offense on October 7, 2010. CP 3. According to the charging documents, Jones assaulted two women in Seattle that he accused of robbing him.¹ CP 3. He was arrested for the assault and taken into custody. CP 3. Police searched Jones incident to arrest and discovered 2.7 grams of cocaine in his pocket. CP 3.

Jones pleaded guilty to possession of cocaine. CP 7-30; RP 4. As part of the plea, Jones acknowledged that "pursuant to RCW 9.94A.589, whenever a person while under sentence for a 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 term." CP 24; RP 13-15.

¹ The plea agreement included an agreement to real facts in the certification for determination of probable cause. CP 23.

Jones's DOSA sentence for his prior conviction was revoked because he committed the current offense. RP 14. He was ordered to serve the remaining twenty-seven months of confinement. RP 33. At sentencing for the current charge, Jones asked that his new sentence be concurrent with the sentence on his revoked DOSA:

We are asking that this, uh, sentence on the felony matter run concurrent with King County Cause Number 08-1-07245-9 SEA. That is the DOSA . . . sentence that was, um, revoked. I am mindful that . . . the concurrent statute 9.94A.589 would indicated that the court doesn't have authority to run it concurrent, however, it's Mr. Johnson's (sic) position that the court does have the authority to run it concurrent.

RP 32. However, Jones did not provide any legal authority that would permit the trial court to overlook RCW 9.94A.589(2)(a).

RP 32-33. Jones did not request an exceptional sentence in his briefing or during the hearing. At no time did Jones cite to RCW 9.94A.535, which governs exceptional sentences, nor did Jones provide a legal or factual basis for an exceptional sentence.

The trial court imposed twenty months of confinement and ordered that the sentence run consecutive to Jones's revoked DOSA sentence:

I do not believe that I have the legal authority to run this, these two sentences . . . concurrent with the

revoked DOSA sentence. Under RCW 9.94A.589(2)(a) the statute appears very clear that I must run them consecutive. So you certainly may appeal that issue if you choose to do so I do not believe I have that legal authority.

RP 37.

Jones had an extensive criminal history that included 14 adult misdemeanor convictions and 10 adult felony convictions including assaults, drug offenses, and weapons offenses. CP 26. Jones had 5 juvenile felony convictions and 19 juvenile misdemeanor convictions. CP 27-29. In addition, Jones committed an assault in the fourth degree on December 3, 2010, which he pled guilty to at the time he was sentenced for his current case.

RP 20.

C. ARGUMENT

1. THE TRIAL COURT WAS NOT ASKED TO IMPOSE AN EXCEPTIONAL SENTENCE.

Jones appeals his standard range sentence arguing that the trial court failed to exercise its discretion to impose an exceptional sentence. Jones is incorrect. Jones did not request an exceptional sentence and the trial court properly followed RCW 9.94A.589,

which required his sentence to be consecutive to the sentence for his revoked DOSA.

When a defendant receives a standard range sentence it may not be appealed. RCW 9.94A.585; State v. Garcia-Martinez, 88 Wn. App. 322, 944 P.2d 1104 (1997). The denial of a request for an exceptional sentence cannot be appealed if the trial court considered the request and exercised its discretion. Id. at 331. However, refusal to grant an exceptional sentence may be appealed if the trial court's decision was based on an erroneous interpretation of the law. In re Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007). A court may fail to exercise its discretion if it mistakenly believes it has no discretion. State v. McGill, 112 Wn. App. 95, 100-02, 47 P.3d 173 (2002). But even if a trial court fails to exercise discretion, remand is not required when the reviewing court is confident that the trial court would impose the same sentence if it exercised its discretion. State v. McGill, 112 Wn. App. 95, 100-01, 47 P.3d 173, 176 (2002), citing State v. Pryor, 115 Wn.2d 445, 456, 799 P.2d 244 (1990).

When an offender commits a new felony while under sentence for a prior felony, the sentences must be served consecutively. RCW 9.94A.589(2)(a). Therefore, a standard range

sentence in Jones's current case was required to run consecutive to his revoked DOSA. A trial court may order concurrent sentences only if there is a legal and factual basis for an exceptional sentence. RCW 9.94A.535.

Jones claims that the trial court failed to exercise discretion to impose an exceptional sentence and order his current case be served concurrently with the sentence for his revoked DOSA. Jones is incorrect. The trial court was not asked to exercise its discretion to impose an exceptional sentence.

Jones relies on State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005), to argue that when discretion is called for the court must exercise some meaningful discretion. Grayson is not on point. In Grayson, the judge categorically declined to impose a DOSA because he did not believe the programs were funded. Id. at 337. There was no basis for the court's belief in the record. The Court of Appeals reversed because the trial court's categorical denial of a DOSA to anyone was a failure to exercise discretion. Id. at 342. In the present case, by contrast, the trial court did not categorically deny an exceptional sentence based on a misunderstanding of fact or law. Here, the judge correctly noted that RCW 9.94A.589(2)(a) required Jones's sentence to be served

consecutively. The trial court did not fail to exercise discretion to impose an exceptional sentence; the trial court was simply not asked to do so, and no legal or factual basis was provided.

Jones also relies upon In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007). However, the rationale of that case is also inapplicable to the facts at bar. In Mulholland, the defendant requested that concurrent terms be imposed on his convictions for multiple serious violent offenses and the Supreme Court reversed because the sentencing court stated explicitly that it did not have discretion to impose concurrent sentences.

Mulholland, 161 Wn.2d at 332-34. In that case, the State had taken the position that under no circumstances did a sentencing court have discretion to impose concurrent terms on multiple serious violent offenses. Id. at 327-31. The Supreme Court concluded that when the trial court stated that it had no discretion to impose concurrent terms, it was acting based on a misunderstanding of the law, which was a fundamental defect in the sentencing. Id. at 332-33.

The facts in this case are distinguishable because the State here did not assert that a court could never impose an exceptional sentence of concurrent terms. The facts in this case are also

distinguishable because Jones did not request an exceptional sentence. While he asked the sentences be run concurrently, he never provided any legal, or factual basis for the court to do so. RP 32; CP 38-40. In this context, the statement of the trial judge that "I do not believe I have the legal authority" to order concurrent sentences was not based on a misunderstanding of the law. RP 37. In the absence of any basis for an exceptional sentence, the trial court's summary of the law was correct. Jones made no request for an exceptional sentence and provided no authority to grant an exceptional sentence. Under these circumstances, the trial court was obligated to follow RCW 9.94A.589(2)(a).

The trial court cannot be faulted for failing to exercise discretion to impose an exceptional sentence when Jones did not request an exceptional sentence. At no point in the briefing to the trial court or at the sentencing hearing did Jones reference an exceptional sentence or cite to RCW 9.94A.535, which governs exceptional sentences. The trial court should not be required to take on the role of advocate for the defendant, and search for a

legal or factual basis to impose an exceptional sentence sua sponte in the absence of a specific request.²

But even if this court concludes that the trial court failed to exercise discretion, remand is not required if this Court is confident that the trial court would impose the same sentence. State v. McGill, 112 Wn. App. at 100-01, citing State v. Pryor, 115 Wn.2d at 456. Jones argues that there is a "reasonable possibility" that he would have received concurrent sentences had the trial court understood its authority to grant an exceptional sentence. Brief of Appellant, at 7. Jones argues the trial court may have granted an exceptional sentence based on the mitigating factor that "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." RCW

² In McGill, this court found ineffective assistance of counsel because the defense failed to request an exceptional sentence where the judge indicated a willingness to impose an exceptional sentence. This court held a "trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." McGill, 112 Wn. App. at 102. In McGill, the defendant challenged both the trial court's erroneous belief it could not impose an exceptional sentence, and his lawyer's failure to request one. Id. Here, Jones does not raise ineffective assistance of counsel.

9.94A.535(1)(g).³ The record fails to support that assertion. While the trial court invited Jones to appeal her ruling, the judge never indicated a desire to impose concurrent sentences. RP 37-38. In both McGill and Mulholland, the trial courts expressed sympathy with the defendant or a desire to impose an exceptional sentence. McGill, 112 Wn. App. at 10; Mulholland, 161 Wn.2d at 333-34. In the present case, the judge made no statements indicating she wished to impose concurrent sentences. Jones cannot demonstrate that twenty months of additional confinement is clearly excessive, particularly in light of the fact that his DOSA was revoked because he committed a new drug offense. Furthermore, Jones managed to accumulate a new assault conviction while his current charges were pending, and had an extensive criminal history.⁴ In short, there was no compelling reason for the trial court to grant an exceptional sentence and order his sentence concurrent to the sentence for his revoked DOSA. This Court should be

³ Jones cites to RCW 9.94A.535(1)(g) for the first time on appeal. While he noted RCW 9.94A.010, he did not direct the court to any legal basis for an exceptional sentence. CP 38-40; RP 32-33. Furthermore, Jones has not raised a claim of ineffective assistance of counsel for his lawyer's failure to specifically request an exceptional sentence or direct the court to RCW 9.94A.535(1)(g).

⁴ Jones had a total of 48 criminal convictions in adult and juvenile court, including assault, drug, and weapons charges. RP 26-29.

confident that the trial court would impose the same sentence, and reject Jones's argument.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Jones's sentence.

DATED this 15th day of December, 2011.

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 Rashod Jones, 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. RASHOD JONES, Cause No. 67270-3-I, 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.

U Brame

Name

Done in Seattle, Washington

12/15/11

Date 12/15/11