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No. 72328-6-I
King County Superior Court No. 13-1-13139-7 SEA

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

STATE OF WASHINGTON,
Plaintiff-Respondent,
v.

ALI ABUKAR MOHAMED,
Defendant-Appellant.

APPELLANT'S REPLY BRIEF
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Regina S. Cahan, Judge

APPELLANT'S REPLY BRIEF

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I.
ARGUMENT IN REPLY

A. TRIAL ISSUES

Mr. Mohamed relies on his opening brief for all issues related to the trial.

B. REMAND IS REQUIRED BECAUSE THE TRIAL COURT WAS MISTAKEN ABOUT THE SENTENCING OPTIONS AVAILABLE

1. Relevant Facts and Procedural History

The State mistakenly states that the trial prosecutor recommended 20-month sentences on the underlying drug counts. In fact, the prosecutor recommended 30 months, but the Court imposed 20. RP 584.

2. The Trial Court Mistakenly Believed that it Could not Reduce the Enhancements Through a DOSA

The State concedes that *Gutierrez v. Dept. of Corr.*, 146 Wn. App. 151, 188 P.3d 546 (2008), held that the school zone enhancements are part of the “standard sentence range” and therefore can be reduced through a DOSA. BOR at 27. It does not cite any case disagreeing with *Gutierrez* in the seven years since that opinion issued. Further, the Legislature has not seen a need to correct *Gutierrez*. Nevertheless, the State asks this Court to reject *Gutierrez*.

The State maintains that *Gutierrez* was wrongly decided because it would authorize improper “hybrid” (partially consecutive and partially concurrent) sentences, as well as improper combinations of a DOSA and an exceptional sentence. In fact, the *Gutierrez* Court did not violate such rules on the facts before it, and there would be no violation in this case. The State’s reasoning is hard to follow, but it seems to be based on the premise that the sentence on count five (which does not include a school zone enhancement) has a lower standard range than those on counts two, three, and four (which do have enhancements). In fact, the consecutive school zone enhancements must be added “to *all* other sentencing provisions, for *all* offenses sentenced under this chapter.” RCW 9.94A.533(6) (emphasis added). Thus, under the reasoning of *Gutierrez*, the standard range for every count is 92 to 132 months, and the midpoint of the standard range for purposes of a DOSA is 112 months. The imposition of a DOSA on all counts would then decrease the prison time to 56 months, with an additional 56 months of community custody.

In any event, even if the school zone enhancements did not apply at all to count five, the court could simply impose a standard range sentence of 20 months on that count, along with a DOSA on the other counts.

The cases cited by the State do not deal with the scenario presented here. In *State v. Smith*, 142 Wn. App. 122, 173 P.3d 973 (2007), the defendant was sentenced on two different cause numbers at the same time. *Id.* at 124. The Court imposed 57 months on one count and a DOSA of 25 months in prison and 25 months in community custody on the other count. The trial court purportedly imposed the sentences concurrently, but it in fact imposed a hybrid sentence. The time would run concurrently for the first 25 months, at which time the in-prison portion of the DOSA sentence would be completed. But the prisoner would then have to wait until the non-DOSA sentence ended before he could begin the community custody portion of his DOSA, which effectively meant that some of the time would be consecutive. *Id.* at 126. Thus, the sentence was an improper hybrid sentence which is not authorized by the SRA. *Id.* at 128, citing *State v. Grayson*, 130 Wn. App. 782, 783, 125 P.3d 169 (2005). Here, however, this problem would not arise if all counts were treated equally. Nor would it arise if the sentence on count five did not include the enhancements, because that sentence would be satisfied long before the in-prison portion of the DOSA was fulfilled.

The State also relies on *State v. Murray*, 128 Wn. App. 718, 116 P.3d 1072 (2005), which held that a court may not combine a DOSA and an exceptional sentence downwards for the same offense. Mr. Mohamed

did not seek such a sentence in the trial court and he is not seeking it on appeal. Thus, *Gutierrez* does not create any conflict with other provisions of the SRA.

The State appears to treat the sentences on counts two through four as if they contained only one school zone enhancement. *See* BOR at 29. Working from that premise, it concludes that the DOSA range would be only 32 months on each count, which could not run consecutively because a DOSA cannot be combined with an exceptional sentence (which would be required to run the underlying drug counts consecutively). But that argument proves too much. By the same logic, the sentence actually imposed in this case would be invalid. After all, if the sentences on counts two through four are truly only 44 months each (20 months plus one 24-month enhancement) then how could the Court have imposed a total of 92 months? That number cannot not be reached either by running all the counts consecutively or by running them all concurrently.

The answer, of course, is that the school zone enhancement itself provides the authority for a partially concurrent and partially consecutive sentence without any need for an exceptional sentence. After the three school zone enhancements are added to each count, the sentence is 92 months on each one, with the time running concurrently. A DOSA can be

applied to such sentences without ignoring the enhancements and without imposing an exceptional sentence.

3. The Trial Court Mistakenly Believed it Could Not Reduce the Enhancements Through a PSA

The State does not dispute that under the reasoning of *Gutierrez*, school zone enhancements could be reduced through a PSA. It maintains, however, that the Legislature could not have intended that result because all PSA's require the same sentence: 12 months of community custody. The State points out that an offender who was guilty of an enhancement could receive the same sentence as one who did not. But the same could be said for offenders who have committed crimes of differing seriousness and/or who have differing criminal history. Clearly the Legislature accepted the notion that PSA's might waive a wide variety of standard ranges.

4. The Trial Court Mistakenly Believed that it Could Not Reduce the Enhancements Through an Exceptional Sentence

The State considers it "unsettled" whether school zone enhancements can be reduced through an exceptional sentence. Under the reasoning of *Gutierrez*, however, the answer is clear. Because the enhancements are part of the "standard range sentence" they can be

reduced if there are grounds for an exceptional sentence. *See* AOB at 17-18.

The State maintains that the trial judge was aware she could impose an exceptional sentence on the underlying drug counts, yet she did not do so. The State therefore infers that the judge would not have reduced the enhancements even if she was aware that she could. The judge may have found it pointless, however, to explore an exceptional sentence as to the underlying convictions since the low end of the standard range was so small to begin with. In any event, remand is required even when the judge did not impose the lowest sentence within the standard range. *See* AOB at 22, discussing *State v. Miller*, 181 Wn. App. 201, 324 P.3d 791 (2014).

It is true that the trial court rejected a finding of “sentencing entrapment,” but it was not clear exactly what defense counsel meant by that. In any event, the defense presented other bases for an exceptional sentence. *See* AOB at 10-11. And even if the defense had presented *no* argument for an exceptional sentence, remand is required. *See* AOB at 21-22, discussing *In re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677, 683 (2007). The appellant need show only a “possibility” that the court might consider an exceptional sentence on remand. Here, for example, various arguments could be made that the multiple offense policy of the SRA resulted in a sentence that was clearly excessive. *See, e.g.*, AOB at 18-19.

II.
CONCLUSION

For the forgoing reasons, this Court should reverse the convictions and remand for a new trial. In the alternative, it should remand for a new sentencing hearing, at which the trial court will consider alternative sentences.

DATED this 20th day of February, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email and by United States Mail, postage prepaid, one copy of the foregoing pleading on the following:

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