

73412-1

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Court of Appeals
Division I
State of Washington

73412-1

NO. 73412-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ISAIAH BARRE,

Appellant.

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

The Honorable Julie Spector, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding appellant's prior felony conviction made him ineligible for a deferred sentence as a matter of law.

2. Appellant was deprived of his right to equal protection.

Issues Pertaining to Assignments of Error

1. Do courts have authority to impose deferred sentences for misdemeanor offenses even if the offender has a prior felony conviction?

2. Did the court that sentenced appellant abuse its discretion by failing to recognize it had discretion to impose a deferred sentence despite the appellant having a prior felony conviction?

3. Was appellant denied his right to equal protection when the trial court failed to properly consider all available sentencing options before imposing sentence?

B. STATEMENT OF THE CASE

In December 2014, the King County Prosecutor charged appellant Isaiah Barre with possession of heroin and possession of a stolen vehicle. CP 1-2. In March 2015, the possession of a stolen vehicle charge was amended down to second degree vehicle prowling, a misdemeanor.

CP 7-8; 1RP¹ 3-4; RCW 9A.52.100(2). Barre subsequently entered an Alford² plea to the vehicle prowl and the heroin possession charge was dismissed. CP 9-21; 1RP 3-11; 2RP 7.

According to the plea agreement, which is incorporated into the "STATEMENT OF DEFENDANT ON PLEA OF GUILTY," Barre was free to request a deferred sentence. CP 11, 20. At sentencing, however, Judge Spector noted Barre had a prior conviction for first degree reckless burning,³ and proclaimed this made him ineligible for a deferred sentence. 2RP 3. When asked by Barre's counsel for the authority relied on by the court, Judge Spector replied: "He's not eligible. You have to have no criminal history to have a deferred -- that's the law in the State of Washington." 2RP 4.

¹ There are two volumes of verbatim report of proceedings referenced as follows: 1RP - March 27, 2015 (plea hearing before the Honorable John H. Chun); and 2RP - April 10, 2015 (sentencing hearing before the Honorable Julie Spector).

² North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

³ Judge Spector actually said, "I'm not sure about his criminal history in Appendix B [to the plea agreement]. I have reckless in the first degree which he received a 60 day jail sentence. So he would not be eligible for deferred which is what the defense is asking" 2RP 3. It is clear from the record she was referring to Barre's conviction for first degree reckless burning, which is listed on "Appendix B." CP 21.

Based on Judge Spector's proclamation of law, Barre's counsel conceded he had advised Barre to the contrary and was granted a moment to discuss with Barre how to proceed. When the court reconvened, counsel explained that despite apparently incorrect advice about what sentences were possible, Barre wanted to proceed with sentencing, and counsel changed the defense recommendation to "a suspended sentence." 2RP 5.

When given the opportunity for allocution, Barre stated that his understanding of the law was that a person is eligible for a deferred sentence as long as they have never committed the offense at issue before.

2RP 5-6. Judge Spector replied,

You have a prior felony on your record. You are not eligible. I mean under your theory you could commit hundreds of crimes that are all different and you would always be eligible for a deferred. That's not how the law works.

2RP 6.

Judge Spector then asked whether Barre was still willing to proceed with sentencing, to which he replied, "Yeah." Id. Judge Spector sentenced Barre to credit for time served and suspended the remaining 364 days. CP 22-24. Barre appeals. CP 26-30.

C. ARGUMENT

THE COURT DEPRIVED BARRE OF HIS RIGHT TO EQUAL PROTECTION AND ABUSED ITS DISCRETION WHEN IT FAILED TO EXERCISE ITS DISCRETION ON WHETHER TO IMPOSE A DEFERRED SENTENCE.

Barre is eligible for a deferred sentence. The trial court's proclamation that his prior felony conviction made Barre ineligible for a deferred sentence as a matter of law is incorrect and constitutes an abuse of discretion. This Court should reverse and remand for resentencing.

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). Where a sentence exceeds the court's sentencing authority, the error may be raised for the first time on appeal. In re Restraint of Cadwallader, 155 Wn.2d 867, 874, 123 P.3d 456 (2005); State v. Parker, 132 Wn.2d 182, 188-89, 937 P.2d 575 (1997).

A court's authority to impose sentence is limited by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); State v. Smith, 144 Wn.2d 665, 673-75, 30 P.3d 1245, 39 P.3d 294 (2001); State v. Moen, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996). Every defendant has the right to the trial court's actual consideration of available sentence alternatives. In re Restraint of Mulholland, 161 Wn.2d 322, 334,

166 P.3d 677 (2007) (quoting State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005)). A sentencing court's incorrect interpretation of the controlling statutes is not only an abuse of discretion, it is a fundamental defect authorizing collateral relief. Mulholland, 161 Wn.2d at 332-33. A trial court's failure to exercise its discretion or to understand the breadth of its discretion is an abuse of discretion.⁴

Trial courts lack inherent authority to suspend a sentence. State v. Parent, 164 Wn. App. 210, 212, 267 P.3d 358 (2011). The Legislature, however, granted trial courts such authority under RCW 9.92.060 and RCW 9.95.210, copies of which are attached as appendices A & B, respectively. Id. Significantly, the Legislature also gave trial courts discretion to vacate a determination of guilt and dismiss the conviction of defendants who comply with the terms and conditions of a suspended sentence. RCW 9.95.240 (a copy of which is attached as Appendix C).

Notably lacking from these statutes is language setting forth eligibility requirements for a suspended sentence. The only restriction is

⁴ See, generally, 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).

that cannot be a felony committed after July 1, 1984. See RCW 9.92.900 (RCW 9.92.060 not applicable to felonies committed after July 1, 1984) and RCW 9.95.900 (RCW 9.95.200, .210 & .240 not applicable to felonies committed after July 1, 1984). Nowhere in Chapters 9.92 RCW or 9.95 RCW does it indicate a prior felony conviction renders a defendant ineligible for a deferred sentence as a matter of law. Judge Spector's proclamation to the contrary was error.

Every defendant has the right to have the trial court exercise its discretion to actually consider available sentence alternatives. Grayson, 154 Wn.2d at 341-42. In failing to recognize its discretion, and in failing to exercise its discretion, the trial court abused its discretion.⁵ It also violated Barre's right to equal protection at sentencing because his sentencing court failed to give consideration to all of the sentencing options available. See Garcia-Martinez, 88 Wn. App. at 330 (equal protection is not violated when court considers all sentencing options).

⁵ The failure to exercise discretion is itself an abuse of discretion. Garcia-Martinez, 88 Wn. App. at 330 (refusal to exercise discretion in imposing an exceptional sentence below the range is reviewable error); State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214 (1995) (failure to exercise discretion in determining whether offenses constitute the same criminal conduct).

The appropriate remedy is to remand for resentencing because it cannot be said the trial court would have imposed the same sentence had it been aware a deferred sentence was an option. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (court's failure to exercise discretion out of belief that it lacked authority to do so requires remand if reviewing court cannot say same sentence would have been imposed even if sentencing court were aware of its options). Therefore, this Court should reverse and remand for resentencing, at which the court should be required to exercise its discretion on whether a deferred sentence is appropriate under the circumstances.

D. CONCLUSION

For the reasons stated, this court should remand for resentencing.

DATED this 21st day of August 2015.

Respectfully Submitted,

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RCW 9.92.060.
Suspending sentences

(1) Whenever any person is convicted of any crime except murder, burglary in the first degree, arson in the first degree, robbery, rape of a child, or rape, the superior court may, in its discretion, at the time of imposing sentence upon such person, direct that such sentence be stayed and suspended until otherwise ordered by the superior court, and, upon such terms as the superior court may determine, that the sentenced person be placed under the charge of:

(a) A community corrections officer employed by the department of corrections, if the person is subject to supervision under RCW 9.94A.501 or 9.94A.5011; or

(b) A probation officer employed or contracted for by the county, if the county has elected to assume responsibility for the supervision of superior court misdemeanor probationers.

(2) As a condition to suspension of sentence, the superior court shall require the payment of the penalty assessment required by RCW 7.68.035. In addition, the superior court may require the convicted person to make such monetary payments, on such terms as the superior court deems appropriate under the circumstances, as are necessary: (a) To comply with any order of the court for the payment of family support; (b) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question or when the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement; (c) to pay any fine imposed and not suspended and the court or other costs incurred in the prosecution of the case, including reimbursement of the state for costs of extradition if return to this state by extradition was required; and (d) to contribute to a county or interlocal drug fund.

(3) As a condition of the suspended sentence, the superior court may order the probationer to report to the secretary of corrections or such officer as the secretary may designate and as a condition of the probation to follow the instructions of the secretary. If the county legislative authority has elected to assume responsibility for the supervision of superior court misdemeanor probationers within its jurisdiction, the superior court misdemeanor probationer shall report to a probation officer employed or contracted for by the county. In cases where a superior court misdemeanor probationer is sentenced in one county, but resides within another county, there must be provisions for the probationer to report to the agency having supervision responsibility for the probationer's county of residence.

(4) If restitution to the victim has been ordered under subsection (2)(b) of this section and the superior court has ordered supervision, the officer supervising the probationer shall make a reasonable effort to ascertain whether restitution has been made as ordered. If the superior court has ordered supervision and restitution has not been made, the officer shall inform the prosecutor of that violation of the terms of the suspended sentence not less than three months prior to the termination of the suspended sentence.

RCW 9.95.210.
Conditions of probation

(1)(a) Except as provided in (b) of this subsection in granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.(b) For a defendant sentenced under RCW 46.61.5055, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension continue upon such conditions and for such time as the court shall designate, not to exceed five years. The court shall have continuing jurisdiction and authority to suspend the execution of all or any part of the sentence upon stated terms, including installment payment of fines. A defendant who has been sentenced, and who then fails to appear for any hearing to address the defendant's compliance with the terms of probation when ordered to do so by the court shall have the term of probation tolled until such time as the defendant makes his or her presence known to the court on the record. Any time before entering an order terminating probation, the court may modify or revoke its order suspending the imposition or execution of the sentence if the defendant violates or fails to carry out any of the conditions of the suspended sentence.

(2) In the order granting probation and as a condition thereof, the superior court may in its discretion imprison the defendant in the county jail for a period not exceeding one year and may fine the defendant any sum not exceeding the statutory limit for the offense committed, and court costs. As a condition of probation, the superior court shall require the payment of the penalty assessment required by RCW 7.68.035. The superior court may also require the defendant to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary: (a) To comply with any order of the court for the payment of family support; (b) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question or when the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement; (c) to pay such fine as may be imposed and court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required; (d) following consideration of the financial condition of the person subject to possible electronic monitoring, to pay for the costs of electronic monitoring if that monitoring was required by the court as a condition of release from custody or as a condition of probation; (e) to contribute to a county or interlocal drug fund; and (f) to make restitution to a public agency for the costs of an emergency response under RCW 38.52.430, and may require bonds for the faithful observance of any and all conditions imposed in the probation.

(3) The superior court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the superior court does not order restitution and the victim of the crime has been determined to be entitled to benefits under

the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the superior court within one year of imposition of the sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the superior court shall hold a restitution hearing and shall enter a restitution order.

(4) In granting probation, the superior court may order the probationer to report to the secretary of corrections or such officer as the secretary may designate and as a condition of the probation to follow the instructions of the secretary for up to twelve months. If the county legislative authority has elected to assume responsibility for the supervision of superior court misdemeanor probationers within its jurisdiction, the superior court misdemeanor probationer shall report to a probation officer employed or contracted for by the county. In cases where a superior court misdemeanor probationer is sentenced in one county, but resides within another county, there must be provisions for the probationer to report to the agency having supervision responsibility for the probationer's county of residence.

(5) If the probationer has been ordered to make restitution and the superior court has ordered supervision, the officer supervising the probationer shall make a reasonable effort to ascertain whether restitution has been made. If the superior court has ordered supervision and restitution has not been made as ordered, the officer shall inform the prosecutor of that violation of the terms of probation not less than three months prior to the termination of the probation period. The secretary of corrections will promulgate rules and regulations for the conduct of the person during the term of probation. For defendants found guilty in district court, like functions as the secretary performs in regard to probation may be performed by probation officers employed for that purpose by the county legislative authority of the county wherein the court is located.

(6) The provisions of RCW 9.94A.501 and 9.94A.5011 apply to sentences imposed under this section.

RCW 9.95.240
Dismissal of information or indictment after
probation completed--Vacation of conviction

(1) Every defendant who has fulfilled the conditions of his or her probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, may at any time prior to the expiration of the maximum period of punishment for the offense for which he or she has been convicted be permitted in the discretion of the court to withdraw his or her plea of guilty and enter a plea of not guilty, or if he or she has been convicted after a plea of not guilty, the court may in its discretion set aside the verdict of guilty; and in either case, the court may thereupon dismiss the information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he or she has been convicted. The probationer shall be informed of this right in his or her probation papers: PROVIDED, That in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed.

(2)(a) After the period of probation has expired, the defendant may apply to the sentencing court for a vacation of the defendant's record of conviction under RCW 9.94A.640. The court may, in its discretion, clear the record of conviction if it finds the defendant has met the equivalent of the tests in RCW 9.94A.640(2) as those tests would be applied to a person convicted of a crime committed before July 1, 1984.

(b) The clerk of the court in which the vacation order is entered shall immediately transmit the order vacating the conviction to the Washington state patrol identification section and to the local police agency, if any, which holds criminal history information for the person who is the subject of the conviction. The Washington state patrol and any such local police agency shall immediately update their records to reflect the vacation of the conviction, and shall transmit the order vacating the conviction to the federal bureau of investigation. A conviction that has been vacated under this section may not be disseminated or disclosed by the state patrol or local law enforcement agency to any person, except other criminal justice enforcement agencies.

(3) This section does not apply to chapter 18.130 RCW.

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73412-1-I
)	
ISAIAH BARRE,)	
)	
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 21ST DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ISAIAH BARRE
FDC-SEATAC
P.O. BOX 13900
SEATTLE, WA 98198

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF AUGUST 2015.

X *Patrick Mayovsky*