

FILED
Jul 29, 2016
Court of Appeals
Division I
State of Washington

No. 74618-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA SUE BARROWS,

Appellant.

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

The Honorable Dave Needy

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR.....1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR1

C. STATEMENT OF THE CASE.....1

D. ARGUMENT3

 1. The trial court’s failure to exercise discretion,
 refusing to to consider a FTOW, was error and Ms.
 Barrows’ sentence should be reversed. 3

 a. *Ms. Barrows was statutorily eligible for a FTOW.*3

 b. *The court’s ruling amounted to a blanket denial of a
 FTOW for a class of defendants.*5

 2. This Court should order that no costs on appeal be
 imposed. 6

E. CONCLUSION.....8

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, *cert denied*, 479 U.S. 930 (1986).....4

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 7

State v. Garcia-Martinez, 88 Wn.App. 322, 944 P.2d 1104 (1997)..... 4

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005) 4, 5

State v. Herzog, 112 Wn.2d 419, 771 P.2d 739 (1989)..... 4

State v. Johnson, 97 Wn.App. 679, 988 P.2d 460 (1999)..... 4

State v. McGill, 112 Wn.App. 95, 47 P.3d 173 (2002)..... 4

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000)..... 6

State v. Sinclair, 192 Wn.App. 380, 367 P.3d 612 (2016) 6, 7, 8

State v. Stately, 152 Wn.App. 604, 216 P.3d 1102 (2009), *review denied*, 168 Wn.2d 1015 (2010) 4

STATUTES

RCW 10.73.160 6

RCW 9.94A.585 4

RCW 9.94A.650 3, 4

RULES

RAP 14.2..... 6

RAP 15.2..... 6

A. ASSIGNMENT OF ERROR

The trial court erred in refusing to impose a First Time Offender Waiver (FTOW).

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The sentencing court has broad discretion in deciding to impose a FTOW. Nevertheless, the court abuses that discretion when it categorically refuses to consider a FTOW where the defendant is otherwise statutorily eligible. Did the court here abuse its discretion where Ms. Barrows was statutorily eligible for a FTOW but the court simply refused to consider a FTOW based solely on the amount of the theft for which Ms. Barrows pleaded guilty?

C. STATEMENT OF THE CASE

On October 28, 2015, Cynthia Barrows pleaded guilty to seven counts of first degree theft and three counts of second degree theft. CP 63-74. The thefts totaled \$233,744.09 over two and one-half years. CP 11-12. Ms. Barrows had no prior criminal history. CP 62.

At sentencing, Ms. Barrows requested a FTOW. CP 11-13; 12/16/2015RP 6-7. The State opposed imposition of FTOW, relying on facts outside the record:

There have been some other cases in this court recently where we have had somewhat similar circumstances.

One was the Island Hospital Foundation case where the defendant received a 36-month sentence. We had a year or so ago an attorney theft from clients where 30 months was the sentence.

And myself just recently, I had a case that pled out two weeks ago to a felony theft where the defendant stole \$5,400 from Anacortes Sports Booster Club. And the amount was only \$5,400, much, much less than the amount we're talking about here. That agreed recommendation was for 60 days with 15 in jail and the remainder on alternatives, and that individual had paid back the entire amount prior to sentencing.

12/16/2015RP 4. Finding Ms. Barrows eligible for a FTOW noting she would be better served staying in the community, the court seizing upon the State's argument and refused to impose a FTOW:

You are probably technically eligible as a first-time offender in that you don't have prior felony history, and you would probably be better served by staying in the community and probably more restitution would be paid if you stayed in the community. But there are other obligations of the court and the justice system, Ms. Barrows, than just what's best for you and actually what's necessarily best for the victim.

The court has an obligation to be consistent in treating various cases that come before the court, and yours is a very, very large amount of theft and/or embezzlement, and the court feels a very strong obligation to be consistent and send a message, not one that's going to benefit you or help you or your circumstances, but a message to the community that if you're going to engage in this kind of conduct over this period of time with this amount of dollars, the consequences are going to be very severe. Whether or not that deters anyone else, I'm not

quite certain, but I feel it's my obligation to be consistent on those cases.

If this were \$3000, I would strongly consider a first offender waiver. But at 2- to \$300,000, I simply cannot in good conscience consider that alternative at this time.

12/16/2015RP 10-11. The court imposed 29 month sentences on the second degree theft, and 45 month sentences on the first degree theft counts, all run concurrently. CP 22; 12/16/2015RP 11-12

D. ARGUMENT

1. **The trial court's failure to exercise discretion, refusing to consider a FTOW, was error and Ms. Barrows' sentence should be reversed.**

a. *Ms. Barrows was statutorily eligible for a FTOW.*

In imposing a sentence, the trial court may impose a FTOW, which allows the court to

may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses.

RCW 9.94A.650(2).

Generally, a defendant cannot appeal a standard range sentence.

RCW 9.94A.585(1). [A] defendant can challenge the procedure by which a sentence within the standard range was imposed. *State v.*

Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, *cert denied*, 479 U.S. 930 (1986). Thus, the limitation on the right to appeal does not preclude appellate review of whether the sentencing court had legal authority to impose a first-time offender waiver under RCW 9.94A.650. *State v. Stately*, 152 Wn.App. 604, 607, 216 P.3d 1102 (2009), *review denied*, 168 Wn.2d 1015 (2010). For example, where a trial court refused to exercise discretion at sentencing because it erroneously believed it lacked authority, RCW 9.94A.585(1) does not bar a defendant's appeal of a standard range sentence. *State v. McGill*, 112 Wn.App. 95, 99-100, 47 P.3d 173 (2002). And a trial court's failure to consider an available alternative sentence is reversible error. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005), *citing State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997) (failure to consider exceptional sentence downward)).

Under the RCW 9.94A.650(2) first-time offender option, the trial court has broad discretion to waive a standard range sentence, including refusing to grant the option. *State v. Johnson*, 97 Wn.App. 679, 682, 988 P.2d 460 (1999). “[W]here a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to

consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.” *Grayson*, 154 Wn.2d at 342.

b. *The court’s ruling amounted to a blanket denial of a FTOW for a class of defendants.*

The trial court found Ms. Barrows was statutorily eligible for a FTOW, would be better served staying in the community, and more restitution would probably be paid if she stayed in the community, the court nevertheless drew an arbitrary line over which it would never impose a FTOW, a line on which she fell on the wrong side. The court’s rationale for rejecting a FTOW clearly indicated it would only impose a FTOW where the amount of theft was approximately \$3000, but would never impose one where the amount exceeds hundreds of thousands of dollars, regardless of the eligibility of the individual.

The trial court’s actions were no different than the court in *Grayson*, which flatly refused to consider a Drug Offender Sentence Alternative (DOSA) because in its view, the DOSA program was underfunded. 154 Wn.2d at 342-43. The *Grayson* court found the trial court’s actions amounted to a categorical refusal to consider a statutorily authorized sentence alternative, which was reversible error.

Id. The same rationale should apply here. This Court must reverse Ms. Barrows' sentence and remand for imposition of a FTOW sentence.

2. This Court should order that no costs on appeal be imposed.

Should this Court reject Ms. Barrows' argument on appeal, she asks that this Court to issue a ruling refusing to allow the State to obtain any reimbursement for costs on appeal due to her continued indigency. Such as request is authorized under this Court's recent decision in *State v. Sinclair*, 192 Wn.App. 380, 389-90, 367 P.3d 612 (2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may "direct otherwise." RAP 14.2; *Sinclair*, 192 Wn.App. at 385-86, *quoting State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to "compelling circumstances." *Sinclair*, 192 Wn.App. at 388, *quoting Nolan*, 141 Wn.2d at 628.

In addition, a defendant found to be indigent is presumed to remain indigent "throughout the review" unless there is a finding that the defendant is no longer indigent. RAP 15.2(f). Here there has been

no showing that Ms. Barrows' circumstances have so changed that she is no longer indigent.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. 192 Wn.App. at 390-91. This Court must then engage in an "individualized inquiry." *Id.* at 391, citing *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

Ms. Barrows was determined to be indigent by the superior court and was represented by appointed counsel. Ms. Barrows is currently serving the 45-month sentence the court imposed. She agreed to pay \$233, 744.09. CP 56. In her Financial Statement of Indigency appended to the trial court's order Authorizing Appeal *In Forma Pauperis*, Ms. Barrow stated she is divorced and has no income and owns a car valued at approximately \$4000. CP Supp ___, Sub No. 109 at 2-3. Besides the substantial amount of restitution, Ms. Barrows has debts of \$16,000; \$10,000 owed to the Skagit County Superior Court, a \$4000 car loan, and a hospital bill of \$2000. CP Supp ___, Sub No. 109 at 4.

Because of her current and presumed continuing indigency, Ms. Barrows asks this Court to order that the State cannot obtain an award of costs on appeal, should the State seek reimbursement for such costs. *Sinclair*, 192 Wn.App. at 393.

E. CONCLUSION

For the reasons stated, Ms. Barrows asks this Court to reverse her standard range sentence and remand for imposition of a FTOW.

DATED this 29th day of July 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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CYNTHIA BARROWS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|-----|--|-------------------|--|
| [X] | ERIK PEDERSEN, DPA
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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JULY, 2016.



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