SUPREME COURT NO. _____
COA NO. 39002-1-III
(consolidated with No. 39003-9-III)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KYLE PAYMENT,

Petitioner.

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

The Honorable Rachelle Anderson, Judge
The Honorable Harold D. Clarke, III, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kyle Payment asks the Supreme Court to accept review of the Court of Appeals decision designated below.

B. COURT OF APPEALS DECISION

Payment requests review of the decision in State v. Kyle Lee Payment, Court of Appeals No. 39002-1-III (consolidated with 39003-9-III) (slip op. filed March 12, 2024).

C. ISSUES PRESENTED FOR REVIEW

1. Due process requires that a guilty plea be knowing, voluntary, and intelligent. Payment was misinformed about the term of community custody for one of the charges to which he pled guilty. Must Payment be allowed to withdraw his plea because he was misinformed about a direct consequence of his plea, and must he be permitted to withdraw his other plea as well because both pleas were part of a package deal?

2. Did the court abuse its discretion in failing to meaningfully exercise its discretion on the request for an exceptional sentence downward?

3. Where the case is being remanded for the judge to again exercise its discretion on whether to impose exceptional consecutive sentences, should Payment be resentenced before a different judge to preserve the appearance of fairness?

D. STATEMENT OF THE CASE

Kyle Payment's family life growing up was dysfunctional. 2CP[1] 168. Payment's parents and family members had substance abuse problems. 2CP 168-71. His father abandoned the family and spent much of the ensuing years in prison. 2CP 169.

[1] 1CP refers to the clerk's papers designated in 39002-1-III. 2CP refers to the clerk's papers designated in 39003-9-III.

Payment suffered severe neglect as a child. 2CP 168-70. He grew up surrounded by violence. 2CP 170. He endured physical and sexual abuse. 2CP 169-72, 251.

Payment was incarcerated in the Juvenile Rehabilitation Administration (JRA) starting at age 11 for theft, assault, and robbery involving a bicycle. 2CP 173, 251. At age 13, he was paroled to community supervision. 2CP 251. As a condition of parole, he was prohibited from being released into his mother's custody because his parents influenced his criminal behavior. 2CP 251. Payment was nevertheless released to his mother. 2CP 251. Further criminal charges accrued. 2CP 251. Payment has been almost continuously incarcerated since he was 11 years old. 2CP 151, 174, 177.

Payment was placed in solitary confinement for much of his time at the JRA. 2CP 151. He was severely depressed, self-destructive and at times actively suicidal. 2CP 174-75, 177. He was transferred to adult prison

when he turned 18 years old. 2CP 151. His behavior while incarcerated resulted in continual solitary confinement and additional criminal convictions. 2CP 151, 174, 176-77. Solitary confinement worsened his behavior. 2CP 177.

Which brings us to the present case. Under 21-1-10757-32, Kyle Payment pled guilty to second degree assault. 1CP 5-16; RP (4/1/22) 3-17. The factual basis for the plea was that Payment hit another inmate with a metal bucket. 1CP 2-4, 15.

Under 21-1-10171-32, Payment pled guilty to second degree assault, third degree assault, and malicious mischief. 2CP 125-37; RP (4/1/22) 3-17. The factual basis for the plea was that Payment, while incarcerated, punched a Department of Corrections (DOC) counselor in the face, punched another counselor who responded to the incident in the face and hit him on

the head with a computer keyboard, and damaged computer equipment. 2CP 3-6,136.

As part of the plea deal in both cases, each side was free to recommend an exceptional sentence, and Payment could also seek a Mental Health Alternative Sentence. 1CP 9; 2CP 129.

In support of the sentencing request, defense counsel summarized Payment's history and submitted an expert report authored by Dr. Grassian. 2CP 147-84, 250-52. Dr. Grassian, a psychiatrist with 40 years of experience, also testified as an expert witness at the sentencing hearing. RP (6/1/22) 6-76.

Dr. Grassian diagnosed Payment with complex posttraumatic stress disorder, the result of massive and repetitive childhood trauma. 2CP 183; RP (6/1/22) 28. He also diagnosed attention deficit hyperactivity disorder and bipolar mood disorder. 2CP 183; RP (6/1/22) 28. These disorders impaired Payment's capacity to conform his

conduct to the requirements of the law by causing him to be impulsive and easily triggered into emotionally reactive behaviors. RP (6/1/22) 29.

Payment has been prescribed medication over the years. 2CP 178. But a major factor in Payment's perpetual cycle of disruptive behavior and punitive isolation is the lack of attention to the deleterious psychiatric effects of isolated confinement. 2CP 177-78.

Dr. Grassian opined that solitary confinement is psychiatrically harmful, especially to vulnerable populations. 2CP 151. Payment's clear and profound vulnerabilities included (1) being raised in a severely dysfunctional psychosocial environment; (2) having serious psychiatric problems, both behavioral and emotional, from early childhood; and (3) being incarcerated in solitary confinement from early adolescence. 2CP 151.

Solitary confinement is a massive stressor for people like Payment who are self-destructive, suicidal, violent, and easily triggered by noxious stimuli. RP (6/1/22) 14. People with those kinds of characteristics inevitably get worse — more impulsive and more out of control emotionally — in solitary confinement. RP (6/1/22) 14-15.

A recurring theme is that Payment knew he was out of control and asked for help in dealing with it. 2CP 175-76. He was desperate to escape his impaired psychiatric status. RP (6/1/22) 30. DOC has not addressed his mental health needs because it has placed him in solitary confinement (Intensive Management Unit), putting Payment in a Catch-22. 2CP 252. Those like Payment who are emotionally labile and impulsive are most likely to be consigned to solitary confinement and least capable of tolerating it. 2CP 178. The lack of attention to his plight has resulted in an endless cycle of disruptive behavior

and confinement in a setting that only worsens his behavior. 2CP 179.

The State opposed a Mental Health Alternative Sentence, instead advocating for an exceptional sentence upward by running the sentence for each conviction consecutively to the others. RP (6/1/22) 77-86, 122-24.

Defense counsel pressed her request for a Mental Health Alternative Sentence, contending it was a perfect fit for Payment's predicament. RP (6/1/22) 93-102. Counsel argued punishment rather than rehabilitation had not worked, as it was insufficient to deter Payment's recidivism. 2CP 253-54. His criminal behavior while incarcerated was the result of serious mental illnesses. 2CP 254-55. Incarceration in solitary confinement exacerbated Payment's mental illnesses. 2CP 254.

Counsel alternatively argued for an exceptional sentence downward based on Payment's mental

impairment and an excessive presumptive sentence. 2CP 255-57; RP (6/1/22) 102-03.

Payment spoke on his own behalf, recounting his history and experiences while incarcerated, its effect on him, and his fruitless quest for mental health treatment. RP (6/1/22) 103-121. He thought a Mental Health Alternative Sentence was the only viable solution because it would provide the treatment he needed. RP (6/1/22) 120-21. He did not think an exceptional sentence downward was appropriate because putting him back on the streets with no treatment structure would be like throwing him to the wolves. RP (6/1/22) 120.

In pronouncing sentence, the judge acknowledged Payment's horrific childhood. RP (6/1/22) 124. There was validity to what Dr. Grassian said in that Payment came into the system with traumas, and the past 20 years in incarceration had not done him a service in terms of recognizing his traumas and affirmatively offering services

that could and should have been made available to him. RP (6/1/22) 124. "And it's a tragedy." RP (6/1/22) 124. But Dr. Grassian focused on "prison reform," and a sentencing judge cannot order prison reform. RP (6/1/22) 125.

Turning to the Mental Health Alternative Sentence, the judge recognized Payment met the eligibility standard for getting such a sentence. RP (6/1/22) 125. Payment indicated a willingness to participate in treatment. RP (6/1/22) 126. There were, however, an overwhelming number of incidents that showed Payment is unable to modulate his behavior and be compliant. RP (6/1/22) 126. A person who is unable to comply cannot be treated. RP (6/1/22) 126. The judge rejected the request for a Mental Health Alternative Sentence because there was no assurance of reasonable success in it. RP (6/1/22) 127.

The judge said the sentence he would impose would keep in mind that Payment committed significant

crimes against persons "with really very little thought to what the consequence was going to look like." RP (6/1/22) 128. Payment is an intelligent man. RP (6/1/22) 128. Although he might suffer from impulse control and a tendency to anger quickly, "he understood what the result or the consequences of his behavior was going to be." RP (6/1/22) 128. The judge could not turn a blind eye to the fact that there are victims who will suffer significant, long-term effects because of Payment's actions. RP (6/1/22) 128.

If the sentences were run concurrently, Payment would be getting "free crimes" because his offender score was maxed out on multiple offenses. RP (6/1/22) 128-29. The court ran each of the three counts in case number 21-1-10171-32 consecutive to one another and consecutive to the count in case number 21-1-10757-32, for a total of 199 months in confinement. RP (6/1/22) 130; 1CP 143; 2CP 264-65.

Payment challenged his guilty pleas and his sentence on appeal. The Court of Appeals held Payment was entitled to relief on the following issues: (1) reduction of the term of community custody for third degree assault to comport with the statutory maximum; (2) reconsideration of the State's request for an exceptional sentence upward; and (3) reassessment of two legal financial obligations to comply with recent statutory changes. Slip op. at 1. The Court of Appeals rejected Payment's challenge to his convictions and his claim that the sentencing court erred in not addressing his request for an exceptional sentence downward. Slip op. at 1.

E. WHY REVIEW SHOULD BE ACCEPTED

1. Payment was misinformed about a direct consequence of his plea, in violation of due process.

Payment's guilty plea was not knowing, voluntary, and intelligent because he was misinformed about the term of community custody, a direct consequence of his

plea. The remedy is withdrawal of both pleas because they were part of a package deal.

a. Payment was misinformed about the term of community custody for the third degree assault charge, rendering his plea invalid.

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. Amend. XIV, Wash. Const. art. I, § 3. A guilty plea is otherwise invalid. Boykin v. Alabama, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228(1996).

This standard is reflected in CrR 4.2(d), "which mandates that the trial court 'shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.'" State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006).

"Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). "An involuntary plea produces a manifest injustice." Id.

Payment may challenge his plea for the first time on appeal. An invalid guilty plea based on misinformation of sentencing consequences may be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). Mendoza, 157 Wn.2d at 589 (citing State v. Walsh, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001)).

A guilty plea is not knowingly made when it is based on misinformation regarding a direct sentencing consequence. Mendoza, 157 Wn.2d at 584, 590-91; In re Pers. Restraint of Quinn, 154 Wn. App. 816, 835-36, 226 P.3d 208 (2010). A sentencing consequence is direct when "the result represents a definite, immediate and

largely automatic effect on the range of the defendant's punishment." Ross, 129 Wn.2d at 284 (internal quotation marks omitted) (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)).

Community custody, including its correct length, is a direct consequence because it affects the punishment flowing immediately from the guilty plea and imposes significant restrictions on a defendant's constitutional freedoms. Ross, 129 Wn.2d at 285-86; Quinn, 154 Wn. App. at 836.

In Payment's case, the "statement of defendant on plea of guilty" sets forth, in discrete paragraphs, certain consequences flowing from the plea. 2CP 126. According to the plea statement, one of the consequences is that the term of community custody for the third degree assault

offense, a crime against a person,[2] is 12 months. 2CP 126, 128. This is incorrect. It is 9 months maximum.

The standard range of confinement for the third degree assault offense is 51-60 months based on an offender score of 9+. RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (seriousness level); RCW 9.94A.599 ("If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence.").

Third degree assault is a class C felony. RCW 9A.36.031(2). The statutory maximum for a class C felony is five years. RCW 9A.20.021(1)(c).

When the combined term of confinement and community custody exceeds the statutory maximum, the community custody term is reduced to fit within the statutory maximum. RCW 9.94A.701(10); State v. Boyd,

[2] RCW 9.94A.411(2).

174 Wn.2d 470, 473, 275 P.3d 321 (2012); State v. Thibodeaux, 6 Wn. App. 2d 223, 227-28, 430 P.3d 700 (2018), review denied, 192 Wn.2d 1029, 435 P.3d 278 (2019).

Under RCW 9.94A.701(10), the term of community custody in Payment's case would be 0 to 9 months depending on the standard term of confinement imposed. If 51 months confinement, then 9 months of community custody. If 60 months confinement, then 0 months of community custody.

Payment, however, was advised that his term of community custody for this offense was 12 months. 2CP 126, 128. The court confirmed during the plea colloquy that Payment had reviewed the guilty plea statement and reviewed the "numbers" with his attorney, including the community custody term. RP (4/1/22) 6, 9. Payment was misinformed that his community custody term would be

12 months as part of a standard range sentence, which is a direct consequence of his plea.

The Court of Appeals held "[t]he trial court accurately advised Mr. Payment of the standard term of community custody that could apply to his third degree assault charge." Slip op. 11. No, it didn't, because under no circumstance is Payment lawfully subject to 12 months of community custody as part of a standard range sentence.

To wriggle out of this due process violation, the Court of Appeals opined "the plea agreement materials indicated Mr. Payment would be requesting an exceptional sentence downward," and it was appropriate for the trial court to advise Mr. Payment of the 12-month term because that term would have been possible if the court had granted the request for an exceptional sentence downward. Slip op. at 11-12.

Nowhere does the Court of Appeals cite any authority for the proposition that a defendant is correctly advised of the direct consequences of a standard sentence where the possibility of an exceptional mitigated sentence exists. There is no such authority.

In assessing direct consequences of a plea of which the defendant must be advised, courts look at the punishment associated with a standard range sentence. Mendoza, 157 Wn.2d at 584, 590-91 (standard range of confinement); Ross, 129 Wn.2d at 284-86 (standard term of community custody); In re Pers. Restraint of Bradley, 165 Wn.2d 934, 939-41, 205 P.3d 123 (2009) (standard range of confinement); Quinn, 154 Wn. App. at 836 (standard term of community custody). In Walsh, the defendant was allowed to withdraw his plea based on misinformation about the standard range even though the defendant received an exceptional sentence. Walsh, 143 Wn.2d at 5, 9-10. The Court of Appeals decision conflicts

with precedent on what constitutes misinformation about a direct sentencing consequence, warranting review under RAP 13.4(b)(1), (2) and (3).

Payment's statement on plea of guilty advised "Each crime of which I am charged carries a maximum sentence, a fine, and a **Standard Sentence Range**, as follows," with count 3 listing a "standard range actual confinement" of 51-60 months and a "community custody" term of 12 months. 2CP 126. Payment was misadvised that he could receive a standard range sentence consisting of 51-60 months confinement plus 12 months of community custody. He could never receive 12 months of community custody.

A guilty plea is deemed involuntary when based on misinformation regarding a direct consequence of the plea, regardless of whether the actual sentence received was more or less onerous than anticipated. Mendoza, 157 Wn.2d at 590-91.

In Mendoza, the Supreme Court held the defendant may withdraw a guilty plea based on involuntariness where the plea is based on misinformation regarding the direct consequences of the plea, including a miscalculated offender score resulting in a lower standard range than anticipated by the parties when negotiating the plea. Id. at 584. "Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." Id. at 591.

The same reasoning applies to Payment's case. The plea statement shows he was affirmatively misinformed about the direct consequence of community custody. Under Mendoza, it does not matter that the lawful sentence is less onerous than anticipated based on the misinformation.

To prevail, Payment need not show reliance on the incorrect community custody provision set forth in the

plea form. "[A] defendant who is misinformed of a direct consequence of pleading guilty is not required to show the information was material to his decision to plead guilty. Mendoza, 157 Wn.2d at 589; see also State v. Weyrich, 163 Wn.2d 556, 557, 182 P.3d 965 (2008) ("The defendant need not establish a causal link between the misinformation and his decision to plead guilty.").

The reviewing court will not speculate on the possible outcomes had the defendant been properly advised on the direct consequences of his plea. Isadore, 151 Wn.2d at 302. The Supreme Court has specifically rejected "an analysis that requires the appellate court to inquire into the materiality of mandatory community placement in the defendant's subjective decision to plead guilty" because "[a] reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave

to each factor relating to the decision." Mendoza, 157 Wn.2d at 590 (quoting Isadore, 151 Wn.2d at 302).

In Bradley, misinformation about the standard range on one of the offenses rendered the plea involuntary even though the defendant's concurrent sentences meant he would never serve the lower standard range about which he was misinformed. Bradley, 165 Wn.2d at 939-41.

As cases like Bradley and Mendoza demonstrate, misinformation regarding a direct consequence renders the plea invalid, regardless of whether the defendant relied on the misinformation and regardless of whether the misinformation subjected the defendant to an overall increased sentence.

Where a guilty plea is based on misinformation regarding the direct consequences of the plea, the defendant may withdraw the plea based on involuntariness. Mendoza, 157 Wn.2d at 584. Payment should be given the opportunity to withdraw his plea

because he was misinformed that he was subject to a community custody term of 12 months as part of a standard range sentence for the third degree assault charge.

b. Payment is entitled to withdraw both of his guilty pleas because they are indivisible.

Payment is entitled to withdraw each of his two pleas under the two cause numbers because they are indivisible. This remedy is available to a defendant where, as part of a "package deal," the defendant was correctly informed of the consequences of one charge, but not of another charge. Bradley, 165 Wn.2d at 941.

A plea bargain is a package deal if the agreements are indivisible from one another. Id. Courts look to objective manifestations of the parties' intent to determine whether a plea is indivisible. State v. Chambers, 176 Wn.2d 573, 581, 293 P.3d 1185 (2013).

The record here shows an objective intent to create an indivisible plea agreement. Payment entered his pleas on the same day at the same hearing. See State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003) (pleas to multiple counts or charges were made at the same time and accepted in a single proceeding are factors supporting indivisibility).

The recommendations in both plea statements are aligned. See In re Pers. Restraint of Shale, 160 Wn.2d 489, 492-93, 158 P.3d 588 (2007) (same recommendations in each plea statement supported indivisible pleas). In both plea statements, the parties agree to being able to request exceptional sentences. In both plea statements, the State agreed to dismiss cause number 22-1-10060-32. In both plea statements, the State agreed not to file any additional charges related to report number 2022-10004190, to include any charges involving Michele Ross (Michele Payment) from the

recorded jail calls within the State's possession. In both plea statements, the "pre-trial no contact order will be recalled." 1CP 9; 2CP 129.

Payment was sentenced on the same day for all of his plea convictions in a unified sentencing hearing. RP (6/1/22) 3. The defense sentencing memo covered both cause numbers, with the defense arguing for a mental health alternative sentence or an exceptional sentence downward in both cases based on the same arguments. 1CP 129-37; 2CP 250-58. The State's sentencing brief was filed under both cause numbers and attached both plea statements as exhibits. 1CP 165, 184-96, 198-209; 2CP 290, 309-21, 323-34. The State advocated for the sentence under one cause number to run consecutive to the sentence in the other cause number and relied on the interplay between the offenses under each cause number in arguing they would go unpunished if run concurrently, which objectively demonstrates intended interrelationship.

RP (6/1/22) 84, 86; 1CP 172-74; see Chambers, 176 Wn.2d at 581 (letter stating the sentences for the February and May charges would run concurrently to one other but consecutively to the November charges demonstrated the interconnectedness of the charges).

Because Payment's pleas are part of a package deal, the remedy is withdrawal of both pleas. Bradley, 165 Wn.2d at 941.

2. The court abused its discretion in failing to meaningfully consider Payment's request for an exceptional sentence downward.

Under RCW 9.94A.535, a sentencing court may impose an exceptional sentence below the standard range if it finds there are substantial and compelling reasons justifying one.

Defense counsel asked the court to exercise its discretion to impose an exceptional sentence downward, citing two mitigating circumstances in support. 2CP 255-58.

First, that "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(e); 2CP 255.

Second, that "[t]he 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 9.94A.535(1)(g); 2CP 255. The purposes of the SRA expressed in RCW 9.94A.010 are to ensure punishment that is proportionate to the seriousness of the offense and the defendant's criminal history, promote respect for the law with just punishment, be commensurate with punishments imposed on others for similar crimes, protect the public, offer an opportunity for the defendant to improve, preserve resources, and reduce the risk of re-offense.

"While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). "The failure to consider an exceptional sentence is reversible error." Id. at 342.

In Payment's case, the court did not meaningfully address the defense request for an exceptional sentence downward. At the sentencing hearing, the court first explained why it would not grant the request Mental Health Sentencing Alternative. RP (6/1/22) 125-28. The court then jumped to why it was imposing exceptional consecutive sentences, as requested by the State. RP (6/1/22) 128-30. The court skipped over the defense request for an exceptional sentence downward.

According to the Court of Appeals, the sentencing court "did not categorically refuse to consider Mr.

Payment's request. It listened to Mr. Payment's evidence and argument and, in its discretion, declined to impose a sentence below the standard range." Slip op. at 12.

Yet the sentencing court at no time addressed the proffered mitigating circumstances in connection with the exceptional sentence downward request. The court did not address the multiple offense policy mitigator under RCW 9.94A.535(1)(g). It did not explain whether the presumptive sentence would be clearly excessive in light of the purposes of the SRA. Nor did the court meaningfully address the mitigator under RCW 9.94A.535(1)(e).

The court did state: "Mr. Payment is a very intelligent man. And despite the fact that he might suffer from impulse control and a tendency to anger quickly, he understood what the result or the consequences of his behavior was going to be." RP (6/1/22) 128. This comment was made in explaining why exceptional

sentences upward were being imposed. The written finding echoing this oral remark reinforces the point, as it was expressly entered in support of the exceptional consecutive sentences. 1CP 155; 2CP 276 (FF 11). In the context of the exceptional sentence downward request, the court did not consider whether Payment's capacity to appreciate the wrongfulness of his conduct was significantly impaired, and whether his ability to conform his conduct to the requirements of the law was significantly impaired.

"When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) (citing Grayson, 154 Wn.2d at 342). A court thus abuses its discretion when it fails to meaningfully consider a possible mitigating circumstance. State v. O'Dell, 183 Wn.2d 680, 696-97, 358 P.3d 359

(2015). The "failure to exercise discretion is itself an abuse of discretion subject to reversal." Id. at 697. The court committed reversible error in failing to meaningfully consider Payment's request for an exceptional sentence downward.

The Court of Appeals, having directed reconsideration on the exceptional sentence upward issue, specified that "resentencing shall be limited to reconsideration of the State's request for an exceptional sentence upward." Slip op. at 16. As argued above, remand for resentencing to consider the exceptional sentence downward request is also appropriate. Payment seeks review under RAP 13.4(b)(4).

3. On remand, a different judge should resentence Payment to preserve the appearance of fairness.

Due process requires not only that there be an absence of actual bias but that justice must satisfy the appearance of justice. State v. Madry, 8 Wn. App. 61, 62,

504 P.2d 1156 (1972); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. "Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised." State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983).

Under the appearance of fairness standard, remand to a different judge is appropriate where facts in the record show "the judge's impartiality might reasonably be questioned." State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). A party may thus seek reassignment for the first time on appeal where the trial judge "will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue." Id. (quoting State v. McEnroe, 181 Wn.2d 375, 387, 333 P.3d 402 (2014)).

The discretionary nature of a trial court's decision heightens appearance of fairness concerns. When the trial court's decision is discretionary, there is a greater risk of prejudice. Tatham v. Rogers, 170 Wn. App. 76, 104-06, 283 P.3d 583 (2012). Conversely, "even where a trial judge has expressed a strong opinion as to the matter appealed, reassignment is generally *not* available as an appellate remedy if the appellate court's decision effectively limits the trial court's discretion on remand." McEnroe, 181 Wn.2d at 387.

Reassignment to a different judge on remand is required here to preserve the appearance of fairness. First, whether to impose an exceptional sentence is entirely discretionary. The risk of prejudice is at its zenith in this regard. Second, the judge could reasonably be expected to have substantial difficulty in overlooking his previously expressed findings on the matter. See State v. Sledge, 133 Wn.2d 828, 846, 947 P.2d 1199 (1997)

(vacating trial court's disposition and remanding to trial court where Sledge may choose to withdraw his guilty plea or have new disposition hearing before another judge in light of previous judge's expressed view of disposition).

The sentencing judge in this case obviously expressed an opinion as to the merits of the original sentence imposed and has already judged it to be appropriate. From a neutral observer’s perspective, this judge cannot be expected to put all that aside and come to a different conclusion. Having the same judge do the resentencing has the appearance of a sham proceeding, the result preordained. A different judge should preside over further proceedings on remand to comply with the appearance of fairness.

The Court of Appeals dismissed Payment's request for reassignment, claiming it was "baldly assert[ed]" and amounted to nothing more than "[m]ere displeasure with an erroneous ruling," which "is not a valid reason for

reassignment." Slip op. at 16-17. Payment cited caselaw and presented a reasoned argument on the issue. Nothing bald about that. The Court of Appeals ignores the reasoning of Solis-Diaz, McEnroe, Tatham and Sledge. Payment requests review under RAP 13.4(b)(3).

F. CONCLUSION

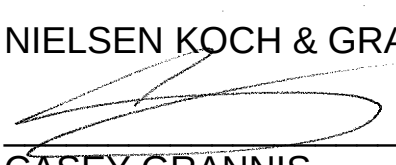
For the reasons stated, Payment respectfully requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 4976 words excluding those portions exempt under RAP 18.17.

DATED this 9th day of April 2024.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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

STATE OF WASHINGTON, Respondent, v. KYLE L. PAYMENT, Appellant.	)))))))))	No. 39002-1-III (consolidated with No. 39003-9-III) UNPUBLISHED OPINION

PENNELL, J. — Kyle Payment appeals his convictions for second degree assault (two counts), third degree assault, and second degree malicious mischief; his 199-month sentence; and his term of community custody. We reject Mr. Payment's challenges to his convictions and his claim that the sentencing court committed legal error in rejecting his argument for an exceptional sentence downward. However, we agree with Mr. Payment that he is entitled to relief on the following issues: (1) reduction of the term of community custody for third degree assault to comport with the statutory maximum; (2) reconsideration of the State's request for an exceptional sentence upward; and (3) reassessment of two legal financial obligations—the crime victim penalty assessment and interest on restitution—to comply with recent statutory changes.

FACTS

Kyle Payment is an inmate in the custody of the Department of Corrections (DOC). In 2020 and 2021, Mr. Payment was involved in two separate incidents in which he assaulted DOC counselors and another inmate. The incidents resulted in property damage as well as extensive physical injuries to the victims. The State brought charges against Mr. Payment and the parties eventually reached an agreement whereby Mr. Payment would plead guilty to two counts of second degree assault, one count of third degree assault, and one count of second degree malicious mischief. The agreement contemplated a contested sentencing, at which both Mr. Payment and the State would argue for exceptional sentences and the defense would seek a mental health sentencing alternative (MHSA). The parties stipulated Mr. Payment would be permitted to call a psychiatrist to testify on his behalf as an expert witness at his sentencing hearing.

As relevant here, the guilty plea statement signed by Mr. Payment advised him that his third degree assault charge "carrie[d] a . . . *Standard Sentence Range*" including 51 to 60 months of confinement and a community custody term of 12 months, and that the maximum sentence was 5 years. Clerk's Papers, *State v. Payment*, No. 39003-9-III (2 CP) at 126 (boldface omitted). During his plea hearing, the court advised Mr. Payment

that his standard sentencing range was 51 to 60 months and that there was a "possible" 12-month term of community custody. Rep. of Proc. (RP) (Apr. 1, 2022) at 9.

In advance of the plea and sentencing hearing, the State filed a memorandum arguing for an exceptional sentence upward, citing the so-called "free-crimes" aggravator. *See* RCW 9.94A.535(2)(c).[1] The State urged the trial court to impose the high end of the standard range on each charge and to run the sentences consecutively. The State further argued Mr. Payment was not a suitable candidate for an MHSA.

In Mr. Payment's sentencing brief, he asked the court to impose an MHSA and, in the alternative, to impose an exceptional sentence below the standard range. Mr. Payment cited two statutorily enumerated mitigating circumstances: first, he claimed his "capacity to appreciate the wrongfulness of his . . . conduct, or to conform his . . . conduct to the requirements of the law, was significantly impaired," RCW 9.94A.535(1)(e), and second, he argued the "presumptive sentence" was "clearly excessive," RCW 9.94A.535(1)(g). Mr. Payment argued that he was caught in a vicious cycle of behavioral problems leading to continuous incarceration, and he desperately needed help that he was not getting due

[1] "The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury [if] . . . [t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." *Id*.

to his current prison classification. Mr. Payment further claimed that prolonged solitary confinement had impaired his ability to conform his conduct to the law. If the court was not inclined to impose an MHSA, Mr. Payment requested an exceptional sentence downward of 90 days on each charge, to run concurrently.

At sentencing, the court received lengthy testimony from Mr. Payment's expert, a board-certified psychiatrist. The expert testified as to Mr. Payment's mental health diagnoses, along with the horrendous circumstances surrounding Mr. Payment's youth and time in custody. The expert pointed out that Mr. Payment had been incarcerated almost continuously since 1999, when he was 13 years old, and that he had spent most of his adult life in solitary confinement. According to the expert, Mr. Payment's vulnerability as a child coupled with his extensive exposure to solitary confinement significantly impaired his ability to conform his conduct to legal expectations. The expert expressed concern that Mr. Payment might spend the rest of his life in solitary confinement.

During the State's presentation, the prosecutor mentioned Mr. Payment's history of "upwards of 475 serious infractions while he's been incarcerated," referencing a DOC presentence investigation report. RP (Jun. 1, 2022) at 78; *see* Clerk's Papers, *State v. Payment*, No. 39002-1-III (1 CP) at 224-25. The prosecutor also described

Mr. Payment as a "master manipulator" with a "long-standing history of assaultive behavior," arguing that "when he decides he's going to assault someone, he doesn't care who it is. . . . [H]e doesn't care about them as a person." RP (Jun. 1, 2022) at 80. The prosecutor reiterated the State's opposition to an MHSA and its request for an exceptional sentence upward. The prosecutor also cited the applicability of the free-crimes aggravator, contending that "[i]f we run any of this concurrent, he's getting away with it for nothing." *Id.* at 83-84.

In his statement to the court, Mr. Payment apologized to one of his victims who was present in the courtroom. Notwithstanding his counsel's arguments for an exceptional sentence downward, Mr. Payment further stated, "I would argue that the exceptional sentence downward is inappropriate because it provides for nothing." *Id.* at 120. He elaborated: "[I]f you're throwing me to the wolves, I wouldn't be surprised if I came back. For me, I think the [MHSA] is the only solution . . . ." *Id*.

The court then proceeded to its ruling. The judge acknowledged that Mr. Payment had experienced "horrific things" and that the DOC's purported mishandling of his mental health treatment was "a tragedy." *Id.* at 124-25. Nevertheless, the court opined the testimony of Mr. Payment's psychiatrist expert constituted arguments for broader prison reform rather than leniency in this specific case.

The judge rejected Mr. Payment's request for an MHSA, reasoning that, to be eligible for such a sentencing alternative, a defendant must be "willing to participate" in the program. *Id.* at 125; *see* RCW 9.94A.695(1)(d). The judge reasoned that:

> Mr. Payment is not able to modulate his behavior and be compliant. That is apparent in . . . the 475 violations with DOC while he was incarcerated. And it begs the question, how can you treat somebody if they're not able to comply.
> . . . .
> I don't doubt that Mr. Payment needs some mental health treatment. But this sentencing alternative is contingent on compliance coming first.

Id. at 126-27. The judge moved on to Mr. Payment's term of confinement:

> The sentencing that the Court is looking at today is going to be a sentence that keeps in mind that these are very significant crimes against persons that Mr. Payment committed. And I know he's aware he committed them. He [pleaded] guilty to them. I appreciate very much the apology to [one of the victims] and his family in court today. But it doesn't diminish the fact that these were significant offenses perpetrated against individuals with really very little thought to what the consequence was going to look like.
>
> Mr. Payment is a very intelligent man. And despite the fact that he might suffer from impulse control and a tendency to anger quickly, he understood what the result or the consequences of his behavior was going to be. And in this particular case I cannot turn a blind eye to the fact that there are victims who will suffer significant, long-term effects as a result of Mr. Payment's actions.
>
> . . . .
>
> The State, first of all, is asking me to run those sentences consecutive. And I will indicate that under the [free-crimes aggravator] statute, . . . [Mr. Payment] has committed multiple current offenses, and [Mr. Payment]'s high offender score results in some of the current offenses going unpunished.

> If I were to run these sentences . . . concurrently, it would simply take the highest number of months within the standard range for one count and encompass everything else within it. In essence, as [the prosecutor] indicated, that would be free crimes.
>
> What I am choosing to do is recognize that each of these crimes, each of these charges does come with it a consequence that needs to be paid by Mr. Payment for his actions against these individuals in each of their capacities. This does meet the criteria under the statute to find an exceptional upward sentence to order the sentences to run consecutive. And I am going to do that.

Id. at 128-29.

Although the court granted the State's request to run Mr. Payment's sentences consecutively, it opted not to impose the high end of the standard range as to each count. Instead, the court imposed the low end of the standard range for each charge, to run consecutively, for a total of 199 months' confinement. The court found Mr. Payment was indigent, but noted the $500 crime victim penalty assessment would be imposed in each of the two cases, along with restitution.

The court subsequently entered a written judgment and sentence in each case, imposing a total of 199 months' confinement[2] and noting that it had found substantial and compelling reasons to justify an exceptional sentence above the standard range.

[2] As relevant to this appeal, the court sentenced Mr. Payment to 51 months' confinement for third degree assault, noting that the maximum sentence for that crime was 5 years.

The court ordered Mr. Payment to pay $60,881.28 in restitution, including interest at the rate applicable to civil judgments. The court further sentenced Mr. Payment to 18 months' community custody pursuant to his convictions for second degree assault, but did not specify a community custody term for third degree assault.

In addition to the judgment and sentence, the court entered a written document entitled, "Findings of Fact and Conclusions of Law Re: *Exceptional Above Sentence*." 1 CP at 154-56; 2 CP at 275-77. The written findings included details about Mr. Payment's criminal history. In addition, there was a finding that Mr. Payment "has had 475 serious infractions while an inmate of the [DOC]." 1 CP at 155; 2 CP at 276. There was also a finding that Mr. Payment "committed significant crimes against persons with little thought of the consequences." *Id*. In its conclusions of law, the court referenced the free-crimes aggravator, RCW 9.94A.535(2)(c), as a basis for imposing an exceptional sentence upward, and incorporated its "oral findings and conclusions" from the sentencing hearing. 1 CP at 155-56; 2 CP at 276-77.

Mr. Payment separately appealed from each judgment and sentence.[3] Months after Mr. Payment initiated his appeals, the trial court entered an order clarifying its judgment and sentence. The order stated Mr. Payment would serve 18 months' community custody

[3] This court later granted Mr. Payment's motion to consolidate his two appeals.

given his convictions for second degree assault, but that his third degree assault conviction carried a term of 12 months' community custody.[4] This court, citing RAP 7.2(e), granted the State's unopposed motion to authorize the superior court to enter the postappeal order.

ANALYSIS

Length of sentence for third degree assault

Mr. Payment contends, and the State concedes, that the 12-month term of community custody for third degree assault must be adjusted downward because it causes the total sentence to exceed the statutory maximum term of 5 years. We accept the State's concession and remand to correct this error.

As a crime against persons, a conviction for third degree assault typically requires a 12-month term of community custody. *See* RCW 9.94A.701(3)(a); RCW 9.94A.411(2)(a). But this rule must yield when imposition of the 12-month term would cause a defendant's total sentence—incarceration plus community custody—to exceed the statutory maximum sentence for the crime of conviction. *See* RCW 9.94A.505(5); RCW 9.94A.701(10). When imposition of the usually-required

[4] The terms of Mr. Payment's community custody shall run concurrently because the sentencing court did not state otherwise. *See* RCW 9.94A.589(2)(a).

community custody term would result in an excessive sentence, the court must reduce the term of community custody so that the total sentence will fall within the statutory maximum. RCW 9.94A.701(10).

The maximum sentence for third degree assault is 5 years, or 60 months. *See* RCW 9A.36.031(2); RCW 9A.20.021(1)(c). Because the trial court sentenced Mr. Payment to 51 months' confinement for third degree assault, it could not impose a 12-month term of community custody for that crime. Instead, the maximum possible term of community custody was 9 months. We remand with instructions to correct the term of community custody as to third degree assault.

Validity of guilty plea

Mr. Payment contends his guilty pleas were invalid in violation of his right to due process because he was misinformed as to a direct consequence of his plea. Specifically, he faults the trial court for advising him that 12 months of community custody applied to his third degree assault charge, given that, if the court imposed a standard-range sentence, the longest term of community custody he could have lawfully received was 9 months. The State counters that the court correctly informed Mr. Payment that third degree assault ordinarily carries a term of 12 months' community custody, a term the court would have

been bound to impose if it granted Mr. Payment's impending request for an exceptional sentence downward. We agree with the State.

Before a court may accept a guilty plea, the defendant must be informed of all "direct consequences" flowing from the plea, including standard terms of confinement and community custody. *State v. Gregg*, 196 Wn.2d 473, 483, 474 P.3d 539 (2020); *see In re Pers. Restraint of Quinn*, 154 Wn. App. 816, 820, 836, 841, 226 P.3d 208 (2010). "Affirmative misinformation as to a direct consequence renders a plea constitutionally invalid." *Gregg*, 196 Wn.2d at 484. Such misinformation renders a plea involuntary regardless of whether the actual sentence is lower or higher than anticipated. *State v. Buckman*, 190 Wn.2d 51, 59, 409 P.3d 193 (2018).

Mr. Payment was not misinformed about the consequences of his third degree assault conviction. The trial court accurately advised Mr. Payment of the standard term of community custody that could apply to his third degree assault charge. Although the record indicated the standard 12-month term would not apply if Mr. Payment received a standard-range sentence, the plea agreement materials indicated Mr. Payment would be requesting an exceptional sentence downward. Had the court granted this request, a 12-month term of community custody would have been possible, if not mandatory, depending on the extent of the departure. It was therefore appropriate for the trial court

to advise Mr. Payment of the 12-month term. *See Buckman*, 190 Wn.2d at 59 (noting due process requires a defendant be advised of possible sentencing consequences at the time of plea).

Exceptional sentence downward

Mr. Payment claims the sentencing court abused its discretion in refusing to consider his request for an exceptional sentence downward. For our court to review this type of claim, Mr. Payment must show legal error such as a categorical refusal to consider an exceptional sentence downward, reliance on a constitutionally improper basis, or a failure to recognize discretion to deviate downward. *See State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017); *State v. Garcia-Martinez*, 88 Wn. App. 322, 328-29, 944 P.2d 1104 (1997).

Mr. Payment has not established any basis for overturning the sentencing judge's denial of an exceptional sentence downward. The court did not categorically refuse to consider Mr. Payment's request. It listened to Mr. Payment's evidence and argument and, in its discretion, declined to impose a sentence below the standard range. There is no indication the trial court's rejection of an exceptional sentence downward rested on legal error or an improper consideration. We therefore must defer to the sentencing judge's decision.

Exceptional sentence upward

A sentencing judge's decision to grant an exceptional sentence request is reviewed with more scrutiny than a denial. *See* RCW 9.94A.585(4). As always, we will review claims of legal error de novo. *State v. Law*, 154 Wn.2d 85, 93-94, 110 P.3d 717 (2005). But we review the purported excessiveness of an exceptional sentence for abuse of discretion and the factual findings supporting the trial court's decision for clear error. *Id*. at 93.

The general rule is that a court may impose a sentence above the standard sentencing range only if aggravating facts have been proven to a jury beyond a reasonable doubt. RCW 9.94A.535, .537. A narrow exception exists for an upward departure based on the "fact of a prior conviction." RCW 9.94A.535; *see also State v. Alvarado*, 164 Wn.2d 556, 567-68, 192 P.3d 345 (2008).

Because it is based solely on criminal history, a permissible exception to the requirement of jury findings is the so-called free-crimes aggravator. *See Alvarado*, 164 Wn.2d at 567-68. This statutorily approved aggravator enables a court to impose a sentence above the standard range if "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses

going unpunished." RCW 9.94A.535(2)(c). The free-crimes aggravator can be effectuated by ordering multiple offenses to run consecutively. *See* RCW 9.94A.589(1).

Here, there is no dispute that the sentencing court could have imposed an exceptional sentence upward without the need for any jury findings based on the free-crimes aggravator. The parties disagree as to whether the trial court relied on impermissible facts in reaching its exceptional sentencing decision. Mr. Payment recognizes the court was allowed to consider facts that flowed directly from his criminal history. *See Alvarado*, 164 Wn.2d at 567-68. But he claims the court went beyond this scope of permissible information and based its exceptional sentencing decision, at least in part, on factual findings regarding his DOC infraction history and his purported indifference to the consequences of his actions.

The State acknowledges the sentencing court's written findings included facts beyond Mr. Payment's criminal history that were never proven to a jury, but nevertheless asks us to affirm. According to the State, the court's improper findings did not actually inform its decision to impose an exceptional sentence. The State urges us to look to the court's oral ruling. The State observes the sentencing judge's oral comments about Mr. Payment's DOC infractions were made in the context of rejecting his MHSA request, and claims the finding about Mr. Payment's indifference to his victims "related to

the reasons that it was declining an exceptional sentence below the standard range." Br. of Resp't at 35. When issuing its oral ruling, the court did not expressly link Mr. Payment's infraction history or indifference to his victims to the exceptional sentence upward.

We reject the State's approach. The rule in Washington is that "[t]he written order is controlling." *State v. Molina*, 16 Wn. App. 2d 908, 922, 485 P.3d 963, *review denied*, 198 Wn.2d 1008, 493 P.3d 731 (2021). "[T]he trial court's oral statements at sentencing are no more than a verbal expression of its informal opinion at the time." *Id.* To be sure, we "may resort to the trial court's oral decision to interpret findings and conclusions." *State v. Hinds*, 85 Wn. App. 474, 486, 936 P.2d 1135 (1997). But "the trial court's oral opinion cannot be used to impeach or contradict an unambiguous written finding." *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 838, 786 P.2d 285 (1990).

Here, the court entered written factual findings explicitly designated as justifying the exceptional sentence upward; no other purpose for the findings was specified. Given the court decided to include findings about Mr. Payment's infraction history and his indifference to his victims in its written justification for the exceptional sentence, we are not satisfied the court "would have imposed the same sentence" without the inclusion of the impermissible facts. *State v. Perry*, 6 Wn. App. 2d 544, 558, 431 P.3d 543 (2018).

It could be, for example, that had the court not considered the extraneous facts, it would have decided to run at least some of Mr. Payment's convictions concurrently. We must therefore remand for resentencing. Based on the nature of our disposition, resentencing shall be limited to reconsideration of the State's request for an exceptional sentence upward.

Crime victim penalty assessment and interest on restitution

The parties agree that, on remand, the sentencing court must reconsider two legal financial obligations. First, imposition of the crime victim penalty assessment must be stricken based on Mr. Payment's indigence. *See* RCW 7.68.035(4), (5)(b). And second, the sentencing court must exercise its discretion under RCW 10.82.090(2) on whether to waive interest on Mr. Payment's restitution obligation. We concur with the parties' agreement and remand for reconsideration of both financial obligations.

Reassignment on remand

Mr. Payment asks this court to order reassignment of this matter to a different trial judge on remand, baldly asserting that the appearance of fairness doctrine requires this remedy. We reject this request. Mr. Payment has not set forth any reason to question the sentencing judge's impartiality. Mere displeasure with an erroneous ruling is not a valid

reason for reassignment. *See State v. McEnroe*, 181 Wn.2d 375, 388, 333 P.3d 402 (2014).

CONCLUSION

This matter is remanded for resentencing limited to the following issues: (1) reduction of the term of community custody for third degree assault so that the total sentence does not exceed the statutory maximum, (2) reconsideration of the State's request for an exceptional sentence upward pursuant to the terms of this opinion, (3) striking of the crime victim penalty assessment, and (4) reconsideration of the imposition of interest on restitution pursuant to RCW 10.82.090(2).

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

I CONCUR:

Fearing, C.J.

No. 39002-1-III
(consolidated with No. 39003-9-III)

COONEY, J. (dissenting in part) — I concur with all but one of the majority's conclusions. The trial court did not err by including extraneous facts in its "Findings of Fact and Conclusions of Law Re: Exceptional Above Sentence—Appendix 2.4." Clerk's Papers at 275 (emphasis and boldface omitted). Remand for resentencing is both unnecessary and inordinately burdensome to the trial court.

At sentencing hearings, trial courts often receive and consider a significant amount of information. RCW 9.94A.500. However, not all of the information is assigned equal weight, nor does all the information underlie a court's decision to order an exceptional sentence. Here, as properly recognized by the majority, the trial court made two findings that are unrelated to the statutory basis for an unpunished crimes enhancement.[1] However, the trial court gave no weight to the superfluous findings when it ordered Mr. Payment to serve an exceptional sentence. Indeed, we need look no further than the trial court's conclusions of law to ascertain the foundation of its decision. Accordingly, I dissent in part.

In passing, we recently recognized that under RCW 9.94A.535(2)(c) a trial court possesses the authority to impose consecutive standard range sentences when it finds

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[1] The trial court's extraneous findings of fact included:

> 10. That the Defendant has had 475 serious infractions while an inmate of the Department of Corrections.
> 11. That the Defendant has committed significant crimes against persons with little thought of the consequences.

CP at 276.

"substantial and compelling reasons justifying" an exceptional sentence. *State v. Eller*, ____ Wn. App. 2d ____, 541 P.3d 1001, *1003 (2024). The statute allows a trial court to "impose an aggravated exceptional sentence without a finding of fact by a jury" if "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). Provided, however, that "[w]henever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535.

The question before us is not whether the record supports the trials court's exceptional sentence—indisputably it does. Rather, the question is whether the trial court assigned any weight to the two superfluous findings when it decided to order consecutive standard-range sentences. The remedy for superfluous findings of fact can vary based on the specific circumstances of the case. In certain situations, additional findings may not necessitate any remedial action at all. *See, e.g.*, *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 425, 367 P.2d 985 (1962). To date, a bright-line rule has not been established that would restrict a sentencing court from entering irrelevant findings, provided one or more of the court's findings justifies the exceptional sentence. Consequently, it becomes unnecessary to remand for resentencing when a trial court demonstrates it imposed an exceptional sentence based on a valid statutory basis.

However, if the reviewing court deems that the trial court placed "considerable weight" on invalid factors during sentencing, remanding for resentencing may be warranted. *State v. Fisher*, 108 Wn.2d 419, 429-30, 430 n.7, 739 P.2d 683 (1987). Considerable weight can be inferred from the imposed sentence length and from the strength of the remaining valid factors. *See, e.g.*, *State v. Dunaway*, 109 Wn.2d 207, 220, 743 P.2d 1237 (1987); *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993).

Here, the free-crimes aggravator indubitably provided the trial court authority to order an exceptional sentence. The trial court ordered the low end of the standard-range sentence for each conviction. The exceptional sentence was presented in the form of consecutive standard-range sentences. The trial court clearly announced in its conclusions of law that the exceptional sentence was based on the free-crimes aggravator. Conspicuously absent from the trial court's conclusions of law is any reference to the two extraneous findings of fact.

Under the guise of a resentencing, the majority is essentially directing the trial court to excise two superfluous findings from its findings of fact. *Fisher*, 108 Wn.2d at 430 n.7. Because the trial court did not assign any weight to the extraneous findings, as evidenced by its conclusions of law, remanding for resentencing is both unnecessary and begets an unwarranted strain on an already overburdened trial court.

Cooney, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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