Supreme Ct. No. 91204-1
COA No. 31580-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOSE MENDEZ, Petitioner.

ANSWER TO PETITION FOR REVIEW

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The Respondent is the State of Washington.

B. COURT OF APPEALS DECISION

At issue is the Commissioner's Ruling filed on September 8, 2014 in Division Three of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

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1. Does the decision meet the criteria for review under RAP 13.4(b)?

ANSWER TO ISSUE PRESENTED FOR REVIEW

2. No, the decision does not meet the criteria for review under RAP 13.4(b).

D. STATEMENT OF THE CASE

Mendez was charged with attempting to elude, possession of cocaine, possession of heroin, first degree driving while license revoked (DWLR), and felony driving under the influence (DUI). CP 23.

Testimony at trial showed that Sgt. McNearney was on patrol when a SUV pulled out right in front of him, almost hitting him. RP 226. The officer had to stop to avoid colliding with the SUV. RP 226-27. Sgt. McNearney turned around to stop the SUV, and activated his overhead lights. RP 227. The driver

pulled over to the right shoulder. RP 228. Sgt. McNearney put his spotlight on the vehicle and parked slightly to the left of the SUV. Id. He walked up behind the SUV, but then saw the brake lights come on and the car take off again. RP 280-81. He was close enough to see the driver's face in the SUV's side mirror. RP 280. He described the person he saw in the mirror as a Hispanic male with short hair, facial hair, and a red shirt. RP 280.

A vehicle pursuit commenced in which the driver ran numerous stops signs and red lights. RP 281-83, 296, 300-01. Two other officers, Officers Panatoni and James, joined the pursuit. RP 290. During the pursuit, other drivers had to pull over or brake to avoid being hit by the SUV. RP 287-9, 294. The SUV slid and struck a power pole at one point, and also struck and damaged another moving vehicle. RP 284, 298.

The vehicle pursuit ended when the driver of the SUV stopped, got out of his vehicle, and ran into someone's yard. RP 304-5, 350. Sgt. McNearny ran after the driver. RP 306. He heard someone in a bush and told him to come out. RP 307. The driver ran out of the bush. Sgt. McNearney chased him and was eventually able to detain the driver and place him in handcuffs. RP 311. The driver was identified as Jose Mendez. RP 312.

Mendez was irate and claimed that the devil was chasing him. RP 313, 342. He repeatedly stated, "The devil is gonna get me." RP 381.

Mail for Mendez was subsequently found in the SUV. RP 327-8, 360, 384. 484. Illegal drugs were also found inside and outside the SUV, as well as in the bush where Mendez had been briefly hiding. RP 320. The SUV was registered to the same home address listed on Mendez's identification card. RP 522.

At trial, Sgt. McNeaney positively identified Mendez in court as the person he saw driving the SUV. RP 315. He testified that Mendez was the only person who got out of the SUV and that he did not see any other individuals around the area. RP 318, 351.

Mendez stipulated that his license was revoked at the time and that he had four or more prior DUI convictions within 10 years. CP 71-74. The only defense Mendez asserted at trial was that he was not the driver. RP 554, 558, 562-73. The jury found him guilty as charged and also returned a special verdict that he endangered others while attempting to elude. CP 111-16.

On the eluding count and felony DUI, Mendez has an offender score of 16. CP 128. The range is 22-29 months on the eluding and 60 months on the DUI. Id. He has an offender score

of 11 for the drug convictions, resulting in a standard range of 12 months and one day to 24 months. Id. The gross misdemeanor count of DWLR has a range of 0-364 days. Id.

The judge sentenced Mendez to an exceptional sentence by running some of the counts consecutive to one another. CP 128. The court found that substantial and compelling reasons justified an exceptional sentence under RCW 9.94A.535(2)(c), the "free crimes" aggravator. Id. In addition, the court made the following finding in section 2.6 of the Judgment and Sentence:

> [X] The defendant committed multiple current offenses and his high offender score results in some the current offenses going unpunished.

Specifically, Mendez was sentenced to 29 months on the eluding (count 1), 24 months on both drug counts (counts 2 and 3), and 60 months on the DUI (count 5). Id. Counts 2 and 3 were ordered to be served concurrently. Id. In sum, the total term of confinement for the felonies (counts 1, 2, 3, and 5) was 113 months. The endangering enhancement added 12 more months and the misdemeanor (count 4) added 180 days. Id. Mendez appealed. The appeal was stayed for entry of the 3.5 findings of

fact and conclusions of law, which were filed in court on May 9, 2014.

The State filed a motion on the merits. It was granted and his conviction was affirmed on September 8, 2014. Appellant filed a motion to modify the commissioner's ruling and it was denied on December 11, 2014.

E. STANDARD OF REVIEW

In re Coats explained the standard for when review should be accepted by this court:

> ...[T]he petitioner must persuade us that either the decision below conflicts with a decision of this court or another division of the Court of Appeals, that it presents a significant question of constitutional interest, or that it presents an issue of substantial public interest that should be decided by this court. RAP 13.5A(a)(1), (b); RAP 13.4(b).

In re Pers. Restraint of Coats, 173 Wn.2d 123, 132-133, 267 P.3d 324 (2011).

Petitioner has not argued in any fashion how the decision of the Court of Appeal satisfies the criteria for discretionary review

pursuant to RAP 13.4(b). He has not pointed to any case that conflicts with the decision at hand. Petitioner has not explained how this case involves any significant question of constitutional law or issue of substantial public interest. In fact, the Court of Appeal decision does not involve a significant question of constitutional or an issue of substantial public interest. As such, review should be denied.

F. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. 3.5 Findings

Mendez claims review should be granted because 3.5 findings were not filed. On May 9, 2014, pursuant to a stay, findings were filed with the court. No prejudice to the Appellant was been caused by any delay in filing the findings. No further issues have been raised pertaining to the 3.5 hearing. As such, there is nothing to review regarding the delayed entry of findings.

2. Identity

Mendez claims that the evidence was insufficient to support a finding of guilty because the State failed to prove identity beyond a reasonable doubt. In reviewing the sufficiency of the evidence, the court must consider the evidence in the light most favorable to

the State and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967, cert. denied, 528 U.S. 922, 145 L. Ed. 2d 239, 120 S. Ct. 285 (1999).

Questions of identification are for the trier of fact. State v. Johnson, 12 Wn. App. 40, 44, 527 P.2d 1324 (1974), review denied, 85 Wn.2d 1001 (1975). Here, there was overwhelming evidence of identification.

Sgt. McNeanney, an experienced officer who has made hundreds of DUI arrests, testified as follows regarding the first time he saw Mendez:

> MCNEARNEY: I could see a face that was peering back in the driver's side mirror on the door at that time, yes.
>
> PROSECUTOR: And how would you describe the face?
>
> MCNEARNEY: It appeared to be a Hispanic male with shorter hair, facial hair wearing a red colored shirt.
>
> PROSECUTOR: Okay and how close did you get to the driver's side door?

MCNEARNEY: I got approximately to the rear bumper of the vehicle.

PROSECUTOR: Okay, so could you clearly see his face in the rearview mirror?

MCNEARNEY: Yes, I could.

RP 280. A little bit later, Sgt. McNearney saw Mendez get out of the car:

PROSECUTOR: So, you actually saw somebody getting out of the driver's seat?

MCNEARNEY: Yes, I did.

PROSECUTOR: Okay and did that person match the physicals of the person that you observed earlier when you pulled the vehicle over?

MCNEARNEY: Yes, it did.

RP 304. Sgt. McNearney then apprehended Mendez in the bushes. He described his high level of certainty regarding the identification as follows:

PROSECUTOR: Okay. When you observed Mr. Mendez leave the vehicle --- or how certain are you that Mr. Mendez is the same person that you saw getting out of the driver's side and run into the backyard?

MCNEARNEY: **Absolutely certain**.

PROSECUTOR: Okay, did you see any other people exit the Blazer --- Trailblazer?

MCNEARNEY: No.

PROSECUTOR: Okay, did you see any other people around that area?

MCNEARNEY: No.

RP 318 (emphasis added). Sgt. McNearney also identified Mendez in open court. RP 315. On cross-examination, Sgt. McNearney indicated that no passengers were seen in the SUV:

DEFENSE ATTORNEY: Okay, did you see anybody get out of the passenger side?

MCNEARNEY: No.

DEFENSE ATTORNEY: Could there had been opportunity for somebody to get out of the passenger side before you arrived?

MCNEARNEY: I do not believe so, no.

RP 351.

In addition to the positive eye-witness identification by an experienced law enforcement officer, there is corroborating evidence that Mendez was the driver of the SUV in question. The evidence at trial showed that Mendez was obviously impaired, which is consistent with the reckless driving that was observed. Physical evidence included mail in Mendez's name that was found in the SUV, as well as drugs found in both the SUV and the bush that Mendez ran from. In addition, the car was registered to someone at Mendez's address.

The evidence of identity was challenged during the trial, but on appeal, the evidence is construed in the light most favorable to the State. There was simply no evidence indicating that anyone other than Mendez was driving the SUV. No one saw anyone else in the SUV. No one saw anyone else get out of the SUV. No one saw anyone else running away from the SUV or in the area of where the pursuit ended.

In sum, Sergeant McNearny's eye-witness testimony alone could be enough for the jury to convict Mendez. But on top of that, there was strong corroborating evidence. As such, a rational trier of fact could have found beyond a reasonable doubt that Mendez was the driver. There is nothing about the sufficiency of the evidence that provides a basis for the court accepting review in this case.

3. Exceptional Sentence

Mendez raises an argument that his high offender score does not result in some of his current offenses going unpunished under RCW 9.94A.535(2)(c). This was the grounds for an exceptional sentence. Here, the trial court found that this aggravating factor was a substantial and compelling reason to justify an exceptional sentence in his case:

> (c) The 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).

CP 128. "Some current offenses go unpunished" under RCW 9.94A.535(2)(c) when no penalty is imposed specific to those offenses. Under the "multiple offense policy," other current offenses result in a penalty by increasing the offender score, and thereby increasing the standard range, as current offenses generally run concurrently to one another. RCW 9.94A.589; State v. Alkire, 124 Wn. App. 169, 173, 100 P.3d 837 (2004), review granted in part, remanded, 154 Wn.2d 1032, 119 P.3d 852 (2005). A defendant's standard range sentence, however, is at its maximum at an offender score of 9. RCW 9.94A.510; State v. Alvarado, 164 Wn.2d 556, 561, 192 P.3d 345 (2008). So if a defendant is maxed out at 9 points on 1 conviction, and all sentences run concurrently, he may face no *additional* time on the other convictions, absent an exceptional sentence. This is where the "free crimes" aggravator comes in.

In adopting RCW 9.94A.535(2)(c), the Legislature intended to codify the "free crimes" aggravating factor as announced in State v. Stephens, 116 Wn.2d 328, 803 P.2d 319 (1991), and State v. Smith, 123 Wn.2d 51, 864 P.2d 1371 (1993). In both these cases the Washington Supreme Court held that former RCW 9.94A.535(2)(i) – "multiple offense policy results in a clearly too lenient sentence" – is automatically satisfied whenever the defendant's high offender score is combined with multiple current offenses so that a standard range sentence would result in "free crimes." Stephens, 116 Wn.2d at 243. "Free crimes" are "crimes for which there is no additional penalty." Id. The Stephens court explained:

> ...although the crimes were counted in calculating the offender score, most of them had no effect on the sentence because Stephens' score was '9 or more' already. Thus, Stephens would not be penalized twice if the multiple crimes were considered toward an exceptional sentence. We believe that the Legislature must have intended that these additional crimes be reflected in the sentence imposed, and that this is one type of situation for which RCW 9.94A.390(2)(g)[1] was designed.

[1] RCW 9.94A.390(2)(g) was recodified to RCW 9.94A.535.

Id. at 244 (footnote added). The court concluded that any other rule would mean that a defendant would be free from additional punishment on other counts, which would be inconsistent with the purposes of the Sentencing Reform Act (SRA) and against public policy. Id. at 245.

That "free crimes" aggravator requires only three findings: (1) the defendant has committed multiple current offenses, (2) the defendant has a high offender score, and (3) that high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c). The record supports all three findings in Mendez's case.

Mendez was convicted of the following felony offenses: attempting to elude, possession of cocaine, possession of heroin, first degree driving while license revoked, and felony driving under the influence. Thus, there are multiple current offenses, satisfying the first requirement of the statute. Given his prior criminal history, Mendez had an offender score of 16 on count 5, felony DUI. This meets the second requirement, a high offender score.

With 16 points, the standard range is 60 months for the felony DUI. If Mendez had been convicted of only that count, he would have had an offender score of 14 and the same standard range of 60 months. If convicted of all counts and *not* given an exceptional sentence, he would receive no punishment for the other felonies because they would not increase his standard range on the DUI (60 months). This meets the third requirement of the statute.

In sum, the record adequately supports the trial court's conclusion that given his high offender score, some of Mendez's current offenses (counts 1, 2, 3 and 4) would have gone unpunished if a standard range sentence (60 months) had been imposed on the DUI. Therefore, the trial court's imposition of an exceptional sentence was not clearly erroneous and there is no reason for the court to accept review as to this issue.

4. OFFENDER SCORE

In his Statement on Additional Grounds, Mendez claimed that his offender score was miscalculated. The Court of Appeals found that his prior offender score was correctly calculated. Mendez has not argued why the court should accept review as to

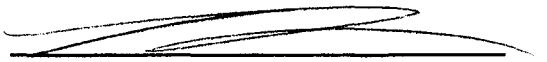
this issue and has provided no legal authority for his claim that his offender score was miscalculated.

G. CONCLUSION

Petitioner has not pointed to any case that conflicts with the decision at hand. There was sufficient evidence to prove the identity of Mendez as the driver in this case. There was also a sufficient basis for the exceptional sentence.

Petitioner has not explained how this case involves any significant question of constitutional law or issue of substantial public interest. The decision at hand does not meet any of the criteria in RAP 13.4(b). The Court of Appeals decision correctly affirmed the trial court's decision. As such, the petition for review should be denied.

Respectfully submitted this 4th day of February, 2015,



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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on February 4, 2015, I put in the US mail a copy of Respondent's Answer to Petition for Review to

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of February, 2015 at Yakima, Washington.

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Attached for filing is "State's Answer to Petition for Review" in case number: 91204-1
Case name: State of Washington v. Jose Mendez

Thank you,

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