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OCT 16 2013

COURT OF APPEALS FOR
STATE OF WASHINGTON
DIVISION III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

ERIK CARRASCO- RAMOS ^{RAMOS})	
Appellate,)	NO. <u>312984</u>
)	
V.)	
)	
STATE OF WASHINGTON,)	
Respondant.)	

**STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW**

APPEAL FROM YAKIMA COUNTY

OCTOBER 11, 2013.

ERIK CARRASCO-~~RAMOS~~^{RAMOS}
WASHINGTON STATE PENITENTAIRY
1313 N. 13th Ave.
Walla Walla, WA 99362

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 WASHINGTON STATE PENITENTIARY
 1313 N. 13th Ave.
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ADDITIONAL GROUNDS FOR REVIEW

ERIK CARRASCO-~~20200101~~ EXCEPTIONAL SENTENCE MUST BE REVERSED BECAUSE IT IS NOT LEGALLY JUSTIFIED.

THE TRIAL COURT ERRED WHEN IT DECLINED TO FIND THAT THE SECOND DEGREE MURDER, TWO COUNTS OF FIRST DEGREE ASSAULT, AND ONE COUNT OF SECOND DEGREE UNLAWFUL POSSESSION OF A FIREARM WAS NOT "THE SAME CRIMINAL CONDUCT"

MAJORITY OF EVIDENCE CONCERNED "GANG" AFFILIATION USED TO INHANCE THE DEFENDANT'S SENTENCE.

COUNSEL WAS INEFFECTIVE FOR NOT ARGUING AN EXCEPTIONAL SENTENCE DOWNWARD BASED ON ERIK CARRASCO-~~20200101~~ POSITION THAT MULTIPLE OFFENSE POLICY WARRANTS A DOWNWARD SENTENCE WHERE A SINGLE VIOLENT ACTION IMPACTS SEVERAL VICTIMS.

MR. ERIK CARRASCO-~~20200101~~ IS ENTITLED TO A NEW SENTENCE HEARING WHERE, BASED ON CONVICTIONS WHICH CANNOT BE SUPPORTED BY EVIDENCE BEYOND A REASONABLE DOUBT THE TRIAL COURT MISCALCULATED HIS OFFENDER SCORE.

TABLE OF CITATIONS

Revised Code of Washington

RCW CHAPTER 9A., Sentencing Reform Act [SRA]
RCW 9.9A.010
RCW 9.94A.030(45)
RCW 9.94A.535(1)(g)
RCW 9.94A.535(3)(s)
RCW 9.94A.505
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RCW 9.9A.585(4)
RCW 9.94A.589(1)(a)
RCW 9.94A.589(1)(b)

STATE CASES

State v. Danis, 64 Wn.App. 814, 821-22, 826 P.2d 1096,
Review denied, 119 Wn.2d 1015 (1992)

State v. Elliott, 14 Wn.2d 6, 17, 785 P.2d 440 (1990)

State v. Faagata, 147 Wn.App. 236, 242, 193 P.3d 1132 (2008)

State v. Green, 46 Wn.App. 101, 730 P.2d 1350 (1986)

In re Personal Restraint of Breedlove, 138 Wn.2d, 298, 311,
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1019 (1997)*State v. Brown*, 60 Wn.
App. 60, 70, 802 P.2d 803 (1990), review denied, 116 Wn.2d
1025, 812 P.2d 103 (1991), overruled on other grounds by
State v. Chadderton, 19 Wn.2d 390, 832 P.2d 4811 (1992)

State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005)

State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992)

State v. McCraw, 127 Wn.2d 281, 898 P.2d 838 (1995)

State v. Michell, 81 Wn. App. 387, 914 P.2d 771 (1996)

State v. Moreno, 173 Wn.App. 479, 294 P.3d 812 (Feb. 2013)

State v. Mulholland, 161 Wn.2d 322, 339-41, 166 P.3d 667
(2007)

State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)

State v. Rienks, 46 Wn.App. 832 (1985)

State v. Roche, 75 Wn.App. 500, 513, 878 P.2d 497 (1994)

State v. Smith, 124 Wn.App. 435-36 (Quoting *State v.*
Zatkovich, 113 Wn.App. 70, 78, 52 P.3d 36
(2002)).

State v. Sunaway, 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160
(1987)

State v. Teuber, 109 Wn.App. 640, 36 P.3d 1089 (2001)

State v. Wright, 131 Wn.App. 474, 127 P.3d 742 (2006),
Aff'd, 165 Wn.2d 783, 203 P.3d 1027 (2009)

UNITED STATES SUPREME COURT

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Brecht v. Abrahamson, 507 U.S. 619 ()

Chapman v. California, 386 U.S. 18, 24, 86 S.Ct. 824, 17
L.Ed.2d 705 (1967)

Griffin v. United States, 502 U.S. 46, 59 ().

Yates v. United States, ___ U.S. 298 (1957)

ERIK CARRASCO-~~SMITH~~'S EXCEPTIONAL SENTENCE MUST BE REVERSED BECAUSE IT IS NOT LEGALLY JUSTIFIED.

An exceptional sentence may be imposed if the trial court finds "substantial and compelling" reasons to go outside the standard range. RCW 9.94A.535. An exceptional sentence is reviewed to see if either (a) the reasons for the exceptional sentence are not supported by the record or do not justify an exceptional sentence, or (b) the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.585(4). Thus, appellate courts review to see if the exceptional sentence has a factual basis in the record, is a legally justified reason, and is not too excessive or lenient. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

Here, the trial court imposed an exceptional sentence ordering ERIK CARRASCO-~~SMITH~~ to serve consecutive terms of 294 months for second degree murder plus a 60-month firearm enhancement and 20-month firearm enhancement and a 20-month exceptional sentence for the gang aggravators on each of counts 2-5; and a concurrent term of 22-months for count 6. (11/16/12 RP 47-53. CP 345-53). The total term of confinement was 1,126-months. In its Findings of Fact and Conclusions of Law supporting the exceptional sentence, the court found that the jurors returned a special verdict finding on counts 1-5 for being armed with a firearm along

with both gang aggravators. (CP 322-338).

As argued above, the special verdict was based on an erroneous jury instruction and ERIK CARRASCO-~~WANDA~~'s conviction of second degree unlawful possession of a firearm violated double jeopardy. Consequently, ERIK CARRASCO-~~WANDA~~'s exceptional sentence must be reversed because a significant aspect of the court's reasons supporting the sentence is not legally justified.

THE TRIAL COURT ERRED WHEN IT DECLINED TO FIND THAT THE SECOND DEGREE MURDER, ^{FIVE} ~~TWO~~ COUNTS OF FIRST DEGREE ASSAULT, AND ONE COUNT OF SECOND DEGREE UNLAWFUL POSSESSION OF A FIREARM WAS NOT "THE SAME CRIMINAL CONDUCT"...

The trial court erred by finding the offenses were not the same criminal conduct. Crimes encompass the same criminal conduct when they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). The sentencing court's decision concerning whether multiple offenses constitute same criminal conduct is reviewed for a clear abuse of discretion or is misapplication of the law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990).

In this case there is no question the murder, ^{FIVE} ~~TWO~~ counts of assault, and one count of possession of a firearm occurred at the same place and time-in the green Saturn occupied by Alex Ixta, Romero Camacho, Baldomero Camacho, Macedonio

Morales, and Storm Lopez. In addition; the offenses required the same objective criminal intent. Criminal intent is the same for two or more crimes when the defendant's intent, viewed objectively, does not change from one crime to the next. Such as when one crime furthers the other. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

ERIK CARRASCO-~~REDACTED~~ submits that *State v. Rienks*, 46 Wn.App. 537, 731 P.2d 1116 (1987) is instructive. In *Rienks* Division One found that burglary, robbery and first degree assault encompassed the same criminal conduct where the defendant went to a victim's apartment to collect money owed to a third person. The defendant entered the apartment assaulted one man and stole money from a briefcase. the court determined that the three offenses were committed with "no substantial change in the nature of the conduct withing the meaning of the SRA. *Rienks*, 46 Wn.App. at 382 (1985)). The court pointed out that "there was no independent motive for the secondary crime"; rather, the objective was to accomplish or complete the primary one. *Rienks*, 46 Wn.App at 554. Id.

MAJORITY OF EVIDENCE CONCERNED "GANG" AFFILIATION USED TO INHANCE THE DEFENDANT'S SENTENCE.

Due Process through the Fourteenth Amendment was violated. *Brecht v. Abrahamson*, 507 U.S. 619. If a Constitutional trial error occurred, the court must determine if the error caused actual and substantial prejudice.

Under the harmless error standard requires reversal if the prosecution can prove there is not a possibility the result could have been different had not the error occurred. Chapman v. California, 386 U.S. 18, 24, 86 S.Ct. 924, 17 L.Ed.2d 705 (1967).

To convict him of first degree assault he intentionally assaulted another and thereby recklessly inflicted substantial bodily harm or assaulted another with a deadly weapon. RCW _____

Clearly ERIK CARRASCO-~~ERIK~~'s objective was self defense. Here he incorporates his counsel brief:[PAGE 10 "Mr. Carrasco was acting in self-defense, 'regardless of his motivation,' as noted by the court."]. (See also, Counsel's brief PAGE 9 "Mr. carrasco was convicted of being a gang membe, which is all the State proved.").

The Assaults and second degree murder was committed for the same purpose as well as the unlawfull possession of a firearm, to protect in self defense. Self defense was the defense position. See Rienks, 46 Wn.App. at 554.

ERIK CARRASCO-~~ERIK~~'s objective throughout the incident was self defense. To argue "gang" criminal intent even there there was no "substantial change in the nature of the criminal objective." Rienks, 46 Wn.App. at 543.

Objectively viewed, the intent was the same from one crime to the next, and the crimes further each other toward the same end. Because these crimes were all assault and

murder and unlawful possession of a firearm were committed at the same time and place and involved the same victims and intent, those offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). The trial court's decision to the contrary was clearly wrong. The court's failure to find that the four offenses encompassed the same criminal conduct was an abuse of discretion. Accordingly the offenses must be scored as a single offense. See, State v. Lessley, 118 Wn.2d At 781.

The possibility of a conviction resting on an invalid theory contained in the jury instructions compels reversal, even where the jury has a legally valid theory to choose from, Yates v. United States, ___ U.S. 299 (1957); Griffin v. United states, 502 U.S. 46, 59 ().

COUNSEL WAS INEFFECTIVE FOR NOT ARGUING AN EXCEPTIONAL SENTENCE DOWNWARD BASED ON ERIK CARRASCO-~~XXXXXX~~'S POSITION THAT MULTIPLE OFFENSE POLICY WARRANTS A DOWNWARD SENTENCE WHERE A SINGLE VIOLENT ACTION IMPACTS SEVERAL VICTIMS.

The State argued and the information alleged that ERIK CARRASCO-~~XXXXXX~~:

"Futhermore, you committed any of the above listed current offenses with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for criminal street gang as defined RCW 9.94A.030, its

reputation, influence, or membership, and the court may impose an exceptional sentence above the standard range for this crime (RCW 9.94A.535(3)(aa.)).

Furthermore, you committed any of the above listed current offenses to obtain or maintain your membership or to advance your position in the hierarchy of an organization, association, or identifiable group, and the court may impose an exceptional sentence above the standard sentence range for this crime. (RCW 9.94.535(3)(s).) (CP 86-87)..

But for the defense lack of advocate for ERIK CARRASCO-~~RODRIGUEZ~~, the record is sufficient to justify an exceptional, concurrent sentence.

When a person is convicted of multiple serious violent offenses, such as second degree murder, two counts of first degree assault, these offenses are generally required to have consecutive sentences. RCW 9.94A.589(1)(b): RCW 9.94A.030(45).

However a trial court does have discretion to impose concurrent sentences, thereby creating an exceptional sentence downward, pursuant to RCW 9.94A.535. In re Mulholland, 161 Wn.2d 322, 339-41, 166 P.3d. 677 (2007).

RCW 9.94A.535 provides that an exceptional sentence

outside the standard range may be imposed where it is justified by "substantial and compelling reasons...." RCW 9.94A.535. These reasons, or mitigating circumstances, need only be established by a preponderance of the evidence. Id. The court reviews for :

"(1) Whether substantial evidence supports the sentencing judge's reasons [under clearly erroneous review standard]; (2) whether the reasons, as a matter of law, justify a departure from the standard range [with de novo review]; and (3) whether the court abused its discretion in sentencing the defendant too excessively or too leniently [based on a review for abuse of discretion].

State v. Smith, 124 Wn.App. 417, 435, 102 P.3d 156, aff'd, 159 Wn.2d 778 (2004)(citing state v. Ferguson, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001)).

RCW 9.94A.535 provides a non-exclusive list of bases for imposing an exceptional sentence downward. "When the court identifies 'more than one justification for an exceptional sentence and each ground is an independent justification, we may affirm the sentence if one of the grounds is valid.'" Smith, 124 Wn.App. at 435-36 (quoting State v. Zatkovich, 113 Wn.App. 70, 78, 52 P.3d 36 (2002)).

The trial court's findings and conclusions must be entered when an exceptional sentence is imposed, or this Court remands for entry of such findings. RCW 9.94A.535; In

re Personal Restraint of Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999).

However ERIK CARRASCO-~~XXXXXX~~ asserts that this court can adequately review the sentencing issue in this case based on the trial court's oral ruling and the briefing on direct appeal. State v. Teuber, 109 Wn.App. 640, 36 P.3d 1089 (2001)(oral ruling can supplement in-adequate written findings) State v. Paagata, 147 Wn.App. 236, 242, 193 P.3d. 1132 (2008)(trial court's oral opinion provided sufficient basis for appellate review).

Defense took no exceptions to the court's instruction. (11/6/12 RP 565). The State's case was built on gang culture when the real facts of the matter are that ERIK CARRASCO-~~XXXXXX~~ got hit on the head by a beer can, believed he saw a gun, and acted in self-defense. The admission of gang evidence is extremely prejudicial because it invites the jury to make "forbidden inference" that ERIK CARRASCO-~~XXXXXX~~'s gang membership showed his propensity to commit the charged offenses. regardless the multiple offense policy in this case clearly justified the exceptional sentence downward. And not the aggravated sentence the state submitted to the jury. this resulted in consecutive sentences and a aggravated enhancement.

Regardless, this court need only find one of the basis relied upon by the trial court is justified in order to affirm the exceptional sentence.

RCW 9.94A.535(3)(s) Testimony only from police is insufficient to support gang related fact finding. *State v. Moreno*, 173 Wn.App 479, 294 P.3d 812 (Feb 2013). In a case from the same county as ERIK CARRASCO-~~LOPES~~ was sentenced in. (Yakima County). In light of the issues appeal counsel raised on direct appeal, the state submitting faulty spiecial finding verdic would not justify the exceptional sentence. And the multiple offense policy in this case clearly justifies the exceptional sentence downward.

A concurrent sentence may be imposed where "[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). This policy has often justified concurrent, exceptional sentences where a single violent action impacted multiple victims.

Also, in *State v. Danis*, 64 Wn.App. 814, 821-22, 826 P.2d 1096, Review denied, 119 Wn.2d 1015 (1992)(leser sentence could be imposed where two victims were in the same vehicle and were 'necessarily hurt by one impact...', reasoning that "one is less culpable in hitting one car, even though two victims are in the car, than in hitting two cars..."); In re *Mulholland*, 161 Wn.2d at 330-31, 166 P.3d 677 (2007).

Here trial court could, "but for", defense counsel's

MR. ERIK CARRASCO-~~0020819~~ IS ENTITLED TO A NEW SENTENCE HEARING WHERE, BASED ON CONVICTIONS WHICH CANNOT BE SUPPORTED BY EVIDENCE BEYOND A REASONABLE DOUBT THE TRIAL COURT MISCALCULATED HIS OFFENDER SCORE.

RCW 9.94A.535(3)(s) Testimony only from police is insufficient to support gang related fact finding. *State v. Moreno*, 173 Wn.App 479, 294 P.3d 812 (Feb 2013). In a case from the same county that ERIK CARRASCO-~~0020819~~ was sentenced in. (Yakima County). In light of the issues appeal counsel raised on direct appeal, the state submitting faulty spicial finding verdic would not justify the exceptional sentence of gang aggrivators.

RCW Chapter 9.9A, Sentencing Reform Act [SRA], sets forth the law for criminal sentencing in felony cases. The SRA sets forth a structured grid based on seriousness levels of offenses ad offender scores. It also permits trial courts the exercise of limited discretion. the court has described the discretion as "principled discretion". *State v. Parker*, 132 Wn.2d 182, 937 P.2d 575, 579 (1997).

The appellate court reviews a sentencing court's offender score calculation de novo. *State v. michell*, 81 Wn.App. 387, 914 P.2d 771 (1996); *State v. Roche*, 75 Wn.App. 500, 678 P.2d 497 (1994); *State v. McCraw*, 127 Wn.2d 281, 898 P.2d 838 (1995). The general rule is that a sentencing court acts without statutory authority when imposing a

sentence based on a miscalculated offender score. In re Pers. restraint of Johnson, 131 Wn.2d 558, 933 P.2d 1019 (1997). A sentencing court acts without statutory authority under the Sentencing Reform Act of 1981 when it imposes a sentence based on a miscalculated offender score. State v. Roche, 75 Wn.App 500, 513, 878 P.2d 497 (1994); State v. Brown, 60 Wn. App. 60, 70, 802 P.2d 803 (1990), review denied, 116 Wn.2d 1025, 812 P.2d 103 (1991), overruled on other grounds by State v. Chadderton, 119 Wn.2d 390, 832 P.2d 4811 (1992).

The sentencing court may impose a sentence outside the standard sentence range if it finds substantial and compelling reasons to justify an exception. RCW 9.94A.505. When imposing an exceptional sentence the court must consider the presumptive punishment as legislatively determined for an ordinary commission of the crime before it may adjust it up or down to account for the compelling nature of the aggravation or mitigating circumstances of the particular case. RCW 9.94A.535.

Because the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway.. See, e.g. State v. Brown, 60 Wn. App. at 70, ("This court cannot say that the much lower standard range would not have an impact on the amount of time given for the

exceptional sentence"), and therefore remand for resentencing is required. *State v. Green*, 46 Wn.App. 101, 730 P.2d 1350 (1986) ("Inasmuch as we find the trial court erred in determining the offender's score a legislatively defined and being unable to determine if the court imposed its excessive sentence of approximately twice the standard range depending upon its determination of the offender score, we remand for resentencing,"), *rev'd on other grounds* *sub nom. State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987). This standard generally used by our appellate courts in parallel contexts.

Appellate courts are hesitant to affirm an exceptional sentence where the standard range has been incorrectly calculated because of the great likelihood that the judge relied, at least in part, on the incorrect standard range in his calculus. Affirming such would uphold a sentence which the sentencing judge might not have imposed given correct information and would defeat the purpose of the SRA. *Parker*, 397 P.2d at 579.

In this case, the trial court found the State's calculation of the standard range to be consecutive terms of 294 months for second degree murder plus a 60-month firearm enhancement and 20 months for the gang aggravators; 123 months plus a 60-month firearm enhancement and a 20 month exceptional sentence for the gang aggravators on each of counts 2-5; and a concurrent term of 22 months for count 6.

(11/16/12 RP 47-53. CP 345-53) The total term of confinement was 1,126 months.

Because as argued above even assuming the sufficiency of evidence for the convictions, RCW 9.94A.535(3)(a) Testimony only from police is insufficient to support gang related fact finding, numerous convictions merge and count as same criminal conduct and/or multiple offense police warranting a downward exceptional sentence,, ERIK CARRASCO-~~BLANCA~~'s offender score must be recalculated based on this court's ruling. This court should remand the matter to the superior court for resentencing.

In the alternate when the State fails to prove the defendant's guilt beyond a reasonable doubt, the defendant is entitled to dismissal of the charge. This is so because the reversal for insufficient evidence is deemed an acquittal terminating jeopardy. State v. Wright, 131 Wn.App. 474, 478, 127 P.3d 742 (2006), Aff'd, 165 Wn.2d 783, 203 P.3d 1027 (2009).

CONCLUSION

For the above reasons resentencing and or new trial is warranted.

OCTOBER 11, 2013.

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ERIK CARRASCO-BLANCA # 362209 E
- E- 114
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Statement of Additional Grounds For Review Page 14.

IN THE COURT OF APPEAL
DIVISION III

State v. Carrasco-^{RAMOS}~~RAMOS~~)
)
) PROOF OF SERVICE

I swear under the penalty of perjury that I ERIK CARRASCO-~~RAMOS~~ placed in the Washington State Penitentiary U.S. mail at 1313 N. 13th Ave. Walla Walla the following document:

Statement of Additional Grounds For Review Pro-se

Addressed to the following:

I SWEAR THE ABOVE TO BE TRUE AND CORRECT by the laws of Perjury of the State of Washington.
SIGNED AND DATED:
October 11, 2013


ERIK CARRASCO-~~RAMOS~~ # 362209 E
- E- 114 RAMOS
WASHINGTON STATE PENITENTIARY
1313 N. 13th Avenue
Walla Walla, Wa 99362