No. 93592-1



Court of Appeals Case No. 73760-1-I

King County Superior Court Cause No. 14-1-02388-6 SEA

---

SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

CLARENCE C. YOUNG, JR.,

Petitioner.

---

# PETITION FOR REVIEW

---

THOMAS F. McDONOUGH
WSBA No. 11110
Attorney at Law
Attorney for Petitioner

McDonough's Law Office
510 Bell Street
Edmonds, WA 98020
Telephone (425) 778-8555
Fax (425) 778-8550
thomas.mcdonough@frontier.com

## Table of Contents

Table of Authorities

ALASKA



TENNESSEE



UNITED STATES SUPREME COURT



Statutes

Washington

Alaska



Tennessee



Other Authorities

## Identity of Petitioner

Petitioner Clarence "Bud" Young (hereinafter Young) respectfully requests this Court to accept review of the Court of Appeals order to remand and resentence Mr. Young within the sentencing guidelines.

## Court of Appeals Decision

On July 11, 2016, the Court of Appeals of Washington Division I reversed the trial court's exceptional sentence and remanded Young's case for resentencing within the standard range. A copy of the decision is in the Appendix at pages A-1 through A-14.

On August 4, 2016, Young's motion for reconsideration was denied. A copy of the order denying motion for reconsideration is in the Appendix at page B-1.

Young requests this court affirm the trial court's sentence or, in the alternative, remand with guidance and the opportunity for Young to argue at resentencing for a sentence outside of the sentencing guidelines.

## Issues Presented for Review

1. Do repayments made prior to the filing of the Information and for the good faith purpose of compensation fulfill RCW 9.94A.535(1)(b), which requires compensation before detection?

2. Does witnesses' desire for repayment coupled with a defendant's ability to re-pay qualify as a non-statutory mitigating circumstance justifying an exceptional sentence?
3. Does the Court of Appeals order for remand for resentencing within the standard range violate Young's due process right as applied because the elements of RCW 9.94A.535(1)(b) are undefined?

## Statement of the Case

Prior to the filing of 16 counts of securities fraud against Young, the prosecution was aware that at least $170,260.00 had been repaid to the victims and that at least one investor was paid back in full. CP[1] 18. After the filing of charges and further investigation, it was determined, and agreed upon by both parties, that Young had actually made $523,456.00 in repayments to the victims. CP 74.

Young pled guilty on April 29, 2015 to ten counts of securities fraud (RCW 21.20.010). CP 35. Defense counsel, Thomas McDonough, and Prosecuting Attorney Scott Peterson stipulated to a restitution amount of $1,264,802.00. CP 50, 74. This amount was a reflection of monetary damage to the victims, minus the amount previously repaid.

[1] CP refers to Clerk's Papers and applicable page number(s).

At sentencing on July 10, 2015, trial court Judge Inveen asked "just for clarification, it [the repayments] was repaid when the—when the investigation was ongoing or brought to light." VRP[2] 20:12-14. Defense counsel, Mr. McDonough, explained the repayments were made "prior to the Information being filed...I don't think the state's investigation was going on." VRP 20:15-18. The State did not object to this factual presentation.

Present at sentencing were listed victims Steve Kenney, John Jackson and Terry Hoder[3]. VRP 2:10-12, pp. 24-28. Mr. Kenney addressed the court and discussed the impact this case had on his life and retirement funds; he told the court, "I would like to see some restitution." VRP 13:2. Similarly, Mr. Jackson shared his troubles related to this case and commented, "So from our standpoint, you know, we would certainly appreciate some restitution. I don't expect that we are ever going to see much. I guess in exchange for restitution that it would be my thought that-ask that Bud (Mr. Young) should spend some time incarcerated." VRP 15:23-25, 16:1-3. Mr. Hoder explained to the court his feelings that "if everybody is truly interested in getting restitution and getting their

[2] VRP refers to Verbatim Report of Proceedings, and references are to page numbers and line numbers, if applicable.

[3] The victim's true name is Terry Hoder, but the record refers to him as Terry Horder. His true name of Terry Hoder is used in this brief.

money back--for all of us it would be in our best interests to keep Bud out there working on trying to get our money back for us in whichever way he can continue doing that." VRP 24-25. The court also received letters from victims Elworth Stegriy and Peter Perry; neither asked for Bud Young's incarceration. VRP 16:12-16, 17:10-11.

Pursuant to RCW 9.94A.510, the standard sentencing range to a plea of ten counts of securities fraud, with an offender score of 9, seriousness level III, is 51-68 months in the Department of Corrections. CP 37. The State recommended that Petitioner Young be sentenced to 51 months in the Department of Corrections, the low end of the standard sentencing range. CP 51. Young, through defense counsel, requested an exceptional sentence of twelve months of electronic home detention along with payment of restitution and costs. CP 52-63.

At sentencing, Judge Inveen commented that an exceptional sentence would provide the victims for the potential of repayment, consistent with the victims' requests. VRP 9:6-7. An exceptional sentence "would facilitate repayment for the victims." VRP 9:9-10. The potential for repayment was legitimized by Young's repayments, prior to the filing of the Information, of "approximately half a million dollars" and actual ability to earn income to continue repay the victims. VRP 20:7-8.

Young currently works as a general business consultant providing market research, operation guidance, and feasibility studies. CP 60.

Judge Inveen in a thoughtful decision weighed the "wreckage" caused by Young and the victim's request for repayment. VRP 34, 35. "I want to see these folks have the ability to get at least some pennies on the dollar of a return, and virtually certain that if he goes to prison, their chances of getting any money back are pretty much zero." VRP 35:7-10. Judge Inveen, in an effort to facilitate repayment, agreed with the defense that an exceptional sentence was justified and sentenced Young to six months work release and six months home detention. CP 112, 115. The sentencing court ordered restitution and accepted the stipulated restitution amount of $1,264,802.00. CP 113, 117, 127.

In support of the exceptional sentence, the court relied on the following findings of fact:

> 6. For the purposes of sentencing, the agreed amount of restitution is $1,264,802.00. According to Appendix C attached to the Defendant's Motion for Exceptional Sentence, the amount of agreed restitution is net of repayment of $523,456.00, which are payments Mr. Young made to the victims in this case prior to the date the Information was filed.
>
> CP 124.

And the following conclusions of law:

> 6. Mr. Young has the ability to continue working and make substantial restitution payments if electronic home

monitoring is imposed. If he is incarcerated, he will only be able to make the most minimal payments towards restitution.

7. Mr. Young made some restitution payments to the victims in this case prior to his plea.

CP 126.

The Findings of Fact and Conclusions of Law in Support of Exceptional Sentence explicitly state that the "bases for an exceptional sentence are sufficient to merit a departure from the sentencing guidelines standing alone or taken together as a whole." CP 126.

On July 24, 2015, the King County Prosecuting Attorney's Office appealed the sentence. Young through defense counsel responded. Oral argument was held on June 6, 2016. The Court of Appeals issued their opinion to reverse and remand for resentencing within the sentencing guidelines on July 11, 2016. Young filed a motion to reconsider on July 29, 2016. This motion was denied on August 4, 2016. Young now seeks relief from this court, the Supreme Court of Washington.

## Argument

### 1. Young's repayments prior to the filing of the Information qualify under RCW 9.94A.535(1)(b), the undefined statutory mitigator, rewarding compensation to victims before detection.

The Washington public is without guidance from the courts on what fulfills the statutory mitigating factor—rewarding victim

compensation prior to detection, RCW 9.94A.535(1)(b). This statutory mitigator reads as follows:

> Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

Young requests this Court accept this Petition for Review to define and guide the public on what "before detection" means. This guidance is "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4 (b)(4).

Young qualifies for this statutory mitigator because payments made "prior to the filing of the Information" is consistent with payments made "before detection." The Information is the initial pleading by the State. CrR 2.1. The purpose of the filing of an Information is to put the defendant on notice of the charges against him so that the defendant can prepare a defense. *State v. Benitez*, 175 Wn. App. 116, 302 P.3d 877 (2013); *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991).

Detection is defined in Black's Law Dictionary as "The act of discovering or revealing something that is hidden or barely perceptible, esp. to solve a crime.—detect, vb." Black's Law Dictionary (10th ed. 2014). There are no published cases that define "before detection." However, RCW 9.94A.535(1)(b) is referenced in *State v. Kinneman,* 120 Wn. App. 327, 84 P.3d 882 (2003), *review denied*, 152 Wn.2d 1022

(2004). In *Kinneman,* the court refused to find that restitution payments had been made prior to detection when Mr. Kinneman had made partial restitution only "after he was apprehended for his crimes." *Id.* at 348.

The difference between payments made after arrest in the *Kinneman* case and prior to the filing of charges in Young's case is obvious and can serve as distinguishing guidance in Young's case. Undoubtedly payments after notice of charges or after the filing of the Information would not amount to "before detection." But, the filing of the Information is the most definite benchmark in criminal procedure that detection has occurred and that the charges have a basis in probable cause. Prior to the charges being filed, any police action could amount to suspicion but not detection, investigation but not detection, or inquiry but not detection.

Looking for guidance outside of the state, in *Green v. State*, 857 P.2d 1197 (Alaska Ct. App. 1993), the Alaska Court of Appeals upheld the trial court's decision not to extend a similar statutory mitigator, Alaska Statute (AS) 12.55.155(d)(10)[4], when the defendant revealed the location of the victim's stolen wallet and money only after he had been identified as the burglar and had been arrested. In a case from Tennessee, *State v.*

[4] "before the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained." AS 12.55.155(d)(10) [now Recodified: AS 12.55.155(d)(8)].

*Jarnigan,* WL 307866 (1993) (not reported; see Appendix C-1 through C-3)[5], the defendant returned all stolen items only after being taken into custody; the trial court decision not to extend a prior to detection statutory mitigator, Tenn. Code Ann. § 40-35-113(5),[6] was affirmed. Both of these cases are distinguishable from Young's case because the repayments occurred after the arrest and after the establishment of probable cause. In the case at bar, Young made repayment prior to arrest, booking, statement of probable cause, and filing of the Information.

In *State v. Wallace*, the Tennessee defendant was denied the application of the statutory mitigator, repayment prior to detection, when the defendant repaid the victim prior to charges being filed but after police contact. *State v. Wallace,* WL 1782757 (2000) (not reported; see Appendix D-1 through D-6)[7]. This set of facts is also distinguishable from Young's facts because Young made repayments prior to police contact or involvement. RCW 9.94A.535(1)(b) is a criminal statute applied in

---

[5] "The party citing an unpublished opinion from a jurisdiction other than Washington shall file and serve a copy of the opinion as an appendix to the pleading in which the authority is cited." GR 14.1(d) (amended effective September 1, 2016).

[6] "[b]efore detection, the defendant compensated or made a good faith attempt to compensate the victim of criminal conduct for the damage or injury the victim sustained." Tenn. Code Ann. § 40–35–113(5).

[7] "The party citing an unpublished opinion from a jurisdiction other than Washington shall file and serve a copy of the opinion as an appendix to the pleading in which the authority is cited." GR 14.1(d) (amended effective September 1, 2016).

criminal cases; therefore, the detection, without further definition, must be done by a criminal prosecuting agency until otherwise specified.

The Court of Appeals opinion is critical of the imperfect record at the sentencing hearing stating that specific dates and amounts for repayment were not established. However, specificity as to amount of payment is not required when both the defense and prosecution stipulate to the amount of $523, 456. Specificity is also not required when both parties agree to the fact that this amount was paid back prior to the filing of the Information. The record is clear as to the date of the Information and proper inferences can be made based on this fact alone. Proper inferences are permissible; for example, in *State v. Bridges*, 104 Wn. App. 98, at 104, fn3, 15 P.3d 1047 (2001), the court held that even though the record did not reveal the specific amounts of controlled substance involved, the record was sufficient to show "small amounts" of controlled substance, because the dollar amounts of each purchase were within the record.

In *State v. McClarney*, 107 Wn. App. 256, 26 P.3d 1013 (2001), the court recognized the connection between objective remorse[8] and RCW 9.94A.535(1)(b) explaining that remorse is reliable when shown prior to

[8] In *State v. Goltz*, the Tennessee Court of Appeals reached a similar conclusion that defendant's anonymous act of returning the rings to the investigator was not done in good faith but in an attempt to avoid detection of his crime. *State v. Goltz*, 111 S.W. 3d 1, 9-10 (Tenn. Crim. App. 2003).

being called out to account for an individual's actions. Young showed objective remorse for his actions by making payments prior to the filing of the Information. This argument would be difficult to make if Young's payments occurred during the pendency of the criminal charges. Rather, in Young's case, payments were made well before charges were filed and in the case of the Culverwells and Larry Stout, eight years prior to the filing of criminal charges. Due to the fact repayment occurred so far in advance of the filing of the Information and "before detection," it is reasonable to conclude true remorse in repayment is demonstrated.

**2. The victims' wishes for repayment and Young's ability to make restitution payments in combination should be considered a valid non-statutory mitigating factor.**

Young requests this Court accept this Petition for Review to determine that victims' wishes for repayment in combination with a defendant's ability to repay are consistent with the Sentencing Reform Act (SRA). This ruling is "an issue of substantial public interest" especially for those who are victims of economic crime and it therefore "should be determined by the Washington Supreme Court." RAP 13.4(b)(4).

The sentencing court has the discretion to make a downward departure from the standard range. *State v. Ronquillo*, 190 Wn. App. 765, 361 P.3d 779 (2015). "In determining whether a factor legally supports

departure from the standard sentencing range [the court] employs a two part test:

> (1) a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range;
>
> (2) the asserted aggravating or mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category."

*State v. Ronquillo* at 771, *citing State v. Law,* 154 Wn. 2d at 95.

In this case, Judge Inveen cites to Mr. Young's "ability to continue working and *make substantial restitution payments* if electronic home monitoring is imposed." CP 126 (emphasis added). Restitution[9] [10] is not considered by the Legislature in establishing the standard sentencing range for the conviction of securities fraud as the severity of the punishment is not dependent on the damages like it is, for example, in the charge of

---

[9] "Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property." Restitution "shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.753(3).

[10] Restitution is both compensatory and punitive in nature. *State v. Kinneman*, 155 Wn.2d 272, 280, 119 P.3d 350 (2005). *See State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992) (restitution promotes respect for the law by providing punishment which is just); *State v. Dennis*, 101 Wn. App. 223, 229, 6 P.3d 1173 (2000) (restitution has a compensatory purpose but is primarily punitive); *State v. Edelman*, 97 Wn. App. 161, 166, 984 P.2d 421 (1999) (restitution is part of an offender's sentence and is primarily punitive).

theft[11]. Next, the amount of damages in this case and Young's unique ability to make restitution payments distinguish him from other similarly situated defendants and perhaps more importantly the impact on the victims. Further, the act of making the victims whole again relates directly to the crime committed and also Young's culpability because if the victims are made whole, the crime becomes less severe, less damaging.

Here, Young has been ordered to pay $1,264,802.00 in restitution. This is a significant amount and a punishment indicative of the seriousness of the case. This portion of the punishment will require an uncomfortable, but justified, lifestyle adjustment for the rest of Young's life. This punishment is also the best option in making the victims whole.

In *State v. Statler*, the court considered the defendant's age, incarceration time compared to co-defendants, and the fact that no victims were seriously injured during the robbery to be sufficient to justify an exceptional sentence. *State v. Statler*, 160 Wn. App. 622, 640, 248 P.3d 165 (2011). The *Statler* case confirms that impact on the victims directly relates to the crime or the defendant's culpability for the crime committed.

[11] A person is guilty of theft in the first degree (class B felony) if he or she commits theft of property or services which exceed(s) $5,000.00 in value. RCW 9A.56.030. A person is guilty of theft in the second degree (class C felony) if he or she commits theft of property or services which exceed(s) $750.00 but does not exceed $5,000.00 in value. RCW 9A.56.040. A person is guilty of theft in the third degree (gross misdemeanor) if he or she commits theft of property or services which does not exceed $750.00 in value. RCW 9A.56.050.

Therefore, Young's ability or efforts to pay the victims or reduce the impact of his actions on the listed victims should also be considered in relation to the Petitioner's culpability or the crime itself.

In *State v. Law*, the court held that the defendant's inability to pay restitution while incarcerated, amongst other reasons, was "personal in nature, failed to 'distinguish the crime in question from others in the same category,'" and therefore was "not sufficiently substantial and compelling to justify an exceptional sentence." *State v. Law*, 154 Wn. 2d 85, at 104, 110 P.3d 717 (2005). However, the facts in the *Law* case are distinguishable from Young's case. First, Young's exceptional sentence was based on his *ability to make* substantial payments; this is unique to Young and the legitimate career he has created over the years. While in *Law* the exceptional sentence was denied because of the defendant's inability to pay if incarcerated, that is a circumstance common to the majority of, if not all, defendants, including Mr. Young if he were incarcerated. *Id.* at 104. Next, the defendant in *Law* pled guilty to theft in the second degree in which the damages range between $750.00 and $5,000.00. RCW 9A.56.040(1)(a). *Id.* at 104. Young pled guilty to ten counts of securities fraud (RCW 21.20.010) with 16 victims and damages resulting in $1,264,802.00. Clearly the restitution payments in Young's case will require significant effort, and are more substantial and impactful

than in the *Law* case. Further, witnesses at the *Law* sentencing hearing discussed the defendant's personal progress in various aspects of her life. *Id.* The testimony at Young's hearing, from both prosecution and defense friendly witnesses, was undeniably focused on recouping money lost and the request for restitution payments. The sentencing court was clearly persuaded by the victims' requests.

Finally, as cited in the Defendant's Response to the State's Sentencing Memorandum, *State v. Law* was argued in 2004, prior to the United States Supreme Court decision in 2005 in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). CP 159-171. The *Booker* court found that mandatory Federal Sentencing Guidelines violated the Sixth Amendment of the U.S. Constitution and that the Guidelines must be considered advisory. *Id.*

**3. The Court of Appeals remand of Young to a resentencing "within the sentencing guidelines" is unconstitutional because RCW 9.94A.535(1)(b) is undefined and therefore unconstitutional as applied to Young in violation of his Due Process right in Wash. Const. Art. 1 § 3 and U.S. Const. Amend. V and XIV.**

As articulated throughout this petition, Young contends that RCW 9.94A.535(1)(b)—the payment before detection statutory mitigator—is undefined and without guidance. This lack of notice implicates Young's

due process rights under the Washington and United States Constitutions and makes RCW 9.94A.535(1)(b) unconstitutional as applied.

In *State v. Hunley,* 175 Wn.2d 901, 287 P.3d 584 (2012), this Court explained the difference of a constitutional attack on the legislation's face and as applied. "A statute is unconstitutional on its face if no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). Such statutes are rendered totally inoperative. *Id.* In contrast, "An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional." *Id.* at 668–69, 91 P.3d 875. "Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated." *Id.* at 669, 91 P.3d 875." *Hunley,* at 916.

In *Hunley,* this Court found that a 2008 amendment, RCW 9.94A.500(1), was unconstitutional as applied because the term "criminal history summary" was undefined. *Id.* at 916, 917. The Court considered many scenarios in which the criminal history summary would be sufficient but found that as applied to the facts in *Hunley* it was insufficient and in violation of due process.

This rationale can be applied to the facts in Young's case, begging the question what does "before detection" mean? As the Court of Appeals indicated, "a range of dates are possibilities: the filing of criminal charges in June 2014, the filing of the consent order by DFI in May 2013, entry of charges by DFI in January 2013, or any contact by investigators during DFI's investigation which began in 2011." *State v. Young,* Case No. 73760-1-I (unpublished opinion) at Appendix A-7, 8. Furthermore, does "before detection" mean by a government agency, a prosecuting agency, a neutral witness, or the alleged victim?

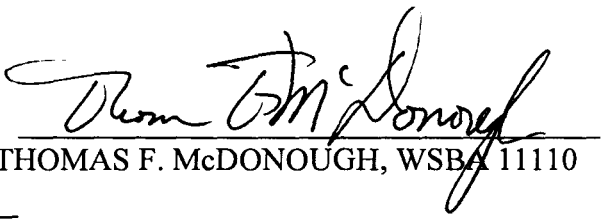
Consistent with due process and notice requirements, Young respectfully requests that this Court, if intending to affirm the Court of Appeals order, do so with an explanation of what constitutes "before detection" and allow Young to argue for this statutory mitigator at resentencing. This does not conflict with the "no second chance" rule as that common law rule is based on the principle of judicial efficiency not in due process. *State v. Jones,* 182 Wn.2d 1, 338 P.3d 278 (2014) (this Court held that the common law rule of "no second chance" was based on judicial economy not due process and therefore the legislature was within

its authority to pass legislation[12] affecting the "no second chance" common law standard).

## Conclusion

Young respectfully requests that this Court accept review for the reasons indicated in the above Argument under sections 1 and 2 and affirm the trial court's sentence, thereby reversing the Court of Appeals order for remand and resentencing within the Guidelines. Young submits this Petition should be accepted for review because it involves issues of substantial public interest that should be determined by this Court, *i.e.*, the meaning of payments "before detection" under the Sentencing Reform Act. If this Court is inclined to affirm the Court of Appeals decision to remand and resentence, Petitioner Young requests that this Court accept review for the reasons indicated in the above Argument under section 3 and instruct the lower court that the remand and resentence occur without the condition that the sentence be limited to the sentencing guidelines.

Respectfully submitted this 2nd day of September, 2016.



THOMAS F. McDONOUGH, WSBA 11110

[12] RCW 9.94A.530(2), which states, "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented."

## DECLARATION OF SERVICE

I, Lynn Wood DeLaMare, declare as follows:

I am a resident of the State of Washington, residing or employed in Edmonds, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 510 Bell Street, Edmonds, Washington 98020.

Today, I served the following parties with the foregoing **PETITION FOR REVIEW** by transmitting a true and correct copy as indicated below:

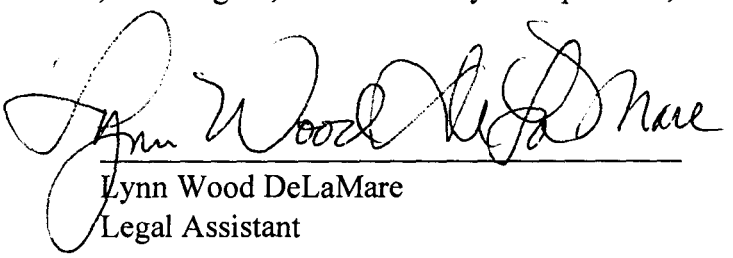
| | | |
|---|---|---|
| Scott Allen Peterson<br>King County Senior Deputy Prosecuting Attorney<br>W554 King County Courthouse<br>516 Third Avenue<br>Seattle, WA 98104-2385 | ☒ | U.S. Mail |
| James Morrissey Whisman<br>King County Prosecuting Attorney's Office<br>516 Third Avenue<br>Seattle, WA 98104-2385<br>jim.whisman@kingcounty.gov | ☒ | Email |
| King County Prosecuting Attorney<br>King County Prosecuting Attorney/<br>Appellate Unit Supervisor<br>W554 King County Courthouse<br>516 Third Avenue<br>Seattle, WA 98104-2385<br>paoappellateunitmail@kingcounty.gov | ☒ | Email |

and that I filed the original of said **PETITION FOR REVIEW** and a $200.00 check payable to the Washington State Supreme Court by having it delivered to:

Clerk of Court
Court of Appeals, Division 1
600 University Street
One Union Square
Seattle, WA 98101-1176
Telephone: (206) 464-7750

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

Signed and dated in Edmonds, Washington, this second day of September, 2016.



Lynn Wood DeLaMare
Legal Assistant

# APPENDIX A

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Appellant,<br><br>v.<br><br>CLARENCE C. YOUNG, JR,<br><br>Respondent. | No. 73760-1-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: July 11, 2016 |

APPELWICK, J. — Young pleaded guilty to 10 counts of securities fraud. His standard sentence range was 51 to 60 months of incarceration. The trial court sentenced Young to six months of work release and six months of home detention after he moved for an exceptional sentence. The trial court based Young's exceptional sentence on several mitigating factors including his medical condition, his age, his ability to make restitution payments, his criminal history, and the fact that the exceptional sentence would make frugal use of the State's resources. Because the Sentencing Reform Act of 1981[1] precludes consideration of these nonstatutory factors and because no statutory mitigating factors apply here, we reverse the trial court's exceptional downward sentence and remand for resentencing within the standard range.

[1] Chapter 9.94A RCW.

FACTS

Clarence Young worked as an accountant from 1974 to 1996 when his license was indefinitely suspended for failing to respond to a complaint by one of his clients. However, Young continued to operate a tax consulting business. In 2001, Young formed a limited liability company, Amigo Vino LLC, to supply wine grapes to hobbyists and small wineries.

In 2004 and 2005, Young began soliciting money from friends and tax clients to invest in one of two feeder funds he created—Cautious LLC and West Coast Financial LLC. Young used these two funds to pool investors' money and invest in a hedge fund—Directors Performance Fund LLC (DPF)—that had a minimum investment limit of $1 million. The Securities and Exchange Commission (SEC) determined that DPF was an illegal prime bank trading scheme and filed a civil action, eventually returning $6.7 million of DPF investment money to Cautious and West Coast. Young used most of that money to repay his investors, but used about $200,000 of it to fund Amigo Vino.

In 2006, Young solicited investments from 16 investors, ten of whom had invested in Cautious and West Coast, in order to invest in another feeder fund—Safeguard Capital, LLC. Young encouraged friends and clients to invest in Safeguard by telling them that their investments would earn a guaranteed return of between 18 and 24 percent with no risk. Young invested $1.6 million of the $2.2 million he raised for Safeguard in a hedge fund—Gemstar Capital Group, Inc. He used most of the remaining $600,000 to repay a line of credit for Amigo Vino. Between 2006 and 2008 Gemstar paid over $5 million in distributions to Safeguard,

A-2

a profit of $3.4 million. Instead of distributing this money to Safeguard investors, Young diverted $4.3 million to Amigo Vino's bank accounts and line of credit. Young did not tell investors that he had received the $5 million in distributions from Gemstar or that he had spent $4.3 million of that amount on his personal business.

The SEC then investigated and sued Gemstar for operating an illegal Ponzi scheme. In a deposition as a part of that investigation, Young testified that he was the sole investor in Safeguard and that he spent all of the profits to develop Amigo Vino and to invest in another failed hedge fund. Young continued to tell Safeguard investors that Safeguard was successful and failed to tell them about the SEC action against Gemstar.

In 2011, the Washington State Department of Financial Institutions (DFI) received an investor complaint regarding Young and launched an investigation. The securities division interviewed eight Safeguard investors and gathered records from various sources including the SEC, investors, and Young. In January 2013, the securities division entered charges against Young for selling unregistered securities, acting as an unregistered salesperson, acting as an unregistered investment advisor, and anti-fraud violations. In May 2013, the securities division entered into a consent order with Young, which required Young to cease and desist in engaging in investments on behalf of others. Between 2008—when the last of his solicited investors made an investment—and 2014, Young provided the investors with various excuses for nonpayment on their investments.

On June 16, 2014, Young was charged by information with many counts of securities fraud. On April 29, 2015, Young pleaded guilty to ten counts of securities

fraud. After pleading guilty, Young's standard sentence range—based on an offender score of nine and a seriousness level of three—was 51 to 60 months. For the purposes of sentencing, the parties agreed that the amount of restitution would be $1,264,802. Prior to sentencing, Young filed a motion in support of an exceptional sentence. He proposed a sentence of 12 months to be served on electronic home detention, to pay restitution, and to pay mandatory costs and fees.

After a sentencing hearing, the trial court adopted the findings of fact and conclusions of law as proposed by Young. The trial court concluded that multiple factors—standing alone or taken together—were sufficient to merit a departure from the sentencing guidelines. The trial court relied on the following factors: (1) Young suffers from several serious medical conditions that would make his incarceration particularly difficult, especially considering his age; (2) An exceptional sentence in this case would save the State from having to expend its limited resources on a large amount of medical expenses due to Young's multiple medical conditions that require ongoing treatment; (3) Young has the ability to continue working and make substantial restitution payments if electronic home monitoring is imposed. If he is incarcerated, he will be able to make only the most minimal payments toward restitution; (4) Young made some restitution payments to the victims in this case prior to his plea; (5) Young is remorseful and wants to repay the victims in the case in full; (6) Young is 69 years old and has no criminal history, Young has no arrest history or history of disruptive or unlawful behavior, the case did not involve any violence, and Young poses no threat to the community. Consequently, the trial court imposed an exceptional sentence of six

months on work release, six months on home detention, and payment of $1,264,802 in restitution.

The State appeals.

DISCUSSION

Generally, under the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, a trial court must impose a sentence within the standard range. State v. Law, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). The purpose of the SRA is to develop a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences. RCW 9.94A.010. It is also designed to:

> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
>
> (2) Promote respect for the law by providing punishment which is just;
>
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
>
> (4) Protect the public;
>
> (5) Offer the offender an opportunity to improve himself or herself;
>
> (6) Make frugal use of the state's and local governments' resources; and
>
> (7) Reduce the risk of reoffending by offenders in the community.

Id.

An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review:

> 1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
>
> 2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
>
> 3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

State v. Ha'mim, 132 Wn.2d 834, 840, 940 P.2d 633 (1997), overruled in part on other grounds by State v. O'Dell, 183 Wn.2d 680, 698-99, 358 P.3d 359 (2015). The SRA sets forth in RCW 9.94A.535 illustrative factors which the court may consider in exercising its discretion to impose an exceptional sentence. Law, 154 Wn.2d at 94. However, the statutory list is not exhaustive and the trial court may consider some nonstatutory mitigating factors under the SRA. See id.

I. Statutory Mitigating Factor – Victim Compensation

Young responds to the State's appeal by asserting that a statutory mitigating factor—RCW 9.94A.535(1)(b)—applies. RCW 9.94A.535(1)(b) states, "Before detection, the defendant compensated, or made a good faith effort to compensate the victim of the criminal conduct for any damage or injury sustained." This statutory mitigating factor is designed to provide a ground for leniency based on a defendant's objective manifestation of remorse. See State v. McClarney, 107 Wn. App. 256, 264-65, 26 P.3d 1013 (2001).

The trial court did not specifically conclude that the elements of RCW 9.94A.535(1)(b) were satisfied.[2] The trial court found that Young made $523,456 in payments to the victims in the case prior to the date the information was filed. And, it concluded that Young made some restitution payments to the victims prior to his guilty plea. But, RCW 9.94A.535(1)(b) clearly requires that the defendant compensate the victims prior to detection. Neither the trial court's finding of fact nor its conclusion of law satisfy this requirement of the statute. The court's conclusion that Young made some restitution payments to the victims prior to his plea or its findings that he made payments to the victims in the case before the information was filed, does not establish that Young made an effort to compensate his victims before detection. Id.

Still, Young asserts that the facts considered by the trial court are consistent with the mitigating factor. At the sentencing hearing, Young's attorney stated that approximately half a million dollars was repaid to the victims prior to the information being filed. When asked by the court whether the payments were made when the investigation was brought to light, Young's attorney stated only that the payments were made prior to the information being filed. Young's attorney stated that he did not believe the State's criminal investigation had been initiated at the time, but that there was a prior DFI cease and desist order in place.

The trial court made no finding as to the date that Young's criminal conduct was detected. A range of dates are possibilities: the filing of criminal charges in

[2] Nor did it have occasion to do so. Young did not make this specific argument below to the trial court.



A-7

June 2014, the filing of the consent order by DFI in May 2013, entry of charges by DFI in January 2013, or any contact by investigators during DFI's investigation which began in 2011.

Moreover, the timing of the $523,456 in payments to the victims is not documented. One exception is the known repayment to Harold and Lisa Culverwell and Larry Stout of $24,944 in 2006 identified in the certification of probable cause. However, it is not clear if this amount was included in the final amount of $87,013 credited as a repayment to Culverwell and Stout. The other exception is the credited repayment of $90,000 paid to Debra Parsons to settle a lawsuit filed in 2011. Without dates, a court could not make the necessary finding that the payments to the victims were made before detection.

The evidence must also allow the trial court to conclude that any payments made before detection of the criminal activity were made for the purpose of compensating the victims for their injury. See RCW 9.94A.535(1)(b). Payments for any other purpose would not support a finding of an objective manifestation of remorse. See McClarney, 107 Wn. App. at 264-65.

The State agreed that the proper amount of restitution was $1,264,802 for the purposes of sentencing after reducing the restitution amount by $523,456 in repayments. The State's agreement as to the amount of restitution was not a concession or stipulation that the payments satisfied RCW 9.94A.535(1)(b)'s compensation requirement.

Young continued allaying victims' concerns about the safety of their investment after DFI began investigating him. As of the time of the filing of the

certificate of probable cause, victim Steven Kenney had not received any return on his investment. Young told victim Steven Kenney in 2013 that Kenney would receive his money by Christmas. And, when Kenney confronted Young about the DFI investigation, Young denied the merit of the investigation. Additionally, Young told victim Elworth Stegriy in 2014 that his funds were being held up at a bank in New York. And, he told victim John Jackson just months before the filing of the certificate of probable cause that his money was held up in a lawsuit "back east." Nothing about Young's conduct evidences an effort to acknowledge his wrongdoing, cease his illegal conduct, or compensate victims for their injury.

Young was also credited with $90,000 in repayments made to Parsons. This $90,000 represented money Young was compelled to pay to Parsons as a result of a settlement in a civil lawsuit filed against him—not a voluntary payment made out of remorse. And, at the time of the certification of probable cause, Young was credited with making $24,944 in repayments to Culverwell and Stout in 2006. But, Young told Culverwell and Stout that the $24,944 constituted two distributions of profits from their investment. And, after receiving these payments, Culverwell and Stout actually decided to invest more money in Safeguard. There is no evidence in the record that the payments made to Culverwell and Stout were intended to compensate them for injury rather than perpetuate Young's scheme.

Young had a business relationship with his victims. The payments totaling $523,456 could have represented routine return of principal or payment of earnings. They could have been churning of funds to induce investors to perpetuate their investments. They could have been to repay injury from criminal

conduct. The purpose of the individual payments is not documented in the record. There is no evidence in the record that Young voluntarily acknowledged his wrongdoing to any victim at the time of the payments nor that he communicated that the payments were being made to compensate them for injury or harm. The record does not support a reasonable inference that the payments represented an objective manifestation of remorse, let alone a finding of fact that these "known repayments" were payments made by Young as an acknowledgement of wrongdoing or as voluntary compensation to these victims for damage or injury sustained. See RCW 9.94A.535(1)(b).

We conclude that the trial court did not make the findings and conclusions regarding Young's payments to his victims necessary to satisfy the statutory mitigating factor in RCW 9.94A.535(1)(b).[3] And, on the record before it, the trial court could not have done so.

II. Non-Statutory Mitigating Factors

The trial court relied on Young's age, health issues, remorse, lack of criminal history, and willingness or ability to repay his victims to support an exceptional sentence below the standard sentence range. The State argues that these factors were either considered by the legislature in establishing the standard

[3] We note that to the extent a defendant seeks to claim a mitigating factor based on compensating victims prior to entry of a judgment, he or she must satisfy the statutory requirements of RCW 9.94A.535(1)(b) as outlined by the legislature. Thus, even if there was sufficient evidence that Young made payments prior to the filing of the information or the guilty plea, he may not assert that these reasons constitute an independent, nonstatutory mitigating factor.

sentence range or were factors of a personal nature that do not constitute legally sufficient nonstatutory mitigating factors supporting an exceptional sentence.

This court reviews the trial court's stated justifications for departing from the standard sentencing range de novo. Law, 154 Wn.2d at 99-100. In determining whether a factor legally supports departure from the standard sentence range, courts employ a two-part test. Ha'mim, 132 Wn.2d at 840. First, a trial court may not base an exceptional sentence on factors necessarily considered by the legislature in establishing the standard sentence range. Id. Second, the asserted mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. Id. To support an exceptional sentence a factor must relate to the crime and make it less egregious. State v. Fowler, 145 Wn.2d 400, 404, 38 P.3d 335 (2002).

A. Factors Considered by the Legislature

Under the first prong of the two-part test, Washington courts have consistently held that the purposes of the SRA, as stated in RCW 9.94A.010, are insufficient factors to justify a departure from the guidelines. Law, 154 Wn.2d at 96-97. Courts have reasoned that the SRA's stated purposes standing alone would not justify an exceptional sentence as the presumptive sentence ranges established for each crime represent the legislative judgment as to how the interests should best be accommodated. Id. at 96.

Here, the trial court reasoned that Young's exceptional sentence was justified, because an exceptional sentence in this case would save the State from having to expend its limited resources on a large amount of medical expenses due

to Young's multiple conditions that require ongoing treatment. As noted above, one of the stated purposes in RCW 9.94A.010 is to make frugal use of the state's and local governments' resources. RCW 9.94A.010(6). And, in State v. Pascal, the court specifically held that making frugal use of the State's resources was an inadequate justification for an exceptional sentence, because the SRA was specifically designed to promote this goal.[4] 108 Wn.2d 125, 137-38, 736 P.2d 1065 (1987). We conclude that the trial court erred to the extent it based Young's exceptional sentence on this factor.

Additionally, the trial court reasoned that Young has no criminal history, the case did not involve violence, and Young poses no threat to the community. These are factors specifically enumerated in RCW 9.94A.010. See RCW 9.94A.010(1),(4). And, consideration of the defendant's lack of criminal history and the defendant's low threat to the public were also explicitly rejected by the court in Pascal. 108 Wn.2d at 137-38. Similarly, in Fowler, 145 Wn.2d at 409, the court rejected the trial court's consideration of the defendant's risk to reoffend because protection of the public had already been considered by the legislature in computing the presumptive standard range. We conclude that the trial court erred when it considered these factors.

[4] Young notes that between 2012 and 2014, Washington courts have on 31 occasions imposed exceptional sentences in order to make frugal use of the State's resources. He cites to tables in the record that are purportedly generated from Washington sentencing records. Whether the trial courts erred in imposing an exceptional sentence on this basis in those unrelated cases is not at issue here.

B. Factors of a Personal Nature

Under the second prong of the test, the mitigating factor must relate to the crime and distinguish the crime in question from others in the same category. Law, 154 Wn.2d at 97, 98. This second prong encapsulates the SRA's explicit command that sentences be applied equally to all offenders without discrimination as to any element that does not relate to the crime or the previous record of the defendant. Id. at 97; RCW 9.94A.340. Washington courts have applied RCW 9.94A.340 to prohibit exceptional sentences based on factors personal in nature to a particular defendant. Law, 154 Wn.2d at 97.

Here, the mitigating factors cited by the trial court were all personal in nature and fail to distinguish the crime in question from others in the same category. Young's age of 69 at the time of sentencing is a personal factor.[5] See Ha'mim, 132 Wn.2d at 847. Extreme remorse expressed by the defendant[6] does not relate to the crime. See McClarney, 107 Wn. App. at 263-64. Young's ability to pay

[5] Young asserts that it was appropriate for the trial court to consider his age. He cites to State v. Ronquillo, 190 Wn. App. 779, 768-69, 783, 361 P.3d 779 (2015), O'Dell, 183 Wn.2d at 698-99, and the United States Supreme Court's decision in Miller v. Alabama, 567 U.S.__, 132 S. Ct. 2455, 2471, 183 L. Ed .2d 407 (2012), to support his assertion that age is relevant to the exceptional sentence determination. But, these cases stand for the proposition that youthfulness in particular, as opposed to age in general or older age, may be considered as an appropriate mitigating circumstance. Key to the reasoning in Ronquillo and O'Dell was the fact that scientific developments indicated that adolescents' cognitive and emotional development may relate to a defendant's crime. O'Dell, 183 Wn.2d at 696-97, 698-99; Ronquillo, 190 Wn. App. at 768-69. Notably, the O'Dell Court's holding was explicitly limited to youth. 183 Wn.2d at 696 (stating that youth can amount to a substantial and compelling factor justifying a sentence below the standard range).

[6] At the sentencing hearing, Young stated that he had deep regret for his actions and that he sought to take full responsibility for his actions.

restitution if not incarcerated is a factor personal in nature.[7] See Law, 154 Wn.2d at 104. As such, none of these factors were sufficiently substantial and compelling to justify an exceptional sentence. See Id.

No statutory mitigating factor is satisfied. No nonstatutory factors justify an exceptional sentence. The trial court erred when it imposed an exceptional sentence downward. As a general rule, if the appellate court determines that all of the factors relied on by the trial court are insufficient to justify an exceptional sentence, the court will remand for resentencing within the standard range. See Ha'mim, 132 Wn.2d at 847.

We reverse and remand for resentencing within the standard range.

Appelwick, J.

WE CONCUR:

Trickey, ACJ

Cox, J.

[7] The Law court explicitly held that a defendant's inability to pay restitution while incarcerated is a factor personal in nature. 154 Wn.2d at 104. Young argues that because Law preceded the U.S. Supreme Court's decision in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), Booker should control. He notes that the Booker court held that mandatory federal sentencing guidelines violated the Sixth Amendment. And, he argues that relevant to this case, the Booker court held that sentencing judges should consider a number of factors including the characteristics of the defendant. But, even if the principles in Booker can be analogized to Washington's sentencing scheme, Booker stands for the proposition that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be admitted by the defendant or submitted to a jury and proved beyond a reasonable doubt. Id. at 244. In other words, it considers the appropriate procedures for imposing an upward exceptional sentence. Nothing in Booker supplants Law or distinguishes it from Young's case.

# APPENDIX B

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

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br><br>Appellant,<br><br>v.<br><br>CLARENCE C. YOUNG, JR,<br><br>Respondent. | ) | No. No. 73760-1-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

The respondent, Clarence Young, having filed his motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied;

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 4th day of August, 2016.

Judge



B-1

# APPENDIX C

1993 WL 307866
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee, at Knoxville.

**STATE** of Tennessee, Appellee,
v.
Robert Bryan **JARNIGAN**, Appellant.

Aug. 12, 1993.

Cocke County, No. 03C01-9208-CR-00295; J. Kenneth Porter, Judge (Sentencing).

**Attorneys and Law Firms**

Edward C. Miller, Dist. Public Defender, Dandridge, Susanna W. Laws, Asst. Public Defender, Newport, for appellant.

Charles W. Burson, Atty. Gen.and Reporter, Kathy M. Principe, Asst. Atty. Gen., Nashville, Alfred C. Schumutzer, Dist. Atty. Gen., Sevierville, John Douglas Godbee, Asst. Dist. Atty. Gen. Pro-Tem, Rogersville, for appellee.

OPINION

WHITE, Judge.

***1** Robert Bryan **Jarnigan** appeals the sentences imposed upon his pleas of guilty in the Cocke County Criminal Court pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. Two indictments were returned against **Jarnigan**. The first one charged that **Jarnigan** committed the offenses of burglary of a grocery store under Tennessee Code Annotated Section 39-14-402 and theft over the value of $500 but less than the value of $1,000 under Tennessee Code Annotated Section 39-14-103. The second indictment alleged the offense of attempted burglary of the same grocery store on the day after the burglary alleged in the first indictment. On July 23, 1991, **Jarnigan** entered into a plea agreement whereby he agreed to plead guilty to each of the three offenses and to receive a two year sentence on the burglary conviction and two one year sentences on the theft and attempted burglary convictions, all of which were to run concurrent to one another. The **state** agreed to not oppose probation.

The court accepted **Jarnigan's** guilty pleas and considered the presentence report, his testimony at the submission hearing, the victim's statement,[1] and the argument of counsel in determining the manner in which the sentence would be served.

The presentence report[2] revealed that **Jarnigan**, eighteen years old at the time of the offense but twenty years old at the time of sentencing, had been adjudicated delinquent on two prior occasions as a result of burglary charges and had been sentenced to community corrections. Counsel for the appellant claimed that the following mitigating factors should be applied in determining the appropriate sentence:

(1) The defendant's conduct neither caused nor threatened serious bodily injury;
(3) Substantial grounds existed tending to excuse or justify the defendant's criminal conduct but failing to establish a defense;

(4) The defendant played a minor role in the commission of the offense;

(5) Before his detection, the defendant compensated or made a good faith attempt to compensate the victim of criminal conduct for the damage or injury the victim sustained;

(6) The defendant, because of his youth or old age, lacked substantial judgment in committing the offense.

The defense relied on the argument of counsel, the statement of the victim, and the statement of the appellant at the sentencing hearing in requesting that the appellant be granted probation. The proof established that appellant burglarized the store on two occasions, stole various merchandise which was in his possession when arrested, and cooperated upon apprehension. Appellant was employed[3] at the time of sentencing and had made complete restitution to the store owner, including repairing damage caused by the forced entry.

**C-1**

Against this backdrop, the court denied **Jarnigan** immediate probation, but sentenced him to probation following sixty days continuous confinement in the Cocke County Jail. From this order, **Jarnigan** appeals.

*2 When a defendant appeals his sentence under the Criminal Sentencing Reform Act of 1989, "the appellate court shall conduct a de novo review on the record ... with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn Code Ann. § 40-35-401(d) (1990 Repl.). That presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." ***State*** *v. Ashby,* 823 S.W.2d 166, 169 (Tenn.1991). The burden of establishing that the sentence is inappropriate, however, remains on the appellant. *Id.*

In conducting our review, we must consider all the evidence, the presentence report, the sentencing principles, the enhancing and mitigating factors, the argument of counsel, the statements of the appellant, the nature and characteristics of the offense, and the potential for rehabilitation. ***State*** *v. Moss,* 727 S.W.2d 229, 238-239 (Tenn.1986). In this matter the appellant stands convicted of one Class D and two Class E felonies. Based on this sparse record, all we know about the offense is that the appellant burglarized Shelton's Grocery located in Del Rio, Cocke County, Tennessee, and stole a quantity of candy, cigarettes, cigars, oil, anti-freeze, and money, valued at over $500 but less than $1,000. We also know that after his first successful burglary of Shelton's Grocery, the appellant returned the following day but was met on that occasion by the proprietor. After being taken into custody, the appellant surrendered the items stolen and gave a statement to law enforcement concerning his involvement in the burglary and made full restitution. The appellant's statements and his prior record reveal little which would explain his penchant for burglary. Notwithstanding two efforts at alternative sentences, appellant reoffended. His lack of insight into his criminal conduct as well as the fact that the burglaries were committed less than two years after his prior delinquent acts lead us to conclude that **Jarnigan** is not a favorable candidate for rehabilitation.

We next review the enhancing and mitigating factors to determine applicability to this case. The **state** claimed no applicable enhancement factors in this case and we find none. The defense urged the application of five mitigating factors but presented very little proof. Based on the evidence in the record we find two appropriate mitigating factors: the defendant's criminal conduct neither caused nor threatened serious bodily injury and the defendant because of his youth or old age lacks substantial judgment in committing the offense. We hasten to add that, although we consider appellant's age as it relates to his lack of judgment as a mitigating factor, it is not very persuasive in light of his prior opportunities to consider the ramifications of bad judgment. We find nothing in this record to substantiate the other mitigating factors claimed by the appellant. [4]

*3 As required, we have also considered the principles and purposes of the Criminal Sentencing Reform Act of 1989. Standing convicted of one class D and two class E felonies with a cumulative sentence of two years places **Jarnigan** in the position of being "presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn.Code Ann. § 40-35-102(6) (1990 Repl.). We acknowledge that **Jarnigan** is not yet the type of convicted felon who possesses a "criminal history evincing a clear disregard for the laws and morals of society." *Id.* at 102(5). However, his history of reoffending within two years of placement in community corrections suggests that he is not willing to take advantage of benefits bestowed on him.

Appellant urges us to grant probation because of his need and potential for rehabilitation. While his need for rehabilitation is obvious, his potential is not. His cavalier treatment of the previous alternative sentencing opportunities given him by the court system reflects an attitude not conducive to rehabilitation. We conclude that while **Jarnigan** is presumed to be a favorable candidate for probation, the number of these offenses [5] and their nature in light of **Jarnigan's** previous juvenile record rebut that presumption.

In this case we believe that the trial judge's decision to sentence the appellant to probation in conjunction with a specific period of confinement, pursuant to Tennessee Code Annotated Section 40-35-212(b), was appropriate. We acknowledge that it is unfortunate that **Jarnigan** may lose his steady employment as a result of serving this sentence. However, we refuse to grant probation in order to avoid harming an offender's future when his

C-2

conduct has demonstrated little regard for his own future. Nothing in this opinion prohibits counsel from requesting work release, if available, or periodic confinement which might allow appellant to maintain his employment under appropriate statutory authority.

For all these reasons, the judgment of the Cocke County Criminal Court is affirmed.

SCOTT, P.J., and TIPTON, J., concur.

**All Citations**

Not Reported in S.W.2d, 1993 WL 307866

Footnotes

1 During the submission hearing the **state** acknowledged the presence of the victim in the courtroom. Although the victim was never sworn, the **state** represented that the victim did not object to probation. The court discussed the matter with the victim as follows:
THE COURT: Are you recommending I put him on probation?
MR. SHELTON: Yes, sir, they made full re.. you know they's awful good about fixin' my store back, and everything.
Although the record is unclear, it appears that appellant made restitution to the victim after apprehension but before sentencing.

2 Evidently, appellant failed to report to the presentence service officer to enable the officer to prepare a complete presentence report. The report only contained appellant's prior record.

3 Appellant's job apparently required travel out of **state** which prompted counsel's argument that a denial of probation would result in appellant's termination.

4 During the course of the submission proceeding, counsel for the appellant requested to have the appellant explain the circumstances of the offense to the court. She, however, never presented that testimony and we are without any basis for finding that substantial grounds existed to excuse or justify **Jarnigan's** conduct or that **Jarnigan**, the sole perpetrator of this offense, played a minor role in its commission. Additionally, although appellant compensated the victim, that compensation was not "before his detection." Therefore, Tennessee Code Annotated Section 40-35-113(5) (1990 Repl.) is not applicable.

5 **Jarnigan** presents the classic case of an offender who, despite a juvenile record, expects a probated sentence on his first adult felony. That expectancy is misplaced in general, but is particularly misplaced under circumstances in which the offender commits three felonies in his first adult criminal episode which are of the same nature as his prior delinquent acts.



C-3

# APPENDIX D

2000 WL 1782757
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee, at Knoxville.

STATE of Tennessee,
v.
Roy Ray WALLACE.

No. E2000-00046-CCA-R3-CD.
|
Dec. 6, 2000.

Appeal from the Circuit Court for Grainger County, No. 3294; O. Duane Slone, Judge.

**Attorneys and Law Firms**

Robert M. Burts, Rutledge, TN, for appellant, Roy Ray Wallace.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Alfred C. Schmutzer, Jr., District Attorney General; and Michael A. Gallegos, Assistant District Attorney General, for appellee, State of Tennessee.

TIPTON, J., delivered the opinion of the court, in which SMITH and WITT, JJ., joined.

OPINION

TIPTON.

*1 The defendant appeals his convictions for burglary and theft of property valued at less than five hundred dollars. He challenges the sufficiency of the evidence in light of the uncorroborated testimony of an accomplice, the admissibility of a recording of his co-defendant's testimony, and the length of his sentence. We affirm the convictions and sentences.

The defendant, Roy Ray Wallace, appeals as of right his convictions by a jury in the Grainger County Circuit Court for burglary, a Class D felony, and theft of property valued at less than five hundred dollars, a Class A misdemeanor. The defendant, a Range III offender, received concurrent sentences of twelve years and eleven months and twenty-nine days respectively. He contends that the evidence is insufficient because the testimony of an accomplice is uncorroborated, the trial court improperly admitted the tape-recorded testimony of a co-defendant, and his sentence is excessive. We affirm the judgments of conviction.

At trial, George McCoy, the owner of McCoy Meat Company, testified as follows: On August 10, 1997, around midnight, his employee, who lived across the street from the meat company, called to tell him that someone had broken into his business. The employee told him that he saw a truck in the meat company's driveway and that when he drove to the rear of the building to investigate, he saw the perpetrators fleeing. The perpetrators had loaded ten thousand dollars worth of perishable food into buggies and left them at the rear of the building. They damaged three doors and took a pager and two hundred dollars in cash. He also identified exhibit one, a .22 caliber, bolt-action gun with a piece of the stock missing, as the gun that had been taken from his business.

Mr. McCoy testified that the perpetrators took his business checkbook and wrote eight to ten checks on his account. Mr. McCoy was the only one authorized to sign checks on this account. He identified a check written on his account, made out to Roy R. Wallace, and signed by George Culin. The memorandum portion of the check stated "week 8-11 -8-15 36 1/2 hours." The check had the name Roy Wallace, a driver's license number, and a phone number on the back. The check reflects that it had been cashed at a business. Mr. McCoy did not know George Culin, and neither Mr. Culin nor the defendant had ever worked for him. The defendant's relatives lived across the street from the meat company, and Mr. McCoy had seen the defendant before but had never given him permission to enter his business or take his property.

Joey Edward Cox testified as follows: On August 17, 1997, the defendant tried to sell him a rifle, which he identified as the gun marked exhibit one. He told the defendant that he did not want to buy the gun, but the defendant's brother continued showing it to him. He thought that the defendant acted suspiciously because the defendant told his brother not to be flashing the gun around. The

**D-1**

defendant sold the gun to James Diehls for twenty-five dollars.

*2 James Diehls testified as follows: On August 17, 1997, he saw the defendant and Joey Cox at a body shop. The defendant was putting a gun in his trunk, and Mr. Diehls, who collects guns, asked him about it. The gun, a .22 caliber rifle, was worth only twenty-five dollars because it was broken. Joey Cox offered the defendant twenty dollars for the gun, but the defendant declined that offer. Mr. Diehls bought the gun from the defendant for twenty-five dollars. He identified exhibit one as the gun that he bought from the defendant on that day.

Wayne Wallace, the defendant's brother, testified as follows: He was with his nephew, Danny Overholt; the defendant; and a boy, whom he identified only as the son of a woman named Robin, when the defendant traded something to Mr. Overholt for a Kenwood car stereo. Sometime later, he was with the defendant, Robin's son, and another boy. The defendant traded the stereo to Robin's son in exchange for a gun. Sometime afterwards, the defendant took the gun to the body shop to sell it. Mr. Wallace sat in the car and did not know how much money the defendant received for the gun. The defendant never told him not to be flashing the gun around. He identified exhibit one as the gun that the defendant got from Robin's son.

Judy Overholt, the defendant's sister, testified as follows: On April 2, 1997, she bought a car and the salesman gave her a Kenwood stereo to install in it. She sold the car to her son, who installed his Pioneer stereo and gave the Kenwood stereo to the defendant in the summer of 1997. She knew nothing about the defendant subsequently trading the stereo for a gun. Grant Runion testified that he had known the defendant all of his life and was there when the defendant traded a Sanyo car radio to a teenage boy in exchange for a gun.

The jury listened to the taped preliminary hearing testimony of Brian Durham, who implicated the defendant in the burglary and stated that the defendant had taken a gun. The trial court instructed the jury that Mr. Durham was also charged in connection with these crimes and that if he had been present, defense counsel would have questioned him about entering into a plea agreement with the state. Based upon the foregoing evidence, the jury convicted the defendant of burglary and theft of property valued at less than five hundred dollars.

## I. SUFFICIENCY OF THE EVIDENCE

The defendant contends that the evidence is insufficient to support his convictions because nothing corroborates the testimony of Brian Durham, who was an accomplice in the crimes. He argues that although the state proved that he sold the gun taken from the victim's business seven days after the burglary, he presented uncontradicted testimony that he had traded a stereo in exchange for the gun. He claims that the mere fact that his name appears on the stolen check does not prove that he stole, wrote, passed, endorsed or ever possessed the check. The state contends that the evidence in the record corroborates Brian Durham's testimony.

*3 Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. *See State v. Sheffield,* 676 S.W.2d 542, 547 (Tenn.1984); *State v. Cabbage,* 571 S.W.2d 832, 835 (Tenn.1978).

In Tennessee, a conviction may not be based upon the uncorroborated testimony of an accomplice. *State v. Bigbee,* 885 S.W.2d 797, 803 (Tenn.1994). An accomplice is an individual who knowingly, voluntarily, and with common intent participates with the principal offender in the commission of an offense. *State v. Lawson,* 794 S.W.2d 363, 369 (Tenn.Crim.App.1990). In the present case, the trial court instructed the jury that Brian Durham was an accomplice and that his testimony must be corroborated. Whether other evidence sufficiently corroborates the testimony of an accomplice is a question of fact entrusted to the jury. *Bigbee,* 885 S.W.2d at 803. The general rule is that:

> there must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has

**D-2**

> been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's evidence. The corroboration need not be conclusive, but it is sufficient if this evidence, of itself, tends to connect the defendant with the commission of the offense, although the evidence is slight and entitled, when standing alone, to but little consideration.

*Hawkins v. State,* 4 Tenn.Crim.App. 121, 133-34, 469 S.W.2d 515, 520 (1971).

The evidence sufficiently corroborates Mr. Durham's testimony linking the defendant to the burglary and theft of the gun from the meat company. James Dielhs testified that the defendant sold him a broken .22 caliber rifle on August 17, 1997. Joey Cox testified that the defendant had offered to sell him a gun on August 17, 1997, and then sold it to Mr. Diehls. Both men identified the gun taken from the meat company as the one in the defendant's possession that day. Absent a satisfactory explanation, the possession of recently stolen property creates the inference that the individual in possession stole the property. *Bush v. State,* 541 S.W.2d 391, 394 (Tenn.1976); *State v. Pfeifer,* 993 S.W.2d 47, 52 (Tenn.Crim.App.1998). The defendant's possession of the stolen gun seven days after the burglary is corroborative of Mr. Durham's testimony.

***4** The defendant contends that three uncontradicted witnesses testified that he traded a stereo to a teenage boy in exchange for the gun. The defendant's explanation of his or her possession of recently stolen property does not destroy the inference that it is stolen, but, instead, presents a question for the jury regarding the weight to give the evidence. *Bush,* 541 S.W.2d at 395. While two witnesses, Wayne Wallace and Grant Runion, testified that the defendant traded a stereo for a gun, only Mr. Wallace identified the gun taken from the meat company as the weapon received by the defendant in the trade. Judy Overholt testified that she knew nothing about the defendant trading the stereo for a gun. Mr. Cox's testimony that the defendant acted suspiciously regarding the gun by telling his brother not to flash the gun around contradicts the defendant's evidence that he gained the gun through legitimate means. The question of whether the defendant received the gun from an unnamed teenager goes to the weight and credibility of the evidence, matters reserved for the jury rather than this court. *See State v.. Pappas,* 754 S.W.2d 620, 623 (Tenn.Crim.App.1987).

The defendant also contends that the fact that the stolen check bore his name does not corroborate Mr. Durham's testimony that he was involved in the burglary because the state did not prove that he stole, wrote, passed, endorsed or possessed the check. The corroborative evidence does not have to prove conclusively that the defendant committed the crime but must simply connect the defendant with the crime. *Hawkins,* 4 Tenn.Crim.App. at 133-34, 469 S.W.2d at 520. The corroborative evidence standing alone may be entitled to little weight. *Id.* Mr. McCoy, the owner of the meat company, testified that his business checkbook was stolen in the burglary, that he was the only one authorized to write checks on the business account, and that the defendant had never worked for him. He identified one of his checks, which was payable to Roy R. Wallace and bore the signature "Roy Wallace" as the endorsement. The check was dated August 15, 1997, and the memorandum notation indicated that the check was for thirty-six and one-half hours of work performed on August 11-15, 1997. The stolen check listing the defendant as the recipient purportedly in exchange for thirty-six and one half hours of labor despite the fact that he never worked for Mr. McCoy connects the defendant with the burglary of the meat company.

Viewing the evidence in the light most favorable to the state, Mr. Durham testified that the defendant broke into the meat company and took a gun. The defendant sold the stolen gun seven days following the burglary. The evidence is sufficient to support the convictions for burglary and theft of property valued at less than five hundred dollars.

II. ADMISSIBILITY OF RECORDED TESTIMONY

D-3

The defendant contends that the audiotape recording of the preliminary hearing testimony of Brian Durham is inadmissible because it violates his Sixth Amendment right to confrontation. He argues that Mr. Durham, who was the key witness linking him to the burglary, repeatedly contradicted himself, could not recall some information, and was motivated to lie because of his plea agreement with the state. He maintains that the record is devoid of proof of the state's effort to bring Mr. Durham into court. He also argues that the trial court should not have admitted the recorded testimony because portions of the recording are inaudible. The state contends that the defendant has waived this issue for failing to include it in his motion for a new trial. It also argues that the defendant failed to question the unavailability of Mr. Durham at trial and that the trial court determined that Mr. Durham was unavailable.

*5 The failure to include a challenge to the admissibility of evidence in the motion for a new trial serves to waive appellate review of the issue. T.R.A.P. 3(e). When necessary to do substantial justice, this court may review an error omitted from the motion for a new trial but affecting the substantial rights of the defendant. Tenn.R.Crim.P. 52(b). In order for the state to introduce the former testimony of an unavailable witness without violating the defendant's right to confrontation, the state must prove that the witness is "truly unavailable" despite the state's good faith effort to secure the witness's presence at trial and that the evidence bears its own indicia of reliability. *State v. Arnold,* 719 S.W.2d 543, 548 (Tenn.Crim.App.1986). We are unable to determine if the state has conformed to these requirements in this case because the defendant has failed to provide a complete record on appeal.

Before trial, defense counsel moved to exclude the audiotaped testimony of Mr. Durham, contending that, as he had told the court earlier, the audiotape was inaudible and that it violated the defendant's right to confront and cross-examine this witness. Without asking for the state's response, the trial court overruled the defendant's motion, stating

> the Court finds that Mr. Durham had unequivocally entered into an agreement with the State of Tennessee to testify against Mr. Roy Ray Wallace. However, he's not here, a capias has been issued for his arrest. He's obviously unavailable as a witness in this matter and he did testify at the Preliminary Hearing of this matter and was subject to cross-examination at that time.

These statements along with defense counsel's reference to what he previously told the court indicate the existence of earlier discussions regarding Mr. Durham's availability that are not a part of the record. The appealing party has a "duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." *State v. Ballard,* 855 S.W.2d 557, 560 (Tenn.1993). In the absence of a complete record, we must presume the trial court correctly found that Mr. Durham was truly unavailable. *See State v. Boling,* 840 S.W.2d 944, 951 (Tenn.Crim.App.1992) ("Absent an essential part of the record, this court must presume that the trial court's determination is correct.").

The defendant argues that the trial court should not have admitted the audiotape into evidence because portions were inaudible. However, the defendant has provided an incomplete record on this issue because he has not preserved the recording as it was heard by the jury. [1] In any event, our review of the recording reveals that while portions of Mr. Durham's testimony are unintelligible, the testimony still implicates the defendant in the burglary and the theft of the gun. We further note that the defendant's trial counsel conducted a thorough cross-examination of Mr. Durham, pointing out a number of inconsistencies in his testimony. The trial court listened to the audiotape before trial and ruled that it was sufficiently audible to be heard by the jury. The defendant's trial attorney stipulated to the authenticity of the audiotape. "Provided that a tape recording is properly authenticated, the incompleteness of it goes only to its weight and not to its admissibility." *State v. Harris,* 637 S.W.2d 896, 898 (Tenn.Crim.App.1982); *see also State v. Beasley,* 699 S.W.2d 565, 569 (Tenn.Crim.App.1985); *Aldridge v. State,* 562 S.W.2d 216, 218 (Tenn.Crim.App.1977). The trial court properly admitted the recorded testimony of Brian Durham.

III. SENTENCING

**D-4**

*6 The defendant summarily contends that his sentence is excessive because he committed property crimes rather than crimes against people, broke into a business rather than a home, and repaid the store that cashed the forged check before he was charged with these offenses. He also argues that his conduct neither caused nor threatened serious bodily injury and that he has a history of bad nerves and diminished mental capacity. The state contends that the trial court properly sentenced the defendant.

Appellate review of sentencing is *de novo* on the record with a presumption that the trial court's determinations are correct. Tenn.Code Ann. § 40-35-401(d). As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentence is improper. The defendant's argument as stated above is essentially all the defendant presents on this issue. As noted by the state, the failure to provide argument and citation to authorities will result in waiver of the issue. Tenn.Ct .Crim.App.R. 10(b). The defendant's brief assertion of circumstances that he apparently believes the trial court should have used to mitigate his sentence is worthy of such waiver.

In any event, our *de novo* review of the record reveals that the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the relevant sentencing factors and principles. The trial court found and attached great weight to enhancement factor (1) because the defendant had criminal convictions in excess of those necessary for his Range III status. *See* Tenn.Code Ann. § 40-35-114(1). The presentence report reflects that the defendant had twenty convictions for felonies and misdemeanors in excess of the six convictions necessary to establish his sentencing range. The trial court also enhanced the defendant's sentence with factor (13)(A), finding that the defendant committed the present felony of burglary while on bail for another felony of which he was ultimately convicted. *See* Tenn.Code Ann. § 40-35-114(13)(A). The trial court applied mitigating factor (1), finding that the defendant's conduct did not cause or threaten serious bodily injury. *See* Tenn.Code Ann. § 40-35-113(1). It found no other mitigating factors to apply, determined that the defendant's lengthy criminal record greatly outweighed any mitigation, and sentenced the defendant to the maximum sentence of twelve years for his burglary conviction.

The defendant contends that the trial court should have considered that his conduct did not cause or threaten serious bodily injury. The record reflects that the trial court mitigated the defendant's sentence with this factor but found it to be outweighed by the defendant's criminal record. To the extent that the defendant is arguing that the trial court did not properly weigh these factors, we observe that the weight accorded sentencing factors is left to the trial court's sound discretion. *See* Tenn .Code Ann. § 40-35-210, Sentencing Commission Comments. The trial court properly applied these factors.

*7 The defendant also contends that the trial court should have considered his mental history of a nervous condition and diminished mental capacity. At the sentencing hearing, the defendant's sister, Judy Overholt, testified that as a child, the defendant experienced nervousness, hyperactivity, and problems concentrating. She stated that while in school, the defendant took medication for this condition but that the medication made him sleepy and that he slept through most of his classes, and he could not read or write. She said that although the defendant needed to be on medication for the rest of his life, he stopped taking the medication as a teenager and started getting into trouble. The trial court considered the defendant's mental condition in relation to mitigating factor (8), the "defendant was suffering from a mental condition or physical condition that significantly reduced the defendant's culpability for the offense." Tenn.Code Ann. § 40-35-113(8). While recognizing that the defendant did have a condition that made him nervous, the court rejected factor (8), finding that the defendant had sufficient mental faculties to know the type of conduct in which he engaged. The record does not preponderate against this finding.

The defendant contends that the trial court should have considered that these crimes were property crimes rather than crimes against people and that he broke into a business rather than a home. The trial court did consider the fact that the offenses posed no threat of injury to others in applying mitigating factor (1). Furthermore, the legislature has provided a lesser penalty for the burglary of a business, which is a Class D felony, than that for the burglary of a habitation, which constitutes aggravated burglary and is a Class C felony. The defendant was

**D-5**

convicted of the former and, thus, has received a lesser penalty based upon the location of the crime.

Finally, the defendant contends that the trial court should have considered that he repaid the store where he cashed the forged check before he was charged with these offenses. At the sentencing hearing, the defendant denied committing the offenses and explained the presence of his name on the forged check by relating that he sold some tires to a woman, who wrote him a check. He said that he would not have endorsed the check, written his social security number on it, or cashed it if he had known that it was stolen. His attorney reminded the court that the defendant could not read or write. The defendant stated that a Union County detective talked to him about the check. He said that after speaking with the detective, he repaid the store in Union County at which he cashed the check. He stated that about one week later, he went to court in Union County and was brought to Grainger County for the burglary of the meat company.

A trial court may mitigate the defendant's sentence if before "detection, the defendant compensated or made a good faith attempt to compensate the victim of criminal conduct for the damage or injury the victim sustained." Tenn.Code Ann. § 40-35-113(5). Although the defendant claims to have repaid the store before being charged with the burglary of the meat company, it does not appear that he repaid the store before the police became involved in the matter of the forged checks. Mitigating factor (5) does not apply because the defendant did not compensate the victim before detection. On the other hand, a defendant's repayment of the check after detection may be considered under the catchall provision of mitigating factor (13). *See State v. Mary McNabb,* No. 03C01-9404-CR-00135, Sullivan County, slip op. at 6 (Tenn.Crim.App. Feb. 8, 1995). Even considering that the defendant repaid the store at which he passed the stolen check, this factor is entitled to little weight in light of his extensive criminal record. We affirm the sentences of twelve years for the burglary and eleven months and twenty-nine days for misdemeanor theft.

***8** Based upon the foregoing and the record as a whole, we affirm the judgments of conviction.

**All Citations**

Not Reported in S.W.3d, 2000 WL 1782757

Footnotes

1 Apparently, Mr. Durham's preliminary hearing testimony was recorded at a decreased speed. The defendant's brief does not refer to the content of the audiotape and states that appellate counsel "tried to listen to the tape and was unable to hear anything." We note that the defendant has a different attorney on appeal but this fact does not relieve him of his burden to provide a complete record for our review. *See Ballard,* 855 S.W.2d at 560. In order to learn the substance of Mr. Durham's testimony, the court listened to the original tape on a variety of tape recorders with variable speed functions and determined that Mr. Durham's testimony was apparently recorded at one-half standard recording speed. During this process, the author inadvertently lost thirteen seconds of the direct examination of Mr. Durham contained on the original tape. The remaining direct testimony still implicates the defendant in the burglary and theft of the gun. We do not believe that the loss of this portion of the tape is to either party's detriment.



**D-6**

# APPENDIX E

**RCW 9.94A.535**

**Departures from the guidelines.**

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW **9.94A.537**.

Whenever 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. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW **9.94A.585**(4).

A departure from the standards in RCW **9.94A.589** (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW **9.94A.585** (2) through (6).

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The 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. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The 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**.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW **10.99.020**, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(k) The defendant was convicted of vehicular homicide, by the operation of a vehicle in a reckless manner and has committed no other previous serious traffic offenses as defined in

**E-1**

RCW **9.94A.030**, and the sentence is clearly excessive in light of the purpose of this chapter, as expressed in RCW **9.94A.010**.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW **9.94A.010**.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW **9.94A.525** results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW **9.94A.537**.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter **69.50** RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

**E-2**

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW **9.94A.835**.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW **10.99.020**, or stalking, as defined in RCW **9A.46.110**, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

**E-3**

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW **9.94A.530**(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW **19.290.010**.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW **9.94A.030**, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW **9.68A.075**, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW **9.68A.011**(4) (a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW **9.94A.030**.

(dd) The current offense involved a felony crime against persons, except for assault in the third degree pursuant to RCW **9A.36.031**(1)(k), that occurs in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This subsection shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW **2.28.200** at the time of the offense.

(ee) During the commission of the current offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple lane highway, as defined by RCW **46.04.350**, with a posted speed limit of forty-five miles per hour or greater.

[ **2016 c 6 § 2; 2013 2nd sp.s. c 35 § 37.** Prior: **2013 c 256 § 2; 2013 c 84 § 26; 2011 c 87 § 1;** prior: **2010 c 274 § 402; 2010 c 227 § 10; 2010 c 9 § 4;** prior: **2008 c 276 § 303; 2008 c 233 § 9; 2007 c 377 § 10; 2005 c 68 § 3; 2003 c 267 § 4; 2002 c 169 § 1; 2001 2nd sp.s. c 12 § 314; 2000 c 28 § 8; 1999 c 330 § 1; 1997 c 52 § 4;** prior: **1996 c 248 § 2; 1996 c 121 § 1; 1995 c 316 § 2; 1990 c 3 § 603; 1989 c 408 § 1; 1987 c 131 § 2; 1986 c 257 § 27; 1984 c 209 § 24; 1983 c 115 § 10.** Formerly RCW **9.94A.390**.]

**NOTES:**

**Intent—2010 c 274:** See note following RCW **10.31.100**.

**Intent—2010 c 9:** See note following RCW **69.50.315**.

**Severability—Part headings, subheadings not law—2008 c 276:** See notes following RCW **36.28A.200**.

**E-4**

**Intent—Severability—Effective date—2005 c 68:** See notes following RCW **9.94A.537**.

**Intent—Severability—Effective dates—2001 2nd sp.s. c 12:** See notes following RCW **71.09.250**.

**Application—2001 2nd sp.s. c 12 §§ 301-363:** See note following RCW **9.94A.030**.

**Technical correction bill—2000 c 28:** See note following RCW **9.94A.015**.

**Effective date—1996 c 121:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [March 21, 1996]." [ **1996 c 121 § 2.**]

**Effective date—Application—1990 c 3 §§ 601 through 605:** See note following RCW **9.94A.835**.

**Index, part headings not law—Severability—Effective dates—Application—1990 c 3:** See RCW **18.155.900** through **18.155.902**.

**Severability—1986 c 257:** See note following RCW **9A.56.010**.

**Effective date—1986 c 257 §§ 17 through 35:** See note following RCW **9.94A.030**.

**Effective dates—1984 c 209:** See note following RCW **9.94A.030**.

**E-5**