

73760-1

73760-1

NO. 73760-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Appellant,

v.

CLARENCE C. YOUNG, JR.,

Respondent.

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2016 JUN 28 PM 8:29  
CLARENCE C. YOUNG, JR.  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

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**REPLY BRIEF OF APPELLANT**

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A. ARGUMENT IN REPLY

1. PAYMENTS RESPONDENT MADE TO HIS VICTIMS AS PART OF HIS SECURITIES FRAUD SCHEME DO NOT SUPPORT HIS EXCEPTIONAL SENTENCE BECAUSE THEY DO NOT CONSTITUTE A GOOD FAITH EFFORT TO COMPENSATE THE VICTIMS OF HIS CRIMINAL CONDUCT AS REQUIRED BY RCW 9.94A.535(1)(b).

Respondent claims that the trial court's exceptional sentence is supported by evidence of payments he made to his victims. He claims that the \$523,465 in payments he made to the victims during his scheme, the difference between the victims' initial investments of \$1,788,267 and the agreed restitution amount of \$1,264,802, were a good faith effort to compensate them and support his exceptional sentence.<sup>1</sup> But these payments were made as part of his securities fraud scheme and do not support an exceptional sentence. RCW 9.94A.535(1)(b) authorizes a trial court to impose an exceptional sentence below the standard sentence range when

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.

RCW 9.94A.535(1)(b). Respondent's payment of \$523,465 to his victims was not a good faith effort to compensate them for his criminal conduct.

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<sup>1</sup> The State agreed to restitution in the amount of the victim's original investments less any amounts respondent paid the victims during his scheme as the most conservative measure of restitution.

Included in the \$523,465 are a \$14,000 payment to victim Steven Kenny that respondent characterized as a dividend from his investment, CP 20-1; a \$4,190 payment to victim Robert Hampton that respondent told Hampton was a return of his principal, CP 22; payments to victim Lisa Culverwell-Stout of \$8,380, \$11,131, and \$13,318 that respondent told her were distributions of profits, CP 23-4; and a payment of \$90,000 to victims Dennis and Deborah Parsons to settle their civil lawsuit against him. CP 26. In addition, victim Terry Hoder told the court that he “took out approximately \$60,000 in payments” from his investment, VRP 27:12<sup>2</sup>, and victim John Jackson told the court that he received \$330,000 from respondent but was unaware respondent had received over \$5 million from the hedge fund in which he had invested. VRP 33:18. All of these payments were meant to lull the victims into a false sense of security regarding their investments to prevent them from discovering that he had spent their investments and the returns on those investments on his winery. As further evidence of this, respondent stopped making payments to his victims once his scheme was discovered and the criminal investigation began. VRP 28:16. What the payments prove is that respondent stole all but \$523,465 of the \$5,073,551 in returns from his victims’ investments in

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<sup>2</sup> The State adopts respondent’s convention for referring to the verbatim report of the sentencing hearing.

Safeguard including \$1,264,802 of their original investments, CP 16, not that he made a good faith effort to compensate them.

Although the State agreed to give respondent credit against his restitution obligation for the payments he made to his victims during the course of his scheme these payments were not payments he made in good faith to compensate his victims for their losses:

“Good faith” means an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with the absence of all information, notice, or benefit or belief of facts which would render a transaction unconscientious. A person acts in good faith when the person acts in a state of mind denoting honesty of purpose, freedom from intention to defraud, and being faithful to one’s duty or obligation.

Black’s Law Dictionary, Fifth Edition (1979) (modified), pp. 623-24, citing Efron v. Kalmanovitz, 249 Cal.App. 187, 57 Cal.Rptr. 248, 251 (1967). Respondent’s representations to his victims that the payments he made to them were returns of principal or distributions of income were not made in an honest state of mind or without intent to defraud because he misrepresented the nature of the payments to them. Nor did he act in good faith by returning \$523,465 of his victims’ investment money while stealing the rest of the \$5,073,551 they should have received. His return of a small part of the victims’ investment money under these

circumstances does not support an exceptional sentence below the standard sentence range under RCW 9.94A.535(1)(b).

2. PAYMENTS RESPONDENT MADE TO HIS VICTIMS AS PART OF HIS SECURITIES FRAUD SCHEME DO NOT CONSTITUTE A SUBSTANTIAL AND COMPELLING REASON SUPPORTING AN EXCEPTIONAL SENTENCE AFTER CONSIDERATION OF THE PURPOSES OF THE SRA.

In order for a reason to justify an exceptional sentence the reason must be substantial and compelling and consistent with purposes of the Sentencing Reform Act. RCW 9.94A.010 et seq., 9.94A.120(2); State v. Allert, 117 Wn.2d 156, 815 P.2d 752 (1991); RCW 9.94A.535. Among the purposes of the Sentencing Reform Act are to promote respect for the law by providing punishment which is just and to provide for punishment that is commensurate with punishment imposed on others committing similar offenses. RCW 9.94A.010(2),(3). In determining whether a factor legally supports a departure from the standard sentence range courts must employ a 2-part test:

First, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range. Second, the asserted aggravating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.

State v. Alexander, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995). Factors supporting an exceptional sentence downward must relate either to the

crime of conviction or the defendant's past criminal record. State v. Law, 154 Wn.2d 85, 110 P.3d 717 (2005). To support an exceptional sentence a factor "must relate to the crime and make it more or less egregious." State v. Fowler, 145 Wn.2d 400, 411, 38 P.3d 335 (2002).

Respondent's payment of \$523,465 to his victims to lull them into a false sense of security about their investments while stealing the remaining \$4.5 million owed to them is not a substantial and compelling reason to impose an exceptional sentence below the standard sentence range. First, an offender's repayment of his victims was considered by the legislature when it enacted RCW 9.94A.535(1)(b). As discussed above, respondent's payments were not a good-faith effort to compensate them. Second, because the payments were made in furtherance of his scheme they make his crime more egregious, not less egregious.

Imposing an exceptional sentence of 6 months' work release and 6 months' home detention for a securities fraud of this magnitude merely because respondent paid \$523,465 as part of that fraud is also inconsistent with the goals of the Sentencing Reform Act to provide punishment which is just and commensurate with other defendants that have committed similar offenses. Respondent's claim that his payments support the sentencing court's exceptional sentence is without merit.

3. THE SENTENCING COURT'S FINDING THAT THE PAYMENTS RESPONDENT MADE TO HIS VICTIMS AS PART OF HIS SCHEME WERE RESTITUTION IS NOT SUPPORTED BY THE RECORD.

The court concluded that respondent had made "some restitution payments to his victims prior to his plea." CP 126. This conclusion of law is not supported by any of the court's findings of fact. CP 122-26. In reviewing a departure from sentencing guidelines an appellate court must decide if the sentencing judge's reasons for imposing an exceptional sentence are supported by record. As this is a factual determination the appellate court should uphold the sentencing judge's reasons if they are not clearly erroneous. RCW 9.94A.210(4). State v. Nelson, 108 Wn.2d 491, 740 P.2d 835 (1987).

There is no evidence in the record that respondent's payments to his victims were meant as restitution. Instead, the record indicates that most of the \$523,465 in payments he made to his victims<sup>3</sup> was designed to make them believe they were earning the promised returns on their investments or that their investment money was safe when in fact he had stolen it. Because there is no finding of fact or evidence in the record that

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<sup>3</sup> The \$90,000 payment respondent made to the Parsons to settle their civil lawsuit was not meant to perpetuate his criminal scheme. Neither was it a good-faith effort to repay them.

the payments were restitution the court's conclusion of law that they are is clearly erroneous.

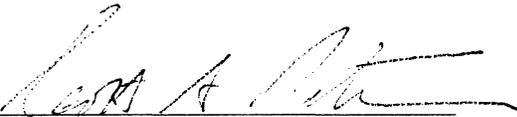
B. CONCLUSION

For these reasons this court should vacate respondent's judgment and sentence and remand this case for resentencing within the standard sentence range.

DATED this 6<sup>th</sup> day of January, 2016.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, two properly stamped and addressed envelopes containing a copy of the ***Reply Brief of Appellant***, in State v. Clarence C Young, Jr, Cause No. 73760-1, in the Court of Appeals, Division I, for the State of Washington.

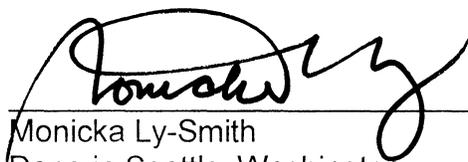
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 8<sup>th</sup> day of January, 2016.

  
\_\_\_\_\_  
Monicka Ly-Smith  
Done in Seattle, Washington